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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JULIA HAART, Petitioner-Below/Appellant, v. SILVIO SCAGLIA, Respondent-Below/Appellee, and FREEDOM HOLDING, INC., AND ELITE WORLD GROUP, LLC, Nominal Respondents-Below/Appellees	No. 333, 2022 Case Below: Court of Chancery of the State of Delaware C.A. No. 2022-0145-MTZ

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS[1]

As it was below, the gravamen of Haart's argument on appeal is that a certain Entity Restructuring Agreement first executed in 2019 and later revised in 2020 (together, the "ERAs") granted her co-equal ownership of Freedom. The Court of Chancery held that the ERAs unambiguously did not include a promise by Scaglia to transfer Haart Freedom stock. The trial court also held that, even if the ERAs were ambiguous, the extrinsic evidence confirmed its reading of the agreements' plain language.

The trial court's first holding should be affirmed as a matter of law. The ERAs clearly do not provide for a transfer of Freedom stock from Scaglia to Haart. Haart conceded as much at trial. *See* A347. After all, it is uncontested that Scaglia transferred Haart common stock approximately four months before the 2019 ERA was executed, and that Scaglia and Haart only discussed a potential transfer of preferred stock approximately five months after the 2019 ERA was executed (and four months before the 2020 ERA was executed). That the ERAs transferred Haart preferred stock is "chronologically impossible." Op. 14 n.56.

[1] The trial court's Memorandum Opinion below (Exhibit B to Haart's Opening Brief) is cited as "Op." Haart's Opening Brief is cited as "OB." All defined terms have the meaning assigned in the trial court's Memorandum Opinion unless otherwise defined. Emphases, alterations, and quotations in case citations are omitted unless noted.

Consistent with their title, the sole purpose of the ERAs was to restructure the ownership of Freedom subsidiaries by transferring them from Freedom to EWG. From top to bottom, the plain language of the ERAs confirms that this was the parties' intention. The only language Haart cites in support of her interpretation is a single clause in a sentence that everyone agrees is completely inaccurate. The trial court properly concluded that this clause was a "meaningless incorrect recital" that could not overcome the language of the ERAs as a whole. Op. 33. The trial court's proper construction of the ERAs' plain language is dispositive of Haart's appeal.

This Court may also affirm based on the trial court's alternate holding that, even if the ERAs are ambiguous, "the extrinsic evidence in the record proves the parties did not intend them to transfer any Freedom shares." Op. 36-37. While Haart's brief treats this holding as a pure question of law, the Court of Chancery's assessment of the extrinsic evidence depends on numerous factual findings that may be reversed only if clearly erroneous. Many of these findings were based on assessments of witness credibility, further enhancing the deference owed to the trial court on appeal.

The trial court's credibility findings were particularly important in this case. Befitting a person whose motto is "fake it till you make it" (A342), Haart gave false testimony and attempted to deceive the public, the Court, and even her own lawyers about Freedom's stock ownership to try and get her way. *See, e.g.*, Op. 14 n.56; Op.

25 n.117; Op. 46.[2] This conduct led the trial court to conclude that there was "dirt on Haart's [hands]." Op. 45. Most importantly, the trial court found Haart's testimony on the central question in the case—the purpose of the ERAs—to be "not credible." Op. 14 n.46. The trial court instead credited the testimony given by every other witness, corroborated by contemporaneous documents, that the ERAs were never intended to transfer Haart any Freedom stock, and that Scaglia had always intended to (and did) keep control of Freedom. *See* Op. 15-16, 37.

The trial court's factual findings and rejection of Haart's credibility do not stop there. The trial court found, contrary to Haart's testimony, that "Haart has known she was not an equal owner [of Freedom] since January 15, 2021," when at least one attorney confirmed to Haart that a Stock Power indorsing Haart 49.9% of Freedom's preferred stock did not give her equal control. Op. 41. The trial court found, contrary to Haart's testimony, that prior to this litigation "Haart focused on [the Stock Power]" as the source of her rights to Freedom preferred stock, not the ERAs. Op. 38. The trial court found, contrary to Haart's testimony, that a "string of miscellaneous documents" in the record referencing Haart as an equal owner of

[2] Haart's penchant for lying to courts is not confined to this proceeding. In the parties' ongoing matrimonial proceeding, a New York court concluded that Haart had filed a "misleading petition" and certain of her "allegation[s] [were] simply false." B158.

Freedom were not persuasive evidence that Scaglia had actually transferred Haart 50% of Freedom's preferred stock. Op. 42.

Based on these findings (and others), the trial court weighed the extrinsic evidence and concluded that "[t]he preponderance of the credible evidence in the record shows that Scaglia did not transfer Haart half his preferred shares." Op. 41. Haart cannot establish that this fact-intensive determination was clearly erroneous.

Haart's other arguments on appeal all depend on her interpretation of the ERAs being correct. These arguments therefore need not be considered. If they are, this Court can reject them summarily. The execution of the ERAs did not transfer title of preferred stock to Haart under the narrow doctrine of constructive delivery. The trial court's factual findings defeat Haart's arguments that Scaglia acquiesced in her equal ownership of Freedom—and demonstrate that, if anything, it is Haart who acquiesced in her unequal ownership.

In short, the plain language of the ERAs, witness testimony (including Haart's own admissions), and the voluminous documentary record amply support the trial court's ruling that Haart has never owned 50% of Freedom's preferred stock. The Court of Chancery's well-reasoned decision should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** The trial court properly found that the ERAs are unambiguous and do not operate to transfer 50% of Freedom's preferred stock to Haart. Haart conceded that the ERAs contain no obligation to transfer her any stock. *See* A347. "In short, the ERAs' function is consistent with their title: restructuring the business by transferring the Entities from Freedom to EWG, and ensuring EWG was fully owned by Freedom. … The ERAs did not intend or accomplish any transfer of Freedom stock between Haart and Scaglia." Op. 36.

Even if the ERAs are ambiguous, the Court of Chancery properly evaluated the extrinsic evidence and concluded that "[t]he preponderance of the credible evidence in the record shows that Scaglia did not transfer Haart half his preferred shares." Op. 41. The trial court's findings include that Haart's testimony claiming the ERAs were Scaglia's "apology" for not previously transferring her preferred stock was "not credible." Op. 14 n.56. There is also no contemporaneous evidence suggesting that the ERAs were intended to transfer her Freedom stock. Haart cannot establish that the trial court's evaluation of the extrinsic evidence was clearly erroneous.

2. **Denied.** Because Haart's interpretation of the ERAs is incorrect, this Court need not decide whether those agreements constituted a "constructive delivery" of preferred stock to Haart. Regardless, Haart cannot establish that the

narrow doctrine of constructive delivery is warranted. Physical delivery of preferred stock certificates—the method of delivery provided for by Article 8 of the Uniform Commercial Code—was practicable, as evidenced by Haart previously being delivered certificates when she was transferred common stock.

3. **Denied**. The trial court properly found that "Haart has failed to carry her burden to show that Scaglia ever transferred her half of Freedom's preferred shares or made an actionable promise to do so. She offers no transaction that Scaglia could ratify or acknowledge." Op. 43-44. Additionally, on numerous occasions, Scaglia reiterated to Haart that he controlled Freedom through its preferred stock. Haart explicitly and repeatedly confirmed her understanding that Scaglia controlled Freedom days before filing this lawsuit. The trial court's decision that Scaglia did not acquiesce in Haart's equal ownership of Freedom is factually and legally correct.

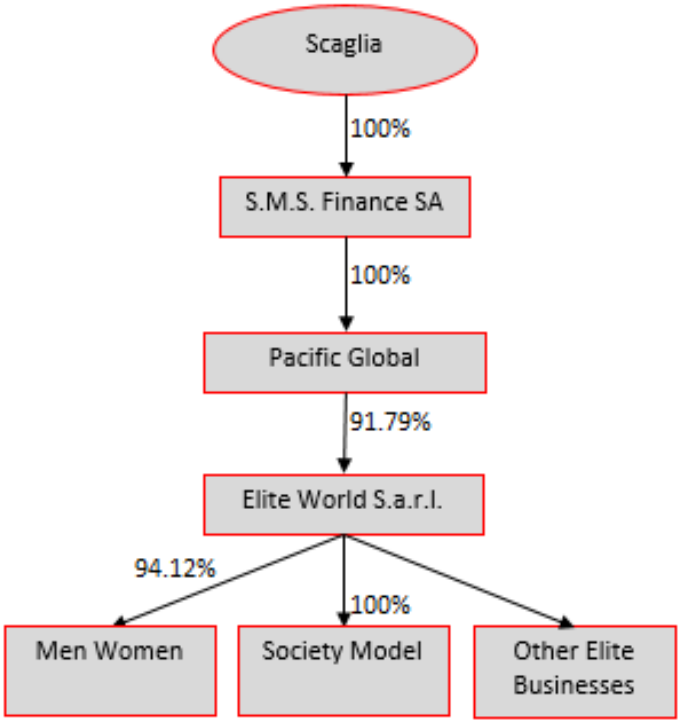
COUNTERSTATEMENT OF FACTS

A. Scaglia and Haart

"Scaglia is an Italian entrepreneur and investor whose business interests span from technology to fashion." Op. 4. Haart has limited business experience, but she craves fame and fortune and is willing to do anything to achieve that goal. A366 (Haart "aspired to become a celebrity" when her and Scaglia met); A1432 (Haart: "It was success or death"); A1450 ("I was going to be wealthy myself."). In pursuit of her goals, Haart continually misrepresented herself to others, pretending to be successful, misstating her age, and conveying a false perception of her wealth. *See* A341-42.

B. Scaglia's Elite Businesses and their Structure

In 2011, Scaglia began investing in Elite World S.a.r.l ("Elite World"), a European talent conglomerate that owned numerous operating companies. A365. By 2018, Scaglia owned over 90 percent of Elite World through his then-holding company, S.M.S. Finance SA. A365-66. The corporate structure of Elite World and its various subsidiaries was as follows:



A365-66; B215-16.

In 2018, Scaglia decided to move to the United States. Accordingly, he restructured Elite World and its subsidiaries to transfer his European holding company (SMS Finance) into Freedom, a newly formed Delaware corporation. A366, A369; B247; B268.

Freedom was incorporated on November 7, 2018. Op. 5; A295; A367; A641. Scaglia was named the sole director. Op. 5; A639. Shortly thereafter, Freedom issued Scaglia 100 certificated shares of common stock. A738-39; A1025.[3]

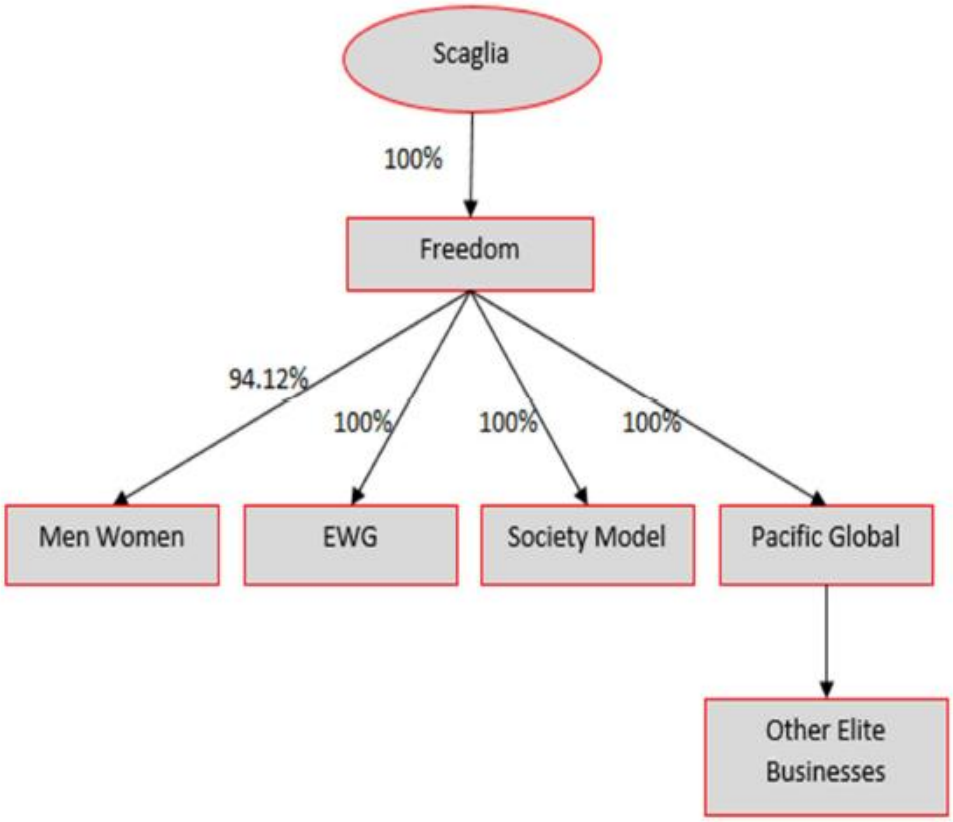
[3] The certificate erroneously states that it represents 200 shares. *See* B238; Op. 6 n.19.

Following Freedom's formation, Scaglia caused Freedom to adopt an Amended and Restated Certificate of Incorporation (the "Amended Certificate"). Op. 6; A646; B271; B277. The Amended Certificate authorized Freedom to issue 123,665 shares of preferred stock. A367-68; A646.

At the same time Freedom adopted the Amended Certificate, Scaglia, acting as Freedom's sole director, approved a Contribution Agreement. A369; A654; B271. Under that agreement, Scaglia contributed "[e]verything that Freedom owns" by transferring to Freedom all of his stock in S.M.S. Finance. A369; A654. Scaglia also contributed his right to repayment of an approximately $123,665,000 loan that Scaglia had made to S.M.S. Finance. A368; A654. In exchange, Freedom issued Scaglia 123,665 shares of preferred stock at an issuance price of a $1,000 per share, which were again evidenced by a stock certificate. A367-69; A654; B269; B271. "The preferred shares are convertible to a calculable number of common shares. Preferred stockholders hold votes equal to the number of whole shares of common stock into which their preferred stock was convertible as of the record date." Op. 6-7.

Shortly thereafter, Freedom formed EWG as "a wholly owned subsidiary intended to hold the Elite business." Op. 7. Freedom has always been EWG's sole member. A370, A473; B281; B296. Scaglia did not immediately undertake "the administrative step of writing a contract transferring these entities from [] direct

Freedom ownership to [EWG] ownership." A376. Accordingly, as of January 2019, Scaglia's ownership of the Elite assets was as follows:



A369-70; B269; B239; B243; B281.

C. Haart Becomes CEO of EWG and Acquires Freedom Common Stock.

Scaglia and Haart met in 2015 when Scaglia owned La Perla, a fashion and lingerie company. Op. 4. "Haart and Scaglia began dating and by early 2018, they were engaged to be married." Op. 4-5. In March 2019, Scaglia facilitated Haart's appointment as CEO of EWG. A366. Haart also became a member of EWG's board of directors, along with Scaglia and Paolo Barbieri (EWG's previous CEO). Op. 7.

"Haart and Scaglia married in June 2019. Shortly thereafter, around July 8, Scaglia executed stock certificates that transferred Haart half of Freedom's common stock." Op. 8. There is no dispute that the July 2019 transfer did not involve Freedom's preferred stock. Op. 8. At trial, Scaglia explained why it was important that he continued to control the preferred stock:

> I owned Elite for a long time. I was willing to share with her the value created, but not the control and not what I built before marrying her or giving her the title, the position of CEO in Elite.

A375; *see also* Op. 15-16 (crediting Scaglia's testimony).

While Scaglia understood the importance of maintaining control, he also understood the importance of holding his new wife out as his equal partner. For example, EWG's 2018 financial statements (drafted in October 2019) stated that Freedom is "a US holding company owned by Silvio Scaglia (50%) and Julia Haart (50%), Group Chief Executive Officer of ELITE WORLD GROUP." A681. As the trial court observed, "the assertion that Scaglia and Haart were equal shareholders was wrong in 2018: Haart agrees Scaglia owned all of Freedom's stock until July 2019. It was also wrong in October 2019: at that point, Haart held fifty percent of Freedom's common stock, but Scaglia held all the preferred." Op. 9.

D. Through the ERA, Scaglia Memorializes the Transfer of the Elite Assets to EWG.

Following Haart's receipt of Freedom common stock, Scaglia began to explore a potential strategic transaction involving the Elite assets. A376. Scaglia

thus sought "to formalize[] the transfer of the entities from [] direct Freedom ownership to" EWG. A378; *see also* A1916 (Feinman testifying that the purpose of the ERAs was "to clarify that EWG would be the reporting entity for financial purposes and keep it sort of separate from Freedom.").

To effectuate Scaglia's plans, the "2019 ERA" was prepared in November 2019, but back-dated to April 1, 2019. Op. 10; *see* A378; A732. The 2019 ERA was prepared by non-legal staff working under Jeffrey Feinman (Scaglia's and Freedom's accountant), and it contains numerous errors. Op. 10-11. Sections 1.1. and 1.2 provide:

> **1.1** The **Shareholders** agree to transfer all of their Membership Interests in **ELITE** to their wholly Delaware corporation known as **FREEDOM**, and thus change the structure of ownership such that **FREEDOM** shall be owned 50% by each shareholder, and **FREEDOM** shall own all of the Membership Interests in **ELITE**, which in turn shall own all of the stock in (i) **E. 1972, INC.**; (ii) **MEN WOMEN N.Y. MODEL MANAGEMENT, INC.**; (iii) **PACIFIC GLOBAL MANAGEMENT SARL, INC.**; and (iv) **SOCIETY MODEL MANAGEMENT, INC.**
>
> **1.2** Each **Shareholder** shall execute their appropriate assignment of Membership Interests in **ELITE** in order to effectuate a transfer of the complete ownership of all Membership Interests in **FREEDOM**.

A728.

As the trial court recognized, everything about these sections is wrong. Op. 11. Scaglia and Haart did not own membership interests in EWG; Freedom did. *See* A370; A473; B281; B296. Likewise, EWG did not already own the stock of the listed entities; Freedom did. *See* A369-70; B240; B244; A642; B281. "The 2019

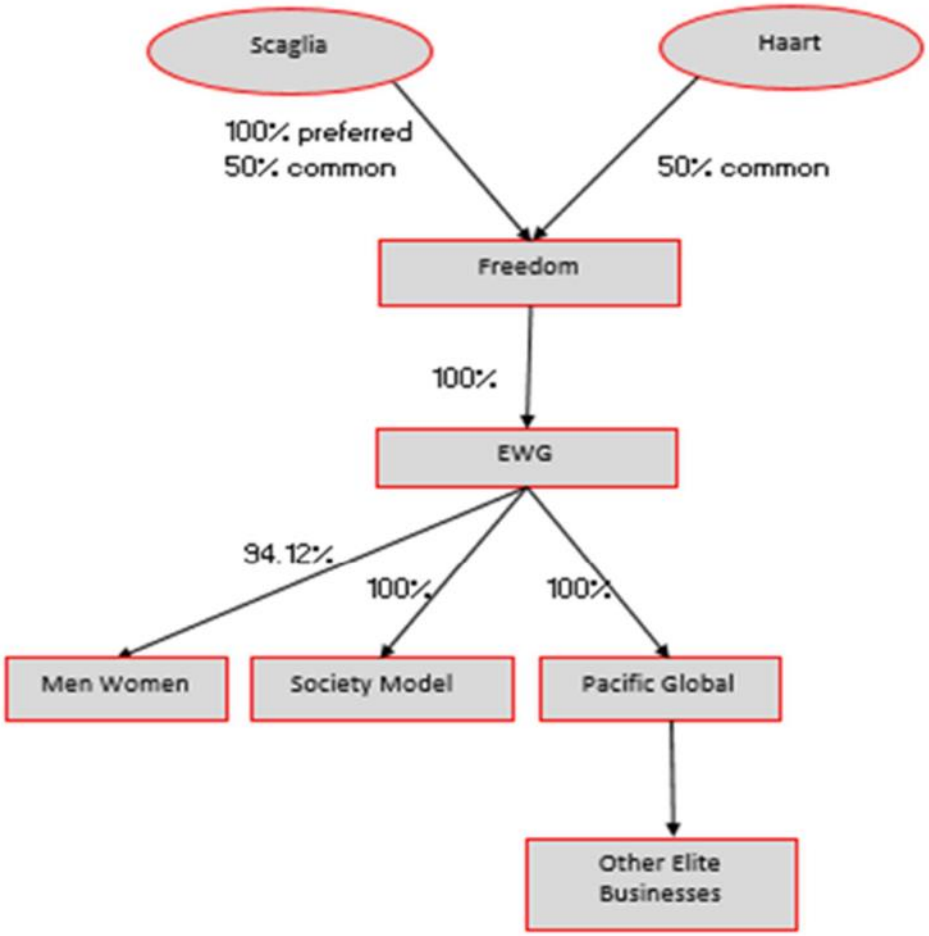
ERA included two 'assignment of membership interest' documents, which purported to transfer 'any and all ownership interests Scaglia or Haart may own in EWG' to Freedom in exchange for $1.00. But, again, neither Haart nor Scaglia owned any interest in EWG; only Freedom did." Op. 12.

Haart's sworn testimony confirms that the 2019 ERA was never intended to transfer anything as between Haart and Scaglia:

> Q. And there's no statement in this document, this ERA document, that says Silvio is transferring shares to you, is there?
>
> A. No.

A347.

The sole purpose of the 2019 ERA was to move the Elite assets under EWG to create the following ownership structure:



A376; *see also* A472-73.

Because the creation of the 2019 ERA was "an internal bookkeeping [] task," neither Scaglia nor Barbieri considered the document closely. A376; A437; A473.

E. Haart Learns of Freedom's Preferred Stock and Demands a Cut.

Notwithstanding Haart's assertion that the 2019 ERA was intended to transfer her preferred stock, Haart testified that March 2020 was the first time that she learned about Freedom's preferred stock. A344. At the time, Freedom was negotiating a possible SPAC transaction for EWG with Gabelli Group Capital Partners

("Gabelli"). Op. 12. But "Gabelli did not plan on retaining Haart as CEO if a SPAC deal closed." *Id.* This enraged Haart. A379; A480; B298. Scaglia nonetheless wanted to pursue the transaction and told Haart (and Barbieri) that he could approve it because he controlled Freedom through his ownership of its preferred stock. A344; A480. "The Gabelli transaction eventually fizzled." Op. 13.

Haart did not claim in Spring 2020 that she had equal control of Freedom through the 2019 ERA. A344; A380. Rather, consistent with her understanding that she lacked control, she wrote Scaglia on April 5, 2020: "[t]he fact that [Gabelli] has no interest in meeting me or even speaking w[ith] me says everything … if we were really 50/50 I would have been included from day 1." B302. Haart began "putting pressure on [Scaglia] to get more control, to be involved in every decision[] that Freedom was making." A382. Scaglia was conflicted between his loyalties as a husband and his responsibilities as an investor and fiduciary of EWG. *See* A382-83.

Amid this "[s]tormy" period of Scaglia's and Haart's relationship (A382), on May 28, 2020, Scaglia texted Feinman: "Julia and I are now ready to finalize our wills and the transfer of the remaining 50% of the Freedom Holding shares to Julia." A616. But even when Scaglia was contemplating this potential transfer, he "always wanted to retain control." A383; *see also id.* ("Sharing control never crossed my mind."). The trial court found Scaglia "credibly testified he was willing to share

Freedom's economic gains with Haart through common shares, but he insisted on keeping control for himself." Op. 15-16.

Feinman then prepared the Stock Power, dated June 12, 2020.[4] A383; A1027. "The Stock Power, by its own terms, does not transfer half of Scaglia's 123,665 preferred shares. Rather, it transfers one half share less than half, or 49.9995957%, of those preferred shares." Op. 15.

"Feinman never executed" the transaction contemplated by the Stock Power. A463; *see also* A383. Scaglia did not surrender the original, and only, stock certificate representing all 123,665 shares of Freedom preferred stock. A380-81; A384; B269. Although Haart had been delivered stock certificates when she was transferred common stock eleven months earlier, she did not ask Scaglia or Feinman to create or certificates for the preferred shares. A348. She also did not ask Scaglia to correct anything in the Stock Power. A384; A463.

[4] The Stock Power has an unwitnessed signature, but Scaglia testified that he did not recall signing it. A381-82. The trial court did not decide whether "the Stock Power actually transferred the shares to Haart." Op. 15 n.62. As Haart has not raised this issue on appeal, this Court likewise should not decide it. *See* Del. Supr. Ct. R. 14(b)(vi)(3).

F. Another Potential Transaction Leads to a Revised ERA.

"EWG continued trying to go public through late 2020. After the Gabelli deal fell through, the parties' focus turned to another SPAC transaction, this time with Galileo Acquisition Corp." Op. 16.

To prepare for due diligence, EWG's then-CFO sought "any formal documentation we have regarding the transfer of the ownership of" Elite entities to EWG. B432. "The CFO received the 2019 ERA in response, and realized it 'contained errors' and proposed corrections." Op. 16. "The parties tried to fix the 2019 ERA by signing the '2020 ERA' in September 2020, keeping it backdated to April 2019." Op. 16-17.

The trial court summarized the changes to the 2020 ERA as follows:

> The 2020 ERA fixed incorrect recitals about the formation of EWG and Freedom, defined various S.M.S. Finance subsidiaries as the 'Entities,' and backdated Haart's signature on the assignment page. It corrected the 2019 ERA's statement that EWG owned all the stock of the Elite entities, reciting that Freedom owned the relevant interests. … And it corrected the tense of the recital about Haart and Scaglia's marriage, putting it in the future respective to the April 2019 backdate.

Op. 17.

The 2020 ERA did not correct the 2019 ERA's erroneous statement that the "Shareholders" (Haart and Scaglia) owned all the membership interests in EWG. A476. Accordingly, Section 1.1 was still nonsensical insofar as it describes a "transfer" of an asset that Freedom already owned (EWG). A439-40; A476; A490.

While Haart testified that Scaglia used the ERAs as an "apology" following her discovery in Spring 2020 that he owned all of the preferred stock (A346), the 2020 ERA did not "add any language that transferred Freedom shares to Haart. The 'assignment of interest' portion and descriptions of the EWG stock transfer remained substantively unchanged." Op. 17. The trial court also observed that Haart's story was "chronologically impossible [because] Haart did not learn about the preferred stock until March 2020, months after the 2019 ERA was executed." Op. 14 n.56. Further, there is no contemporaneous evidence suggesting any relationship between the 2020 ERA and the Stock Power, which were drafted nearly four months apart. The trial court deemed Haart's "apology" story of the ERAs' origins to be "not credible." Op. 14 n.56.

After executing the 2020 ERA, "the parties continued to execute documents in the ordinary course of business suggesting Scaglia and Haart equally shared Freedom's stock." Op. 18. "Examples include director and officer insurance questionaries, organizational charts, and statements to potential investors. Most of these documents were prepared by nonparty EWG employees and contractors, including Barbieri, Feinman, and others." Op. 18. These documents' representation of Haart as an equal owner of Freedom are consistent with others that pre-date the 2020 ERA. Op. 39. To the extent Scaglia saw these documents, he "failed to either notice or correct the inaccurate statements about Haart's share." Op. 18.

G. As Haart's and Scaglia's Relationship Deteriorates, Haart Recognizes She Lacks Control.

"Haart and Scaglia increasingly disagreed about EWG's operations." Op. 19. Haart secretly began considering divorcing Scaglia and undertook to compile documents showing her ownership interest in EWG, Freedom, and other entities.

On January 15, 2021, Haart texted Feinman and asked for "the docs for Freedom Holding, Elite, The Society, Men Women, and any other related or relevant entity[.]" A1021; *see also* A1023; A350. She also asked that Feinman provide her "the doc that shows we both own everything tog[ether]." A1021; A350. Feinman provided her with a copy of Freedom's stock ledger and the Stock Power. *See* A1023-27.

Haart immediately understood that the Stock Power did not establish that she had equal control of Freedom. She texted Feinman:

> **Haart**: the stock power says that Silvio gave me SixtyOne [sic] Thousand Eight Hundred Thirty Two (61,832) Shares of the One Hundred Twenty Three Thousand Six Hundred Sixty Five (123,665). This is slightly less than 50%[.] [A]m I missing something darling?
>
> **Haart**: 61,832 shares x 2 = 123,664 is that important? Does that give him more power than me? That he has one more share than me?
>
> **Haart**: If he has 50.1% of the voting stock and you have 49.9% he is still the majority stock holder? Or am I confused my darling?

A1024. Haart never brought up the ERAs with Feinman in these January 2021 discussions—or, for that matter, at any time. A1954-55.

Haart then sent the Stock Power to Brian Cousin, an attorney for EWG.

A1028. Cousin confirmed that the Stock Power indorsed to Haart "slightly less than 50%" of Freedom's preferred stock. A1028. Haart asked: "You think that 1 share is gonna make any diff?" *Id.* Cousin replied: "It may depending on what the corporate documents say. If he has 50.1% of the voting stock and you have 49.9%, he is still the majority stock holder." *Id.*; *see also* A351. Haart never sent the ERAs to Cousin. A352.

At this same time, Haart also discussed the Stock Power with a divorce attorney, and she engaged Woolery P.C. to review the document too. *See* A352; B312; B426. Haart did not send the ERAs to these attorneys either. A352.

"In short, Haart knew no later than January 2021 that she held less than 50% of Freedom's preferred shares." Op. 21.

H. Amid Divorce Discussions, Haart Continues Her Quest for Co-Equal Control.

In late-2021, Scaglia and Haart began discussing an amicable divorce. Haart resumed pressuring Scaglia to give her equal control of EWG. A389; B339. On January 19, 2022, they met with Feinman to discuss this subject. A388-89. At that meeting, Scaglia agreed to allow Haart to discuss with Benjamin Kozinn, another attorney for EWG, a potential "restructuring of Freedom to give [] Haart equal control" of EWG if and when it became a public company. A389.

Haart called Kozinn on January 27, 2022. During the call, Haart claimed that Scaglia had agreed to appoint her as a Freedom director. A499. Haart asked Kozinn

to assist with the process of making her a director at Freedom and to draft a stockholder's agreement. *Id*. While Haart testified that her communications with Kozinn were limited to discussion of Freedom's JPMorgan bank account (A356), her testimony is contradicted by contemporaneous documents and Kozinn's sworn testimony—given as a third party with no motivation to favor one side or the other. *See* A500; *see also* A1606-10; B339-40; B317.

Kozinn followed up with Scaglia on February 3, 2022. A389; A499. Scaglia told Kozinn "that he would not give [Haart] the ability to [be a Freedom director] because then she would have a right to block actions that he might want to take with respect to the assets of Freedom Holding, and he would not allow that." A499; *see also* A389 (Scaglia: "I told [Kozinn], I'm not willing to give any control to her now.").

Haart was furious when she learned what Scaglia had told Kozinn. That same day, she left Scaglia a rambling, eighteen-minute voicemail in which she repeatedly acknowledged that Scaglia controlled Freedom. A1606-10; A354; *see infra*, at 36-37. And, the next day, Haart sent Scaglia a series of text messages where she again acknowledged his control of Freedom. B339-40; A357; *see infra*, at 36-37.

Left with the reality that the documents did not give her the control she desired, Haart "focused on convincing Feinman to parrot that she owned half of Freedom." Op. 23. On February 5, 2022, she texted him: "Silvio told [Kozinn]:

there is no way I am making her an equal partner[.] I owned elite for 8 yrs before and I'm not giving her any decision rights whatsoever." B317. Haart then tried to get Feinman to claim that she already had equal control of Freedom—not through the ERAs, but through the June 2020 Stock Power:

> I'm going to need you to do what you said my darling if push ever came to shove and tell the truth that the second document we signed[,] it was supposed to make us equal in not only cash but in true partnership and I asked you then if I have the same rights as Silvio and you said yes and then we find out that's not the case at all and that I do not have equal decision making (actually no decision making rights whatsoever) but that was def[initely] Silvio[']s] intention and what he told you to draft up.

Id. at 4.

"Haart continued leaning on Feinman after this litigation began: when Feinman complained about unpaid bills Haart owed, Haart responded 'You want to get paid? Plz help me help you! I cannot pay you without the truth first coming out and being acknowledged as a 50% owner which you know better than anyone that I am.'" Op. 24 (quoting B327).

Feinman refused to lie. On February 10, 2022, Feinman confirmed in an e-mail that "Silvio Scaglia controls the preferred shares and is the sole director of Freedom Holding, Inc." B371. Feinman then testified unequivocally to both facts. A500-501. Consistent with her vindictive philosophy of "get angry and then [] get even," (A340), following Feinman's testimony, Haart sued him and his accounting firm in New York state court. B173.

I. Haart is Removed from Her Positions and Litigation Ensues.

Haart's tenure as EWG's CEO was disastrous. Haart was frequently absent and racked up millions of dollars in personal expenses. A383; A390-91; A478; *see, e.g.*, B306; B307; B310. EWG suffered heavy losses, and further losses were projected for 2022. *See* A372; A383; A1640.

Accordingly, on February 7, 2022, Scaglia and Barbieri made a business decision to remove Haart from her positions at EWG. A1640-41; A484. When Haart learned of her imminent removal, she responded by misappropriating $850,000 from a Freedom bank account. A356; B344.

On February 8, 2022, Scaglia executed a written consent on behalf of Freedom as EWG's managing member, which removed Haart as an EWG director. A297; A1645. Haart responded with her own written consent, which declared Scaglia's consent "null and void." A297; A485; A1647. But Haart knew that Scaglia held all the cards. She texted Feinman the next day: "[Scaglia] is the sole member of freedom which may very well give him rights I don't have[.]" B353-54.

On February 9, 2022, Scaglia and Barbieri convened a meeting of EWG's board of directors. As EWG's sole directors, they voted to remove Haart as CEO and appointed Barbieri to that position. B346; A485.

Haart responded by filing the present litigation on February 11, 2022. A1. Haart's initial Petition did not mention Freedom's preferred stock or the Stock Power. Op. 21 n.100; B380.

On February 13, 2022, Scaglia responded to the Petition's false claims of "deadlock" by taking the following actions by written consent. First, Scaglia acted as Freedom's controlling stockholder to remove all directors other than Scaglia (if any). A1653. Second, Scaglia acted as sole director of Freedom to confirm Haart's removal from any officer positions she held at Freedom and to authorize Freedom to remove Haart from any positions she held at EWG. A1656. Third, Scaglia caused Freedom to act as managing member of EWG to confirm Haart's removal from her positions at EWG. A1660.

When made aware of these actions, Haart's counsel responded that they "have not received any documentation indicating that any preferred stock of the Company had been validly issued to" Scaglia. B402. After Scaglia provided the requested documents (B404), Haart's counsel withdrew. B1. The trial court found Haart's failure to "mention [Freedom's] preferred shares to her original counsel or the Court" in her initial pleading created "dirt on Haart's [hands]." Op. 45.

Represented by new counsel, Haart filed the Amended Petition. A59. Haart now claimed that the ERAs transferred her *both* common and preferred stock. A67-68. The Amended Petition alleged that Haart had learned about the preferred stock

in March 2019, and that the ERA had first been drafted in *April 2019* after she "protested" Scaglia's sole ownership of it. A67. Those allegations were proven false. Op. 14 n.56; *see supra*, at 18.

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED THE ERAS.

A. Question Presented

Did the trial court correctly conclude that the ERAs did not include a promise by Scaglia to transfer Haart 50% of Freedom's preferred stock? Op. 32-36.

B. Scope of Review

The interpretation of contractual language is a legal question subject to *de novo* review. "To the extent the trial court's interpretation of an agreement rests on findings concerning extrinsic evidence, however, this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process." *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999); *accord Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008). When the trial court's factual findings "are based on determinations regarding the credibility of witnesses, [] the deference already required by the clearly erroneous standard of appellate review is enhanced." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000).

C. Merits Argument

The ERAs are governed by New York law, which, like Delaware law, "give[s] great weight to the parties' objective manifestations of their intent in the written language of their agreement." *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 54 (Del. Ch. 2001); *see Slamow v. Del Col*, 594 N.E.2d 918, 919 (N.Y. 1992) ("The

best evidence of what parties to a written agreement intend is what they say in their writing."). A contract "must be read as a whole in order to determine its purpose and intent." *Bijan Designer for Men, Inc. v. Fireman's Fund Ins. Co.*, 705 N.Y.S.2d 30, 33 (App. Div. 2000). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002); *accord In re Viking Pump, Inc.*, 148 A.3d 633, 645 (Del. 2016). "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Selective Ins. Co. of Am. v. Cnty. of Rensselaer*, 47 N.E.3d 458, 461 (N.Y. 2016).

1. The Trial Court Correctly Interpreted the ERAs' Plain Language.

Consistent with their title, "Entity Restructuring Agreement," the language of the ERAs confirm that their sole purpose was to restructure the ownership of EWG and the Elite businesses under Freedom. Prior to the ERAs, Freedom was the direct parent of each of these entities. Following the ERAs, EWG would "assume ownership of One Hundred (l00%) Percent of the stock Freedom owns of the [Elite

businesses],” so that Freedom would be the direct parent of EWG, and EWG would in turn be the direct parent of the Elite businesses. A1884.[5]

Although riddled with errors, the plain language of the ERAs consistently reflect this purpose. Section 1 of the agreement describes two transfers. The first transfer is the declarative clause of Section 1.1: “The Shareholders [Scaglia and Haart] agree to transfer all of their Membership Interests in EWG to their wholly [sic] Delaware corporation known as Freedom.” A1885. This clause “has no practical effect” because Freedom already owned all of EWG’s equity. Op. 34. The second transfer, and the one which the ERAs actually memorialized, is described in Section 1.3: “Freedom shall execute all necessary documents to complete the transfer of its stock ownership in the [Elite businesses] to [EWG].” A1885.

The rest of the agreement revolves around these two transfers:

- The recitals confirm that the transaction was intended to “qualify as a tax-free funding of [EWG],” and that Haart and Scaglia executed the ERAs “as a funding agreement.” A1884-85.
- The “Now Therefore” clause in the recitals reinforces that the provisions of the ERAs are the “terms and conditions” upon which Scaglia and Haart “agree

[5] Like the trial court, Scaglia “quote[s] the more current and cleaner 2020 ERA,” Op. 33.

to fund any and all Membership Interests in [EWG] into FREEDOM." A1885.

- Section 1.2 provides that Haart and Scaglia will execute an assignment of their EWG membership interests to Freedom. *Id.* Section 2 provides that the assignment documentation "shall be in the form substantially identical to that attached hereto as Exhibit A." *Id.*; *see* A1888-90.
- Section 3 provides that "Freedom shall hereinafter reflect on its books and records the ownership of [EWG] (and its three (3) owned subsidiaries) and shall file all of its tax returns in accordance therewith." A1885.

By contrast, as Haart conceded at trial, "there's no statement in [the ERAs] that says [Scaglia] is transferring shares to [Haart.]" A347. None of the recitals describe a transfer of Freedom stock, and the agreement does not require Scaglia or Haart to execute an assignment form transferring Freedom stock (as it does for the supposed transfer of EWG membership interests).

The only contractual language Haart points to supporting her interpretation of the ERAs is an oblique clause in the middle of Section 1.1. This clause does not describe a separate transfer of Freedom stock. It instead suggests that, *as a result* of Scaglia and Haart supposedly transferring their EWG membership interests to Freedom, Scaglia and Haart would "*thus* change the structure of ownership such that Freedom shall be owned 50% by each shareholder." A1885. As the trial court

correctly found, the context of Section 1.1 (itself a nonsensical provision) reveals this clause to be a "meaningless incorrect recital." Op. 33. Any transfer of EWG's ownership would have no effect on Freedom's ownership. Section 1.1's suggestion that a transfer of EWG membership interests would "thus" effectuate a transfer of Freedom stock is false. Neither Section 1.1 nor any other part of the ERAs describes a transfer between Freedom's stockholders. *See, e.g.*, *Fireman's Fund Ins. Co.*, 705 N.Y.S.2d at 33 ("[S]ingle clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part.").

Haart's only response is that the trial court's interpretation renders the middle clause of Section 1.1 meaningless. OB 23-25. The trial court properly rejected this argument. *See* Op. 35. The interpretative canon disfavoring surplusage is "not absolute," but is "premised on the existence of a choice among reasonable meanings of contract provisions" and "that other relevant considerations are not dispositive." *DaPuzzo v. Globalvest Mgmt. Co., L.P.*, 263 F. Supp. 2d 714, 729 (S.D.N.Y. 2003); *see also, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. b (1981) ("The preference for an interpretation which gives meaning to every part of an agreement does not mean that every part is assumed to have legal consequences."); *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *14-15 (Del. Ch. Sept. 11, 2015) ("The canon against surplusage, moreover, is most properly used to fathom the objective

intent of the contracting parties, not to trap a careless draftsperson into including a contract right that he did not mean to include. And the canon does not change the fact that courts will not bend contract language to read meaning into the words that the parties obviously did not intend.").

As the trial court found, the "ERAs contain many errors," and the language of Section 1 is "nonsense." Op. 33, 36. It is unsurprising that an inaccurate section of an inaccurate agreement would include inaccurate and superfluous language regarding Haart's ownership of Freedom. Moreover, it is undisputed that, five months before the 2019 ERA was executed, Scaglia had separately transferred Haart 50% of Freedom's common stock. A1882-83. The language excerpted by Haart is either a confirmation of Haart's ownership of Freedom's common stock, or simply one of the ERAs' many inaccuracies.

Haart's interpretation also ignores that the ERAs presume that Haart is *already* a Freedom stockholder. Haart and Scaglia are jointly defined as the "Shareholders," and the first recital states that "[t]he Shareholders by and between them own One Hundred (100%) Percent of the stock of all classes of capital stock in Freedom Holding, Inc." A1885.[6] Haart agrees that she acquired Freedom common stock in July 2019—not April 2019 (when the ERAs were supposedly

[6] This recital says nothing about the allocation of ownership of Freedom stock between Scaglia and Haart. Op. 34 n.170.

effective), not November 2019 (when the 2019 ERA was executed), and not October 2020 (when the 2020 ERA was executed). OB 6. That Haart was already a Freedom stockholder further confirms that the ERAs were not intended to transfer her 50% of any class of Freedom stock—and certainly not preferred stock, which the ERAs nowhere reference.

Haart also cannot account for the fact that her interpretation of the ERA would render any promise to transfer her Freedom stock unenforceable. The only consideration Haart supposedly gave in the ERAs was her membership interest in EWG. Since Freedom was already the sole member of EWG, any promise in the ERAs to transfer Haart 50% of Freedom's preferred stock would be unenforceable for lack of consideration. *See Reddy v. Mihos*, 76 N.Y.S.3d 13, 18 (App. Div. 2018).[7] Likewise, the ERAs would fail due to mutual mistake. *See Gould v. Bd. Of Educ. Of Sewanhaka Cent. High Sch. Dist.*, 616 N.E.2d 142, 145-46 (N.Y. 1993).

The only reasonable interpretation of the ERAs is that found by the trial court:

> In short, the ERAs' function is consistent with their title: restructuring the business by transferring the Entities from Freedom to EWG, and ensuring EWG was fully owned by Freedom. These tasks do not require any particular ownership of Freedom by Haart and Scaglia. The ERAs did not intend or accomplish any transfer of Freedom stock between Haart and Scaglia.

[7] As the ERAs say nothing about Haart's "sweat equity," this cannot constitute consideration pursuant to the ERAs' integration clause. *See* A348; A1886.

Op. 36.

2. Even if the ERAs Are Ambiguous, the Trial Court's Assessment of the Extrinsic Evidence Was Not Clearly Erroneous.

Reflecting the lack of textual support for her position, Haart spends nearly twice as many pages disputing the trial court's assessment of the extrinsic evidence as she does analyzing the ERAs' plain language. As the trial court correctly found the ERAs unambiguous, this Court may affirm without reaching the extrinsic evidence. Nonetheless, Haart cannot meet her burden to show that the trial court's extensive factual findings concerning the extrinsic evidence—in many cases based on assessments of witness credibility—were clearly erroneous.

The trial court found that "both ERAs were executed against the backdrop of potential going-public transactions," and that Scaglia and Barbieri "credibly testified that the Elite business needed to be restructured to support such a transaction." Op. 37; *see, e.g.,* A376 (Scaglia explaining that the 2019 ERA was created because "we never did the administrative step of writing a contract transferring these entities from the direct Freedom ownership to the Elite World Group ownership"); A474 (Barbieri: "[T]he only target of this agreement was [to] move assets which were directly under Freedom into this new shell company, to consolidate the assets."). Contemporaneous e-mails surrounding the drafting of the 2020 ERA show that the parties' focus was on "reorganizing the entities' structure, not Haart and Scaglia's

interest in them." Op. 37; *see, e.g.*, A753 (e-mail discussing revisions to 2020 ERA to accurately describe transfer of Elite businesses from Freedom to EWG). The same is true of the documents Haart cites where the ERAs were transmitted to third parties. *See, e.g.*, A778 (attaching ERA to establish that EWG is the owner of The Society Model Management, Inc.); A843 (sending 2020 ERA to auditors to establish "Transfer [of Elite entities] to Elite World Group, LLC"); A1065 (same).

Haart's contention that "third parties in fact construed the ERAs as transferring 50% ownership to Haart" is unsupported by the documents she cites. OB 25; *see also* OB 14-15. The "ownership percentages" that are the subject of the e-mail chain at A1061-69 is EWG's ownership in the Elite businesses. *See* A1063. EWG's control of these businesses was the "control issue" referenced in A1070. *See* A1088 (financial statement discussing transfer of Elite businesses to EWG). As for the statement by a DDK associate that "Post restructure, [Freedom common and preferred] stock is 100% jointly owned by Julia and Silvio" (A1066), this sentence says nothing about how much common or preferred stock Scaglia and Haart own individually. *See* Op. 34 n.170 (reaching same conclusion with respect to ERAs' reference to Scaglia and Haart as together owning "100%" of Freedom's stock).[8] In any event, the "restructure" being referenced is the transfer of assets from SMS to

[8] Haart did not explore in discovery this DDK associate's knowledge of Freedom's ownership.

Freedom in late 2018, and not the ERAs. This is demonstrated by the rest of the e-mail that Haart does not quote, which refers separately to the "Elite restructure agreement" as the document that transferred the Elite businesses to EWG. *See id.* In reality, there is not a single pre-litigation document that references the ERAs as instruments through which Haart acquired Freedom stock.

This includes Haart's own documents. Prior to the litigation, Haart never claimed that the ERAs gave her any Freedom stock. The *only* document Haart ever pointed to as giving her preferred stock was the Stock Power, drafted in June 2020. *See, e.g.*, A1028; A1613-14; B317-18. The Stock Power, and not the ERAs, is what Feinman sent Haart in January 2021 when she asked for the "doc that shows we both own everything tog[ether]." A1021. The Stock Power, and not the ERAs, is what Haart sent Cousin as evidence of her ownership of preferred stock. A1028. The Stock Power, and not the ERAs, is what Haart told Feinman in January 2022 was the document that "was supposed to make us equal in not only cash but in true partnership." B317. Haart's claim that the ERAs transferred her Freedom stock is a litigation invention necessitated by the fact that the Stock Power decidedly did *not* indorse a transfer to Haart of 50% of Freedom's preferred stock.

The Stock Power itself is powerful extrinsic evidence that the ERAs did not transfer Haart preferred stock. The trial court found that the stock power "would not have been necessary if the 2019 ERA transferred Haart half of Freedom's stock."

Op. 37. Moreover, the trial court concluded Haart's testimony linking the 2020 ERA and the Stock Power was "not credible," and there is no evidence to support Haart's claim. Op. 14 n.56. Haart herself understood the devastating implications of the Stock Power to her claims of equal ownership, which is presumably why she attempted to bribe Feinman to give false testimony about that document (and sued him when he did not), and why she concealed the Stock Power from the Court and her own lawyers. *See* B327; Op. 21 n.100.

Haart also ignores her numerous pre-litigation admissions that Scaglia controlled Freedom. "Haart knew no later than January 2021 that she held less than 50% of Freedom's preferred shares." Op. 21; *see, e.g.*, A1024.[9] Shortly before this litigation, Haart repeatedly acknowledged her lack of control in voicemails and text messages. *See, e.g.*, A1608-09 (Haart February 2022 voicemail to Scaglia: "I wanted us to be equal partners…[T]hat's what I asked Ben [Kozinn] to do, is to finally make us actually equal; that not only do we share the profits."); A1609 ("[T]o me, Freedom is having the same rights and decision-making that you do. And I see that it's just not something you're capable of doing); A1627 (Haart February 2022 WhatsApp message to Scaglia: "I'm sure you can understand why I can't accept

[9] Haart's attempt to downplay her January 2021 text messages as "backward-looking" extrinsic evidence (OB 33) is contradicted by her own extensive reliance on similar evidence. *See, e.g.*, A778; A843; A1061.

such an uneven partnership after literally we spent 2 hrs on Sunday planning how we would change the shareholder agreement to finally be fair and we all agreed and then you literally did an about face on Thur[sday] and told Ben [Kozinn] I had it for 8 yrs I'm not giving her control."); *id.* ("Better to find out now that we can never be equals than to find out a few years later like I found out the last two times"); B317 (Haart February 2022 WhatsApp message to Feinman: "[Scaglia] wouldn't ever sign anything truly fair that would make us equal partners.").

Ignoring or downplaying her admissions and other contemporaneous evidence contradicting her position, Haart instead points to various unrelated documents stating that her and Scaglia each owned 50% of Freedom. The trial court considered this "string of miscellaneous documents" and found it unpersuasive to carry Haart's burden of proof. Op. 40, 42.

That finding was not clearly erroneous. None of these documents reference the ERAs as the source of Haart's ownership of Freedom stock,[10] others do not reference Scaglia and Haart's relative ownership or voting power,[11] others pre-date

[10] *See supra*, at 34-35.

[11] *See*, *e.g.*, A1019; A1109. Haart repeats the misleading argument she made below that Schedule G to Freedom's tax returns "listed Scaglia and [Haart] as equal owners of voting stock." OB 12. The tax return says that Scaglia and Haart each own "100%" of Freedom's voting power due to IRS spousal attribution rules. A1019; *see* A1925 (Feinman explaining ownership percentages on tax returns). The return says nothing about how much voting power each own individually.

when Haart claims she was transferred any Freedom preferred stock,[12] and most were drafted by individuals unfamiliar with the company's capital structure.[13] Even Barbieri did not learn about the existence of Freedom's preferred stock until 2020, and he did not know precisely how much Haart and Scaglia owned until this lawsuit. *See* A480; A482; A489. Accordingly, when preparing documents discussing Freedom's ownership, he generally said that Haart owned 50% of the company based on her equal ownership of common stock (of which he was aware). *See* A481-83. This included the draft D&O questionnaires Barbieri hastily prepared for the potential Galileo transaction. *See* A482-83.

To the extent that Scaglia received these documents, he "failed to either notice or correct the inaccurate statements about Haart's [ownership] share." Op. 18. While Haart argues that this is "facially unbelievable," OB 30, the record amply supports the trial court's determination. Both documents and testimony demonstrate that Scaglia generally relied on Barbieri and Feinman to prepare and review corporate documents like the ERAs, Freedom board minutes, and director questionnaires.[14] As for Scaglia's May 2021 e-mail to Jefferies describing Haart as

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[12] *See, e.g.*, A666-723; Op. 39.

[13] *See, e.g.*, A1042-44; B337-38; A1115; A2322.

[14] *See, e.g.*, A473 (Barbieri testifying that Feinman was "responsible for bookkeeping at Freedom" and the creation of the ERA was "relatively unimportant to us"); A490 (similar); A769 (Scaglia blank-forwarding draft ERA to Barbieri); A827 (Scgalia forwarding draft 2020 ERA to Feinman and asking him "to confirm

an "equal owner," (OB 28), the trial court credited Scaglia's testimony and found that "Haart drafted and urged Scaglia to make this statement," "Scaglia was trying to appease his wife in the shadow of looming marital problems," and "[i]t is not surprising that Scaglia would seek to present Haart positively in front of potential investors, especially considering her upcoming Netflix show." Op. 40-41; *see* A441-42; A460-61.

Haart also claims that the trial court erred by failing to construe any ambiguities in the ERAs against Scaglia as its drafter. OB 26. Haart overstates the doctrine of *contra proferentum*, which is applied only "as a matter of last resort after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument." *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 573 (2d Cir. 1991); *see also, e.g.*, *Birdsong Estates Homeowners Ass'n v. D.P.S. Sw. Corp.*, 957 N.Y.S.2d 785, 787 (App. Div. 2012); *Fernandez v. Price*, 880 N.Y.S.2d 169, 173 (App. Div. 2009). Here, there is bountiful extrinsic evidence contradicting Haart's reading of the ERAs. *Contra proferentum* is also "generally

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that you are in agreement with this," and Feinman responding that it was "fine to sign"); A392 (Scaglia testifying he reviewed the draft director questionnaires "very quickly"); A482 (Barbieri testifying that Scaglia asked him to prepare director questionnaires); A375 (Scaglia testifying that September 25, 2021 Freedom board minutes served an "administrative process" and he likely only read the resolution); A840 (Scaglia asking Barbieri to "take the lead to complete the [director] questionnaires" for him and Haart); A1943 (Feinman agreeing that Scaglia and Haart "look[ed] to [him] as the custodian of corporate records").

inappropriate if both parties are sophisticated." *DaPuzzo*, 263 F. Supp. 2d at 729. Haart claims she is "a successful fashion designer, entrepreneur, author, and business executive." OB 5. Finally, the doctrine applies only where one party exclusively prepares the agreement and the counterparty "had no voice in the selection of its language." *Sci. Applications Int'l Corp. v. State*, 876 N.Y.S.2d 182, 184 (App. Div. 2009). The record shows that (i) Feinman's staff prepared the 2019 ERA without Scaglia's supervision, (ii) Scaglia was provided with the ERAs but did not closely review them, and (iii) Haart was also provided the ERAs and had the opportunity propose revisions before signing. *See, e.g.*, A376, A379, A724, B304. *Contra proferentum* has no place under these facts.

II. HAART WAS NOT CONSTRUCTIVELY DELIVERED FREEDOM PREFERRED STOCK.

A. Question Presented

Did the trial court correctly decline to decide whether the ERAs constituted a constructive delivery of preferred stock to Haart? Op. 15 n.62.

B. Scope of Review

Whether constructive delivery occurred is a "factual determination" for the trial court that will be upheld if it is "adequately supported by the record and appears the product of an orderly and logical deductive process." *Kallop v. McAllister*, 678 A.2d 526, 531 (Del. 1996). Haart's contention that *de novo* review applies is mistaken. OB 37. *Kallop* found that "[t]he issue of whether Article 8 displaced the principle of common law constructive delivery of corporate stock is one of statutory interpretation and is thus appropriate for *de novo* review." 678 A.2d at 530. That question is distinct from whether constructive delivery occurred in a particular case, which *Kallop* recognizes as a factual question. *See id.* at 531.

C. Merits Argument

As the trial court correctly concluded that the ERAs did not contain a promise to transfer Haart preferred stock, this Court, like the trial court, need not decide whether the ERAs constructively delivered Freedom preferred stock to Haart. *See supra*, at 25-39.

Should this court address Haart's constructive delivery argument, however, it should find that doctrine inapplicable here. Constructive delivery is a narrow exception to Article 8's requirement that, for certificated securities, a stock certificate must be physically delivered to transfer title. 6 *Del. C.* §§ 8-104; 8-301(a)(1); *see also McAllister v. Kallop*, 1995 WL 462210, at *18 (Del. Ch. July 28, 1995) (recognizing "the importance in most circumstances of following the formal requirements for stock cancellation or transfer"), *aff'd*, 678 A.2d 526 (Del. 1996). Constructive delivery thus applies only "when actual transfers of physical possession is impractical." *Kallop*, 678 A.2d at 531; *see also In re Estate of Szabo*, 176 N.E.2d, 395, 396 (N.Y. 1961) (constructive delivery must be "the only kind of delivery that would be practicable under the circumstances"). Where, as here, "a transfer of a part interest in stock certificates is concerned," the constructive delivery "must proceed to a point of no return, and this point can only be reached when there is a transfer of record on the stock books of the company." *Szabo*, 176 N.E.2d at 396.

There was no impediment to Scaglia delivering Haart a preferred stock certificate by surrendering his certificate and then having new certificates issued to him and Haart. Scaglia had done just that when transferring Haart common stock in July 2019, and the parties begun the same process in June 2020 when Feinman drafted the Stock Power. *See* B430; B431; *see also, e.g.*, *In re Cohn*, 176 N.Y.S. 225, 232 (App. Div. 1919) (declining to find constructive delivery where "there was

no physical or other impossibility to the actual delivery of the stock"). The ERAs' vague reference to Haart's ownership interest in Freedom does not reflect "an unmistakable intention to transfer title without transferring possession." *Kallop*, 678 A.2d at 531. The ERAs do not include as an exhibit an indorsement of Freedom stock, even though they do exhibit an indorsement for a transfer of EWG membership interests.

For these and other reasons, *Kallop* is distinguishable. There, "physical transfer of the certificate was not a reasonable option" because the certificate was held as a security interest by a third party. 1995 WL 462210, at *16. Further, the writing evidencing the transfer was countersigned by the transferee, the transferee retained a copy of the document, and the document stated that it constituted a "deliver[y]" of the shares. *Id.* at *17. *Kallop* does not stand for the proposition that an agreement to transfer stock always constitutes constructive delivery, which would nullify Article 8's physical-delivery requirement. *See, e.g.*, *Towbin v. Towbin*, 986 N.Y.S.2d 119, 121-22 (App. Div. 2014) (execution of stock power did not constitute delivery because "a showing of the requisite surrender of dominion and control is lacking"); *In re Lefrak*, 215 B.R. 930, 937 (Bankr. S.D.N.Y.) (signed writings did not constitute delivery where transferor later "abandoned all efforts to complete the transfer process"), *aff'd*, 227 B.R. 222 (S.D.N.Y. 1998). Like many cases, *Kallop* was a fact-specific decision, and the facts it rested on are absent here.

Haart was never delivered stock certificates for Freedom preferred stock. Therefore, she never acquired any preferred shares. *See* 6 *Del. C.* § 8-301(a)(1).

III. THE TRIAL COURT CORRECTLY FOUND THAT SCAGLIA HAD NOT ACQUIESED IN HAART'S EQUAL OWNERSHIP OF FREEDOM.

A. Question Presented

Did the Court of Chancery correctly conclude that Haart failed to carry her burden that Scaglia acquiesced in her ownership of 50% of Freedom's preferred stock? Op. 42-44.

B. Scope of Review

"A trial court's application of equitable defenses presents a mixed question of law and fact." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). The trial court's findings of the "historical facts" giving rise to potential acquiescence is subject to clear-error review. *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *2 (Del. May 6, 2013) (TABLE). "Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated," which is subject to *de novo* review. *Id.*

C. Merits Argument

Acquiescence requires "a complained-of act." *Klaassen*, 106 A.3d at 1047. In other words, a claimant must prove there was some underlying transaction where, although legal requirements may not be satisfied, a counterparty's outward acceptance warrants binding them in equity. All of Haart's cases fit this pattern. *See, e.g.*, *id.* (CEO acquiesced to removal following failure to properly notice board meeting); *Frank v. Wilson & Co.*, 32 A.2d 277 (Del. 1943) (stockholder acquiesced

to recapitalization following alleged failure to properly amend certificate of incorporation); *Simple Glob., Inc. v. Banasik*, 2021 WL 2587894 (Del. Ch. June 24, 2021) (stockholder acquiesced in share transfer after finding agreement included promise to transfer shares); *Nevins v. Bryan*, 885 A.2d 233, 246 (Del. Ch.) (CEO acquiesced to removal following improperly noticed stockholder meeting), *aff'd*, 884 A.2d 512 (Del. 2005) (TABLE).

The Court of Chancery found that "Haart has not proven any agreement to evenly split Freedom's shares or voting power." Op. 43. Accordingly, as the trial court correctly concluded, "there was nothing … to which Scaglia could acquiesce." Op. 42. Haart's acquiescence argument is predicated on her erroneous interpretation of the ERAs—if the latter argument fails, so too must the former.[15]

In any event, Scaglia never acquiesced to Haart owning 50% of Freedom's preferred stock. After the ERA was first executed in November 2019, Scaglia never told Haart or anyone else that document gave Haart 50% of Freedom's preferred stock. Instead, in Spring 2020, he told Haart that he controlled Freedom through its preferred stock. A344, A480. A few months after that, Feinman drafted the Stock Power, which only indorsed to Haart 49.9% of Freedom's preferred stock. In January and February 2022, Scaglia reiterated to Haart that he still controlled

[15] Haart has not appealed the Court of Chancery's finding that no oral contract existed between her and Scaglia to transfer preferred stock. Op. 43 n.210.

Freedom through its preferred stock and refused to make her a director. *See, e.g.*, A353-55; A388-89; A499; A1606-07; B339; B350-51. While Scaglia "failed to either notice or correct" documents that inaccurately described Haart as an equal owner of Freedom (Op. 18), the record supports the trial court's determination that this did not reflect an acknowledgment of the truth of those statements. *See supra*, at 37-38.

The foregoing demonstrates that it is Haart's claims that would be barred by acquiescence if her interpretation of the ERAs was correct (and it is not). Despite knowing no later than January 2021 that she did not own 50% of Freedom's preferred stock, Haart never raised the ERAs with Scaglia or anyone else. Instead, shortly before this dispute, Haart confirmed her understanding that her and Scaglia were not "equal partners" (A1609) because Scaglia "has one more share than me." A1024; *see also* A1627 ("Better to find out now that we can never be equals than to find out a few years later like I found out the last two times"); B317 ("I do not have equal decision making (actually no decision making whatsoever)"). Accordingly, she acquiesced to this fact.

CONCLUSION

The ruling of the Court of Chancery should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 1, 2022, true and correct copies of the foregoing *Appellees' Answering Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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