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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE/CROSS-APPELLANT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This appeal arises in Phase II of a bifurcated proceeding. In Phase I, the Court of Chancery found in favor of plaintiff/appellee William Brown and awarded declaratory relief, and this Court summarily affirmed. In Phase II, the court entered a damages award consistent with its Phase I findings. This appeal is about Phase II only. Although certain of the court's Phase II legal conclusions should be revisited as discussed in the cross-appeal briefed below, there is no dispute that its Phase II factual findings are sound. No one is asking this Court to revisit them.

Matterport's entire appeal turns on a single, meritless argument: that the damages award somehow conflicts with "law of the case" established in Phase I. This Court can and should reject that argument for any one of several reasons. ***First***, it was not properly preserved for appeal, as Matterport did not argue "law of the case" in its briefing below. ***Second***, it fails on its merits, as the argument presumes that the court in Phase I actually resolved the precise meaning of a term in the relevant bylaws, when in fact, the court in Phase I specifically ***declined*** to resolve that issue, finding it "unnecessary." And ***third***, all of this is a red herring, as the Phase II ruling does not stand or fall based on the bylaw term; it rests on factual findings that Matterport does not and cannot challenge.

Brown's cross-appeal, on the other hand, presents true Phase II legal questions. ***First***, did the Court of Chancery apply the correct legal rule in

calculating damages? Brown respectfully believes it did not; the calculation should be made under the highest intermediate value rule. ***Second***, did the court apply the correct legal standard to Brown's 6 *Del. C.* § 8-401(b) claim? Again, Brown respectfully believes it did not. And ***third***, did the court apply the right post-judgment interest rate? Brown respectfully believes it did not—and he asks this Court to adopt a clear rule on this issue for the benefit of not only the parties in this case but all parties in similar cases going forward. All three cross-appeal questions are questions of law that can be resolved without disturbing any factual findings.

Brown served as the former Chief Executive Officer of Legacy Matterport. He left the company nearly three years before it combined with a special purpose acquisition company (in a "de-SPAC" transaction) to form Matterport in the summer of 2021. As part of the combination, Legacy Matterport stockholders like Brown did not automatically become Matterport stockholders. Rather, they could submit a letter of transmittal, at which point they would surrender their Legacy Matterport shares and receive new Matterport shares. Matterport's Amended and Restated Bylaws contained a lockup provision on "shares of Class A common stock ***held by Lockup Holders immediately following the closing***" (emphasis added). The lockup provision prevented the sale of lockup shares for 180 days.

In early July 2021, Brown sued Matterport in the Court of Chancery, seeking declaratory and other relief challenging any potential lockup as applied to him. With the combination imminent, the court agreed to hear Brown's Count I (for declaratory relief) on an expedited basis and bifurcated the proceedings.

The combination closed on July 22, 2021. Brown amended his complaint twice, first in September and again in November. He also pursued his appraisal rights, which he maintained up until the mid-November deadline for filing an appraisal petition expired. In parallel, Brown dedicated hundreds of hours to developing a predictive model and researching various trading strategies to ascertain the optimal time to trade, if any. Ultimately, Brown decided to forgo his appraisal petition and obtain shares in Matterport so that he could pursue a trading strategy. Brown submitted letters of transmittal to Matterport's transfer agent on November 9 (for 37,000 shares that were excluded from appraisal) and November 19 (for 1,350,000 shares that had been subject to appraisal). The transfer agent credited Brown's account with the shares on November 18, and then mailed Brown a direct registration book-entry advice on November 22. It is undisputed that Matterport restricted these shares under the lockup provision at that time, so Brown could not trade them.

The Court of Chancery then held a two-day bench trial on Phase I. After trial, the parties briefed and presented oral argument on the sole issue of whether

the shares Brown received in November were subject to the lockup provision. The court found for Brown, concluding that the shares he received on November 22, 2021 were ***not*** subject to the lockup provision. The court expressly declined to decide precisely what the words "immediately following" mean for purposes of the provision; it reasoned that whatever "immediately following" may mean, November 22, 2021 was well past it.

On January 12, 2022, the court entered a Rule 54(b) judgment on the "declaratory relief aspect of Count I," but it saved any damages on that count—and the rest of the case—for Phase II. Matterport transferred the shares without restriction following that ruling, and Brown began selling his shares upon receipt ahead of the lockup's scheduled expiration. Matterport appealed the Phase I judgment, and this Court summarily affirmed after briefing and oral argument. *Matterport, Inc. v. Brown*, 282 A.3d 1053 (Del. 2022) (TABLE).

For the next two years, the parties litigated the remainder of Brown's case in Phase II, as it evolved through amendments and dismissals. In November 2023, the court held a five-day Phase II bench trial on damages based on the liability as determined in Phase I, as well as on Brown's claim that Matterport had failed or refused to register a transfer of his shares in violation of 6 *Del. C.* § 8-401 (Count IV or the "UCC claim"), and his claim for violation of 8 *Del. C.* § 202 (Count II).

Ultimately, the court awarded Brown damages for Count I but found for Matterport on the remaining counts. On the UCC claim in particular, the court found that while Matterport had failed or refused to register the transfer of unrestricted shares to Brown's account, its conduct was not "unreasonable" given its contrary interpretation of the bylaws.

On damages, the court first applied the "reasonable trading period" framework from this Court's decision in *Duncan v. TheraTx, Inc.* to determine when Brown could have traded the shares he received on November 18, 2021 had they not been restricted. *See* 775 A.2d 1019 (Del. 2001). The court found that he would have traded them over 4.9 trading days starting on November 22, 2021. But the court declined to apply *Duncan*'s "highest intermediate price" test, instead taking the volume weighted average price ("VWAP") over that 4.9-day period. It also awarded pre- and post-judgment interest, applying 5% over the federal discount rate under 6 *Del. C.* § 2301, calculated from November 22, 2021.

Brown then moved for reconsideration on the post-judgment interest rate calculation, arguing that the court should use the federal discount rate in effect on the day it enters final judgment in Phase II. Ultimately, the court denied Brown's motion, reasoning that Brown's damages derived from the Phase I partial judgment on the declaratory judgment claim (Count I). Based on that conclusion, the court

decided that it would use the federal discount rate in effect on January 12, 2022 (the partial judgment date).

Matterport appeals and Brown cross-appeals the Court of Chancery's damages calculation for Count I on separate bases. Brown also cross-appeals the court's interpretation of § 8-401 and its interest calculation. Brown does not cross-appeal the ruling on his § 202 claim.

SUMMARY OF ARGUMENT ON APPEAL

1. **Denied.** Matterport cannot avoid the Court of Chancery's damages calculation by invoking the law-of-the-case doctrine.

a. As a threshold matter, Matterport waived any law-of-the-case argument by not preserving it below. Matterport's briefs in the Court of Chancery never mentioned the argument that the court's Phase I ruling established "law of the case" on the meaning of the bylaw term "immediately following" that would limit the court's damages calculation. And this Court rejects passing references in oral argument as insufficient to preserve an issue. Under Delaware Supreme Court Rule 8, this Court can decline to consider Matterport's new argument entirely.

b. On the merits, this Court has repeatedly explained that the law-of-the-case doctrine applies only to issues that were ***actually decided***. Matterport's law-of-the-case argument depends on the idea that the court's Phase I decision interpreted the phrase "immediately following" to mean ***only*** "the first few days after closing" and nothing more. Br. 28–29. But in fact, the Phase I decision expressly declines to decide the precise time period that the provision would cover. So, Phase I did not establish any "law of the case" on this issue at all.

c. Even if Matterport were correct about the meaning of "immediately following," there would still be no reason to set aside the Phase II opinion. At most, Matterport's law-of-the-case argument would require concluding that a share acquired in August 2021 would not have fallen within the lockup provision. ***But Brown did not acquire his shares in August***; he acquired them in late November, and Matterport improperly applied the lockup at that time. The question for Phase II was when Brown could have sold the shares he acquired in ***November*** but for the improper lockup. And the answer—with or without law of the case—is late November 2021. Right or wrong, then, the law-of-the-case argument does justify disturbing the Phase II judgment in any respect.

2. **Denied**. The Court of Chancery did not award improper "windfall damages" to Brown. Even if Matterport had attempted to challenge the court's factual findings—and its opening brief does not do so—Matterport fails to establish that the trial court committed any clear error.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. If anything, the award of damages should have been higher. The Court of Chancery committed legal error when it failed to apply *Duncan v. TheraTx*'s "highest intermediate price" rule to calculate Brown's damages, incorrectly reasoning that the highest intermediate price rule applies only when the defendant is a "wrongdoer" and/or there is "significant factual uncertainty."

a. *Duncan* is a bright line rule. When, as here, an issuer has improperly restricted a stockholder's default right to sell stock, damages must be calculated by "identifying a reasonable period after the restriction was imposed during which the stockholders could have sold the shares and then selecting the 'highest intermediate price' during that period as the presumed sale price." 775 A.2d at 1023. The Court of Chancery followed *Duncan*'s first step by identifying a reasonable trading period—but then erred by applying a volume weighted average price. The highest intermediate value rule is not optional; it's the only rule. Failure to apply it is reversible error.

b. *Duncan* does not require that the defendant be a wrongdoer for the highest intermediate price rule to apply, but even if it did, Matterport ***was*** a wrongdoer as relevant here. Matterport improperly restricted Brown's right to sell Matterport shares when he received them in November 2021,

preventing him from freely trading. In Phase I, the Court of Chancery determined that the bylaw's lockup provision did not apply to Brown's shares because he requested and received them November 2021. That is enough for *Duncan* to apply. But the court erroneously reasoned that Matterport had not "breached a contract, committed a tort, or violated positive law." The record shows otherwise. The bylaws are a contract, and Matterport breached them. *Duncan* also recognizes that improper trading restrictions, such as Matterport's, are akin to the tort of conversion. And Brown proved at trial that Matterport violated 6 *Del. C.* § 8-401 by wrongfully failing or refusing to transfer Brown's stock in November 2021.

c. Without disturbing any of the Court of Chancery's factual findings, the correct calculation under *Duncan* would entitle Brown to a damages award of at least $110,858,865.08.

2. The Court of Chancery also erred when it interpreted 6 *Del. C.* § 8-401 to require plaintiffs to prove that the defendants' refusal or failure to transfer securities was "unreasonable," counter to the statutory text and caselaw precedent.

a. The court's conclusion is inconsistent with the express language of the statute. Courts consistently find that "unreasonable" in this passage modifies "delay" and not "failure or refusal." The plain language of

§ 8-401(b) is clear and unambiguous: a wrongful failure or refusal to register the transfer establishes liability, regardless of the issuer's intent. The court committed reversible error when it found for Matterport, reasoning that while Brown may have proven every element of his § 8-401 claim, Matterport was exempt from liability because it had a good-faith or reasonable belief that Brown's stock would be subject to the lockup provision.

b. A finding of liability on the § 8-401 claim would have shifted the reasonable trading period to begin on November 24, 2021, the day Brown requested the transfer and his claim accrued. Using the same length for the reasonable trading period, Brown should have received additional damages.

3. Finally, the Court of Chancery erred when it calculated post-judgment interest from the date of the Rule 54(b) partial judgment on liability and not the date of the final judgment awarding damages.

a. In Phase I, the Court of Chancery only determined liability with respect to the declaratory relief aspect of Count I. Though it entered partial judgment on that aspect under Rule 54(b), it reserved for Phase II all other claims and issues, including damages for Count I.

b. This Court's recent decisions in *Noranda Aluminum Holding Corporation* and *NGL Energy Partners LP* make clear that post-judgment interest under 6 *Del. C.* § 2301(a) must "accrue at the legal rate that was in effect on the date of the judgment" (*Noranda*, 269 A.3d 974, 979 (Del. 2021)), and that the relevant "judgment" must "consist[] of the factfinder's award of damages, the costs assessed by the court, and prejudgment interest" (*NGL*, 319 A.3d 335, 341 (Del. 2024)). The Court of Chancery's Phase I partial judgment provided none of the components *Noranda* or *NGL* would require before one could calculate the post-judgment interest. Only after Phase II did the court enter a final judgment (including on Count I) with all the necessary damages and costs decisions to set post-judgment interest. Therefore, the interest rate should reflect what was in effect on July 1, 2024, the date of Phase II final judgment.

STATEMENT OF FACTS

The following facts were found by the Court of Chancery either in its January 10, 2022 opinion after the Phase I trial or in its May 28, 2024 opinion after the Phase II trial—or were otherwise stipulated by the parties. The court's findings are not challenged on this appeal.

I. Legacy Matterport entered into a de-SPAC merger, and the SPAC adopted bylaws that contain a lockup provision.

Appellant Matterport, Inc. is a publicly traded spatial data company that creates 3D technologies for virtual tours of real-world spaces. Phase II Op. 1 (Br. Ex. A). It was initially a special purpose acquisition company ("SPAC") named Gores Holdings VI, Inc. ("Gores") and affiliated with The Gores Group, LLC. *Id.* at 3–4.

Appellant Matterport Operating, LLC ("Legacy Matterport") is now a wholly owned subsidiary of Matterport. It was a privately held corporation until it entered into a de-SPAC merger with Gores that closed on July 22, 2021. *Id*. at 4.

Appellee Brown was Legacy Matterport's Chief Executive Officer from November 2013 to December 2018. *Id.* at 1. During his tenure, Brown was awarded Legacy Matterport stock options as part of his compensation. *Id.* He also purchased additional shares of Legacy Matterport common stock. *Id.* At the time of the de-SPAC merger, Brown had exercised his options and held 1,387,000 Legacy Matterport shares. *Id*.

In February 2021, Legacy Matterport's board approved a merger with Gores, and an agreement between the parties and their merger subsidiaries was promptly executed. *Id.* at 7. At the same time, a majority of Legacy Matterport's stockholders executed written consents approving the agreement. Brown did not (and was not asked to) consent to the approval and adoption of the agreement. *Id*. at 7–8.

Legacy Matterport stockholders did not automatically become Matterport stockholders. A93 (Phase I Op.). Rather, as part of the transaction, they were given the right to receive 4.1193 shares of Matterport Class A common stock in exchange for each share of Legacy Matterport stock. Phase II Op. 7–8. Alternatively, eligible Legacy Matterport stockholders, including Brown, could seek appraisal with respect to the value of their Legacy Matterport shares. *Id*. at 12.

To obtain their Matterport shares, Legacy Matterport stockholders needed to submit "letters of transmittal" to Matterport's transfer agent, the American Stock Transfer & Trust Company ("AST"). *Id*. at 14. Thus, at the time the de-SPAC transaction closed—and unless they submitted their letters of transmittal to AST and received shares in response—Brown and other Legacy Matterport stockholders did not hold Matterport shares at all. *Id*. at 16 (citing A98-A99 (Phase I Op.)).

The merger agreement contemplated that the SPAC would adopt Amended and Restated Bylaws (the "A&R Bylaws") to govern Matterport after closing. *Id.* at 8. The A&R Bylaws were adopted on July 21, 2021, and became effective the next day when the business combination closed. *Id*.

The A&R Bylaws imposed a transfer restriction (or "lockup") on certain Matterport stockholders. *Id.* Specifically, Section 7.10(d)(ii) of the A&R Bylaws defined "Lockup Shares" as "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination." *Id*. at 9; *see* A843. Section 7.10(a) provided that the Lockup Shares could not be transferred until 180 days after the business combination closed. Phase II Op. 9.

II. Brown did not become a Matterport stockholder until November 2021.

It was not until November 2021 that Brown sent a letter of transmittal to AST. *Id.* at 14. Before that, on August 13, 2021, he demanded appraisal for 1,347,00 of his Legacy Matterport shares, which he pursued as a hedging strategy to protect his downside risk while also pursuing litigation over whether his prospective Matterport shares would be subject to the lockup. *Id*. at 12.[1]

Ultimately, Brown declined to file an appraisal petition by the deadline. *Id*. at 13. On November 9, 2021, he submitted a letter of transmittal with respect to the 37,000 Legacy Matterport shares that had been excluded from his appraisal

[1] Brown did not seek appraisal for his remaining 40,000 shares. Phase II Op. 12.

demand. *Id.* at 14. Then, when the deadline to file an appraisal petition passed on November 19, he submitted a second letter of transmittal for his other 1,350,000 Legacy Matterport shares. *Id.* On November 22, AST mailed Brown a direct registration book entry advice (dated November 18) reflecting that 5,713,441 Matterport shares had been credited to Brown's AST account. *Id.* at 14–15. The document stated that Brown's new Matterport shares were subject to the transfer restriction in the A&R Bylaws. *Id*. at 14–15.

On November 24, Brown's counsel sent a letter to Matterport's counsel demanding that the transfer restrictions be removed from Brown's shares. *Id.* at 15. On November 30, Brown's counsel sent a similar letter to AST's counsel. *Id.* Despite these letters, Matterport did not lift the improper trading restrictions. *See id.* At the time of the November 30 letter, Brown's shares were worth over $170 million. *Id.* at 16.

III. In Phase I, the court found that Brown's shares were not "Lockup Shares," and this Court affirmed.

The Phase I trial addressed Count I of Brown's then-operative complaint, in which he sought a declaration that his Matterport shares were not subject to the transfer restrictions in Section 7.10 of the A&R Bylaws. *Id.*[2] The Phase I trial was

[2] In this action, Brown also asserted claims for violation of 8 *Del. C.* § 202, breach of fiduciary duty, and breach of 6 *Del. C.* § 8-401 (B29-B43), none of which were at issue in the Phase I trial, nor are they at issue on this appeal aside from the

held in early December 2021, and the court issued its Phase I Opinion on January 10, 2022. *Id.*; *see* A89-A101 (Phase I Op.).

The court found that Brown's shares were not Lockup Shares as defined in Section 7.10(d)(ii) of the A&R Bylaws because the "evidence demonstrate[d] that Brown did not hold Matterport Class A shares 'immediately following' the transaction." A99 (Phase I Op.); Phase II Op. 16. According to the court, when the de-SPAC transaction closed, "Brown held only the right to receive Matterport Class A common shares." A98 (Phase I Op.); Phase II Op. 16. He was first issued Matterport shares only in November 2021, after sending letters of transmittal to AST. A99 (Phase I Op.); Phase II Op. 16. Because "[r]oughly three and a half months elapsed between the business combination closing and the date Brown possessed any Matterport shares"—and because "[o]btaining shares over 100 days after closing" is not "'immediately following' the transaction under any commonly accepted meaning of that phrase"—the court found that Brown did not hold Lockup Shares. A98-A99 (Phase I Op.).

In so holding, the court expressly found that "[i]t is unnecessary to define the precise time period that the 'immediately following' language covers. The only

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6 *Del. C.* § 8-401 claim. Brown voluntarily dismissed the breach of fiduciary duty claim, and, in Phase II, the Court of Chancery found no liability on the other counts. Phase II Op. 52; Final J. 2 (Br. Ex. B).

question presently before the court is how (and whether) the transfer restrictions apply to the plaintiff." A98 (Phase I Op.). The court explained that "defendants' argument that 'immediately' should be read to mean 'within a reasonable time, in view of the circumstances of the case,'—even if true—is therefore irrelevant.'" A98 n.36 (citation omitted). While finding in Brown's favor on his claim for declaratory relief, the Court of Chancery made clear that "[a]ll other relevant issues"—including the determination of whether Brown was entitled to damages and, if so, in what amount —"remain for the second phase of this litigation." A101 (Phase I Op.).

Finding no just reason to delay implementing its Phase I findings, the Court of Chancery entered a partial judgment on January 12, 2022, ordering that Brown's shares were not Lockup Shares and that Brown may freely trade them. B3 ¶¶ 1-3. The court once again noted that Brown's claims "other than the declaratory relief aspect of Count I remain active …." *Id.* ¶ 4. After Matterport appealed, this Court affirmed the court's Phase I decision "on the basis of and for the reasons assigned by the Court of Chancery in its [Phase I Opinion]." *Matterport Inc. v. Brown*, 282 A.3d 1053, 1053 (Del. 2022) (TABLE).

IV. In Phase II, the court calculated Brown's damages based on its factual finding that November 22 was the earliest date that Brown could have sold his Matterport shares absent the improper restriction.

Following the Phase I ruling, AST delivered unrestricted Matterport shares to Brown's brokerage account, which Brown proceeded to sell over a multi-day period between January 11 and 18, 2022. Phase II Op. 17–18. In the Phase II trial—held in November 2023—Brown sought to recover damages caused by the unlawful application of the lockup provision that prevented him from selling the shares he received in November 2021. *Id.* at 19–20.

Following a five-day trial, post-trial briefing, and oral argument, the Court of Chancery issued its Phase II Opinion on May 28, 2024. Consistent with this Court's direction in *Duncan*, the court began its damages analysis by first determining "a reasonable trading period" during which "Brown could realistically have begun trading … had his shares not been restricted." *Id.* at 38–46; *see also id*. at 28–29 (acknowledging that, under *Duncan*, the first step in calculating damages in this context is determining "a reasonable period after the restriction was imposed during which stockholders could have sold the[ir] shares").

Based on the fact and expert evidence put forward, the court concluded that "[t]he reasonable trading period for purposes of calculating Brown's losses is November 22 to 29, 2021." *Id.* at 46. In arriving at that conclusion, the court noted that "Brown received all 5,713,441 shares of his Matterport Class A common

stock … into his AST account in book entry form" on November 18, 2021, and that "[t]he accompanying book entry advice stated that Brown's shares were subject to the transfer restriction in Section 7.10 of the A&R Bylaws." *Id*. at 38. Had there been no restriction, the court concluded, "Brown could have requested that the shares be transferred to his brokerage account—a process that would take one or two days." *Id*. Accordingly, the court determined that "Brown could realistically have begun trading as early as Monday November 22 had his shares not been restricted." *Id*.

In the process, the court expressly rejected Matterport's position that the "reasonable trading period" should be deemed to begin in late July or early August 2021, reiterating that Brown was not yet a stockholder of Matterport at that time. *Id*. at 40–41 (quoting its Phase I findings that "[i]n July 2021, Brown 'held only the right to receive Matterport Class A common shares'" (A98 (Phase I Op.)) and that he did not request and receive his Matterport shares until November 2021). Along the way, the Court also found that Brown did ***not*** intend to sell as quickly as possible after the transaction but rather "was singularly focused on making an optimal trade—spending hundreds of hours developing a predictive model [and] researching various trading strategies" (*id.* at 39)—all "consistent with his desire to ascertain the optimal time to trade" (*id.* at 40 n.190). The court's finding in these (and all other) respects are not challenged on appeal.

Having determined the "initial trading day" of the "reasonable time period," the court then "proceed[ed] to set the length of a reasonable trading period." *Id*. at 44. To do so, the court also considered "the volume of shares a trader would rationally sell in the market as a percentage of the total trading volume—known as the 'participation rate.'" *Id*. at 42. Again relying on this Court's decision in *Duncan*, the court explained that "[t]he targeted participation rate is a key input in estimating a 'reasonable period … during which [a] stockholder[] could have sold the[ir] shares.'" *Id*. (quoting 775 A.2d at 1023). Balancing the "competing target participation rates" proffered by the parties' respective experts (*id.* at 43), the court decided to apply a 20% participation rate, which led it to conclude that "it would [have] take[n] Brown approximately 4.9 business days to liquidate his position" (*id.* at 46). *See id*. at 42–46. Accordingly, the court concluded that "[t]he reasonable trading period for purposes of calculating Brown's losses [wa]s November 22 to 29, 2021." *Id*. at 46.

To calculate Brown's damages, the court then multiplied the number of Brown's shares (5,713,441) by the volume weighted average price (or VWAP) during the "reasonable trading period" (a price of $27.92), resulting in total proceeds of $159,519,272.72. *Id.* at 46–49. Subtracting the amount that Brown received from later selling his shares in January 2022 ($80,427,139.60), this resulted in a net damages calculation of $79,092,133.12. *Id.* at 49.

A final judgment in this amount was entered on July 1, 2024. In awarding post-judgment interest on this amount, the court did not use the Federal Reserve discount rate in effect on July 1, 2024, but instead used the rate that was in effect on January 12, 2022, when the court entered its partial judgment in Brown's favor on his claim for declaratory relief. Final J. 3 ¶ 4. Brown timely sought reconsideration of the court's interest calculation, which the court denied. B126-B129; B130-B132.

ARGUMENT ON DEFENDANTS' APPEAL

I. The court's damages award is not barred by law of the case.

A. Question Presented.

Did the doctrine of law of the case prohibit the court's factual finding that the "reasonable trading period" for purposes of calculating Brown's damages did not begin until November 2021, when Brown first became a Matterport stockholder?

B. Scope of Review.

Although this Court generally reviews a lower court's application of the law-of-the-case doctrine *de novo* (*Frederick-Conway v. Baird*, 159 A.3d 285, 296 (Del. 2017)), where, as here, the issue was not preserved below, this Court can either decline to consider the argument entirely or apply plain error review (Del. Sup. Ct. R. 8). Although Matterport cites A799-A800 to suggest that it raised this issue in the trial court, the cited pages of the record (to one of Matterport's briefs below) make no mention of the law-of-the-case doctrine.

C. Merits of Argument.

Matterport is careful not to challenge the court's considered and detailed factual findings in Phase II. And for good reason, as any such challenge would be subject to clearly erroneous and abuse-of-discretion standards of review that Matterport could not possibly meet in this case. *See Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1212 (Del. 2012) ("This Court will uphold the trial

court's factual findings unless they are clearly erroneous, and will review damage awards … for abuse of discretion." (citations omitted)); *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94–95 (Del. 2021) ("The clearly erroneous standard of review is deferential to the trial court," and this Court "'will not set aside a trial court's factual findings unless they are clearly wrong and the doing of justice requires their overturn.' … 'When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" (citations omitted)).

Rather, Matterport goes to great pains to package its appeal as one depending solely on a ***legal*** question—whether the law-of-the-case doctrine somehow bars the court's factual findings as a matter of law. It most decidedly does not. And as discussed below, this Court need not reach this issue in any event.

1. Matterport waived its law-of-the-case argument by not fairly presenting it to the Court of Chancery.

To start, Matterport failed to preserve its "law-of-the-case" argument in the Court of Chancery—and this Court can and should decline to reach the argument on that basis alone. Delaware Supreme Court Rule 8 provides that "[o]nly

questions fairly presented to the trial court may be presented for review[.]"[3] Matterport did not brief this argument in the trial court. Although Matterport cites one of its briefs to suggest that it preserved the issue below, the cited passage makes no mention of the doctrine of law of the case. Br. 25 (citing A799-A800). Rather, it simply asked the trial court to "adopt the meaning of 'immediately following' previously proffered by Plaintiff." A799 (cleaned up); *see also* A800 (citing *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del. Ch.), to advance a judicial estoppel argument, with no mention of law of the case).

During oral argument in Phase II, Matterport's counsel mentioned "law of the case" only one time, and only in passing: "Matterport offers a damages framework that's derived from contract principles and based on the law of the case regarding the lockup provision …." (B75:23-B76:1). Then, Matterport's counsel repeated the ***estoppel*** argument from its brief: "The Court should find plaintiff estopped from engaging in a reversal and should continue to give 'immediately following' its plain meaning." B83:23-B84:2.[4] On appeal, though, Matterport

[3] The sole exception to Rule 8's mandatory preservation provision is "when the interests of justice require," which is not applicable here. Del. Sup. Ct. R. 8. This "very narrow" and "extremely limited" exception applies only when failure to consider the issue is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Ravindran v. GLAS Tr. Co.*, 2024 WL 4258889, at *12 (Del. Supr.) (citations omitted).

[4] Unsurprisingly, Matterport does not cite oral argument as preserving its law-of-the-case argument.

abandons any estoppel argument and focuses solely on the doctrine of law of the case.

This Court can and should reject Matterport's law-of-the-case argument as inadequately preserved. Just last month, under Rule 8, this Court rejected a similar attempt to raise a waived issue on appeal in *Ravindran v. GLAS Trust Company*. *See* 2024 WL 4258889 (Del. Supr.). There, the appellant argued that the trial court erred by refusing to enforce a forum selection clause. *Id.* at *11. This Court reviewed the trial record and concluded that "at no point in the proceedings below did Appellants' counsel explicitly argue that [Appellee] was bound by the forum selection clause" but instead the parties and court "engaged in a lengthy discussion concerning" a related issue. *Id.* at *12. This Court reached its conclusion despite finding that at oral argument below, appellant had briefly addressed the forum selection clause argument, holding that a "cursory comment does not register as an argument that is fairly presented to the trial court for consideration as required by Rule 8." *Id.*

Here, as in *Ravindran*, Matterport never "explicitly argue[d]" that the law of the case bound the trial court to reject Brown's damages period and accept Matterport's. *See id.* Counsel's "cursory comment" at oral argument does not preserve a law-of-the-case challenge. *See id*. As "required by Rule 8," this Court should decline to consider Matterport's waived argument. *See id.*

2. There is no law of the case implicated here, as the issue was not "actually decided."

Waiver aside, Matterport's argument fails on its merits. This Court has repeatedly explained that the law-of-the-case doctrine "only applies to issues that the court ***actually decided***." *Washington v. Del. Transit Corp.*, 226 A.3d 202, 212 (Del. 2020) (emphasis added); *State v. Wright*, 131 A.3d 310, 321 (Del. 2016) (same); *see also Washington*, 226 A.3d at 212–13 (explaining that "the previously resolved issue must be the same" and "different, albeit related, issues" are not sufficient). The doctrine "applies only to those matters necessary to a given decision and those matters which were decided on the basis of a fully developed record." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996).

Here, Matterport's "law of the case" argument hinges on the assertion that, in Phase I, the court actually decided that the "immediately following" language in the definition of Lockup Shares does not apply to Legacy Matterport stockholders who received their Matterport shares between July 30 and August 13, 2021. Br. 27–35. Altering the court's language, Matterport's brief argues that the court decided the lockup applied only to stockholders who "'received their Matterport shares within a few days of closing' (***but not later than that***)." *Id.* at 27 (quoting in part A97–98) (emphasis added). But the critical "but not later than that" language ***does not actually appear in the Phase I opinion***.

Indeed, the court in Phase I could not have been clearer that it was ***not*** deciding the precise contours of the language "immediately following." On the contrary, the court stressed that

> [i]t is ***unnecessary*** to define the precise time period that the "immediately following" language covers. The only question presently before the court is how (and whether) the transfer restrictions apply to the plaintiff.

A98 (Phase I Op.) (emphasis added). As to the "only question" presented, the court found "that Brown did not hold Matterport Class A shares 'immediately following' the transaction under any commonly accepted meaning of that phrase … [b]ecause obtaining shares over 100 days after closing is not 'immediately.'" A98-A99 (Phase I Op.). For this reason, the court continued, "defendants' argument that 'immediately' should be read to mean 'within a reasonable time, in view of the circumstances of the case,'—even if true—is therefore ***irrelevant***.'" A98 n.36 (emphasis added) (citation omitted). Thus, whether "immediately following" applied to shares acquired in July or August was ***not even at issue*** in Phase I, much less actually decided in the court's Phase I decision.[5]

[5] Further, the phrase a "few days"—which appears 23 times in Matterport's opening brief—appears only once in the court's Phase I opinion, responding to Matterport's argument that "'no Legacy Matterport stockholder received Matterport shares' instantly after the transaction closed." A97-A98. In full, the court stated that "the evidence demonstrates that some Legacy Matterport stockholders would have received their Matterport shares within a few days of closing. That timing ***could be*** viewed as consistent with a plain reading of the

On this record, Matterport's "law of the case" argument is utterly baseless. The law-of-the-case doctrine "only applies to issues that the court ***actually decided***." *See Washington*, 226 A.3d at 212 (emphasis added); *Wright*, 131 A.3d at 321 (same); *Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *6 (Del. Ch.) (refusing to apply law of the case because, inter alia, the prior order "did not explicitly address the underlying issues"); *see also Zirn*, 681 A.2d at 1062 n.7 (reasoning a "prior ruling cannot be considered to be the law of the case" where, as here, the "Court could not have envisioned the full factual posture of a particular claim"). And here, the issue was ***not*** actually decided—far from it.

The decisions on which Matterport relies (Br. 29–31), if anything, serve only to underscore this result; unlike here, they all involve situations where an issue was actually decided. *See Cede & Co. v. Technicolor, Inc*., 884 A.2d 26 (Del. 2005) (law-of-the-case violation where trial court, having previously decided precise issue regarding amount of corporate debt and appropriate discount rate, subsequently switched to different numbers on remand after appeal); *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 895 (Del. 2015), as revised (Mar. 27, 2015) (finding law-of-the-case violation where replacement trial court judge purported to reinstate "exact claim" previously

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bylaw." A97-A98 (Phase I Op.) (emphasis added). This hypothetical statement does not define the contour of what "immediately following" means.

dismissed by predecessor trial court judge); *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2012 WL 6049157 (Del. Supr.) (no mention of law-of-the-case doctrine, nor did case involve interplay between prior and subsequent decisions); *French v. Collins*, 2008 WL 4057740 (Del. Supr.) (no mention of law-of-the-case doctrine); *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2023 WL 4857281, at *3 (Del. Ch.), *judgment entered*, (Del. Ch. 2023), *aff'd sub nom. Mobile Invs., LLC v. Tygon Peak Cap. Mgmt., LLC*, 315 A.3d 445 (Del. 2024) (on motion for judgment on pleadings, court adhered to prior ruling with respect to same specific contract interpretation); *Manti Holdings, LLC v. Authentix Acquisition Co.*, 2020 WL 4596838, at *6 (Del. Ch.), *judgment entered*, (Del. Ch. 2020), *aff'd*, 261 A.3d 1199 (Del. 2021) (where petitioner sought to relitigate previously decided issue, court adhered to prior ruling on precise legal issue and refused to entertain subsequent challenge). In short, there is no ruling here to serve as "law of the case" at all.

3. The Phase II decision does not turn on any particular reading of the term "immediately following" in any event.

There is one additional problem with Matterport's argument: the damages award in this case does not stand or fall depending on the issue on which Matterport says there was law of the case (i.e., whether shares acquired in August 2021 would have fallen within the lockup provision). Matterport's law-of-the-case argument asserts (incorrectly) that in Phase I, the court found that shares acquired

in August 2021 would not count as "immediately following" the de-SPAC transaction and thus would not have been Lockup Shares. ***But Brown did not acquire his shares in August; he acquired them in November***. It was the lockup on the ***November-acquired*** shares that the court in Phase I found inappropriate, and it was that inappropriate ***November*** lockup that was the subject of the damages analysis in Phase II. In other words, whatever the Phase I opinion says about August shares, Brown did not have them and could not have sold them. They are entirely irrelevant to the damages analysis.

Indeed, to the extent the Phase II opinion discusses August shares, it was only to speculate that "if" Brown had received them, "he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded. He may well then have lost the phase one trial, which would obviate the need for a damages assessment entirely." Phase II Op. 41. That was an entirely hypothetical discussion because—as the Phase II decision makes clear—Brown did ***not*** "receive[] his shares in August." *Id*. Matterport's law-of-the-case argument with regard to August shares would impact only this hypothetical statement; it should have no impact at all on the damages award here.

As discussed further below, the Court of Chancery's Phase II decision rested on not one but two different—and undisputed—factual findings: (1) Brown did not receive his Matterport shares until November and could not have traded on

those shares until then, with or without the lockup (*id.* at 2, 37–38, 41); and (2) Brown never intended to sell immediately after the SPAC transaction but rather had a demonstrated "desire to ascertain the optimal time to trade" (*id.* at 40 n.190). For this reason too, Matterport cannot use any alleged "law of the case" on the meaning of "immediately following" to upset the damages award.

II. The court did not award improper "windfall damages."

A. Question Presented.

Did the Court of Chancery improperly award "windfall damages" to Brown in violation of Delaware law?

B. Scope of Review.

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo. Determinations of fact and application of those facts to the correct legal standards, however, are reviewed for an abuse of discretion." *Shock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument.

By its own terms, Matterport's second argument depends entirely on the success of its first fatally flawed argument—that is, that the law-of-the-case doctrine somehow bars the court's factual findings with respect to the calculation of Brown's damages. *See* Br. 33 (heading: "The trial court's error" with respect to law of the case "***resulted in*** windfall damages to Brown" (emphasis added)). Accordingly, this argument fails for the same reasons set forth above. Indeed, if anything, as demonstrated in the cross-appeal below, had the court properly applied all aspects of this Court's controlling decision in *Duncan* regarding the proper calculation of damages in this context, Brown would have been entitled to even ***more***—not ***less***—in damages.

Further, to the extent Matterport's second argument, while couched in terms of a purported "legal error," is intended as a backdoor challenge to the court's factual findings, it fails for a number of reasons.

First, because Matterport has not argued that the trial court's factual findings were clearly erroneous, it has waived any such challenge. Delaware Supreme Court Rule 14(b)(vi)(A)(3) provides that "[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (explaining that the "failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal"). This Court "has held that the appealing party's opening brief must ***fully*** state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." *Roca*, 842 A.2d at 142 (emphasis in original). Here, Matterport's opening brief does not challenge the trial court's factual findings or make any mention whatsoever of clear error or abuse of discretion. Matterport has waived any such challenge.

Second, even if Matterport ***had*** challenged the trial court's factual findings, such a challenge would fail on this record. *See Backer*, 246 A.3d at 94 ("The clearly erroneous standard of review is deferential to the trial court" and this Court "'will not set aside a trial court's factual findings unless they are clearly wrong and

the doing of justice requires their overturn.'"); *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 869 (Del. 2015) ("[W]e afford a trial court's factual findings a 'high level' of deference, and will leave such conclusions undisturbed unless they are the by-product of clear error." (citations omitted)).

In reaching its conclusions, the trial court considered and weighed the extensive record of factual and expert evidence and correctly found that Brown was not a Matterport stockholder until "November 2021, after sending letters of transmittal to AST." Phase II Op. 16. As the trial court found in its Phase I opinion, when the merger closed, "Brown held only the right to receive Matterport Class A common shares" and the "evidence demonstrates that Brown did not hold Matterport Class A shares 'immediately following' the transaction …." A98 (Phase I Op.). This Court affirmed the trial court's Phase I findings (282 A.3d 1053) which are law of the case on this precise issue. *See Wright*, 131 A.3d at 321 (law of the case applies to issues "expressly or implicitly disposed of by the appellate court"). Accordingly, the trial court correctly found—and in no event committed clear error or an abuse of discretion in finding—that "the evidence and Phase One Opinion support treating November 22, 2021 as the start of the trading period." Phase II Op. 37.

Finally, there is no merit to any suggestion that the court committed clear error in rejecting Matterport's hypothetical "but-for" alternative universe, where,

according to Matterport, Brown would have sold "promptly after [the] de-SPAC closing." *See* Br. 36–37. As an initial matter, it is undisputed that Brown did not own shares at that time and therefore ***could not*** sell. A98 (Phase I Op.); Phase II Op. 16. And in any event, the court correctly found as a matter of fact that Brown did ***not*** intend to sell as quickly as possible but rather "was singularly focused on making an optimal trade—spending hundreds of hours developing a predictive model [and] researching various trading strategies." Phase II Op. 39 (citing A340 at 59, A350 at 99, A380 at 250, A392 at 268, B133 (JX 1068), B134 (JX 1071)). As Matterport concedes, the court "observed that 'the fact that Brown wanted to receive his shares "as soon as possible" is not a commitment to sell in July or August.'" Br. 37 n.5 (quoting Phase II Op. 40 n.109). Brown "was consistent in his desire to ascertain the optimal time to trade." Phase II Op. 40 n.109 (citing B133 (JX 1068), B134 (JX 1071), A860).

In this regard, Brown "analyz[ed] the likely price trajectory of Matterport's stock post-closing," which included "create[ing] a spreadsheet model that gathered stock price data from more than 130 SPACs during the 180 days before a de-SPAC closed to 240 days after closing." *Id.* at 9–10. "He further refined the data to focus on transactions involving companies with products and investors similar to Legacy Matterport's or SPACs with sponsors similar to Gores,'" and the "model automatically updated with fresh data and was refined to provide a focused

predictive tool for Matterport's stock price." *Id.* at 10. Brown spent "'hundreds of hours' on his stock price model" (*id.* at 11), and "[b]ased on the model, Brown observed that SPACs often experienced a run-up in stock price within the first 160 days post-closing, with prices falling as the lockup expiration approached" (*id.* at 10).

These factual findings have ample support in the record. *See, e.g.*, B134 (JX 1071); A349 at 93-95, A350 at 97-99, A352 at 107-08.[6] As a result, they cannot be "clearly erroneous"; to the contrary, "they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Backer*, 246 A.3d at 95. They were correctly "based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally." *Id.*; *see RBC*, 129 A.3d at 828 (factual findings not clearly erroneous because they were "supported by the evidence").

Again, Matterport does not contend that the trial court's findings on these points were unsupported. Rather, at most, Matterport argues that it presented an alternative universe that the trial court "declined to credit." *See* Br. 37. But even

[6] The court also correctly relied upon the fact that Brown "interviewed financial services firms to sell his Matterport shares and manage his investment portfolio," and ultimately retained Rockwood Wealth Management "after reaching an understanding that he could 'drive [some] investment decisions' for his portfolio to utilize the many hours [he] had spent studying price trends." Phase II Op. 10 (citing A353 at 109–12, A354 at 113, 116, A355 at 119).

assuming that is true, "the Court of Chancery's choice between two permissible views of the evidence cannot be clearly erroneous" as a matter of law. *Backer*, 246 A.3d at 102; *see RBC*, 129 A.3d at 849 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). This Court should reject any challenge to the trial court's factual findings.

ARGUMENT ON PLAINTIFF'S CROSS-APPEAL

I. The court erred when it failed to apply *Duncan*'s highest intermediate price rule to assess Brown's damages.

A. Question Presented.

Did the Court of Chancery err when it failed to apply *Duncan*'s bright line highest-intermediate-value rule to determine the damages caused by a defendant-issuer's improper restriction on a plaintiff-stockholder's ability to sell his shares? (Appellee/Cross-Appellant preserved this issue at A722-A729.)

B. Scope of Review.

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo. Determinations of fact and application of those facts to the correct legal standards, however, are reviewed for an abuse of discretion." *Shock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument.

Although the Court of Chancery was indisputably right about the facts, it erred as a matter of law when it failed to adhere to this Court's "bright line rule" that a plaintiff's damages in this context must be calculated using the highest intermediate value during a reasonable trading period once the trading restriction was imposed. *See Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1029 (Del. 2001). *Duncan* provides that where, as here, the defendant improperly restricted a stockholder's right to sell stock, damages must be calculated by "identifying a

reasonable period after the restriction was imposed during which the stockholders could have sold the shares and then selecting the 'highest intermediate price' during that period as the presumed sale price." *Id.* at 1023.

This Court explained that "[t]he intuition behind this rule is that the issuer-defendant should bear the risk of uncertainty in the share price because the 'defendant's acts prevent a court from determining with any degree of certainty what the plaintiff would have done with his securities had they been freely alienable.'" *Id.* The rule "has the advantage of permitting the stockholders to recover some of the increases in the share price during the restricted period without assuming that the stockholders would have sold at the highest possible share price during the [entire restricted] period." *Id.* Accordingly, this Court pronounced a "'bright line' rule that is fair[,] achieves more certainty than the alternatives," and "appropriately accommodates the reasonable expectations of the contracting parties *ex ante*, which are centered upon maximum freedom of choice for the stockholders." *Id.* at 1029.

Here, the Court of Chancery correctly followed *Duncan*'s first step and "identif[ied] a reasonable period after the restriction was imposed during which [Brown] could have sold the shares." *See id.* at 1023; Phase II Op. 42.[7] But

[7] Per *Duncan*, the court made a series of "determinations [that] are necessarily hypothetical" to calculate the approximated trading period (*see* 775 A.2d

despite this Court's unambiguous pronouncement, the court erroneously declined to apply *Duncan*'s "bright line" highest intermediate value rule, concluding that it is appropriate only where defendant is a "wrongdoer" that caused "considerable uncertainty … around when a sale would have occurred." Phase II Op. 30.; *see id.* at 36 ("An alternative to the highest intermediate price method is the average price over a reasonable period."). Instead, the court calculated damages using a volume weight average price (or VWAP) over a reasonable trading period.

That approach was wrong as a matter of law. *Duncan* is not optional, and it is not limited to cases involving wrongdoers. *See Mehta v. Smurfit-Stone Container Corp.,* 2014 WL 5438534, at *7 (Del. Ch.) (noting that in "situations where a party has a right to sell and the defendant has foreclosed the plaintiff from exercising that right, the law awards the plaintiff the highest intermediate value of the shares"); *Haft v. Dart Grp. Corp.*, 877 F. Supp. 896, 902 (D. Del. 1995) (noting that under Delaware law the "traditional method" of computing "damages for a failure to deliver securities" is "determined by the highest market price the stock reached within a reasonable time of plaintiff's discovery of the breach." (citation

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at 1022–23), including: (i) "treating November 22, 2021 as the start of the trading period;" (ii) "[a]pplying a participate rate of 20%;" and (iii) assuming "Brown would have sold his stake by November 29." Phase II Op. 37. Matterport does not challenge these factual findings on appeal.

omitted)). And, even if *Duncan* was so limited, Matterport was a "wrongdoer" that caused considerable uncertainty about when Brown would have traded.

1. *Duncan* is a bright line rule that must be applied, not a rule of last resort.

The Court of Chancery erred in holding that *Duncan* is limited to situations in which there is "significant factual uncertainty" as to what the stockholder would have done and when, and thus an insufficient record to craft a more accurate damages award. Phase II Op. 27, 30. The court erroneously reasoned that "[u]nlike in *Duncan* where there was no reliable evidence of when the plaintiffs would have sold, the court has hundreds of exhibits and hours of testimony on the subject." *Id*. at 32–33. Not so. *Duncan* recognized that courts would (and should) do what the court did here, calculate an "approximation of what the stockholders would have received absent the restriction," and set out a bright line rule to be used because "the issuer-defendant should bear the risk of uncertainty in the ***share price*** …." 775 A.2d at 1023 (emphasis added).

Indeed, in *Duncan*, just as here, the court found a short reasonable trading period (from January 13 to January 23) and "that [plaintiff] did intend to sell its shares during the restricted period." *Id.* at 1022 n.7, 1023 n.9. Despite these findings, this Court mandated that damages be calculated using the highest intermediate value, not an average price or any other mechanism. *Id. Duncan* acknowledged that measuring damages in this context requires "determinations

[that] are necessarily hypothetical," but established the "sensible bright line" highest intermediate value rule to ensure that the stockholder could "recover some of the increases in the share price" while the issuer-defendant bears the risk of price uncertainty. *Id.* at 1022–23; *see also Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10 (Del. Ch.), *aff'd*, 620 A.2d 856 (Del. 1992) ("Because it is the defendant who creates this uncertainty, fundamental justice requires that, as between the plaintiff and the defendant, the perils of such uncertainty should be laid at defendant's door." (cleaned up)).[8]

This Court also explained that the highest intermediate value is the appropriate measure because "[t]he injury here is not the loss of a specific transaction but the loss of the ability to trade the shares as desired" and "the primary effect" of defendant's actions "is to cause a deprivation of the stockholder's range of elective action." *Duncan*, 775 A.2d at 1022 n.7. Thus, "the plaintiff is not required to show that she actually would have sold the shares during the restricted period," nor is the fact that she would have traded a reason to divert

[8] *See Halifax Fund, L.P. v. MRV Commc'ns, Inc.,* 2001 WL 1622261, at *5 (S.D.N.Y.), *aff'd*, 53 F. App'x 598 (2d Cir. 2003), *opinion amended and superseded*, 54 F. App'x 718 (2d Cir. 2003) ("[T]the purpose of the [highest intermediate value] rule is to provide a fair valuation of stocks, by allocating the risk of market fluctuation to the breaching party, and to redress the unfairness that would result from allowing the party in the wrong to dictate the timing of the innocent party's trading and thus the recoverable damages." (quotation omitted)).

from the highest intermediate value. *Id.* Rather, it's the loss of the "elective action" that mandates the highest intermediate value. *Id.* The court's limiting of *Duncan* was legal error that this Court should reverse.[9]

2. By improperly restricting Brown's ability to trade, Matterport was a "wrongdoer" under *Duncan*.

The Court of Chancery's other reason for departing from *Duncan*—that Matterport was not a "wrongdoer"—is also reversible error. *See* Phase II Op. 2 ("[t]here is also no wrongdoer to fairly construe uncertainty against"); *see also id.* at 27, 32.

As an initial matter, *Duncan* does not require any level of wrongdoing other than improperly restricting plaintiff's trades and that is exactly what Matterport indisputably did here. In fact, *Duncan* does not use the word "wrongdoer" at all, and instead speaks only of the "issuer-defendant" or "breaching party."[10] *See, e.g.*,

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[9] The court's limiting of *Duncan* also ignores this Court's mandate that "the plaintiff is not required to show that she actually would have sold the shares during the restricted period." *Duncan*, 775 A.2d at 1022 n.7. Indeed, because it was Matterport's conduct that interfered with Brown's ability to sell his stock, "the issue of damage must be resolved without resort to an inquiry into plaintiff's intent." *Am. Gen.,* 622 A.2d at 9. To "require the plaintiff to show that he would have sold his securities, had he been able, is to require him to prove that he would have taken the very steps that defendant's wrongful act precluded him from taking." *Id.* at 10.

[10] The decisions the court relied on likewise do not speak of a "wrongdoer," and instead apply *Duncan*'s highest intermediate value rule where the defendants' conduct prevent the plaintiff from selling her shares. *See, e.g.*, *BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 283 (Del. Ch. 2003), *as revised* (Oct. 6, 2003) (no

775 A.2d at 1023, 1025, 1027, 1029. And in *Duncan* it was "the Securities and Exchange Commission [that] advised [Defendant] to suspend the shelf registration and to re-impose the trading restrictions on the shares held by [Plaintiff and others]." *Id.* at 1021. Despite the trading restriction being imposed upon the SEC's request, *Duncan* still required that damages be calculated using the highest intermediate value. *Id.* at 1023.

Simply put, there is no level of scienter required. All that matters is that the issuer-defendant improperly restricted a stockholder's right to trade, thereby depriving plaintiff of "the ability to trade the shares as desired." *Id.* at 1022 n.7. That is precisely what occurred here.

Matterport was a "wrongdoer" in this respect. As the Court of Chancery found in its Phase I Opinion, Matterport improperly restricted Brown's shares. Matterport contended that it properly restricted Brown's shares under Section 7.10 of Matterport's A&R Bylaws, which "imposed transfer restrictions on certain shares of Matterport Class A common stock …." A92 (Phase I Op.). But the court, applying "principles of contract interpretation" (A95 (Phase I Op.)) found that Matterport's reading of Section 7.10 was erroneous and the transfer restrictions therein did not apply to Brown's shares (A99 (Phase I Op.)). Accordingly,

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mention of "wrongdoer"); *Comrie v. Enterasys Networks, Inc.,* 837 A.2d 1, 20 (Del. Ch. 2003) (same).

Brown's shares should have been "unrestricted" so that he could "freely trade." A90 (Phase I Op.). This Court affirmed the court's finding (282 A.3d 1053), which was reiterated in the trial court's Phase II Opinion. Phase II Op. 33 ("Brown's right to freely trade was impaired by Matterport"); *see id.* at 1 (Brown "challenged the lockup in this court as illegal and inequitable" and "argued his shares were excluded from the lockup. He was right.").

Despite the now-indisputable finding that Matterport violated Brown's rights, the Court of Chancery, in rejecting *Duncan*, erroneously reasoned that "Matterport was not found to have breached a contract, committed a tort, or violated positive law." *Id.* at 31. As demonstrated, that is simply not the case.

First, Matterport did breach a contract, specifically its A&R Bylaws. A company's "bylaws are contracts" that "constitute part of a binding broader contract among the directors, officers and stockholders." *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020) (quoting *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015)); *see Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010)*; Centaur P'rs, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990).[11]

[11] Indeed, the Court of Chancery recognized as much with respect to Brown and Matterport's bylaws in its Phase I Opinion. A95 n.24 (Phase I Op.) ("Because corporate charters and bylaws are contracts, our rules of contract interpretation apply.").

Matterport breached that contract by improperly applying Section 7.10 to impose trading restrictions on Brown's shares.

Second, as recognized in *Duncan*, improper trading restrictions are akin to the tort of conversion. *Duncan* "adapted [the highest intermediate value rule] from the rule used to determine damages in conversion cases," explaining that "by preventing the stockholders from trading their shares, the issuer's breach at least in some sense is a temporary 'conversion' of the shares." 775 A.2d at 1023 n.9 (citing *Madison Fund, Inc. v. Charter Co.*, 427 F. Supp. 597, 609–10 (S.D.N.Y 1977) (awarding highest intermediate value where issuer-defendant improperly restricted stock, observing that "the highest intermediate value formula … is the most commonly employed measure of damages in conversion cases"); *see Am. Gen.*, 622 A.2d at 9 (applying "the [highest intermediate value] formula used in conversion cases" because "the conversation measure of damages" are appropriate where defendants "interfere[d] with the alienability of [plaintiff's securities]"); *Wyndham, Inc. v. Wilmington Tr. Co.*, 59 A.2d 456, 459 (Del. Super. Ct. 1948) ("the measure of damages for the loss (as capital) of converted shares of stock of fluctuating value is the highest value from the time of conversion up to a reasonable time after").

Here, as in conversion cases, the injury that Brown suffered was "not the loss of a specific transaction but the loss of the ability to trade the shares as

desired" and "the primary effect" of Matterport's conduct was to cause a "deprivation of [Brown's] range of elective action." *Duncan*, 775 A.2d at 1022 n.7 (citation omitted); *see Am. Gen.* 622 A.2d at 10 ("The hallmark of conversion cases is the interference with the plaintiff's ability to transfer securities he owns or to which he is entitled."). Thus, as in *Duncan*, Matterport's conduct was akin to conversion and damages calculated using the highest intermediate value is the appropriate remedy.[12]

3. Under *Duncan*, Brown is entitled to a damages award of at least $110,858,865.08 based on the Court of Chancery's relevant factual findings.

Under *Duncan's* bright line rule, Brown's damages must be calculated using the highest intermediate value occurring between November 22, 2021 and November 29, 2021—the reasonable trading period found by the Court of Chancery. The highest intermediate value occurring during this time period was $33.48 on November 29, 2021. *See* Phase II Op. 46 (table containing the high price on each date in the reasonable trading period). Accordingly, the Court of Chancery erred in applying a VWAP of $27.92 instead of the highest intermediate value of $33.48.[13]

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[12] As detailed in Argument on Cross-Appeal II below, Matterport also violated positive law as it violated § 8-401 of the Delaware Uniform Commercial Code.

[13] The court determined the reasonable trading period based on an assumed hypothetical start date of November 22, 2021, and a participation rate of 20%,

To determine Brown's damages, the Court of Chancery should have multiplied the number of Brown's shares (5,713,441) by the highest intermediate price ($33.48) yielding total proceeds of $191,286,004.68. Accounting for the proceeds Brown received when he sold his shares, total damages should have been at least $110,858,865.08, not $79,092,133.12 as awarded by the Court of Chancery.[14] This Court should enter an order directing the Court of Chancery to modify the judgment to reflect damages of at least $110,858,865.08.

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which led to a trading period of 4.9 trading days. Phase II Op. 44–46. Thus, the court found that the "trading period spans four full days with Brown trading the remainder of his shares during a fifth day." *Id.* at 46 n.217. The court also took judicial notice of the fact that the market was closed on November 25, 2021, for the Thanksgiving holiday, and was only open for a half day on November 26. *Id.* at 46 n.218 (citing Nasdaq, *Trading Calendar 2021*, https://www.nasdaq.net/PublicPages/assets/MyMID/Trade_Calendar_2021.pdf). The parties are not contesting these factual findings on appeal.

[14] *Duncan's* backend time period is not at issue on appeal. Brown recognizes that *Duncan* rejected using the stockholder's later "actual sale price" in determining damages and instead held that the damages should be calculated using the difference between the highest intermediate value on the front end and "the average market price of the shares during a reasonable period after the restrictions were lifted." *Duncan*, 775 A.2d at 1029. Here, as to Brown, the lock-up expired on January 11, 2022, and Brown sold over a five-day period thereafter. The parties did not contest using his actual proceeds instead of an average price over this time period for the purpose of *Duncan's* backend period. *See* Phase II Op. 27 n.139.

II. The court applied the wrong legal standard for § 8-401(b) claims when it required Brown to show Matterport's actions were "unreasonable."

A. Question Presented.

Is an issuer exempt from strict liability under 6 *Del. C.* § 8-401 even if its conduct satisfies every element of the claim, so long as the issuer's failure or refusal to register the transfer was "reasonable"? (Appellee/Cross-Appellant preserved this issue at A712-A718.)

B. Scope of Review.

"We review a trial court's statutory construction *de novo*." *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 977 (Del. 2021).

C. Merits of Argument.

The Court of Chancery erred when it found that Brown had failed to prove his § 8-401(b) claim against Matterport because it considered Matterport's failure or refusal to transfer Brown's shares "reasonable." Under § 8-401(b), Matterport should be liable to Brown "for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer." But the court determined that § 8-401(b) included a "reasonableness" requirement, and Matterport's "good faith—albeit mistaken—belief" that the lockup applied shows its refusal to register the transfer was not unreasonable. Phase II Op. 23–25. The court reasoned that "[a] refusal to register a transfer of stock may not be wrongful if the issuer has 'reasonable' grounds to do so." *Id.* at 23–24 (citing *Dewitt v. Am. Stock Transfer*

Co., 433 F. Supp. 994, 1000 (S.D.N.Y. 1977), *amended*, 440 F. Supp. 1084 (S.D.N.Y. 1977); *Kanton v. U.S. Plastics, Inc.*, 248 F. Supp. 353, 363 (D.N.J. 1965)). But the language of § 8-401(b) is clear and unambiguous: a wrongful failure or refusal to register the transfer establishes liability, regardless of the issuer's intent. Brown did not need to prove that Matterport's failure or refusal was "unreasonable" to prevail on his claim.

The court's erroneous conclusion on Brown's § 8-401(b) claim significantly impacted Brown's damages. Section 8-401(b) claims accrue at the time of the wrongful act. *See Barbara v. MarineMax, Inc.*, 2012 WL 6025604, at *6 (E.D.N.Y.) (applying Delaware law and citing *Fike v. Ruger,* 754 A.2d 254, 260 (Del.Ch.1999) and *Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 383–84 (Del.1951)). Based on the court's findings, Matterport first refused to transfer Brown's shares on November 24, 2021, and the five-day reasonable trading window for the UCC claim should run from that date.

A plain reading of § 8-401(b) demonstrates that the word "unreasonable" modifies only "delay," not "refusal." Moreover, courts have consistently considered "unreasonable delay in registration" ***or*** "failure or refusal to register" as separate, alternative ways to incur liability under the statute. This makes sense because "unreasonable delay" refers to a temporal period, whereas refusal is just

that. In *Loretto Literary & Benevolent Institution v. Blue Diamond Coal Company*, the court explained the distinction:

> The first standard, loss occasioned by unreasonable delay, envisions a situation where the issuer undertakes to register the security but unreasonably delays in effecting the registration. The second standard, loss occasioned by a refusal to transfer, is self-explanatory: it applies when the issuer for a wrongful reason refuses to register the security.

444 A.2d 256, 259 (Del. Ch. 1982).

Other Delaware courts that have applied the statute likewise separate "unreasonable delay" from "refusal" and have ***consistently*** concluded that the "failure or refusal" creating liability under § 8-401(b) need not be "unreasonable." *See, e.g.*, *Jing v. Weyland Tech, Inc.*, 2017 WL 2618753, at *2 (D. Del.) ("Section 8-401(b) provides liability 'if an issuer is under a duty to register a transfer' and either refuses or causes unreasonable delay."); *Kolber v. Body Cent. Corp.*, 2012 WL 3095324, at *2 (D. Del.) ("a wrongful refusal or unreasonable delay" is "actionable under 6 *Del. C.* § 8-401(b)"); *Bender v. Memory Metals, Inc.*, 514 A.2d 1109, 1118 (Del. Ch. 1986) (issuer may "be held liable for an unreasonable delay, or for wrongful failure, to register the transfer"); *see also Jodek Charitable Tr., R.A. v. Vertical Net Inc.*, 412 F. Supp. 2d 469, 482 (E.D. Pa. 2006) ("8-401 imposes liability … for 'failure or refusal' to register, without regard for whether this failure or refusal is reasonable.").

Further, reading an unreasonableness requirement into subsection (b) would be superfluous given the requirement that a transfer be "rightful" under subsection (a) of the statute. 6 *Del. C.* § 8-401(a)(7) (requiring that "transfer is in fact rightful"). It is a canon of statutory construction that courts "must give meaning to every word in the statute." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020). Subsection (b) should not be construed to duplicate the requirements under subsection (a). And while an "issuer corporation is privileged for a reasonable period of time to refuse to register a transfer of the stock," "[t]his is to enable the issuer to discharge its duty to inquire into the adverse claim" under § 8-403, or otherwise investigate the rightfulness of the transfer. *Bender*, 514 A.2d at 1117. But once "the issuer's duty of inquiry is discharged, and assuming compliance with the other requirements of § 8-401, it then becomes mandatory under § 8-401 for the issuer to register the transfer." *Id*. In other words, if a court determines that the requirements of subsection (a) are met—including that the transfer is rightful—then the issuer is under a duty to transfer and there is no secondary reasonableness inquiry.

Here, Matterport did not "delay" in the transfer; it "refused" the transfer. The Court of Chancery thus erred when it rejected the UCC claim based on its finding that Matterport had a "reasonable basis" to refuse the transfer (Phase II Op. 25) because reasonableness is not part of the analysis. Matterport was under a duty

to register the transfer, but it wrongfully refused to transfer Brown's shares until the Court of Chancery ordered that they were freely tradable. B3 ¶ 2 (ordering in Phase I that "Brown may freely trade his Matterport shares"). It does not matter what Matterport subjectively believed. Its refusal was "unreasonable as a matter of law" because Brown's transfer request was "rightful." *Bender*, 514 A.2d at 1116 (agreeing with plaintiff and holding that "transaction [was] clearly 'rightful' and that the defendant's refusal to remove the legend and to register the transfer was unreasonable as a matter of law").

This case is nothing like the few cases that found an issuer's ***temporary*** refusal to transfer shares was non-actionable while the issuer took time to investigate adverse claims or compliance with the law. Here, unlike in those cases, there were no concerns that the transfer would be unlawful or that there were any adverse claims on Brown's shares. *See, e.g.*, *Dewitt*, 433 F. Supp. at 1000–01 (recognizing that issuer is "liabl[e] for a wrongful refusal to transfer" but finding triable issue of fact as to whether defendant's "refusal to transfer became reasonable" because it was "mak[ing] a reasonable inquiry into the rightfulness of the transfer" and whether it "might violate the Securities Act of 1933" (cleaned up)); *Kanton*, 248 F. Supp. at 362 ("Notice of an adverse claim to the stock sought to be transferred is a reasonable ground for temporarily refusing to register the transfer."); *cf. Bender*, 514 A.2d at 1117 (determining refusal was unreasonable but

observing that where "an adverse claim is made, the issuer corporation is privileged for a reasonable period of time to refuse to register a transfer of the stock").

Brown's counsel informed Matterport and its transfer agent, AST, that the shares could transfer unrestricted, and any inquiry would have revealed that the only holdup was Matterport's incorrect interpretation of the plain language of the bylaws. Phase II Op. 15. Once "the issuer's duty of inquiry [was] discharged, and assuming compliance with the other requirements of § 8-401, it then [became] mandatory under § 8-401 for the issuer to register the transfer." *Bender*, 514 A.2d at 1117. The Court of Chancery should have found Matterport's refusal to transfer Brown's shares violated § 8-401 and found it liable for "the loss occasioned by [that] refusal to transfer." *Loretto*, 444 A.2d at 259.

Further, reading a reasonableness requirement into § 8-401(b) would improperly put the burden on a stockholder to prove that an issuer's wrongful refusal to transfer was "unreasonable." It would likewise provide perverse incentives to issuers and violate public policy because it would allow an issuer to escape liability for a wrongful position simply by litigating the issue.

A finding of liability on the § 8-401 claim would have required that the reasonable trading window begin no earlier than November 24, 2021, after Brown's initial request to transfer. Section 8-401 claims accrue "at the moment of

the wrongful act," which is when Matterport first refused Brown's request to have the transfer restrictions lifted. *See Barbara*, 2012 WL 6025604, at *6 (applying Delaware law and citing *Fike*, 754 A.2d at 260 and *Mastellone*, 82 A.2d at 383–84); *see also Bender*, 514 A.2d at 1114 ("[T]he issuer has a duty to register a transfer of shares that are presented to the issuer in registered form together with a request to register the transfer."); *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 335 P.3d 190, 195–96 (2014) ("Presentation of a properly supported 'request to register transfer' (or here, request to remove a legend) is the sine qua non of an NRS 104.8401 claim.").

Here, Brown first requested that Matterport transfer the shares in unrestricted form to his Fidelity Investments account on November 24. Phase II Op. 15. Accordingly, Brown's UCC claim accrued no earlier than November 24, 2021, and damages must run from there. For all these reasons, the Court should vacate the judgment and remand for further consideration of the UCC claim.

III. The court erred as a matter of law by failing to apply the post-judgment interest rate in effect on the date it entered final judgment.

A. Question Presented.

Is post-judgment interest calculated using the prevailing rate at the time the court enters final judgment awarding damages, or at a prior time if the court previously issued a partial final judgment under Rule 54(b) resolving an aspect of a claim, but leaving others, including damages, unresolved. (Appellee/Cross-Appellant preserved this issue at A753-A754; *see also* B126-B129.)

B. Scope of Review.

"We review a trial court's statutory construction *de novo*." *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 977 (Del. 2021).

C. Merits of Argument.

The Court of Chancery erred when it failed to award post-judgment interest using the federal discount rate in effect on July 1, 2024, the date of the final judgment awarding Brown $79,092,133.12 in damages. *See* Final J. 2 ¶ 1 ("Judgment is entered for Brown on Count I. Brown is awarded $79,092,133.12 in damages (the 'Damages') against the Entity Defendants."). It is well settled that "Delaware law provides that [p]ost–[j]udgment [i]nterest is a right belonging to the prevailing plaintiff and is not dependent upon the trial court's discretion." *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000); *see* 6 *Del. C.* § 2301(a). As this Court has recently held, "Section 2301(a) unambiguously

requires that post-judgment interest ***accrue at the legal rate that was in effect on the date of judgment***." *Noranda*, 269 A.3d at 979 (emphasis added). The relevant "judgment" for these purposes must "consist[] of the fact-finder's award of damages, the costs assessed by the court, and prejudgment interest." *NGL Energy Partners LP v. LCT Cap., LLC*, 319 A.3d 335, 341, 343 (Del. 2024). Accordingly, here, the "judgment" from which post-judgment interest is determined must be the July 1, 2024 Final Judgment because it is the only judgment that included the factfinder's "award of damages" and prejudgment interest.

Despite this "unambiguous requirement" (*Noranda*, 269 A.3d at 979), the court awarded post-judgment interest using the rate in effect on January 12, 2022, the date the court entered its partial judgment finding in Brown's favor on his claim for declaratory relief that his shares were "not Lockup Shares" (the "Phase I Partial Judgment"). *See* B1-B4. Critically, the Phase I Partial Judgment only decided whether Brown's shares were Lockup Shares and expressly reserved all other aspects of Brown's claims, including whether and to what extent he was entitled to damages under Count I. B3 ¶ 4 (Brown's "claims other than the declaratory relief aspect of Count I remain active"). It was not until the Phase II Final Judgment, which occurred after a second trial, that the court determined that

Brown was entitled to damages and the amount thereof.[15] Thus, the Court of Chancery erred in calculating interest based on the Phase I Partial Judgment, rather than the Final Judgment.

This Court's decisions in *Noranda* and *NGL* are controlling. In *Noranda*, as here, the court (at defendants' urging) awarded post-judgment interest based not on when a final damages judgment was entered but at an earlier time, when "liability first arose." 269 A.3d at 975–77. This Court reversed, holding that the "plain, unambiguous meaning of Section 2301(a)" creates an "explicit statutory command" that interest be "the legal rate in effect on the date judgment was entered." *Id.* at 977–78.[16] The "date of the judgment" is "the time from which interest is due … because there can be no interest on a judgment before it exits." *Id.* at 979. Indeed, a defendant "is not responsible for post-judgment interest until judgment is entered" because a defendant cannot pay an amount if it does not know how much it owes. *Id.* at 982.

Earlier this year, in *NGL*, this Court further held that the "judgment" for purposes of determining post-judgment interest is the judgment that "***consists of***

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[15] Indeed, the court recognized as much, providing that "[t]he final order I have yet to enter concerns the amount of damages" for Brown's under Count I. B131-B132.

[16] *See also Noranda*, 269 A.3d at 979 ("[S]tatutory text forecloses the use of … a single rate of interest calculated on the date of liability and extending through final payment.").

the factfinder's award of damage*s**, the costs assessed by the court, and prejudgment interest." *NGL*, 319 A.3d at 341 (emphasis added). *NGL* explained that such a judgment "comprises elements, such as costs and fees, that are not components of the underlying liability" (*id.*), and "so long as a trial court has not entered an award of prejudgment interest, the aggrieved party has not yet secured a final judgment" (*id.* at 343). Thus, "the date of the judgment," from which post-judgment interest runs must be when "the judgment debtor's obligation is a ***sum certain that includes the amount of the award plus prejudgment interest and, in some cases, fees and costs." *Id.* at 345 (emphasis added) (explaining that post-judgment interest is not based on "the date of the verdict or damages award," but rather the entry of final judgment).[17]

Here, the Phase I Partial Judgment did not "consist[] of the factfinder's award of damages," much less include a "sum certain." *See id.* at 341, 345. Rather, it was only the Final Judgment after Phase II that included the damages

[17] *NGL* followed this Court's decision in *Tyson Foods, Inc. v. Aetos Corp.*, which held that a final judgment is "defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration." 809 A.2d 575, 579 (2002). *Tyson Foods* explained that "[a]lthough the trial court's intention to enter a final order is an essential element in the inquiry, the mere use of the term 'final judgment' may not be determinative if … the court has left the docket open for further proceedings." *Id.* at 580. That is exactly what the Court of Chancery did here. B3 ¶ 4 (ordering "claims other than the declaratory relief aspect of Count I remain active").

award. Accordingly, the Court of Chancery erred in adopting a post-judgment interest rate based on the prevailing rate as of the January 12, 2022 Partial Judgment, rather than the prevailing rate as of the July 1, 2024 Final Judgment. This Court should reverse.

CONCLUSION

For the reasons discussed above, this Court should reject Matterport's appeal. It should also accept Brown's cross-appeal, vacate the judgment, and remand with instructions to award damages in the amount of $110,858,865.08 on Count I, to conduct additional proceedings with respect to the UCC claim, and to award post-judgment interest at a rate based on the federal discount rate in place on July 1, 2024.

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Respectfully submitted,

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