EFiled: Nov 13 2024 04:48PM EST
Filing ID 74994979
Case Number 294,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS/CROSS-APPELLEES' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

Robert L. Burns (#5314)
Kyle H. Lachmund (#6842)
Nicole M. Henry (#6550)
Nicholas F. Mastria (#7085)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

OF COUNSEL:
Jennifer Selendy
Joshua S. Margolin
David A. Coon
Corey Stoughton
SELENDY GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000

Attorneys for Appellants/Cross-Appellees Matterport, Inc. and Matterport Operating, LLC

Dated: November 13, 2024

TABLE OF CONTENTS

Pages

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

SUMMARY OF ARGUMENT ON CROSS-APPEAL 7

REPLY ARGUMENT ON APPEAL 10

I. THE TRIAL COURT DISREGARDED THE LAW OF THE CASE AND RELIED ON THAT LEGAL ERROR TO DETERMINE DAMAGES ON COUNT I 10

A. The Phase 2 Ruling Was Directly Contrary to Law of the Case on the Meaning of the Lockup Provisions 10

B. Brown's Waiver Argument is Meritless 15

II. THE TRIAL COURT'S DAMAGES AWARD VIOLATED DELAWARE DAMAGES PRINCIPLES 18

ARGUMENT ON CROSS-APPEAL 25

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO RESORT TO THE HIGHEST INTERMEDIATE VALUE METHODOLOGY 25

A. Question Presented 25

B. Standard of Review 25

C. Merits of the Argument 25

1. *Duncan* Is a Method of Calculating Expectation Damages and Not an Absolute Rule 26

2. The Trial Court Did Not Abuse its Discretion in Declining to Apply the Highest Intermediate Value Methodology 29

3. The Trial Court's Analysis of Matterport's Culpability Was Not Essential to Its Holding and Was Not Erroneous 32

4. If *Duncan* Applies, Brown's Damages Are Substantially Reduced.....33

II. THE COURT BELOW CORRECTLY INTERPRETED SECTION 401(b) OF ARTICLE 8 AS IMPOSING LIABILITY ONLY WHERE AN ISSUER UNREASONABLY REFUSES TO REGISTER A TRANSFER.....37

A. Question Presented.....37

B. Standard of Review.....37

C. Merits of the Argument.....37

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SETTING POST-JUDGMENT INTEREST.....43

A. Question Presented.....43

B. Standard of Review.....43

C. Merits of the Argument.....43

CONCLUSION.....46

TABLE OF CITATIONS

Page(s)

CASES

Am. Gen. Corp. v. Cont'l Airlines Corp.,
622 A.2d 1 (Del. Ch. 1992) 27

Bender v. Memory Metals, Inc.,
514 A.2d 1109 (Del. Ch. 1986) 39

BioLife Sols., Inc. v. Endocare, Inc.,
838 A.2d 268 (Del. Ch. 2003) 27

Cede & Co. v. Technicolor, Inc.,
542 A.2d 1182 (Del. 1988) 41

Cede & Co. v. Technicolor, Inc.,
884 A.2d 26 (Del. 2005) 11

In re Columbia Pipeline Grp., Inc. Merger Litig.,
316 A.3d 359 (Del. Ch. 2024) 43

Comrie v. Enterasys Networks, Inc.,
837 A.2d 1 (Del. Ch. 2003) 27

Daniel v. Hawkins,
289 A.3d 631 (Del. 2023) 32

Dewitt v. Am. Stock Transfer Co.,
433 F. Supp. 994 (S.D.N.Y. 1977) 38

Duncan v. TheraTx, Inc.,
775 A.2d 1019 (Del. 2001) .....*passim*

E.I. du Pont de Nemours & Co. v. Green,
411 A.2d 953 (Del. 1980) 40

Energy Transfer, LP v. Williams Cos.,
2023 WL 6561767 (Del. Oct. 10, 2023) 43

Haley v. Town of Dewey Beach,
672 A.2d 55 (Del. 1996) 41

Jing v. Weyland Tech, Inc.,
2017 WL 2618753 (D. Del. June 15, 2017) 38

Jodek Charitable Tr., R.A. v. Vertical Net Inc.,
412 F. Supp. 2d 469 (E.D. Pa. 2006).....39

Kanton v. U.S. Plastics, Inc.,
248 F. Supp. 353 (D.N.J. 1965).....38

Kolber v. Body Cent. Corp.,
2012 WL 3095324 (D. Del. July 30, 2012).....39

Lichens Co. v. Standard Commercial Tobacco Co.,
40 A.2d 447 (Del. Ch. 1944) 26

Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.,
444 A.2d 256 (Del. Ch. 1982) 9, 38

Ovens v. Danberg,
149 A.3d 1021 (Del. 2016).....37

Paul v. Deloitte & Touche, LLP,
974 A.2d 140 (Del. 2009).....26, 31

Ravindran v. GLAS Trust Co.,
--- A.3d ----, 2024 WL 4258889 (Del. Sept. 23, 2024) 17

Salzberg v. Sciabacucchi,
227 A.3d 102 (Del. 2020).....40

Schloss v. Danka Bus. Sys. PLC,
2000 WL 282791 (S.D.N.Y. Mar. 16, 2000), *aff'd*, 234 F.3d 1263 (2d Cir. 2000).....38

SIGA Techs., Inc. v. PharmAthene, Inc.,
132 A.3d 1108 (Del. 2015).....*passim*

Summa Corp. v. Trans World Airlines, Inc.,
540 A.2d 403 (Del. 1988).....43, 44

Whittington v. Dragon Grp., L.L.C.,
2011 WL 1457455 (Del. Ch. Apr. 15, 2011).....26

STATUTES & RULES

6 *Del. C.* § 8-401(b) 37

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981) 32

12 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5527 (2023) 38

PRELIMINARY STATEMENT

In Phase 1, the trial court resolved a single issue: whether Appellee William J. Brown's shares fell within the definition of Lockup Shares, and therefore whether Brown could trade his Matterport shares freely pursuant to the Lockup Provisions.[1] Construing the bylaw phrase in the Lockup Provisions, "immediately following the closing of the Business Combination Transaction," the trial court held that the "plain meaning" of "immediately" means "without delay" and "following" means "being next in order or time." The trial court therefore held that the Lockup Provisions applied only to stockholders who "received their Matterport shares within a few days of [the July 22, 2021] closing." A97-98. In Phase 2, the trial court violated the law of the case by adopting a directly contradictory interpretation of the Lockup Provisions, ruling that although "Brown wished to obtain his shares in tradeable form promptly upon the closing," he "*could not* have traded" in July or August 2021—up to nearly six weeks after the closing—because "he would likely have held Lockup Shares," Phase 2 Mem. Op. 40, 41 (emphasis in the original).

Brown's opposition to Matterport's appeal rests on the fiction that the trial court never ruled on either of these critically important issues and its contradictory interpretations were nothing more than "hypothetical statement[s]" and

[1] Capitalized terms not defined herein carry the same meaning as in Appellants' opening brief.

"speculat[ion]." Appellee's Br. 28-29 n.5, 31. That is clearly wrong. There was nothing hypothetical about the court's Phase 1 determination that "immediately following" meant next in time without delay, which was the basis for the trial court's holding that Brown "[did] not hold Lockup Shares subject to the transfer restrictions" because he did not hold his shares "within a few days" of the closing. A98-A99 & n.36. Far from being hypothetical, the trial court's Phase 2 ruling that Brown "would likely have *held Lockup Shares* under the A&R Bylaws and *could not* have traded" if he had been able to act on his express desire to receive his Matterport shares in July or August resulted in the trial court's erroneous conclusion rejecting Matterport's damages analysis and instead ruling that November 2021 was the earliest possible trading date that could be used for assessing damages. Phase 2 Mem. Op. 41 (emphasis added).

Matterport was severely prejudiced by the trial court's inconsistent rulings regarding the meaning of "immediately following." Based on the Phase 1 ruling, Matterport did not present damages calculations regarding potential trading start dates later than July or August 2021 (such as September or October, which fell far outside of the trial court's plain-language interpretation of the Lockup Provisions). But as a result of its inconsistent Phase 2 interpretation, the trial court disregarded as a matter of law Matterport's damages analysis utilizing July and August trading start dates. Because the parties submitted no other but-for trading dates, the court

fell back upon a November trading start date corresponding to Brown's actual conduct when he was incorrectly locked up. That trading start date was near the stock's all-time peak price, leading to massively inflated damages as compared to an analysis consistent with the law of the case that the Lockup Provisions only applied to holders that acquired their shares "within a few days of closing." Because the trial court's erroneous Phase 2 interpretation of the Lockup Provisions violated the law of the case, it must be reversed.

The trial court's reliance on Brown's actual conduct when calculating damages, rather than relying on the court's own factual findings regarding how Brown would have acted if he was not incorrectly restricted, was an additional legal error that provides independent grounds for reversal. Delaware law is clear, and the trial court acknowledged, that determining Brown's damages (if any) required the trial court to answer the fundamental question of how Brown would have acted in the but-for world had he been free to trade his Matterport shares consistent with the Lockup Provisions. Thus, even if Brown is right that the trial court never construed the "immediately following" language, the trial court at the Phase 2 trial was obligated to decide when the actual restricted period ended, and calculate Brown's damages by determining what he would have done at that time in the but-for world.

As the trial court observed, there was an "extensive record from which to reasonably approximate when Brown would have sold his shares" in the but-for

world where he was not restricted, including "hundreds of exhibits and hours of testimony" providing "reliable evidence of when [Brown] would have sold." *Id.* at 32-33; *see also, e.g.*, *id.* 40-41 n.190 (quoting A860, A865) (finding that Brown swore in October 2021 interrogatory responses that if he had "not been subject to unlawful transfer restrictions, [he] would have sold all shares he held in Matterport at the highest possible trading prices, including on or around August 10, 2021"). Based on that evidence, the trial court found that the "factual and litigation record indicat[ed] that Brown wished to obtain his shares in tradeable form promptly upon the closing of the business combination." *Id.* at 40. The only reasonable conclusion that can be drawn from the record is that Brown would have obtained his shares sometime in late July or early August 2021, and then promptly sold them, had Matterport not mistakenly insisted that Brown was bound by the Lockup Provisions. The trial court erred by ignoring that evidence and its findings regarding the but-for world and instead measuring damages based on Brown's actual conduct, specifically, his tactical and litigation-driven decision to delay obtaining his shares. This contravenes bedrock damages principles.

Brown's cross-appeal reflects a tit-for-tat strategy, not any meritorious grounds for reversal. *First*, Brown incorrectly argues that the trial court was obligated to apply the highest intermediate value methodology discussed in this Court's opinion in *Duncan v. TheraTx, Inc.*, 775 A.2d 1019 (Del. 2001). That is

wrong: the highest intermediate value methodology is not an inflexible rule but is simply one means to determine expectation damages by proxy where "the defendant's acts prevent a court from determining with any degree of certainty what the plaintiff would have done" absent the restriction. *Id.* at 1022-23. The trial court's determination that the highest intermediate value methodology is inapplicable to this case was not an abuse of discretion; it was well supported by the court's findings that there is not any "significant factual uncertainty" about when Brown would have traded if he were not incorrectly restricted. Phase 2 Mem. Op. 27. In any event, even if Brown were correct that the highest intermediate value methodology applies to this case, a proper application of *Duncan* would, for the reasons discussed above, require a finding that the beginning of the period when Brown was improperly restricted from trading began in late July or early August 2021. Using the highest intermediate value of Matterport's stock from a reasonable period thereafter reduces Brown's damages to approximately $12.5 million, nearly $67 million less than the trial court's award.

Second, the trial court did not err in ruling that Matterport was not liable under Article 8, Section 401 of the Uniform Commercial Code ("UCC") because Matterport reasonably refused to remove the restrictive legend from Brown's Matterport shares during the pendency of the litigation prior to the Phase 1 trial. Courts, including in Delaware, have repeatedly and correctly held that liability for a

refusal to register a transfer will attach only if such refusal was unreasonable. The trial court correctly concluded that Matterport reasonably refused to transfer Brown unrestricted shares based on its good-faith belief that Brown held Lockup Shares while the parties litigated the issue, and therefore there can be no liability under Article 8, Section 401.

Finally, the trial court did not abuse its discretion in setting the post-judgment interest rate using the rate in effect on January 12, 2022, when the Court of Chancery entered partial final judgment following the Phase 1 trial. Delaware law affords the Court of Chancery broad discretion to determine an appropriate award of interest based on the factual circumstances, and the trial court's interest award on the unusual facts of this case was fully consistent with that principle.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. **Denied**. The Court of Chancery did not abuse its discretion by declining to use the highest intermediate value methodology applied in *Duncan*, 775 A.2d 1019.

a. The trial court thoroughly and persuasively explained why the highest intermediate value methodology applied in *Duncan* is inapplicable here. *Duncan* describes one method of determining expectation damages, not an absolute rule that must be applied regardless of the trial court's broad discretion to determine appropriate damages based on the facts of a particular case. Specifically, the highest intermediate value methodology is applied where the defendant's wrongdoing created "significant factual uncertainty" regarding when a plaintiff would have sold shares had they not been improperly restricted. *See* Phase 2 Mem. Op. 27. The highest intermediate value methodology is thus a specific application of the general remedial principle that a wrongdoer bears the risk of uncertainty created by their actions. Here, there was no uncertainty to assign to Matterport because the court found that overwhelming evidence presented at trial established when Brown would have obtained and then sold his shares if he had not been incorrectly restricted from doing so.

b. While not essential to its holding, the trial court's finding that Matterport was not an intentional wrongdoer provides additional support for its decision not to apply the highest intermediate value methodology.

c. Under an abuse-of-discretion standard, Brown cannot prevail in challenging the Court of Chancery's decision to decline to use the highest intermediate value methodology given the "extensive record from which to reasonably approximate when Brown would have sold his shares." Phase 2 Mem. Op. 32.

d. Even if the highest intermediate value methodology applied in *Duncan* were the correct damages methodology for this case, a proper application of *Duncan* substantially reduces Brown's damages. The Phase 1 ruling requires that the "reasonable period after the restriction was imposed during which the stockholders could have sold the[ir] shares" absent the restrictions (*Duncan*, 775 A.2d at 1023) begin no more than "a few days" after the closing of the de-SPAC because, as Brown has repeatedly admitted, that is when Matterport began to improperly enforce the transfer restrictions. Using a July 30, 2021, start date for that but-for trading period (consistent with the Phase 1 ruling), and deducting an average share price during the period following the lifting of the restriction (as *Duncan* would require, if it applied), reduces Brown's damages to approximately $12.5 million.

2. **Denied**. The Court of Chancery correctly interpreted Article 8, Section 401(b) of the UCC as providing that an issuer is only liable for an "unreasonable" failure to register a transfer. This interpretation is supported by case law both inside and outside Delaware finding that an issuer "may refuse to register a transfer" if it is "based on a legitimate ground supported by some credible evidence." *Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.*, 444 A.2d 256, 261 (Del. Ch. 1982).

3. **Denied**. Longstanding Delaware Supreme Court precedent holds that the statutory interest rate applies only to courts of law and provides a guide, but not a binding rule, to the equitable Court of Chancery. The Court of Chancery's use of the applicable interest rate as of January 12, 2022, was not an abuse of discretion.

REPLY ARGUMENT ON APPEAL

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

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

The trial court's Phase 2 ruling on the meaning of the Lockup Provisions was directly contrary to the law of the case established in the Phase 1 ruling affirmed by this Court. *See* Appellants' Br. 25-32. The Lockup Provisions define Lockup Shares as "the shares of Class A common stock held by the Lockup Holders immediately following the [de-SPAC]." A845. In Phase 1 the trial court applied a "plain reading" of the Lockup Provisions and concluded that "immediately" means "without delay" and "following" means "being next in order or time." A97-98. Based on that reading, the trial court held that Legacy Matterport stockholders who did not receive their Matterport shares "within a few days of closing" on July 22, 2021, did not hold their shares "immediately following" the transaction, and therefore did not hold Lockup Shares subject to the Lockup Provisions. A97-A98. That legal ruling established law of the case regarding the interpretation of the Lockup Provisions that should have been consistently applied in later stages of the trial court proceedings because the facts underlying the trial court's Phase 1 ruling did not change in Phase 2. *See* Appellants' Br. 28.

Contrary to the Phase 1 ruling affirmed by this Court, in Phase 2 the trial court held that if Brown had received his Matterport shares at any time in July or August 2021—up to nearly six weeks after the July 22, 2021 closing—"he would likely have held Lockup Shares under the A&R Bylaws and *could not* have traded." Phase 2 Mem. Op. 41. Put simply, conduct that occurs six weeks after the closing of the de-SPAC transaction cannot fairly be described as "next in order of time" and "without delay" following the closing. The trial court's Phase 2 interpretation of Lockup Shares thus directly contravened the trial court's Phase 1 ruling that a Legacy Matterport stockholder who received Matterport shares more than "a few days [after] closing" would not have held Lockup Shares, and reversal of the Phase 2 decision is therefore required. *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 43 (Del. 2005).

Brown does not attempt to reconcile the conflicting descriptions of Lockup Shares in Phase 1 and Phase 2. Instead, Brown argues that the trial court did not mean everything it said in Phase 1, because the *only* decision made by the court regarding the meaning of the Lockup Provisions was that "obtaining shares over 100 days after closing is not 'immediately,'" Appellee's Br. 28 (quoting A98-99), and the court otherwise made mere "hypothetical statement[s]" regarding the meaning of the Lockup Provisions. Appellee's Br. 28-29 n.5. That is false.

The trial court's decision in Phase 1 that Brown did not hold the shares he received "immediately following" the de-SPAC closing did not happen in a vacuum. The trial court's conclusion rested on *reasoning* that established the meaning of specific words in the Lockup Provisions. Based on dictionary definitions, the trial court ruled that "immediately" means "without delay" and "following" means "being next in order or time." A96-97. There was nothing hypothetical about this plain language interpretation—it was a textual analysis that determined the meaning of Matterport's bylaws as a matter of law.

Building upon that legal foundation, the court then passed judgment on the parties' respective arguments regarding the proper interpretation of the Lockup Provisions. Brown argued that the temporal scope of "immediately following" was extremely narrow: it meant "in the *initial moments* after the transaction's [July 22, 2021] closing." A1454 (emphasis added). The trial court expressly "agree[d] with [Brown's] interpretation." A98. Matterport, on the other hand, argued that Brown's reading of the Lockup Provisions as covering only those shares received "in the initial moments after the transaction's [July 22, 2021] closing," A1454, must be rejected as unreasonable. Matterport explained that "no Legacy Matterport stockholder received Matterport shares instantly after the transaction closed," and therefore an interpretation of the Lockup Provisions as applying only to shares received in the initial moments after closing would mean ***no Legacy Matterport***

stockholders were locked up—"'nullify[ing]' the transfer restrictions" and creating an absurd result contrary to Delaware law. A97. But the trial court disagreed, explaining that its adoption of Brown's extremely narrow interpretation of the Lockup Provisions, based upon its textual analysis of the bylaws' plain language, would not nullify the Lockup Provisions entirely. Rather, the court found that "the evidence demonstrates that some Legacy Matterport stockholders would have received their Matterport shares within a few days of closing," and "that timing could be viewed as consistent with a plain reading of the bylaw." A97-98.

Brown's appeal argument advocates a myopic view of the Phase 1 ruling in which the court ruled only that "immediately following" means something less than 100 days, and nothing else. *E.g.*, Appellee's Br. 28. Indeed, Brown offers no other interpretation of what the Lockup Provisions mean. But that not only requires reading all of the trial court's reasoning out of the Phase 1 ruling, it also *contradicts* that reasoning. There is no reasonable world in which "without delay" means "within 100 days" and "being next in order or time" means "up to 100 days after the event." A96-97.

It is undisputed that the trial court declined to rule in Phase 1 as to the *precise* amount of time encompassed by "immediately following." A98. However, the trial court's plain language analysis of the Lockup Provisions, fleshed out by the court's express adoption of Brown's proffered interpretation and its explanation of why that

interpretation did not create an absurd result, established clear boundaries: the Lockup Provisions apply only to stockholders who "received their Matterport shares within a few days of [the July 22, 2021] closing." A97-98. This level of clarity was, in fact, essential given the necessity of a follow-on trial to determine what, if any, damages Brown (and potentially other stockholders) had suffered as a result of Matterport's enforcement of the Lockup Provisions. Against that backdrop, it is abundantly clear why Matterport built its Phase 2 litigation and trial strategy around that interpretation of the Lockup Provisions: any reasonable party in Matterport's shoes would have understood that the trial court's interpretation of the Lockup Provisions was what the Phase 1 decision said it was, and the trial court would continue to apply that law of the case interpretation in Phase 2.

The trial court's inconsistent Phase 2 ruling was not "an entirely hypothetical discussion." Appellee's Br. 31. Matterport's case focused on the amount of money Brown would have obtained had he begun to trade within a range of alternative trading start dates between 8 and 22 days after closing. Matterport's chosen dates—July 30, 2021, August 6, 2021, and August 13, 2021—were conservative assumptions intended to be consistent with both the trial court's Phase 1 interpretation of "immediately following" and the evidence demonstrating Brown's urgent desire to sell as soon as possible after the July 22, 2021, closing (*see, e.g.*, Appellants' Br. 36-38).

The trial court's Phase 2 ruling improperly rendered Matterport's damages case (which case was based on the Court's Phase 1 ruling) a nullity. The trial court disregarded Matterport's damages scenarios because, it concluded: 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's departure from the Phase 1 construction of the Lockup Provisions was not hypothetical, but rather was the express basis for rejecting Matterport's damages analysis. Phase 2 Mem. Op. 40-41. In reliance on the law of the case, Matterport did not present damages calculations regarding later potential trading start dates (such as September or October 2021—periods well beyond "a few days [after] closing"). Accordingly, the trial court fell back upon a November trading start date corresponding to Brown's actual conduct necessarily shaped by the incorrect trading restriction. Matterport was thus prejudiced by the trial court's erroneous analysis because, at that later date, the stock was near its all-time peak.

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.

B. Brown's Waiver Argument is Meritless

Brown's assertion that Matterport waived the argument that the trial court's inconsistent Phase 2 ruling on the meaning of "immediately following" violated the

law of the case is unequivocally wrong. Accordingly, as Brown admits, the standard of review for Matterport's law of the case argument is *de novo*. Appellee's Br. 23.

Matterport's post-trial brief reflects the identical argument Matterport now presents on appeal. Matterport's brief first recounted the trial court's "plain reading" Phase 1 interpretation of the Lockup Provision, including that "a Legacy Matterport stockholder who … received public Matterport shares 'a few days [after] closing,' did not hold Lockup Shares and was free to transfer such shares[.]" A799-800. Matterport continued:

> Contrary to the arguments he previously prevailed upon in this action, Plaintiff now argues that had he received his shares on August 13, 2021—*more than three weeks after the July 22, 2021 de-SPAC closing*—they would have been Lockup Shares subject to the transfer restrictions. **That argument flies in the face of the Court's plain-language interpretation of the Bylaws urged by Plaintiff in the first phase of this case.** At that time, Plaintiff successfully argued that "immediately following" meant "in the *initial moments* after the transaction's [July 22, 2021] closing." **The Court agreed with Plaintiff's interpretation when it ruled in his favor in Phase 1**. Plaintiff's inconsistent, self-serving arguments in favor of a different meaning of "immediately following" should be rejected, and **the Court should continue to give that term its plain meaning.**

A800 (emphasis added, citations omitted). Moreover, as Brown concedes (Appellee's Br. 25), Matterport expressly argued during the post-trial hearing that Matterport's damages theory, unlike Brown's, was consistent with the trial court's law of the case interpretation of the Lockup Provisions.

Against this record, Brown's argument that Matterport waived its law of the case argument is makeweight. Brown cites no authority for his apparent position that a law of the case argument is waived when a party presents a substantively identical argument in the trial court but does not incant the words "law of the case."[2] Such a rule would be absurd, as it would require parties to assume that trial courts will violate the law of the case unless explicitly reminded not to do so, forcing parties at each stage of the case to serially remind the trial court of all its prior rulings . That is not Delaware law.

[2] This case is nothing like *Ravindran v. GLAS Trust Co.*, --- A.3d ----, 2024 WL 4258889 (Del. Sept. 23, 2024), in which an appellant failed to preserve an argument because the substance of that argument was not presented to the trial court. Appellee's Br. 26.

II. THE TRIAL COURT'S DAMAGES AWARD VIOLATED DELAWARE DAMAGES PRINCIPLES

On appeal, Brown almost entirely fails to engage with Matterport's argument that the trial court erred as a matter of law in calculating damages based on Brown's actual conduct rather than his likely conduct in a but-for world where he had not been incorrectly restricted. Brown mischaracterizes this as a factual dispute, but the trial court unquestionably determined that, had he not been restricted, Brown would have obtained and thereafter sold his shares in July or August 2021, promptly following the close of the de-SPAC transaction. The trial court nonetheless decided to calculate damages based on a November 2021 trading start date because that is when Brown (driven by his litigation tactics and knowing he could not trade regardless of what day he submitted his letters of transmittal ("LOTs") to request his shares) actually submitted LOTs and received his shares. Phase 2 Mem. Op. 41. That decision was incorrect as a matter of law and requires reversal.

Neither party disputes the general principle that, as a matter of law, Brown's damages (if any) were equal to "the amount of money that would put [Brown] in the same position as if" he had not been incorrectly restricted. *See Duncan*, 775 A.2d at 1022; *see also SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015); Appellants' Br. 33-34. Establishing this amount necessarily required examination of any available evidence of Brown's likely conduct in the but-for world where he was able to trade his Matterport shares unrestricted by Matterport's

incorrect application of the Lockup Provisions. The trial court sought to apply this standard damages framework (though it ultimately failed to do so), 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).

Contrary to Brown's summary assertion that the trial court "found that Brown did ***not*** intend to sell as quickly as possible after the transaction," Appellee's Br. 20, 32, 36, all of the trial court's factual determinations point to the conclusion that, if he had not been incorrectly restricted, Brown would have obtained his unrestricted shares and traded them in late July or early August, shortly after the de-SPAC closed. The trial 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" on July 22, 2021, *id.* at 40, and "that Brown wanted to receive his shares 'as soon as possible.'" *Id.* at 40-41 n.190. The court found that "extensive" evidence established this intention. *E.g.*, Phase 2 Mem. Op. 32-33, 40. For example, the court found that as early as January 18, 2021, "Brown told his financial consultant … **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'**" after Matterport's de-SPAC transaction. Phase 2 Mem. Op. 7 (emphasis added) (alterations in original). The court also found

that on July 11, 2021—just 11 days before the de-SPAC closing—"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 22]." Phase 2 Mem. Op. 11. Then, "[o]n July 13, Brown filed a lawsuit in [the trial] court seeking to enjoin the enforcement of the transfer restrictions against him," in which he "expressed a desire to 'freely transfer his shares upon the close' of the business combination" on July 22. *Id.*

Although the trial court observed in a footnote that Brown (in the real world when he was actually restricted from trading) did not irrevocably commit to selling his shares in July or August, Phase 2 Mem. Op. 40-41 n.190, the evidence and the trial court's factual findings demonstrate that "the amount of money that would put [Brown] in the same position as if" he had not been incorrectly restricted must be measured by an analysis of Brown's hypothetical trading in July or August 2021. *See Duncan*, 775 A.2d at 1022. Accordingly, in the very same footnote, the trial court found that Brown swore in October 2021 interrogatory responses that if he had "not been subject to unlawful transfer restrictions, [he] 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; Phase 2 Mem. Op. 40-41 n.190 (quoting A860, A865).[3]

The trial court swept its correct factual determinations aside based on its legally erroneous ruling 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. On this basis, the trial court declined to measure damages based on its own factual findings regarding Brown's intentions to act in the but-for world, and instead calculated damages based on Brown's ***actual*** conduct (*i.e.*, his decision to wait until November 2021 to request and obtain his shares) while he was incorrectly restricted from trading. Phase 2 Mem. Op. 41. The trial court did so even while acknowledging that the reason Brown sought appraisal, rather than obtaining his shares earlier, was 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.

The Phase 2 decision expressly states that the trial court measured damages based on Brown's actual conduct while locked up. Though the court found "Brown wished to obtain his shares in tradeable form promptly upon the closing of the

[3] At a minimum, the trial court's findings lead to an inexorable conclusion that Brown would have *obtained* his shares in July or August 2021 so that he would be in a position to promptly sell them.

business combination" if he were not incorrectly restricted, the court observed "***that is not what happened***" in the actual world. *Id.* 40-41 (emphasis added). In the actual world where he *was* restricted, "Brown opted not to [request his shares] in July … [n]or did he receive his shares in August. … He waited until November 2021 to [request his shares] and received his Matterport shares that month." *Id.* at 41. "Given these facts," the trial court chose November 22, 2021, as the trading start date for the damages analysis. *Id.* That trading start date was directly contrary to the court's factual findings regarding Brown's conduct in the but-for world, and a direct result of the trial court's erroneous Phase 2 interpretation that if Brown had requested and received his shares earlier than November, he would have been locked up. *See id.* The trial court thus did exactly what it counseled against in rejecting the highest intermediate value rule (*see* Section I, *infra*): "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. Such an approach would lead to obviously improper results: if Matterport's stock price happened to decrease between August and November 2021, instead of increasing, the trial court's "actual world" damages analysis would result in zero recovery for Brown even though the record showed conclusively that he would have acted differently in the absence of incorrect restrictions. *See* Appellants' Br. 39-40.

In the face of the overwhelming record and factual findings establishing the "but-for" world where Matterport did not incorrectly restrict him, Brown asserts that the trial court's legally erroneous damages analysis reflected the court's "choice between two permissible views of the evidence." Appellee's Br. 36-38 (quoting *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021)). But that is simply not what the trial court held. Instead, as discussed above, the trial 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" on July 22, 2021 (*e.g.*, Phase 2 Mem. Op. 40). However, the trial court disregarded as a matter of law those factual findings concerning Brown's but-for conduct, and instead calculated damages based on Brown's actual conduct while he was incorrectly restricted from trading.[4]

In sum, the evidentiary record and the trial court's factual findings overwhelmingly demonstrate that from learning of the de-SPAC through closing, Brown's consistent goal and plan was to sell "day one" after the July 22, 2021, closing. *See* Appellants' Br. 10-16. A legally proper damages analysis should have

[4] That the trial court's erroneous damages analysis was the product of legal error, not factual findings, is further underscored by the fact that the only evidence Brown can muster as purportedly supporting a November 2021 trading date—his so-called "predictive" stock price models, Appellee's Br. 36-37—was disavowed by Brown himself at trial. *E.g.*, A403 ("I wouldn't use this [model] to predict anything, and I didn't."); A404; *see also* A402.

relied on this evidence of the but-for world to establish "the amount of money that would put [Brown] in the same position as if" he was not incorrectly restricted, based on one of the alternative trading start dates offered by Matterport. *See Duncan*, 775 A.2d at 1022. But in reliance on its erroneous Phase 2 interpretation of Lockup Shares, the trial court improperly measured damages based on Brown's actual conduct when he was restricted from trading. The trial court's damages methodology thus violated governing damages principles and must be reversed.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO RESORT TO THE HIGHEST INTERMEDIATE VALUE METHODOLOGY

A. Question Presented

Whether the Court of Chancery abused its discretion by declining to automatically apply the highest intermediate value methodology irrespective of the factual record.

B. Standard of Review

This Court will "review [a] damages determination for abuse of discretion." *PharmAthene*, 132 A.3d at 1128. Under that standard, this Court does "not substitute our own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness and arbitrariness." *Id.*

Brown argues for a *de novo* standard by claiming that the trial court's ruling raises whether "an equitable remedy exists or is applied using the correct standards." Appellee's Br. 39 (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)). That is clearly wrong. The trial court awarded money damages, which is not an equitable remedy.

C. Merits of the Argument

Economic damages are "based upon the reasonable expectations of the parties *ex ante*." *Duncan*, 775 A.2d at 1022. "Expectation damages are measured

by the losses caused and gains prevented by defendant's breach." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146-47 (Del. 2009) (citation omitted). The Court of Chancery has "broad discretion to form an appropriate remedy for a particular wrong." *Whittington v. Dragon Grp., L.L.C.*, 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011); *see also Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944).

1. *Duncan* Is a Method of Calculating Expectation Damages and Not an Absolute Rule

The foundation of Brown's cross-appeal is that the Court of Chancery had no discretion when calculating his damages. Brown argues that the trial court was obligated to apply the highest intermediate value methodology discussed in this Court's opinion in *Duncan*, 775 A.2d 1019.

Brown's argument fails to recognize that the highest intermediate value methodology is simply one means to determine expectation damages—in particular, it is used as a proxy for expectation damages where "the defendant's acts prevent a court from determining with any degree of certainty what the plaintiff would have done" absent the restriction. *Id.* at 1022-23. In such situations, even though it is highly improbable that the plaintiff would have actually sold at the highest intermediate price, the defendant bears the risk of the uncertainty created by their actions, consistent with the "wrongdoer rule" recognized by Delaware law. *See PharmAthene*, 132 A.3d at 1131 & n.132.

Significant factual uncertainty existed in *Duncan*, where a corporation breached a contractual obligation to file a shelf registration that would have allowed a group of stockholders to trade their shares. *Duncan*, 775 A.2d at 1021. After the shelf registration was reinstated, the plaintiff-stockholders "sold their shares at various times, and thus at various prices." *Id.* at 1021 n.2. Thus, "[c]alculating damages was a theoretical exercise due to numerous unknowns surrounding when the plaintiffs would have sold 'but-for' the restrictions." Phase 2 Mem. Op. 28 (citing *Duncan*, 775 A.2d at 1022-23). Given those facts, it is unsurprising that the defendant-company in *Duncan* ***agreed*** that the "highest intermediate price" during "a reasonable period after the restriction was imposed during which the stockholders could have sold the shares" would be an "appropriate estimate of the hypothetical sale price" absent restrictions. *Duncan*, 775 A.2d at 1023.

Other Delaware decisions applying the highest intermediate value methodology did so where it was similarly indeterminable when the plaintiff would have sold their shares. *See, e.g.*, *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1 (Del. Ch. 2003) (uncertainty arising from eleven different plaintiffs who likely had varying motivations and plans); *BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 284 (Del. Ch. 2003) (uncertainty because there was "no way of knowing precisely when a registration statement would have become effective or when … the 'restricted period' began"); *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10

(Del. Ch. 1992) (finding "[t]he 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"). As the trial court distilled, "[a] common thread through the cases is considerable uncertainty … around when a sale would have occurred but-for the defendant's actions." Phase 2 Mem. Op. 30.

Brown insists that *Duncan* "set out a bright line rule" that must be applied in any case where shares are improperly restricted. Appellee's Br. 42. *Duncan* makes no such broad pronouncement. Its holding is fact-specific: the highest intermediate value methodology is "the appropriate measure of the damages caused by an issuer's temporary suspension of a shelf registration in violation of the terms of a merger agreement." *Duncan*, 775 A.2d at 1029. That is a situation which, as explained above, inherently involves uncertainty over when the plaintiffs would have sold their shares absent the restriction.

Duncan at one point used the phrase "bright line rule," but this did not refer to using a security's highest intermediate value when calculating expectation damages for an improper trading restriction. Rather, the "bright line rule" *Duncan* found referred to the next step in calculating those damages—the deduction of sales proceeds. *Duncan* held that Delaware courts should deduct the average share price following the lifting of the restriction, rather than the plaintiff's actual sales price. *See id.* This was the issue litigated in *Duncan*, not the appropriate method for

determining the price at which the stockholder would have hypothetically sold but-for the restriction. *See id.* at 1024. *Duncan* accordingly did not foreclose trial courts from exercising discretion in whether to use the highest intermediate value or a different methodology depending on the facts presented. *See PharmAthene*, 132 A.3d at 1152-53 (Valihura, J., concurring) (recognizing that *Duncan* applied a flexible analysis that "tailored [damages] to the scope of the injury caused by the breach[] and it excluded uncertainties caused by external factors").

Brown also argues that the highest intermediate value methodology is the appropriate damages measure because an improper share restriction "cause[s] a deprivation of the stockholder's range of elective action." Appellee's Br. 43 (quoting *Duncan*, 775 A.2d at 1022 n.7). That argument assumes the conclusion. A stockholder's "range of elective action" can only be interfered with if it is not determinable when the stockholder would have sold. Where that can be determined with reasonable certainty, the plaintiff did not lose "the ability to trade the shares as desired." *Id.* Although the parties dispute the applicable trading start date, Brown does not dispute the trial court's findings that Brown would have sold his shares by a date certain. Phase 2 Mem. Op. 41; *see* Appellee's Br. 40 & n.7, 42-43, 48.

2. The Trial Court Did Not Abuse its Discretion in Declining to Apply the Highest Intermediate Value Methodology

Brown cannot show that the trial court abused its discretion in declining to apply the highest intermediate value methodology. Indeed, Brown's brief

completely ignores the primary basis for the trial court's determination that the highest intermediate value methodology is inapplicable to this case: there is not any "significant factual uncertainty," but instead "there is sufficient evidence to make a responsible assessment of when Brown would have traded" if he were not incorrectly restricted. Phase 2 Mem. Op. 27. Thus, "[a]warding damages based on the highest intermediate price would require [the trial court] to disregard th[e] factual record," inconsistent with the reasoning of *Duncan*. *Id.* at 27-28.

As the trial court observed, "there is an extensive record from which to reasonably approximate when Brown would have sold his shares." Phase 2 Mem. Op. 32. For three years before the Business Combination was publicly announced, Brown was interested in "explor[ing] a sale of his Legacy Matterport shares." *Id.* at 5; *see also id.* at 6. Upon learning about the Business Combination (before it was publicly announced), Brown instructed his financial advisor to begin trading his Matterport stock "as soon as the market open[ed] on day one." A394; AR9. After the public announcement, Brown "analyz[ed] the likely price trajectory of Matterport's stock post-closing" by creating a spreadsheet model of various SPAC stock prices that he testified he spent "hundreds of hours" on. Phase 2 Mem. Op. 9; A349, A350. Brown's life became "consumed by the impending life-changing trade," including taking the extraordinary step of "mov[ing] from California to

Puerto Rico for tax planning purposes in anticipation" of selling his Matterport stake. Phase 2 Mem. Op. 11.

The record overwhelmingly demonstrates that Brown was an eager, willing seller who would have sold as soon as he believed that he could. Indeed, as discussed in Matterport's opening brief, Brown did not attempt to obtain his shares and sell before November 2021 is because, until then, Brown "shared [Matterport's and Gores's] view" that the Transfer Restrictions "as written extended to all Legacy Matterport stockholders." Phase 2 Mem. Op. 31. Moreover, Brown's tactical decision to submit a LOT when he knew he could not trade—as the Lockup Provisions were being litigated and trial was weeks away—is simply not reflective of what his "but for" actions would have been in the absence of the incorrect restriction of Brown's trading.

Accordingly, there was no need to resort to the highest intermediate value to approximate Brown's expectation damages.

Far from complying with Delaware law, applying the highest intermediate value methodology in this case would contradict it because "[expectation] damages should not act as a windfall." *Paul*, 974 A.2d at 146. Below, Brown argued that the highest intermediate value methodology entitled him to damages of $134,398,242, equivalent to 21% of the total amount of capital raised by Legacy Matterport in the business combination and approximately ten times Brown's ownership interest.

A622. Neither law nor equity supports this result. *See* Phase 2 Mem. Op. 35 ("The highest intermediate price approach would exact damages greater than Brown's costs, outside of the improbable scenario where he would have sold at that price.").

3. The Trial Court's Analysis of Matterport's Culpability Was Not Essential to Its Holding and Was Not Erroneous

Brown also argues that the trial court erred because it found that Matterport was not a "wrongdoer" when declining to apply the highest intermediate value methodology. This aspect of the trial court's decision "was not essential to its ultimate holding" and so does not constitute reversible error. *Daniel v. Hawkins*, 289 A.3d 631, 655 (Del. 2023); *see* Phase 2 Mem. Op. 32 ("Even if one could view Matterport as a wrongdoer, there is an extensive record from which to reasonably approximate when Brown would have sold his shares."). In any event, the trial court's finding was not erroneous.

Contrary to Brown's assertion, the trial court did not hold that a particular "level of scienter [is] required" to apply the highest intermediate value methodology. Appellee's Br. 45. Rather, the trial court applied settled Delaware law that a defendant's culpability is a relevant factor "in deciding whether to require a lesser degree of certainty" in assessing damages. *PharmAthene*, 132 A.3d at 1122; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981). Since the highest intermediate value methodology relieves the plaintiff of having to prove when they would have sold their shares, a trial court may accordingly consider the defendant's

culpability when deciding whether to resort to that method of calculating damages. *See, e.g.*, *Duncan*, 775 A.2d at 1023.

The Court of Chancery *did not* find (as Brown falsely suggests) that Matterport's Lockup Provisions were "improper"—rather, it found that Matterport honestly but incorrectly believed Brown's shares were Lock Up Shares and that the lockup was not "a product of conflicts or used to benefit insiders at the expense of non-insiders." Phase 2 Mem. Op. 31-32. As a result, Matterport did not commit a "culpable act" that application of the highest intermediate value could have deterred *ex ante*. *Id.* at 35. Brown does not challenge these factual findings, which are amply supported by the factual record. A529; A569; AR11-12; AR15.

4. If *Duncan* Applies, Brown's Damages Are Substantially Reduced

Even if Brown is correct that *Duncan*'s framework for determining expectations damages applies, Brown is wrong that his damages would be "at least $110,858,865.08." Appellee's Br. 49. On the contrary, correctly applying *Duncan* would substantially reduce Brown's damages, for two reasons.

First, under *Duncan*, the highest intermediate value is measured starting from the "reasonable period after the restriction was imposed during which the stockholders could have sold the shares … absent the restrictions." 775 A.2d at 1023. Consistent with the law of the case (*see* Section I, *supra*), Brown was improperly restricted from trading Matterport shares as soon as the period

"immediately following the closing of the Business Combination" ended, *i.e.*, "a few days" after closing. *See id.*

The fact that Brown did not have custody of book-entry shares until November 2021 does not change the start of the restricted period. The only reason Brown sought appraisal rather than obtaining his shares earlier was because he was restricted. Phase 2 Mem. Op. 12. A267:3-21, A268:14- 18, A269:1-8; A318:25-A323:18; A407 at 325:2-326:6. Further, Brown has repeatedly admitted that Matterport restricted him from trading beginning at the time of the July 22, 2021, de-SPAC closing. *E.g.*, A265 ("I wasn't able to trade on August 10[, 2021]. The Company prevented me by enforcing the lockup, so -- that's it."); A932 (alleging in September 3, 2021 Amended Complaint that Matterport's "unilateral imposition of the unlawful transfer restrictions [] denied Brown his rights to freely transfer his shares and thereby forced Brown to exercise appraisal rights as to most of his shares" in August 2021); A860 (swearing in October 2021 that if Brown had "not been subject to unlawful transfer restrictions, [he] 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").

Assuming a July 30, 2021, start date (8 days after de-SPAC closing, well after the period "immediately following" the closing under the law of the case) and a 21-

day trading period, the highest intermediate price was $16.73. AR51.[5] This price is relatively close to the $14.09 per share price at which Brown actually sold his shares in January 2022, Phase 2 Mem. Op. 18, and dramatically lower than the high-water mark of $33.48 per share that Brown is seeking to unfairly impose as measure of damages, Appellee's Br. 48.

Brown misrepresents the record when he claims that the trial court has already "applied the 'reasonable trading period' framework from [*Duncan*] to determine when Brown could have traded" if he were not incorrectly locked up. Appellee's Br. 5, 40-41 n.7, 48 & n.13. Because the trial court did not resort to the highest intermediate value rule, the court necessarily made no findings regarding the reasonable trading period used in that analysis. To the contrary, the trial court's analysis of trading periods came *after* it declined to use the highest intermediate value methodology and resorted to its novel alternative analysis based on Brown's actual conduct. Phase 2 Mem. Op. 26-36.

Second, Brown ignores the one issue for which *Duncan* actually established a "bright-line rule"—the use of the average share price following the lifting of the

[5] A 21-day trading period reflects the time needed to sell Brown's shares using a Volume Weighted Average Price ("VWAP") strategy, which the trial court found was "consistent with Brown's goal to sell fast while limiting price impact," and was the same strategy used "when trading Brown's shares in January 2022." Phase 2 Mem. Op. 48; AR81.

restriction, rather than the plaintiff's actual sale price. *See Duncan*, 775 A.2d at 1029. Brown falsely claims that "[t]he 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." Appellee's Br. 49 n.14. In its post-trial briefing, Matterport clearly contested Brown's attempt to use actual sales proceeds to inflate his damages. A810. Brown cannot have it both ways: applying *Duncan* where it increases his damages but ignoring it when it reduces his damages.

With the above two changes, applying the highest intermediate value methodology as contemplated by *Duncan* would result in Brown only recovering $12,455,301.38 in damages, or $66,986,197.38 less than the trial court awarded. AR51. That would be a far more appropriate outcome than the windfall damages awarded by the trial court.

II. THE COURT BELOW CORRECTLY INTERPRETED SECTION 401(b) OF ARTICLE 8 AS IMPOSING LIABILITY ONLY WHERE AN ISSUER UNREASONABLY REFUSES TO REGISTER A TRANSFER

A. Question Presented

Whether the lower court erred in holding that Matterport was not liable under Article 8, Section 401 of the UCC because Matterport reasonably refused to remove the restrictive legend from Brown's Matterport shares during the pendency of the litigation prior to the Phase 1 trial.

B. Standard of Review

The Court reviews "questions of law, including the interpretation of statutes, *de novo*." *Ovens v. Danberg*, 149 A.3d 1021, 1024 (Del. 2016).

C. Merits of the Argument

Under Article 8, Section 401(b) of the UCC, an issuer with "a duty to register a transfer of a security" under Section 401(a) is liable "for loss resulting from *unreasonable* delay in registration or failure or refusal to register the transfer." 6 *Del. C.* § 8-401(b) (emphasis added).

Brown contends that the word "unreasonable" in Section 401(b) of Article 8 only modifies the phrase "delay in registration" of a transfer and does not modify an issuer's "failure or refusal to register [a] transfer." Appellee's Br. 51-52. Consequently, Brown claims an issuer is strictly liable for any "failure or refusal to register [a] transfer," regardless of the reasonableness of its actions. *Id.* at 53-54.

The trial court properly rejected this argument. Many courts, including in Delaware, have held that "an issuer can inquire into the rightfulness of a transfer request." Phase 2 Mem. Op. 23. In *Loretto Literary & Benevolent Institution v. Blue Diamond Coal Co.*, for example, the Court of Chancery held that an issuer may refuse to register a transfer if it is "based on a legitimate ground supported by some credible evidence." 444 A.2d 256, 261 (Del. Ch. 1982).[6] In *Loretto*, the company had not shown "any reasonable justification to refuse to transfer the shares," and so it was held liable. *Id.* Likewise, in other cases where issuers have shown they acted reasonably in refusing to register a transfer, they were not held liable under Article 8. *See* 12 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5527 (2023) (collecting cases).

Brown argues that Delaware courts have "consistently concluded that the 'failure or refusal' creating liability under § 8-401(b) need not be 'unreasonable.'" Appellee's Br. 52. Not so. Brown's cited cases were not presented with and did not address the question of whether a reasonableness standard applies to an issuer's refusal to register a transfer. Instead, the excerpts Brown cites merely paraphrased, in passing, the language of Section 401(b). *See Jing v. Weyland Tech, Inc.*, 2017

---

[6] *Accord Schloss v. Danka Bus. Sys. PLC*, 2000 WL 282791, at *7 (S.D.N.Y. Mar. 16, 2000), *aff'd*, 234 F.3d 1263 (2d Cir. 2000); *Dewitt v. Am. Stock Transfer Co.*, 433 F. Supp. 994, 1000 (S.D.N.Y. 1977); *Kanton v. U.S. Plastics, Inc.*, 248 F. Supp. 353, 363 (D.N.J. 1965).

WL 2618753, at *3-4 (D. Del. June 15, 2017) (dismissing complaint for failing to present transfer to issuer); *Kolber v. Body Cent. Corp.*, 2012 WL 3095324, at *3 (D. Del. July 30, 2012) (dismissing complaint because the issuer provided transfer agent a Rule 144 opinion letter on the same day as it received request to transfer); *Bender v. Memory Metals, Inc.*, 514 A.2d 1109, 1117 (Del. Ch. 1986) (finding "no valid issue existed as to the 'rightfulness' of the proposed transfer" because it had been refused by the issuer to benefit its CEO and largest stockholder); *see also* Phase 2 Mem. Op. at 24 n.124 (discussing and distinguishing *Jodek Charitable Tr., R.A. v. Vertical Net Inc.*, 412 F. Supp. 2d 469, 482 (E.D. Pa. 2006)).

Brown next asserts that an unreasonableness requirement "would be superfluous given the requirement that a transfer be 'rightful' under" Section 401(a) of Article 8. Appellee's Br. 53. This argument fails because whether a transfer is "rightful" and whether an issuer acted "reasonably" in refusing to register a transfer are not synonymous. As Brown acknowledges, even where a transfer is in fact "rightful," the issuer "is privileged for a reasonable period of time to refuse to register [the] transfer" while the corporation investigates rightfulness, such as the presence of an adverse claim. Appellee's Br. 53 (quoting *Bender*, 514 A.2d at 1117). Rather than rendering any portion of the statute superfluous, the reasonableness requirement for refusals to register transfers thus harmonizes Section 401 by aligning an issuer's duty to register a transfer under Section 401(a) (when rightful)

with an issuer's liability for refusing to do so under Section 401(b) (when unreasonable). *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020) ("Each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."); *see also E.I. du Pont de Nemours & Co. v. Green*, 411 A.2d 953, 956 (Del. 1980) ("[T]he last antecedent rule is but one of numerous rules designed to assist in the discovery of intent and is not to be inflexibly or uniformly applied…. When the sense of the entire act requires that a qualifying word or phrase apply to several preceding or succeeding sections, the word or phrase will not be restricted to its immediate antecedent." (quotations omitted)).

Brown also seeks to distinguish precedent recognizing an issuer may reasonably refuse to register a transfer by saying those cases involved a "temporary refusal to transfer shares … while the issuer took time to investigate adverse claims or compliance with the law." Appellee's Br. 54. But that is exactly what happened here. Matterport temporarily refused to transfer Brown unrestricted shares pending an expedited trial to determine whether doing so would violate Matterport's bylaws. At the time, Matterport believed in good faith that such a transfer would violate Matterport's bylaws. "This view was supported by the advice of counsel." Phase 2 Mem. Op. 25-26, and *Brown himself* "shared this view until November 2021," *id.* at 31.

Similarly, even if Brown's reading of Section 401(b) were correct, Matterport would still not be liable because it only delayed the transfer of shares to Brown. It is undisputed that after the trial court's Phase 1 ruling that Brown did not hold Lockup Shares, Matterport caused Brown's shares to be transferred to him the very next day. Phase 2 Mem. Op. 17. The trial court's findings regarding Matterport's good-faith belief that Brown held Lockup Shares while the parties were litigating the issue confirm that delay was reasonable. Brown agrees that an issuer is not liable for a reasonable delay in refusing to register a transfer. While the trial court did not need to reach this argument, this Court can affirm on this basis. *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996) ("An appellee … may defend the judgment with any argument that is supported by the record[.]"); *see* A788-A789.

Finally, the Court may reject Brown's appeal of his Article 8 claim because the trial court's findings on his declaratory judgment claim (Count I) render the claim moot. All of Brown's claims sought damages for the same injury—the improper restriction of his Matterport shares. Brown is only entitled to one recovery for this injury. *See Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1191 (Del. 1988). Under any version of the Count I damages analysis urged by the parties or applied by the trial court, the hypothetical trading period from which Brown's damages must be measured begins *before* November 24, 2021, the date he argues Matterport "first refused to transfer [his] shares." Appellee's Br. 51; *see* Sections I, II, *supra*. The

hypothetical trading period for Count I reflects Brown's sale of the very same shares that are the subject of his UCC claim. Accordingly, regardless of when Brown's UCC claim accrued, it is moot.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SETTING POST-JUDGMENT INTEREST

A. Question Presented

Whether the lower court erred in setting the post-judgment interest rate using the rate in effect on January 12, 2022, when the Court of Chancery entered partial final judgment following the Phase 1 trial.

B. Standard of Review

This Court reviews the Court of Chancery's selection of a post-judgment interest rate for abuse of discretion. *See Energy Transfer, LP v. Williams Cos.*, 2023 WL 6561767, at *22 (Del. Oct. 10, 2023).

C. Merits of the Argument

Longstanding precedent from this Court holds that, "[i]n the Court of Chancery[,] the legal [interest] rate is a mere guide, not the inflexible rule." *Energy Transfer*, 2023 WL 6561767, at *22 (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)); *see also, e.g.*, *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 316 A.3d 359, 406 (Del. Ch. 2024) ("A court has broad discretion to establish fair terms for an award of interest."). The Court of Chancery may consider "the nature of the plaintiff, the nature of the wrong to be remedied, and the peculiar facts of the case." *Summa Corp.*, 540 A.2d at 409.

Brown simply ignores this binding, on-point precedent. He instead claims *Noranda Aluminum Holding Corp. v. XL Insurance America, Inc.* controls. 269

A.3d 974, 977 (Del. 2021). *Noranda Aluminum* involved an appeal from the Superior Court, a court of law which is required to apply the statutory interest rate. The Court of Chancery, a court of equity, is not. *Summa Corp.*, 540 A.2d at 409. Brown's other cited case, *NGL Energy Partners LP v. LCT Capital, LLC*, was likewise an appeal from the Superior Court, and specifically acknowledged that the Court of Chancery's "equitable powers" give it additional discretion not available to the courts of law when setting an interest rate. 319 A.3d 335, 341 (Del. 2024).

Even setting aside this insurmountable, fundamental error in Brown's argument, the Court of Chancery's selection of the interest rate in effect as of the partial final judgment does not contravene *Noranda Aluminum*. That decision held that, under 6 *Del. C.* § 2301, post-judgment interest "accrue[s] at the legal rate that was in effect on the date of judgment." 269 A.3d at 979. In a situation like this case, where a liability judgment was rendered prior to a damages judgment, *Noranda Aluminum* does not address *which judgment* must be used to determine the statutory rate. And Brown cites no other case addressing this question either.

The unusual facts of this case presented a classic instance where the Court of Chancery is permitted to apply its wide, equitable discretion in setting a post-judgment interest rate. Brown does not argue that the trial court abused that discretion, and no such challenge could succeed. As the trial court noted, "[i]nterest rates have risen dramatically since the phase one partial final judgment," and so

"separat[ing] the date for setting post-judgment interest from the date that judgment was entered would risk interest rate arbitrage." B132. It would be especially punitive for Matterport to pay this rate given the trial court's findings that Matterport acted in "good faith" in enforcing the Transfer Restrictions. Phase 2 Mem. Op. 25, 35.

CONCLUSION

Matterport respectfully submits that this Court should (i) 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; and (ii) affirm the trial court's determination that the highest intermediate value methodology does not apply to this case, its dismissal of Brown's claim under 6 *Del. C.* § 8-401, and its determination of the appropriate rate for post-judgment interest.

OF COUNSEL:

Jennifer Selendy
Joshua S. Margolin
David A. Coon
Corey Stoughton
SELENDY GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000

/s/ Robert L. Burns
Robert L. Burns (#5314)
Kyle H. Lachmund (#6842)
Nicole M. Henry (#6550)
Nicholas F. Mastria (#7085)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Appellants/Cross-Appellees Matterport, Inc. and Matterport Operating, LLC

Dated: November 13, 2024