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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JIM LUNDBERG, an individual, Defendant/Counterclaim-Plaintiff Below, Appellant, v. VIVINT SOLAR, INC., a Delaware Corporation, Plaintiff/Counterclaim-Defendant Below, Appellee.	)	No. 335, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2020-0988-PAF

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

In August 2016, Appellant Jim Lundberg left his employment at Appellee Vivint Solar, Inc. ("Solar") to become associate general counsel at Solar's sister company, Vivint Smart Home, Inc. ("SmartHome"). Given Solar's and SmartHome's affiliation and common ownership, Lundberg believed his Solar equity awards continued to vest after his transition to SmartHome as the plain terms of the Solar 2014 Equity Incentive Plan ("2014 Plan") provide. However, unbeknownst to Lundberg, all of his unvested Solar equity was automatically canceled and forfeited, pursuant to Solar's internal software, on his last day of employment with Solar. Lundberg never received notice of this cancelation until after August 6, 2020.

Over the preceding three years, 96,953 Solar Restricted Stock Units ("RSUs") should have vested and been delivered to Lundberg as he continued to work as a "Service Provider" for SmartHome.[1] Instead, because Solar automatically and without notice terminated Lundberg's unvested shares, no equity was delivered. In July 2020, as Solar's stock price increased nearing its acquisition by Sunrun, Inc. ("Sunrun"), Lundberg made demand of Solar to deliver his RSUs and wrote a check

[1] 5,247 Solar stock options also should have vested.

to exercise his options.[2] Solar responded, via letter from Solar's counsel, dated August 6, 2020. In that letter, Solar told Lundberg—for the first time—that his unvested shares were canceled on the day he left Solar pursuant to Solar's Compensation Committee's supposed exercise of "discretion" in determining that Lundberg ceased to be a "Service Provider" within the "Company Group" upon his departure from Solar. Solar's counsel represented that "[s]ince the [2014 Equity] Plan's inception," "the Plan Administrator has consistently interpreted and administered the Plan [to find that SmartHome is not within the Company Group]." Consequently, Solar refused to deliver any shares to Lundberg.

Lundberg sued Solar in September 2020 in Utah federal court, then brought similar claims in a Utah arbitration, seeking damages for Solar's unlawful termination of his shares under the 2014 Plan and under a 2013 Plan with identical vesting language ("under common control). Solar filed a declaratory judgment and antisuit injunction action in the Delaware Court of Chancery, seeking to enforce the parties' exclusive Delaware forum-selection provision under the 2014 Plan. Solar prevailed in obtaining that injunction, causing Lundberg to assert his 2014 Plan claims as counterclaims.

[2] The 2013 Plan provides for litigation of disputes in Utah, where Solar is headquartered. Lundberg's Utah litigation over those undelivered stock options remains pending.

After a trial on paper, with oral argument in June 2023, the Court of Chancery issued its ruling finding that Solar's Compensation Committee "made no actual decision to interpret the 2014 Plan as Solar claims in this litigation." (Memorandum Opinion ("Op."), Exhibit A, at 35.) Further, the court found that Solar's interpretation of whether Lundberg continued as a "Service Provider" within the "Company Group," entitling him to continued vesting, was unreasonable. (Op.48.) Accordingly, "Lundberg was employed by Solar or by Smart Home throughout the vesting period for his Awards," and he is entitled to damages. (*Id.*)

The Court of Chancery also found, however, that certain tranches of Lundberg's equity awards vested outside of Delaware's three-year statute of limitations, and that such claims were untimely filed. The court dismissed Lundberg's claims to nearly 50,000 RSUs, finding that Lundberg had "notice" that the shares were not delivered more than three years before suit filing. The court made an inquiry notice finding based on a few quarterly stock plan statements from third-party Morgan Stanley Smith Barney ("Morgan Stanley") and Morgan Stanley web pages whereby Lundberg supposedly "would have" seen that his shares were not delivered (Op.75–76), while acknowledging that no evidence was presented that Lundberg was ever made actually aware of cancelation until Solar's August 6, 2020 letter (Op.21–22), and despite acknowledged consistent problems with Morgan Stanley's systems that led to Merrill Lynch taking over.

The court awarded Lundberg damages for timely RSU claims of $295,921.08. This figure was based on the "New York Rule," adopted by Delaware courts, for purposes of calculating damages stemming from the non-delivery of an asset with fluctuating value, referred to as a "temporary conversion." Under the New York Rule, the court measures damages using the highest intermediate stock price within a "reasonable time" after the injured party obtains actual knowledge and notice of a breach/temporary conversion of the asset.

Contrary to this rule, the court measured Lundberg's damages by incorporating by reference its statute of limitations accrual analysis that Lundberg had inquiry "notice" of Solar's non-delivery of shares each time RSUs were not delivered. The court failed to acknowledge that the first time Lundberg received *actual notice* of Solar's temporary conversion was when he received Solar's August 6, 2020 letter baselessly asserting that Solar's Compensation Committee exercised "discretion."

Lundberg's appeal pertains only to the Court of Chancery's damages calculation under the New York Rule and the court's statute of limitations analysis. Specifically, the Court of Chancery erred when it measured damages based on the multiple dates Solar failed to deliver Lundberg's RSUs, rather than when Lundberg had actual knowledge of Solar's temporary conversion. Further, the court erred in relying on its statute of limitations inquiry notice analysis in applying the New York

Rule, and Lundberg is entitled to remand based on the highest intermediate stock price within a reasonable time *after* Solar made Lundberg aware of its erroneous 2014 Plan interpretation and when Lundberg no longer had non-public information.

The Court of Chancery erred in its statute of limitations analysis in two respects: (1) by applying Delaware's statute of limitations, rather than Utah's, when the agreements at issue do not mandate application of Delaware's limitations period, and Utah has the most substantial relationship to these facts; and in the alternative, (2) by finding that Lundberg was not entitled to tolling when Lundberg was blamelessly ignorant of Solar's temporary conversion under the 2014 Plan until after August 6, 2020.

For these reasons, Lundberg respectfully requests that this Court remand to the Court of Chancery for reinstatement of all Lundberg's RSUs, and for recalculation of Lundberg's damages under the New York Rule's actual notice standard.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law and thereby abused its discretion when it calculated Lundberg's damages based on dates Solar could have delivered Lundberg's RSUs as they vested under the Equity Award Agreements' vesting schedule. The court's anlaysis erroneously uses dates by which the court determined Lundberg *should have known* of Solar's non-delivery, which finding the court made based on little to no evidence, including at least, in part, deposition testimony that was not designated. Instead, the court should have measured damages using the date on which Lundberg had *actual knowledge* of Solar's temporary conversion leading to its refusal to comply with the Equity Award Agreements, which knowledge Lundberg did not obtain until after Solar's August 2020 response to his demand. In that response, Solar informed Lundberg—for the first time—that Lundberg's shares were terminated by computer programming when he left Solar in August 2016, pursuant to the Solar Compensation Committee's supposed exercise of "discretion" and that Lundberg ceased to be a "Service Provider" when he went to work for SmartHome contrary to the plain and only "reasonable" reading of the 2014 Plan's language. In reality, as the Court of Chancery held, the Compensation Committee never acted or exercised disretion and the only reasonable reading is that Lundberg's equity continued to vest after he joined SmartHome. The Court of

Chancery should have measured Lundberg's damages based on the stock price within a 90-day period after Lundberg's receipt of Solar's August 2020 response.

2. The Court of Chancery erred as a matter of law when it determined that Delaware's statute of limitations applies to Lundberg's claims, rather than Utah's contract limitations statute. The court erroneously applied the "general rule" that the law of the forum governs which state's limitation periods apply, rather than undergoing the correct analysis in circumstances where a claim arises outside of Delaware. The court should have first looked to the parties' agreements. Where the parties' agreements do not specify which state's statutes of limitation or "procedural law" apply, then the court looks to Delaware's "Borrowing Statute" as addressed in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 24 (Del. 2005). Under *Saudi Basic*, the Borrowing Statute does not apply to Lundberg's counterclaims because Lundberg brought the claims as compulsory counterclaims to Solar's declaratory judgment action. In such circumstances, the court must determine which state has the most substantial relationship to the claims under Restatement (Second) of Conflicts of Laws ("Restatement") to determine which limitations period to apply. Under those factors, Utah clearly has the most substantial relationship and Utah's six-year period limitations should apply to Lundberg's counterclaims.

3. Alternatively, the Court of Chancery erred in finding that Lundberg failed to meet his burden to toll Delaware's statute of limitations. The court looked only to when Lundberg had inquiry notice of some *injury*—the non-delivery of particular shares as they vested—and failed to incorporate into its analysis that Solar's wrongful conduct only occurred when Solar rejected Lundberg's demand in August 2020. Delaware law provides for tolling where a claimant shows that he is "blamelessly ignorant" of the wrongful act and the resulting harm. The Court of Chancery rested its notice finding only on the "resulting harm" prong of the inquiry, notwithstanding unrebutted evidence that Lundberg never could have known of an automated, internal forfeiture of his unvested shares, nor of Solar's *ex post facto* attempt to justify its unlawful automated action by falsely claiming that its Compensation Committee exercised "discretion." Because Lundberg was not on notice of both the wrongful conduct *and* the resulting harm until after August 6, 2020, his claims should have been tolled until he received Solar's letter.

STATEMENT OF FACTS

A. The Parties.

Lundberg was employed as Associate General Counsel by Solar from May 2014 until he moved to Solar's affiliate (sister company), SmartHome, in August 2016. (A133–34 (PTO, IV(g),(h)); A334 (7/27/2021Lundberg, 66:14–67:10).) Solar was a Utah-based home solar company, formed under Delaware law, until its acquisition by non-party Sunrun in October 2020. (A133 (PTO, ¶24(a)).) Non-party SmartHome is a Utah-based home security company, and Lundberg, a Utah resident, worked for both Solar and SmartHome in their Utah headquarters. (A62 (Compl. ¶4); A1085 (Ans. ¶4).) At all relevant times, non-party 313 Acquisition, LLC ("313"), owned 50% or more of the common stock of Solar and SmartHome. (Op.4.)

B. Lundberg's RSU Awards.

During his Solar employment, Solar granted Lundberg a series of equity awards under the 2014 Plan. These awards are granted under the "2015 RSU Agreement" and "2016 RSU Agreement" (collectively, the "Equity Award Agreements").[3] The 2015 RSU Agreement grants Lundberg 7,632 RSUs, which vested 25% on May 14, 2016, with the remainder of vesting occurring over the next twelve quarters, fully vesting on May 14, 2019. (A1185–1192 (JX-3).) And on May 11, 2016, Lundberg was granted 88,706 RSUs under the 2016 RSU Agreement with

[3] Lundberg also received 5,247 stock options under a similar agreement. (A1193.)

a two-year vesting period, 50% eligible to vest on May 15, 2017, and the remaining 50% eligible to vest on May 15, 2018. (A1204–1216 (JX-5).)

Under to the 2014 Plan, "Payment of earned Restricted Stock Units will be made when practicable after the date set forth in the Award Agreement and determined by the Administrator." (A1172 (JX-2, §6(d)).) The Equity Award Agreements provide that "vested Restricted Stock Units will be paid in whole Shares as soon as practicable after vesting, but in each such case within the period 60 days following the vesting date." (A1186 (JX-3, Ex.A ¶2).)

The 2014 Plan and the Equity Award Agreements are governed by Delaware law and designate Delaware courts as the exclusive forum for claims. (A1239 (JX-20); A1191 (JX-3).) The forum-selection clauses, however, do not specify which state's limitations period govern. (*Id.*) Lundberg's Employment Agreement, in contrast, provides that Utah law will apply to "any and all controversies, claims, and disputes," including all "other benefits paid to [Lundberg] by [Solar]" (A1516–17 (JX-362)), and further mandates that "substantive ***and procedural*** Utah law [shall apply] to any dispute or claim, without reference to rules of conflict of law." (*Id.* (emphasis added).) Lundberg's Employment Agreement also includes an arbitration provision in "Utah County, Utah" for controversies or disputes arising out of Lundberg's employment. (A1519.) Lundberg is also party to the 2013 Plan, which is the subject of active litigation in Utah based on that plan's Utah forum-selection

provision despite the selection of Delaware law as governing. (A1417–18 (JX-332, §14(q)).)

Notwithstanding Lundberg's efforts to consolidate all actions in Utah, at the outset Solar proved at the outset that the Equity Award Agreements and 2014 Plan "supersede" the forum-selection and substantive choice of law provisions in Lundberg's Employment Agreement. (A110 (1/20/21Ruling, 22).)

Under the 2014 Plan, Lundberg's equity grants continue to vest so long as he is a "Service Provider" through the respective vesting dates in the Equity Award Agreements. (A1183 (JX-2, §21(kk)).) Each of the Equity Award Agreements also provides: "If a Participant ceases to be a Service Provider for any or no reason before Participant fully vests in the [award], the unvested [award] will immediately terminate." (A1185 (JX-3, 1); A1204 (JX-5, 1).).

The agreements also specify that the events triggering termination of unvested awards are governed by the 2014 Plan's provision regarding the "Termination of Status" (A1186 (JX-3, Ex.A, §5); A1205 (JX-5, Ex.A, §4)), which states that "the Participant's status as Service Provider will end at midnight at the end of the last day in the primary work location in which the Participant actively provides services for a member of the Company Group." (A1168 (JX-2, §3(c)(i)).)

The following relevant terms, as used in the above vesting and termination provisions, are defined in the 2014 Plan:

a. “Company” means “Vivint Solar, Inc.”
b. “Company Group” means “the Company, any Parent or Subsidiary of the Company, and any entity that ... is under common control with the Company.”
c. “Employee” means “any person … employed by the Company or any member of the Company Group.”
d. “Service Provider” means “an Employee, Director or Consultant.”

The 2014 Plan further provides that “[s]ubject to the Plan, any limitations on delegations specified by the Board, and Applicable Laws, the Administrator will have the authority[] in its sole discretion to make any determinations deemed necessary or advisable to administer the Plan[.]” (*Id.* (§3(b)).) The “Administrator” is defined as the Compensation Committee of Solar’s Board. (*Id.* (§3(a)).) Nothing in the 2014 Plan gives the Administrator the discretion to terminate any Service Provider’s equity awards, except as expressly provided for. (A1165–84.) Consistent with the limitation that the Administrator’s discretion is “[s]ubject to the Plan,” the Plan Prospectus states that the Administrator may only “determine the terms and conditions” in a manner “not inconsistent with the terms of the Plan.” (A1246 (JX-21, 4).)

Solar alleged in its November 16, 2020 Complaint that Lundberg, as Solar’s in-house counsel, was aware “that [Solar’s Compensation Committee] interpret[ed] and administ[ered] the 2014 Plan … to cancel/terminate unvested equity [upon termination with Solar despite subsequent employment with SmartHome because SmartHome] was not included within the term ‘Company Group’ under the 2014

Plan." (A76–77 (Complaint, ¶¶76–83).) Solar also alleged that the Compensation Committee's interpretation of the 2014 Plan, whereby SmartHome was not within the "Company Group," is "within its interpretive discretion and authority … and correct" and Lundberg's reading of "Company Group" to include SmartHome is "newfangled [and] unfounded." (*Id.*, ¶¶76–83, 98–99, 121(g).)

Solar maintained these untrue factual positions until the Court found in its May 30, 2024 Memorandum Decision that the Compensation Committee ***never acted or exercised discretion to find that SmartHome was not in the Company Group***; and the 2014 Plan's ***only reasonable reading*** is that SmartHome falls within the defined phrase "Company Group." (Op.31–42.)

C. The Compensation Committee Never Determined SmartHome Was Outside the Company Group.

The 2014 Plan grants to the Administrator "the authority, in its sole discretion to make any determination deemed necessary or advisable to administer the [2014] Plan." (Op.6, 31 (citing JX-2, §3(b).) Solar's position since August 6, 2020 has been that "[s]ince the Plan's inception, the Plan Administrator has consistently interpreted and administered the Plan and all RSU award agreements" such that SmartHome was outside the Company Group. (Op.24–25 (citing JX-108); A491–92 (Solar Tr. Br.).) Solar ***first*** communicated this position to Lundberg ***by letter dated August 6, 2020***, received by Lundberg several days later. (Op.24–25 (citing JX-108).)

Although Solar had a consistent practice unknown to Lundberg of ***automatically*** (by computer program) forfeiting unvested awards upon a recipient's transition of employment away from Solar, Solar presented no persuasive evidence that the Compensation Committee ever determined that SmartHome was outside the Company Group and the evidence showed that no such determination was ever in fact made. (Op.33–35.)

Solar also never mailed or emailed quarterly or annual statements to Lundberg or other recipients, expressly reflecting awards as of the end of each quarter or year, as admitted by Solar's counsel. (A954 (Tr.Trans., 214:16–22).)

Although "Solar believed that Morgan Stanley communicated the forfeiture of the equity awards to employees, … neither party … produced a transmission notice from Morgan Stanley for Lundberg or any other employee" and there exists no evidence that a forfeiture notice was *ever* provided to Lundberg by Solar or Morgan Stanley. (Op.9.)

Internal Solar records may reflect alleged forfeiture, but such records were never sent to and were not accessible by Lundberg. (Op.21–22.)

A few Morgan Stanley statements that Lundberg received and produced fail to show new vesting after particular vesting dates came. (*Id.*) Solar asserted post-trial in its proposed findings of fact that the receipt of these few statements (silent as to forfeiture) demonstrate that "Lundberg knew ***or was on notice*** that all his

unvested equity awards granted under the 2014 Plan had been canceled ….” (A1051 (¶88).).

Solar also contends that Lundberg had access to and accessed online Morgan Stanley information. (*Id.*) Solar presented evidence that Lundberg logged onto his account six times between August 2016 and October 2019 (A1230–34 (JX-19)), but there is no evidence that Lundberg saw that his Solar awards had been canceled or forfeited. (A351–54 (7/27/2021Lundberg, 170:20–171:2; 171:19–172:23; 174:2–17; 186:13–188:25).)

Additionally, Solar investigated Lundberg’s logins, but it has no information as to what Lundberg reviewed. (A244–45 (BlackDep., 50:23–54:1).) Lundberg’s testimony as to his recollection of what information might have been available on-line through drop down menus or Solar’s email draft “landing page” graphic as elicited by Solar’s counsel is not part of the testimony designated but the Court nonetheless cited to snippets of this testimony not referencing other testimony that more directly addresses the absence of available information regarding forfeiture.[4]

[4] As Lundberg testified, he does not recall forfeiture information being available and an email and landing page that Solar references was no longer available once Lundberg first signed up for a Morgan Stanley account. *Compare* Op.76, n.201; Op.89, n.235 (non-designated testimony); Op.77, n.205 (non-designated testimony); Op.89, n.235 (non-designated testimony) *with* A350–361 (7/27/21Lundberg, 166:23–168:13 (designated)); 182:1–185:19 (not designated); 232:13–233:22 (not designated); A569–70 (9/10/2021Lundberg, 55:8–19 (designated); 57:20–60:2 (not designated)).

In its Form 10-K for the period ended December 31, 2016, Solar disclosed that it had experienced a high forfeiture rate that year due to the departure of several members of the management team (Op.19), but the 10-K does not name Lundberg. (*Id.*)

D. Morgan Stanley's Automated Forfeiture.

On February 25, 2015, Solar entered into an agreement with Morgan Stanley to provide administrative services. (A1370 (JX-143).) In addition to tracking awards internally, Morgan Stanley sent periodic statements to employees. (A1217–23 (JX-7; JX-8; JX-9; JX-15).) To assist in administration, Solar used an automated program to allow its human resources management platform, Workday, to notify Morgan Stanley when an employee was terminated. (A394–96 (Meads, 83:12–20; 86:7–18; 92:16–21); A282 (Meads Decl., ¶¶4–10).) Upon notification, the Morgan Stanley system would automatically forfeit all unvested portions of employees' awards. (*Id.*; A476–77 (02/14/2023Lindquist, 131:13–132:25); A242 (Black, 43:22–44:22).) No evidence exists that Morgan Stanley issued any notice to terminated employees (including Lundberg) that unvested awards had been forfeited. (Op.9.)

In mid-2017, Solar switched from Morgan Stanley to Merrill Lynch as its third-party administrator for the 2014 Plan. (A298 (BlackDecl., ¶28).) After the transition, employees with legacy Morgan Stanley accounts retained access to those accounts, but Lundberg used Morgan Stanley to access his SmartHome equity

statements, and he never created a Merrill Lynch account. (A350 (7/27/2021Lundberg, 167:5–168:13).)

E. Lundberg Leaves Solar for SmartHome, and His Solar Awards Are Forfeited Without Actual Knowledge.

After negotiating about a potential transition to SmartHome during the spring and summer of 2016, Lundberg, Solar, and SmartHome, agreed on an arrangement whereby Lundberg transitioned employment to SmartHome, but he remained a "consultant" for ongoing legal matters for Solar until resolved. (A336, (*Id.*, 77:12–80:10); A1307–10 (JX-44).) Lundberg's SmartHome employment began on July 18, 2016. (A134 (PTO, IV.24(h).) His employment at Solar was terminated on August 21, 2017. (*Id.* (IV.24(g)).) Lundberg continued to work on Solar litigation matters into "late" 2017. (A334 (7/27/2021Lundberg, 66:14–67:10).) After his termination from Solar, Lundberg was continuously employed at SmartHome at all relevant times. (A134.)

Pursuant to Morgan Stanley's automated process described above, Lundberg's unvested awards were "cancelled" effective his last day at Solar, August 21, 2017. (A125–26 (PTO, I.A(5).). Solar and Morgan Stanley did not provide Lundberg with any form of "notice" of cancellation. (Op.9, 21.) On that date, Lundberg possessed 5,247 unvested stock option awards and 2,385 vested stock option awards granted in 2015; 5,247 unvested RSUs and 2,385 vested RSUs granted in 2015; and 88,706 unvested RSUs granted in 2016. (A1340 (JX-88).)

F. Lundberg Demands Delivery of His Vested RSUs and Exercises His Options.

In mid-2020, after Solar publicly announced that it had entered into a merger agreement with Sunrun, Lundberg sent multiple notices to Solar requesting that Solar deliver his vested equity. (A1352 (JX-107); Op.24.)

In a letter sent by outside counsel dated August 6, 2020, Solar denied Lundberg's requests. (A1354 (JX-108); Op.24, n.118–122.) Solar stated for the first time that Lundberg ceased to be a "Service Provider" when he transitioned employment to SmartHome because SmartHome was not within "the Company Group." (*Id.*) Contrary to this position, the court found that Solar's reading of "Company Group" to not include SmartHome" is "not a reasonable [reading]" (Op.39), and the definition of "Company Group" unambiguously includes "careful" drafting whereby vesting "continue[s] … if a Participant continued to work for one of Solar's siblings." (Op.40–41.)

Solar's letter further states that "[SmartHome] is not a parent or subsidiary of [Solar]. It is not an entity that directly or indirectly is in control of [Solar] or controlled by [Solar], and it is not commonly controlled *by* [Solar]," without addressing the Plan's actual language referencing companies under common control "***with***" Solar, not "***by***" Solar as the Court noted. (Op.25, n.121.) Further, Solar's letter asserts that the 2014 Plan grants "sole" discretion to the Plan's Administrator (*i.e.*, the Compensation Committee) to interpret the language of the 2014 Plan and

"***[s]ince the Plan's inception, the Plan Administrator has consistently interpreted and administered the Plan [to find that SmartHome is not within the Company Group]***." (A1357.) As set forth above, "the Administrator made no such decision [and] there is no decision to which any deference is owed." (Op.31–35.)

G. Lundberg Files Suit in Utah in September 2020, But His Claims End Up as Counterclaims.

On September 29, 2020, Lundberg filed a complaint in the United States District Court for the District of Utah (the "Federal Action") asserting breach of contract claims against Solar under the 2014 Plan (the "Delaware Claims") and claims under the 2013 Plan. (Op.25–26.) Solar moved to dismiss the Federal Action on several grounds, including for improper venue and lack of federal jurisdiction. (Op.26.)

On November 2, 2020, Lundberg filed an Arbitration Demand in Utah (the "Arbitration"), alleging the same claims against Solar. (*Id.*) Again, Solar moved to dismiss for improper venue and lack of subject matter jurisdiction, among other grounds. (*Id.*)

On November 16, 2020, Solar filed this action, alleging that Lundberg breached the exclusive Delaware forum provision in the 2014 Plan by filing the Federal Action and the Arbitration. (*Id.*) Solar also sought damages and a permanent injunction enjoining Lundberg from prosecuting the Delaware Claims in any forum outside of Delaware. (*Id.*) Solar also sought a decree validating the Compensation

Committee's alleged exercise of discretion in finding SmartHome to not be in the "Company Group." (Op.26–27.)

Also on November 16, 2020, Solar moved for a preliminary antisuit injunction, which the court granted on January 20, 2021. (Op.27.) On February 8, 2021, Lundberg filed his Delaware Claims as counterclaims. (*Id.*) In its answer, Solar asserted affirmative defenses, including that the Delaware Claims are time-barred. (*Id.*) Lundberg and Solar agree that, for purposes of any time-bar defense, those claims were asserted on September 29, 2020—the date of the Federal Action. (*Id.*)

On June 7, 2023, the Court of Chancery held a one-day hearing for presentation of previously designated evidence and oral argument. The Court of Chancery issued its decision on May 24, 2024, finding for Lundberg on the merits on later tranches of RSUs and option awards, but dismissing claims to earlier RSUs outside the Delaware three-year statute of limitations. The court awarded damages to Lundberg in the amount of $295,921.08, plus prejudgment interest, in addition to a "symbolic award" of $12 in nominal damages for Lundberg's option awards. (Op.107.) The court based its damages award for the RSUs on the highest intermediate stock price within a 90-day period of each date on which the RSUs should have been delivered to Lundberg under the Equity Award Agreements. (Op.88.)

The highest intermediate price Solar's shares achieved within a "reasonable" 90-day time period after Solar's August 2020 letter was received was on January 12, 2021, after Lundberg no longer possessed non-public information.[5]

[5] A1425 (JX-351.5); A484 (3/9/2023Lundberg, 26:22–27:23); A1461–63 (JX-360).) The court indicated it was inclined to weigh more heavily a declaration from Black regarding due diligence conducted in connection with the Sunrun acquisition, but it failed to identify what facts, if any, are in conflict and would be weighed towards Black's declaration. (Op.87, n.225.) The court's statements also have no application to the court's ruling since it determined that the relevant dates for damages predate October 11, 2019. (Op.88.) Most importantly, Black and Lundberg, in their roles as inside counsel for Solar and SmartHome, had different information and Black does not dispute any material aspect of Lundberg's testimony including the existence of intercompany agreements and a need to resolve use of the name "Solar". The existence of these facts means the beginning of a "reasonable" period must be after the Sunrun transaction, or at minimum, remand is necessary so the court can rule on this issue for the first time.

ARGUMENT

I. THE COURT OF CHANCERY ABUSED ITS DISCRETION IN CALCULATING LUNDBERG'S DAMAGES BASED ON DATES ON WHICH LUNDBERG HAD NO ACTUAL NOTICE OF HIS CLAIMS.

A. Question Presented.

Did the Court of Chancery commit legal error or abuse its discretion in calculating damages based on nine dates the Court determined Lundberg should or may have known of Solar's failure to deliver particular RSUs, rather than when Lundberg had actual knowledge of Solar's contract breach and temporary conversion? (A1421–30; A880–88; A997–1008.)

B. Standard and Scope of Review.

This Court reviews "findings as to damages by the Court of Chancery for an abuse of discretion." *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015). However, embedded legal issues are reviewed *de novo*. *See Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument.

1. Under the "New York Rule," damages are measured from when the claimant receives actual knowledge of breach.

In a breach of contract action in Delaware, a plaintiff's damages are "generally measured by what is necessary to put [the plaintiff] in as good a position as [he] would have occupied had there been full performance of the contract." *Am. General Corp. v. Continental Airlines Corp.*, 622 A.2d 1, 8 (Del. Ch.), *aff'd*, 1992 WL 426435,

(Del. Dec. 28, 1992). However, Delaware courts have long held that "[d]amages for a failure to deliver securities are generally determined by the 'highest market price the stock reached within a reasonable time of plaintiff's discovery of the breach.'"[6] *Haft v. Dart Group Corp.*, 877 F. Supp. 896, 902 (D. Del. 1995) (quoting *American General,* 622 A.2d at 8 and citing *Wyndham, Inc. v. Wilmington Trust Co.*, 59 A.2d 456, 459 (Super. Ct. 1948)).

This measure of damages, known as the "New York Rule," is "adapted from the rule used to determine damages in conversion cases" because "the issuer's breach at least in some sense is a temporary 'conversion' of the shares." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, n.9 (Del. 2001). In such cases, the Court of Chancery has held, "[t]he injury that the plaintiff suffers is the deprivation of his range of elective action, and by applying the conversion measure of damages a court endeavors to restore that range of elective action." *Am. General*, 622 A.2d at 10. Because the stock issuer creates the "uncertainty" regarding whether and when an aggrieved party could replace and dispose of its unlawfully denied shares, "fundamental justice requires that, as between [the plaintiff] and [the defendant], the perils of such uncertainty should be 'laid at defendant's door.'" *Id.* (quoting *Madison Fund, Inc. v. Charter Co.*, 427 F. Supp. 597 (S.D.N.Y. 1977)).

[6] The appropriate "reasonable time" to measure the highest intermediate stock price after discovery of the breach is determined by the Court. *See id.* Lundberg does not challenge the court's selection of a 90-day "reasonable time."

Thus, the purpose and function of the New York Rule is to fashion a remedy that strikes a balance between putting the plaintiff "in as good a position as [he] would have occupied had there been full performance of the contract," *Am. General Corp.*, 622 A.2d at 8, and "eliminat[ing] a possible windfall for claimants" that could result if damages were simply calculated based on the highest price the stock ever reached, whether before or after the claimant learns of the breach. *Schultz v. Commodity Futures Trading Comm'n*, 716 F.2d 136, 140 (2d Cir. 1983).

That balance is struck—and has been struck for over a century by the U.S. Supreme Court, New York courts, and Delaware courts—by selecting the highest intermediate stock value within "a reasonable time after the owner has ***received notice*** of [the conversion or breach] to enable him to replace the stock." *Gallagher v. Jones*, 129 U.S. 193, 9 S. Ct. 335, 32 L. Ed. 658 (1889) (emphasis added); *see also Wyndham, Inc. v. Wilmington Tr. Co.*, 59 A.2d 456, 460 (Del. Super. Ct. 1948) ("Values during a 'reasonable time' after ***knowledge of the conversion*** are taken into consideration on the ground that the risk of fluctuations … should be borne by the wrongdoer, at least during a period sufficient under the particular circumstances for the injured person to inquire into his rights and to replace the shares wrongfully taken from him." (emphasis added)); *Schultz*, 716 F.2d at 141 ("Thus, the measure of damages for wrongful conversion of stock is … its highest intermediate value

between notice of the conversion and a reasonable time thereafter during which the stock could have been replaced had that been desired….").

This standard for valuing undelivered stock has stood the test of time for a reason: it provides a bright-line, objective method of restoring a claimant to as close a position as possible as he would have been in had the defendant performed, while eliminating uncertainty, speculation, and a potential windfall for the injured claimant. The keystone of this objectivity is the actual notice standard. By measuring a given stock's value only after the claimant receives "knowledge of the conversion," *Wyndham, Inc.*, 59 A.2d at 460, and not during a debatable "red flag" period of inquiry, the rule substitutes a speculative inquiry into what an injured claimant *might have done* if he had received the stock when due, with an objective inquiry into what the injured claimant *could and did do* when he learned of the conversion.

As the Second Circuit in *Schultz* explains, measuring damages from the time of actual "notice of conversion" best remedies the breach without resulting in a "windfall for claimants." 716 F.2d at 140. "Such [a windfall] can occur," "when wrongfully converted property of fluctuating value reaches a higher price in the period between its conversion and the notice of conversion than in the period between notice of conversion and a reasonable time thereafter granted to a claimant to permit the reestablishment of his preconversion position." *Id.* "In such cases the injured party should not be afforded the windfall of the higher price attained during

the period ***before he receives actual notice*** of the conversion, because 'if he had desired to dispose of [his property] in that interval, he would have learned of the conversion.'" *Id.* (emphasis added) (quoting *In re Salmon Weed & Co.*, 53 F.2d 335, 341 (2d Cir.1931)). "A claimant will not be permitted to receive this higher value which he has shown no desire to realize." *Id.* (cleaned up).

In many cases, actual knowledge is reflected in the claimant's demand for delivery. For example, in *Haft v. Dart Group Corp.*, 877 F. Supp. 896, 902 (D. Del. 1995), the court applied the New York Rule to calculate damages based on the highest intermediate stock price from "the date plaintiff requested in writing that [the defendant] issue an unrestricted stock certificate." The court explained in footnote that this date marked the date of "plaintiff's knowledge of defendant's breach." *Id.* n.2 (quoting *Am. General Corp.*, 622 A.2d at 13).

More recently, in *Diamond Fortress Techs., Inc. v. EverID, Inc.*, 274 A.3d 287, 308 (Del. Super. Ct. 2022), the Superior Court calculated fluctuating asset damages based on the high "token" price after "Plaintiffs sent their final communication to [defendant], declaring their intent to treat the Agreement as breached and to pursue legal remedies." *Id.* Importantly, the Superior Court measured damages from this "final communication" even though plaintiffs had "attempted to contact [defendant] to discuss then-due token distributions and obtain

adequate assurances of payment" for nearly a month prior, but heard only "crickets." *Id.*

Thus, over a century of case law applying and refining the New York Rule makes clear that the relevant date for expectation damages for undelivered fluctuating assets is when the claimant receives actual knowledge of the temporary conversion/breach. That longstanding rule accords with public policy favoring bright-line, non-speculative damage awards that return the claimant nearest as possible to the position he would be in had the defendant performed, without resulting in a windfall to claimants.

2. The Court of Chancery erroneously measured expectation damages from nine time periods before Lundberg had actual knowledge of Solar's breach.

Rather than apply an actual knowledge standard to Lundberg's damages, the Court of Chancery measured Lundberg's breach of contract damages using multiple dates corresponding to when Solar failed to deliver Lundberg's vested RSUs, on which dates the court determined Lundberg "would have" learned that Solar failed to deliver shares as they vested. (Op.74–75, 85.) This ruling contravenes the New York Rule as it has been applied in Delaware and elsewhere and constitutes clear error warranting remand to recalculate damages based on when Lundberg received actual "knowledge of the conversion." *Wyndham, Inc.*, 59 A.2d at 460. The only record evidence of actual knowledge shows that Lundberg first received actual

knowledge of Solar's "interpretation" of the 2014 Plan in its August 6, 2020 response to his communications.

i. The evidentiary record does not support actual knowledge until August 2020.

The Court of Chancery declined to measure damages from Solar's August 6, 2020 response to Lundberg's communications whereby Solar, for the first time, notified Lundberg that his shares were terminated purportedly because "the Plan Administrator has consistently interpreted and administered the Plan [to find that SmartHome is not within the Company Group]." (A1357 (JX-108).) The Court of Chancery instead measured damages from various prior RSU vesting and delivery dates on the premise that Lundberg was on inquiry "notice" that Solar had not delivered his vested shares by virtue of a few Morgan Stanley quarterly statements or Lundberg's "access to his Morgan Stanley account." (Op.74.) The court also did not tie any particular statement to notice of multiple other RSU vesting periods for which no statement is correlated.

The court committed reversible error by relying on alleged inquiry "notice," rather than when Lundberg obtained actual knowledge after August 6, 2020 of Solar's termination of shares allegedly based on an unreasonable interpretation of the 2014 Plan's language and action by the Compensation Committee that ***never took place*** and therefore could not have been discovered.

The Court of Chancery's error is two-fold. First, the court relied on evidence, including testimony that neither party designated, that does not support a finding of inquiry notice let alone actual knowledge. And second, the court improperly conflated Lundberg's failure to meet his burden of proving a narrow exception to inquiry notice for purposes of the statute of limitations with Lundberg's actual knowledge for purposes of the New York Rule on damages.

The court's finding that Lundberg had "notice" of breach claims is based on evidence that Lundberg's Morgan Stanley account statements "***would reveal*** to him…whether Solar had delivered—or failed to deliver—shares upon vesting" and that the "Awards—or their absence—***would have*** been displayed" in Lundberg's online Morgan Stanley account. (Op.75–76 (emphasis added).) Relying on snippets of undesignated deposition testimony surrounded by testimony contrary to the court's implications, the court attempts to bolster this finding of what Lundberg *would have learned* in statements and webpages by finding that Lundberg's "testimony that he was unable to log into his Solar Morgan Stanley account until mid-2020 is not credible." (*Id.*) In making this paper "credibility" determination, the court disregards other designated and undesignated clarifying testimony, including that Lundberg readily acknowledged that he logged onto his Morgan Stanley account, but he does not recall ever seeing that his unvested shares were terminated and he, like others, had problems with the systems leading to Solar switching to Merril

Lynch.[7] Indeed, there is no evidence regarding what Lundberg actually saw, before the system switched to Merrill Lynch. (A244–45 (Black, 50:23–54:1) (investigation did not yield information regarding what Lundberg would have seen).)

In concluding that Lundberg "would have" seen that his shares were not delivered, the Court of Chancery never makes any finding that Lundberg knew that Solar ***unlawfully temporarily converted*** his shares based upon a purported exercise of discretion by the Compensation Committee—which exercise of discretion the court found never occurred. (Op.85.)

As explained above, the New York Rule directs that damages are measured not from when a breach occurs, or when a claimant is on inquiry notice or allegedly *should* know that a breach has occurred—as in a statute of limitations analysis—but from when the claimant receives "knowledge of the conversion." *Wyndham, Inc.*, 59 A.2d at 460. Here, the only evidence regarding Lundberg's actual knowledge of Solar's wrongful conduct is when Solar responded to Lundberg's communications on August 6, 2020 and for the first time notified him of a purported interpretation by the Compensation Committee that SmartHome was not in the "Company Group," which, in fact, never happened. (A1357; Op.21–22.) It was then, and only then, that

[7] *See infra*. Not only does the record contain no evidence that Morgan Stanley provided information to Lundberg regarding forfeiture, the problems with Morgan Stanley's system, including the inability to access information, is undisputed. (A247 (Black, 65:10–19).)

Lundberg became "absolutely entitled" to delivery, and under the New York Rule, that single date is the date the Court of Chancery should have begun evaluating the start of the "reasonable period" for measuring damages. *Diamond Fortress Techs., Inc.*, 274 A.3d at 308 (measuring damages from last demand letter after silence in response to prior demands).

Moreover, the Court of Chancery's focus on whether the RSUs and options were delivered for purposes of inquiry "notice" was itself erroneous. The correct framework for whether Lundberg had actual knowledge of Solar's breach/temporary conversion is when did Lundberg have notice of wrongful conduct—not merely that he did not see vested RSUs in one or two quarterly statements and a void of statement information as to most of the RSUs. The Superior Court took the correct approach in *Diamond Fortress*, following on when "Plaintiffs sent their final communication to [defendant], declaring their intent to treat the Agreement as breached and to pursue legal remedies." 274 A.3d at 308. It was then, and only then, that "Plaintiffs became absolutely entitled to issuance of their" undelivered asset, i.e., temporary conversion. *Id.* Here, the Court of Chancery improperly measured damages from the moment Lundberg might have been on inquiry notice that particular tranches of RSUs were not delivered. *See infra* §III.

Second, the Court of Chancery expressly made its inquiry "notice" ruling in the context of whether Lundberg had "prov[en] an exception to the general rule of

accrual" for purposes of the statute of limitations. (Op.73–78.) Finding that Lundberg failed to satisfy his "burden of presenting and proving" tolling, the court incorrectly ***incorporated by reference the same inquiry "notice" analysis in its damages calculation***. (Op.85.) This was error.

The Court of Chancery's reliance on an inquiry notice limitations standard for purposes of applying the New York Rule of damages imposes an unreasonable burden on Lundberg to prove a narrow exception to the limitations period. In effect, the Court of Chancery punished Lundberg twice for failing to meet his high burden of proving later accrual under Delaware's discovery rule, and it did so in contravention of longstanding law that triggers damage measurement only upon a simple, objective inquiry of the claimant's actual knowledge of the temporary conversion. *See, e.g.*, *Diamond Fortress Techs., Inc.*, 274 A.3d at 308.

The court's reliance on inquiry notice rulings also flips the public policy rationale behind the New York Rule on its head rather than furthering the rule's objective, bright-line approach that attempts to put Lundberg in the position he would be in but for Solar's breach. Doing so doubly rewards Solar as the breaching party for its failure to notify Lundberg of its wrongful conduct and for taking secret action (internal forfeiture) never communicated but justified in August 2020 based upon an unreasonable reading of the 2014 Plan and on the Compensation Committee's exercise of discretion that never occurred.

The only evidence below that Lundberg actually knew that Solar had automatically terminated his unvested RSUs and options based on action by a fiduciary that never occurred is Solar's August 6, 2020 letter. This Court should remand for the Court of Chancery to measure damages based upon a 90-day period after that letter was received and after Lundberg could reasonably liquidate his shares.[8]

[8] The 90-day period could not begin until at the earliest after the Sunrun acquisition closed on October 8, 2020, when Lundberg no longer had concerns with trading on non-public information.

II. THE COURT OF CHANCERY ERRED IN APPLYING DELAWARE'S STATUTE OF LIMITATIONS, RATHER THAN UTAH'S.

A. Question Presented.

Did the Court of Chancery commit legal error when it refused to apply Utah's six-year limitations period, and instead applied Delaware's shorter three-year period for contract actions? (A888–904; A633–38 (Reply Tr.Br. 55–59).)

B. Standard and Scope of Review.

This Court reviews *de novo* whether the Court of Chancery incorrectly determined the applicable law governing a limitations period. *See Saudi Basic*, 866 A.2d at 24.

C. Merits of Argument.

1. The Court of Chancery erred in applying a Delaware limitations period to Lundberg's counterclaims.

The Court of Chancery held that Lundberg's RSU counterclaims arising before September 29, 2017, are untimely under Delaware's three-year statute of limitations in 10 Del. C. § 8106. (Op.53–70.) Because both Lundberg and Solar resided in Utah, and the RSU agreements were executed, performed, and breached in Utah, the court committed legal error in refusing to apply Utah's six-year period of limitations. Utah Code §78B-2-309(1). The court's erroneous application of Delaware's limitations period, rather than Utah's, is based on a mistaken choice-of-law analysis in which the court concluded that "Delaware law provides the

applicable limitations period" simply because Delaware is the "forum state." (Op.53–54.)

The court erred because it relied upon a "general rule" that the forum state's statute of limitations applies. (*Id.*) But the general rule *does not* apply when a cause of action arises outside of Delaware. The court's analysis should have begun by looking to the parties' agreements. *See Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017). While Delaware courts generally enforce choice of law provisions, limitations periods in a contractually selected forum only apply "if the choice of law provision states with specificity that it applies to [statutes of limitation]." *Am. Energy Techs., Inc. v. Colley & McCoy Co.*, 1999 WL 301648, at *2 (D. Del. Apr. 15, 1999) (unpublished); *see also B.E. Cap. Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 147 (Del. Ch. 2017). If the contractual choice of law does not "expressly" apply a forum's statutes of limitation, "the contract provision is not dispositive." *B.E. Cap.*, 171 A.3d at 147.

The next step is to look to Delaware's Borrowing Statute at 10 *Del. C.* § 8121. *Id.* The Borrowing Statute "states that if [a] claim arose in a jurisdiction that has a shorter statute of limitations than Delaware, then the court should use the shorter period." *Id.*; 10 *Del. C.* §8121. However, this Court has determined that the Borrowing Statute does not apply if it would enable a party seeking dismissal "to prevail on a limitations defense that would never have been available to it had the ...

claims been brought in the jurisdiction where the cause of action arose." *Saudi Basic*, 866 A.2d at 17–18; *see also Bear Stearns Mortgage Funding Trust 2006–SL1 v. EMC Mortgage LLC*, 2015 WL 139737 at *9 (Del. Ch. Jan. 12, 2015)(unpublished) (Borrowing Statute does not apply to allow defense on Delaware limitations period in case that arose in New York); *Furnari v. Wallpang, Inc.*, 2014 WL 1678419 at *5 (Del. Super. Apr. 16, 2014)(unpublished) (declining to apply Borrowing Statute).

If the Borrowing Statute does not apply because the claimant is not forum shopping, or the Statute's anti-forum-shopping purposes are otherwise not served, "then a Delaware court follows Delaware's general choice-of-law rules to select the operative statute of limitations." *B.E. Cap.*, 171 A.3d at 148 (citing *Bear Stearns*, 2015 WL 139731 at *9 and *In re Washington Mut., Inc.*, 2010 WL 3238903, *6 (Bankr. D. Del. Aug. 13, 2010)).

As the Court of Chancery acknowledged, but ultimately disregarded, Delaware follows the Restatement to resolve conflicts. (Op.54.) The Restatement sets forth the following factors for consideration in a contract action:

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Id. Based on a weighing of these factors—which the Court of Chancery failed to undertake—Utah is the state with the most significant relationship to the parties and their dispute. *See Bear Stearns*, 2015 WL 139731, at *10.

2. The Borrowing Statute does not apply and Utah has the most significant relationship.

Applying the foregoing analysis to Lundberg's RSU counterclaims, the Court of Chancery erred in not applying Utah's six-year limitations period. The Court of Chancery's analysis should have begun by determining whether the parties' agreements govern which limitations period applies. *Lloyds*, 160 A.3d at 464. If, and only if, "the choice of law provision states with specificity that it applies to [statutes of limitation]" does the parties' agreement determine which statute of limitations applies. *Am. Energy Techs., Inc.*, 1999 WL 301648, at *2. The Court of Chancery instead concluded that, because "[t]he 2014 Plan and the Awards at issue … are all governed by Delaware law and require that any disputes be litigated in the courts in Delaware" that "only one state's law [Delaware] applies." (Op.54.) This was error.

The only agreement between Lundberg and Solar that addresses *procedural* law is Lundberg's Employment Agreement, which states that "substantive and procedural Utah law [shall apply] to any dispute or claim, without reference to rules of conflict of law." (A1516–17 (JX-362).) While the court below recognized that the Equity Award Agreements' choice-of-law provision supersede the Employment Agreement's Utah choice-of-law provision, the Employment Agreement is the only

contract that addresses procedural law—and it directs application of Utah procedural law. *Id.* The Court of Chancery also erroneously assumed that the Delaware choice-of-law provision in the Equity Award Agreements "provide[] the applicable limitations period." (Op.54.) These agreements make no reference to statutes of limitation or procedural law, and therefore, do not answer that inquiry. *Am. Energy Techs., Inc.*, 1999 WL 301648, at *2.

Consequently, because the claims arose outside of Delaware, the Court of Chancery should have proceeded to the next stage of the analysis, looking to the Borrowing Statute. *B.E. Cap.*, 171 A.3d at 147. The court addressed the Borrowing Statute in footnote, but declined to acknowledge or apply this Court's reasoning in *Saudi Basic*, finding that "Lundberg is party to an exclusive Delaware forum provision with respect to his counterclaims" and "[t]herefore, Lundberg is voluntarily before this court and subject to a Delaware statute of limitations." (Op.54, n.177.)

Under *Saudi Basic*, the Court of Chancery should have held that application of the Borrowing Statute would enable Solar "to prevail on a limitations defense that would never have been available to it had the ... claims been brought in the jurisdiction where the cause of action arose." 866 A.2d at 17–18. Indeed, just as in *Saudi Basic*, Solar sought declaratory relief in Delaware, forcing Lundberg to assert his contract counterclaims here. When applied as the Court of Chancery applied it,

the Borrowing Statute needlessly punishes Lundberg for asserting counterclaims in a forum where the claims did not arise—and notwithstanding Lundberg's attempts to consolidate this litigation into a single forum in Utah where the claims *did* arise. (Op.25–27,95–96.[9])

Had the Court of Chancery applied this Court's ruling in *Saudi Basic*, the court would have then resorted to "Delaware's general choice-of-law rules to select the operative statute of limitations." *B.E. Cap.*, 171 A.3d at 148 (citing *Bear Stearns*, 2015 WL 139731, at *9 and *In re Washington Mut., Inc.*, 2010 WL 3238903, at *6 (Bankr. D. Del. Aug. 13, 2010)). The court committed error in failing to apply Delaware's choice-of-law analysis under the Restatement.

Under the undisputed facts, the Restatement factors favor application of Utah's limitations period. Lundberg is a Utah resident who worked at Solar's headquarters in Utah. (A133–34 (PTO, IV(g),(h)); A334 (7/27/2021Lundberg, 66:14–67:10).) Lundberg thus was a "Service Provider" under the 2014 Plan—and thereby performed under applicable agreements—at all times in Utah. As the court previously recognized, Solar's position that selection of Delaware substantive law reflects a desire for "uniformity and consistency" is also undermined by its selection

[9] The court also recognized the inefficiency of Solar's reliance on differing venue provisions in the 2014 Plan and the 2013 Plan. (A118–19 (01/20/2021Trans., 30:18–31:5)("[Litigating in 2–4 forums] is inefficient and a waste of all parties' resources.… Nor is it lost on me that Mr. Lundberg has offered to resolve his claims in one forum of the company's choosing.").)

of Utah as the forum for litigation of the 2013 Plan and its non-selection of Delaware procedural law in the 2014 Plan. (A118–19.)

Solar also failed to deliver Lundberg's shares to him in Utah. The case's sole connection to Delaware is Solar's incorporation in Delaware, and the Delaware forum-selection clause is included in only one of the three main agreements between the parties. Under this analysis, which the Court of Chancery failed to undertake, Utah has the most significant relationship to this dispute and Utah's six-year limitations period should have been applied. Utah Code §78B-2-309(1).

Given that only about four years separate Solar's termination of Lundberg's unvested equity awards and his September 2020 filing date, application of Utah's limitations period renders all of Lundberg's counterclaims timely for all RSU tranches. Thus, this Court should remand to include in the calculation of damages the erroneously dismissed RSU claims.

III. ALTERNATIVELY, THE COURT OF CHANCERY ABUSED ITS DISCRETION IN FINDING THAT LUNDBERG FAILED TO MEET HIS BURDEN TO TOLL THE DELAWARE LIMITATIONS PERIOD.

A. Question Presented.

Did the Court of Chancery abuse its discretion in finding that Lundberg failed to meet his burden to toll the Delaware limitations period, given evidence that Lundberg could not have known of Solar's temporary conversion until Solar's August 6, 2020 response to Lundberg's exercise communications?[10]

B. Standard and Scope of Review.

This Court reviews the question whether the Court of Chancery applied the correct legal standard de novo, and reviews factual findings for clear error. *Coster v. UIP Companies, Inc.*, 255 A.3d 952, 959 (Del. 2021).

C. Merits of Argument.

1. The Court of Chancery abused its discretion by not finding that Lundberg was "blamelessly ignorant" until he received Solar's demand response after August 6, 2020.

The Court of Chancery's inquiry notice analysis for purposes of Delaware limitations period focuses on a singular fact: whether and when Lundberg was aware that Solar had not delivered a small percentage of vested RSUs pursuant to the RSU vesting schedule. (Op.77-79.) This singular focus departs from the governing standard for tolling under the "blamelessly ignorant" exception to accrual. Lundberg

[10] A645–48.

proved below that he was not aware of Solar's *wrongful conduct* (temporary conversion) until he received Solar's August 6, 2020 letter declining to issue Lundberg his shares purportedly based on the Compensation Committee's fictional exercise of "discretion" in interpreting the 2014 Plan. As the Court of Chancery correctly found, that exercise of discretion never occurred. (Op.35.)

Rather, Lundberg's unvested RSUs were "automatically forfeit[ed]" by Morgan Stanley when he left Solar, which was never communicated to Lundberg (Op.8), and not until August 2020 did Solar falsely disclose that such forfeiture was based upon the Compensation Committee's purported interpretation that Lundberg was no longer within the "Company Group." (A1357.) Lundberg—relying on the Compensation Committee and its administrator as fiduciary over his equity—was blamelessly ignorant of these fictional facts until Solar's counsel first disclosed temporary conversion facts to Lundberg in August 2020. Then, and only then, could Lundberg learn of Solar's wrongful conduct and breach of the governing agreements.

The Court of Chancery's focus on possible non-delivery of some but not all shares that were previously wrongfully forfeited ignores the full scope of the "discovery rule." Under that rule, Lundberg bore the burden of demonstrating that it would be "practically impossible for [him] to discover the existence of a cause of action." *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007). But critically, discovery of the "existence of a cause of action" encompasses "both the wrongful

act and the resulting harm." *Id.* at 584–85; *Vichi v. Koninklijke Philips Elec., N.V.*, 85 A.3d 725, 789 (Del. Ch. 2014); *In re Dean Witter P'ship Lit.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 2998).

Critically, "plaintiffs can establish 'blameless ignorance' by showing justifiable reliance on a professional or expert," or a fiduciary, "whom they have no ostensible reason to suspect of deception." *Dean Witter*, 1998 WL 442456, at *5. Under this standard, Lundberg proved that he was blamelessly ignorant of Solar's "*wrongful act*" in asserting that the Compensation Committee had exercised its discretion to interpret the phrase "Company Group" in a manner that is ***unreasonable*** as a matter of law until he received Solar's August 6, 2020 letter from counsel.

Even if Lundberg was on inquiry notice of some non-delivery of some RSUs based on one or two quarterly Morgan Stanley statements that disclosed "no intermediate transactions" (Op.20 (citing JX 9, 15),[11] that is not a red flag of wrongdoing because non-reflection of equity could have been due to any number of factors,[12] but most significantly, non-delivery is less than half the equation.

[11] Only 1/8th of Lundberg's 2015 Awards vested in this timeframe. (Op.13 (citing JX 3, 4).)

[12] For example, a single statement's non-reflection of newly vested shares is potentially attributable to clerical error or known problems with Morgan Stanley's computer systems that led Solar to change to Merrill Lynch.

The unrebutted evidence in the record proves that Lundberg did not know and *could not have known* of Solar's "wrongful act" of temporarily converting his shares without Compensation Committee action and contrary to the only "reasonable" reading of the 2014 Plan. Indeed, as the Court of Chancery found, the automatic cancelation within Solar's "own system," and internal statements reflecting the cancelation, "***were not accessible or communicated to Lundberg***." (Op.19, 21 (emphasis added). Further, this case presents a unique factual scenario in which—for the first time after August 6, 2020—Solar attempted to retroactively justify an automatic internal "forfeiture" by relying on an act of discretion by the Compensation Committee that ***never occurred***.

Thus, the *first instance* of Solar's "wrongful act" of temporary conversion occurred in August 2020 when Solar responded to Lundberg's communications and Lundberg could not have known of any "wrongful act" that occurred previously because the evidence has now proven that Solar's fiduciaries committed no such act. Under these facts that Solar cannot rebut, Lundberg was blamelessly ignorant of Solar's wrongful temporary conversion until Solar staked out its position after August 6, 2020.

The Court of Chancery abused its discretion in finding that Lundberg failed to satisfy his burden of meeting the "blamelessly ignorant" discovery rule under

Delaware law. This Court should remand with instructions to reinstate Lundberg's dismissed RSU claims and recalculate damages accordingly.

CONCLUSION

For the foregoing reasons, Lundberg respectfully requests that the Court reverse the Court of Chancery's damages award insofar as it failed to measure damages based on the highest intermediate stock price after the date Lundberg received notice from Solar of its wrongful temporary conversion. The Court should further reverse and remand for the Court of Chancery to reinstate Lundberg's RSUs erroneously dismissed under Delaware's limitation period.

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