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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

APPELLEE VIVINT SOLAR, INC.'S CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This appeal is Appellant Lundberg's latest effort to obtain a windfall profit from RSU[1] equity awards Appellee Vivint Solar, Inc. ("Solar") granted Lundberg while employed as Solar's Associate General Counsel but which had not vested when he terminated his employment with Solar. The dispute arose when Lundberg, four years after terminating his Solar employment and when Solar's stock price skyrocketed due to a publicly announced merger with Sunrun Inc., demanded delivery of the RSU equity awards. Solar rejected his demand based on its long-standing interpretation/administration of its equity incentive plan that required Lundberg to continue employment with Solar for his RSU awards to vest.[2] Lundberg disagreed, arguing that the company with which he went to work, non-party Vivint Smart Home, Inc. ("SmartHome"), was included within the equity plan and his equity awards continued to vest while employed by SmartHome. Lundberg filed claims for breach of his equity award agreements in improper forums, violating the Delaware forum selection clause in Lundberg's equity award agreements and the plan.

Solar, in compliance with the Delaware forum selection clause, opposed the improper forum filings and sued in the Delaware Court of Chancery on November

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[1] Restricted Stock Unit ("RSU").

[2] Lundberg's preoccupation with the Chancery court's interpretation of the equity plan is not relevant because that finding and conclusion were not appealed.

16, 2020, seeking declaratory relief, damages for Lundberg's breach of the forum selection clause, and anti-suit injunctive relief. The court entered a preliminary anti-suit injunction against Lundberg, and Lundberg filed counterclaims alleging Solar breached his RSU award agreements by not timely delivering his Solar stock and seeking damages.[3]

By agreement, Solar and Lundberg tried the case on the papers with argument on June 7, 2023. The court issued its Memorandum Opinion on May 30, 2024, and a corrected Memorandum Opinion on June 18, 2024 ("Opinion"). The court agreed with Lundberg's equity plan interpretation and concluded Solar breached Lundberg's RSU award agreements by not delivering stock within 60 days after the vesting date of each RSU tranche. The court applied Delaware's statute of limitations and concluded it was not tolled and Lundberg's RSU counterclaims based on RSU tranches required to be delivered before September 29, 2017, were time-barred.

On July 15, 2024, the court entered a Final Order and Judgment.

On October 1, 2024, Lundberg appealed the Opinion and Final Order and Judgment.

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[3] Lundberg's counterclaims also include breach of contract claims for Lundberg's stock option equity awards. Lundberg did not appeal the court's findings regarding those claims. Opinion 93, Ex. A Lundberg Opening Brief ("LOB").

SUMMARY OF ARGUMENT

1. This Court should affirm the Chancery court's factual finding of when Lundberg knew of Solar's breaches. Contrary to Lundberg's argument, there is no basis in the record supporting the conclusion that the court used an inquiry notice standard in determining when Lundberg's damages accrued. Rather, the court made a factual determination of when Lundberg "knew" of Solar's breaches. Even if the court had used an inquiry notice standard, that would have been legally appropriate. Regardless, the court's factual finding, under either standard, was based on substantial, credible evidence, and Lundberg's contrary assertions are not credible, as the court found. Lundberg knew the dates each RSU tranche vested, that Solar was required to deliver the stock within 60 days of the vesting date of each tranche, and that Solar did not meet its contractual 60-day delivery obligation beginning with the first RSU tranche that Solar was required to deliver after Lundberg terminated his Solar employment and continuing with each tranche of RSUs required to be delivered thereafter. Delaware law does not require Lundberg to know the reason Solar breached his agreements or the technical mechanism used to breach the agreements for the court to find Lundberg knew about the breach. Nor does Delaware law require Solar to have expressly told Lundberg it was going to breach or had breached his RSU award agreements for Lundberg to know about the breach.

2. This Court should affirm the Chancery court's conclusion that Delaware's, not Utah's, statute of limitations applies to Lundberg's counterclaims. Under controlling Delaware law—*CHC, Invs.*[4] —Delaware's borrowing statute, 10 Del. C. § 8121, applies in this case, requiring use of Delaware's shorter statute of limitations, as the court found. Lundberg ignores *CHC Invs.*'s application here and instead relies on *Saudi Basic* and related cases decided before *CHC Invs.* and not applicable to these facts. In *CHC Invs.*, the court clarified *Saudi Basic's* borrowing statute holding requiring longer out-of-state statute of limitations to apply over Delaware's. It held that *Saudi Basic's* rule applies *only* in cases where a party was forced to be before the Delaware court and does not apply where the parties have an exclusive Delaware forum selection clause, making the parties' appearance before the Delaware court voluntary. Here, the parties have an enforceable Delaware forum selection clause, making Lundberg's appearance before the Delaware court voluntary, not forced, and requiring application of Delaware's statute of limitations. The court's determination that Delaware's statute of limitations applies also is supported by the parties' agreement that Delaware law governs this litigation, evidencing the parties' intent that Delaware's statute of limitations applies. Since only one state's law applies—Delaware's—there is no

[4] *CHC Invs., LLC v. FirstSun Cap. Bancorp.*, 2020 WL 1480857 (Del. Ch. Mar. 23, 2020), *aff'd,* 241 A.3d 221 (Del. 2020).

basis to conduct a conflict-of-laws analysis, contrary to Lundberg's argument. Even if there were, Lundberg's analysis under which he asserts Utah law applies is flawed. The Restatement (Second) of Conflict of Laws requires a party's choice-of-law provision to be given substantial weight in determining which state's law applies. Lundberg does not mention, let alone analyze, the parties' Delaware law provision. That provision should tip the analysis in favor of applying Delaware law, particularly since that provision states it applies "without giving effect to principles of conflicts of law," and Delaware is the exclusive forum regardless of where Lundberg performs his services.

3. This Court should affirm the Chancery court's conclusion that Lundberg failed to meet his burden to show the Delaware statute of limitations was tolled until after August 6, 2020. Lundberg waived his argument that the statute of limitations was tolled under the *blameless ignorance* doctrine because he did not raise that tolling doctrine below. Even considering the belated tolling argument, Lundberg did not meet his burden to show he did not have notice that Solar breached his RSU award agreements until after August 6, 2020. The court did not just find, as Lundberg asserts, that Lundberg had notice of "some injury." Under Delaware law, the "wrongful act" triggering the statute of limitations on a breach of contract claim and of which a plaintiff must not have notice for tolling purposes is the *breach of contract.* The breach of contract here is Solar's failure to deliver

shares to Lundberg within 60 days of the vesting date of each RSU tranche. There is substantial, credible evidence that Lundberg had notice of Solar's breaches. That is both the contract breach and injury here of which Lundberg had notice. Lundberg's attempt to argue that he didn't know about the "wrong" until after Solar's August 6, 2020, letter to him is wrong. Lundberg's argument that Solar committed its "wrong" only when it rejected his demand in August 2020, misconstrues the "wrong" at issue in his RSU counterclaims. The "wrong" forming the basis of Lundberg's express breach of contract RSU counterclaims was that Solar breached its express contractual obligation under his RSU award agreements to deliver shares to his Morgan Stanley account within 60 days of the vesting date of each RSU tranche after Lundberg terminated employment with Solar. That is, the "wrong" committed was when Solar did not deliver shares to Lundberg consistent with its contractual obligations, and not when Solar and Lundberg corresponded on the topic years later.

STATEMENT OF FACTS

A. PARTIES

Solar is a Delaware corporation with its executive offices in Lehi, Utah.[5] Solar was a publicly traded company from September 30, 2014 until October 8, 2020, and sold full-service residential solar energy systems in the United States.[6] On October 8, 2020, Solar was acquired by non-party Sunrun Inc. ("Sunrun") and is now its wholly owned subsidiary.[7]

Lundberg is a former Associate General Counsel of Solar's who began his employment on May 16, 2014.[8] In July 2016, Lundberg became employed by SmartHome, and officially terminated his Solar employment on August 21, 2016.[9] Lundberg is a lawyer and resident of Utah.

B. SOLAR'S 2014 PLAN AND MORGAN STANLEY'S ADMINISTRATION OF 2014 PLAN

In connection with Solar's IPO in September 2014, Solar adopted the Vivint Solar, Inc. 2014 Equity Incentive Plan ("2014 Plan").[10] All equity awards at issue here were granted under that Plan.[11] The 2014 Plan and Lundberg's award agreements mandate that all disputes arising under the 2014 Plan must be litigated

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[5] Pretrial Order, dated May 4, 2023 ("PTO"), ¶24(a).
[6] *PApp* 7 (¶16).
[7] *Id.*
[8] PTO, ¶24(b).
[9] PTO, ¶¶24(h), 24(g).
[10] *PApp* 9 (¶23); 126.
[11] PTO, ¶¶24(c)-(e).

exclusively in a Delaware court, and that Delaware law governs the 2014 Plan, awards under the plan, and all determinations made and actions taken under the plan.[12]

On February 25, 2015, Solar agreed with Morgan Stanley Smith Barney LLC ("Morgan Stanley") for Morgan Stanley to provide administrative services for the 2014 Plan.[13] Morgan Stanley internally tracked equity awards granted to Solar employees and sent monthly and quarterly account statements to those employees.[14] It also provided grantees with an online portal to their Morgan Stanley account.[15]

Solar used an automated program from its human resources management platform, Workday, to notify Morgan Stanley when employees granted equity awards terminated their Solar employment.[16] Upon notification of termination, Morgan Stanley's system automatically canceled the unvested portion of awards in the employee's account.[17]

In mid-2017, Solar switched from Morgan Stanley to Merrill Lynch as its third-party administrator of its 2014 Plan.[18] Employees who had Morgan Stanley

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[12] *PApp* 59 (§3(h); 81 (Ex. A ¶12(i)); 89 (Ex. A ¶12(i)); Opinion 5.
[13] JX-143.
[14] *PApp* 41 (47:1-7); 96-101; 104-106.
[15] *PApp 102-103;* 115-117.
[16] *PApp* 465-467 (83:12-20, 86:7-18, 92:16-21).
[17] *PApp* 480-481 (131:13-132:25); 39-40 (43:22-44:22); Opinion 9.
[18] *PApp* 41 (47:10-17).

accounts retained access to those accounts through their online portal and continued to receive account statements from Morgan Stanley.[19]

C. LUNDBERG'S EMPLOYMENT WITH SOLAR, SOLAR'S GRANTS OF UNVESTED RSU AWARDS AND THEIR VESTING SCHEDULE

Solar hired Lundberg as its Associate General Counsel on May 16, 2014.[20] On May 14, 2015, Solar granted Lundberg 7,632 unvested RSUs under the 2014 Plan and Lundberg's 2015 RSU Agreement[21] ("2015 Grant"). To receive the 2015 Grant, Lundberg created an online Morgan Stanley StockPlan Connect account and reviewed and accepted the 2014 Plan, 2014 Plan Prospectus, and 2015 RSU Agreement online.[22] Lundberg accessed his online account thereafter to monitor his equity awards.[23] Lundberg also received quarterly and monthly statements from Morgan Stanley that provided him with information about activities in and the status of his account.[24]

The 2015 Grant vesting schedule provided that one-quarter of the RSU awards would vest after one year (May 2016) and 1/16th of the awards would vest on each of the next twelve quarterly anniversary dates.[25]

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[19] *PApp* 11-13(¶28); 121-124; 529-532; Opinion 9.
[20] PTO, ¶24(b).
[21] *PApp* 75-82.
[22] *PApp* 443-445 (138:19-139:5, 142:3-16); Opinion 11.
[23] *PApp* 121-124; 486-488.
[24] *See, e.g., PApp* 96-101; 113-114; 525-532; Opinion 11, 75-76.
[25] *PApp* 75.

On May 9, 2016, Solar granted Lundberg 88,706 unvested RSUs under the 2014 Plan and Lundberg's 2016 RSU Agreement ("2016 Grant").[26] This substantial grant of RSUs was part of Solar's employee retention plan to stop the exodus of Solar employees following a failed merger, when Solar's future was uncertain.[27]

The 2016 Grant had an accelerated vesting schedule: one-half of the 2016 Grant would vest one year from the grant date (44,353 RSUs May 15, 2017) and the remaining one-half would vest two years from the grant date (44,353 RSUs May 15, 2018).[28]

D. PAYMENT OF VESTED RSUS UNDER 2015 GRANT AND 2016 GRANT

Under the 2014 Plan, "[p]ayment of earned Restricted Stock Units will be made when practicable after the date set forth in the Award Agreement and determined by the Administrator."[29] The 2015 and 2016 RSU agreements require that "vested Restricted Stock Units will be paid in whole Shares as soon as practicable after vesting, *but in each case within the period of 60 days following the vesting date***.**"[30]

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[26] *PApp* 83; 485.
[27] *PApp* 31 (¶¶58-59); 302-310; Opinion 11-12.
[28] *PApp* 485; Opinion 13-14.
[29] *PApp* 62 (¶6(d))(italics added).
[30] *PApp* 76 *(*Ex. A ¶2)(italics added); 84 (EX. A ¶2)(italics added); Opinion 14.

E. SOLAR'S CANCELATION OF LUNDBERG'S UNVESTED RSU AWARDS

From the 2014 Plan's inception, Solar consistently canceled equity awards that were unvested on the date an employee terminated employment with Solar, regardless of where they went to work.[31]

When Lundberg terminated his employment on August 21, 2016, he had 5,247 unvested RSU awards and 2,385 vested RSU awards under the 2015 Grant, and 88,706 unvested RSU awards under the 2016 Grant.[32] When two tranches of RSU awards under the 2015 Grant vested while Lundberg was employed by Solar, Solar delivered the stock—totaling 2,385 shares— to Lundberg's Morgan Stanley account.[33] Lundberg sold some of that stock to cover taxes associated with each tranche, leaving him with 1,343 shares in his Morgan Stanley account as of June 30, 2016.[34]

Upon Lundberg's termination of employment on August 21, 2016, he was removed from Solar's Workday, which automatically signaled Morgan Stanley that Lundberg had been terminated.[35] Morgan Stanley canceled Lundberg's unvested

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[31] *PApp* 17-20 (¶¶38-39); 140; 319-320; 468-470 (133:16-22, 143:19-144:2); 360; 376; Opinion 31-32.
[32] *PApp* 378-379.
[33] *PApp* 96-99.
[34] *Id.*
[35] *PApp* 461-462 (173:6-174:5); 465-466 (83:5-11, 83:16-20, 86:7-18); Opinion 18-19.

RSUs in Lundberg's account.[36] Solar canceled Lundberg's unvested RSUs in its system and returned them to the equity award pool available for grant under the 2014 Plan.[37]

F. LUNDBERG KNEW SOLAR CANCELED HIS UNVESTED RSUS UPON HIM TERMINATING SOLAR EMPLOYMENT

Morgan Stanley sent Lundberg account statements notifying him of the status of his RSU awards while he was employed by Solar and after he terminated Solar employment. Lundberg's Morgan Stanley Quarterly Stock Plan Summary from January 1, 2016 through March 31, 2016 disclosed to him that 1,908 shares underlying the 2015 Grant that had vested had been delivered by Solar to Lundberg's Morgan Stanley account March 10, 2016.[38] His Quarterly Stock Plan Summary for April 1, 2016 through June 30, 2016 disclosed that 477 shares underlying the 2015 Grant that had vested had been delivered by Solar to Lundberg's account June 7, 2016.[39] Morgan Stanley's statements Lundberg received after leaving Solar did not reflect that any unvested RSU awards

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[36] *PApp* 480-481 (131:13-132:25); 39-40 (43:22-44:22); Opinion 9.
[37] *PApp* 32 (¶62); 381-382; Opinion 19.
[38] *PApp* 96-97; 75.
[39] *PApp* 98-99, 75.

continued to vest or that Solar delivered shares within 60 days after the vesting date of each RSU tranche.[40]

Lundberg retained access to his online Morgan Stanley account after he terminated employment with Solar, and this also informed him of the status of his RSU awards.[41] The portal to that account presented a landing page upon login disclosing the number of outstanding RSU awards a grantee had, the vesting dates, the number of RSU awards vested and unvested at any given time, and unvested RSUs that had been canceled.[42] The record of Lundberg's logins to his account shows that Lundberg logged into his account while he was employed by Solar and after he terminated his Solar employment:

- In 2016 on five different occasions for periods lasting between one and six-and-a-half minutes;[43]
- For fourteen minutes on August 29, 2016—eight days after leaving Solar and when all his unvested equity awards had been canceled;[44]
- On two occasions totaling four minutes and twenty-three seconds on October 10, 2016;[45]

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[40] *PApp* 100-101; 113-114; 442 (129:10-23); 486-488; 529-532; Opinion 20.
[41] *PApp* 121-123; 486-488.
[42] *PApp* 116; 118-119; 11-13 (¶28); 459-460 (59:12-60:4); 450-451 (183:1-8, 184:16-17); Opinion 22, 76.
[43] *PApp* 123-124; Opinion 22, 75-76.
[44] *PApp* 123; Opinion 22.
[45] *Id.*

- On July 6, 2017—after all of Lundberg's unvested and vested equity awards under the 2015 Grant and 2016 Grant had been canceled and the stock required to be delivered in January 2017 and April 2017 had not been delivered—Lundberg logged into his account twice for approximately 22 minutes.[46]
- Lundberg's last login to his Morgan Stanley account before this dispute was on October 9, 2019.[47]

G. SUNRUN'S ACQUISITION OF SOLAR; LUNDBERG'S DEMAND LETTER

Solar and Sunrun, on July 6, 2020, publicly announced they had entered into a merger agreement under which Sunrun would acquire Solar in a stock-for-stock merger.[48] The merger closed on October 8, 2020.[49]

On July 23, 2020, Lundberg demanded that Solar deliver his RSU equity awards granted under the 2015 Grant and 2016 Grant.[50] On August 6, 2020, Solar, through outside counsel, sent a letter rejecting Lundberg's demands.[51] Solar explained that Lundberg forfeited his unvested equity awards when he terminated

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[46] *PApp* 122; 113.
[47] *PApp* 122. The Chancery court found that, based on contrary, objective evidence, Lundberg's contention was not credible that he was unable to login to his Morgan Stanley account for years and could only login around July 2020. Opinion 23.
[48] *PApp* 35 (¶70).
[49] *PApp* 35 (¶72).
[50] *See PApp* 395-396.
[51] *PApp* 397-405.

his Solar employment four years earlier and that Lundberg's Morgan Stanley account showed his equity awards were forfeited shortly thereafter.[52] Solar explained that the 2014 Plan's plain language supported Solar's interpretation/administration and that "[s]ince the Plan's inception, the Plan Administrator has consistently interpreted and administered the Plan and all RSU award agreements in that manner."[53]

H. THIS ACTION

On November 16, 2020, Solar filed this action seeking, *inter alia,* a declaratory judgment that Solar interpreted and administered the 2014 Plan correctly and upholding its cancelation of Lundberg's equity awards under the 2014 Plan.[54] Solar also sought and was granted a preliminary anti-suit injunction enjoining Lundberg from litigating his breach of contract claims in non-Delaware forums where he had filed suit.[55] On February 8, 2021, Lundberg filed counterclaims alleging Solar breached his 2015 and 2016 RSU Agreements by not timely delivering his equity awards.[56] Solar denied Lundberg's counterclaims and asserted affirmative defenses, including that Lundberg's counterclaims are time-

[52] *PApp* 398.
[53] *PApp* 399-400.
[54] Dkt 1.
[55] Dkt. 3; Dkt. 42.
[56] *PApp* 43-54.

barred.[57] Solar and Lundberg agreed the counterclaims were brought on September 29, 2020.[58]

The parties agreed to try the case on the papers, and the court held a one-day hearing on June 7, 2023.[59]

I. CHANCERY COURT'S OPINION AND FINAL JUDGMENT

The court agreed with Lundberg's interpretation of the 2014 Plan and concluded that "Solar breached the plan by canceling Lundberg's vested and unvested awards" after he terminated employment with Solar and became employed by SmartHome.[60] Those findings and conclusions are not at issue here.

The court determined Delaware's three-year statute of limitations, 10 *Del. C.* § 8106, not Utah's six-year statute of limitations, applied to Lundberg's counterclaims.[61] The court concluded that each RSU segment on which Lundberg's RSU counterclaims were based accrued on the date Solar breached its 60-day delivery obligation, and that tranches of RSU awards required to be delivered before September 29, 2017 were time-barred, rejecting Lundberg's tolling argument.[62] Lundberg appeals the court's conclusion that Delaware's

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[57] Dkt. 59.
[58] Dkt 160 (75); Dkt. 153 (6).
[59] Dkts. 175, 152, 179; Opinion 27.
[60] Opinion 2.
[61] Opinion 51-54.
[62] *Id.* 78-79.

statute of limitations applies and that the statute was not tolled until after August 6, 2020.

For the timely RSU counterclaims, the court concluded "Lundberg is entitled to damages based on the highest market price of the Solar shares reached within a reasonable time of Lundberg's discovery of the breach." Opinion 80. The court found that "Lundberg knew of Solar's breaches concerning the RSU awards no later than 60 days after the vesting date for each tranche, which is the date upon which Solar was required to deliver the shares." Opinion 85. The court then determined, as a matter of law, that the "reasonable period of time" to use for calculating damages on the timely RSU tranches was 90 days from the date of Lundberg's discovery of the breach. *Id.* 87. Based on that factual finding and legal conclusion, the court determined Lundberg was entitled to base damages of $295,921.08, plus pre-judgment and post-judgment interest. *Id.* 89, 94-95. Lundberg purports to appeal the legal standard the court used to establish the damage accrual date. Lundberg appeals the court's factual finding that Lundberg knew Solar breached his RSU award agreements no later than 60 days after the vesting date of each RSU tranche, and the court's use of those dates as the damage accrual date to calculate damages. Lundberg does not appeal the court's legal conclusion as to the "reasonable period of time."

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE CHANCERY COURT'S FINDING OF THE DATE OF ACCRUAL OF DAMAGES

A. QUESTIONS PRESENTED:

Was the Chancery court required to find that Lundberg had "actual knowledge" of Solar's breaches to establish the date damages accrued?

Does the record support the Chancery court's factual finding that Lundberg had "actual knowledge" or "inquiry notice," if that is the standard, that Solar breached his RSU award agreements no later than 60 days after the vesting date for each RSU tranche?

B. SCOPE OF REVIEW:

This Court reviews questions of law *de novo*. *See Precision Air, Inc. v. Standard Chlorine of Del. Inc.*, 654 A.2d 403, 406 (Del. 1995). This Court reviews factual findings for clear error. *Coster v. UIP Companies, Inc.,* 255 A.3d 952, 959 (Del. 2021). This Court gives enhanced deference to the Chancery court's determinations regarding credibility. *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC,* 268 A.3d 198, 209 (Del. 2021).

C. MERITS OF ARGUMENT:

The Chancery court appropriately determined Lundberg's damages accrued when Lundberg "knew" of Solar's breach: no later than 60 days after the vesting date of each RSU tranche. Lundberg's arguments to the contrary are not supported

by the Opinion, the record, or the law he cites. The Opinion does not support the proposition that the Chancery court calculated Lundberg's damages under an "inquiry notice" standard. Even assuming that it did, this analysis is supported by the case law Lundberg cites and other compelling authority. Regardless, the record in this matter contains substantial evidence that Lundberg had both actual and constructive knowledge of Solar's breach.

1. The Record Does Not Support Lundberg's Claim that the Chancery Court Utilized Inquiry Notice to Determine When Lundberg's Damages Accrued.

Lundberg's argument that the court analyzed the accrual of damages using an inquiry notice analysis is not supported by the text of the Opinion. The Opinion nowhere uses the phrase "inquiry notice" or the analogous "should have known" language regarding Lundberg's knowledge of the breach. To the contrary, the court, in its role as fact-finder, made the factual determination that "Lundberg *knew* of Solar's breaches concerning the RSU awards no later than 60 days after the vesting date for each tranche, which is the date upon which Solar was required to deliver the shares." Opinion 85-86(italics added).[63] It awarded "damages based on the highest market price of the Solar shares reached within a reasonable time of

[63] The court uniformly referred to Lundberg's notice of Solar's breach in concrete terms of actual notice. *See* Opinion 88 ("Lundberg knew of the breaches at or shortly after the vesting dates for each tranche."); *id*. at 77 ("Lundberg knew no later than July 6, 2017 ... that Solar had not delivered the RSU's that became due more than three years before he filed the Federal Action.").

Lundberg's *discovery of the breach*." Opinion 80(italics added). This was a *factual* determination of when Lundberg actually knew of Solar's breaches. This factual determination should be affirmed.[64] *See SV Inv. Partners, LLC v. ThoughtWorks, Inc.,* 37 A.3d 205, 210 (Del. 2011) ("So long as the Court of Chancery's findings and conclusions are supported by the record and the product of an orderly and logical deductive process, they will be accepted.").

2. Inquiry Notice is the Proper Standard to Use for the Date of Accrual of Damages.

Lundberg's central premise that his damages only accrued upon "actual notice" of Solar's breach is similarly unsupported. No court appears to have recognized this theory, and it is not supported by the cases Lundberg cites.[65]

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[64] Both parties lodged the full transcript of every deposition taken in the Delaware and Utah actions and expressly stated in the stipulated pretrial order that, since they would not be presenting live witnesses, each "will rely upon the deposition testimony" of each person whose deposition the parties lodged with the court. [PTO, ¶¶29-33]. The parties did not place any restriction on the court's consideration or use of any of the deposition testimony lodged with the court. [PTO].

[65] The United States Supreme Court described the damage accrual date as "after the owner had *received notice* of the [breach]." *Gallagher v. Jones,* 129 U.S. 193 (1889)(italics added). "Notice" is not "actual knowledge." The Delaware superior court similarly described the damage accrual date under the rule as "*knowledge of the conversion*." *Wyndham, Inc. v. Wilmington Tr. Co.,* 59 A.2d 456, 460 (Del. Super. Ct. 1948)(italics added). The *Wyndham* court did not use the word "*actual* knowledge" and imputed "knowledge" to plaintiff from when any other shareholder, officer or director became aware of the conversion, again indicating that the date can be based on "inquiry notice," which later cases clarify, as described above. While Lundberg misleadingly adds the word "actual" to the language it quotes from the Second Circuit (LOB 25), the Second Circuit states it

Lundberg's heavy reliance on *Schultz v. Commodity Futures Trading Comm'n*, 716 F.2d 136, 140 (2d Cir. 1983), best demonstrates Lundberg's misplaced reliance on a theorical "actual notice" requirement. Lundberg materially misquotes this case by inserting the word *"actual"* before notice (and then bolding and italicizing it and its surrounding phrase) in the sentence: "In such cases the injured party should not be afforded the windfall of the higher price attained during the period before he receives 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*. at 141. To be clear, the phrase "actual notice" is not found in that case.

Schultz, and the cases on which it relies, demonstrate that inquiry notice, and not some strict requirement of a writing, is what is required. *Schultz*'s text is contrary to an "actual notice" requirement. Indeed, *Schultz* notes that the salient purpose of the New York Rule is to avoid granting a windfall because "if [a plaintiff] had desired to dispose of [his property] in that interval, he would have learned of the conversion." *Schultz*, 716 F.2d at 141 (quoting *In re Salmon Weed & Co.*, 53 F.2d 335, 341 (2d Cir.1931). That *Schultz* contemplates inquiry notice is unsurprising. It cites with approval *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir. 1971), which analyzes the New York Rule under an inquiry notice

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as "*notice* of the conversion." *Schultz* 716 F.2d at 141 (italics added). Again, "notice" is not "actual knowledge."

standard. *Mitchell* is a securities fraud case premised on a misleading April 12 press release that was corrected by an April 16 press release. The Tenth Circuit determined the plaintiffs' damages would begin to run upon a "reasonable time for the reasonable and diligent shareholder to learn of the April 16 announcement." *Mitchell,* 446 F.2d at 104. That is, the cases underpinning *Schultz* expressly contemplate an inquiry notice analysis to determine when damages begin to run.

Schultz and *Mitchell* are not anomalies. While rarely addressed, appellate courts interpreting the New York Rule have applied an inquiry notice analysis to determine when damages accrue. For example, in *Fawcett v. Heimbach*, 591 N.W.2d 516, 521 (Minn. Ct. App. 1999), the court expressly endorsed an inquiry notice analysis to determine when damages accrue under the New York Rule, holding, "it is most equitable to both the perpetrator and the injured party to determine damages within a reasonable time *after the injured party should have known of the conversion*." (italics added). Similarly, in *Jones v. Nat'l Chautauqua Cnty. Bank of Jamestown,* 272 A.D. 521 (NY. App. Div. 1947), that court specifically noted, "[e]ither actual or constructive knowledge would determine the point from which the reasonable time for fixing the damages begins to run." *Id*. at 529. There is no basis to eschew these cases, and the authority on which Lundberg purports to rely, to reach a different conclusion.

Using "inquiry notice" also furthers the purposes behind courts' use of the New York Rule in these types of cases. As Lundberg stated, the purpose behind that damage analysis 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," [citation omitted] 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." LOB 25.

The court's use of the dates on which Lundberg knew (or should have known) that Solar breached its 60-day delivery obligation pegs his damages from when he suffered harm by being deprived of the stock, and from when Lundberg should have investigated further to protect his equity investment, furthering the purpose of placing Lundberg "in as good a position as he would have been in" had Solar performed its 60-day delivery obligation. It also prevents Lundberg from obtaining a windfall by not allowing Lundberg to consciously ignore the facts giving rise to his claim and then protest he required "actual knowledge" which he did not have until the stock reached its highest prices ever, furthering the other purpose of the New York Rule.

Both purposes of the New York Rule would be defeated by Lundberg's insistence that "actual notice" is the appropriate standard. Using a date years after Solar's breach – when its stock price was at a record high—effectively allows Lundberg to speculate with the benefit of hindsight; hand-picking the highest

possible price while assuming that he never would have sold his stock after he knew it had not been delivered. This would result in Lundberg obtaining a windfall because Solar's stock price skyrocketed during the 90 days after August 2020 due to the announced Sunrun merger and merger's closing on October 8, 2020.[66]

Further, the reason courts use "inquiry notice" for statute of limitation purposes applies with equal force to its use to establish the date of damage accrual. The entire premise of laches, the mechanism by which courts of equity apply a statute of limitations, "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights." *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009). Laches is, of course, premised on the concept "that limitation and laches does not begin to run until evidence of [the alleged wrong] is discovered or could have been discovered had reasonable diligence been exercised, for whatever is notice calling for inquiry is notice of everything to which such inquiry might have led." *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677

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[66] *PApp* 494-512; 520-521 (JX-318.40-58; JX-351.24-25). Lundberg's reference to "after Lundberg could reasonably liquidate his shares" as the date from which the "reasonable period of time" should be measured upon remand (LOB 33), is not relevant. Lundberg did not appeal—and therefore waived appealing—the court's finding that Lundberg's "bare testimony" was not credible that he had "insider knowledge" and "tax considerations" keeping him from selling his stock until January 2021, when the stock reached its highest price ever. Opinion 83-84, 84 fn.225. *Elam v. State*, 852 A.2d 907 (Del. 2004). *See PApp* 33-37 (¶¶66-75); 437; 439-440; 454-456 (234:11-236:17).

A.2d 497, 504 (Del. 1996). There is no basis to depart from this fundamental tenet of Delaware jurisprudence here, and the Chancery court's Opinion should be affirmed as a result.

3. Substantial, Credible Evidence Supports the Chancery Court's Determination of the Damage Accrual Dates Regardless of which Standard Applies.

Regardless of which standard this Court uses to establish the damage accrual date, the record supports that the damage accrual date is no later than 60 days after the vesting date of each RSU tranche, when Solar failed to deliver Lundberg's stock. Opinion 85; 74-78; 19-20; 22-23, 85, 89. The purported evidence to the contrary is Lundberg's self-serving assertion that he did not know about the breaches until after August 6, 2020, which the court found not credible considering the substantial, objective evidence of Lundberg's prior knowledge. Opinion 75 & fn.198; 76 & fns.220-201; 89 & fn.233.

Lundberg knew of Solar's 60-day delivery obligation. The 2014 Plan governing Lundberg's RSU counterclaims provides: "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."[67] The Administrator mandated in the RSU Award Agreements, including Lundberg's, that the date by which Solar was required to pay the shares was no later than 60 days after the

[67] *PApp* 62 (§6(d)(italics added)).

vesting date of each RSU tranche. Section 2 of Lundberg's 2015 and 2016 RSU award agreements states, in relevant part:

> Company's Obligation to Pay. Each Restricted Stock Unit represents the right to receive a Share on the date it vests…. Restricted Stock Units that vest…will be paid …in whole Shares…. [V]ested 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."[68]

Lundberg knew Solar had this contractual delivery obligation and Solar's failure to meet it breached his RSU award agreements, regardless of what he now claims. Lundberg is a litigation attorney.[69] These are the express terms of Lundberg's agreements on which he bases his breach of contract RSU counterclaims. He averred in his RSU counterclaims that it was this 60-day obligation that Solar had breached, entitling him to damage for the value of the undelivered shares. These averments constitute binding judicial admissions.[70] *Twin Willows, LLC v. Pritzkkur,* 2022 WL 3039775, at *6 (Del. Ch. 2022).

Lundberg knew of Solar's employment vesting requirement. Before being granted any RSU award, Lundberg knew Solar required employees, including Lundberg, to be employed by Solar through all applicable vesting periods. Lundberg received a letter in 2015 and 2016 notifying him that Solar would be

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[68] *PApp* 76 (Ex. A ¶2); 84 (EX. A ¶2).
[69] *PApp* 45-46 (Answer 3, 42).
[70] *PApp* 49-53 (Countercl. ¶¶ 51, 55, 69, 74).

granting him RSU awards under the 2014 Plan. Both grant notification letters expressly told him of that vesting requirement:

> Please note that you must be employed by Vivint Solar on the effective date of grant to receive the awards and that the awards will be subject to a vesting schedule, and *all vesting will be subject to your continued employment with Vivint Solar through applicable vesting dates.*[71]

Lundberg therefore knew before he received either the 2015 Grant or 2016 Grant that, if he terminated his employment with Solar, none of his unvested RSUs would continue to vest; that is, Solar would cancel the unvested RSU awards.

Lundberg tracked his RSU awards through Morgan Stanley. Lundberg kept track of his RSU awards through the Morgan Stanley statements he received and by accessing his Morgan Stanley online account.[72]

Lundberg admitted he received Morgan Stanley Quarterly Account Statements from January 2016 to June 2020 and received those statements "within a few weeks" of the end of each quarterly reporting period.[73] Lundberg never denied he reviewed those statements when he received them. The statements showed Lundberg all stock Solar had delivered to his account, the date of delivery,

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[71] *PApp* 108(italics added); 111(italics added); *PApp* 150(italics added); *PApp.* 446-448, 452-453 (144:3-11, 162:16-163:25, 230:14-231:18); *see also PApp* 384; 406.
[72] *See PApp.* 102-106; 96-101,113-114; 443, 445 (138:19-139:5, 142:3-16); 525-532; 120-124; 486-488.
[73] *PApp.* 442 (129:10-23).

the value of the stock, the amount of such stock Lundberg sold to cover taxes, and whether there had been any other transactions during the statement's period.[74]

Lundberg had access to and did access his online Morgan Stanley account both before and after he terminated his Solar employment.[75] Lundberg's online account showed him, upon login, the number of RSU awards he had been granted, the date of granting, how many RSU awards were vested and unvested at that time, and unvested RSU awards that had been canceled.[76]

Lundberg took delivery of two tranches of RSUs that were required to be delivered while Lundberg was employed by Solar. While Solar employed Lundberg, two tranches of his RSU awards under his 2015 Grant vested—1,908

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[74] *See, e.g., PApp* 96-101; 113-114; 525-532; 442 (129:10-23**).**
[75] *PApp* 121-124; 489-492; 11-13 (¶¶ 27-28).
[76] *PApp* 116; 118-119; 11-13 (¶¶27-28). Lundberg's argument that "[t]here is no evidence regarding what Lundberg actually saw before the system switched to Merrill Lynch" (LOB 30) is not true based on the evidence, including the record cited in this footnote. The Chancery court rejected that very argument, finding "[t]he notion that Lundberg would have logged into his account without checking his award strains credulity. Beyond that, Solar introduced convincing evidence that the Awards—or their absence—would have been displayed in Lundberg's Morgan Stanley account." Opinion 77.

and 477 RSUs.[77] Solar delivered the 1,908 shares to Lundberg's Morgan Stanley account in March 2016 and delivered the 477 shares in June 2016.[78]

The Morgan Stanley statements Lundberg received showed Lundberg the delivery of those shares to his account on those dates, Lundberg's sale of shares, and the shares remaining after the sales.[79] After Lundberg's sale, Lundberg held 1,343 shares in his Morgan Stanley account, which are the only shares in his account as of December 31, 2016, as reflected in Lundberg's statements.[80] Lundberg also saw on his online account when he accessed it while employed by Solar in 2016, that those two RSU tranches had vested. Thus, Lundberg physically saw, and interacted with, the vesting and delivery processes of the RSU awards.

Lundberg knew of the vesting and delivery dates for the remaining RSU awards. Lundberg knew from his 2015 and 2016 RSU Agreements the vesting dates for and the number of each tranche of his unvested RSU awards that remained after the two tranches vested and were delivered to him in March and June 2016.[81] Lundberg also knew from when he accessed his online account in February, March and June 2016, what those vesting dates were and how many

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[77] *PApp* 75.
[78] *PApp* 96-99.
[79] *PApp* 96-101.
[80] *PApp* 100-101.
[81] *See PApp* 75; 83; 483, 485.

RSU awards vested on each of those dates.[82] Upon sign-in, Lundberg's online account showed Lundberg all the RSU awards he had been granted, the number of vested and unvested RSU awards, and the vesting dates for unvested awards.[83]

Lundberg knew that the next vesting dates for the RSU awards under the 2015 Agreement were November 14, 2016, February 14, 2017, and May 14, 2017.[84] He knew that the next vesting date for the RSU awards under the 2016 RSU Agreement was May 15, 2017.[85]

Lundberg knew Solar was contractually obligated to deliver shares to Lundberg's Morgan Stanley account no later than 60 days after the vesting date of each RSU tranche, and when those required delivery dates were: (1) January 13, 2017, for the tranche of RSUs that vested on November 14, 2016; (2) April 15, 2017, for the tranche of RSUs that vested on February 14, 2017; (3) July 13, 2017 for the tranche of RSUs that vested on May 14, 2017; and (4) July 14, 2017 for the tranche of RSU's that vested on May 15, 2017.[86]

Lundberg knew on August 29, 2016, that Solar canceled all his unvested RSUs. Lundberg, no later than August 29, 2016, knew Solar breached his 2015

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[82] Lundberg logged into his account on February 26, 2016 (6 minutes), March 28, 2016 (12 minutes), and June 3, 2016 (4 minutes). *PApp* 123-124.
[83] *PApp* 116; 118-119; 11-13 (¶28); *see* 450-451 (183:1-8, 184:16-17).
[84] *PApp* 75.
[85] *PApp* 83; 485.
[86] *PApp* 483-485.

and 2016 RSU Agreements by canceling all his remaining unvested RSU awards, showing Lundberg that Solar did not intend to and would not meet its 60-day delivery obligation for unvested RSUs after Lundberg terminated Solar employment.

On August 29, 2016—eight days after terminating employment and after Solar had canceled all his unvested RSUs—Lundberg logged into his online account for approximately 14 minutes.[87] His landing page showed him that all his remaining unvested RSUs had been canceled and he had no unvested RSUs as of that time.[88] In other words, Lundberg knew that Solar had breached his agreements by canceling all his remaining unvested RSU awards and knew his canceled RSUs would not vest and therefore would not be delivered within 60 days of their vesting date.

Lundberg knew Solar breached its 60-day delivery obligation within 60 days of the vesting date of each RSU tranche. Lundberg knew from his Quarterly Account Statements from January 1, 2017, through September 30, 2020, and from accessing his online account that Solar breached every one of its contractual 60-

[87] *PApp* 123 (also October 10, 2016 (5 minutes)).
[88] *PApp* 116; 118-119; 11-13 (¶28); 460 (60:3-4); *see* 450-451 (183:1-8, 184:16-17).

day delivery obligations covered by each statement.[89] The relevant timeline here is:

- Lundberg's January 1, 2017, through June 30, 2017 Quarterly Account statements showed Lundberg that Solar did not deliver the stock it was required to deliver by January 13, 2017 and April 15, 2017, totaling 943 shares.[90]
- Lundberg's online access to his account on July 6, 2017 for 20 minutes[91] showed Lundberg that Solar had not delivered the 943 shares it was required to deliver by January 13, 2017 and April 15, 2017, [92] and that it had canceled all his RSU awards that were unvested when he terminated Solar employment, including the 943 RSU awards.[93]
- When Lundberg accessed his account on July 6, 2017, Lundberg sold the only stock in his account—the 1,343 shares Solar delivered while Lundberg was employed by Solar. After the sale, Lundberg's online

[89] *PApp* 442 (129:10-23); 96-101; 113-114; 525-532.
[90] *Id.*
[91] *PApp* 122.
[92] *PApp 75; 83; 483-485.*
[93] *PApp* 116; 122; 118-119; 11-13 (¶28); 460 (60:3-4); *see* 450-451(183:1-8, 184:16-17).

account showed him no stock remained in his account and that Solar had canceled all his RSU awards.[94]

- Lundberg's Morgan Stanley Quarterly Account statement for the period July 1, 2017 through September 30, 2017, showed Lundberg that Solar had not delivered a total of 45,784 shares of stock that Solar was required to deliver on January 13, 2017 and April 15, 2017 and the two tranches it was required to deliver in July 2017.[95] The statement showed Lundberg that, as of July 5, 2017, he had only 1,343 shares that Solar had delivered in 2016 and that no other shares had been delivered through September 30, 2017.
- The September 2017 statement also showed Lundberg that, on July 6, 2017, he sold 1,343 shares, had sale proceeds withheld to pay taxes, and had Morgan Stanley pay him the remaining sale proceeds. The statement then showed Lundberg that he had no further stock in his account as of September 30, 2017.[96]
- The Morgan Stanley Quarterly Account Statements for the periods from October 1, 2017, through September 2020, showed Lundberg that Solar did not deliver the stock within 60-days after the vesting

[94] *PApp* 113-114; 442 (129:10-23).
[95] *PApp* 113-114; 442 (129:10-23).
[96] *Id.*

date of each RSU tranche required to be delivered after July 30, 2017, and during each period covered by those statements.[97]

Lundberg admitted he sold his stock because he knew Solar had not delivered and would not deliver any more stock. The court properly found that "Lundberg's decision to sell out [his stock on July 6, 2017] underscores the logical inference that he did not expect further shares to be delivered."[98] It found Lundberg's "deposition testimony confirms that he understood he was selling his entire investment"—all the shares Solar would deliver to him:

> Q: And why did you decide to sell the shares?
>
> A: I decided to sell the shares because … I also wanted to close out that account.
>
> Q: And when you say 'close out the account,' what do you mean?
>
> A: I – I understood I wouldn't be utilizing that account anymore and so I wanted to – I wanted to close out the use of the Morgan Stanley account and the shares that were in that."[99]

By Lundberg's admission, he knew no later than 60 days after the vesting date for each RSU tranche that Solar had breached and would continue to breach in the future its 60-day contractual delivery obligation.

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[97] *See* fn. 89, *supra.*
[98] Opinion 77 fn.205.
[99] *Id.*; *PApp.* 449 (166:11-22).

4. Lundberg's Reversal Arguments are without Merit.

Lundberg's criticism that the court "did not tie any particular statement to notice of multiple other RSU vesting periods for which no statement is correlated" is belied by Lundberg's above testimony regarding his reason for selling his only Solar shares. It also is undercut by the Morgan Stanley statements Lundberg received from January 1, 2016 to June 2020, and his lengthy accesses to his online account which told him shortly after terminating his Solar employment that all his unvested RSUs had been canceled, and thereafter told him that he had no vested or unvested RSUs, and Solar had not delivered any shares to his Morgan Stanley account since June 2016.

Lundberg's assertion is wrong that the court was required to but did not make a "finding that Lundberg knew that Solar *unlawfully temporarily converted*[100] his shares based upon a purported exercise of discretion by the Compensation Committee—which exercise of discretion the court found never occurred." LOB 30 (emphasis in original). That statement demonstrates Lundberg's misconception of what Delaware law requires to establish the damage accrual date. Neither Delaware law nor any case Lundberg cites[101] requires that, to establish the damage accrual date, Lundberg had to know Solar's reason for

[100] The court concluded that the alleged breaches here were "segmented" breaches, not a "continuing" breach or temporary conversion. Opinion 69-73.
[101] *See* Lundberg's cited authority LOB 24-27, 30-31.

breaching,[102] or the mechanism it used to accomplish the breach, or that Lundberg had been told Solar had breached or was going to breach, as Lundberg contends. LOB 30, 33.

[102] Lundberg knew from the inception that, if he terminated Solar employment, Solar would never deliver stock underlying RSUs unvested on that date, including within its 60-day delivery obligation. *See* Section I.C.3., at *supra* 26-27.

II. THIS COURT SHOULD AFFIRM THE CHANCERY COURT'S CONCLUSION DELAWARE'S THREE-YEAR STATUTE OF LIMITATIONS APPLIES TO LUNDBERG'S COUNTERCLAIMS

A. QUESTION PRESENTED:

Did the Chancery court correctly conclude that Delaware's three-year statute of limitations, 10 *Del. C.* § 8106, not Utah's six-year statute of limitations, applies to Lundberg's RSU counterclaims?

B. SCOPE OF REVIEW:

This Court reviews questions of law *de novo*. *See Precision Air, Inc. v. Standard Chlorine of Del. Inc.*, 654 A.2d 403, 406 (Del. 1995).

C. MERITS OF ARGUMENT:

The Chancery court correctly concluded that Delaware's three-year statute of limitations, 10 *Del. C.* § 8106, applies to Lundberg's RSU counterclaims.[103] Opinion 54. This Court should affirm that conclusion.

The court correctly determined that the general rule under Delaware law that, "the forum state's statute of limitations applies," applies to these facts. And, because only Delaware law applies, the court correctly concluded there is no basis for conducting a conflict-of-laws analysis. Opinion 53-54; *see TrustCo Bank v. Mathews,* 2015 WL 295373 at *5 (Del. Ch. Jan. 22, 2015) (internal quotation

[103] Dkt. 59, at 52-53; *see* Opinion 49.

marks omitted); *see also CHC Invs., LLC v. FirstSun Cap. Bancorp,* 2020 WL 1480857, at *4 (Del. Ch. March 23, 2020), *aff'd*, 241 A.3d 221 (Del. 2020).

CHC Invs.[104] is determinative that Delaware's statute of limitations applies under the facts here, as the Chancery court found. *CHC Invs.* was decided after *Saudi Basic* and the related cases on which Lundberg relies and distinguished those cases from cases like here where the parties agreed to an exclusive Delaware forum selection clause. In *CHC Invs.,* the court explained that *Saudi Basic*—requiring application of a longer foreign statute of limitations—applies in a case *only* where "the party asserting the underlying claims was forced to file in Delaware." It does not apply where the parties agreed to an exclusive Delaware forum selection clause because the parties are voluntarily before the Delaware court. *CHC Invs.,* 2020 WL 1480857, at **2, 8-9.

Here, the parties in the 2014 Plan and each of Lundberg's RSU award agreements agreed to an enforceable Delaware forum selection clause that applies to Lundberg's counterclaims, making Lundberg's appearance voluntary before the Delaware court:

> For purposes of litigating any dispute that arises under this Plan, a Participant's acceptance of an Award is his or her consent to the jurisdiction of the State of Delaware and agree[ment] that any such litigation will be conducted in Delaware Court of Chancery, or the federal courts for the United States for the District of Delaware, and no

[104] *CHC Invs.,* 2020 WL 1480857.

> other court, regardless of where a Participant's services are performed.[105]

The Chancery court cited *CHC Invs.* and explained its application here, pointing out that Lundberg failed to address Delaware's borrowing statute:

> Under the borrowing statute, when a case arising factually in a foreign jurisdiction is brought in Delaware, the court will apply the shorter statute of limitations. The court applies a longer foreign statute of limitations *only if* the party asserting the otherwise barred claim was *forced* to litigate that claim. *CHC Invs.*, 2020 WL 1480857, at *4-8. A party subject to an enforceable forum selection provision is not forced to litigate the claim in Delaware, instead, the party is deemed to be before the court voluntarily. *Id.* at *8. Lundberg is party to an exclusive Delaware forum selection provision with respect to his counterclaims. Not only is that provision enforceable, it has, in fact, been enforced. Dkts. 47-48. Therefore, Lundberg is voluntarily before this court and subject to the Delaware statute of limitations. *See CHC Invs.,* 2020 WL 1480857, at *8.

Id. (italics added).

Lundberg simply ignores *CHC Invs.* and the court's conclusion that it applies here. LOB 34-39.[106]

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[105] *PApp* 59 (§3(h)); 81 (Ex. A §12(i)); 89 (Ex. A §12(i)).

[106] The court's determination that Delaware's statute of limitations applies also is supported by the parties' agreement that Delaware law applies to Lundberg's counterclaims, in addition to Delaware being the exclusive forum. The Delaware law provision uses broad-encompassing language and is not limited to interpreting the agreements at issue, like standard choice-of-law provisions. The cases Lundberg cites to support his position that the Delaware law provision must expressly include procedural law, unlike here, involve non-Delaware choice-of-law provisions that are limited to substantive law—"interpreting" or "construing" the agreement—and do not involve an exclusive Delaware forum selection clause. LOB 35, 37-38.

While there is no basis for conducting a conflict-of-laws analysis here because only one state's law applies—Delaware's—Lundberg's purported conflict-of-laws analysis requiring Utah's statute of limitations to apply is materially flawed. Under the Restatement (Second) of Conflict of Laws, the parties' Delaware choice-of-law provision is given significant weight in the analysis. Restatement (Second) of Conflict of Laws §187(1) (1971). Lundberg does not mention, let alone analyze, the impact the parties' Delaware law provision would have on the outcome. The parties' Delaware law choice should tip the analysis in favor of applying Delaware law, particularly since the Delaware law provision instructs that Delaware law governs "without giving effect to principles of conflicts of laws," and the Delaware exclusive forum clause applies regardless of where Lundberg performs his services.

Finally, Lundberg's reliance on his Utah employment agreement's choice-of-law provision misinterprets the court's actual holding at the inception of this case that the employment agreement does not apply to Lundberg's counterclaims. The court held that the employment agreement expressly exempts Lundberg's equity awards from the terms of his employment agreement, including the arbitration provision, and that they are governed by the terms and conditions of the 2014 Plan and Lundberg's RSU Agreements. Opinion 65 & fn.185; 66 & fns. 186-

187. The choice-of-law provision on which Lundberg relies in the employment agreement is a term of that agreement and therefore cannot apply here either.

III. THIS COURT SHOULD AFFIRM THE CHANCERY COURT'S CONCLUSION THAT LUNDBERG FAILED TO MEET HIS BURDEN TO PROVE TOLLING

A. QUESTIONS PRESENTED:

Did the Chancery court correctly conclude Lundberg failed to prove Delaware's statute of limitations was tolled until after August 6, 2020?

B. SCOPE OF REVIEW:

This Court reviews factual findings for clear error. *Coster v. UIP Companies, Inc.,* 255 A.3d 952, 959 (Del. 2021). It reviews questions of law *de novo*. *See Precision Air, Inc. v. Standard Chlorine of Del. Inc.*, 654 A.2d 403, 406 (Del. 1995).

C. MERITS OF ARGUMENT:

This Court should affirm the Chancery court's conclusion that Lundberg failed to prove the Delaware statute of limitations was tolled until after August 6, 2020.

In Delaware, the general law "is that the statute of limitations begins to run, *i.e.,* the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998), *aff'd,* 725 A.2d 441 (Del. 1999). The wrongful act for a breach of contract claim is the breach, "and the cause of action

accrues at the time of breach." *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).

This Court should reject Lundberg's "blamelessly ignorant" tolling argument because he did not raise it below and therefore waived the right to raise it on appeal. Supr. Ct. R. 8. Below, the only tolling argument Lundberg raised, which the court rejected, was his argument that he did not have inquiry notice of Solar's breaches until after August 6, 2020, without any reference to the blamelessly ignorant doctrine. Opinion 75-79. Lundberg's record citation for preserving that tolling argument does not support preservation. Lundberg App. 645-648. That should end this Court's consideration of tolling.

Regardless, Lundberg's new tolling argument lacks merit.[107] Lundberg's RSU counterclaims on which he received a favorable judgment and which are the subject of this appeal are based on Solar's breaches of its express contractual delivery obligations under Lundberg's RSU award agreements and the resulting damage to Lundberg based on the value of the shares not delivered.[108] As the Chancery court explained at length, Solar's breach and Lundberg's damages were

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[107] Lundberg's misleading attempt to recast the "wrong" to fit his tolling argument—Solar's assertion in its August 6, 2020, letter that the Administrator interpreted the 2014 Plan to require Lundberg to be employed by Solar through all vesting periods, and Lundberg's later understanding of Morgan Stanley's role in the forfeiture of his unvested RSU awards—are not the "wrong" on which Lundberg's RSU counterclaims on appeal are based.

[108] *PApp* 49-53 (Countercl. ¶¶49-56, 67-75); Opinion 73-78, 96.

not inherently unknowable; Lundberg *knew of Solar's breach and his damages* and therefore cannot prove tolling.[109]

In *Vichi*,[110] cited by Lundberg, the court appropriately explained the "blamelessly ignorant" rule under Delaware law:

> According to the doctrine of inherently unknowable injuries, sometimes referred to as the "discovery rule," a statute of limitations does not run "where it would be practically impossible for a plaintiff to discover the existence of a cause of action." A plaintiff bears the burden of demonstrating that he was "blamelessly ignorant" of both the wrongful act and the resulting harm.

85 A.3rd at 789-90.

Lundberg quotes from this portion of the opinion as support that he must but did not know both the wrongful act and resulting harm for the statute of limitations to run. LOB 42-43.[111] However, *Vichi* stated the rule applies only "where it would be practically impossible for a plaintiff to discover the existence of a cause of action" and further explained:

> Thus, if objective or observable factors exist to put the plaintiff on constructive notice that a wrong has been committed, he may not rely on the discovery rule to toll a limitations period. Moreover, a statute of limitations will begin to run when the plaintiff discovers facts

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[109] Lundberg is playing fast and loose with the RSU counterclaims involved in his tolling argument before the Chancery court and on appeal. The counterclaims involved here are not Lundberg's counterclaims based on the implied covenant of good faith and fair dealing, which the court dismissed based on the express contract claims and which dismissal Lundberg did not appeal.

[110] *Vichi v. Koninklijke Philips Elecs., N.V.,* 85 A.3d 725 (Del. Ch. 2014).

[111] *In re Dean Wittter*, 1998 WL 442456, at *5, does not support Lundberg's position.

> "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which if pursued, would lead to the discovery of such facts."

Id.

The objective and observable factors in this case demonstrate Lundberg knew that Solar breached its 60-day stock delivery obligation each time it was contractually obligated to but did not deliver Lundberg's stock. Those objective and observable factors putting Lundberg, a litigation attorney, on notice of breach and harm are described in detail in the first argument, *supra.* Those factors show Lundberg discovered facts "constituting the basis of [his] cause of action" or discovered the existence of facts that would have put a person of ordinary intelligence and prudence on inquiry, which if pursued, would lead to the discovery of such facts" constituting Solar's breach and resulting harm to Lundberg.[112] Those factors are far more than the plaintiffs had in *Vichi* and *In re Dean Witter* for those courts to find inquiry notice.

Lundberg's argument that he meets the "blamelessly ignorant" tolling doctrine "'by showing justifiable reliance on a professional or expert,' or a fiduciary, 'whom they have no ostensible reason to suspect of deception'" is equally without merit. LOB 43. The Administrator was not Lundberg's

[112] Lundberg's argument that Solar's failure to deliver stock may have been due to any number of factors, not necessarily breach, does not relieve him of his obligation to investigate further when he learned of the non-deliveries. LOB 43.

investment advisor, as was the situation in the cases Lundberg cites.[113] Even if the Administrator owed Lundberg fiduciary duties in administering the 2014 Plan, there is no evidence it breached such a duty by deceiving Lundberg or making misrepresentations on which Lundberg relied in not acting in the face of the objective factors of Solar's breaches of Lundberg's equity award agreements. Even in *Dean Witter*, where the defendant was a fiduciary because he was plaintiffs' investment advisor, the court rejected plaintiffs' tolling argument because "the trusting plaintiff still must be *reasonably attentive* to his interests. … [E]ven where defendant is a fiduciary, a plaintiff is on inquiry notice when the information underlying plaintiff's claim is readily available." 1998 WL 442456 at *8. The same is true here. Lundberg knew of Solar's breaches because the information underlying his counterclaim was readily available to him.

[113] *Dean Witter*, 1998 WL 442456*; In re Tyson Foods Inc.*, 919 A.2d 563 (Del. Ch. 2007)(abrogation recognized by *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 470 (Del. 2024)). Unlike here, in *Tyson,* plaintiff would have been required to review all the information in a proxy statement and a year's worth of press clippings and other filings to have inquiry notice.

CONCLUSION

Solar respectfully requests that this Court affirm the Chancery court as described and for the reasons above.

GORDON REES
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