EFiled: Sep 13 2024 04:52PM EDT
Filing ID 74312873
Case Number 294,2024

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| MATTERPORT, INC. and MATTERPORT OPERATING, LLC,<br><br>Defendants Below/Appellants/Cross-Appellees,<br><br>v.<br><br>WILLIAM J. BROWN,<br><br>Plaintiff Below/Appellee/Cross-Appellant. | ) | No. 294, 2024<br><br>Case Below: Court of Chancery of the State of Delaware<br>C.A. No. 2021-0595-LWW |

# APPELLANTS' OPENING BRIEF

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Dated: September 13, 2024

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## NATURE OF PROCEEDINGS

A bedrock requirement for fair and equitable resolution of Delaware civil actions is consistent legal interpretations (*i.e.*, consistent application of the law of the case) throughout the proceedings, especially when liability and damages are adjudicated in two phases. That is, when a company loses a liability case based on the trial court's interpretation of the company's bylaws, that company should be entitled to have damages assessed based on a consistent interpretation of those bylaws. The Court of Chancery's May 2024 post-trial damages decision in this case contravened this principle, necessitating it be reversed.

In the first phase of a bifurcated case, the Court of Chancery construed a provision in the bylaws of Appellant Matterport, Inc. ("Matterport") and concluded that Matterport incorrectly applied a stock transfer restriction imposed through its bylaws (the "Lockup Provisions") to Appellee William J. Brown ("Brown") following a business combination transaction. The trial court's construction of the Lockup Provisions was affirmed by this Court. In the second phase of the case, when assessing damages for Matterport's mistaken application of the Lockup Provisions to Brown, the Court of Chancery applied an interpretation of the Lockup Provisions directly contrary to its own prior interpretation. That legal error caused the trial court to improperly disregard its own factual findings based on overwhelming evidence and award windfall damages contrary to Delaware law.

In July 2021, Brown filed this action challenging 180-day transfer restrictions that Matterport applied to all legacy stockholders (including Brown) who received Matterport shares as merger consideration after the closing of its business combination transaction with a private corporation formerly named Matterport, Inc. ("Legacy Matterport") on July 22, 2021. Following an initial December 2021 trial on one count of Brown's complaint ("Phase 1"), the Court of Chancery ruled that Matterport incorrectly restricted Brown from trading his Matterport shares when it insisted that the Lockup Provisions applied to those shares. The court's ruling rested on language in the Lockup Provisions limiting their application to shares held "immediately following" the closing of the business combination transaction—which the court interpreted to mean "within a few days of" the July 22, 2021 closing. Brown, who was barred from trading during the Phase 1 litigation, did not get around to requesting and obtaining Matterport shares until November 2021, and therefore the trial court held his shares were not "Lockup Shares" as defined in Matterport's bylaws. That law of the case regarding the meaning of Lockup Shares was affirmed by this Court.

In a subsequent November 2023 trial of all remaining issues in the litigation ("Phase 2"), including any damages from Matterport's incorrect restriction of Brown's trading, the Court of Chancery adopted a fatally inconsistent interpretation of Lockup Shares. After ruling in Phase 1 that only those stockholders who sought

and received their Matterport shares "within a few days of" the July 22, 2021 closing held Lockup Shares, the court in Phase 2 ruled that Brown would have held Lockup Shares if he received his shares at any time in July or August 2021—up to ***six weeks*** after the closing. The trial court's inconsistent interpretation of Lockup Shares caused it to disregard its factual findings that Brown had actual plans and an urgent desire to sell his shares after the July closing. That ruling was irreconcilable with the law of the case affirmed by this Court and must be reversed.

The Court of Chancery's contravention of the law of the case was severely prejudicial to Matterport. In reliance on the court's Phase 1 interpretation of Lockup Shares, Matterport in the Phase 2 trial presented voluminous fact and expert evidence regarding the amount of money Brown would have obtained in the but-for world where he could receive his Matterport shares "a few days [after] closing"—*i.e.*, in late July or early August 2021—without being subject to the lockup. But the trial court retroactively (and erroneously) treated Matterport's evidence and damages analysis as irrelevant as a matter of law, despite the vital importance of that evidence.

The trial court dismissed Matterport's damages scenarios and all the evidence supporting them because the court found that, if Brown had received shares in July or August 2021, "he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded." Phase 2 Mem. Op. 40-41. Based on that reasoning, the

trial court instead calculated Brown's damages based on his real-world conduct (a separate reversible error), with trading starting on November 22, 2021—*four months after* closing. Using that date to calculate damages provided Brown an enormous windfall, awarding him nearly $80 million in damages on top of the more than $80 million he already received in the marketplace after he was permitted by the Phase 1 ruling to sell his shares before all other Legacy Matterport stockholders.

The trial court's improper damages analysis premised on its erroneous interpretation of the Lockup Provisions must be vacated. The trial court's decision to ignore the evidence of the but-for world where Brown was not mistakenly restricted from trading, and to instead calculate damages based on Brown's actual conduct, was contrary to the fundamental principle that compensatory damages should "put the [plaintiff] in the same position" as if the conduct complained of had not occurred. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). To properly estimate the amount of money that would put Brown in the same position as if he was not incorrectly restricted, damages must be calculated based on a but-for world in which Brown and Matterport knew Brown could receive unrestricted shares "a few days [after] closing" on July 22, 2021. That analysis, applied consistently with the law of the case, required calculating Brown's damages based on trading beginning in late July or early August 2021, consistent with the

court's factual findings "that Brown wished to obtain his shares in tradeable form promptly upon the closing of the business combination."

To correct the Court of Chancery's erroneous legal ruling in direct contravention of the law of the case and the improper damages analysis relying on that legal error, this Court should reverse the trial court's erroneous interpretation of the Lockup Provisions, vacate the improper damages analysis relying on that legal error, and order that Matterport's damages calculations are correct pursuant to the law of the case.

## SUMMARY OF ARGUMENT

1. The Court of Chancery erred by relying on a definition of Lockup Shares that was inconsistent with its prior definition, affirmed by this Court, and thereby violated the law of the case doctrine and caused the trial court to incorrectly calculate damages.

The trial court's Phase 1 decision established law of the case that Legacy Matterport stockholders who did not receive their Matterport shares "within a few days of [the July 22, 2021] closing" of Matterport's business combination transaction did not hold their shares "immediately following" the transaction and therefore did not hold Lockup Shares. That ruling was based on the court's determination that "immediately" means "without delay" and "following" means "being next in order or time." This Court affirmed the trial court's judgment in its entirety.

In its Phase 2 decision, however, the trial court ruled that even if Brown had received his Matterport shares in late July or in August 2021, weeks after the July 22, 2021 closing, "he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded." The trial court's interpretation of Lockup Shares in Phase 2 was contrary to binding law of the case, which established that Legacy Matterport stockholders who received their Matterport shares more than "a few days

[after] closing" did not hold their shares "immediately following" the transaction and thus did not hold Lockup Shares.

2. The Court of Chancery applied a legally erroneous damages analysis predicated on real-world actions that disregarded key evidence and factual findings regarding Brown's conduct in the but-for world where he was not subject to transfer restrictions.

In part relying on its erroneous Phase 2 determination that, if Brown had received his Matterport shares in July or August 2021, "he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded," the trial court calculated damages based on Brown's real-world conduct in the face of the restrictions. The trial court accordingly calculated damages based on when Brown actually received shares in November 2021 after being incorrectly restricted from trading, rather than what Brown would have done if he had not been restricted. That damages calculus contradicted the principle that damages should reflect the amount of money that would "put [Brown] in the same position as if" he was not incorrectly restricted, *PharmAthene*, 132 A.3d at 1130, and the trial court's own determination that "Brown's damages are [] appropriately measured by the average price [of Matterport shares] over a reasonable time period that he would have traded had the transfer restrictions been removed."

## STATEMENT OF FACTS

### A. The Parties

Appellant Matterport, Inc. ("Matterport") is a spatial data company that creates 3D technologies for remote, virtual tours of physical spaces. Prior to the business combination transaction at issue (the "de-SPAC" or "Business Combination Transaction"), Matterport was a special purpose acquisition company ("SPAC") named Gores Holdings VI, Inc., controlled by the Gores Group ("Gores"). Phase 2 Mem. Op. 1.

Appellant Matterport Operating LLC ("Legacy Matterport") is a wholly-owned subsidiary of Matterport. Prior to the de-SPAC, Legacy Matterport's corporate predecessor was a privately held corporation named "Matterport, Inc." A484 ¶ 69.

Appellee Brown was Legacy Matterport's Chief Executive Officer from November 2013 to December 2018. Phase 2 Mem. Op. 4. While CEO, Brown received Legacy Matterport stock options and purchased a small quantity of Legacy Matterport common stock. A470 ¶ 17; Phase 2 Mem. Op. 4. In late 2020, Brown exercised his options and thereafter held 1,387,000 common shares of Legacy Matterport. Phase 2 Mem. Op. 4. After Legacy Matterport's board of directors notified Brown in February 2018 that he would be replaced due to his poor performance as CEO, *e.g.*, A590 at 900:6-11, he undertook a yearslong, near-

continuous (and unsuccessful) effort to sell his Legacy Matterport shares in the secondary market (as those shares were not publicly traded), *see* Phase 2 Mem. Op. 5-6.[1]

### B. Matterport Engages in a De-SPAC Transaction and Applies Transfer Restrictions to All Legacy Stockholders

On February 7, 2021, Legacy Matterport's board approved an agreement to merge with Gores Holdings VI via a de-SPAC transaction. A476 ¶ 39. Also on February 7, a majority of Legacy Matterport's stockholders executed written consents approving the merger agreement. Phase 2 Mem. Op. 7.

As part of the de-SPAC, Legacy Matterport stockholders were entitled to receive as merger consideration 4.1193 shares of Matterport Class A common stock per share of Legacy Matterport stock. Phase 2 Mem. Op. 7. The merger agreement contemplated that the SPAC would adopt Amended and Restated Bylaws (the "A&R Bylaws") to govern Matterport after closing. The A&R Bylaws were adopted on July 21, 2021, and became effective on July 22—the day the business combination closed. Phase 2 Mem. Op. 7.

The A&R Bylaws included the Lockup Provisions—180-day restrictions on the sale or transfer of shares by Legacy Matterport stockholders. Such restrictions

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[1] *See also, e.g.*, A329 at 15:23-16:13, 16:23-17:4; A335 at 37:12-18; A337 at 48:10-19; A372 at 186:6-12, 187:18-188:19; A511 at 583:2-6; A539 at 693:11-696:9; A556 at 764:6-11; A558-59 at 772:7-773:4; A559 at 775:23-776:15; A560 at 777:21-778:22, 780:10-16.

are "often employed after an initial public offering or de-SPAC to avoid flooding the market and stabilize the price of a new security." Phase 2 Mem. Op. 8, 32. Specifically, the Lockup Provisions in Section 7.10(a) of the A&R Bylaws stated that "the holders … of shares of Class A common stock … may not Transfer any Lockup Shares until the end of the Lockup Period." "Lockup Shares" were defined as "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination Transaction." A845 § 7.10(d).[2]

The Lockup Provisions were "intended to apply to all shares issued to Legacy Matterport stockholders as merger consideration, including stockholders unaffiliated with Legacy Matterport's directors and officers." Phase 2 Mem. Op. 8. Until the Phase 1 post-trial decision in January 2022, Matterport "held a good faith … belief that the [Lockup Provisions] applied to all shares received by Legacy Matterport stockholders (including Brown)." Phase 2 Mem. Op. 25.

### C. Brown Prepares to Sell His Matterport Shares as Soon as Possible After De-SPAC Closing

Months before the de-SPAC transaction was announced, Brown learned from a Matterport board observer and others in 2020 that a Matterport de-SPAC transaction was likely, and he even knew a specific timeframe for the transaction.

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[2] The A&R Bylaws defined "Lockup Holders" as holders of Matterport Class A stock "issued [] as consideration under [the de-SPAC merger agreement]." A92 at 3.

A346 at 82:19-24, A348 at 91:2-7.[3] After Brown learned of a potential Matterport de-SPAC transaction, which would result in Matterport's shares trading on public exchanges rather than the secondary market, his life was "consumed" by preparations to sell his Matterport shares. Phase 2 Mem. Op. 6-7, 11.

Brown was so focused on selling his stock after learning of the impending de-SPAC that he moved his family over 3,000 miles from California to Puerto Rico in 30 days, to an area where he did not feel safe outside his gated community, and quickly signed a tax treaty with the government of Puerto Rico to minimize the capital gains taxes he would owe on his forthcoming stock sales. Phase 2 Mem. Op. 11; A1037; A287:21-A289:18; A290:9-24; A340 at 59:2-7; A379 at 216:1-18; A380 at 217:7-10, 218:6-10, 219:2-14; A380-A381 at 220:19-221:5, 223:12-22.

Doubling down, Brown borrowed millions of dollars from friends and business acquaintances and sold his assets, including his house and car, to pay for the December 2020 exercise of his Legacy Matterport stock options and associated

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[3] In both trials in this action, Plaintiff falsely testified that he first learned of the de-SPAC transaction when the official press release was announced (*i.e.*, February 8, 2021), and from "a rumor" published on *Yahoo! Finance* the Friday before the public announcement (*i.e.*, February 5, 2021). A87:16-A88:4; A383 at 231:11-17. In fact, as further discussed below, Plaintiff emailed a financial consultant about selling his shares "on day one" after Matterport's de-SPAC ***three weeks before*** the transaction was publicly announced. A1209. And Brown eventually confessed that he learned of the de-SPAC *months* before the date he specified in his deceptive testimony. A346 at 82:19-24, A348 at 91:2-7; A1209.

tax liabilities (which was necessary before selling his stock). A294:20-A295:1, A296:21-A298:1, A299:19-23, A310:20-23; *see also* A1357-A1359; A1360; A1361; A1053-A1058; A1019-A1026; A344 at 76:5-11, A345 at 77:15-78:10, A366 at 163:20-24, A367 at 167:12-23, A388 at 249:22-252:24. Brown admittedly lied to his close friends and others in order to obtain funds from them, as well as information to help him sell his shares. *E.g.*, A300:20-A305:15, A306:18-A307:6; A374 at 193:10-194:18, A389 at 253:5-254:23, A390 at 259:4-260:11. Eventually, Brown exhausted his ability to raise funds from his friends and acquaintances. *See, e.g.*, A968, A390 at 259:4-22, A391 at 261:4-262:16, A392 at 266:7-11.

By 2021, Brown was rapidly running out of funds and had been without full-time employment since his termination from Legacy Matterport. *E.g.*, A1059-A1200; A1354-A1356; A280:19-A281:10; A306:12-17, A308:3-15, A309:9-17; A387 at 246:19-22, 247:9-12, 248:12-15; A388 at 249:22-252:24; A389 at 253:1-254:3, 255:11-24, 256:1-24; A392 at 268:1-8. Only loans from an acquaintance—which came with a hefty interest rate—prevented Brown from running out of cash. A1019-A1026; A391 at 262:2-16, 263:2-6; A391-A392 at 263:20-266:2, 266:7-18. Without borrowing funds from his friends, Brown could not have covered his living expenses in 2020 or 2021, and he was using funds from one lender to pay off another. A388 at 250:16-23, A392 at 268:1-8. In short, by the end of 2020, Brown had put "virtually all of [his] funds into" monetizing his Legacy Matterport stock, A388 at

252:8-11, demonstrating not only Brown's desire to sell as soon as he could, but also his desperate need to do so. A1037.

On January 18, 2021—three weeks before the public announcement of the de-SPAC—"Brown told his financial consultant that Legacy Matterport could go public 'within 90 day[s] through a SPAC,'" and "said that he 'want[ed] to get completely out of [his] position as soon as possible without impacting the market price,' with trading to start 'as soon as the market open[ed] on day one.'" Phase 2 Mem. Op. 7.

In April 2021, Brown hired a financial advisor, Rockwood Wealth Management, to help him sell his Matterport shares as soon as the de-SPAC closed. Phase 2 Mem. Op. 10. Rockwood testified that Brown agreed on a "strategy over which [he] was pretty much unwavering … which is [to] sell the shares of Matterport as soon as [he] ha[d] them." A282:23-A283:2; *see also id.* A273:5-A274:2, A276:5-7, A278:21-A277:2; A312:7-12; A396 at 281:4-12, A397 at 284:9-22. That goal was independent of Matterport's market price: Brown "was price agnostic … [w]henever we have the shares, we are to begin divestment immediately independent of the price … [t]here was no minimum price." A274:22-A275:9; *see also* Brown A317:6-17; A362 at 145:10-17.

As the July 22, 2021 de-SPAC closing drew closer, "[o]n July 11, 2021, Brown told Rockwood that it should 'still be ready to trade' his shares 'starting ~July 23' after the de-SPAC merger closed." Phase 2 Mem. Op. 11.

### D. Brown Challenges the Lockup Provisions and Seeks the Right to Transfer His Shares at the Close of the Transaction

Brown filed his Verified Complaint on July 13, 2021. Brown's complaint claimed that the Lockup Provisions were unenforceable under Delaware law and violated certain preexisting agreements governing his shares, and "expressed [his] desire to 'freely transfer his shares upon the close' of the business combination." Phase 2 Mem. Op. 11. Brown moved for expedition and a temporary restraining order ("TRO") enjoining the enforcement of the Lockup Provisions upon the closing of the de-SPAC. A1288-A1309.

The court denied Brown's motion for a temporary restraining order on laches grounds on July 19, 2021, and the Business Combination Transaction closed on July 22, 2021. Phase 2 Mem. Op. 8, 11-12. The trial court ordered expedition on Brown's claim for a declaratory judgment that the Lockup Provisions were "unenforceable as to [him]" and that he "may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions." *See* Phase 2 Mem. Op. 13. The court did not order Brown's other claims expedited, therefore bifurcating the proceeding.

Brown's pleadings and TRO briefing repeatedly and unambiguously conveyed his urgent desire to sell immediately after de-SPAC closing. A1212 ¶ 2, A1213-A1214 ¶ 5 ("Brown fully expected that, immediately upon consummation of the Reorganization, he (and/or Brown's affiliates) would be able to transfer his

SurviveCo shares without restriction"), A1214 ¶ 6 ("Brown's right to freely transfer his shares upon the close of the Reorganization is potentially worth tens of millions of dollars."); A931-A932 ¶ 86, A934 ¶ 95; A1301 ("Without expedition and a temporary restraining order, Brown will be unable to freely trade his Matterport shares"); A1395. At argument on Brown's TRO motion, three days before de-SPAC closing, his counsel confirmed that, for Brown, "[t]he ideal scenario is that a TRO is entered today, and Mr. Brown can trade his stock tomorrow." A1326:5-6.

Throughout discovery in Phase 1, Brown repeatedly expressed his urgent desire to sell his shares. In interrogatory responses served on August 27, 2021, Brown swore that he was damaged as a result of "the opportunity cost from not having ***immediately available the proceeds from the sale*** of Matterport, Inc. shares following the [de-SPAC]." A865. Brown also swore that had he "not been subject to unlawful transfer restrictions, Brown would have sold all shares he held in Matterport at the highest possible trading prices, including on or around August 10, 2021, when Matterport stock traded as high as $16.55." A860. Brown never revised this response.

In his first deposition on October 28, 2021, Brown testified: "I wanted to trade my shares ***starting on day one***." A265 (emphasis added). Brown also testified that, when he filed this action in July 2021, his goal was to enjoin the application of the transfer restrictions to him so that he could sell his shares right away after the de-

SPAC closed, A324:22-A325:3, and that he accordingly instructed his financial advisors to be ready to sell his shares on July 23, 2021, A313:24-A314:16, A315:17-A316:8.

After the trial court denied Brown's motion for TRO, and more than three weeks after the de-SPAC closed, on August 13, Brown demanded appraisal for 1,347,000 of his Legacy Matterport shares (approximately 97% of his Legacy Matterport holdings). Phase 2 Mem. Op. 12. As the trial court found, appraisal was "not Brown's first choice": he pursued it as "a hedging strategy to protect his downside risk while pursuing litigation over whether Matterport could impose unilateral restrictions on his shares." Phase 2 Mem. Op. 12. "[A] sale remained the goal." Phase 2 Mem. Op. 12. Indeed, Brown admitted that he only submitted an appraisal demand because he was prevented from selling, and that he preferred to sell his shares without restriction rather than seek appraisal. A267:3-21, A268:14-18, A269:1-8; A318:25-A323:18; A407 at 325:2-326:6.

In sum, Brown's initial complaint, his Phase 1 testimony, his instructions to financial advisors (confirmed by their testimony and the documentary record), and his counsel's representations to the trial court when seeking a TRO were consistently focused on ensuring Brown could fulfill his plan to sell his shares on "day one" after closing. Brown only fell back on appraisal and litigating this case when he failed in that effort, demonstrating that in the but-for world where Matterport and Brown

knew the Lockup Provisions permitted him to obtain unrestricted shares "a few days after closing," he would have obtained his shares as soon as he could after closing and sold them within days of receiving them.

### E. Constrained By Matterport's Transfer Restrictions, Brown Submits His Letters of Transmittal in November 2021

Following the close of the Business Combination Transaction, Legacy Matterport stockholders could obtain their Matterport shares by submitting letters of transmittal to Matterport's transfer agent American Stock Transfer & Trust Company ("AST"). Phase 2 Mem. Op 14. On November 9, Brown submitted a letter of transmittal for 37,000 Legacy Matterport shares that were excluded from his appraisal demand. Then, after allowing the deadline to file an appraisal petition to lapse, Brown submitted a second letter of transmittal on November 19 for his remaining 1,350,000 Legacy Matterport shares. "[U]ntil November 2021 when he tendered letters of transmittal," "Brown apparently shared" Matterport's view "that the lockup as written extended to all Legacy Matterport stockholders." Phase 2 Mem. Op. 31.

On November 22, 2021, AST mailed Brown a direct registration book entry advice for 5,713,441 Matterport shares. Phase 2 Mem. Op. 15.

### F. The Trial Court Rules Brown's Shares Were Not Lockup Shares Because They Were Not Held "Immediately Following" De-SPAC Closing

A trial on Count I of Brown's complaint was held on December 1 and 2, 2021. A95. On January 10, 2022, the trial court issued its post-trial memorandum opinion, which ruled that Brown did not hold Lockup Shares subject to the Lockup Provisions in Section 7.10 of the A&R Bylaws. A89-A101. In determining the scope of "Lockup Shares"—defined in the A&R Bylaws as "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination Transaction"—the court ruled that "immediately" means "without delay" and "following" means "being next in order of time." A96-A97. Accordingly, given that "[r]oughly three and a half months elapsed between the business combination closing and the date Brown possessed any Matterport shares," the court ruled that Brown's shares were not held "immediately following" the closing and were not Lockup Shares. A99.

By contrast, the court ruled that application of the Lockup Provisions to Legacy Matterport stockholders who "received their Matterport shares within a few days of closing," but not later than that, "could be viewed as consistent with a plain reading of the bylaw." A97-A98. In the court's view, therefore, any Legacy Matterport stockholder could avoid application of the Lockup Provisions by submitting their letters of transmittal anytime following the first few days after

closing. Based on this construction, the court found that the Lockup Provisions did not apply to Brown's shares and Matterport was liable to Brown for any damages resulting from its incorrect application of the Lockup Provisions to his shares. A98-A99.

After Matterport appealed, this Court affirmed the trial court's decision and judgment "on the basis of and for the reasons assigned by the Court of Chancery in its Post-Trial Memorandum Opinion Regarding Count I, dated January 10, 2022 and the Order and Partial Final Judgment dated January 12, 2022." *Matterport, Inc. v. Brown*, 282 A.3d 1053 (Del. 2022) (TABLE).

### G. After Brown Immediately Sells His Shares for $80 Million, the Parties Proceed to Phase 2 of the Case

On January 11, 2021, the day after the trial court's Phase 1 decision, Matterport (through AST) delivered Brown all of his shares, without restriction. A487 ¶ 86. Between January 11, 2022 and January 18, 2022, Brown sold all 5,713,441 of his Matterport shares. A488 ¶ 87. Brown received a weighted average sale price of approximately $14.09 per share, resulting in net proceeds of approximately $80,427,139.60. Phase 2 Mem. Op. 17-18. On February 10, 2022, Brown learned that he had been issued additional Matterport earn-out shares and requested that they be immediately transferred to his brokerage account. A1362-A1364; *see also* Phase 2 Mem. Op. 18 n.96. On February 11, 2022, Brown received 634,237 earn-out shares in his brokerage account and sold them the same day,

receiving more than $5 million in additional proceeds. A489 ¶¶ 94-95; A407 at 326:7-15. These transactions were the actualization of Plaintiff's longstanding goal to sell his Matterport shares on "day one."

Even after he succeeded in freeing himself from the Lockup Provisions and selling his Matterport shares before any other Legacy Matterport shareholder, Brown persisted in this litigation. On September 19, 2022, Brown filed a Verified Third Amended Complaint advancing four claims: the same declaratory judgment claim on which he had prevailed in the Phase 1 Trial, as well as a claim for violation of 8 *Del. C.* § 202, a breach of fiduciary duty claim against certain of Legacy Matterport's directors, and claim for breach of 6 *Del. C.* § 8-401. Phase 2 Mem. Op. 18. Brown's Verified Third Amended Complaint sought $141,293,395.93 in damages. *See id.*

### H. The Trial Court Determines that Brown's Desire to Quickly Sell His Shares After De-SPAC Closing is Relevant to Brown's Damages

During discovery in Phase 2 of this action, Matterport sought discovery regarding Brown's efforts and desire to sell his Legacy Matterport shares at the earliest possible time. *See, e.g.*, A854-A896. Brown resisted such discovery in motion practice in the trial court, arguing that this evidence was irrelevant in light of the Phase 1 decision. A212:22-A213:7; A216:10-17; *see also id.* A217:13-17. The trial court disagreed and ruled that evidence of Brown's desires and plans to sell before November 2021 was relevant, A216:18-22, A250:12-21, A251:7-14—

particularly where Brown had already "testif[ied] at [the Phase 1] trial that he would have sold and wanted to sell right away, as soon as possible" after the de-SPAC if he had not been restricted, *id.* A218:19-23. Accordingly, the trial court granted Matterport's motion to compel Brown to produce, *inter alia*, information "concern[ing] the actual or potential sales of Brown's shares," which was relevant "to the issue of when Brown would have sold but for the transfer restriction." A254:7-13.

### I. The Phase 2 Trial

Brown voluntarily dismissed his breach of fiduciary duty claims against Legacy Matterport's directors less than one week before trial. A469 ¶ 12. A five-day trial on Brown's remaining unresolved claims, and on his alleged damages for Count I, began on November 13, 2023. A469 ¶ 13. Matterport dedicated approximately 28% of its trial time to presenting fact evidence and testimony of Brown's desire and plans to obtain and sell his shares as soon as he possibly could following the closing of the de-SPAC. *See, e.g.*, A367 at 166:12 to A376 at 203:20; A379 at 216:1 to A381 at 224:21; A382 at 227:2 to A383 at 230:5; A387 at 245:23 to A394 at 273:16; A395 at 279:4 to A402 at 306:20; A405 at 317:4 to A407at 326:6; A419 at 373:21 to A428 at 410:9; A510 at 578:2-22; A538 at 690:14 to A539 at 693:1; A555 at 757:22 to A560 at 778:20; A560 at 780:3 to A563 at 791:13. Based on the trial court's Phase 1 interpretation of the Lockup Provisions, which defined

"immediately following" to mean "within a few days of closing," Matterport focused its presentation regarding Brown's alleged damages on the proceeds he would have received if he had been permitted to sell his shares in late July or early August 2021—more than "a few days [after] closing"—and did not offer damages calculations for hypothetical trading beginning in September or October 2021, long after the time when Brown gained the ability to request and obtain unrestricted shares pursuant to the Phase 1 ruling.

### J. The Phase 2 Post-Trial Decision

The trial court issued its Phase 2 post-trial memorandum opinion on May 28, 2024. The court held that Brown lacked standing to bring his DGCL Section 202 claim because the Phase 1 decision had already determined he was not subject to the Lockup Provisions he alleged were unlawfully adopted. Phase 2 Mem. Op. 21. The court also dismissed Brown's claim under 6 *Del. C.* § 8-401, finding that Matterport had not violated the statute because it had not unreasonably refused Brown's November 2021 demands for unrestricted shares—instead, Matterport "held a good faith—albeit mistaken—belief that the restrictions in Section 7.10 of the A&R Bylaws applied to all shares received by Legacy Matterport stockholders (including Brown)." Phase 2 Mem. Op. 25. That left only the Phase 1 finding of liability on Brown's declaratory judgment claim from Count I of his complaint.

In addressing Brown's alleged damages for Count I, the court found that the appropriate measure of damages was the "the average price over a reasonable time period" during which Brown could have sold his shares in the absence of restrictions. Phase 2 Mem. Op. 27-28. The court found that there was "an extensive record from which to reasonably approximate when Brown would have sold his shares," with "hundreds of exhibits and hours of testimony on the subject," which provided "reliable evidence of when [Brown] would have sold." Phase 2 Mem. Op. 32-33. The court found that "[t]he factual and litigation record indicate that Brown wished to obtain his shares in tradeable form promptly upon the closing of the business combination." Phase 2 Mem. Op. 40.

However, in determining when the reasonable period should begin, the court held that if Brown obtained his shares in late July or August 2021—that is, as much as a month or more after the close of the Business Combination Transaction—he "would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded." Phase 2 Mem. Op. 41. Based on this conclusion, and offering no analysis of whether Brown could have obtained and freely traded his shares after August 2021 but before he actually received his shares in November 2021 (*i.e.*, in September or October 2021), the court determined that "November 22 is the most realistic first day that Brown could have traded his Matterport shares had they lacked a restrictive legend." Phase 2 Mem. Op. 41. The trial court's damages analysis thus reflected a

scenario in which Brown waited months after de-SPAC closing to sell his Matterport shares in late November 2021, at which time the stock price was near its all-time peak after a dramatic, short-lived rise in fall 2021.

Using November 22, 2021 as the beginning of the hypothetical trading period, the court concluded that Brown would have sold all his shares by November 29, 2021. Phase 2 Mem. Op. 46. The court further determined that the average price of Matterport's shares over that hypothetical trading period was $27.92 per share. Phase 2 Mem. Op. 47. Multiplying Brown's 5,713,441 shares by this average price, the court determined that Brown would have received $159,519,272.72 if he had sold his shares between November 22 and 29, 2021. Subtracting the $80,427,139.60 Brown actually received from selling his shares in January 2022, the court awarded damages of $79,092,133.12. Phase 2 Mem. Op. 49.

# ARGUMENT

## I. THE TRIAL COURT DISREGARDED THE LAW OF THE CASE AND RELIED ON THAT LEGAL ERROR TO IMPROPERLY DETERMINE DAMAGES ON COUNT I

### A. Question Presented

Did the trial court erroneously fail to apply the law of the case regarding the meaning of Lockup Shares, and therefore apply a damages analysis that improperly disregarded evidence and factual findings regarding Brown's conduct if he had not been subject to transfer restrictions? Appellants raised this issue below at A799-A800.

### B. Standard of Review

This Court reviews a court's application of the law of the case doctrine *de novo*. *E.g.*, *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36, 39-41 (Del. 2005).

### C. Merits of Argument

#### 1. The Phase 1 Ruling Affirmed by This Court Established Law of the Case on the Meaning of the Lockup Provisions

"Under the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change." *State v. Wright*, 131 A.3d 310, 321 n.44 (Del. 2016) (quoting *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC,* 112 A.3d 878, 894–95 (Del. 2015)). The law of the case doctrine thus "promotes efficiency and fundamental fairness in cases by counseling against the

reconsideration of issues that have already been decided." *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *4 (Del. Ch. Feb. 6, 1997) *aff'd*, 703 A.2d 645 (Del. 1997) (TABLE).

The trial court's Phase 1 decision established law of the case as to the meaning of the Lockup Provisions. The court determined that Legacy Matterport stockholders who did not receive their Matterport shares "within a few days of closing" did not hold their shares "immediately following" the transaction, and therefore they did not hold Lockup Shares and were not subject to the Lockup Provisions. A97-A98. That ruling was based on the trial court's "plain reading" of the Lockup Provisions, *id.*, which define Lockup Shares as "the shares of Class A common stock held by the Lockup Holders immediately following the [de-SPAC]." A845.

Brown in Phase 1 argued that "immediately following" meant "in the *initial moments* after the transaction's closing," A1454 (emphasis added), and that he therefore did not hold Lockup Shares because he did not hold Matterport shares "immediately following" the July 22, 2021, de-SPAC closing, *see* A97. Matterport, on the other hand, argued that Brown's reading of the Lockup Provisions would "'nullify' the transfer restrictions" and create an absurd and unreasonable result because "'no Legacy Matterport stockholder received Matterport shares' instantly after the transaction closed." *Id.*

The trial court "agree[d] with [Brown's] interpretation of the bylaw." A98 The court ruled that "immediately" means "without delay" and "following" means "being next in order or time." A97. It further ruled that Brown's reading of the Lockup Provisions would not create an absurd result, because "the evidence demonstrates that some Legacy Matterport stockholders would have received their Matterport shares within a few days of closing," and a lockup applying only to Legacy Matterport stockholders who "received their Matterport shares within a few days of closing" (but not later than that) "could be viewed as consistent with a plain reading of the bylaw." A97-98. The court therefore ruled that Brown "[did] not hold Lockup Shares subject to the transfer restrictions." A98-A99. That ruling established Matterport's liability to Brown for damages resulting from its erroneous—if good faith—effort to apply the Lockup Provisions to Brown's shares and prevent him from trading as early as he would have liked to.

Matterport appealed the trial court's Phase 1 decision to this Court. Matterport's appeal challenged the trial court's reading of Lockup Shares and its resulting ruling that the transfer restrictions applied only to "Matterport shares 'owned or possessed' by Legacy Matterport stockholders 'without delay' after closing and exclude[d] all other shares." A127; *see also id.* A136 ("Even if the Vice Chancellor's factual finding were correct (and there is no record evidence that any stockholders actually did *receive* Matterport shares from the transfer agent 'within a

few days of closing'), this interpretation of Lockup Shares would remain unreasonable."). Brown maintained on appeal that the Court of Chancery correctly interpreted Lockup Shares, emphasizing that "the meaning of 'immediately following' in this case is 'upon' or 'in the initial moments after the transaction's closing.'" A181. This Court affirmed, "on the basis of and for the reasons assigned by the Court of Chancery in its" Phase 1 decision, *Matterport*, 282 A.3d at 1053.

Pursuant to the trial court's Phase 1 ruling, a Legacy Matterport stockholder who received public Matterport shares more than "a few days [after] closing" did not hold Lockup Shares and was free to transfer such shares. A97-A98. That legal ruling established law of the case regarding the proper interpretation of the Lockup Provisions that should have been consistently applied in later stages of the trial court proceedings, given that the facts underlying the court's Phase 1 ruling did not change in Phase 2. *Nationwide Emerging Managers*, 112 A.3d at 895 ("[A] court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change."); *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990) ("The construction or interpretation of a corporate certificate or by-law is a question of law ….").

### 2. The Phase 2 Ruling Was Directly Contrary to Law of the Case on the Meaning of the Lockup Provisions

Despite its holding in Phase 1 that the "immediately following" language in the Lockup Provisions meant that a Legacy Matterport stockholder who received

Matterport shares more than "a few days [after] closing" would not have held Lockup Shares and would be free to transfer such shares, in its Phase 2 post-trial decision on damages the Court of Chancery held that if Brown had received his Matterport shares at any time in July or August 2021—up to nearly six weeks after closing—"he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded." Phase 2 Mem. Op. 41. Based on that new and irreconcilable interpretation of the Lockup Provisions, the court evaluated damages using the input that "November 22 is the most realistic first day that Brown could have traded his Matterport shares had they lacked a restrictive legend." *Id.* Because the trial court's Phase 2 interpretation of Lockup Shares directly contravened the court's interpretation in its Phase 1 ruling that was affirmed by this Court, reversal of the Phase 2 decision is required. *See Technicolor*, 884 A.2d at 43.

This Court's decision in *Technicolor* is instructive. In that appraisal action to value a minority stockholder's shares, the Court of Chancery in an initial trial adopted a discount rate and corporate debt figure to be used in the share valuation; those determinations were undisturbed in an appeal from the trial court's judgment. 884 A.2d at 39-40. After a retrial of unrelated issues, the Court of Chancery valued the shares using a different discount rate and different corporate debt than it adopted in the first trial. *Id.* This Court recognized that there was no "basis to change matters already decided and not appealed," and there "was no available exception to the law

of the case doctrine" in the absence of a trial court determination that its original ruling was "clearly wrong." *Id.* at 40-41. Thus, the trial court's original "findings on the discount rate and corporate debt of Technicolor were binding upon the Court of Chancery," and this Court issued a judgment reflecting a revised per-share valuation that incorporated the original discount rate and corporate debt that were law of the case. *Id.* at 41.

A similar result is required here. Like in *Technicolor*, the trial court did not determine that its original ruling on the meaning of the Lockup Provisions was "clearly wrong," nor did it provide any basis to alter or amend the definition of Lockup Shares that it had already decided. *See* 884 A.2d at 40. Thus, the trial court's original definition of Lockup Shares was binding in Phase 2, and its contradictory Phase 2 legal interpretation must be reversed. *See also Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2012 WL 6049157, at *3 (Del. Dec. 5, 2012) (ORDER) (reversing trial court's ruling that plaintiff was entitled to receive a commitment fee, which was "fatally inconsistent" with trial court's finding that a contract would not have closed even absent the defendant's breach); *French v. Collins*, 2008 WL 4057740, at *2 (Del. Sept. 2, 2008) (ruling trial court's "contradictory conclusion" on the same issue in different rulings "requires a remand") (ORDER); *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2023 WL 4857281, at *3 (Del. Ch. July 31, 2023) (declining to reconsider contract interpretation under law of the case),

*aff'd sub nom. Mobile Inv'rs, LLC v. Tygon Peak Cap. Mgmt., LLC*, 315 A.3d 445 (Del. 2024) (TABLE); *Manti Holdings, LLC v. Authentix Acquisition Co.*, 2020 WL 4596838, at *6 (Del. Ch. Aug. 11, 2020) (same), *aff'd*, 261 A.3d 1199 (Del. 2021).

The inconsistency between the Phase 1 and Phase 2 rulings is highlighted by the flip-flopping evident in Brown's briefing after the Phase 2 trial. In Phase 1, Brown successfully argued to the trial court and this Court that his shares were not Lockup Shares because "the meaning of 'immediately following' in this case is 'upon' or 'in the initial moments after the transaction's closing.' A181. Then, in Phase 2, Brown argued that if he had received his Matterport shares on August 13, 2021—*more than three weeks after de-SPAC closing*—they would have been subject to Lockup Provisions. A729, *id.* at n.4; A738-739. These two positions cannot be reconciled, but the trial court applied both.

The trial court's departure from the law of case was severely prejudicial to Matterport and produced windfall damages for Brown. Brown's damages (if any) necessarily flowed from evidence of Brown's conduct in the but-for world in which he had been free to trade his Matterport shares, which would establish "the amount of money that would put [Brown] in the same position as if" he had not been incorrectly restricted. *See Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). As the trial court recognized, here there was voluminous factual evidence of Brown's desire to obtain and sell his shares as soon as he could after the de-SPAC

(*see supra*, at 23).[4] The trial court should have applied that evidence and its own factual findings to find the earliest possible date on which Brown could have received freely tradable shares in order to establish "the amount of money that would put [Brown] in the same position as if" he was not incorrectly restricted—which pursuant to the law of the case and the court's factual findings would reflect Brown obtaining his shares in late July or early August and promptly selling them. *See Duncan*, 775 A.2d at 1022.

The court's Phase 2 decision did not write on a blank slate. The court's ruling regarding the date when Brown could have received his shares without being subject to the lockup was required to be consistent with the law-of-the-case determination that "immediately following" meant "within a few days after closing." A98. Because it was not, the court's Phase 2 decision must be reversed.

[4] For that reason, as the trial court correctly held, there was no need to resort to the "highest intermediate value" approach to determining damages, used when there is a lack of factual evidence regarding when the plaintiffs would have sold their shares in the but-for world without restrictions. Phase 2 Mem. Op. 2; *Duncan*, 775 A.2d at 1023 (citing *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10 (Del. Ch. 1992)).

## II. THE TRIAL COURT'S ERROR RESULTED IN WINDFALL DAMAGES TO BROWN AND VIOLATED DELAWARE DAMAGES PRINCIPLES

### A. Question Presented

Did the trial court erroneously apply a damages analysis that improperly disregarded evidence and factual findings regarding Brown's conduct if he had not been subject to transfer restrictions, and instead relied on Brown's conduct in the actual world where he was locked up? Appellants raised this issue below at A795 and A813-A819.

### B. Standard of Review

This Court reviews legal issues embedded in an award of damages *de novo*. *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 937 (Del. 2023).

### C. Merits of Argument

"The standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." *PharmAthene*, 132 A.3d at 1130. "This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost." *Id.*; *see also Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688, 695 (Del. 2019) (similar); 24 WILLISTON ON CONTRACTS § 64:3 (4th ed.) ("Damages based on the expectation interest are

designed to secure for that party the benefit of the bargain that he or she made by awarding a sum of money that will place the promisee in as good a position as he or she would have been in had the contract been performed."); RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a. ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.").

Applied to this case, compensatory damages for Matterport's incorrect application of the Lockup Provisions to Brown's shares must reflect "the amount of money that would put [Brown] in the same position as if" he was not incorrectly restricted. *See Duncan*, 775 A.2d at 1022. The trial court acknowledged as much, explaining that Brown's damages are "appropriately measured by the average price [of Matterport shares] over a reasonable time period that *he would have traded had the transfer restrictions been removed*." Phase 2 Mem. Op. 27-28 (emphasis added). However, the trial court erred as a matter of law by measuring damages based on the real-world timing of when Brown requested and received his shares while he was locked up, rather than measuring damages based on when he would have obtained and sold his shares in the but-for world where Brown and Matterport knew that the Lockup Provisions permitted Brown to request and obtain freely tradeable shares "a few days [after] closing." A98.

Matterport's fact and expert evidence focused on the amount of money Brown would have obtained had he begun to trade within a range of alternative trading start dates that were consistent with the Court's decision on the meaning of "immediately following." Because it was law of the case that a Legacy Matterport stockholder could have received unrestricted Matterport shares "a few days [after] closing," A98, Matterport's chosen alternative dates—July 30, 2021, August 6, 2021, and August 13, 2021—conservatively assumed that Brown, in accordance with his urgent desire to sell as soon as possible after closing, received and began trading unrestricted shares somewhere between 8 and 22 days after closing.

But when the court ruled in Phase 2 that if Brown had received his Matterport shares in July or August 2021, "he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded," Phase 2 Mem. Op. 41, the trial court retroactively and erroneously treated Matterport's evidence and damages analysis as irrelevant as a matter of law—contrary to its own discovery ruling that evidence of Brown's plans and desire to sell his shares before the time he actually obtained his shares in November 2021 was relevant to damages on Brown's Count I. A216:18-22; A250:12-21; A251:7-14. And because Matterport (in reliance on the law of the case) did not present damages calculations regarding later potential trading start dates (such as September or October 2021), the trial court fell back upon the

November trading start dates corresponding to Brown's actual conduct when he was locked up, resulting in windfall damages without legal basis. Phase 2 Mem. Op. 41.

Given the overwhelming evidence that Brown desired to trade as early as possible, there is no reasonable evidentiary basis in the record for the court's decision to select November as the earliest possible trading date if Brown was not mistakenly restricted. Indeed, the only way that the trial court could have landed on a November 2021 trading start date was by rejecting Matterport's proposed trading start dates based on the Court's erroneous and inconsistent interpretation of the Lockup Provisions, and defaulting to the actual date Brown requested and obtained his shares when he was restricted.

The trial court's Phase 2 decision repeatedly and correctly found that the fact evidence established Brown's plans and desire to obtain and sell his shares promptly after de-SPAC closing if Matterport had not restricted him from doing so:

- "On January 18, 2021, Brown told his financial consultant that Legacy Matterport could go public 'within 90 day[s] through a SPAC.' **Brown said that he 'want[ed] to get completely out of [his] position as soon as possible without impacting the market price,' with trading to start 'as soon as the market open[ed] on day one.'**" Phase 2 Mem. Op. 7 (emphasis added) (alterations in original).

- "On July 11, 2021, **Brown told [his financial advisor] that it should 'still be ready to trade' his shares 'starting ~July 23' after the de-SPAC merger closed**. … On July 13, Brown filed a lawsuit in this court seeking to enjoin the enforcement of the transfer restrictions against him. … **He expressed a desire to 'freely transfer his shares upon the close' of the business combination**." Phase 2 Mem. Op. 11 (emphasis added).

- "[T]here is an extensive record from which to reasonably approximate when Brown would have sold his shares." Phase 2 Mem. Op. 32.

- "Unlike in *Duncan* where there was no reliable evidence of when the plaintiffs would have sold, this court has hundreds of exhibits and hours of testimony on the subject." Phase 2 Mem. Op. 33.

- "The factual and litigation record indicate that Brown wished to obtain his shares in tradeable form promptly upon the closing of the business combination." Phase 2 Mem. Op. 40.[5]

When it came to calculating damages on Count I, however, the Court's legal error led it to improperly ignore these factual findings and evidence. Relying on its erroneous interpretation of Lockup Shares, the trial court improperly declined to credit the "extensive record from which to reasonably approximate when Brown would have sold his shares" in the but-for world where he was not restricted, *id.* at 32, including "hundreds of exhibits and hours of testimony" providing "reliable evidence of when [Brown] would have sold," *id.* at 33, which the court found was a "factual and litigation record indicat[ing] that Brown wished to obtain his shares in

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[5] While the trial court observed that "[t]he fact that Brown wanted to receive his shares 'as soon as possible' is not a commitment to sell in July or August," Phase 2 Mem. Op. 40-41 n.190, no such advance "commitment" is required to support a conclusion that in the but-for world, Brown would have acted consistently with the court's findings regarding his urgent desire to obtain and sell unrestricted shares as soon as he could after de-SPAC closing. Indeed, the record overwhelmingly shows that from learning of the de-SPAC through closing, Brown's consistently stated goal was to sell "day one." *See* Statement of Facts, C. Brown so stated in his testimony, interrogatory responses, contemporaneous communications, and even his counsel's representations to the trial court when seeking to enjoin the transfer restrictions for the specific purpose of selling as soon as possible. *Id.*

tradeable form promptly upon the closing of the business combination," *id.* at 40. Instead, the court calculated damages based on Brown's ***actual*** conduct when he was locked up: because Brown "waited until November 2021 to send letters of transmittal to AST and received his Matterport shares that month," the court chose November 22 as the trading start date for calculating damages on Count I. *Id.* at 41. The court thus did exactly what it counseled against in rejecting the highest intermediate value rule: "nullify th[e] evidence" of "when [Brown] would have sold" absent restrictions, thereby "limit[ing] the court's discretion to craft an appropriate remedy," *id.* at 33, and instead calculating damages based on Brown's tactical decision to obtain and sell his shares months later in the actual world where he was restricted from trading his shares, *id.* at 41.

By looking to the real-world timing of when Brown requested and obtained his shares while subject to the lockup, the trial court disregarded the principle that compensatory damages should reflect "the amount of money that would put [Brown] in the same position as if" he was not incorrectly restricted. *E.g.*, *PharmAthene*, 132 A.3d at 1130; *Duncan*, 775 A.2d at 1022. The evidence and the trial court's factual findings established that in the but-for world where Matterport and Brown knew he could freely trade by requesting his shares anything more than "a few days" after closing, Brown would have obtained and sold his shares as soon as possible after closing, rather than waiting months to do so as he did in the real world. Brown

admitted as much: he swore in October 2021 that if he had "not been subject to unlawful transfer restrictions, Brown would have sold all shares he held in Matterport at the highest possible trading prices, including on or around August 10, 2021, when Matterport stock traded as high as $16.55." A860. Delaware law requires that damages be measured based on that but-for world.

The error in the trial court's damages analysis is demonstrated by the fact that it would have deprived Brown of any remedy if Matterport's stock price had decreased between August and November 2021, instead of increasing. In that scenario, Brown undoubtedly would have argued that his damages must be measured based on the evidence and findings that he would have obtained and sold his shares promptly after de-SPAC closing in the but-for world without a lockup. Indeed, Brown's initial theory was that he must be allowed to sell to avoid what he believed would be a *decrease* in Matterport's stock price after closing. A1214 ¶ 6; A1237 ¶ 79; A1301.

But the trial court's "actual world" analysis would disregard that evidence and instead hold Brown to a trading start date months later, at lower prices, based on his decisions that were expressly driven by the fact he was locked up. Such an analysis would improperly deny Brown a remedy that puts him in the same position as he would have been but for the incorrect lockup (*see Duncan*, 775 A.2d at 1022; Phase 2 Mem. Op. 27-28), and would be equally erroneous as the court's Phase 2 ruling.

The fortuity that Matterport's stock price increased after closing, instead of decreasing, does not salvage the trial court's legally improper analysis.

The court's erroneous approach that jettisoned evidence of Brown's but-for conduct in favor of his actual conduct was especially inequitable given the trial court's finding that Brown, while locked up, waited months after de-SPAC closing to obtain his shares *because he had not yet come up with his argument that his Matterport shares were not Lockup Shares*. Phase 2 Mem. Op. 31. Brown admitted that he only submitted an appraisal demand because he was prevented from selling, and that he preferred to sell his shares without restriction rather than seek appraisal. A266:20-A267:21; A268:14-18; A269:1-8; A318:25-A323:18; A407 at 325:2-326:6. The trial court's factual findings credited Brown's admission: appraisal was "not Brown's first choice"; instead, he pursued it as "a hedging strategy to protect his downside risk while pursuing litigation over whether Matterport could impose unilateral restrictions on his shares." Phase 2 Mem. Op. 12. "A sale remained the goal." *Id.* Moreover, as late as October 2021, Brown continued to give sworn statements making explicitly clear that in the "but-for" world where he was not "subject to unlawful transfer restrictions, Brown would have sold all shares he held in Matterport" in the first half of August 2021. A860.

These factual findings and Brown's admissions demonstrate that the proper but-for world for measuring damages was not the world in which Brown was

incorrectly denied the ability to trade his shares shortly after de-SPAC closing, and as a result (after losing his TRO motion) resorted to the backup plan of submitting an appraisal demand and ultimately requesting shares in November 2021, as the court erroneously concluded. Instead, the but-for world must reflect the hypothetical scenario in which Brown and Matterport knew the bylaws permitted Brown to receive unrestricted shares "a few days [after] closing," A97-98, and he was therefore free to effectuate the plan that was his singular focus from late 2020 to July 2021: obtaining and selling his shares as soon as possible after the closing of the de-SPAC.

Correcting the trial court's legal error and resulting improper damages determination does not require disturbing the court's factual findings. Instead, it requires applying the court's findings (which reflect Brown's desire and plans to obtain and sell his shares as soon as he could after de-SPAC closing) consistently with the but-for world that was created by the law of the case in the Phase 1 ruling. Specifically, the appropriate damages analysis under that law of the case must start by looking to the time "a few days [after] closing" when a stockholder could receive shares and not be subject to the transfer restrictions, *see id.*, and then calculate any damages based on hypothetical trading beginning promptly after that time when Brown could have obtained unrestricted shares in the but-for world.

## CONCLUSION

Matterport respectfully submits that this Court should reverse the trial court's erroneous interpretation of the Lockup Provisions, vacate the improper damages analysis relying on that legal error, and order that Matterport's damages calculations are correct pursuant to the law of the case established in Phase 1.


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Dated: September 13, 2024