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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 REPLY BRIEF

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INTRODUCTION

Appellant Jim Lundberg ("Lundberg") appeals the Court of Chancery's damages measurement, as well as the finding that certain of Lundberg's claims are untimely under Delaware's three-year limitations period. Central to the appeal is the question of when Lundberg actually knew that Appellee Vivint Solar, Inc. ("Solar") breached the 2014 Equity Incentive Plan ("2014 Plan") and various Restricted Stock Unit ("RSU") and Option Agreements. Critically, Solar's cancellation of Lundberg's equity awards occurred not due to any act by Solar, but by virtue of automatic software that cancelled awards when Lundberg left Solar to work for its sister company, Vivint SmartHome, Inc. ("SmartHome"). The only act that Solar took occurred in August 2020 when, in response to Lundberg's demands, Solar notified Lundberg for the first time that his equity was cancelled in 2016 based on a purported "interpretation" of the 2014 Plan by the Solar Compensation Committee that SmartHome was not within the "Company Group." Lundberg proved at trial that this story was a fabrication. (Op.35 (Solar's Compensation Committee "made no actual decision to interpret the 2014 Plan as Solar claims in this litigation").)

Remarkably, Solar continues to advance its rejected theory that Lundberg was not entitled to his shares based on Solar's "long-standing interpretation/administration of its equity incentive plan that required Lundberg to

continue employment with Solar for…awards to vest." (Solar Answering Brief ("SolarBr.") at 1.) While it is troubling that Solar refuses to acknowledge that its defense is premised on a falsity, it is not surprising given the import this finding bears. But Solar cannot dispute that it failed to give Lundberg notice of forfeiture, and that its August 2020 letter represents Solar's first notice of forfeiture and Solar's first (fabricated) justification for a software failure.

Solar's Answering Brief fails to justify the trial court's flawed damages and statute of limitations holdings. First, Solar argues damages are measured by when the victim is on inquiry notice of possible conversion, rather than actual notice, as Delaware courts have consistently held for nearly 80 years. Solar supports this position exclusively with non-Delaware authority and fails to even mention, let alone distinguish, on-point Delaware law. Further, Solar attempts to show that the trial court made an "actual knowledge" finding, but like the trial court, it never identifies any evidence that Lundberg had actual knowledge of Morgan Stanley's software programming omission before August 2020. In fact, Solar's primary effort to support alleged actual knowledge is a selective quotation of Lundberg's deposition testimony blatantly omitting Lundberg's explanation that he "closed out" his Morgan Stanley stock account in 2017 because Solar moved stock administration to Merrill Lynch, not that he expected no further shares. This Court should reverse the

trial court's damages measurement, with instructions to measure damages based on the first date that Lundberg knew in August 2020 of Solar's temporary conversion.

Second, Solar argues the trial court correctly applied Delaware's limitations period because Lundberg "agreed" to litigate in Delaware, and therefore the court correctly refused to look to which forum has the most substantial relationship with Lundberg's counterclaims. Solar's argument rests on a single case, *CHC Investments, LLC v. FirstSun Capital Bancorp*, 2020 WL 1480857 (Del. Ch. Mar. 23, 2020), *aff'd*, 241 A.3d 221 (Del. 2020), in which the court refused to apply this Court's holding in *Saudi Basic* because the *plaintiff* chose to file in Delaware. Id. at *8. Of course, that is not what happened here. Lundberg attempted to consolidate all claims in Utah—where both parties are located and operate—but Solar refused this invitation, obtained an anti-suit injunction against Lundberg, and forced Lundberg to litigate counterclaims in Delaware. Thus, CHC Investments is distinguishable, and the trial court erred in refusing to apply Utah's six-year limitations period.

Finally, in response to Lundberg's alternative argument that he was "blamelessly ignorant" of automated forfeiture until August 2020, Solar returns to its tactic of ignoring its most egregious conduct—manufacturing a defense with no basis in fact—and attempts to focus the Court on technical non-delivery "breaches" resulting from software that was not programmed correctly to the 2014 Plan's plain

language. But again, there is no evidence that Lundberg could have known of Solar's internal forfeiture any earlier than August 2020, or of Solar's purported exercise of discretion regarding the 2014 Plan that did not happen. Solar made its bed when it crafted a sham defense, and it should be made to lie in it. The trial court's decision instead rewards Solar for its misleading conduct by dismissing substantial RSU claims and severely compromising Lundberg's damages.

Lundberg respectfully requests that the Court reverse and remand to reinstate Lundberg's dismissed counterclaims and to measure damages under an actual notice standard.

ARGUMENT

I. LUNDBERG HAD NO ACTUAL KNOWLEDGE OF SOLAR'S WRONGFUL CONDUCT UNTIL AUGUST 2020, WHICH MARKS THE BEGINNING DATE FOR MEASURING DAMAGES.

Lundberg cited numerous cases confirming that Delaware applies the "New York Rule" when a victim receives actual knowledge of the defendant's conversion of a fluctuating asset. (Lundberg Opening Brief ("LundbergBr.") at 22–32.) In response, Solar confoundingly asserts that "***[n]o court*** appears to have recognized" that a victim of stock conversion measures its damages from when the victim receives actual knowledge of the conversion. (SolarBr.20 (emphasis added).) Delaware courts, however, have ***uniformly*** relied on the victim's receipt of actual knowledge of conversion as the date when stock conversion damages begin, reasoning that the actual knowledge standard ensures the victim is not permitted to speculate on the market with hindsight.

Solar's brief nonsensically twists this premise 180° arguing that an actual notice standard permits Lundberg to speculate based on hindsight. (SolarBr.23.) Solar's argument assumes Lundberg somehow knew whether Solar's stock price would rise or fall at various intervals between 2017–2020. He did not, and the only non-speculative way to measure damages is to look to the date when Lundberg *actually knew* of Solar's conversion—which occurred upon Solar's response in August 2020.

Solar also contends the Court of Chancery found that Lundberg had actual knowledge of his claims and that the evidentiary record supports this alleged finding, but Solar's arguments merely highlight the gap in evidence and explain why Solar itself presented a post-trial proposed finding "Lundberg knew or was on notice." (A1051(¶88).) The trial court erred in measuring damages from each date Solar failed to deliver stock, which method has been consistently found to be "inadequate to compensate the injured person[.]" *Wyndham, Inc. v. Wilmington Tr. Co.*, 59 A.2d 456, 459 (Del. Super. 1948). This Court should reverse the trial court's damages calculation and remand with instructions to calculate damages based on stock prices following Solar's response to Lundberg in August 2020.

A. In Order To Prevent Speculation With The Benefit Of Stock Market Hindsight, Delaware Courts Look To The Time A Claimant Receives Actual Knowledge Of Breach/Conversion.

Solar's effort to distinguish Lundberg's cited authority is exclusively focused on out-of-state authority and completely disregards the Court of Chancery's most recent application of the New York Rule to the date when the plaintiff demands payment—similar to what Lundberg argues here. *See Diamond Fortress Techs., Inc. v. EverID, Inc.*, 274 A.3d 287, 308 (Del. Ch. 2022). In *Diamond Fortress*, the defendant failed to deliver payments (in the form of "token distributions") to the plaintiff. *Id.* at 294–95, 308. After the payments were not made on due dates, the plaintiff launched "numerous efforts to obtain [defendant's] assurances that the

token distributions were forthcoming[,]" but the defendant "refused to respond or distribute the tokens." *Id.* at 294–95. The plaintiff sent a final communication demanding payment and stating that it would initiate litigation if payment was not made. *Id.* at 308. In its damage calculation, the court looked to the value of the tokens within a reasonable time of the date of "discovery of [defendant's] breach," which the court held occurred upon the plaintiff's "final communication" demanding payment—***not the earlier date of non-delivery***. *Id.* at 308 ("[This date] is therefore the date the Plaintiffs became absolutely entitled to issuance of their ID Tokens."). Again, Solar makes no mention of *Diamond Fortress*, let alone distinguishes it.

Solar similarly disregards, and makes no effort to distinguish, *Haft v. Dart Group Corporation*, 877 F. Supp. 896, 902 (D. Del. 1995). In *Haft*, the defendant stock issuer notified the plaintiff that it determined the plaintiff voluntarily terminated his employment, which entitled the defendant/employer to repurchase shares. *Id.* at 899. The plaintiff later "requested in writing" that the defendant issue an unrestricted certificate, rather than repurchase, because the plaintiff asserted he had not voluntarily terminated his employment triggering the repurchase right. *Id.* at 899, 902. Finding that the defendant breached, the court awarded damages based on the date the plaintiff "requested [the certificate] in writing"—rather than the earlier date when the company "breached" by informing the plaintiff that it would not deliver certificates. *Id.* at 902. In a footnote, Judge Robinson explained that

under prior Court of Chancery authority, "the date from which to measure damages is the date of plaintiff's ***knowledge*** of defendant's breach." *Id.* at 902 n.2 (emphasis added).

Finally, Solar feebly attempts, in footnote, to distinguish *Wyndham*, which similarly holds that the date of the victim's "knowledge of the conversion" is the operative damages date. 59 A.2d at 459-60. Solar argues that because *Wyndham* does not use the word "actual" in front of the word "knowledge," this "indicat[es] that the date can be based on 'inquiry notice[.]'" (SolarBr.20 n.65.) Solar suggests the basis for this "indication" is that the court in *Wyndham* "imputed 'knowledge' to plaintiff from when any other shareholder, officer or director became aware of the conversion[.]" (*Id.*) But this proves that the court applied an *actual knowledge* standard, not inquiry notice. The plaintiff in *Wyndham* was a corporation, and thus actual knowledge is necessarily "imputed" through agents. *See Wyndham*, 59 A.2d at 457, 460 ("Here, … when knowledge of the conversion first came to any shareholder, officer or director other than decedent, is obviously to be treated as the time when the owner ***first acquired knowledge of the conversion***." (emphasis added)).

Solar thus fails to distinguish any of Lundberg's cited ***Delaware*** authority, all of which applies an actual knowledge standard. Solar's out-of-state authority does not bind this Court and provides no basis to depart from nearly 80 years of Delaware

precedent. Solar focuses on the Second Circuit's decision in *Schultz* to argue that "appellate courts interpreting the New York Rule have applied an inquiry notice analysis to determine when damages accrue." (SolarBr.22.) But Solar's only basis for "distinguishing" (misciting) *Schultz* is that it uses the word "notice," rather than "knowledge."[1]

As explained in Lundberg's opening brief, *Schultz* strongly supports Lundberg's position not Solar's. *Schultz* applies the New York Rule by describing a hypothetical in which "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." *Schultz v. Commodity Futures Trading Comm'n*, 716 F.2d 136, 140–41 (2d Cir. 1983). The New York Rule prevents the victim from being "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 (internal quotes and citation omitted) (emphasis added). Consequently, actual knowledge is the proper measure because the victim's failure to take efforts to sell during a high-price interval ***proves*** that the victim would not have sold and avoids hindsight speculation. The victim is ***not*** entitled to a

[1] Solar also cites Minnesota authority that has no bearing on, and simply marks a departure from, Delaware courts' application of the rule.

damages measurement during such period that he might "have learned of the conversion" but didn't—*i.e.*, during the inquiry notice period—because doing so facilitates speculating with hindsight. *Id.*

Opposite *Schultz*, the Court of Chancery measured damages from the "time of [Solar's undisclosed] conversion." *Wyndham*, 59 A.2d at 459. But Delaware courts have consistently rejected this "time of conversion" approach as "inadequate to compensate the injured person." *Id.* That reasoning is exemplified here, where the court rewarded Solar for a secret automated forfeiture and subsequent false justification regarding Compensation Committee discretion never exercised, because Lundberg purportedly should have known of Solar's earlier conversion. That holding is inconsistent with Delaware law and should be reversed.

B. The Court Of Chancery's Damage Calculation Needlessly Injects Speculation About What Lundberg Would Have Done.

Disregarding the reasoning of its own cited cases, Solar asserts that the "actual notice" standard would "effectively allow[] Lundberg to speculate with the benefit of hindsight[.]" (SolarBr.23–24.) But the actual knowledge rule in *Schultz* and each Delaware case cited above is the only means of ***preventing*** victims from "speculat[ing] with the benefit of hindsight." Just as Lundberg had no idea what Solar's stock price would do after Solar failed to deliver stock from 2017–2020, Lundberg did not know what Solar's stock price would do after he made demand in August 2020. To suggest that Lundberg "obtain[ed] a windfall" by making demand

in August 2020 before Solar's stock rose implies that Lundberg is a stock price seer. He is not. Similarly, to suggest that Lundberg knew or had reason to know of his claims between 2017–2020 but sat on his rights in hopes of a price jump suggests that Lundberg somehow knew Solar's stock price would not go *down*. Again, he did not.

Solar also implies Lundberg speculated "with the benefit of hindsight" because Lundberg *now* knows that Solar's stock price rose after his August 2020 demand—but Lundberg had no such knowledge then. And, as Solar itself states, the announcement of a merger is no guarantee of future performance because a 2016 failed merger with Sun Edison resulted in an "exodus of Solar employees [and] Solar's future was uncertain." (SolarBr.10.) Solar's point is made tangible by the fact that when Solar's merger was announced on July 20, 2015, Solar's shares traded at $31.66 (judicial notice), but by August 8, 2016, the first price date reported on Solar's expert's report (PApp. 512), the stock traded at $3.28, demonstrating that a merger announcement does not foretell the future.

Significantly, as wrongdoer, Solar assumed the risk of a rise in stock price. *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10 (Del. Ch. 1992), *aff'd*, 620 A.2d 856, (Del. 1992) (TABLE). However, had Solar's stock price gone down in the post-demand interval, Lundberg would be entitled to damages based on the lower

price. Further, under the trial court's analysis, Lundberg would have obtained a windfall if the stock price rose between the time of conversion and August 2020.

Applying actual notice, as Delaware courts have consistently done, is the only way to make Lundberg whole while preventing speculation with the benefit of hindsight. The trial court's measurement departs from established precedent and deprives Lundberg of damages to which he is entitled, and needlessly opens the door to speculation and possible windfall.

C. The Court Of Chancery Erroneously Applied An Inquiry Notice Standard.

Solar argues at length that "substantial, credible" evidence supports the Court of Chancery's findings regarding "damages accrual dates." (SolarBr.25–36.) In reality, Solar attempts to relitigate what Lundberg knew and when, rather than grapple with the trial court's muddled finding that Lundberg had "notice" of cancellation for statutes of limitation purposes, which analysis the court then incorporated by reference into damages. (Op.85, n.231.) Solar's argument highlights the gap in evidence between what Lundberg actually knew and what the trial court determined he *could* have known, and hides the fact that Solar litigated this case on a false premise that the Compensation Committee acted at all.

Solar goes to exceptional lengths to distract from the reality that its "defense" was a ruse. As the trial court correctly found, no such act occurred, (Op.35), and Lundberg was not notified until August 2020 that his shares were forfeited, (Op.22)

("These internal [forfeiture] documents were not accessible or communicated to Lundberg."). But more importantly, the trial court never identified any evidence that ***Solar*** acted to terminate Lundberg's awards or that Lundberg had knowledge of such breach before August 2020, and Solar's course of performance proved that Solar's action was consistent with continued vesting.

In fact, Solar concedes that "Morgan Stanley canceled Lundberg's unvested RSUs" through an "automated program." (SolarBr.8, 11–12.) Solar also does not dispute that no notice of forfeiture was ever sent to Lundberg. (*Id.*) Instead, Solar references three Morgan Stanley statements which it argues prove Lundberg should have figured out what Solar's internal computer programs had done. (SolarBr.13, n.40.) Finally, Solar does not dispute that no evidence exists that Lundberg actually learned of any forfeiture from Morgan Stanley's statements or online material. (SolarBr.12–13 nn.36–41).

In apparent recognition that the record reveals no affirmative action or decision by Solar to treat movement from Solar to SmartHome as cutting off vesting, and no evidence of notice, Solar doubles down on its fully rejected factual position that ***the Compensation Committee acted*** and Lundberg ***had to know*** of Solar's

action as a result of plan-related letters.[2] Solar's factual argument of action and notice by implication is contrary to the trial court's findings that the Compensation Committee "made no actual decision to interpret the 2014 Plan as Solar claims in this litigation" (Op.35), and to its finding that not including SmartHome within the "Company Group" is unreasonable. (Op.48.)

The absence of affirmative action by Solar is further proven by Solar's ***actual practice*** of interpreting the "under common control" language to continue vesting upon movement between sister companies. For example, Dan Black, Solar's key witness, inquired of SmartHome whether sales personnel were continuing as "Service Providers" for equity vesting upon movement from Solar to SmartHome under the same "common control" language. (Lundberg Opening Trial Brief ("LOTB") at A170–71, A200–02) (citing JX-329,JX-330,JX-331,JX-341) (AR1–103).) Additionally, when the question of what "under common control" meant came up in 2020, Solar's former chief legal counsel, now at SmartHome, and the outside law firm that was the architect of both Solar's and SmartHome's equity plans,

[2] SolarBr.1 ("Solar rejected [Lundberg's] demand based on its long standing interpretation/administration of its equity incentive plan that required Lundberg to continue employment with Solar"); SolarBr.27 (citing letters to argue "Lundberg therefore knew…if he terminated his employment with Solar, none of his unvested RSVs would continue to vest…"). The letters refer to vesting ending upon leaving Solar without acknowledging that the court rejected Solar's argument that such letters modify the 2014 Plan's plain language.

advised that vesting continued. (LOTB (A171–73) (citing JX-345,JX-346,JX-347) (AR104–113); Lundberg Trial Reply Brief (A583,A592,A604-05,A608).)

With a record that shows performance consistent with continued vesting and that does not support action or notice of forfeiture upon movement to a sister company, Solar factually doubles down in briefing. Solar makes the bold factual claim that "Lundberg admitted he sold his stock because he knew Solar had not delivered and would not deliver any more stock." (SolarBr.34 (emphasis in original).) The record, however, does not ***remotely*** support such alleged fact. Solar relies on deposition testimony not admitted below and that, even if considered, does not support Solar's claim. Solar also incorrectly justifies its reliance on testimony neither side sought to admit by stating that the trial court could consider whatever paper exists, contrary to the PTO's terms.[3]

The deposition testimony, however, is clear that Lundberg sought to sell shares and close his Morgan Stanley account not because he knew no more shares would issue (never testified to) but instead because "I could legally do so because …

[3] *Compare* SolarBr.20 n.64 *with* A125 (simultaneous opening and reply trial briefs must "cite to and rely upon deposition testimony of party and third-party witnesses"), A142 ("Any party seeking to offer deposition testimony as evidence shall cite to the specific deposition testimony in its Trial Briefs and/or at oral argument [with] objections to particular testimony [to be] addressed in the Parties' Trial Briefs"). If Solar's argument were correct, objections to evidence would not be permitted, inconsistent with due process.

I was no longer privy to inside information" and Lundberg wanted to close his Morgan Stanley account in favor of a Merrill Lynch account given Solar's transition away from Morgan Stanley. (A350.)

The peril associated with relying upon possibly "relevant" but never offered trial testimony and without opportunity for objection is obvious and is no different in a paper trial as compared to a live trial where the court might improperly ignore admitted testimony in favor of deposition transcripts submitted on summary judgment.[4] The PTO conflicts with Solar's argument that the trial court could

[4] The Court fell into this same morass by stating that Lundberg's claim that he did not access Morgan Stanley's online information until mid-2020 lacked credibility. (Op.75 n.198.) In reality, Lundberg did not testify and as Dan Black admitted, Morgan Stanley's systems did not work well. (LundbergBr.15, 30.) Lundberg's actual testimony is consistent with the login report Solar relies on, including that Lundberg testified ***he did login prior to mid-2020*** and he sold shares in 2017. (*Compare* PApp. 120–24 *with* A354–55.) The login report corroborates Lundberg's testimony by showing multiple failed logins, the apparent selling of shares in 2017, and other short logins with multiple login failures, and the report's only substantive note references non-substantive email and phone number updates. (*Id.*) Critically, no evidence exists to refute Lundberg's non-designated testimony that once logged in, he did not discover drop down menus that Solar's counsel speculated disclosed the number of RSUs awarded and no evidence exists that such drop downs ever existed. (A353–54.) Similarly, Solar's argument that a "landing" page contains information as to shares proves nothing because such page was available to Lundberg only at account creation and therefore without subsequent forfeiture information. (*Id.*) Lastly, Solar is incorrect that if this Court finds that the date damages must be calculated is other than the dates adopted by the court below, adverse findings exist as to Lundberg's damages calculation, insider information, and Lundberg has not appealed this issue. *Compare* LundbergBr.21 n.5 *with* SolarBr.24 n.66. At minimum, remand is necessary because Lundberg could not safely sell prior to the Sunrun merger closing.

consider non-designated testimony without opportunity for objection. (A125, A142 (¶¶4, 34).)

In short, the record proves that Solar never affirmatively acted to forfeit Lundberg's shares, and Morgan Stanley's automated omission is inconsistent with Solar's actual practice of allowing vesting to continue upon transfer to SmartHome and the only ***reasonable*** reading of the Plan's terms. Considering this record, Solar's wrongful conduct occurred not when Morgan Stanley's computer system failed to perform consistent with the Plan's language, but when Solar's outside legal counsel falsely claimed in August 2020 that "the Plan Administrator has consistently interpreted and administered the Plan" to not allow continued vesting. (Op.35; A1354.) Then, and only then, did Lundberg have actual knowledge of any breach/conversion. Under Delaware law that Solar fails to distinguish, that is the date that begins the "reasonable period" to measure damages, and the failure to follow this law constitutes reversible error.

II. THE COURT OF CHANCERY ERRED IN APPLYING DELAWARE'S LIMITATION PERIODS TO LUNDBERG'S COUNTERCLAIMS.

The Court of Chancery's dismissal of several RSU claims rested on the notion that Delaware's limitation periods apply, rather than Utah's, where this case and its claims arose. This was error and Solar fails to identify support for the trial court's error. Solar instead repeats the incorrect assumption that the 2014 Plan's choice-of-law provision supports application of Delaware limitations period, and misapplies *CHC Investments*.

A. The Parties' Choice-Of-Law Provision Does Not Specify That Delaware's Limitation Periods Apply.

The Court of Chancery's first erroneous assumption—now parroted by Solar—is that the parties' Delaware choice-of-law provision "should tip the analysis in favor of applying Delaware law[.]" (SolarBr.40.) The parties' choice-of-law provision makes no reference to limitation periods and therefore has no bearing on whether Delaware's limitation periods apply. Solar asserts that "Lundberg does not mention, let alone analyze, the impact the parties' Delaware law provision would have on the outcome," (*id.*), even though Lundberg's opening brief clearly supports that a choice-of-law provision is relevant "[i]f, and only if, 'the choice of law provision states with specificity that it applies to [statutes of limitation].'" (LundbergBr.37 (quoting *Am. Energy Techs., Inc. v. Colley & McCoy Co.*, 1999 WL

301648, at *2 (D. Del. Apr. 15, 1999) (unpublished) and *B.E. Cap. Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 147 (Del. Ch. 2017).)

Solar then argues in footnote that this authority does not apply because the choice-of-law provision in the 2014 Plan uses "broad-encompassing language" (SolarBr.39 n.106), but this argument mistakes breadth for specificity. Only *specific reference* to a forum's statutes of limitation result in application of the chosen forum's limitation periods. *See id.* Solar otherwise makes no effort to distinguish Delaware authority declining to apply a choice-of-law provision to statutes of limitation. Therefore, the 2014 Plan's Delaware choice-of-law provision does not enter the analysis.

B. *CHC Investments* Does Not Apply Where Lundberg Was Forced To File Counterclaims In Delaware Under A Contract Of Adhesion.

Solar erroneously asserts that the Court of Chancery's decision in *CHC Investments*, affirmed *per curiam* by this Court, is "determinative that Delaware's statute of limitations applies under the facts here[.]" (SolarBr.38 (citing *CHC Invs.*, 2020 WL 1480857, at *4).) Solar reasons that *CHC Investments* conclusively establishes that the exception to the Delaware Borrowing Statute stated in *Saudi Basic* "applies in a case *only* where 'the party asserting the underlying claims was forced to file in Delaware.'" (*Id.*) And because Lundberg "agreed to an enforceable Delaware forum selection clause," Solar contends he was not "forced to file in Delaware." (*Id.*)

Solar's and the trial court's reading and application of *CHC Investments* dramatically expands its holding, which does not apply because Lundberg ***had no choice*** but to file counterclaims in Delaware and in Utah, resulting in great inefficiency as the court recognized (A118–19) after attempting to consolidate all claims in Utah or in JAMS arbitration. Critically, the party against whom the Borrowing Statute was applied in *CHC Investments* was the ***plaintiff*** who ***voluntarily*** initiated a lawsuit and affirmative claims in Delaware. *See* 2020 WL 1480857, at *4. The plaintiff also did not argue that a forum-selection provision did not apply because it was "procured fraudulently" or because it was otherwise "invalid[]." *Id.* at *8. Here, Lundberg is not a plaintiff (but is a defendant forced to make compulsory counterclaims as in *Saudi Basic*), and he fought against litigating in Delaware. (Op.25–27,95–96.) Further, to state that Lundberg appeared in Delaware court "voluntarily" because he "agreed" to the forum-selection provision in the 2014 Plan (SolarBr.39; Op.54 n.177) ignores both Lundberg's extensive efforts to consolidate all claims in Utah or arbitration, as well as the reality that the 2013 and 2014 Plans, calling for venue in Delaware and Utah, are non-negotiable contracts of adhesion. Lundberg had no choice but to "agree" to venue in Delaware if he wanted to participate in the 2014 Plan. *See, e.g.*, *Hub Grp., Inc. v. Knoll*, 2024 WL 3453863, at *1 (Del. Ch. July 18, 2024) (describing general employment contracts as "contracts of adhesion"). Unlike in *CHC Investments*, where the

plaintiff voluntarily filed claims in Delaware, Solar initiated suit, sought and won an anti-suit injunction, and forced Lundberg to litigate in Delaware.

Thus, Solar and the trial court create a false equivalency between the parties and circumstances of this case and those in *CHC Investments*. Lundberg's and Solar's positions are instead akin to those in *Saudi Basic*, which means the Borrowing Statute has no application, and the trial court should have looked to the "most substantial relationship" test to determine which forum's limitation periods to apply. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 17–18 (Del. 2005) (Borrowing Statute does not allow party "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").

As explained previously, *all claims* arose in and have the most substantial relationship with Utah—not Delaware—which Solar does not dispute. (LundbergBr.39–40; SolarBr.37–41.) As a result, Utah's six-year limitations period for contract actions should be applied on remand.

III. LUNDBERG WAS BLAMELESSLY IGNORANT OF THE BASIS OF HIS CLAIMS UNTIL AUGUST 2020.

In the alternative to the above position regarding application of Utah's six-year limitations period, Lundberg's claims should have been tolled under Delaware's "blamelessly ignorant" doctrine. Solar dismisses this argument as waived under Del. Sup. Ct. Rule 8, despite extensive briefing and findings below regarding Lundberg's knowledge of his claims, and because Solar hopes to ignore the trial court's key finding that Solar's entire case theory was a ruse, premised on Compensation Committee action that never occurred.

Lundberg, however, was blamelessly ignorant of Solar's fictitious "interpretation" of the 2014 Plan or Morgan Stanley's programming. No evidence exists that Lundberg could have learned the true facts, because no such interpretation occurred until Solar's outside counsel's untrue explanation. (Op.35.) Thus, the trial court erred in determining that Lundberg was on inquiry notice of claims merely by virtue of Solar's non-delivery of RSUs due to computer programming and without notice.

A. Lundberg Has Not Waived His Alternative Argument.

Solar first argues that Lundberg waived his alternative argument because it was not raised below, citing Supreme Court Rule 8. (SolarBr.43.) However, the parties argued at length below—and the Court of Chancery engaged in extensive analysis—regarding when Lundberg knew or should have known of his claims,

citing the same cases cited here. (*See, e.g.*, Op.73–78 (citing, *inter alia*, *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)).)

While Lundberg did not use the "blamelessly ignorant" language in trial briefing, that standard is no different than the inquiry notice arguments made by the parties and ultimately ruled on. (*See* Op.74 ("Lundberg asserts that he was not on notice of Solar's interpretation of the 2014 Plan until he received the letter from Solar's attorneys formally rejecting his demand for his Awards sometime after August 7, 2020."); A645-48.) Thus, Lundberg has not waived this argument and the "blamelessly ignorant" language presents the same factual issue presented below. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382–83 (Del. 2014).

B. The Evidentiary Record Regarding Forfeiture—Comprised Exclusively Of Internal Solar Documents And Morgan Stanley Automation—Does Not Support That Lundberg Was On Inquiry Notice.

For the same reasons set forth above demonstrating that Solar's first act of breach occurred when it falsely notified Lundberg that his shares were forfeited based on Compensation Committee "action" that never occurred, Lundberg was blamelessly ignorant of Solar's wrong until August 2020. The trial court erroneously determined that because Lundberg was "on notice" of possible claims by virtue of Morgan Stanley statements not reflecting full shares, he is not entitled

to tolling. The trial court's analysis misapprehends Solar's breach, which ripened only with Solar's retroactive justification of Morgan Stanley's automated and undisclosed forfeiture.

Solar argues that because Lundberg was purportedly aware that his RSUs were not delivered—which the record does not support—Lundberg "discovered facts 'constituting the basis of [his] cause of action'" or information that "if pursued, would lead to the discovery of such facts." (SolarBr.45.) Solar simply ignores the glaring fact that the "basis of [Lundberg's] cause of action" for breach—that Solar purportedly interpreted the 2014 Plan in an unreasonable manner—was unknowable until Solar's August 2020 letter. And even then, Solar attempts to brush under the rug the fact that its explanation was false, which further cements the fact that Lundberg *could not have learned* of Solar's "act or omission ***and*** the injury" before August 2020. *See Dean Witter*, 1998 WL 442456, at *5 (emphasis added).

Solar's attempt to parse the language of *Dean Witter* and other cases misses the point that the "forfeiture" of Lundberg's awards was an automated action by a third-party, and Solar committed no "act or omission" until it falsely told Lundberg that his awards were forfeited based on a legally unreasonable interpretation of the

2014 Plan.[5] *See supra* Section I.C.; (Op.35.) Solar chose a deceptive legal strategy in August 2020, premised on falsities that Lundberg could not have discovered. Solar should be made to live with the consequences of that strategy, and under Delaware law, the consequence is that Lundberg is entitled to tolling until August 2020.

[5] Solar's argument that Lundberg pled non-delivery as breach ignores that at the time, Lundberg had no way to know that forfeiture was the result of computer automation or that Solar would misrepresent its fiduciary's non-action.

CONCLUSION

Lundberg respectfully requests that this Court reverse the Court of Chancery's damages award and remand. This Court should further reverse and remand for the Court of Chancery to reinstate Lundberg's RSUs awards erroneously dismissed.

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