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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONTINENTAL INVESTORS FUND LLC, Plaintiff Below, Appellant, v. TRADINGSCREEN INC., PIERO GRANDI, AND PIERRE SCHROEDER, Defendants Below, Appellees.	)	No. 290, 2021 Court Below: Court of Chancery of the State of Delaware, C.A. No. 10164-VCL PUBLIC VERSION FILED NOVEMBER 17, 2021

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from an Opinion and Order denying Plaintiffs' Motion for Judgment on the Pleadings and a Post-Trial Opinion and Final Judgment and Order by the Court of Chancery holding that interest only accrues under a mandatory stock redemption provision in a Delaware corporation's certificate of incorporation if and when the corporation breaches the provision by failing to make redemption payments from legally available funds.[1] However, the certificate of incorporation at issue in this appeal (the "Charter") contains no such qualification. The trial court's interpretation distorts the arm's-length bargain reached when plaintiff Continental Investors Fund LLC ("Continental") and other investors (collectively, the "Preferred Stockholders") invested in a 2007 issuance of Series D Preferred Stock by defendant TradingScreen Inc. ("TradingScreen" or the "Company"). Under the plain terms of the Charter, interest began to accrue at 13% on the Company's due but unpaid redemption obligations irrespective of whether the Company had legally available funds.

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[1] *See* Exhibit A (Memorandum Opinion on Pls.' Mot. for Judgment on the Pleadings, dated February 26, 2015 (the "MJOP Opinion" or "MJOP Op.")); Exhibit B (Order Denying Pls.' Mot. for Judgment on the Pleadings, dated February 26, 2015 (the "MJOP Order")); Exhibit C (Post-Trial Memorandum Opinion, dated July 23, 2021 (the "Post-Trial Opinion" or "Post-Tr. Op.")); Exhibit D (Final Judgment and Order, dated August 19, 2021 (the "Final Order")).

In 2012, two Preferred Stockholders, TCV VI, L.P. and TCV Member Fund L.P. (together, the "TCV Funds" and, with Continental, "Plaintiffs") sought to liquidate their equity positions in the Company. Because the TCV Funds could not find a buyer for their Series D Preferred Stock, they exercised their right under the Charter to require the Company to redeem their preferred shares in 2013. Continental elected to participate in the redemption process.

In January 2014, pursuant to the Charter, TradingScreen and the TCV Funds engaged Centerview Partners LLC ("Centerview") to determine the fair market value of the Company and the preferred shares. On February 5, 2014, Centerview determined that the Company's fair market value was $120 million, implying a per-share price for the Series D Preferred Stock of $16.71. Based on Centerview's valuation, which the parties did not dispute, the Company was required to redeem Continental's Series D Preferred Stock for an aggregate price of more than $7.1 million.

Article IV Section C.7 of the Charter (the "Redemption Provision") required the Company to make redemption payments to Continental in three equal installments of approximately $2.3 million on the six-month, twelve-month, and eighteen-month anniversaries of the date that was thirty days after the date Centerview provided its valuation (the "Installment Dates"). The Redemption

Provision also included an agreed-upon remedy if the Company failed to pay its redemption obligations on time (the "Interest Provision"), which provided that "[i]n the event the Corporation defaults on any payments due pursuant to this Article IV Section C.7.1.2, interest shall accrue on all amounts then owed pursuant to this Article IV Section C.7.1.2 equal to an annual percentage rate of thirteen percent (13%)."

The Company failed to make full redemption payments to Continental on any of the Installment Dates despite having more than sufficient surplus on its balance sheet. Instead, a special committee of the Company's board of directors (the "Special Committee") concluded over the period September 2014 to August 2020 that , based on a series of assumptions and financial projections with a two-year time horizon, the Company lacked sufficient legally available funds on a solvency basis to make anything more than *de minimis* payments to the redeeming Preferred Stockholders. The Special Committee made its determinations even though it acknowledged that the Company's capital was not impaired—and would not have been impaired had the Company made the first redemption payment in full. Between 2014 and 2020, the Company paid Continental just $658,321.85, approximately 9.3% of the more than $7.1 million principal amount owed. Under the Interest

Provision, the Company also owed—but refused to pay—to Continental interest at 13% on the unpaid balance based on the Interest Provision.

Plaintiffs challenged the Special Committee's decision to withhold payment for substantially all of the Company's redemption obligation and also sought a declaratory judgment that interest was accruing at 13% on amounts that were due but unpaid under the Interest Provision. The trial court accorded great deference to the Special Committee's determinations that the Company lacked legally available funds to make additional redemption payments because the Company required at least $20 million of "show capital" to be reserved from payments owed to the Preferred Stockholders.[1] The trial court also found that interest accrued under the Interest Provision only as to unpaid redemption amounts in excess of whatever reserves the Company determined it should maintain to be able to operate for the "foreseeable future without a threat of liquidation."[2]

This appeal does not address the trial court's conclusion as to whether the Company had legally available funds to make redemption payments on the Installment Dates. Rather, this appeal concerns only the meaning of the Interest Provision. As Continental argued below, the trial court's interpretation is

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[1] *See* Post-Tr. Op. at 34-42, 45-56.
[2] *See* Post-Tr. Op. at 44, 57-59.

inconsistent with the Interest Provision's plain meaning, read in isolation or in conjunction with the broader Charter, and creates an absurd result that the parties did not intend.[3] This Court should find that the Interest Provision dictates that interest accrued at 13% on all redemption payments that the Company failed to make on an Installment Date regardless of whether the Company had legally available funds to make additional redemption payments.

[3] *See* A182-A185 (MJOP OB at 43-46); A280-A282 (MJOP RB at 24-26); A831-A834 (Pls.' Post-Tr. Opening Br. at 49-52).

SUMMARY OF ARGUMENT

1. Under the Charter's Redemption Provision, interest begins to accrue at the rate of 13% per annum on an Installment Date if the Company "defaults" by failing to make the redemption payment on time and in full. "Default" does not occur only when the Company fails to make a redemption payment out of legally available funds. Rather, interest accrues on any redemption payment that comes due and goes unpaid by the Company. TradingScreen should pay Continental interest at 13%, running from each of the Installment Dates through the final date of payment, on the amount of the payments the Company failed to make on those dates.

STATEMENT OF FACTS

A. The Parties

Plaintiff-below, appellant Continental is a Delaware limited liability company operated by Philip Purcell, the former CEO of Morgan Stanley.[4]

Former plaintiffs-below the TCV Funds were private equity investment funds that, as of the time of trial, had $4 billion of assets under management.[5] In July 2020, the TCV Funds settled with Defendants and were voluntarily dismissed from the action below.[6]

Defendant-below, appellee TradingScreen is a Delaware corporation with its principal place of business in New York City.[7] The Company is a global provider of electronic trading solutions.[8]

Defendant-below, appellee Piero Grandi was a director of TradingScreen and a member of the Special Committee.[9]

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[4] A435 (Am. Compl. ¶ 11); A712 (Pretrial Order ("PTO") ¶¶ 11, 12).
[5] A766 (Tr. (Trudeau) at 806:5-10).
[6] A952-A953 (Order Granting Mot. to Dismiss Pls. TCV VI, L.P. and TCV Member Fund, L.P., dated July 13, 2020).
[7] A711 (PTO ¶ 4).
[8] A711 (*Id.*).
[9] A711 (*Id.* ¶ 6).

Defendant-below, appellee Pierre Schroeder was a director of TradingScreen and a member of the Special Committee.[10]

Defendant-below Philippe Buhannic ("Buhannic") was TradingScreen's founder, chairman, and chief executive officer.[11] Buhannic also was a member of the special committee formed to evaluate the Company's response to Plaintiffs' redemption notices.[12] Buhannic passed away before the trial court issued its Post-Trial Opinion.[13] Buhannic is not a party to this appeal.

Defendant-below Patrick Buhannic (together with Buhannic, Grandi, and Schroeder, the "Individual Defendants" and, with TradingScreen, the "Defendants") was Philippe Buhannic's brother, a director of TradingScreen, and a member of the Special Committee.[14] Patrick Buhannic is not a party to this appeal.[15]

B. Plaintiffs Invest In The Company

On August 7, 2007, the Company and Plaintiffs, among others, entered into the TradingScreen Inc. Series D Convertible Preferred Stock Purchase Agreement

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[10] A711 (*Id.* ¶ 7).
[11] A711 (*Id.* ¶ 5).
[12] A711 (*Id.*).
[13] Post-Tr. Op. at 3 n.3.
[14] Post-Tr. Op. at 6, 15.
[15] At the time the court below entered its Final Judgment and Order, defendants below Philippe and Patrick Buhannic were not represented by counsel, and Philippe Buhannic was deceased.

(as amended, the "Stock Purchase Agreement").[16] Pursuant to the Stock Purchase Agreement, the TCV Funds purchased a majority of the Series D Preferred Stock for $65,931,947.74, and Continental purchased 425,663 shares of Series D Preferred Stock for a total purchase price of $6,465,948.67.[17]

C. The Relevant Charter Provisions

In order to issue the Series D Preferred Stock, TradingScreen amended and restated its Charter in September 2007.[18] The Series D Preferred Stock was redeemable by TradingScreen in accordance with Article IV Section C.7 of the Charter (the "Redemption Provision").[19]

Under the Redemption Provision, the TCV Funds had the right to require the Company to assist Preferred Stockholders that wished to sell all or part of their Series D Preferred Stock beginning three months prior to the fifth anniversary of its issuance.[20] If, after the TCV Funds exercised this right, the Preferred Stockholders electing to sell their shares were unable to find a buyer during the following nine months, then the TCV Funds could require TradingScreen "to purchase all or a

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[16] A711-A712 (PTO ¶ 9).
[17] A712 (*Id.* ¶¶ 10, 11).
[18] A1168-A1186 (JX5 ("Charter")).
[19] A1180-A1182 (*Id.* Art. IV § C.7).
[20] A1180 (*Id.* Art. IV § C.7.1.1).

portion of such holders[’] shares.”[21] The Company was required to redeem the tendered shares of Series D Preferred Stock at the price determined by the parties’ mutually agreed-upon independent financial advisor.[22] The Redemption Provision provided that the Company would pay the redemption price in three equal installments on the Installment Dates.[23]

The Charter contemplated the possibility that the Company might not make full redemption payments on the Installment Dates. The Redemption Provision addressed that risk in two different ways.

First, Section 7.1.2’s Interest Provision provides that “**[i]n the event the Corporation defaults on any payments due pursuant to this Article IV Section C.7.1.2, interest shall accrue on all amounts then owed pursuant to this Article IV Section C.7.1.2 equal to an annual percentage rate of thirteen percent (13%)**.”[24] Nothing in Section 7.1.2 provides that, for a default to trigger the Interest Provision, the Company must default on the redemption payment obligation by withholding legally available funds. Rather, Robert Trudeau, the TCV Funds’ principal and then a member of the Company’s board of directors (the “Board”) at

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[21] A1180 (*Id.* Art. IV § C.7.1.2).
[22] A1180 (*Id.* Art. IV § C.7.1.2).
[23] A1180 (*Id.*).
[24] A1180 (*Id.*) (emphasis added).

all pertinent times, testified that the purpose of the Interest Provision "is to make sure there's a mechanism to incent the business to pay on time. . . . So it's effectively a hammer."[25] Defendants never attempted to rebut or dispute this testimony. Trudeau further testified that the Interest Provision was intended to run "if a payment was missed" or if TradingScreen made a partial payment, and that it was not intended to run only in the event the Preferred Stockholders were able to prove a breach of the Charter.[26] Thus, consistent with routine commercial relationships, the parties agreed to the Interest Provision knowing and anticipating that the Company might not have legally available funds to make a full redemption payment when due.[27]

Second, Section 7.1.3 (the "Continuing Redemption Provision") provides:

> In the event the Corporation has insufficient cash to pay the holders of the Series D Preferred Stock the full redemption amount due to them under Article IV Section C.7.1.2, then the holders of Series D Preferred Stock shall share ratably in any cash available pro rata in proportion to the respective amount of Series D Preferred Stock held by such holder until all such holders are paid in full.[28]

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[25] A750 (Tr. (Trudeau) 747:19-22).
[26] A751 (Tr. (Trudeau) 748:20-21).
[27] *See, e.g.,* 8 *Del. C.* § 151(b) ("Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, ***or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation*** or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to subsection (a) of this section." (emphasis added)).
[28] A1181 (*Id.* Art. IV § C.7.1.3).

Relatedly, the Redemption Provision also states that, upon any liquidation event, merger, consolidation, sale of all or substantially all of the Company's assets, or qualified public offering, "all amounts due and owing from the Corporation pursuant to this Article IV Section C.7.1.2 shall become fully due and payable."[29] Thus, the parties also anticipated that redeeming stockholders may not have the ability to compel an immediate redemption payment and may have to wait for a liquidation event or merger in order to receive full payment for missed redemption payments. In Sections 7.1.2 and 7.1.3, the parties agreed that the Company could satisfy its redemption obligations in installments, but, if the Company required additional time or made only partial payments, the Company would compensate the Preferred Stockholders for the delay with a negotiated 13% interest rate on any unpaid principal amounts.

D. Plaintiffs Exercise Their Redemption Rights

On March 14, 2013, the TCV Funds notified the Company that they were exercising their redemption rights.[30] The Company provided notice to the other

[29] A1180-A1181 (*Id.* Art. IV § C.7.1.2).
[30] A718-A719 (PTO ¶ 25).

Preferred Stockholders, and, on March 19, 2013, Continental provided a redemption notice for all of its shares to the Company.[31]

The Centerview valuation accepted by the Company and the Preferred Stockholders entitled Continental to an aggregate redemption payment of $7,112,828.73.[32] The Redemption Provision required TradingScreen to make three equal payments of $2,370,942.91 to Continental on each of the three Installment Dates.[33] TradingScreen's first redemption payment of nearly $2.4 million to Continental came due on September 15, 2014.[34]

E. TradingScreen Fails To Make Redemption Payments

In July 2014, the Special Committee retained AlixPartners LLP ("AlixPartners") to provide financial advice regarding the amount of funds the Company could use to redeem the Plaintiffs' shares.[35] On September 3, 2014, AlixPartners delivered its initial presentation to the Special Committee.[36] In its presentation, AlixPartners advised that the Company had a surplus of between $16.7 million and $52.1 million and did not address any purported or projected

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[31] A719 (PTO ¶ 26).
[32] *See* A719-A720 (*Id.* ¶¶ 28-30); A1181 (Charter Art. IV § C.7.1.4).
[33] A431-A432 (Am. Compl. ¶ 4).
[34] *See* A721 (PTO ¶¶ 33, 35); A1181 (Charter Art. IV § C.7.2.1).
[35] Post-Tr. Op. at 15.
[36] A613 (Defs.' Pre-Tr. Br. at 41).

requirements for reserves that might lower the amount of legally available funds.[37] In discovery, the Individual Defendants conceded that the Company had at least $45 million in balance sheet surplus during the period June 30, 2014 through December 31, 2014.[38] Moreover, the Individual Defendants admitted that TradingScreen could have made the first redemption payment in full without impairing the surplus on the Company's balance sheet.[39]

Notwithstanding the strength of the Company's financial position, the Special Committee determined on September 4, 2014 that TradingScreen had just $7.2 million of "funds legally available" to made redemption payments to the Preferred Stockholders.[40] The Special Committee asserted that the Company needed to retain $20 million in "show capital" to "demonstrate its financial strength to counterparties," "comply with foreign regulatory requirements," apply toward "repatriation taxes" and, ultimately, "remain a going concern," which meant the Company had only $7.2 million in cash that it could use for the first redemption payment.[41] The next day, Buhannic informed the Plaintiffs that the Special

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[37] Post-Tr. Op. at 15.
[38] A421-A422 (Individual Defs.' Am. And Supplemented Ans. & Objections to Pls.' First Set of Interrogatories at 26-27).
[39] A413 (*Id.* at 18).
[40] A721-A722 (PTO ¶ 36).
[41] Post-Tr. Op. at 22, 46.

Committee had determined not to make the full redemption payment due to the Preferred Stockholders under the Redemption Provision.[42] Based on the Special Committee's determination, the Company sent a check payable to Continental for just $464,703.09 of the $2,370,942.01.[43]

On September 9, 2014, the TCV Funds delivered a notice of default to the Company.[44] The TCV Funds' notice explained that, "[d]ue to the Corporation's default in respect of [its] payment obligation, under Section 7.1.2 of Part C of Article IV of the Certificate of Incorporation, an amount equal to an annual percentage rate of thirteen percent (13%) shall accrue on all amounts due and owing[.]"[45] The TCV Funds also demanded adequate assurances "that the Corporation will satisfy its obligations to make the redemption payment that is currently due and owing . . . (together with accrued interest thereon) as well as the redemption payments that will become due on the 12- and 18- month anniversary of the Redemption Date."[46]

TradingScreen responded to the TCV Funds' notice of default on September 18, 2014.[47] TradingScreen denied that the TCV Funds were entitled to further

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[42] A722-A723 (PTO ¶ 37).
[43] A722-A723 (*Id.*).
[44] A723-A724 (*Id.* ¶ 38).
[45] A723-A724 (*Id.*).
[46] A723-A724 (*Id.*).
[47] A724-A725 (*Id.* ¶ 39).

assurances and denied that the Company had defaulted on its redemption obligations.[48] According to TradingScreen, "there ha[d] been no default" because the Company had paid the Plaintiffs "the amount of funds TradingScreen had available for the redemption of shares of its Series D Preferred Stock that would not jeopardize TradingScreen's ability to continue as a going concern."[49]

On November 21, 2014, at the Special Committee's next quarterly meeting, the Special Committee approved the redemption of an additional $2.5 million worth of Series D Preferred Stock.[50] On March 5, 2015, the Special Committee approved an additional $500,000 for redemptions.[51] The Company did not make any more redemption payments to Continental until August 2020. Until that point, Continental received just $658,321.85 of the more than $7.1 million it was owed by TradingScreen, leaving Continental with an unpaid principal balance of $6,454,504.86.[52] TradingScreen's payments did not reflect any of the interest due

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[48] A724-A725 (*Id.*).
[49] A724-A725 (*Id.*).
[50] A725-A726 (*Id.* ¶ 40). TradingScreen paid Continental $161,351.76 in exchange for 9,656 shares. A1189 (JX371 at 3).
[51] A1191 (JX444 at 1). TradingScreen paid Continental $32,267 in exchange for 1,931 shares. A1191 (*Id.*).
[52] Post-Tr. Op. at 33.

on the unpaid amount following the Company's defaults on the installment payments for almost six years during the period September 2014 through August 2020.

F. Proceedings Below And Post-Trial Events

On September 24, 2014, the TCV Funds and Continental filed their Verified Complaint (as amended, the "Complaint").[53] The Complaint alleged, in pertinent part in Count II, that TradingScreen was required to pay interest at the annual rate of 13% on any amounts due and unpaid.[54]

Plaintiffs moved for judgment on the pleadings as to Count II of the Complaint on October 23, 2014.[55] Plaintiffs argued that the Company's failure to make payment in full on the first Installment Date constituted a "default" triggering 13% interest as to all amounts due but unpaid.[56] Defendants argued that the Company did not "default" on its redemption obligation triggering interest because the only amount "due" under the Redemption Provision was the amount the Company was legally able to pay.[57]

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[53] A428-A488 (Am. Compl.).
[54] A458-A463 (Am. Compl. ¶¶ 61-79).
[55] A129-A132 (Pls.' Mot. for Judgment on the Pleadings).
[56] A182-A185 (Pls.' Opening Br. in Support of Mot. for Judgment on the Pleadings ("MJOP OB") at 43-46); A280-A282 (Pls.' Reply Br. in Support of Mot. for Judgment on the Pleadings ("MJOP RB") at 24-26).
[57] A244-A246 (Defs.' Br. in Opp. to Mot. for Judgment on the Pleadings at 47-49).

The Court of Chancery issued its Opinion and Order denying the Motion for Judgment on the Pleadings on February 26, 2015.[58] The trial court used Black's Law Dictionary to define "default" as "[t]he omission or failure to perform a legal or contractual duty."[59] The trial court determined that, because "Plaintiffs cannot prove that TradingScreen failed to perform a legal or contractual duty, they cannot establish that it defaulted on any payments, even if payments are considered due under Section 7.1.2."[60] Accordingly, the trial court denied the Plaintiffs' motion as to Count II.

On March 9, 2015, Plaintiffs applied to the trial court for certification of an interlocutory appeal on the parties' primary dispute over whether the Company had sufficient surplus and solvency to make the redemption payments.[61] The trial court granted Plaintiffs' application on March 27, 2015.[62] Without commenting on the parties' positions on the Interest Provision, this Court refused the interlocutory appeal because it found that "the facts developed in discovery could profoundly affect the legal questions that must be answered to decide the case . . . ."[63]

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[58] Exs. A, B.
[59] MJOP Op. at 19 (quoting *Black's Law Dictionary* 417 (6th ed. 1990)).
[60] MJOP Op. at 18-20.
[61] A358-A387 (Pls.' App. for Certification of Interlocutory Appeal).
[62] A388-A395 (Letter Op. on Pls' App. for Certification of Interlocutory Appeal).
[63] *TCV VI, L.P. v. TradingScreen Inc.*, 2015 WL 3453453, at *1 (Del. Apr. 7, 2015).

The case proceeded through trial in February 2016.[64] During post-trial briefing, the Board placed Buhannic on leave from his position as CEO, which led to two separate actions in the Court of Chancery, litigation in New York, and an arbitration proceeding.[65] The trial court stayed the redemption action until each of these proceedings was resolved.[66] By November 2019, all of these proceedings had concluded[67] with the result that Buhannic was permanently removed from his positions with the Company.[68] Although the parties attempted to negotiate a mutually acceptable resolution of this action during the pendency of the stay, the Company and Continental were unable to reach an agreement.[69] Accordingly, in July 2020, Continental moved to lift the stay and proceed to a final decision on the merits.[70] The trial court granted Continental's motion on July 13, 2020.[71]

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[64] Post-Tr. Op. at 30.
[65] A941-A943 (Continental's Mot. to Lift Stay ¶¶ 3,6-8).
[66] A934-A936 (Order Staying Action, dated May 23, 2016); A937-A939 (Order Staying Action, dated Mar. 17, 2016).
[67] A943 (Continental's Mot. to Lift Stay ¶¶ 9-10).
[68] Post-Tr. Op. at 32.
[69] A943-A944 (Continental's Mot. to Lift Stay ¶ 11).
[70] A940-A948 (Continental's Mot. to Lift Stay).
[71] A949-A951 (Order Lifting Stay and Setting Post-Tr. Br. Sched., dated July 13, 2020).

In June 2020, the Board approved the sale of the Company's 79% interest in a subsidiary for approximately $128 million.[72] The deal closed in early July 2020.[73] On August 27, 2020, the Company made a payment to Continental for $6,472,098.12, representing the principal amount of TradingScreen's unpaid redemption obligation plus $17,593.26 in interest.[74] As a result of TradingScreen's 2020 payment, Continental sought a post-trial decision on the merits from the trial court regarding the Company's obligation to pay 13% interest under the Redemption Provision.

The trial court heard post-trial argument on May 23, 2021[75] and issued its Post-Trial Opinion on July 23, 2021.[76]

The Post-Trial Opinion denied Continental's requested relief. Vice Chancellor Laster credited the Special Committee's determination that TradingScreen did not have sufficient legally available funds to make further redemption payments because the Company would have been unable to "operate for the foreseeable future without the threat of liquidation."[77] The Post-Trial Opinion

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[72] A942 (Continental's Mot. to Lift Stay ¶ 7).
[73] A943 (*Id.* ¶ 9).
[74] A1007-A1008 (Letter to Court, dated Sept. 29, 2020, at 1-2).
[75] A1013-A1120 (Post-Tr. Argument Transcript).
[76] Post-Tr. Op.
[77] *Id.* at 44 (quoting MJOP Op.).

also found that the MJOP Opinion's interpretation of the Interest Provision remained the law of the case and that the Interest Provision only required the Company to pay interest "on funds that could be deployed legally for redemptions but which were not used for that purpose."[78]

Continental filed on September 15, 2021 a timely Notice of Appeal from the MJOP Opinion and Order and the Post-Trial Opinion and Final Judgment and Order.[52] For the reasons set forth below, Continental requests that this Court find that, under the Charter, interest began to accrue at the rate of 13% per annum on all amounts due but unpaid upon the Company's failure to make redemption payments in full on each of the three Installment Dates.

[78] *Id.* at 59.
[52] C.A. No. 406, 2020, Notice of Appeal (Dkt. 1).

ARGUMENT

I. UNDER THE CHARTER, INTEREST BEGAN TO ACCRUE ON UNPAID AMOUNTS AT THE CONTRACTUAL RATE OF 13% PER ANNUM UPON THE COMPANY'S FAILURE TO MAKE REDEMPTION PAYMENTS IN FULL ON EACH OF THE THREE INSTALLMENT DATES

A. Question Presented

Whether, under the Charter, interest began to accrue on the Company's unpaid redemption obligations at the contractual rate of 13% per annum after the Company failed to make redemption payments in full on each of the three Installment Dates.[79]

B. Scope of Review

The interpretation of a certificate of incorporation is a question of law subject to *de novo* review.[80]

C. Merits of the Argument

Under the Charter, TradingScreen was obligated to pay 13% interest on all redemption amounts due and unpaid after each Installment Date.

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[79] This question was presented below at A182-A185 and A831-A834 and considered by the trial court in the MJOP Opinion (*see* pages 18-20) and the Post-Trial Opinion (*see* pages 34-35, 57-60).

[80] *Oberly v. Kirby*, 592 A.2d 445, 457 (Del. 1991).

1. The Interest Provision Is Clear

The Interest Provision provides that "[i]n the event the [Company] defaults on *any payments due* pursuant to this [Section 7.1.2], interest shall accrue on *all amounts then owed* pursuant to this [Section 7.1.2] equal to an annual percentage rate of thirteen percent (13%)."[81] Under this provision, whenever the Company "defaults" by failing to make payment in full on an Installment Date, interest accrues on the unpaid amount. The Court need only give the terms "defaults," "any payments due," and "all amounts then owed" their ordinary meaning to arrive at this conclusion.[82]

Although the Charter does not define the word "defaults," the Court of Chancery has defined "default" as "[t]he omission or failure to perform a legal or contractual duty; esp[ecially] the failure to pay a debt when due"[83] and has defined the "failure to fulfill a contract agreement, or duty as: (a) to fail to meet a financial obligation."[84] The Redemption Provision provides that TradingScreen "shall

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[81] A1180 (Charter Art. IV § C.7.1.2 (emphasis added)).
[82] *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (Delaware courts interpret charter provisions "according to their plain, ordinary meaning").
[83] *Seaford Assocs. Ltd. P'ship v. Subway Real Est. Corp.*, 2003 WL 21254847, at *5 (Del. Ch. May 21, 2003) (quoting *Black's Law Dictionary* 428 (7th ed. 1999), *reargument denied*, 2003 WL 21309117 (Del. Ch. May 29, 2003).
[84] *Id.* at *5 n.31 (quoting *Webster's Ninth New Collegiate Dictionary* 332 (1987)).

redeem the shares of Series D Preferred Stock" on the applicable Installment Dates.[85] A "default" triggering 13% interest does not require a showing that TradingScreen breached the Charter by failing to perform a legal duty.[86]

According to the MJOP Opinion, which the Post-Trial Opinion adopted as law of the case,[87] the "relevant question" is whether the court can "conclude . . . that TradingScreen has failed to perform a legal or contractual duty[.]"[88] The trial court found that a default requires the existence and non-performance of a legal or (as here) a contractual obligation. But the application of trial court's reasoning to the Charter breaks down because the court failed to distinguish between the Company's failure to perform its contractual obligation (a default), which exists irrespective of whether the Company has a legal defense to making redemption payments, and the

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[85] A1180 (Charter Art. IV § C.7.1.2).

[86] *See Berger v. Weinstein*, 350 F. App'x. 633, 638 (3d Cir. 2009) (analyzing a "specifically bargained for" default provision in a complex real estate transaction that allowed a party to receive liquidated damages and affirming conclusion that "a default is not the same as a breach of contract"); *see also* 3 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* Form 5.4 § 3(C) (4th ed. 2021) (providing for creation of two board seats to be filled by holders of preferred stock where "the equivalent of [six] quarterly dividends (whether or not consecutive) payable on any share or shares of _____ Preferred Stock *are in default*" (emphasis added)).

[87] Post-Tr. Op. at 59 ("Based on the court's prior ruling, the Company only owes interest on funds that could be deployed legally for redemptions but which are not used for that purpose.").

[88] MJOP Op. at 19.

Company's entitlement under the common law solvency test to withhold redemption payments.

In *In re Bicoastal Corp.*, 600 A.2d 343, 351 (Del. 1991), this Court held that a charter provision granting junior preferred stockholders a mandatory redemption right also granted the junior preferred stockholders an alternative right "in ***default*** of that" redemption right to elect a majority of the board if the company failed to redeem "for any reason."[89] The Court explained that the impossibility defense to a redemption payment arising from an injunction "does not excuse nonperformance where the promisor has indicated an intent to assume the risk."[90] In *Bicoastal*, this Court viewed "default" and a failure to perform "for any reason" as synonymous and interchangeable. Thus, the Company's failure to perform a financial obligation for any reason is a "default" under the Interest Provision, and, because the unpaid amount is "owed" to the redeeming Preferred Stockholders, interest accrues on "all" such "amounts then owed."[91]

In its MJOP Opinion, the court hypothesized that parties could have drafted the Interest Provision to apply "'[i]n the event the Corporation *fails to make* any

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[89] *In re Bicoastal Corp.*, 600 A.2d 343, 351 (Del. 1991) (emphasis added).
[90] *Id.*
[91] A1180 (Charter Art. IV § C.7.1.2).

payments due . . . .'"[92] But—as the Court of Chancery acknowledged in its Post-Trial Opinion—that is precisely what "default" means.[93] The parties *could* have used many different formulations in drafting the Interest Provision. Indeed, they could have clarified that the Interest Provision is triggered only where the Company "fails to make any payments to the extent permitted by law" or "out of legally available funds" if they intended that meaning. They did not. Rather, the Interest Provision simply states that TradingScreen "shall" make the redemption payments on the Installment Date schedule. Because interest is triggered by a "default" on an Installment Date, the trial court inappropriately attempted to re-write the contract with completely different language the parties simply did not use.[94] The meaning is clear from the face of the document and should be enforced accordingly.

If the Company "defaults" as it did on each of the Installment Dates, the Interest Provision, in turn, imposes an unqualified contractual obligation on TradingScreen to pay interest on any unpaid redemption payments irrespective of

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[92] MJOP Op. at 20 n.46 (emphasis in original).
[93] *See* Post-Tr. Op. at 58 (noting that *Black's Law Dictionary* defines the verb "default" as "to fail to perform a contractual obligation").
[94] *See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) ("[I]t is not the proper role of a court to rewrite . . . a written agreement.").

the cause of the Company's failure to pay, including whether the Company lacked "legally available funds." The words "any payments due" create no limitation on the interest payment obligation; on the contrary, the Interest Provision broadly refers to *any* payments that are *due* on a given Installment Date.[95] The bargain that the parties memorialized in the Charter does not say that interest only accrues on unpaid legally available funds. Rather, interest accrues on "*all* amounts *then owed* pursuant to" the Redemption Provision.[96] This *includes* any redemption payments the Company cannot legally pay when due and which are deferred—*but still owed*—pursuant to Sections 7.1.2 and 7.1.3.

The ordinary meanings of "payments due," "amounts then owed," and "amounts payable" confirms that the Interest Provision is triggered even if the Company had a legal defense to making payment of the redemption amounts. A debt is "owed" from whenever the parties agree it is due until paid. A debt becomes "due and payable" only when it is both owed *and* "subject to immediate collection."[97] Since the parties did not use "amounts payable" in the Interest

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[95] *See also Seaford Assocs.*, 2003 WL 21254847, at *5 (finding a default where party to lease failed to make rental payments on date specified by lease).
[96] A1180 (Charter Art. IV § C.7.1.2 (emphasis added)).
[97] *See Pine River Master Fund Ltd. v. Amur Fin. Co., Inc.*, 2017 WL 4023099 (Del. Ch. Sept. 13, 2017) (adopting *Black's Law Dictionary* definition of "due and payable" to mean "owed and subject to immediate collection because a specified

Provision and instead referred to a default on "payments due" and interest accruing on "all amounts then owed," the trial court erred by effectively rewriting the Redemption Provision to use the inconsistent and much different "amounts payable" term that appears nowhere in the Interest Provision.

The Post-Trial Opinion could not help but describe the Interest Provision using language that reinforces the Company's obligation to pay 13% interest regardless of a legal basis to withhold the principal payment. In describing the Installment Date schedule established by the Redemption Provision, the trial court explained that "[t]he Charter contemplated that the Company would pay the redemption price in three equal installments, with one-third of the price ***due*** on the six-month, twelve-month, and eighteen-month anniversaries of the redemption date."[98] The trial court's description of the Redemption Provision (correctly) omits any mention of a "legally available funds" limitation or any other qualification on what is "due" after the Preferred Stockholders tender their shares for redemption.

On September 15, 2014, TradingScreen was obligated to pay to Continental the first installment of approximately $2.37 million to Continental.[99] Likewise, on

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date has arrived or time has elapsed, or some other condition for collectability has been met").

[98] Post-Tr. Op. at 5 (emphasis added).

[99] *See supra p.* 12.

March 15, 2015 and September 15, 2015, TradingScreen was required to pay the second and third installments in the same amount. Instead of making the aggregate $7,112,828.73 payment required by the Charter in three equal installments of $2,370,942.91 on the Installment Dates, TradingScreen paid Continental just $658,321.85 between September 2014 and August 2020, which hardly reduced the amount due on the first Installment Date. The Company's failure to render payment in full on all three of the Installment Dates constituted three separate payment "defaults" triggering the Interest Provision.

2. Read As A Whole, The Charter's Text Confirms Continental's Interpretation

"It is well established that a court interpreting any contractual provision, including preferred stock provisions, must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."[100] Throughout the Redemption Provision, the word "due" refers to redemption payments for which the Installment Date has arrived regardless of whether the Company has a legal defense to avoid payment because of a lack of

[100] *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998); *see also GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) ("[A] court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage.").

funds. The Interest Provision applies to "all amounts then owed" rather than all amounts then "payable."

In the final sentence of Section 7.1.2, the Charter provides that "all amounts *due and owing* from the [Company] pursuant to this [Section 7.1.2] shall become *fully due and payable* upon" the occurrence of specified corporate events.[101] The juxtaposition of the phrase "amounts due *and owing*" in the same sentence as the phrase "due *and payable*" underscores the parties' ability to differentiate between amounts that are "owed" and amounts that are "payable"—and their agreement for interest to run on the former and not merely the latter.

The "due and payable provision" in the final sentence of Section 7.1.2 applies upon the occurrence of a Liquidation Event (including a merger and sale of all assets) or a Qualified Public Offering.[102] Under the Charter, a Liquidation Event renders the legal restrictions on redemption payments inapplicable and entitles non-redeeming Preferred Stockholders to a specified liquidation preference.[103]

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[101] A1180-A1181 (Charter Art. IV § C.7.1.2 (emphasis added)).

[102] *See* A1180-A1181 (Charter Art. IV § C.7.1.2); A1172 (Charter Art. IV § C.4.1.1 ("Liquidation Event" defined to include a "liquidation, dissolution or winding up")); A1173 (Charter Art. IV § C.4.2 (change in control treated as "Liquidation Event" triggering liquidation preference for Preferred Stockholders under Charter Art. IV § C.4.1.1)); A1174-A1175 (Charter Art. IV § C.6.2 (Qualified Public Offering)).

[103] A1172 (Charter Art. IV § C.4.1.1 ("Liquidation Event" entitles holders of Series D Preferred Stock to liquidation preference at specified rate "to be paid out of the

Similarly, a Qualified Public Offering triggers the automatic conversion of unredeemed Series D Preferred Stock into common stock.[104] However, the last sentence of Section 7.1.2 ensures that , if the Company fails to redeem 100% of shares tendered for redemption on any Installment Date, and a subsequent Liquidation Event or Qualified Public Offering occurs, the redemption amount "due and owing" from such Installment Date becomes "fully due and payable" to redeeming Preferred Stockholders in lieu of the treatment they would have received as non-redeeming Preferred Stockholders. Under the trial court's construction, however, the lack of legally available funds results in no amount ever being "due and payable," because no amount was ever "due and owing."[105] This result would be absurd.[106]

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assets of the Corporation or the proceeds of such Liquidation Event available for distribution . . . , whether such assets are capital, surplus or earnings")).

[104] A1174-A1175 (Charter Art. IV § C.6.2 (outstanding Series D Preferred Stock automatically converts into common stock "immediately prior to the closing of a Qualified Public Offering")).

[105] *Due and payable*, *Black's Law Dictionary* (11th ed. 2019) ("(Of a debt) owed and subject to immediate collection because a specified date has arrived or time has elapsed, or some other condition for collectibility [*sic*] has been met.").

[106] *See also, e.g.*, *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 891 n.45 (Del. 2015) ("In the interpretation of a promise or agreement or a term thereof, . . . an interpretation which gives a reasonable, lawful, and *effective* meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]" (emphasis added) (internal quotation marks omitted)); *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (Del.

Even if the Company has a legal defense to non-payment, any portion of a redemption payment that goes unpaid on an Installment Date remains "due" *and* "owing" until paid under the final sentence of Section 7.1.2. Likewise, the Interest Provision dictates that interest runs on "all amounts then owed" following an Installment Date, without imposing the additional requirement that the unpaid amount be "payable" as of the Installment Date.

The Continuing Redemption Provision reinforces this analysis. It provides that "[i]n the event the Corporation has insufficient cash to pay the holders of the Series D Preferred Stock the full redemption amount *DUE* to them under [Section 7.1.2]," then the Preferred Stockholders are entitled to *pro rata* distribution of any cash available until paid in full.[107] The Continuing Redemption Provision does not provide that, if the Company has insufficient cash to pay the full redemption amount, then that amount "is not owed," "shall never be due" or refer to the amount "due" as an amount that "would otherwise be due" if the Company had legally sufficient

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2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, *reconciles all of the provisions of the instrument when read as a whole*." (emphasis added)); *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[A] court must construe the agreement as a whole, *giving effect to all provisions therein*." (emphasis added)).

[107] A1181 (Charter Art. IV § C.7.1.3) (emphasis in italics and capitalized).

funds. Nor does the Charter provide that interest accrues on amounts owed under Section 7.1.2, subject to an exception for "insufficient cash" as contained in Section 7.1.3. Rather, the Continuing Redemption Provision reflects the parties' agreement that redemption payments are "due" on the Installment Dates irrespective of the Company's ability to make them. If the Company cannot make the redemption payments when due, then (a) interest accrues on the unpaid amounts (*i.e.*, the amounts still owed), and (b) if the reason for failure to pay is insufficient cash, the Company will pay "any available cash" to the Redeeming Preferred Stockholders *pro rata*.

The trial court's failure to distinguish between the Charter's consistent and logical use of specific terms addressing "payments due," "amount then owed," and "amounts payable" resulted in a misinterpretation of when the Interest Provision is triggered.

3. The Parties Intended The Interest Provision To Protect the Preferred Stockholders In The Event The Company Would Not Or Could Not Redeem Their Shares

"The basic business relationship between parties must be understood to give sensible life to any contract."[108] Under Defendants' view of the Charter (which the

[108] *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017).

trial court accepted), a default can only trigger interest if (1) the Company has surplus; (2) the Company has "legally available funds"; (3) the Board determines in its sole discretion that it has so much cash lying around that it has zero colorable use for those "legally available funds"; and (4) notwithstanding the first three conditions, the Company breaches its redemption payment obligation by keeping the cash. This interpretation eviscerates the parties' clear intent, produces an absurd result, and effectively renders the Interest Provision a nullity.

The parties recognized the possibility that TradingScreen might not have sufficient legally available funds to make the redemption payments in full on the Installment Dates.[109] The Charter balanced that risk in multiple ways. The Charter mitigates risk in favor of the Company by prohibiting the Preferred Stockholders from selling their Series D Preferred Stock for approximately five years from the date of their initial investment,[110] requiring the Preferred Stockholders to attempt to sell their shares before undertaking to redeem them,[111] and, only after a private sale

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[109] A861 (Defs.' Post-Tr. Ans. Br. at 5 ("The parties' bargain included a redemption right, but the parties expressly recognized that, if the holders of the Series D exercised this right, TradingScreen might not have sufficient funds to make the redemption.").
[110] A1180 (Charter Art. IV § C.7.1.1).
[111] A1180 (*Id.*).

fails, spreading out TradingScreen's redemption payment obligations over a nineteen-month period.[112]

The Charter mitigates the risk in favor of the Preferred Stockholders, in part, by including the Continuing Redemption Provision. But the Continuing Redemption Provision merely says that insufficient cash does ***not*** act as a complete bar to an *eventual* recovery of a Preferred Stockholder's investment. To incentivize the Company to maintain sufficient legally available funds in order to make *timely* payments in full and to ensure a return on the Preferred Stockholders' investment, the parties also added the Interest Provision.[113] The trial court's rewrite of the

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[112] The Company has thirty days from the Redemption Date to redeem the Series D Preferred Stock *plus* eighteen months thereafter to pay the redemption proceeds. A1180 (Charter Art. IV § C.7.1.2).

[113] *See, e.g.*, *Giesecke+Devrient Mobile Sec. Am., Inc. v. Nxt-ID, Inc.*, 2021 WL 982597, at *9 n.11 (Del. Ch. Mar. 16, 2021) (finding "perpetual 15% dividend rate . . . is what incentivizes the Company to redeem the preferred stock, so as to both provide Plaintiff with liquidity and to allow the Company to avoid the continuing obligation to pay an extremely high dividend payment into perpetuity"); *Mueller v. Kraeuter & Co.*, 25 A.2d 874, 877 (N.J. Ch. 1942) ("The defendant should have prepared for the retirement of its stock and taken every reasonable necessary step in order to be able to fulfill its contract."); *supra* notes 25, 26. The parties could have agreed to include a different penalty provision in the Charter or negotiated a resolution after the Company defaulted in order to suspend or avoid the accrual of 13% interest. *See SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 991 (Del. Ch. 2010) (explaining investors can request "penalty provisions" that take effect where a "[c]ompany's available cash flow does not permit . . . redemption—e.g., the redemption amount shall be paid in the form of a one-year note to each unredeemed

Interest Provision resulted in Continental making an interest-free loan of approximately $6.5 million to the Company for six years based on a redemption valuation in 2014. This outcome makes no sense and never would have been approved by the former CEO of Morgan Stanley and the manager of a $4 billion investment fund.

"An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."[114] Here, the trial court's interpretation is beyond unreasonable. Requiring Plaintiffs to demonstrate that the Company breached a legal duty to make redemption payments in order for interest to become payable does not make any economic sense.[115] Such an interpretation would leave investors at the board's mercy to pay them (or not) at the board's sole discretion (which the Post-Trial Opinion suggests is nearly limitless) without consequences. No reasonable investor would have accepted this result, which permits the Company to hold Continental's redemption payments as an interest free loan for nearly six years.

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holder" (quoting NVCA, Model Term Sheet For Series A Preferred Stock Financing 6 n.14 (Apr. 2009)).

[114] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

[115] *See* A753-A754 (Tr. (Trudeau) 750:18-751:1).

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the MJOP Order and Final Order below and direct the trial court to find that (i) interest began to accrue at the contractual rate of 13% per annum on all unpaid amounts from the Installment Dates on which they became due; and (ii) interest compounds annually.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2021, my firm served a true and correct copy of the foregoing *Public Version of Appellant's Corrected Opening Brief* by File & Serve*Xpress* upon the following counsel of record:

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