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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 JANUARY 3, 2022

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Below, Defendants never fully explained how they think the Interest Provision is supposed to interact with the rest of the Charter. Now that Defendants have finally given their answer, they offer a nonsensical explanation that demonstrates the absurdity of their position. Under the plain terms of TradingScreen's Charter, interest began accruing at 13% as of each Installment Date that the Company failed to make its contractually-required redemption payments in full.[1] By not making the payments required by the Redemption Provision, TradingScreen "default[ed]" on "payments due" triggering interest on "all amounts then owed" regardless of whether the Company had sufficient legally available funds.[2] Nothing in the Charter limited the Company's interest obligation, which *accrued even without becoming payable* while the Company lacked legally available funds.

Defendants' attempt to resist this conclusion based on the text of the Charter falls short. Accordingly, Defendants frame Continental's appeal as a referendum on the trial court's post-trial decision that the Company lacked legally available funds

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[1] Capitalized terms have the same meanings as set forth in Appellant's Corrected Opening Brief ("Op. Br.") (Dkt. 11). References to Appellees' Answering Brief (Dkt. 13) are cited herein as "Ans. Br. __."

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

sufficient to make additional redemption payments in 2014 and 2015.[3] But Continental's Opening Brief clearly states that this appeal challenges only the trial court's interpretation of the Interest Provision.[4] Because Continental can obtain the full recovery it sought below through this narrow appeal, the Court need not address certain novel questions of law that Defendants erroneously suggest are well-settled. For example, while Defendants claim that Continental acquired its Preferred Stock with "eyes open," knowing full well that "to continue as a going concern, a corporation needs sufficient resources to operate for the foreseeable future,"[5] Vice Chancellor Laster recognized that the test for determining legally available funds was vague and unsettled.[6] Defendants' other arguments are similarly unavailing.

Defendants repeatedly assert that courts should consult dictionaries when interpreting contracts, but Defendants do not cogently address how the definition of "defaults" or other words in the Charter's Interest Provision and surrounding text

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[3] The trial court found that TradingScreen affirmatively breached the Charter by withholding legally available funds in 2020 but did not make any findings with respect to TradingScreen's conduct between 2016 and July 2020. Post-Tr. Op. 59.
[4] Op. Br. 4-5.
[5] Ans. Br. 6 (citing B49-B50).
[6] B50 (Tr. (Trudeau) at 805:9-12 (THE COURT: "Look, I don't even know if I know what the definition [of "to continue as a going concern"] is until -- because until the Delaware Supreme Court rules on these things, they're the ones who get to answer this stuff.")). The court made this observation at trial in 2016; Continental acquired its Preferred Stock in 2007. A711-A712 (PTO ¶¶ 9-11).

should be applied to arrive at an objectively reasonable meaning. Instead, Defendants introduce the unsupported and erroneous theory that the common law interposes a "condition precedent to the enforcement of a mandatory redemption right."[7]

In focusing myopically on the definition of "defaults," Defendants also ignore the fact that "context is a primary determinant of meaning."[8] For example, Defendants fail to consider the absurd consequences created by their argument that "the definitions of 'due,' 'owed,' 'owing,' and 'payable,' are synonymous" and have "no independent significance."[9] A careful analysis of those words and the provisions in which they are situated demonstrates just the opposite: each word *is* independently significant, informs the meaning of the Interest Provision, and adds content to the broader Redemption Provision. Therefore, in order to interpret the Interest Provision, the Court must consider not only the dictionary definition of "defaults," but also the meaning of the words around it and how those words and the

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[7] Ans. Br. 1 (emphasis added).
[8] *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *5 (Del. Ch. Jan. 29, 2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24 167-69 (2012)) (alterations omitted).
[9] Ans. Br. 31.

Interest Provision as a whole interact with the Redemption Provision and Charter more broadly.

Furthermore, Defendants introduce a public policy argument that would upend bedrock principles of Delaware law and the settled expectations of investors. According to Defendants, any interpretation of the Interest Provision that would "punish" the Special Committee for prioritizing the Company's creditors over the Preferred Stockholders is "absurd" and "contrary to Delaware law."[10] As an initial matter, Continental's interpretation does no such thing because TradingScreen admitted it carried no debt. Furthermore, nothing about Continental's interpretation, which compensates the Preferred Stockholders ahead of the residual equity-holders—*if and only if* the Company has legally available funds—is punitive, absurd, or contrary to law.

For the reasons below and in Continental's Opening Brief, the Court should the analyze the Interest Provision in the context of the broader Charter and the commercial purposes it was designed to serve and find that interest accrued at 13%, compounded annually, on the portion of the Company's redemption payments it

[10] Ans. Br. 22.

failed to make on the Installment Dates regardless of whether the Company had legally available funds to make additional redemption payments.

ARGUMENT

I. INTEREST BEGAN TO ACCRUE 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

Since Plaintiffs filed the MJOP in October 2014, Continental has offered the same interpretation of the Interest Provision and presented the same plain meaning and structural arguments now raised on appeal.[11] Likewise, Continental consistently asserted that the Interest Provision "was negotiated to compensate the redeeming Preferred Stockholders for any delay in payments, whatever the cause" and was designed to function as an incentive for TradingScreen to maintain sufficient legally available funds.[12]

The trial court's Opinions and Defendants' Answering Brief do not seriously contend with these arguments. Rather, they largely focus on the separate question—not on appeal—of whether TradingScreen had legally available funds sufficient to make full redemption payments on each of the Installment Dates. But these issues should not be conflated. This Court should consider Continental's appeal for the

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[11] *See* A182-A185 (MJOP OB 43-46); A280-A282 (MJOB RB 24-26); A831-A834 (Pls.' Post-Tr. Op. Br. 49-52); A1000-A1002 (Pl.'s Post-Tr. Reply Br. 38-40).
[12] A280 (MJOP RB 24); A831, A832, A840 (Pls.' Post-Tr. Op. Br. 49, 50, 58); A1001-A1002 (Pl.'s Post-Tr. Reply Br. at 39-40).

straightforward question of contractual interpretation it is and find that the trial court erroneously deprived Continental of the interest to which it was entitled under the Charter's Interest Provision.

A. The Plain Meaning Of The Interest Provision Is Consistent With Continental's Interpretation

1. The Definition of "Defaults" Does Not Imply a "Legally Available Funds" Condition Precedent

There is no dispute that "Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."[13] But Defendants push this tenet of Delaware law beyond its natural limits to the exclusion of other important interpretive principles. The Answering Brief, like the Opinions below, focuses myopically on certain dictionary definitions divorced from context while ignoring the linguistic limitations of the definitions Defendants purport to find dispositive.

Black's Law Dictionary defines the noun "default" as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when

[13] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

due."[14] Although the trial court adopted this definition,[15] it is by no means the only or best definition. For example, Merriam-Webster defines the verb "default" as "to fail to fulfill a contract, agreement, or duty: such as (a) to fail to meet a financial obligation[.]"[16] And the Oxford English Dictionary defines a "default" as the "[f]ailure to meet financial commitments; non-payment of money owed; *the state of being unable to fulfil financial obligations*."[17] Because the Redemption Provision created a contractual financial obligation that the Company failed to perform and was "unable to fulfil," these additional definitions support Continental's interpretation of the Interest Provision.

Defendants' attempt to distinguish the charter language in *Bicoastal* likewise fails. In *Bicoastal*, the charter granted junior preferred stockholders a mandatory redemption right. The charter further provided that, if the company failed to redeem "for any reason," the junior preferred stockholders would have the right to elect a

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[14] *Default* (noun), *Black's Law Dictionary* (11th ed. 2019). This definition has not changed from the sixth edition of Black's, which the MJOP Opinion used. Black's defines verb "default" as "[t]o be neglectful; esp., to fail to perform a contractual obligation." *Default* (verb), *Black's Law Dictionary* (11th ed. 2019).
[15] MJOP Op. 19.
[16] *Default* (verb), *Merriam-Webster Online* (Dec. 2021). *See also Seaford Assocs. Ltd. P'ship v. Subway Real Est. Corp.*, 2003 WL 21254847, at *5 n.31 (Del. Ch. May 21, 2003) (citing same definition in Webster's Ninth New Collegiate Dictionary 332 (1987)).
[17] *Default*, *Oxford English Dictionary Online* (Mar. 2020) (emphasis added).

majority of the company's board.[18] Defendants attempt to argue that the inclusion of the words "for any reason" in the charter renders *Bicoastal* inapposite.[19] But this Court explained clearly that even a valid impossibility defense (much like the illegality defense Defendants asserted below) "does not excuse non-performance" and the junior preferred stockholders' election rights obtain "*in default of*" the company's failure to make the mandatory redemption payment.[20] Here, the Company's failure to perform its contractual financial obligation is a "default" under the Interest Provision regardless of the reason for non-payment, and, because the unpaid amount is "owed" to the redeeming Preferred Stockholders, interest accrues on "all" such "amounts then owed."[21]

Defendants resist this conclusion by asserting for the first time the allegedly "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*

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[18] *In re Bicoastal Corp.*, 600 A.2d 343, 347 n.5, 351 (Del. 1991).
[19] Ans. Br. 27-28.
[20] *Bicoastal*, 600 A.2d at 351 (emphasis added).
[21] A1180 (Charter Art. IV § C.7.1.2).

redemption provision because this limitation is implied by law."[22] Defendants' novel theory is unsupported and runs counter to logic.

This Court has never held that the common law creates a limitation comparable to a funds legally available restriction in a corporate charter, let alone that such a limitation is a *condition precedent* rather than a defense to payment. While the Court of Chancery held in *ThoughtWorks* that the common law *implies* a funds legally available restriction where that language is omitted from a charter, it did so in *dictum*[23] that this Court declined to reach in affirming the decision.[24] The only decision Defendants actually cite in support of their argument is *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 906 A.2d 218, 221 (Del. Ch. 2006). But *Harbinger* is unavailing because the certificate of designation in that case contained an express funds legally available restriction, which created exactly the type of contractual condition precedent absent from the

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[22] Ans. Br. 1 (emphasis added); *see also id.* at 25.

[23] *SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 990 (Del. Ch. 2010) ("*Were these words omitted*, a comparable limitation would be implied by law." (emphasis added)).

[24] *SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 211-12 (Del. 2011) (finding that, "[b]ecause the Vice Chancellor determined that [plaintiffs] had failed to prove [their] case even under [their] own definition of 'legally available funds,' we need not reach or address the issue of whether [plaintiffs'] definition is legally correct.").

Charter.[25] Indeed, the only decision to find that the common law operates as a condition precedent to the enforcement of a mandatory redemption right is the Post-Trial Opinion, which Continental now challenges to the extent it conflicts with Continental's interpretation of the Interest Provision.[26]

More fundamentally, the common law cannot operate as a "condition precedent" in this circumstance. "Where a contractual obligation is subject to a 'condition precedent,' that obligation will only mature on satisfaction of a *contractually specified condition*."[27] "Typically, conditions precedent are *easily ascertainable objective facts*, generally that a party performed some particular act or that some independent event has occurred."[28] As the Post-Trial Opinion's analysis makes plain, the legitimacy of the Special Committee's determination was far from an easily ascertainable objective fact.[29] While the common law at most creates a

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[25] *Harbinger Cap. P'rs Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 221 (Del. Ch. 2006).
[26] Post-Tr. Op. 36-37.
[27] *S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2020 WL 6018738, at *17 (Del. Ch. Oct. 12, 2020) (emphasis added); *see also id.* at *19 (finding provision did not call for "easily ascertainable objective facts" and thus did "not fit the mold of a condition precedent" and that defendant, "[a]s the party seeking to avoid its contractual obligation, . . . bears the burden of proof").
[28] *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008).
[29] Post-Tr. Op. 2 (decision issued after four-day trial involving 662 exhibits, 24 depositions lodged, live testimony from eight witnesses and four experts).

legal defense to the immediate enforceability of TradingScreen's payment obligation, it does not operate as a defense to the accrual of interest.

The Court should reject Defendant's attempt to inject a novel "condition precedent" concept into the Interest Provision where none exists and give the word "defaults" in the Interest Provision its plain meaning in this context, which is to fail or be unable to perform a contractual obligation.

2. Context Resolves This Appeal in Continental's Favor

As Continental has consistently argued, the words contained in the Interest Provision cannot be interpreted in isolation from one another or taken out of the context of the broader Charter. But that is just what the Opinions below did—and what Defendants ask this court to do again. "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[30] Indeed, "[a]s the whole-text canon instructs, context is the *primary* determinant of meaning."[31] Here, the context of the Charter,

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[30] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24 167 (2012).

[31] *Bouchard v. Braidy Indus., Inc.*, 2020 WL 2036601, at *9 (Del. Ch. Apr. 28, 2020) (emphasis added); *see also id.* (finding "the entirety of [the provision], rather than the single phrase [plaintiff] emphasizes, informs its intended meaning"); *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2020 WL 3620220, at *6 (Del. Ch. July

which the Answering Brief largely ignores, confirms Continental's interpretation of the Interest Provision.

a. Defendants' construction leads to absurd results

As Continental argued below and in its Opening Brief, the Court should begin its analysis of the Interest Provision by examining not only the definition of the word "defaults," but also the meaning of its direct object "any payments due" as well as the phrase "all amounts then owed" as they relate to one another.[32] Beyond that, the Court should reconcile the meaning of those terms in the Interest Provision with the same and similar terms, such as "due and owing" and "due and payable," used elsewhere in the Charter.[33] This holistic interpretation confirms the application of the Interest Provision regardless of the existence of legally available funds sufficient to make full payment as of any given Installment Date.

2, 2020) ("In determining the intention of the parties entering into an agreement, 'courts must read the specific provisions of the contract in light of the entire contract.'" (quoting *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913-14 (Del. 2017))); *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at *6 (Del. Ch. Jan. 29, 2019) (describing whole-text canon as "the overarching principle that context is the primary determinant of meaning").

[32] Op. Br. 22.

[33] Op. Br. 29-32; *see also Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *5 (Del. Ch. Jan. 29, 2019) (collecting cases and explaining that courts "must avoid interpreting a legal text in a manner that renders provisions superfluous or creates discord or tension between the parts of the text" (footnotes omitted)).

Defendants posit without support that "the definitions of 'due,' 'owed,' 'owing,' and 'payable,' are synonymous" with "immediately enforceable" and have "no independent significance,"[34] but the opposite is true. As a preliminary matter, Defendants present no authority for the proposition that the words "owed" and "owing" mean "immediately enforceable." In fact, Black's defines "owing" simply as "yet to be paid; owed; due."[35] While the words "owing" and "owed" *could* in certain circumstances mean "due," they do not mean "payable" or "immediately enforceable." Moreover, as Defendants' own authority recognizes, the words "due" and "owing" "may have ***different meanings*** depending upon their context."[36]

Considering only the dictionary definitions of these terms without an assessment of the context in which they are situated renders the Redemption Provision and Continuing Redemption Provision unintelligible and frustrates the clear intent of the parties.[37] The following definitions from Black's, which are self-referential, vague, and, at times, contradictory, demonstrate the point:

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[34] Ans. Br. 31. While Defendants give short shrift to the definitions of these words, they insist that the word "defaults" has a hyper-specific meaning.
[35] *Owing*, *Black's Law Dictionary* (11th ed. 2019).
[36] *DeNicolo v. Hertz Corp.*, 2020 WL 5816365, at *10 (N.D. Cal. Sept. 30, 2020) (emphasis added); *see also* Ans. Br. 29-30 (citing *DeNicolo*).
[37] *See United States v. Williams*, 553 U.S. 285, 294 (2008) ("In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*—

- *Due* (adj.) 1. Just, proper, regular, and reasonable <due care> <due notice>. 2. Immediately enforceable <payment is due on delivery>. 3. Owing or payable; constituting a debt <the tax refund is due from the IRS>.[38]
- *Due and Payable* (Of a debt) owed and subject to immediate collection because a specified date has arrived or time has elapsed, or some other condition for collectability has been met.[39]
- *Owing* (adj.) That is yet to be paid; owed; due.[40]
- *Payable* (adj.) (Of a sum of money or a negotiable instrument) that is to be paid. • An amount may be payable without being due. Debts are commonly payable long before they fall due.[41]

Defendants never seriously attempt to make sense of this jumble of similar but different words used in close proximity to one another in the Charter. Nor could they with reference only to a dictionary. Adopting the trial court and Defendants'

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which counsels that a word is given more precise content by the neighboring words with which it is associated.").

[38] *Due*, *Black's Law Dictionary* (11th ed. 2019).

[39] *Due and Payable*, *Black's Law Dictionary* (11th ed. 2019).

[40] *Owing*, *Black's Law Dictionary* (11th ed. 2019).

[41] *Payable*, *Black's Law Dictionary* (11th ed. 2019).

view that these words all mean "immediately enforceable" would yield the following unworkable revision of the Redemption Provision:

> In the event the Corporation defaults on any payments [***that are immediately enforceable***] pursuant to this [Section 7.1.2], interest shall accrue on all amounts [***that are immediately enforceable***] pursuant to this [Section 7.1.2] equal to an annual percentage rate of thirteen percent (13%). In addition, all amounts [***that are immediately enforceable***] from the Corporation pursuant to this [Section 7.1.2] shall become [***immediately enforceable***] upon any (i) Liquidation Event, (ii) merger, consolidation or other reorganization . . . , (iii) any sale of all or substantially all of the Corporation's assets or (iv) upon a Qualified Public Offering . . . ."[42]

The corresponding revision to the Continuing Redemption Provision renders it equally absurd: "In the event the Corporation has insufficient cash to pay the holders of the Series D Preferred Stock the full redemption amount [***that is immediately enforceable***] under [Section 7.1.2], then the holders of the Series D Preferred Stock shall share ratably in any cash available pro rata . . . until all such holders are paid in full."[43] This interpretation produces exactly the kind of "absurd result" that "no reasonable person would have accepted when entering the [Charter]" and it cannot be the plain meaning of Sections 7.1.2 and 7.1.3.[44]

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[42] A1180-A1181 (Charter Art. IV § C.7.1.2 (Defendants' revisions emphasized in brackets)).
[43] A1181 (Charter Art. IV § C.7.1.3 (Defendants' revision emphasized in brackets)).
[44] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

Giesecke cannot save Defendants' argument. In the Opening Brief, Continental cited *Giesecke* for the uncontroversial proposition that charters frequently contain provisions designed to incentivize corporations to maintain sufficient legally available funds to make timely redemption payments.[45] Defendants rightly point out that *Giesecke* rejected a "tortured reading" of the applicable penalty provision. But Defendants fail to mention that the court in *Giesecke* agreed with the plaintiff stockholder in finding the *company*'s reading of that provision to be absurd and unsupported by the text.[46] The same is true here.

At bottom, the meaning of the Interest Provision is a highly contextual inquiry.

b. The only sensible interpretation of the Interest Provision is one that reconciles the terms "due," "owed," "due and owing," and "due and payable"

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

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[45] *See* Op. Br. 34 & n.113.

[46] *See 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"); *id.* at *11 ("The Company advocates a tortured reading of the provision, which leads to absurd results.").

rate of thirteen percent (13%)."[47] The parties *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. The words "any payments due" create no limitation on the interest payment obligation. The phrase "amounts then owed" includes any redemption payments the Company could not legally pay when due and which are deferred—*but still owed*—pursuant to Sections 7.1.2 and 7.1.3 and any applicable common law restrictions. This construction gives meaning to the parties' recognition that the Company might not have legally available funds at the time a preferred stockholder demanded redemption and that payment may have to occur in the future, over a period of time. Until payment is made, however, interest accrues on "all amounts then owed." *See* § I.B *infra*.

The terms "due" and "then owed" in the Interest Provision are different from the terms "due and owing" and "fully due and payable" in the next and final sentence of the Redemption Provision. The final sentence of the Redemption Provision provides that, upon a liquidation event, merger, or qualified public offering, amounts that are "due and owing" to redeeming Preferred Stockholders become "fully due

[47] A1180 (*Id.* (emphasis added)).

and payable."[48] This provision ensured that, if the Company failed to redeem 100% of shares tendered for redemption on any Installment Date and a subsequent end-stage corporate event occurred, the unpaid redemption amount from such Installment Date would become immediately enforceable—*with interest*—and the shares would not receive the default liquidation preference (upon a liquidation event) and would not be automatically converted (upon a qualified public offering) as they otherwise would have had they not been tendered for redemption.

The Continuing Redemption Provision reinforces Continental's 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.[49] This 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 word "due" were a proxy for payable from "legally available funds" as Defendants suggest and the trial court held, then the entire Continuing Redemption Provision would be rendered a nullity as it would

[48] A1180-A1181 (Charter Art. IV § C.7.1.2)
[49] A1181 (Charter Art. IV § C.7.1.3).

be an *impossibility* (and a contradiction in terms) for the Company to have insufficient cash to pay the full amount from legally available funds.

In contrast to the trial court's rendering, Continental's interpretation is proper because it gives meaning to each word and phrase without creating contradiction and gives life to parties' clear intent.[50] Under this interpretation, "any payments due" means the amount the Company was contractually bound to pay to redeeming Preferred Stockholders on an Installment Date regardless of any legally available funds considerations. The term "amounts then owed" refers to unpaid redemption amounts that are past due. The term "due and owing" simply means "due" plus "owed" and refers to the total amount of past due redemption payments, plus interest. Finally, the term "due and payable" means "immediately enforceable."

The Connecticut Superior Court's decision in *Longcap PNT, LLC v. Post-N-Track Corp.*, 2013 WL 3629000 (Conn. Super. June 19, 2013), cited by Defendants

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[50] *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term meaningless or illusory." (internal quotation marks omitted)); *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) ("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."); *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.").

for the proposition that the Charter implies a legally available funds limitation,[51] reaffirms the strength of Continental's argument. As Defendants concede, the certificate of designations at issue in *Longcap* contained an express legally available funds restriction unlike the Charter.[52] Also unlike the Charter, the certificate of designations in *Longcap* defined the word "default."[53] Further still, the term "default" was defined as "the failure by the Corporation to make all or any portion of any redemption payment with respect to any of the Series A Preferred Stock as and when *due and payable* . . . ."[54] Thus, to the extent the company in *Longcap* lacked legally available funds, it did not default because it did not fail to make payments that were due and payable (*i.e.*, immediately enforceable). Moreover, Defendants fail to mention that the certificate of designations in *Longcap* provided for a penalty dividend rate increase from 8% to 11.5% if a redemption were "deferred" and that the company was making the increased dividend payments.[55]

The trial court's failure to distinguish between the Charter's use of specific terms addressing "any payments due," "all amounts then owed," "amounts due and

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[51] Ans Br. 22-23.
[52] Ans. Br. 23.
[53] *Longcap PNT, LLC v. Post-N-Track Corp.*, 2013 WL 3629000, at *2 (Conn. Super. June 19, 2013).
[54] *Id.* (emphasis added).
[55] *Id.* at *2-3.

owing," and "fully due and payable" resulted in a misinterpretation of when the Interest Provision is triggered.

B. Defendants' Novel Public Policy Argument Finds No Support In Delaware Law And Further Upsets The Settled Expectations Of Investors

"The basic business relationship between parties must be understood to give sensible life to any contract."[56] Here, 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. One of the ways the parties attempted to address that known risk was to include the Interest Provision *as an incentive* for the Company to maintain sufficient legally available funds in order to make *timely* redemption payments and to ensure a return on the Preferred Stockholders' investment if the Company failed to do so (*i.e.*, it defaulted).[57]

Defendants now purport to deny the enforceability of the parties' bargain on public policy grounds. According to Defendants, any interpretation of the Interest Provision that would "punish" the Special Committee for prioritizing the Company's

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[56] *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017).
[57] *See supra* note 46; Op. Br. 33-34.

creditors over the Preferred Stockholders is "absurd" and "contrary to Delaware law."[58] This Court should reject this argument for at least three reasons.

First, Buhannic admitted at trial that TradingScreen carried no debt.[59] Without creditors, the common law solvency restrictions serve no purpose.[60] Accordingly, the Company should not be heard to invoke public policy interests that are not applicable to its particular circumstances.[61]

Second, Defendants' argument runs contrary to Delaware's "fundamental policy" of "upholding freedom of contract."[62] When parties "have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to

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[58] Ans. Br. 22.
[59] AR3 (Tr. (Buhannic) at 14 (Q: "It's true, isn't it, that the company has historically been debt free?" A: "Yes.")).
[60] *See SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973,at 982 (Del. Ch. 2010) (Section 160 and the common law "are intended to protect creditors" (citing *Propp v. Sadacca*, 175 A.2d 33, 38 (Del. Ch. 1961))); *see also Askanase v. Fatjo*, 130 F.3d 657, 675 (5th Cir. 1997) (refusing to find violation of Section 160 even where a corporation's capital was impaired because to do so would not be within the statutory purposes of protecting creditors); *In re Reliable Mfg. Corp.*, 703 F.2d 996, 1002 (7th Cir.1983) (declining to enforce Section 160 where no creditors were before the court because "the policies underlying Section 160 are not implicated").
[61] *Rogers v. Tennessee*, 532 U.S. 451, 474 (2001) (Scalia, J., dissenting) (the "Latin maxim *cessante ratione legis, cessat ipse lex*" means "the reason of the law ceasing, the law itself ceases" and applies where "a change of circumstances . . . render[s] the common-law rule no longer applicable to the case").
[62] *Ascension Ins. Hldgs., LLC v. Underwood*, 2015 WL 356002, at *4 (Del. Ch. Jan. 28, 2015).

respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."[63] Defendants not only failed to make such a showing here, but also have conceded the point. According to Defendants, "[t]he parties could have drafted the Interest Provision to apply whenever TradingScreen missed a payment for any reason[.]"[64] Thus, it is incoherent for Defendants to argue that conditioning payment of interest on a "default" (in Continental's view, upon a failure to pay) somehow violates public policy and thus is unenforceable.

Third, Defendants' public policy argument is a thinly-disguised attempt to promote their own interests as common stockholders over the contract rights of the Preferred Stockholders. Under well-settled principles of Delaware law, the rights and preferences of holders of preferred stock are governed by—*and limited to*—express contractual provisions.[65] As the Court of Chancery explained, "it is the duty of directors to pursue the best interests of the corporation and its common stockholders, *if that can be done faithfully with the contractual promises owed to the*

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[63] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 903 (Del. 2021) (quoting *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006)).
[64] Ans. Br. 19.
[65] *See, e.g., Rothschild Int'l Corp. v. Liggett Gp. Inc.*, 474 A.2d 133, 136 (Del. 1984); *Judah v. Del. Tr. Co.*, 378 A.2d 624, 628 (Del. 1977).

preferred[.]"[66] Nothing about Continental's interpretation of the Interest Provision, which would compensate the Preferred Stockholders ahead of the residual equity-holders—*if and only if* the Company has legally available funds, is punitive, absurd, or contrary to law.[67] On the contrary, Defendants' position would effectively strip Continental of its only enforceable rights as Preferred Stockholder. Were the Court to countenance this approach, it would upend the settled expectations of current and prospective investors.

The Court should not entertain Defendants' public policy argument.

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[66] *LC Cap. Master Fund, Ltd. v. James*, 990 A.2d 435, 452 (Del. Ch. 2010) (emphasis added).

[67] *See, e.g.*, *Mueller v. Kraeuter & Co.*, 25 A.2d 874, 874 (N.J. Ch. 1942) ("That fulfillment of the contract may work injury to common stockholders, is immaterial.").

CONCLUSION

For the foregoing reasons and those set forth in Continental's Opening Brief, Continental respectfully requests that this Court 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 January 3, 2022, my firm served a true and correct copy of the foregoing *Public Version of Appellant's Reply Brief* by File & Serve*Xpress* upon the following counsel of record:

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