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IN THE SUPREME COURT OF THE STATE OF DELAWARE

REDACTED PUBLIC VERSION
DATED: April 12, 2024

SUNDER ENERGY, LLC, Plaintiff-Below/Appellant, v. TYLER JACKSON, FREEDOM FOREVER, LLC, BRETT BOUCHY, CHAD TOWNER, and FREEDOM SOLAR PROS, LLC, Defendants-Below/Appellees.	No. 455, 2023 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0988-JTL

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NATURE OF PROCEEDINGS

Sunder Energy, LLC asks this Court to either ignore or override the Court of Chancery's well-supported factual findings and well-reasoned discretionary decisions. In doing so, it implores this Court to bless the egregious fiduciary breaches of its majority owners, Eric Nielsen and Max Britton; to rewrite draconian restrictive covenants to prevent Tyler Jackson from gainful employment; and to impose a trade restraint against its competitor. Sunder is not entitled to any of this relief.

The Court of Chancery correctly found that Nielsen and Britton unlawfully used their positions of trust to dupe Jackson and the other Sunder co-founders into executing a joinder to Sunder's first written operating agreement. Unbeknownst to them, the operating agreement gutted their rights—converting them from "co-owners of a single class of equity to powerless holders of nothing more than a form of incentive compensation that a business might offer line employees"—and imposed extraordinarily broad restrictive covenants. Applying well-settled Delaware law to these facts, the Court of Chancery held the operating agreement unenforceable against Jackson and explained that, even if the operating agreement were enforceable, the court would not blue pencil the oppressive restrictive covenants.

As explained fully below, the Court of Chancery correctly applied established Delaware law to its detailed factual findings in denying Sunder's application for preliminary injunction. Sunder cannot succeed on a single issue on appeal. This Court should affirm.

SUMMARY OF ARGUMENT

This Court accepted interlocutory appeal of three questions certified by the Court of Chancery: (i) whether Nielsen and Britton owed fiduciary duties at the time of Nielsen's New Year's Email and whether that email, standing alone, was sufficient notice that the minority members needed to negotiate at arm's-length; (ii) whether the restrictive covenants were unreasonably overbroad and appropriately not blue penciled; and (iii) whether Utah law applied to the tortious interference claim. Sunder does not address all the questions ***as accepted*** by this Court and improperly raises different questions this Court did not accept. Nevertheless, Jackson addresses Sunder's additional questions, as well as those questions accepted by this Court.

1. Denied. The Court of Chancery appropriately exercised its discretion by declining to blue pencil the Covenants. Delaware courts routinely decline to blue pencil facially overbroad restrictive covenants. The trial court's discretionary decision is supported by its findings of fact regarding disparities in resources, bargaining power, and access to information between Jackson and Sunder, and the Covenants' facial overbreadth.

2. Denied. The Court of Chancery correctly found that the New Year's Email was the result of an egregious violation of Nielsen's and Britton's fiduciary duties, which they undisputedly owed at the time Nielsen sent the email.

(a) Denied. Even if the Court were to accept Sunder's incorrect premise that Jackson could only raise Nielsen's and Britton's wrongful conduct in the form of an affirmative defense, Jackson timely raised it by specifically pleading the defense of "unclean hands" in his Answer under Rule 8 and his Amended Answer under Rule 15(a). Ct. Ch. R. 8(c). The trial court correctly found that Jackson "diligently pursued" his fiduciary duty defense and "fairly presented [it] for purposes of the injunction application," providing Sunder with ***ample and actual*** notice of the defense.

(b) Denied. The factual record sufficiently and clearly demonstrates that Nielsen and Britton breached their fiduciary duties when seeking Jackson's approval of the amended operating agreement, thus rendering it unenforceable.

3. Denied. For the reasons stated in the Freedom Defendants' brief, the trial court correctly determined that Utah law applies to Sunder's tortious

interference claims and that Sunder failed to demonstrate all the elements of a tortious interference claim under Utah law.

COUNTERSTATEMENT OF FACTS

A. Jackson Drops Out Of College To Pursue Door-To-Door Sales.

Jackson attended college in Utah for one year. A1075, 316:24−317:13. After serving a two-year mission for his church, he completed one more semester of college and then dropped out because he was succeeding as a door-to-door sales representative. A1075-6, 316:24-318:4. Jackson worked as a sales representative for various door-to-door sales companies. A1076, 318:7–19. Jackson eventually went to work for LGCY Power, LLC ("LGCY"), a residential solar sales company. A1076, 318:7–320:3-14.

B. Seven "Partners" Start Sunder In August 2019.

Sunder opened its doors in August 2019, when Eric Nielsen, Max Britton, Tyler Jackson, Steven Cohen, Michael Gutschmidt, Jed Sewell, and Max Ganley (collectively, the "Co-Founders") left LGCY. Opinion Denying Preliminary Injunction ("Opinion") 9; A096. When they formed Sunder, the Co-Founders agreed on an equity split. Opinion 9; A1862, 27:5–28:15; A1417, 16:4–17:3. Jackson, Cohen, Gutschmidt, Sewell, and Ganley each received 8% (the "Minority

Members"). Opinion 9; *see also* B912 at B914−B915.[1] Nielsen and Britton split the rest, giving them a 60% majority. Opinion 9; A1862, 27:5–28:15; A1417, 16:4–17:3.

The Co-Founders all owned the same ***type*** of equity and were all the same ***type*** of members. Opinion 9; A1862, 27:5–25, A1865, 38:15–21; A1420, 28:12–15; A1077, 323:17–325:10. They understood that Nielsen and Britton were majority owners, but that they all had the same rights as Nielsen and Britton. Opinion 10; A1865, 38:15-21; A1420, 28:8−15, 37:14–38:15; A1077, 323:17–325:10. The Co-Founders thought of themselves as partners, and they called themselves "partners." Opinion 10; A1077, 323:17-324:6.

The Co-Founders formed Sunder as a Delaware LLC; its certificate of formation was filed on August 16, 2019. Opinion 10; A096. At the time, the Co-Founders had not executed a written LLC agreement. Opinion 10. As such, Sunder operated under their equity split and the default provisions of the Delaware Limited Liability Company Act (the "LLC Act").

On August 23, 2019, all the Co-Founders—both as members and individuals—executed a five-year exclusive dealer agreement (the "Dealer

[1] Jackson's PowerPoint presentation and included videos were part of the record below, A2317, 111:1–15 (TRANSCRIPT), and are produced to this Court at B912−B966.

Agreement") with Freedom Forever LLC ("Freedom") whereby Freedom would be its exclusive installer for solar sales. Opinion 10; B517−B567. Under Sunder's business model, sales representatives went door-to-door to sell Freedom systems to homeowners. Opinion 9. When a Sunder sales representative inked a deal, the representative would record it in Freedom's sales portal. Opinion 9. Freedom then installed the system, collected payment from the customer, and paid a commission to Sunder, split between the sales representative who secured the deal and Sunder. Opinion 9.

Sunder's business took off within the first few months. Opinion 12; A1079−A1080, 333:14–334:6. Freedom Forever was providing an abundance of sales leads, and the Co-Founders were recruiting many people to join Sunder. A1079−A1080, 333:14–334:6.

C. The Co-Founders Hire Snell & Wilmer To Represent Them.

On September 23, 2019, LGCY sued the Co-Founders. Opinion 11; B675−B703. The Co-Founders and Sunder engaged Snell & Wilmer to represent them jointly in the LGCY action. Opinion 11; A1080, 334:23−334:25. The Co-Founders also regarded Snell & Wilmer as their lawyers more generally. Opinion 11.

D. Nielsen and Britton Breach Their Fiduciary Duties.

In fall 2019, Nielsen and Britton engaged Snell & Wilmer to draft an LLC agreement for Sunder. A099 (the "LLC Agreement"). The other Co-Founders were not involved in the process. Opinion 12. When the draft was ready, Nielsen and Britton went to Snell & Wilmer's offices, and attorneys from the firm walked them through the agreement. Opinion 12; B711−B712. The other Co-Founders were not invited to the meeting, and no one explained the agreement to them. Opinion 12; A1873, 71:2–73:10; A1448, 153:1−6; A1079, 331:8–332:3. Nielsen testified that he could not have understood the LLC Agreement without the attorneys explaining it to him, and he invoked privilege in response to questions about the LLC Agreement on the grounds that his understanding came entirely from his counsel. Opinion 12; A1138-9, 254:1–259:2. [redacted] B722-B723, 240:10–245:18.

The LLC Agreement radically altered Sunder's ownership and internal governance structure. Opinion 12. Among other things, Nielsen and Britton gave themselves complete control; created two classes of member units, with Common Units for Nielsen and Britton and Incentive Units for all others; eliminated voting

rights for the Minority Members; provided for automatic forfeiture of any unvested Incentive Units; gave Sunder a call option to purchase ***vested*** Incentive Units for $0 if a Minority Member left without "Good Reason"; granted only Nielsen and Britton broad indemnification rights; eliminated fiduciary duties; imposed confidentiality obligations on only the Minority Members; and added onerous perpetual non-compete and non-solicit restrictions (together, the "Covenants"). Opinion 12–14.

As the Court of Chancery explained, the Minority Members had "their rights emasculated" and "went from being co-owners of a single class of equity to powerless holders of nothing more than a form of incentive compensation that a business might offer line employees." Opinion 12, 14.

E. On New Year's Eve, Nielsen and Britton Dupe The Minority Members Into Ratifying The LLC Agreement.

On New Year's Eve 2019, Nielsen and Britton sprung the 50-page LLC Agreement on the Minority Members. Opinion 14. Nielsen sent the Minority Members an email that attached a .pdf of the 2019 Operating Agreement—***already executed*** by Nielsen and Britton. A098 (the "New Year's Email"); A153. Greeting the Minority Members as "Partners," Nielsen wrote:

> Max [Britton] and I have executed our portion of the Sunder Operating Agreement today and a copy for your review is attached. I will be sending each of you a couple of documents via docusign momentarily. The first one contains ***your grant of shares*** and the second one is a

> joinder agreement that will formally add each of you to the Operating Agreement. If you are married, your spouse will also be sent a spousal consent form. Please let Max or me know if you have any questions.
>
> Lastly, ***the attorney's [sic] highly recommend completing these documents by the end of tonight***, but we don't expect any of you to sign something if you are uncomfortable with it or ***if you need more clarification from the attorney's [sic] on something***. Please let me know if you have questions.
>
> Happy New Year!

Opinion 15; A098 (emphases added).

The New Year's Email did not indicate that the LLC Agreement eviscerated the Minority Members' rights. A098; Opinion 15. Nielsen referenced each Minority Member's "grant of shares," but did not disclose that there were two classes of equity with diametrically different rights. A098; Opinion 15. Nor did Nielsen disclose that—unlike Nielsen and Britton—the Minority Members were receiving only Incentive Units, which were structured to be nothing more than a form of incentive compensation. A098; Opinion 15.

There was ***no*** suggestion in the New Year's Email that the Minority Members could not rely on Nielsen and Britton—their "Partners"—as fiduciaries. Opinion 15. Nor did the email suggest that Snell & Wilmer, the firm representing all the Co-Founders in the LGCY action, was claiming to represent only Sunder in drafting the

LLC Agreement. Opinion 15. The email also gave no indication that the Minority Members needed to engage in arm's-length negotiations over the LLC Agreement's provisions. Opinion 15.

Just the opposite. The email suggested the Minority Members should sign the LLC Agreement quickly before resuming their holiday celebrations. Opinion 16; A098. Nielsen made clear that he and Britton had already executed the as-circulated copy of the Agreement, and Nielsen sent the document as a .pdf, signaling it was in final form. Opinion 16. Nielsen did not suggest the Minority Members could provide edits to the agreement or bargain over its provisions. Opinion 15; *see* A098. Rather, he commented they could simply ask Snell & Wilmer for ***clarification***. Opinion 15; A098. And Nielsen explained that the Snell & Wilmer attorneys "highly recommend completing these documents by the end of the night." Opinion 16; A098.

To prevent close review, Nielsen and Britton did not have the Minority Members sign the LLC Agreement. *See* A098. Instead, they had them sign a one-paragraph Joinder Agreement circulated via DocuSign. Opinion 16; A098; A153; A163; Opinion 16. When Jackson and the others executed the documents they actually had to sign, they did not have to scroll through the LLC Agreement. Opinion 16; A163.

Nielsen and Britton were successful in what they set out to accomplish.[2] Jackson did as he was asked and signed the LLC Agreement barely one hour after receiving the New Year's Email. Opinion 17; B726. He and the Minority Members had no idea what Nielsen and Britton had achieved. Opinion 46. Nielsen and Britton continued to conceal what they had done. When they amended the LLC Agreement in 2021, they did not even send a copy of it to the Minority Members. Opinion 17. Worse, they falsely claimed that the amendment contained no substantive changes, even though it did, including expanding the Covenants' geographic scope. *Id.; see generally* B735−B833; B759.

F. Sunder's Relationship With Freedom Flourishes.

From 2019 until the start of 2023, Sunder experienced explosive growth. Opinion 18. Sunder grew into one of Freedom's "super-dealers," generating over 25% of Freedom's sales. Opinion 18; A1295, 84:5−18. Freedom heavily invested in Sunder and provided it with payroll support, commissions calculations, and

[2] [redacted] B730

marketing. Opinion 18; A1496, 78:16−80:9; A1085, 355:9−356:16; A1499, 89:6–90:3.

Jackson's sales group excelled, and Jackson was given responsibility over several of Sunder's markets. Opinion 18; A1293, 77:12−23. In 2022, Jackson was given the title of Vice President—a title given to all sales leaders who achieve a certain number of submitted solar projects. Opinion 18; A1291, 68:24−69:12. The title did not give Jackson executive or officer responsibilities; he remained an independent contractor. *See* Opinion 18; A1292, 70:7−15.

G. Sunder's Relationships With Its Sales Representatives And Freedom Deteriorate.

In 2021 and 2022, Nielsen and Britton made a series of business decisions that strained Sunder's relationships with its sales force and Freedom. Opinion 19; A1085, 354:3−20; A1087−8, 365:21−368:7.

Freedom approached Sunder about an equity swap deal that would deepen their partnership. A1762, 72:14–73:1–7. Nielsen and Britton rejected the offer because they hoped to secure a private equity deal to sell a portion of Sunder's business. Opinion 19; A1497, 82:4–18; B281, 79:7–19; A1086, 360:2–12. Additionally, Nielsen and Britton attempted to use a finance company outside of Freedom's network—which the Dealer Agreement prohibited—to capture margin

on finance fees from projects. A1497, 82:17–23; A1795, 204:2–205:1; A1086-7, 360:18–362:14.

Sunder also began artificially increasing the cost to install solar panels to usurp profits from sales representatives. Opinion 19; A1087, 363:1–22. Freedom provided Sunder with a fixed installation cost for a solar system. Opinion 20; B200, 214:13−16. When Sunder calculated sales commissions and sales leaders' overrides, Sunder used a higher, artificial floor and pocketed the difference between the artificial floor and Freedom's cost. Opinion 20; A1087, 363:1–22. Sunder's sales representatives discovered that Sunder was taking a portion of their commissions, generating feelings of betrayal and distrust. Opinion 20; A1087, 366:4–368:9; A708, 78:3–79:22; A645, 129:6-22; A953, 94:18–22.

Additionally, Sunder would not commit to a long-term deal with Freedom. Opinion 20. Sunder's initial five-year deal with Freedom would end in 2024, and a new agreement needed to be negotiated. Opinion 20; A1306, 128:24−129:20. Freedom had been critical to Sunder's success; Sunder's sales force knew Freedom's products and valued Freedom's industry-leading installation times. Opinion 20; A1093, 389:7−15. Nielsen and Britton refused to reassure representatives that Sunder would remain with Freedom. Opinion 20; A1306, 129:6−11.

H. Sales Leaders Question Sunder's Future And Sales Representatives Begin Moving To Solar Pros.

Sunder's sales leaders began questioning Sunder's future. Opinion 20–21; A1500, 93:8–21; A707, 76:3–78:7; A1231, 137:17–139:25; B340, 51:14–52:9. At the time, Solar Pros was an attractive alternative because Freedom was its exclusive install partner, it did not have an artificial pricing floor, and it offered significantly better commissions than Sunder. Opinion 21, 23; A778, 141:13–143:3; A1041, 178:7–16; A708, 78:3–24; A935, 22:7–14.

By spring 2023, sixty-three Sunder sales representatives moved to Solar Pros. Opinion 23; B886−B890.

I. Jackson Seeks To Mend Sunder's Relationship With Freedom.

Jackson explored the possibility of moving to Solar Pros. Opinion 21; A1027, 125:5-13. In May 2023, Jackson met with Chad Towner and Brett Bouchy, Freedom's CRO and CEO, respectively. Opinion 21; A1768, 97:17−21. During the meeting, they discussed the possibility of Jackson working for Freedom or one of its dealers. Opinion 21; B201−B202, 221:9−12, 222:14−23. After that meeting, Jackson asked Sunder's CFO, Devon Glassman, for a copy of the agreements he signed with Sunder and first learned about the Covenants. Opinion 21–22; A1084, 351:8−9.

Jackson worked hard to preserve the Sunder-Freedom relationship and keep his sales force together. Opinion 22; A1091, 380:8−23; A1093, 386:17−387:15. Jackson facilitated meetings between Sunder and Freedom so they could mend their relationship. Opinion 22; A1308, at 134:11–135:19–24; B892−B894; B895−B897; B898−B900; A1029−A1031, 131:10−141:1; A1034, 150:9−153:17. Jackson also tried to prevent the sales leaders in his downline from leaving for Solar Pros by explaining that Sunder and Freedom were working to resolve their issues. Opinion 22; *E.g.*, A791, 155:6–15; A1212, 63:5–17; A1093, 386:17–387:15.

Jackson's efforts were in vain. In June and July 2023, Sunder began meeting with other solar installers, and in August, Sunder retained litigation counsel. Opinion 23; A1313, 154:11–14; A1341, 269:7–271:19. Sunder's sales leaders learned that Nielsen and Britton were moving away from Freedom, and the sales leaders became even more concerned about their futures. Opinion 23; A779, 147:2−17; A131, 157:7−19. One of the senior leaders in Jackson's downline, Clayton Granch, even told Nielsen on a recorded phone call that he would leave if Sunder did not stay with Freedom. Opinion 24; A779−A780, 146:17−152:18.

J. Sales Leaders In Jackson's Downline Begin Moving to Solar Pros.

Granch did just that. He and his downline began onboarding with Solar Pros on September 11, because Granch did not trust Sunder. Opinion 25; A1035, 154:21–

24; A782, 157:17–158:6; A761, 74:2–16. Two regional managers who reported to Granch—Jason Tisdale and Josh Simmons—signed agreements with Solar Pros on September 12. Opinion 25; *see also* A1213, 65:21−25; A1229, 132:17–24; A1230, 136:15–17.

K. Freedom Offers Sunder An Olive Branch For A Mutually Agreeable Separation.

Through Jackson's efforts, leaders from Freedom and Sunder met in Las Vegas on September 14 to discuss their relationship. Opinion 26; B580. Jackson did not attend the meeting. Opinion 26. During the meeting, Freedom offered to pay $10 million in exchange for Sunder's agreement to release Jackson from the Covenants and to facilitate the transfer of "his group" to Solar Pros. Opinion 26; A1499, 90:16–24; A1501, 97:4–20; A1503, 103:20–24; A1919, 76:10–80:3. The parties did not reach an agreement at the meeting, but "they also did not seem that far apart." Opinion 26.

L. Sunder Tells Jackson And Others It Plans To Take Freedom's Offer.

Sunder planned to accept Freedom's offer and told Jackson this. A1343, at 275:18–22; B197, 205:7–9; A1012, 64:13–22; A1092, at 382:18–383:1, 384:8–15. Jackson had phone calls with Nielsen and Britton to discuss his transition to Solar Pros and their request for him to identify those in his downline who would make the

transition. A1092, 382:7–17; B580. Sales leaders and others at Sunder learned about the offer and that Jackson would likely be transitioning to Solar Pros. A1092, 383:12–384:17; A1442, 116:5–20; B197, 202:17–205:9.

Because Sunder told Jackson that it planned to take the offer, Jackson had discussions with sales representatives in his downline about his expected transition to Solar Pros, and discussions with Towner and Bouchy about the same. Opinion 27; A1052, 222:1–7; A1055-1056, 237:22–238:5; A1093, 389:25–393:11. Jackson and his team also began making calls and traveling to meet with leaders of sales teams to find out if they wanted to join Solar Pros. Opinion 27; B400.

M. Sunder Shuts Off the Enzy Accounts Of Sales Representatives In Jackson's Downline.

On September 19, Sunder's leaders held a Zoom call with all sales representatives. A1776, 127:10–15. On the call, Sunder announced that it was going through a company-wide "detox." B903; A1776, 128:14–25. Sales representatives in Jackson's downline understood this to mean they would be transitioned to Solar Pros. *E.g.*, A696, 30:2–10; A847, 68:21–22, A853, 69:11–15; A854, 93:1–95; A884, 215:12–216:5; A935, 22:3–6. Hours later, Sunder directed its CFO to shut off the Enzy accounts (Enzy is Sunder's sales tracking app) of sales representatives in

Jackson's downline because they would be transitioning to Solar Pros. B202 222:24–224:7.

N. Most Sales Leaders In Jackson's Downline Transition To Solar Pros.

Sales leaders in Jackson's downline understood the Enzy shutoff to mean they were being transitioned to Solar Pros, and they began onboarding with Solar Pros. A696, 30:2–10; A847-48, 68:21–22, 69:11–15, A854, 93:1–95, A884, 215:12–216:5; A935, 22:3–6. At this point, the majority of Jackson's downline had already left Sunder for Solar Pros. Granch, Tisdale, and Simmons—who had already signed agreements with Solar Pros—formally resigned from Sunder on September 16. Opinion 27; B902. Parker resigned sometime between September 16 and 19. Opinion 27; A943−944, 55:18−56:3. Wilson and his Regional Managers left by September 21. Opinion 27; A854, 93:1−95:8.

Jackson resigned from Sunder while settlement negotiations were ongoing because his sales representatives had already left, he was not satisfied with Sunder's direction, and he wanted to keep Freedom as his install partner. A1093, 388:17–389:15; A1490, 56:23–57:11. On September 22, 2023, Jackson signed an independent consulting agreement with Solar Pros a few hours before he resigned from Sunder. Opinion 29; A1050, 217:8–10.

O. Sunder Files For A TRO And Files An Arbitration Action.

Nielsen and Britton never told Jackson that they had changed their minds and decided not to accept Freedom's offer. A1092, 383:2–4. Jackson first learned that Sunder was not going to accept Freedom's offer when, on September 29, Sunder terminated its relationship with Freedom, filed for a TRO against Jackson and Freedom, and filed an arbitration action against Freedom. A1092, 383:5–11; A1341, 268: 6–11.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE RESTRICTIVE COVENANTS WERE INVALID BECAUSE OF NIELSEN'S AND BRITTON'S FIDUCIARY DUTY BREACHES.

A. Question Presented

Whether the Court of Chancery correctly held that (i) Nielsen and Britton owed fiduciary duties to the Minority Members when they asked their "partners" to approve Sunder's first written operating agreement, and (ii) the New Year's Email, standing alone, was insufficient to put the Minority Members on notice of their need to negotiate at arm's-length.

B. Scope Of Review

This Court reviews a trial court's factual findings for clear error. *Bäcker v. Palisades Growth Cap. II*, 246 A.3d 81, 96 (Del. 2021). It reviews *de novo* the "trial court's formulation and application of legal principles." *Reddy v. MBKS*, 945 A.2d 1080, 1085 (Del. 2008).

C. Merits Of Argument

1. The Court Of Chancery Correctly Found That Nielsen And Britton Owed Fiduciary Duties.

Sunder does not (and cannot) dispute that Nielsen and Britton owed fiduciary duties to Jackson and the other Minority Members when, on December 31, 2019,

Nielsen and Britton asked their "Partners" to approve Sunder's first written operating agreement. Indeed, Sunder concedes that Nielsen and Britton owed such duties by (1) ignoring and not responding to this question as accepted by the Court, and (2) arguing (wrongly) that Nielsen and Britton did not ***breach*** their fiduciary duties, rather than arguing that Nielsen and Britton did not ***owe*** such duties. As a result, Sunder has waived any argument in response to this question. *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 8 (Del. 2013).

Sunder's concession is not surprising, as Delaware law is clear that Nielsen and Britton owed fiduciary duties to the Minority Members because Sunder did not have an agreement stating otherwise. The LLC Act provides that—in the absence of an agreement otherwise—controlling members and managers of an LLC owe fiduciary duties. 6 *Del. C.* § 18-1104. In fact, in response to this Court's decision in *Gatz Props. v. Auriga Capital*, 59 A.3d 1206, 1219 (Del. 2012), the General Assembly amended the LLC Act to add Section 18-1104 to confirm that members in a member-managed LLC or managers in a manager-managed LLC owe fiduciary duties even in the absence of a written agreement expressly imposing those duties. H.B. 126, 147th Gen. Assembly, 1st Reg. Sess. (Del. 2013).

The undisputed facts developed in the proceedings below establish that when Sunder was formed, the Co-Founders operated pursuant to an oral equity split, with Nielsen and Britton owning the majority (60%), and the Minority Members splitting the remainder (8% each). Importantly, when Sunder was formed and at the time of the New Year's Email, there was no agreement—written or otherwise—that its members would not owe fiduciary duties to one another. Therefore, pursuant to the LLC Act's default rules, Nielsen and Britton owed fiduciary duties to the other members when, on December 31, 2019, they sent their ***already executed*** .pdf copy of the LLC Agreement via email to dupe the Minority Members into signing a joinder agreement. *See* 6 *Del. C.* § 18-1104. At the preliminary injunction hearing, Sunder's counsel conceded that Nielsen and Britton owed fiduciary duties under the oral operating agreement: "living under the oral agreement from between August to the December 31st. Now you've got a fiduciary." Transcript 154:22-155:1.

Accordingly, the Court of Chancery correctly held that Nielsen and Britton owed fiduciary duties when they asked their "Partners" to approve the first written operating agreement.

2. The Court of Chancery Correctly Found The New Year's Email—Standing Alone—Was Insufficient To Put The Minority Members On Notice Of Their Need To Negotiate At Arm's-Length.

Nielsen and Britton owed the same fiduciary duties that corporate officers and directors owe to a corporation and its stockholders. 6 *Del. C.* § 18-1104. Those duties are "unremitting." *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

"This Court has traditionally and consistently defined the duty of loyalty of officers and directors to their corporation and its shareholders in broad and unyielding terms: 'Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.'" *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993) (citation omitted), *decision modified on reargument*, 636 A.2d 956 (Del. 1994). "The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest." *Id.* Nielsen and Britton—who together owned the majority of Sunder's equity at all relevant times—also owed the duty to disclose "fully and fairly all material information within [their] control," and to not make partial or misleading disclosures when they sought the Minority Members' action. *Malone*, 722 A.2d at 12.

This Court has also made clear that fiduciaries "are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon . . . all stockholders generally." *Mills Acquisition v. Macmillan*, 559 A.2d 1261, 1280 (Del. 1989). Fiduciaries must "disclose all material information relevant to the corporate decisions from which they ***may*** derive a personal benefit." *Id.* (emphasis added). Moreover, fiduciaries defending the validity of a self-interested transaction on the basis of purported shareholder approval, like Nielsen and Britton here, "bear the burden" to establish that the shareholder (*i.e.*, the Minority Members') approval "resulted from a fully informed electorate," including of the "consequences of their [approval]." *Yiannatsis v. Stephanis by Sterianou*, 653 A.2d 275, 280 (Del. 1995); *Mills Acquisition*, 559 A.2d at 1280.

This Court accepted interlocutory review of a specific question regarding Nielsen's and Britton's duties: whether the Court of Chancery correctly found that the New Year's Email, standing alone, was insufficient to put the Minority Members on notice of their need to negotiate at arm's-length. B1107, (Jan. 25, 2024 Order) at B1011. Sunder does not address this question for obvious reason: the Court of Chancery correctly found with ample factual support that Nielsen and Britton

egregiously breached their fiduciary obligations.[3] As the Court of Chancery found, the New Year's Email did not come close to properly discharging Britton's and Nielsen's duties, which—at minimum—would have required disclosing to the Minority Members that (1) the LLC Agreement did not memorialize their oral agreement; (2) the LLC Agreement materially and adversely altered their rights; (3) Snell & Wilmer represented Nielsen and Britton, not the Minority Members; and (4) the Minority Members needed to retain their own independent counsel to negotiate at arm's-length. The New Year's Email did none of these things. Worse, it misled the Minority Members.

Importantly, "the exact course of conduct that must be chartered to properly discharge th[e fiduciary] responsibility" is fact specific and will "change in the specific context of the action the director is taking with regard to either the corporation or its shareholders." *Malone*, 722 A.2d at 10. Here, the specific factual circumstances establish why the Court of Chancery was correct when it found that the New Year's Email did not satisfy Nielsen's and Britton's "unremitting" fiduciary obligations.

[3] Sunder cannot raise new arguments in response to this question in its reply brief. *Rogers*, 73 A.3d at 8.

First, the Court of Chancery found that the action Nielsen and Britton asked the members to take—executing a joinder to the written operating agreement—was "monumental" to the LLC and its members:

- The LLC Agreement made "monumental changes" to the Minority Members' rights. Opinion 44.
- The LLC Agreement "dramatically changed" Sunder's ownership structure and "radically altered" its internal governance. Opinion 12.

Second, the trial court found that Nielsen and Britton were self-interested fiduciaries as "Nielsen and Britton had their rights supercharged," and "the other Co-Founders had their rights emasculated":

- "The 2019 LLC Agreement ***materially and adversely*** altered the Minority Members' rights." Opinion 43−44.
- The Agreement created two classes of member units—Common Units for Nielsen and Britton and Incentive Units for the other Co-Founders, which were subject to complete forfeiture. Opinion 13, 15.
- The Agreement eliminated the Minority Member's voting and informational rights. Opinion 13.
- The Agreement prohibited the Minority Members from transferring their incentive units. Opinion 13.

Third, the trial court found, at the time of the New Year's Email, there was significant asymmetry of information and sophistication:

- Only Nielsen and Britton, and not the other Co-Founders, were involved in the drafting of the LLC Agreement with Snell & Wilmer. Opinion 12.

- Nielsen and Britton received a briefing from Snell & Wilmer when the draft was ready, and the attorneys from Snell & Wilmer walked Nielsen and Britton through the Agreement. Opinion 12.

- The Minority Members were not invited to the Snell & Wilmer meeting, and no one explained the agreement to them. Opinion 12.

- It is not reasonable "to infer on this record that the Minority Members would have understood the traps in the document if they had read it." Opinion 16–17.

- Nielsen's "understanding of the 2019 LLC Agreement came exclusively from his attorneys. In other words, the sender of the New Year's Email could not understand the 2019 LLC Agreement without having Snell & Wilmer lawyers explain it to him." Nielsen even invoked privilege in response to questions about the LLC Agreement on the grounds that his understanding came entirely from counsel. Opinion 17.

- The Minority Members trusted that Nielsen and Britton—their "Partners"—were representing their collective interests as fellow fiduciaries. Opinion 16.

- The Minority Members were all high school graduates who had spent all or most of their careers in the door-to-doors sales industry. Opinion 16.

- The Minority Members were not sophisticated in legal matters. Opinion 16.

Fourth, the Court of Chancery found that Nielsen and Britton intentionally "designed" the New Year's Email to mislead the Minority Members, to "reassure the Minority Members, not put them on their guard," and to "induce them to sign" the joinder agreements:

- Nielsen and Britton sent the document on New Year's Eve, urging that the Minority Members sign it that night—as the court described it, as if it were something they could "get out of the way quickly before continuing with their celebrations." Opinion 16.

- Nielsen referred to the Minority Members as "Partners" and "did not suggest in any way that the Minority Members could not rely on Nielsen and Britton—their 'Partners'—as fiduciaries." Opinion 15.

- Nielsen informed the Co-Founders that he and Britton had already executed the agreement and sent it as a .pdf. Opinion 16.

- Nielsen "specifically referenced 'your grant of shares' without flagging that the Minority Members were only receiving Incentive Units, not the Common Units that he and Britton were receiving." Opinion 15.

- Nor did Nielsen "mention that the two classes of equity had diametrically different rights or that the Incentive Units were structured to be nothing more than a form of incentive compensation." Opinion 15.

- Nielsen and Britton ensured that the Minority Members did not have to scroll through—let alone read—the LLC Agreement to sign it; rather, they sent a one-paragraph joinder agreement via DocuSign for the Minority Members to sign. The LLC Agreement was not sent via DocuSign. Opinion 16.

- Nielsen made a "masterful understatement" when he "superficially" told the Minority Members that he and Britton did not expect them to sign something they were uncomfortable with or if they needed more clarification from the attorneys. Opinion 44

Fifth, the trial court found Nielsen and Britton deceptively suggested that Snell & Wilmer (who, at the time, was defending the Minority Members in litigation) were the Minority Members' own attorneys for purposes of the LLC

Agreement. Using that deception, Nielsen made them believe their attorneys "highly recommend[ed] completing these documents be the end of tonight":

- "Note the use of the definite article. [Nielsen] did not say 'Sunder's attorneys.' He said 'the attorneys.'" Opinion 16.
- Snell & Wilmer were "really acting as Nielsen and Britton's attorneys." That was not disclosed to the Minority Members. Opinion 15–16.

Nielsen and Britton were successful in what they set out to accomplish. "Jackson did as he was asked. He signed the LLC Agreement barely one hour after receiving the New Year's Email." Opinion 17 (citing JX. 11, B726). Worse, as the Court of Chancery aptly put it, "the record demonstrates that the Minority Members had no idea what Nielsen and Britton had accomplished. When questioned about their rights under the 2021 LLC Agreement and then confronted with its actual terms, the Minority Members consistently evidenced shock and surprise about what the agreement said. And that testimony came from Minority Members aligned with Nielsen and Britton." Opinion 46; B941; B943.

Given the above "specific context of the action" that Nielsen and Britton took, namely "gutt[ing] the Minority Members' rights," Opinion 15, it is clear that they cannot meet their burden to show that the "course of conduct" they "chartered" (the New Year's Email) "properly discharge[d]" their fiduciary obligations, *Malone*, 722 A.2d at 10. In fact, with that email, Nielsen and Britton did the exact opposite of

what this Court requires fiduciaries to do: they "used their position of trust and confidence to further their private interests." *Cede & Co.*, 634 A.2d at 361. "Nothing about the email put [the Minority Members] on notice that their 'Partners' were acting self-interestedly and that the Minority Members needed to protect themselves." Opinion 16.

Sunder ignores the specific question presented. Instead, Sunder (1) attacks the Court of Chancery's factual findings to argue that Nielsen and Britton did not violate their fiduciary duties; (2) argues that because Jackson allegedly benefited from the LLC Agreement, it should be enforced; and (3) claims the Court of Chancery's decision was premature. To the extent this Court entertains these improperly presented arguments, they should be rejected for the following reasons.

First, Sunder argues that Nielsen and Britton did not violate their fiduciary duties because the Minority Members "received a complete and final copy of the Operating Agreement . . . *prior* to [] signing the joinder agreement." Sunder Opening Brief ("OB") 36. But Nielsen and Britton are required to demonstrate much more than the transmittal of the dense agreement because they are fiduciaries seeking to defend the validity of a self-interested transaction (the LLC Agreement) based on Jackson's approval through the joinder. This Court's jurisprudence establishes that

a party defending a self-interested transaction based on the shareholder's purported approval bears the burden of showing that the shareholder was ***fully informed***. *Yiannatsis*, 653 A.2d at 280. Merely sending the final .pdf copy of the LLC Agreement and a separate one-page joinder agreement for signature does not constitute "full" or "fair" disclosure in the specific context of this case. *Malone*, 722 A.2d at 12; *Yiannatsis*, 653 A.2d at 280.

Indeed, Nielsen himself admitted that "his understanding of the 2019 LLC Agreement came exclusively from his attorneys. In other words, Nielsen's testimony establishes that he, the sender of the New Year's Email, could not understand the LLC Agreement without having Snell & Wilmer lawyers explain it to him." Opinion 16–17. Sending the final document did not come close to "full and fair" disclosure. Fiduciaries cannot "expect the Minority Members to do what [the fiduciary] could not," Opinion 45, especially in a self-interested transaction. If, as Sunder contends, the simple act of sending the final agreement to the Minority Members were enough to satisfy Nielsen's and Britton's fiduciary obligations in this context, it would diminish Delaware's jurisprudence regarding fiduciary obligations to little more than what's required for adverse, arm's-length transactions.

Sunder also ignores the Court of Chancery's factual findings that Nielsen did

not simply send the agreement. Rather, he attached the agreement to an email that was designed to, and did, intentionally mislead the Minority Members. Opinion 14–16. Sunder does not argue that these findings were clearly erroneous; rather, Sunder argues that cherry-picked, self-serving testimony shows the terms of the LLC Agreement "had been thoroughly discussed." OB 38. This is wrong. Sunder cites the testimony of Minority Member Sewell who, when questioned by ***Sunder's own attorney***, admitted that he did not discuss the LLC Agreement with anyone. A1448, 153:1−6; B922. The Court of Chancery's factual findings also conclusively rebut the suggestion that the Agreement "had been thoroughly discussed." OB 38; *see also* Opinion 46 ("Members consistently evidenced shock and surprise about what the agreement said."). And the Court of Chancery correctly found "the record demonstrates that the Minority Members had no idea what Nielsen and Britton had accomplished." Opinion 46.

Second, Sunder argues that the LLC Agreement should be enforced because "Jackson is not clamoring to give back the millions of dollars[4] he earned by virtue

[4] Sunder's claim that Jackson earned "millions of dollars" from distributions under the Operating Agreement is misleading. As the Court of Chancery found, Opinion 18, and as Sunder admits, OB 13, Jackson earned the majority of his compensation through his own efforts under his separate, independent contractor agreement.

of the Operating Agreement's terms." OB 37. But this argument is a red herring. Jackson did not benefit from the LLC Agreement. Rather, it "gutted" his rights. Opinion 15. Under the oral operating agreement, Jackson was a member with an 8% equity share. Jackson therefore was already entitled to distributions as one of Sunder's original members ***before*** he ever executed the LLC Agreement. 6 *Del. C.* §18-504. Indeed, the LLC Agreement substantially weakened Jackson's rights to distributions, turning his fully vested 8% ownership interest into a contingent interest subject to forfeiture at the whims of the managers. Opinion 13; A117 at § 3.5; B909. This red herring does not support reversing the Court of Chancery's decision.

Third, Sunder argues that the Court of Chancery's finding that Nielsen and Britton breached their fiduciary duties is premature. This argument, which was not raised in Sunder's application for interlocutory appeal, is not properly before this Court. Regardless, Sunder is wrong. The factual record establishes that the Court of Chancery correctly found that the New Year's Email did not satisfy Nielsen's and Britton's fiduciary obligations; rather, it was an intentional dereliction of duty by fiduciaries.

This Court should affirm the Court of Chancery's finding that the New Year's Email was "an egregious breach of fiduciary duty." Opinion 7.

II. THE COURT OF CHANCERY PROPERLY CONSIDERED NIELSEN'S AND BRITTON'S FIDUCIARY DUTY BREACHES.

A. Question Presented

Whether the trial court properly considered Nielsen's and Britton's fiduciary duty breaches when determining the enforceability of the Covenants. Though the Court did not accept review of this question, Jackson addresses it out of an abundance of caution.

B. Scope Of Review

Sunder frames this (unaccepted) question as an issue of whether Jackson timely raised Nielsen's and Britton's egregious fiduciary duty breaches as a defense to the enforceability of the LLC Agreement. A trial court's decision to permit amendment or to consider an affirmative defense is reviewed for abuse of discretion. *E.g.*, *Abdi v. NVR*, 2008 WL 787564, at *2 (Del. Mar. 25, 2008) (TABLE).

C. Merits Of Argument

This Court should not address Sunder's timeliness argument because it is beyond the scope of the order granting interlocutory review. B1007−B1013; *see Danforth v. Acorn Structures*, 608 A.2d 1194, 1195 n.2 (Del. 1992).

If the Court considers this unaccepted question, it should reject Sunder's meritless arguments.

First, Sunder's argument presumes, without authority, that Jackson was required to plead an affirmative defense to challenge the enforceability of the LLC agreement based on Nielsen's and Britton's conduct. OB 29. That premise fails. Sunder must establish an enforceable contract as one element of its claim, meaning the facts and circumstances of the contract's execution are directly at issue. *See Braga Inv. v. Yenni Income Opportunities Fund I*, 2020 WL 3042236, at *8 (Del. Ch. June 2020) ("To establish a claim for a breach of contract under Delaware law, a plaintiff must prove: (i) the existence of a ***valid and enforceable contract***…."). Jackson has every right to present arguments and facts to disprove that the contract was validly executed without having to plead an affirmative defense.

Second, to the extent Jackson was required to raise an affirmative defense to present an argument regarding the lack of enforceability of the LLC Agreement based on Nielsen and Britton's fraud and fiduciary breaches, Jackson did so. He raised the affirmative defense of "unclean hands" in his Answer, A566, satisfying Rule 8.[5] Court of Chancery Rule 8(c). Sunder does not dispute the Court of

[5] Sunder faults Jackson for not calling the fiduciary breaches "unclean hands" in his briefing, OB 32–33, but its argument is self-defeating. Jackson had no basis to argue separately for unclean hands when that defense encompassed the fiduciary duty breaches.

Chancery's holding that "unclean hands" is a proper vehicle for raising a fiduciary-duty defense. OB 32–33. Instead, Sunder baldly asserts that "[h]ere, it was not." OB 32. But Sunder cites no authority supporting a heightened pleading standard for affirmative defenses. Rule 8(c) requires only "notice pleading." *See* A2459 (Memorandum Opinion Certifying Interlocutory Appeal ("Cert. Op.")).

Third, Sunder had ***ample and actual notice*** of Jackson's fiduciary duty defense because Jackson diligently pursued it. The trial court observed that "parties often raise arguments during injunction briefing that have not been fully spelled out in the pleadings." A2459 (Cert. Op.). Here, Jackson did more. He raised an "unclean hands" defense in his Answer, and he expressly pursued a fiduciary-duty defense in a detailed motion to compel filed in October, in an amended pleading on November 13, and in briefing on November 14.[6] A2459−60 (Cert. Op.). Sunder does not show (nor can it) that the trial court committed "clear error" in finding that Jackson "diligently pursued" his fiduciary duty defense through these actions. A2460 (Cert. Op.).

[6] Sunder misstates the record about the timing of the injunction briefing. Only the transmission of Jackson's exhibits was delayed; his brief was served timely. *Contra* Brief at 30.

Sunder nevertheless complains that it did not receive notice early enough given the expedited schedule and "rushed deposition schedule." OB 30. But ***Sunder*** moved for, and was granted, expedited proceedings. It cannot now complain the case was moving too quickly.[7] Sunder also had sufficient notice to respond to the defense: Jackson's detailed motion to compel was filed 9 days before the close of discovery, 11 days before Sunder's opening injunction brief, and 18 days before hearing.

Fourth, even if Jackson's fiduciary duty defense were not presented until his November 13, 2023 amended pleading, that amendment was filed within the time permitted under Rule 15(a). Under Rule 15(a), defenses are not waived if they are included in an amended answer filed as of right or by permission. *See id.*; *see also* Ct. Ch. R. 12(h); *Abdi*, 2008 WL 787564, at *2.

Sunder cites no authority supporting its argument. All of Sunder's cases (OB 31) address ***un-pleaded*** affirmative defenses that were raised immediately before ***trial***. *E.g.*, *Alexander v. Cahill*, 829 A.2d 117, 128 (Del. 2003). Despite the lack of authority, Sunder requests this Court do the unprecedented and remand the case "with instruction not to consider the fiduciary duty defense." OB 33. To the extent

[7] Sunder's assertion that ***it*** submitted only three pages of argument on the issue is no basis for finding a waiver ***by Jackson***. OB 30 n.2.

the Court addresses Sunder's request, it should affirm the Court of Chancery's finding that Jackson timely and diligently pursued this defense.

III. THE COURT OF CHANCERY CORRECTLY DECLINED TO BLUE-PENCIL THE OVERBROAD COVENANTS.

A. Question Presented.

Whether the Court of Chancery correctly held that the Covenants are overbroad and appropriately exercised its discretion in declining to blue pencil them.

B. Scope Of Review.

Whether to blue pencil overbroad restrictive covenants is a matter within the trial court's discretion. *Kodiak Bldg. Partners v. Adams*, 2022 WL 5240507, at *4 n.49 (Del. Ch. Oct. 6, 2022). This Court reviews a trial court's discretionary ruling under an abuse of discretion scope of review. *Firestone Tire & Rubber v. Adams*, 541 A.2d 567, 570 (Del. 1988).

C. Merits Of Argument.

Sunder does not challenge the trial court's holding that the Covenants are facially overbroad and therefore unenforceable under Delaware law. OB 5, 22–27. Thus, Sunder waived any argument that the trial court erred in so holding. *Rogers*, 73 at 8.

Sunder argues the trial court erred by not blue penciling the Covenants. OB 5, 22–27. But Sunder ignores settled Delaware law, public policy, and the trial court's

factual findings that establish the trial court properly exercised its discretion not to blue pencil the Covenants.

1. Sound Delaware Law And Policy Provides The Trial Court With Discretion Concerning Whether To Blue Pencil.

Delaware courts have historically scrutinized restrictive covenants to ensure they are reasonable. *See Caras v. Am. Original,* 1987 WL 15553, at *2 (Del. Ch. July 31, 1987); *Cantor Fitzgerald v. Ainslie*, 2024 WL 315193, at *13 (Del. Jan. 29, 2024) (affirming this practice). For more than a decade, Delaware courts have consistently declined to blue pencil facially overbroad restrictive covenants in the employment context. *E.g.*, *Centurion Serv. v. Wilensky*, 2023 WL 5624156, at *1 (Del. Ch. Aug. 31, 2023) (declining to blue pencil employer's overbroad restrictive covenants); *Intertek Testing Servs. v. Eastman*, 2023 WL 2544236, at *1 (Del. Ch. Mar. 16, 2023) (same); *Kodiak*, 2022 WL 5240507, at *4 n.49, *5–*7 (same); *Elite Cleaning v. Capel*, 2006 WL 1565161, at *8 (Del. Ch. June 2, 2006) (same).[8]

Delaware courts recognize there are sound policy reasons for declining to blue pencil an employer's overbroad restrictive covenants. Opinion 50. Specifically, a mandate to amend unreasonable restrictive covenants creates a "no-lose position"

[8] Sunder argues that Delaware courts have historically blue penciled overbroad restrictive covenants to make them reasonable. OB at 23–24. Sunder is wrong. *See* Opinion 50–51; *see also* Freedom Parties Ans. Br. B429−B438.

for employers by incentivizing them to draft restrictions as broadly as possible. *Id.*; *Del. Elevator v. Williams*, 2011 WL 1005181, at *10 (Del. Ch. Mar. 16, 2011). Overbroad restrictions invariably "chill some individuals from departing," and chill competitors from hiring individuals subject to overbroad covenants. Opinion 50; *Del. Elevator*, 2011 WL 1005181, at *10. Further, if an employee challenges a covenant's reasonableness, the worst-case scenario for the employer is that the court will blue-pencil the covenant so that it is acceptable. Opinion 50.

These concerns apply with particular force where there are "[d]isparities in resources, bargaining power, and access to information." *Del. Elevator*, 2011 WL 1005181, at *11; Opinion 50. "The employer is a repeat player with strong incentives to invest in legal services, to devise an advantageous non-compete, and to insist that employees sign." *Del. Elevator*, 2011 WL 1005181, at *11. "Later on, if a dispute arises, the employer will be better able to fund the costs of enforcement, including litigation, and can benefit from economies of scale." *Id.* "The departing employee faces not only the costs of litigation, but the difficulties the non-compete creates for a new employer who could be brought into the dispute." *Id.*

Rewriting egregiously overbroad restrictions—like the Covenants—would impose a harmful restraint on trade. Specifically, blue-penciling the Covenants

would create a perverse incentive for companies formed in Delaware, like Sunder, to impose expansive restrictive covenants on their employees, creating an in terrorem effect on employees, like those seen here,[9] as well prospective employers. Neither employees nor prospective employers would know the extent to which a Delaware court might re-write the covenants. This would deprive employers access to qualified employees and limit the mobility of untold numbers of employees fearful of overbroad restrictions.

Sunder argues these policy considerations should not apply because Jackson's conduct was "egregious," as he "poached hundreds of talented sales representatives from his former equity partners." OB 3, 27. That, though, is not the standard or a reason to wholesale redraft the Covenants. Moreover, the Court of Chancery found that "[c]ausation is a serious impediment" because sales leaders in Jackson's downline testified "factors other than Jackson drove their decision to leave" Sunder. Opinion 36 n.41 ("To parse causation ultimately will require difficult credibility assessments and careful weighing of evidence.").

[9]*E.g.*, A1674, 135:7-13 (Gutschmidt testifying that the clause could prohibit his daughter from working in the door-to-door industry).

Sunder also argues the trial court's decision creates uncertainty because "drafters are left in the dark to guess at the outer bounds of acceptable scope for these types of provisions." OB 22. This argument ignores, however, the vast array of legal authority outlining the appropriate scope for restrictive covenants. *E.g.*, Angie Davis et. al., *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 ABA J. Lab. & Emp. L. 255 (2015) (describing best practices for negotiating reasonable restrictive covenants). It also ignores the above policy problems with employers stretching the outer bounds of post-employment restrictions. Importantly, the disparity in bargaining power between the employer/controlling shareholder and employee/incentive unit holder warrants placing the burden on employers to draft reasonable restrictions. As Delaware courts recognize, placing the burden on employers (or in this case controlling shareholders) promotes good policy: "The threat of losing all protection gives employers an incentive to restrict themselves to reasonable clauses. Taking away the employer's no-lose proposition helps equalize bargaining power up front such that a court can be more confident in the arm's-length nature of the terms." *Del. Elevator*, 2011 WL 1005181, at *11.

Established Delaware law and these policy considerations therefore support the trial court's discretionary decision. Opinion 50.

2. The Overbreadth Of The Restrictive Covenants Supports The Court of Chancery's Decision.

The trial court's decision not to blue pencil the Covenants is also supported by its factual findings concerning the Covenants' astonishing overbreadth.

The trial court first found that the non-compete provision in the LLC Agreement (the "Competition Restriction") is facially overbroad in virtually every respect. Opinion 53–55.

- It prevents Jackson from working in ***any*** business in the "entire door-to-door industry, without regard to whether Sunder markets or sells similar products."

- It restricts, not just Jackson, but any member of his immediately family—his wife, kids, parents, and siblings. Opinion 53–54 ("As written, Jackson's daughter cannot go door to door selling Girl Scout Cookies.").

- It applies in at least 46 states—that is, every state where Sunder does business or reasonably anticipates doing business. Opinion 54.

- It is indefinite and potentially perpetual because it applies while a Minority Member holds Incentive Units and then for a period of two years after. *Id.* at 54–55. Nielsen and Britton unilaterally determine ***when*** to exercise Sunder's option to purchase a Minority Member's vested Incentive Units for $0. Opinion 55.

- It contains a "Customer Restriction" that "bars Jackson from participating in any business that sells to any homeowner in the states where Sunder did business before Jackson's departure." Opinion 57.

The trial court next found the non-solicit provision ("Personnel Restriction") is overbroad and unenforceable. Opinion 59–60. Like the Competition Provision, it is overbroad in multiple ways:

- It prohibits Jackson from hiring or recruiting on behalf of any employer or company, even if the employer or company is not involved with the solar power industry. Opinion 59.

- It applies to Jackson ***and*** every member of his immediate family. Opinion 59.

- It extends to "(1) any current Sunder employee or independent contractor or (2) any person employed in the past by Sunder for any period of time." Opinion 59 ("Jackson would violate the Personnel Restriction if he contacted someone who went door to door for Sunder on one job.")

- It applies regardless of why the employee or independent contractor left. Opinion 60 ("[T]he person might leave the sales industry entirely and join a non-profit, and yet Jackson would have breached the Personnel Restriction if he lacked the self-discipline to refuse to discuss whether joining a non-profit would be more personally rewarding and aligned with that person's values.").

The Court of Chancery determined these overbroad restrictions are "both oppressive and far more restrictive than any legitimate interest that Sunder could have." Opinion 58. These findings support the trial court's decision not to save Sunder from its overreach by blue-penciling the Covenants. The overbreadth is

undisputedly astonishing. Thus, the trial court was not required to re-write the Covenants to make them reasonable.

In fact, this Court need to look no further than Section 13.2 of the LLC Agreement (the blue-pencil provision) to affirm that the trial court did not abuse its discretion. Sunder argues Section 13.2 supports its argument. Not so. The provision does not allow a court to re-write the Covenants wholesale:

> **13.2 Blue Pencil.** If any court determines that any of the covenants set forth in 12.1 [sic], or any part thereof, is unenforceable ***because of the duration or geographic scope of such provision***, such court shall have the power ***to reduce the duration or scope of such provision***, as the case may be, and, in its reduced for, such provision shall then be enforceable.

A146 § 13.2 (emphasis added). This provision is discretionary, not mandatory. That discretion also is limited the provision contemplates ***only*** the revision of the temporal and geographic scope. Revising the Covenants' temporal and geographic scope would not make them reasonable. As the trial court found, the Covenants are overbroad in all aspects: whom they cover, what they cover, where they apply, how long they apply, and their justification. *See* Opinion 52–60. Revising the Covenants to make them reasonable would require rewriting them in whole—not just the "duration" or "geographic scope"—and revising other provisions of the contract.

The trial court was not required to apply this provision, and even if it did, it would not salvage the Covenants.

Sunder also argues that the trial court erred in declining to blue-pencil because Section 13.2 prevents Jackson from challenging the Covenants' reasonableness. OB 26 (citing A146 § 13.2). But as the trial court correctly held, "[a] provision of this sort is not valid under Delaware law" and that the court "has an independent obligation to review the reasonableness of the restrictive covenants that cannot be bargained away." Opinion 51 n.70; *see also Kodiak*, 2022 WL 5240507, at *5.

3. The Court Of Chancery's Factual Findings About Jackson's Lack Of Resources, Bargaining Power, And Information Concerning The Covenants Support Its Decision.

The trial court's decision not to blue pencil the covenants is also supported by its factual findings regarding the circumstances giving rise to the LLC Agreement, including that there were disparities in resources, bargaining power, and information between Sunder and Jackson. *See* Opinion 12.

As detailed in *supra* Section I.C., Nielsen and Britton engaged in egregious fiduciary violations to induce Jackson and the other Minority Members to execute a joinder to the LLC Agreement containing the Covenants. Opinion 7. Nielsen did not disclose that the LLC Agreement gutted their rights or contained the onerous

Covenants. Opinion 15−17. Rather, he led Jackson and the others to believe he and Britton—as their "Partners"—and Snell &Wilmer were representing their interests. Jackson did not know until years later that the Covenants existed. Opinion 16. The trial court found that it is not reasonable to infer Jackson would have understood the Covenants if he had been informed about and read them. Opinion 16–17.

Additionally, the trial court found that even had Jackson understood the Covenants, the record does not suggest he would have been able to negotiate over them. Opinion 16−17. Nielsen and Britton executed the LLC Agreement and ***then*** sent it to Jackson and the other Minority Members as a .pdf, signaling it was in final form. Opinion 16. Nielsen did not invite Jackson or the other Minority Members to provide edits to the agreement or bargain over its provisions. Opinion 15−17. Rather, he sent them a "joinder" agreement and suggested they could ask Snell & Wilmer for ***clarification***, urging Jackson and the others to sign ***that night*** per Snell & Wilmer's recommendation. Opinion 15−16; A098.

As Delaware courts recognize, the policy concerns arising from blue-penciling an employer's overbroad restrictive covenants are exacerbated where there are imbalances in bargaining power and information between an employee and employer. Opinion 50−51 nn.68, 69 (citing scholarly articles recognizing the

language of contracts affects employees' behavior, independent of laws determining their enforceability, and overbroad restrictive covenants create confusion for employees and encourage litigation). Thus, the trial court's discretionary decision not to blue pencil the Covenants is further bolstered by these factors.

Sunder argues that "the typical concerns regarding bargaining power simply are not present" because Jackson "was a founding member and a Vice President of Sunder" and "involved in discussions regarding the Operating Agreement and its scope." OB 25. But, as explained above, the trial court specifically found that Jackson and the other Minority Members were ***not*** involved in discussions regarding the LLC Agreement and lacked the ability to negotiate the Covenants. Opinion 12, 15−16. And the trial court found that Jackson's "Vice President" title was just that—an independent contractor title. Opinion 18. The title did not give Jackson executive or officer responsibilities or authority.

In sum, the Covenants are astonishingly overbroad in whom they cover, what they restrict, when they apply, where they apply, and why they are purportedly justified. *See* Opinion 52–70. Allowing Sunder to escape its misconduct by re-writing the Covenants would run afoul of sound policy, especially where—as here—the Covenants were the result of an egregious breach of self-interested fiduciaries.

Jackson respectfully requests this Court affirm the trial court's discretionary decision to decline to blue pencil the Covenants.

CONCLUSION

For these reasons, the Opinion and Order should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April 2024, a copy of the foregoing *Redacted Public Version of Appellee Tyler Jackson's Answering Brief* was served via *File & ServeXpress* upon the following attorneys of record:

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