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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.	)	**PUBLIC VERSION** **EFILED: December 17, 2021** No. 290, 2021 Court below: Court of Chancery of the State of Delaware C.A. No. 10164-VCL

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The Court of Chancery has twice ruled that TradingScreen Inc. ("TradingScreen," or the "Company") was not in breach of its obligation to redeem shares of its Series D Preferred Stock (the "Preferred Stock") held by Continental Investor Fund LLC ("Continental"). As such, the Court of Chancery has also twice ruled that interest never began to accrue under Section 7.1.2 of the Company's amended and restated certificate of incorporation (the "Charter") because the Company was never in default of its obligation to make a redemption payment.

It is a well-established principle of Delaware law that the existence of "funds legally available" operates as a condition precedent to the enforcement of a mandatory redemption right regardless of whether such term appears in the applicable redemption provision because this limitation is implied by law. Not only is this limitation on mandatory redemption rights settled under Delaware law, it is also well within the reasonable expectations of sophisticated investors, such as Continental. "This is not a case where the board had ample cash available for redemptions and simply chose to pursue a contrary course." *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 989 (Del. Ch. 2010), *aff'd*, 37 A.3d 205 (Del. 2011). The Company formed a special committee of its board of directors (the "Committee"), and, as the trial court held, engaged in a good faith process consistent with established Delaware law to determine whether the Company had funds legally

available to make redemption payments. In both the Opinion denying Plaintiffs' Motion for Judgment on the Pleadings and in the Post-Trial Opinion, the trial court conducted a well-reasoned analysis and applied binding precedent from this Court to determine that the Company was not in breach of any legal or contractual obligation under the Charter. In fact, Continental does not appeal the trial court's ruling that the Company did not breach its redemption obligation under the Charter.

Instead, Continental's appeal seeks to reverse the trial court's ruling that Continental is not entitled to interest at a rate of 13% beginning eight years ago. The Charter provides that if 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%)" (the "Interest Provision"). A1180. Continental argues that "default" means a failure to make a redemption payment, *for any reason*. The narrow issue on this appeal, therefore, is the meaning of "default" under the Interest Provision.

Continental's recycled arguments and the new ones it improperly raises for the first time on appeal all suffer from being contrary to the plain language of the Interest Provision and ignoring the accepted meaning of "default." A "default" is the omission or failure to perform a legal or contractual duty. Here, in the context

of a redemption obligation, that means a failure to make a redemption payment if the Company had funds legally available to do so.

Not surprisingly, Continental's interpretation of the Interest Provision was rejected twice by the Court of Chancery, and it should be rejected for a third time by this Court. The unambiguous language of the Charter provides that interest shall accrue only upon a *default* by the Company to make a redemption payment in accordance with Section 7.1.2. Because the Company never failed to use funds legally available to satisfy the redemption obligation, it never failed to perform a legal or contractual obligation and, therefore, was never in default under Section 7.1.2. That being the case, no matter how many ways Continental attempts to contort the plain language of Section 7.1.2, interest never began to accrue until July 2020.[1] This Court should affirm the well-reasoned opinions of the trial court.

[1] The trial court held that interest began to accrue at the default rate on July 7, 2020, when the Company offered to pay $5,485,947 to resolve Continental's claims, until the Company redeemed the shares on August 27, 2020. Ex. C at 59. The resulting amount of interest was $99,648.85, which was paid in connection with the entry of the Final Order and Judgment. *Id.* at 60. Defendants Below, Appellees do not appeal this ruling of the trial court.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that Continental is not entitled to interest at a rate of 13% per annum running from each redemption payment installment date (each an "Installment Date" and collectively, the "Installment Dates") under Section 7.1.2 of the Charter. Contrary to Continental's argument, a default does not occur if the Company fails to make a redemption payment on time and in full, for any reason. Rather, the clear and unambiguous language of the Charter provides that interest accrues only if the Company *defaults* on its obligation to make redemption payments under Section 7.1.2. The common and accepted meaning of "default" is the omission or failure to perform a legal or contractual duty. Under settled Delaware law, the Company was prohibited from making redemption payments absent its having the requisite funds legally available therefor. As such, a default occurs only if the Company has funds legally available and fails to redeem the Preferred Stock. Because TradingScreen used all its funds then legally available to redeem the Preferred Stock, the Company was never in default of its redemption obligations. Accordingly, interest never began to accrue under Section 7.1.2.

STATEMENT OF FACTS

A. The Parties.

TradingScreen is a global provider of electronic trading solutions that enable institutional investors to access markets, connect with counterparties, and execute trades. Ex. C at 3. Former plaintiff Technology Crossover Ventures ("TCV") is an experienced private equity investor with $10 billion under management that invests primarily in preferred stock. *Id.* Appellant, Continental, is the family investment vehicle of Philip Purcell, the former CEO of Morgan Stanley. *Id.*

B. Continental Invests In Preferred Stock With Limited Redemption Rights.

In August 2007, funds managed by TCV ("TCV Funds") and other sophisticated investors, including Continental (collectively, the "Preferred Stockholders"), entered into an agreement with the Company to purchase shares of the Preferred Stock. *Id.* The parties bargained at arm's-length concerning the terms of the Preferred Stock issuance. *Id.* at 6; *see* B35. Following these arm's-length negotiations, the Company adopted an amended and restated certificate of incorporation (previously defined as the "Charter"), which provided various rights regarding the Preferred Stock, including the redemption right reflected therein in Article IV, Section 7.

The Preferred Stockholders recognized that the redemption right would be governed by common and statutory law and obtained legal advice before investing. B49. In this regard, the Preferred Stockholders knew (or should have known) when they purchased the Preferred Stock that whether a corporation has funds legally available to deploy for redemption constitutes a legal limitation on the mandatory redemption provisions, and that if the holders of the Preferred Stock exercised their redemption rights under the Charter, the Company might not then have sufficient funds legally available to make the redemption. Ex. C at 5; B49. The Preferred Stockholders further understood this legal limitation on their redemption rights to mean "the corporation needs sufficient resources to operate for the foreseeable future[.]" B50. Accordingly, the Preferred Stockholders understood the risks associated with their equity investment in the Company and chose to enter into the agreement with "eyes open." B49.

On September 11, 2007, TCV Funds purchased 4,340,398 shares of Preferred Stock constituting 52.4% of the series, and Continental purchased 425,663 shares of Preferred Stock constituting 5.3% of the series. Ex. C at 4-5. As majority holders of the Preferred Stock, TCV Funds were, among other things, entitled to appoint two directors to TradingScreen's board of directors (the "Board"). *Id.* at 6.

C. Continental Exercises Its Redemption Rights.

In June 2012, TCV Funds notified the Company that they intended to sell their shares of Preferred Stock. *Id.* at 7. The Board thereafter formed the Committee to facilitate the sale and to consider other related matters consistent with the applicable terms of the Charter. *Id.* at 8.

On March 14, 2013, after failed efforts to sell their Preferred Stock, TCV Funds notified the Company that they were exercising their redemption rights. *Id.* Continental elected to participate in the redemption for all of its shares. *Id.*

D. The Committee Evaluates Funds Legally Available For Redemption And Redeems Shares.

The Committee, with the assistance of its independent legal and financial advisors, began its evaluation of the amount of funds legally available to redeem shares of Preferred Stock. Among other things, in making this determination, the Committee considered the requirements of the Company's business, its financial prospects in the intermediate term, its ability to obtain debt financing, and the Company's long-term health. *Id.* The Committee also considered the Company's unique business needs, realizing that because the Company's core business involved offering a trading platform essential to the operations of its global financial institutional clients, the Company required adequate cash reserves to demonstrate to such clients that the Company was financially secure and capable of

supporting their core operations over a multi-year term. *Id.* at 16. In September 2014, at the conclusion of this process, the Committee determined that the Company had $7.2 million available to redeem shares of Preferred Stock. *Id.*

On September 5, 2014, the Preferred Stockholders were informed of the Committee's decision and that the Company would therefore redeem $7.2 million of Preferred Stock. Following this announcement, the Company sent checks payable to TCV Funds for $4,400,049.86 in exchange for 263,319 shares and to Continental for $464,703.09 in exchange for 27,810 shares. *Id.* at 22. Because this did not represent the entire amount of shares the Preferred Stockholders sought to redeem, the Preferred Stockholders were also informed that the Committee would meet regularly, and no less than quarterly, to determine the amount of funds legally available for future redemption payments. *Id.*

E. TCV Funds And Continental Commence This Action.

On September 24, 2014, TCV Funds and Continental (together, "Plaintiffs") filed suit, asserting claims for breach of contract and breach of the fiduciary duty of loyalty on the theory that the Company and the members of the Committee, respectively, failed to use all "funds legally available" to redeem their shares of Preferred Stock, seeking a declaratory judgment that interest was accruing at 13% per annum, and maintaining that the full redemption amount, plus such

interest, was immediately due and owing based on the alleged breach of the Charter. *Id.* at 23. The complaint also sought injunctive relief to prevent the Company from "dissipating or otherwise encumbering the Company's assets, including its cash." *Id.* at 23-24.

1. The Trial Court Denies Plaintiffs' Motion For Judgment On The Pleadings.

On October 24, 2014, Plaintiffs moved for judgment on the pleadings (the "MJOP"). *Id.* at 24. Among other things, Plaintiffs argued that the Company's failure to redeem all the shares of Preferred Stock they had put for redemption constituted a default that caused interest to accrue at a rate of 13% annually on the unredeemed amount. *Id.*[2] Plaintiffs incorrectly argued that they did not need to prove a breach of the Charter for interest to accrue, and that instead the Interest Provision unambiguously provided that whenever TradingScreen failed to make a redemption payment in full, for any reason, then interest immediately began to accrue. Ex. A at 18-19.

On February 26, 2015, the trial court denied the MJOP. *Id.* at 22; Ex. C at 24. Relevant to this appeal, the trial court held that Plaintiffs were not entitled

[2] As the MJOP was pending, the Committee held its next quarterly meeting on November 21, 2014, and determined that an additional $2.5 million was legally available for redemption. *Id.* The Company then used that $2.5 million to redeem additional shares of Preferred Stock. *Id.*

to a declaration that interest was accruing at 13% under the Interest Provision. Ex. C at 25. The trial court explained that the Interest Provision provides that "interest shall only accrue on amounts owed pursuant to that section if TradingScreen *defaults* on any payments that are due." Ex. A at 19; Ex. C at 57 (emphasis in original). Interpreting the meaning of the word "default" as used in the Interest Provision, the trial court held that a "default" is "[t]he omission or failure to perform a legal or contractual duty." *Id.* The trial court reasoned as follows:

> If the Court were able to conclude, based on the pleadings, that TradingScreen failed to perform its contractual duty (thus defaulting), then Plaintiffs would be successful on their first count, *i.e.*, their breach of contract claim. As discussed *supra*, Section II. C., Plaintiffs cannot succeed on that claim on the pleadings. Because, on this motion, 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. In the absence of a default, interest does not begin to accrue, and Plaintiffs are not entitled to judgment on their second count.

Ex. A at 20. [3]

[3] Plaintiffs moved for certification of the trial court's decision for interlocutory appeal. Ex. C at 25. The trial court granted certification, but this Court rejected the appeal, noting that the trial court certified the appeal "even though its decision hewed closely to the Court of Chancery's thoughtful decision in *SV Investment Partners, LLC v. ThoughtWorks, Inc.* and [this Court's] affirming opinion." *Id.* (citing *TCV VI, L.P. v. TradingScreen Inc. (TradingScreen II)*, 115 A.3d 1216 (Del. 2015)).

2. The Litigation Is Stayed And All Preferred Stockholders Settle Except For Continental.

Trial occurred from February 16-19, 2016. Ex. C at 30. On May 12, 2016, an action under 8 *Del. C.* § 225 ("Section 225") was filed against certain directors of the Company (the "Section 225 Action"). *Id.* at 31. On May 23, 2016, before post-trial briefing concluded, the trial court granted Plaintiffs' motion to stay the proceedings pending resolution of the Section 225 Action. *Id.* at 32. The Section 225 Action concluded in February 2017. *Id.* However, Plaintiffs did not then move to lift the stay. *Id.*

In June 2020, the Company entered into an agreement to sell one of its subsidiaries, with the transaction resulting in the Company having sufficient funds legally available to redeem all remaining shares of Preferred Stock that had been put for redemption, plus interest (the "Subsidiary Transaction"). *Id.* On the date that the Board met to approve the Subsidiary Transaction, Continental moved to lift the stay, despite the fact that it had been over three and a half years since the conclusion of the Section 225 Action. *Id.* TCV Funds did not join Continental's motion. *Id.* at 33. Instead, the Company paid TCV Funds and all other redeeming Preferred Stockholders (except Continental) the full redemption price plus a premium equal to approximately 23% of the redemption amount. *Id.* Continental rejected the

Company's settlement offer. *Id.* at 32. TCV Funds were dismissed from this action, and Continental remained as the sole plaintiff. *Id.* at 33.

On August 27, 2020, the Company paid Continental the full redemption price, plus interest, for all of its remaining 386,266 shares of Preferred Stock, representing the amount of interest that accrued on the full redemption amount less the amount of the settlement offer (which the Company had tried to pay with funds then legally available but Continental refused to accept), assuming that interest began to run on July 7, 2020, at an annual rate of 13% in accordance with the Interest Provision. *Id.* at 33.

F. The Post-Trial Ruling.

Despite the fact that TCV Funds and all other redeeming Preferred Stockholders settled for a premium, Continental pushed forward with the litigation. *Id.* The parties completed post-trial briefing, and the trial court heard post-trial argument. *Id.* On July 23, 2021, the trial court issued its post-trial Memorandum Opinion, holding that the Company did not breach its redemption obligation under the Charter and that interest did not accrue immediately upon non-payment of the full redemption amount in 2014. *Id.* at 36-59.

The trial court re-affirmed its prior ruling regarding the Interest Provision, rejecting Continental's argument that the court's previous holding was

"'clearly wrong' because it interpreted 'default' as a noun rather than as a verb and 'failed to consult multiple dictionaries to compare definitions.'" *Id.* at 57-59.[4] The trial court reasoned that the verb form of "default" as defined in Black's Law Dictionary—"to fail to perform a contractual obligation"—was "nearly identical" to the definition of the noun form used in the court's prior ruling. *Id.* at 58-59. Accordingly, the Interest Provision was only triggered if the Company had funds legally available to redeem the Preferred Stock but did not do so. *Id.* at 59.

Under this framework, the trial court made the limited finding that, in July 2020, following the closing of the Subsidiary Transaction, the Company did have sufficient funds legally available to redeem all of Continental's remaining shares of Preferred Stock. *Id.* Because the Company did not redeem those remaining shares until August 2020, the trial court found that Continental was entitled to the full amount of interest due for the period beginning July 2020 (when the Company had the requisite funds legally available) to August 2020 (when the Company made the redemption payment). *Id.* at 59-60.[5]

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[4] Continental has dropped this line of argument on appeal.

[5] The trial court's holding was premised on extensive factual findings, not challenged here, including that the Committee acted within its business judgment in making its determination of the amount of funds legally available for redemption and that the Company did not have sufficient funds to redeem all of the shares of Preferred Stock prior to July 2020. *Id.* at 2-33, 45-59.

On August 2, 2021, Defendants caused $111,715.93 to be paid to Continental. Ex. D at 3. On August 19, 2021, the trial court entered final judgment, ordering that the Company's $111,715.93 payment to Continental on August 2, 2021 fully satisfied the final judgment, and otherwise entered final judgment in favor of Defendants on all counts in the Complaint. *Id.*

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT CONTINENTAL IS NOT ENTITLED TO INTEREST AT 13% ANNUALLY ON THE TOTAL OUTSTANDING REDEMPTION AMOUNT BECAUSE THE COMPANY WAS NOT IN DEFAULT OF THE REDEMPTION PROVISION.

A. Question Presented.

Did the trial court correctly find that interest did not begin to run under the Interest Provision because the Company was not in default of its contractual obligation to make redemption payments on each Installment Date? *See, e.g.*, A917-919.

B. Scope Of Review.

Matters of contract interpretation are reviewed *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014) ("We review questions of contract interpretation *de novo*.").

C. Merits Of Argument.

It is undisputed under the clear, unambiguous terms of the Charter that there must be a "default" for interest to accrue under the Interest Provision. The Interest Provision states that: "[i]n the event [TradingScreen] *defaults* on any payments due pursuant to [Section 7.1.2], interest shall accrue on all amounts then owed pursuant to [Section 7.1.2] equal to an annual percentage rate of thirteen

percent (13%)." A1180 (emphasis added). The term "default" is undefined in the Charter; however, the trial court correctly used well-established contract interpretation principles to apply the common meaning of "default," finding that a default under the Interest Provision occurs only if the Company "fail[ed] to perform a legal or contractual duty." Ex. C at 57 (citing Ex. A at 8). Thus, to be in default, the Company would have to fail to perform its contractual obligation to redeem the Preferred Stock. Ex. C at 34-35, 59. As the trial court correctly ruled and Continental now concedes, the Company did not have funds legally available to redeem the Preferred Stock in full on each of the Installment Dates, and therefore the Company was not in breach of its contractual duty under the Charter. *Id.* at 59. As such, the Company was not in default under the Interest Provision, and interest did not accrue. *Id.*

1. The Trial Court Correctly Interpreted The Meaning Of "Default" Under The Interest Provision.

The trial court correctly applied the commonly understood meaning of the term default in the Interest Provision. Delaware courts interpret charter provisions "according to their plain, ordinary meaning." *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) ("We give words [in a contract] their plain meaning unless it appears the parties intended a special meaning.").

Where a term is undefined in a contract, "[t]his Court often looks to dictionaries to ascertain a term's plain meaning." *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1132 (Del. 2020); *see also Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227-28 (Del. 2010) ("Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words, we often rely on them for assistance in determining the plain meaning of undefined terms."); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."); *Giesecke+Devrient Mobile Sec. Am., Inc. v. Nxt-ID, Inc.*, 2021 WL 982597, at *10 (Del. Ch. Mar. 16, 2021) (where term "days" was undefined in contract, court used the "commonly understood" definition from *Black's Law Dictionary*) (cited at OB 34); *MaD Invs. GRMD, LLC v. GR Cos., Inc.*, 2020 WL 6306028, at *4 (Del. Ch. Oct. 28, 2020) ("It is well-settled under Delaware law that courts may rely on dictionaries for assistance in determining the plain meaning of undefined terms."); *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *10 (Del. Ch. July 6, 2018) ("[I]n the case of an undefined term, the interpreting court may consult the dictionary [to determine plain meaning]."). Applying this common and acceptable practice, the trial court defined the term "default" as "[t]he omission or failure to

perform a legal or contractual duty." Ex. A at 19 (citing *Black's Law Dictionary* 417 (6th ed. 1990)); Ex. C at 57.

Other Delaware courts examining the plain meaning of the term "default" similarly have looked to dictionary definitions and applied the same reasoning as the trial court here. *See Seaford Assocs. Ltd. P'ship v. Subway Real Est. Corp.*, 2003 WL 21254847, at *5 (Del. Ch. May 21, 2003) (where "default" was undefined in contract, court used *Black's Law Dictionary* for the "common usage of the term") (cited at OB 22, 26); *see also In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10, n.87 (Del. Ch. Aug. 18, 2005) (citing to *Black's Law Dictionary* for "the usual meaning of default"); *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *10 (Del. Super. Ct. May 30, 2008) (defining default when it was not defined in a loan agreement as "[t]he omission or failure to perform a legal or contractual duty"); *Unbound Partners Ltd. P'ship v. Invoy Holdings Inc.*, 251 A.3d 1016, 1033 & n.105 (Del. Super. Ct. 2021) (using *Black's Law Dictionary* to define default in the context of a payment contract).

In *Seaford*, for example, the parties disputed whether a tenant was in default of a lease agreement. The lease provided that the tenant had the right to extend the lease term "[p]rovided that Tenant has not been in default" of its obligations under the lease. 2003 WL 21254847, at *5. The lease did not define a

"default," and so, the court applied the "common usage of the term default in the legal community" to hold that default meant "the omission or failure to perform a legal or contractual duty; esp[ecially] the failure to pay a debt when due." *Id.* (alteration in original). Reviewing the lease agreement at issue, the court concluded that the tenant was in "default" when it failed to pay rent on the date it was due under the terms of the lease agreement. *Id.* There was no condition precedent limiting or prohibiting payment and, therefore, the tenant was deemed in default for failure to perform its contractual duty to pay rent on the date specified in the lease agreement. *Id.* Consistent with the interpretation of the undefined term "default" in *Seaford*, the Company here was not in default until it had a legal obligation—*i.e.*, it was not prohibited by a lack of funds legally available—to redeem Continental's shares. [6]

Moreover, the trial court's interpretation of the Interest Provision gives effect to the term "default," whereas Continental's interpretation jettisons the term. The parties could have drafted the Interest Provision to apply whenever TradingScreen missed a payment for any reason; however, instead they expressly provided in the Charter that the Company must be in default for interest to accrue. This language suggests that "default" must have meaning, supporting a construction

[6] Notably, Continental cites *Seaford* in its OB at 26 for the proposition that the words "any payments due" in the Charter create no limitation on the interest payment obligation. As discussed below, that argument fails.

of default that involves a failure to meet a legal or contractual duty, as defined in *Black's Law Dictionary*. *See, e.g.*, *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *5 (Del. Ch. Jan. 29, 2019) (courts will not read terms "in a manner that renders provisions superfluous or creates discord or tension between the parts of the text"); *Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *5 (Del. Ch. Mar. 19, 2001) (reasoning that language used in contract must have meaning).

2. The Trial Court's Interpretation Of The Interest Provision Is Consistent With Preferred Stock Investments And The Business Relationship Of The Parties.

Under Delaware law, to "give sensible life to the contract," this Court looks to the "overall scheme or plan of the agreement and the basic business relationship between the parties." *OptiNose AS v. Currax Pharms., LLC*, 2021 WL 5071885, at *7 (Del. Nov. 2, 2021). Thus, the "meaning inferred" from the Interest Provision cannot conflict with the Charter's "overall scheme or plan." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

Here, the parties' business relationship supports the trial court's interpretation of "default." Sophisticated investors, like Continental, understand that "equity instrument[s] [are] governed by certain common law and statutory rules." Ex. A at 14 (citing *ThoughtWorks I*, 7 A.3d at 991; *In re Trados Inc. S'holder Litig.*,

73 A.3d 17, 39 n.8 (Del. Ch. 2013)); *see also* Lee F. Benton et al., *Hi-Tech Corporation: Amended and Restated Incorporation*, in I VENTURE CAPITAL & PUBLIC OFFERING NEGOTIATION, 8-23, 8-26 (3d ed. Supp. 2013) ("Cash redemption of the Preferred Stock is generally not viewed as a realistic exit alternative" and therefore "investors may include additional protective provisions or voting rights (such as designating additional directors) that become effective if the redemption obligation remains unfulfilled following the mandatory redemption date.").

One such rule under Delaware law is the prohibition on redemption absent funds legally available. *See Frederick Hsu Living Tr. v. ODN Holdings Corp.*, 2017 WL 1437308, at *11 (Del. Ch. Apr. 24, 2017) ("Delaware common law has long restricted a corporation from redeeming its shares when the corporation is insolvent or would be rendered insolvent by the redemption."). The reasoning behind this prohibition is to "prevent boards from draining corporations of assets to the detriment of creditors and the long-term health of the corporation." *Klang v. Smith's Food & Drug Ctrs., Inc.*, 702 A.2d 150, 154 (Del. 1997); *ThoughtWorks I*, 7 A.3d at 990-91 ("Authority spanning three different centuries adverts to and enforces limitations on the ability of preferred stockholders to force redemption."). Indeed, it is black-letter law that the Preferred Stockholders' right to compel the redemption was subordinate to the rights of creditors. *See* 11 William Meade

Fletcher et al., FLETCHER'S CYCLOPEDIA OF THE LAW AND PRIVATE CORPORATIONS § 5310 (perm. ed., rev. vol. 2011) ("[T]he burden rests upon the preferred shareholder to show that redemption can be accomplished without prejudicing the rights of creditors.").

Continental's interpretation of "default" is directly contrary to the purpose of Delaware law's limitation on redemptions. Under Continental's interpretation, if the Company did not have funds legally available for a redemption payment, but interest still accrued on that payment, then the Interest Provision would punish the Committee for prioritizing the Company's ability to operate for the foreseeable future (notwithstanding that it is required to do so), as well as the rights of its creditors. Not only is this an absurd result, it is also contrary to Delaware law. *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952) (while stockholders "may by contract embody a charter provision departing from the [default] rules of the common law" they cannot "transgress . . . a public policy settled by the common law or implicit in the [DGCL] itself").

Longcap PNT, LLC v. Post-N-Track Corp., 2013 WL 3629000 (Conn. Super. Ct. June 19, 2013), considered a similar question as presented on this appeal. There, the company could only make partial redemption payments because of insufficient funds then legally available. 2013 WL 3629000, at *2. In *Longcap*, the

"funds legally available" limitation under common law was expressly set forth in the relevant corporate documents and agreements, and thus had the same import as the identical limitation implied by law in the TradingScreen Charter. The *Longcap* court rejected the plaintiff's argument that the defendant had defaulted when it only made "partial [redemption] payments based on its calculation of what funds [were] 'legally available' quarterly." *Id.* Specifically, in *Longcap*, the court held that the definition of default "as a failure [by the Corporation] to make all or any portion of any redemption payment…when due and payable," did not include deferred redemption payments due to insufficient funds then legally available. *Id.* at *5. The same construct applies here and is consistent with preferred stock investments generally and the business relationship between the parties to such investments.

3. Continental's Litany Of Arguments Seeking To Contrive A New Meaning For The Term "Default" All Fail.

In seeking reversal of the trial court's ruling, Continental argues that the trial court erred in adopting the dictionary definition of "default" and that, under the Charter, the Interest Provision was triggered immediately when the Preferred Stock was not redeemed in full on each Installment Date, regardless of whether the Company had funds legally available to make such redemption payments. In making this argument, Continental asks the Court to disregard basic tenets of contract

construction, to consider arguments it failed to raise below, and to consider extrinsic evidence to construe concededly unambiguous language.

"The primary rule of construction is this: where the parties have created an unambiguous integrated written statement of their contract, the language of that contract (not as subjectively understood by either party but) as understood by a hypothetical reasonable third party will control." *In re NextMedia Invs., LLC*, 2009 WL 1228665, at *6 n.30 (Del. Ch. May 6, 2009); *see also NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005) ("Delaware adheres to the 'objective' theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party."). Here, the trial court's interpretation of the term "default" in the Interest Provision is the only objective, reasonable interpretation, and Continental's arguments to the contrary must be rejected. "[I]t is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts." *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006). While Continental may now wish that it had defined "default" separately in the Interest Provision or otherwise in the Charter, the common meaning, as found by the trial court, controls.

(a) Continental Misconstrues The Meaning Of A Mandatory Redemption Provision

In an attempt to avoid the ordinary meaning of the term default in the Interest Provision, Continental characterizes the common law "funds legally available" limitation as a legal defense as opposed to a condition precedent to the Company's ability to make redemption payments. OB at 23-24. Continental's argument misconstrues the separate and distinct legal doctrines of a condition precedent and a legal defense to non-payment. *See Seaford*, 2003 WL 21254847, at *5 n.30 ("A condition precedent is defined as: An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises."); *Martin v. Star Publ'g Co.*, 126 A.2d 238, 242-43 (Del. 1956) (discussing elements of contract defenses to nonpayment).

Here, "funds legally available" is a clear condition precedent required by law to any redemption payment obligation. *See Harbinger Cap. Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 221 (Del. Ch. 2006) (holding that the existence of funds legally available was a condition precedent to dividend right under certificate of designation). For example, in *Harbinger*, the Court of Chancery interpreted a similar provision as establishing a condition precedent. *Id.* There, the certificate of designation required "the corporation to 'redeem, to the extent of funds legally available therefore' all shares at a fixed price plus

accumulated dividends on April 1, 2009." *Id.* The court explained that, under this language, "a dividend is effectively payable on that redemption date *if the corporation has sufficiently legally available funds to make payment*." *Id.* (emphasis added); *see also ThoughtWorks I*, 7 A.3d at 992 ("sophisticated investors understand that mandatory redemption rights provide limited protection and function imperfectly, particularly when a corporation is struggling financially"); Ex. C at 36 ("When bringing a claim for a breach of a mandatory redemption provision, the plaintiff must prove that the corporation had additional funds that it could deploy legally for redemptions (commonly called 'funds legally available'), yet failed to deploy the funds for that purpose."); *In re Altaba, Inc.*, 2021 WL 4705176, at *11 (Del. Ch. Oct. 8, 2021) ("The DGCL contains other provisions that . . . are designed to prevent equity investors from receiving funds at the expense of creditors, such as . . . restrictions on redemptions of capital stock.").

Because of the "funds legally available" condition precedent, these so-called "mandatory" redemption provisions do not offer the "clear path to a large monetary judgment and concomitant creditor remedies" that Continental would suggest, as evidenced by the fact that "many alternatives . . . have evolved." *ThoughtWorks I*, 7 A.3d at 992. Plaintiffs "understood that one of the legal limitations on redemptions is that the corporation has to be able to continue as a

going concern." B49. Accordingly, Continental cannot now credibly argue that the common law "funds legally available" condition precedent does not apply to the Interest Provision and is instead a legal defense to TradingScreen's purported failure to perform its contractual obligation. OB at 23.

Unsurprisingly, the cases that Continental cites in support of its argument are inapposite. Continental mistakenly asserts that *In re Bicoastal Corp.*, 600 A.2d 343, 351 (Del. 1991), which was decided in the context of an impossibility defense in a Section 225 action, stands for the proposition that the term "default" is synonymous and interchangeable with a failure to perform "for any reason." OB at 24. *Bicoastal* does not make the sweeping proclamation of contract interpretation that Continental attributes to it. In *Bicoastal*, the underlying certificate of incorporation at issue provided that, "[u]pon the failure of the Corporation to redeem *for any reason* the [preferred stock] as and when required by the mandatory redemption provision in subdivision (d)1 hereof, the holders of [preferred stock] shall have the right and option, *at any time* after such failure to redeem, to [exercise the election right]." *Bicoastal*, 600 A.2d at 347 n.5 (emphasis in original). Thus, unlike here, the parties in *Bicoastal* expressly included the language Continental seeks to insert in the TradingScreen Charter: "for any reason." Specifically, the preferred stock right at issue in *Bicoastal*—election of directors (not a monetary right

to payment of interest)—was triggered by the failure to make a redemption payment *for any reason*. *Id.* *Bicoastal* cannot be reasonably read to support the proposition that "default" and "for any reason" are synonymous under Section 7.1.2 of the TradingScreen Charter.

Continental's reliance on *Berger v. Weinstein*, 350 F. App'x. 633, 638 (3d Cir. 2009) is likewise misplaced. *See* OB at 23 n.86. Continental cites *Berger* for the incorrect proposition that a "default triggering 13% interest does not require a showing that TradingScreen breached the Charter by failing to perform a legal duty." *Id.* at 23. However, the parties in *Berger* specifically negotiated a "Default Clause" that supplied two exclusive occurrences that could trigger a default under the contract: (i) a failure to close because of a failure to pay closing costs, or (ii) a failure to make a termination payment. *Berger*, 350 F. App'x at 638. Unlike *Berger*, where the "Default Clause in the agreement was a specifically bargained for provision" that defined the required conditions for a default, *id.*, here the parties did not define the term "default" and therefore the trial court correctly looked to the plain and ordinary meaning of "default." *See supra* Section I.C.1., at 16-20.

(b) Continental's "Payment Due" vs. "Amounts Then Owed" vs. "Amounts Payable" Argument Is Incomprehensible And Wrong

Continental argues, for the first time on appeal, that "[t]he 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." OB at 26. Continental's novel argument appears to be that, because *Black's Law Dictionary* defines "due and payable" as "owed and subject to immediate collection," the term "due" should be interpreted as meaning "owed" and "payable" as meaning "subject to immediate collection." *Id.* In other words, Continental attempts to divorce the term "due" from any definition suggesting it requires immediate collection. Continental's argument, however, quickly evaporates as *Black's Law Dictionary* also defines "due" in isolation as "[i]mmediately enforceable." DUE, *Black's Law Dictionary*, (11th ed. 2019); *see also Frye v. J.D. Cousins & Sons, Inc.*, 416 N.Y.S.2d 365, 367 (N.Y. App. Div. 1979) ("The word 'due' is defined in *Black's Law Dictionary* (Rev. 4th ed.) as 'that which the law or justice require to be done or paid.'"). Indeed, courts generally recognize that "[w]hen something is 'due' in the context of payment, it is '[i]mmediately enforceable.'" *Hebrank v. LinMar IV, LLC*, 2014 WL 3797942, at *3 (S.D. Cal. July 29, 2014); *see also DeNicolo v. Hertz Corp.*, 2020 WL 5816365,

at *10 (N.D. Cal. Sept. 30, 2020) (relying on California Office of the Attorney General opinion stating that "'Due' generally means 'having reached the date at which payment is required' or '[i]mmediately enforceable.'").

At bottom, Continental incorrectly argues the trial court erred by substituting the term "amounts payable" for the Interest Provision's term "payments due." OB at 27. Because the trial court never mentioned the term "amounts payable" in either of its opinions, Continental's argument that the trial court rewrote the Charter relies solely on the fact that the court interpreted the term "payments due" to mean "payments that were immediately enforceable," an interpretation that did not include payments of funds that are not then legally available. Continental mistakenly contends that "payments due" should have been interpreted as "payments owed"—indeed, courts have widely rejected this interpretation of the word "due" in the context of payments. Continental's strained interpretation is contrary to the plain language of the redemption provision and should be rejected by this Court.

(c) Read As A Whole, The Charter's Text Confirms The Trial Court's Interpretation

For the first time on appeal, Continental advances the argument that, when read as a whole, the Charter purportedly evidences an intent to distinguish between amounts "owed" and "payable." In making this argument, Continental points to the final sentence of Section 7.1.2 of the Charter, which applies to

liquidation events or qualified public offerings, as an example of the parties' purported ability to differentiate between amounts "owed" and amounts "payable." OB at 29. This new argument has no basis in law or logic.

Liquidation events are separate and distinct from redemption rights. A liquidation event is an end-stage transaction, whereas a redemption right necessarily contemplates the company continuing as a going concern. *See Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 938 (Del. Ch. 2012) (finding "[a]utomatic [r]edemption" provision connected to liquidation event did not include equivalent of funds legally available requirement, but "[o]ptional [r]edemption" provision exercisable by preferred stockholders required company to assess funds legally available to redeem). In addition, as set forth above, the definitions of "due," "owed," "owing," and "payable," are synonymous. *See supra* Section I.C.3(b), at 29-30. Accordingly, there is no independent significance to which of these terms is used in the various Charter provisions. *See Sanyo Elec. Co., Ltd v. Intel Corp.*, 2021 WL 747719, at *9 (Del. Ch. Feb. 26, 2021) ("The plain meaning of 'constitutes' supports . . . equivalency. Merriam-Webster defines 'constitute' as 'make up, form, compose.' [Therefore,] '[c]onstitute,' 'compose,' and 'comprise' are interchangeable."); *see also Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *12 (Del. Super. Ct. Sept. 10, 2021) (recognizing that

this Court, in certain circumstances, has applied synonymous terms in insurance contracts, reasoning that the terms were not independently significant, and any renderings reflected the terms' plain meaning adequately); *Prairie Cap. III, L.P. v. Double E. Holding Corp.*, 132 A.3d 35, 51 (Del. Ch. 2015) ("Language is sufficiently powerful to reach the same end by multiple means, and drafters can use any of them to identify with sufficient clarity the universe of information on which the contracting parties relied.").

Continental also argues that Section 7.1.3 of the Charter (the "Continuing Redemption Provision") demonstrates the parties agreed that TradingScreen could be in default under the Interest Provision even if it did not have funds legally available to make a full redemption payment when due. OB at 10. Continental misconstrues the Continuing Redemption Provision.

The Continuing Redemption Provision states that "[i]n the event the Corporation has insufficient cash to pay the holders of the [Preferred Stock] the full redemption amount due to them under [Section 7.1.2], then the holders of [Preferred Stock] shall share ratably in any cash available pro rata in proportion to the respective amount of [Preferred Stock] held by such holder until all such holders are paid in full." A1181. According to Continental, the use of the term "due" in the Continuing Redemption Provision reflects the parties' agreement that "payments are

'due' on the [i]nstallment [d]ates irrespective of the Company's ability to [pay] them." OB at 32. Continental's interpretation of the Continuing Redemption Provision requires a strained and isolated reading of the provision. *See Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1260 (Del. 2010) ("[A] single clause or paragraph of a contract cannot be read in isolation, but must be read in context."). When read together with the Interest Provision, the Continuing Redemption Provision reflects what the parties recognized—and what all sophisticated investors should recognize—that the Company might not be able to redeem all of the Preferred Stock put for redemption due to lack of funds legally available. Ex. C at 5; *see also Longcap*, 2013 WL 3629000, at *5 (recognizing the distinction between deferred payments due to a lack of legally available funds and a failure to pay legally available funds, the former which does not constitute a "default").

Accordingly, the Charter, read as a whole, provides a mechanism whereby if the Company has sufficient cash to redeem a portion of the Preferred Stock, then the Company will use that cash to redeem the shares that it legally can on a pro rata basis. However, if the Company has funds legally available to redeem all of the Preferred Stock (or even a portion of the shares under the Continuing Redemption Provision), but the Company does not redeem such shares, then the

Company has defaulted on its obligation and then, and only then, is the Interest Provision triggered.

(d) Continental's Interpretation Of The Interest Provision Leads To An Absurd Result

Continental posits that the trial court's construction of the Charter would result in no amounts ever being "due and payable," because no amount was ever "due and owing." OB at 30. Not so. To the extent the trial court found that amounts never became "due and owing," that finding is limited to the amounts that would have prevented the Company from continuing as a going concern for the foreseeable future if paid. This finding by the trial court is not absurd, as Continental suggests, but is consistent with Delaware law. *See, e.g.*, *ThoughtWorks I*, 7 A.3d at 990 (finding that, although the phrase "funds legally available" was used in the Charter, even if "these words [were] omitted, a comparable limitation would be implied by law").

Rather, it is Continental's interpretation that leads to an absurd result. Although Continental affirmatively argued in support of its MJOP that the Charter was unambiguous, and that the trial court should only "consider the four corners of the Charter," *see* Ex. C at 59, Continental now improperly argues that the parties intended for the immediate running of interest to serve as an incentive for the Company to "maintain sufficiently legally available funds in order to make timely

payments in full and to ensure a return on the Preferred Stockholders' investment . . . ." OB at 34. To accept Continental's interpretation that the parties intended the Interest Provision to incentivize the directors and the Company to depart from the statutory and common law "advocates a tortured reading of the [Interest Provision], which leads to absurd results." *Giesecke+Devrient Mobile*, 2021 WL 982597, at *11. Indeed, viewing Continental's argument to the extreme—that the parties intended the Interest Provision to incentivize the Company to avoid having to pay interest at the risk of sending the Company into insolvency to the obvious detriment of its creditors and ability to continue as a going concern—"only magnif[ies] the absurdity of the result." *Id.*

The cases Continental cites for its position are readily distinguishable. OB at 34 n.113. Contrary to Continental's contention, *Giesecke* does not support a finding that the parties intended for the Interest Provision to incentivize the Company to make timely payments in full. *Id.* *Giesecke* involved specific contractual language that differs significantly from the Interest Provision—in particular, the certificate of designations provided that: "In the event that the Company's market capitalization is $50,000,000 for greater than thirty (30) consecutive days, then the Dividend Rate shall increase to fifteen percent (15%) per annum." *Giesecke+Devrient Mobile*, 2021 WL 982597, at *11. Accordingly, the

provision at issue in *Giesecke* was automatically triggered by the company's attainment of a specific market capitalization, unlike here, where the Charter expressly provides only that interest only accrues upon a default.

To be sure, continuing to operate as a going concern and fulfill obligations under well-established Delaware law is a stronger incentive than avoiding interest on a preferred stock redemption payment, as the Committee found and the trial court upheld. Continental's strained incentives argument conflicts with well-settled Delaware statutory and common law and should be rejected by the Court.[7]

[7] *See supra* Section I.C.2., at 21 (citing *ThoughtWorks I*, 7 A.3d at 990-91) ("Authority spanning three different centuries adverts to and enforces limitations on the ability of preferred stockholders to force redemption."); *Frederick Hsu*, 2017 WL 1437308, at *11; *Klang*, 702 A.2d at 156; *see also* 8 *Del. C.* § 160(a)(1) (statutory restriction limiting a corporation's ability to redeem shares out of surplus); 8 *Del. C.* § 174(a) (subjecting directors to personal liability for the unlawful redemption of stock); *In re Trados*, 73 A.3d at 39 (a board "does not owe fiduciary duties to preferred stockholders when considering whether or not to take corporate action that might trigger or circumvent the preferred stockholders' contractual rights").

CONCLUSION

For the reasons stated herein, the judgment of the trial court should be affirmed.

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