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IN THE SUPREME COURT OF THE STATE OF DELAWARE

VALHALLA PARTNERS II, L.P., JAMES J. PALLOTTA, GREAT OAKS VENTURE FUND LP, SCOTT BECKER, ADVANCIT CAPITAL I, LP, ENIAC VENTURES II, L.P., ENIAC VENTURES, L.P., DFJ MERCURY II, L.P., DFJ MERCURY II AFFILIATES FUND, L.P., OCCAM'S RAZOR, LLC, GORDON SU, BRENT BUNTIN, OCEAN ASSETS LLC, DRAPER ASSOCIATES RISKMASTERS III, LLC, AND ROBERT HORWITZ, Plaintiffs Below, Appellants, v. VISTAR MEDIA, INC., Defendant Below, Appellee.	No. 65, 2025 Court below: Court of Chancery of the State of Delaware C.A. No. 2019-0202-SG

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal presents a discrete issue of contract interpretation. In late 2012, Defendant Below, Appellee Vistar Media, Inc. ("Vistar" or the "Company"), was a start-up company in need of funding. Plaintiffs Below, Appellants Valhalla Partners II, L.P., James J. Pallotta; Great Oaks Venture Fund LP; Scott Becker; Advancit Capital I, LP; Eniac Ventures II, L.P.; Eniac Ventures, L.P.; DFJ Mercury II, L.P.; DFJ Mercury II Affiliates Fund, L.P.; Occam's Razor, LLC; Gordon Su; Brent Buntin; Ocean Assets LLC; Draper Associates Riskmasters III, LLC; and Robert Horwitz (collectively "Plaintiffs," or "Investors") are venture capitalists and angel investors who provided that funding through second round convertible notes (the "Notes" or "Convertible Notes"). Op.1-2.[1]

As the trial court recognized, "convertible noteholders are engaged in a risky game, in which the investment may well be lost but, conversely, can pay quite handsomely if the issuer is a success. The noteholders are not banks, and do not anticipate making money on the notes viewed as nominal-interest loans." Op.1-2.

The issue before the trial court (and now on appeal) involved the interpretation of the following language from the Notes:

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[1] "Op." or "Opinion" refers to the Post-Trial Memorandum Opinion dated December 9, 2024, attached as Exhibit A. In addition, the trial court issued a letter opinion on January 17, 2025 ("JOp."), which resolved the Investors' estoppel claims that are not at issue in this appeal, attached as Exhibit B.

> Subject to the provisions related to the conversion of this Note, the outstanding principal balance of this Note., [sic] together with interest accrued and unpaid to date *shall be payable* the earlier of (x) the Maturity Date, (y) a Sale (as defined below) or (z) an Event of Default ….

A2510 (emphasis added). The "subject to" clause introduced this provision because the Notes provided that, without exception, the Notes' principal and interest would convert to equity upon certain conversion events, including a Qualified Financing, so long as the Notes had "outstanding principal and interest." A2510.

Vistar was one of the rare start-ups that succeeded. Op.3. However, no conversion event had occurred as of the Maturity Date, which was extended twice at Vistar's request to March 31, 2016 (the "Maturity Date" or "Maturity"). Op.27. Upon Maturity, Vistar made no attempt to repay the Notes -- and no Investor requested repayment. Instead, Vistar and the Investors continued to anticipate and discuss a potential conversion event for the Notes' outstanding principal and interest. Op.27-30; JOp.16.

Almost a year after Maturity, Vistar asserted for the first time that it could repay the Notes at its discretion prior to a conversion event, and thereby unilaterally prevent the Investors from sharing in Vistar's success. That was not the deal the parties had struck -- and the Investors rejected Vistar's improper repayment attempt. Op.31-32.

This litigation ensued. The issue was one of contract interpretation -- what did the parties intend through the phrase "shall be payable" after Maturity if the Notes had not yet converted. The Investors asserted they had the right to continue to hold the Notes after Maturity until a conversion event occurred. A475-76. Vistar argued it had the discretion to repay the Notes whenever it wanted to after the Maturity Date and thereby terminate the Investors' conversion rights at its whim. A477.

The trial court found the language ambiguous, and therefore, considered the extrinsic evidence to determine the parties' intent. Op.34-40. That extrinsic evidence -- presented over a four-day trial -- strongly supported the Investors' interpretation of the Notes.

In construing the "shall be payable" language, the trial court first determined it provided the Investors with a "right to be repaid (with interest) at [M]aturity," but the Notes were not *required* to be repaid at Maturity such that the Investors could continue to hold them post-Maturity. Op.45. This interpretation was supported by the terms of the Notes, including that (i) principal and interest were not "*due and* payable" at Maturity (only "payable") and (ii) failure to pay principal at Maturity was not an "Event of Default." A2510. The trial court's interpretation was further supported by the extrinsic evidence, including that, for a year after Maturity, Vistar

did not attempt to repay the Notes, the Investors did not request repayment, and the parties continued to operate as if a conversion event was forthcoming. Op.27-29.

The trial court also rejected Vistar's claim that it had the discretion to repay and terminate the Notes before a conversion event -- holding that, even if Vistar attempted to repay the Notes, there was no "obligation on the part of [the Investors] to accept repayment at any particular time or in any particular way." Op.52. Thus, the Investors could (as they did) reject Vistar's attempts to repay the Notes after Maturity. Op.52.

These two holdings are critical here. Upon Maturity, the Investors gained a right to be repaid, but they had no obligation to (and did not) accept repayment and could leave the Notes' principal and interest "outstanding." The Notes expressly provide that "upon the closing of a Qualified Financing …, all of the outstanding principal and interest under this Note will automatically be converted into shares …." A2510. Stated simply, all that is required for the Notes to convert to equity is that they have "outstanding principal and interest" at the time of a Qualified Financing, which the parties agree occurred in 2021.

The foregoing two determinations should have ended the analysis in the Investors' favor. Yet, the trial court mistakenly went further and held "it is not unreasonable for the right to conversion to have had a cutoff date" -- and that the cutoff occurred on the Maturity Date (the "Cutoff Date Holding"). Op.46-47. That

interpretation, which the trial court acknowledged was "difficult for a judge in equity" and "inconsistent with the general business model of Plaintiffs," was a legal error. Op.6, 48.

The Cutoff Date Holding was incorrect for numerous reasons. First, it conflicts with the trial court's separate ruling that the Investors were not required to accept repayment such that the principal and interest under the Notes remained "outstanding" and would therefore "automatically" convert to equity upon a Qualified Financing. Second, it is not supported by the language of the Notes, which do not state that the Investors' valuable conversion rights were "cut-off" upon Maturity if the Notes' principal and interest remained outstanding. Third, the extrinsic evidence contradicted the Cutoff Date Holding, including that months after Maturity, Vistar itself acknowledged that the Notes were "still outstanding," and that Vistar expected to do a Qualified Financing that would convert the Notes "over the next 6 months." Op.27-30; JOp.16. Thus, the Cutoff Date Holding was directly contrary to the parties' undisputed conduct and clear expectations.

The Investors respectfully request that this Court reverse the Cutoff Date Holding, and remand to the trial court to enter a judgment that the Notes converted into equity at the time of the Lamar Transaction in 2021.

SUMMARY OF ARGUMENT

1. The trial court erred in holding that the Investors' conversion rights "cutoff" at Maturity even if the Notes had outstanding principal and interest. Significantly, no party requested a declaration that the conversion rights cutoff at Maturity -- a declaration that was not supported by the contract language and conflicted with the parties' undisputed conduct. The Cutoff Date Holding also was inconsistent with the trial court's separate rulings that (i) the Notes were not required to be repaid at Maturity, and (ii) the Investors were not required to accept Vistar's attempt to repay the Notes after Maturity. Moreover, the trial court's factual findings and the extrinsic evidence directly conflict with the Cutoff Date Holding, including that, after Maturity, Vistar repeatedly acknowledged that the Notes remained outstanding and could be converted into equity. For all these reasons, the Cutoff Date Holding was a legal error and should be reversed.

STATEMENT OF FACTS

The Investors do not challenge the trial court's factual findings and instead rely on those findings as fully supporting the Investors' interpretation of the Notes. The facts relevant to the discrete contract issue raised on appeal are set forth below.[2]

A. The Parties

The Investors are Vistar noteholders who "make investments in early-stage companies as an investment strategy." Op.8-9, 14. "Their business model is to invest in start-up companies, including, as here, via convertible notes." Op.1. The Investors know that many of the companies they invest in will fail, but "hope that a few companies will be outsized successes that deliver more than offsetting returns." Op.15. "To capture those returns, [the Investors] want to hold equity in the successful companies they invest in (as opposed to holding debt, which would typically only return a specified interest rate)." Op.15. As part of that strategy, the Investors invest through convertible notes, "which, in theory, allows an investor to participate in the upside of a successful investment through conversion to equity if certain agreed upon conditions are met." Op.15. The Investors "are not banks, and do not anticipate making money on the notes viewed as nominal-interest loans." Op.2.

[2] To avoid repetition, certain relevant facts are included in the Argument section.

Vistar was founded in 2012 and "is a technology company that gathers consumer data, such as consumers' physical location and movements, and uses that information to define consumer audiences and thereby help other companies develop digital marketing strategies." Op.10 n.27. During the relevant period, Vistar's founders, Michael Provenzano (CEO), Jeremy Ozen (CFO), and Mark Chadwick (CTO), served as its senior officers and collectively owned approximately 87% of Vistar. Op.10; A1446; A1452-54; A2555; A1536-37.

B. Vistar Issues The Initial Convertible Notes

In early 2012, Vistar raised approximately $500,000 through an initial round of convertible notes (the "First Round Notes"). Op.11. The First Round Notes provided for automatic conversion to common stock at maturity. Op.12; A2473. Those notes also would convert upon "a sale of convertible preferred stock of [Vistar] with immediately available gross proceeds to [Vistar] of at least $2,000,000." A2473. The First Round Notes converted into common stock in January 2014. Op.25.

C. Vistar Issues The Second Round Notes

1. The Negotiation Of The Second Round Notes

In late 2012, Vistar sought to raise additional funding. Op.11-12. The Investors were solicited to participate in Vistar's financing. Op.13-14.

Vistar prepared initial drafts of the convertible notes for the second round "based on the First Round Notes," and similarly provided that outstanding principal

and interest would automatically convert to common stock upon maturity. Op.16. Vistar shared a draft note with certain Investors, including Valhalla, in December 2012. Op.16-17.

Ozen acted as the "representative for Vistar" while negotiating the Notes. Op.32. Valhalla acted as the *de facto* lead investor with respect to negotiating the conversion terms. Op.17, 21. On December 17, 2012, Valhalla sent comments to the draft notes, including that Vistar's proposed automatic conversion to common stock upon maturity was "not market," and stating further that "we would not want automatic conversion if you fail to raise a Qualified Financing -- instead, we would want to be repaid or extend the maturity at our discretion." A2477; Op.18-19. Valhalla wanted the conversion "to be at [its] discretion" because it "wanted to control whether or not [it] got equity in the Company." A527-28. Maintaining discretion was "super important." A603.

As detailed in the Opinion and addressed in the Argument (*infra*, Section I.C.1.c.v.(4)), the relevant negotiations over conversion rights were limited to a few emails between Valhalla and Ozen. Op.18-21. Importantly, in none of the emails did Ozen purport to reject Valhalla's request that the Investors retain the discretion to await a conversion event. Op.18-21. The trial court recognized that certain of the parties' edits to the language in the draft Notes were not consistent with the parties' intentions as expressed in their contemporaneous emails. Op.18-21, 40-44.

2. The Relevant Terms Of The Notes

Vistar issued Notes in December 2012, March 2013, June 2013, and September 2013, raising $1.5 million. Op.23. The Notes had an initial Maturity Date of September 30, 2014. A2510.

Each of the Notes contain identical conversion and Maturity terms, including as follows:

> This Note shall have a maturity date of September 30, 2014 (the "Maturity Date"). Subject to the provisions related to the conversion of this Note, the outstanding principal balance of this Note., [sic] together with interest accrued and unpaid to date shall be payable the earlier of (x) the Maturity Date, (y) a Sale (as defined below) or (z) an Event of Default (as defined below).

A2510; Op.22-23. The "subject to" language reflected that the Notes would convert to equity upon a Qualified Financing or, at the Investors' discretion, a Non-Qualified Financing. A2510.[3] Importantly, all "outstanding principal and interest" on the Notes would "automatically" convert to equity upon the occurrence of a Qualified Financing. A2510.

[3] The Notes defined "Qualified Financing" as "a sale of convertible preferred stock of the Maker with immediately available gross cash proceeds to the Maker of at least $2,000,000." A2510. The Notes defined "Non-Qualified Financing" as "a sale of convertible preferred stock of the Maker with immediately available gross cash proceeds to the Maker of less than $2,000,000." A2511. Neither term provided that the financing must occur before Maturity.

D. The Notes Are Extended Twice At Vistar's Request

On October 2, 2014, after the initial Maturity Date had passed, Vistar advised the Investors that "[a]s a result of our growing revenue which has exceeded our projections, we burned very little cash and have not needed to raise a qualifying financing. As such we need to extend the maturity of the note by 12 months to September 2015." A2520; Op.26. The Investors agreed to the extension. Op.26-27. At Vistar's request, the Investors later agreed to a second extension by which the Maturity Date became March 31, 2016. Op.26-27; A2528.

E. Vistar's Communications With The Investors Prior To Maturity

Prior to the revised March 31, 2016 Maturity Date, Vistar and the Investors communicated frequently concerning, *inter alia*, Vistar's performance and information concerning the Notes "for accounting and financial reasons." Op.29. These communications reflected that Vistar treated the Notes as equity investments, rather than debt. For example, in January 2014, Vistar shared financial statements with one Investor that "recorded the Second Round Notes as 'Purchase of Stock' on its financial statements." Op.29 n.121; A2518; *see also* A2549, A2515. As a further example, in December 2015, Vistar shared a capitalization table with another Investor "that showed holders of the Second Round Notes, on a fully diluted basis that assumed conversion of the Second Round notes to equity, as holding Vistar equity." Op.29 n.121; A2534.

Vistar's communications with third parties similarly "suggested the [] Notes would convert or were intended to convert to equity." Op.28 n.116. For example, in February 2015, Ozen described the Notes to Vistar's accountants as "basically an equity instrument" (A2521), and stated that "[c]onvertible round 2 is intended to convert to shares as well. We don't pay cash interest. The interest (4% simple) accrues to the principal and then the total face value is used for converting the note into shares." A2524; Op.28 n.116. And in May 2015, Ozen stated that "[the Notes] will almost 100% convert into common. When that will happen I couldn't tell you 100%. Over next 18 months I really think so." A2526; Op.28 n.116.

F. The Notes Mature And Vistar Repeatedly Acknowledges The Notes Remain Outstanding And May Be Converted Into Equity

The Maturity Date came and went on March 31, 2016, without the Investors demanding repayment or Vistar attempting to repay the Notes. Op.28-30. Consistent with the parties' understanding, Vistar repeatedly represented, internally and externally, that the Notes remained outstanding with the ability to convert into equity.

For example, on May 10, 2016, over two months after the Maturity Date, Investor Great Oaks wrote to Ozen inquiring "when Vistar expected to do a qualified financing that would convert the [] Notes." Op.28; A2560. Vistar responded that it "expect[s to] have a qualified equity financing that converts our notes outstanding over the next 6 months." A2559; Op.28.

On October 12, 2016, nearly seven months post-Maturity, Investor Becker asked Ozen to "confirm that I own two convertible notes." A2556. Ozen responded that "the first convertible is now common stock," and "the second convertible is still outstanding with a face value of $100k (plus accrued interest). Hard to say what the estimated current value is." A2556; Op.29-30.

G. The Investors Reject Vistar's Improper Repayment Attempt Almost A Year After Maturity

As detailed above, following Maturity, the parties expected the Notes would convert into equity at some point in the future. In late 2016, however, Vistar's founders came up with the idea that Vistar could simply attempt to repay the Notes before they converted. A2287-89; A2298; A2302-04; A2321-22; A1481; A2123; A2128; A2130-31; A2133; Op.30. Stated another way, Vistar's founders sought to keep all the benefits of Vistar's success for themselves -- and fundamentally change the bargain they had struck with the Investors.

On February 17, 2017, almost a year after Maturity, Vistar's Board adopted a written consent to repay "the outstanding Convertible Notes." A2573; Op.30. This purported action was not initially disclosed to the Investors. To the contrary, just six days after Vistar resolved to repay the Notes, Ozen provided audited financials to Investors Becker and Great Oaks that did not identify the Notes as a debt, current or long-term. A2672-73; A2778-79; Op.30 n.127. And, in response to inquiries from Investor Becker, by email dated February 23, 2017, Ozen explained that "[t]he

second note has not converted yet" and that "note is still outstanding." A2797; Op.30 n.127.

"On March 16, 2017, Vistar notified the holders of Second Round Notes by email, including each Plaintiff, of Vistar's intent to repay their Notes in full on March 31, 2017." Op.31. Vistar thereafter sent checks to each Investor for the amounts outstanding for their respective Notes -- as well as a separate agreement that would terminate all other provisions of the Notes upon acceptance of payment. Op.31-32; A2800. The Investors' reactions "were consistent in voicing an expectation that the … Notes would convert to equity … contesting Vistar's rights to repay the Notes." Op.31. The Investors returned the uncashed checks to Vistar. Op.32.

H. In July 2021, Vistar Completes A Qualified Financing

In July 2021, Vistar issued a new series of preferred securities to Lamar Investments, LLC, in a transaction generating gross cash proceeds to Vistar in excess of $2,000,000 (the "Lamar Transaction"). Op.34. The Lamar Transaction met the definition of a Qualified Financing under the terms of the Notes, and thus should have resulted in the automatic conversion of the outstanding Notes.

I. The Procedural History

1. The Investors' Complaint And Vistar's Counterclaims

The Investors initiated this Action on March 13, 2019. Op.34; A81. Among other things, the Investors requested a declaration "that Plaintiffs have a contractual

right to hold their Convertible Notes, and refuse repayment, until a Conversion Event has occurred." A107. The Investors subsequently filed two amended complaints. A11; A218.

On April 24, 2019, Vistar filed its answer and counterclaims. Op.34; A109. Vistar's counterclaims sought, among other things, a declaration that "by tendering full payment of outstanding principal and interest pursuant to the [Notes], Vistar has fully discharged its payment obligation under those instruments and has fully extinguished those instruments …." A161.[4]

2. The Trial Court Repeatedly Holds That The Notes Are Ambiguous

On June 4, 2019, Vistar moved for judgment on the pleadings. Op.34; A2. After briefing and argument, the trial Court denied Vistar's request that it adopt Vistar's interpretation of the Notes, holding: "I am not able to say, based on this language, that the language is unambiguous." A214.

On December 7, 2022, the parties filed cross motions for summary judgment. Op.36; A55-60. The trial court denied both motions "on the grounds that the language is ambiguous in the context of repayment following the Maturity Date." Op.38. The parties then proceeded to trial.

[4] Vistar refiled its counterclaims in response to each amended complaint (A212; A290), but the substantive relief sought in the counterclaims did not change.

3. The Investors Presented Extrinsic Evidence At Trial Supporting Their Contractual Interpretation

Trial spanned four days between March 4-7, 2024. Op.36. The trial record included testimony from 18 witnesses (both fact and expert), including 11 Investors. As further addressed in the Argument (*infra*, Section C.1.c.v.(3)), the trial court heard testimony from numerous witnesses describing their intentions and understanding when the Notes were negotiated and executed, their business relationship, and their industry experience. The trial court also was presented with contemporaneous documents created both pre- and post-execution of the Notes, which showed the parties' expectations (*infra*, Section C.1.c.v).

The extrinsic evidence, as described in the trial court's factual findings, strongly supported the Investors' interpretation that, following Maturity, the Investors had the right to continue to hold the Notes until a conversion event. As the trial judge recognized at post-trial argument:

> [y]ou wouldn't expect that parties would design a scenario that would play out the way it has. That just wouldn't -- people wouldn't enter such contracts. And that was the gravamen of the testimony, that it wouldn't make sense to structure a deal where -- in this specific narrow instance, where the company was especially successful so that there wasn't a triggering event, the company would win the lottery and not have to make the investors whole.

A2037.

4. The Post-Trial Opinion

On December 9, 2024, the trial court issued the Opinion, which reaffirmed its earlier decisions that the Notes were ambiguous. Op.38. It therefore considered the extrinsic evidence, which included pre-execution negotiations, post-execution communications and conduct, and industry practice. The trial court, however, inexplicably concluded the extrinsic evidence was not "enlightening," and reverted to the "words of the contract" (Op.45) -- the same words it previously found to be ambiguous.

As discussed more fully in the Argument, in interpreting the relevant language, the trial court correctly determined the Notes did not require payment at Maturity, but the Investors "had the right to be repaid (with interest) at maturity of the Second Round Notes." Op.45. The trial court further held that, even if Vistar attempted to repay the Notes, there was no "obligation on the part of [the Investors] to accept repayment at any particular time or in any particular way." Op.52. Thus, the trial court rejected Vistar's argument that it had the discretion to repay and terminate the Notes after Maturity, and accepted the Investors' interpretation that they could continue to hold the Notes after Maturity. This was the declaration that the Investors requested, which should have resolved the dispute between the parties.

The trial court, however, went further and held "it is not unreasonable for the right to conversion to have had a cutoff date," which it held to be the Maturity Date.

Op.46-47. The trial court cited no specific provision of the Notes or any extrinsic evidence supporting the Cutoff Date Holding, which was inconsistent with the plain language of the Notes and the extrinsic evidence presented at trial. Moreover, the ruling was inconsistent with the trial court's separate holding that the Investors were not required to accept repayment, such that the Notes remained outstanding after Maturity. Significantly, the trial court conceded its Cutoff Date Holding was "inconsistent with the general business model of Plaintiffs" (*i.e.*, the parties' basic business relationship). Op.48. That is an understatement -- there would be no legal, logical, or economic reason the Investors would have entered into a contract in which they could reject repayment after Maturity if they did not also retain the right to convert the Notes that remained outstanding.[5]

[5] The Opinion also addressed additional claims and counterclaims asserted by the parties (*e.g.*, the Investors' implied-covenant and reformation claims and Vistar's contract claim), which rulings no party has appealed.

ARGUMENT

I. THE TRIAL COURT ERRED IN INTERPRETING THE NOTES AS PRECLUDING CONVERSION AFTER MATURITY

A. Question Presented

Did the trial court err in interpreting the Notes to include a "cutoff" of the Investors' conversion rights at Maturity? Op.36-47. The proper interpretation of the Notes was raised below. *See, e.g.*, A475-78.

B. Scope of Review

"A judicial interpretation of a contract presents a question of law that this Court reviews *de novo*." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits of the Argument

1. The Trial Court Erred By Interpreting The Notes To "Cut-off" The Investors' Conversion Rights At Maturity

The parties' dispute largely centered on the meaning of three words of the five-page Notes: what was meant by the phrase "shall be payable":

> This Note shall have a maturity date of September 30, 2014 (the "Maturity Date"). Subject to the provisions related to the conversion of this Note, the outstanding principal balance of this Note., [sic] together with interest accrued and unpaid to date *shall be payable* the earlier of (x) the Maturity Date, (y) a Sale (as defined below) or (z) an Event of Default (as defined below).

A2510 (emphasis added). As is common in such cases, the parties offered two different interpretations of the contract language.

The Investors sought a declaration that the language provided them "the option to hold the Notes or demand repayment after maturity at their discretion, … accordingly [they] had a right to refuse Vistar's unilateral demand that they accept repayment and modification of the Notes." A475-76; *see also* A287. Vistar argued the Investors were required to accept its March 2017 repayment (*i.e.*, a year after Maturity) and sought a declaration that, "by tendering full payment of outstanding principal and interest on the Notes, Vistar fully discharged its payment obligation under those instruments and has fully extinguished those instruments." A477; *see also* A385-86; A1839; A2006.

In construing contracts, Delaware courts adhere to the "'objective' theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quotations omitted). Thus, "[i]t is a court's duty to preserve to the extent feasible the expectations that form the basis of a contractual relationship." *Eagles Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233-34 (Del. 1997). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *GMG Cap. Invs., LLC v. Athenian Venture Cap. P'rs I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (internal quotations and citation omitted).

Contractual ambiguity exists "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings[.]" *Eagle Indus.*, 702 A.2d at 1232. When resolving contractual ambiguity, the court "will apply the parol-evidence rule and consider all admissible evidence." *Energy Transfer, LP v. Williams Co., Inc.*, -- A.3d --, 2023 WL 6561767, at *19 (Del. Oct. 10, 2023) (quoting *In re Mobilactive Media, LLC*, 2013 WL 297950, at *15 (Del. Ch. Jan. 25, 2013)).

a. The Trial Court Correctly Held The "Shall Be Payable" Language Was Ambiguous and Therefore Properly Determined That Extrinsic Evidence Must Be Considered

In connection with the parties' pre-trial dispositive motions, the trial court repeatedly held that "shall be payable" was ambiguous. A214; A451; Op.34, 38. As summarized in the Opinion, the trial court "found ambiguity to lurk in the phrase 'payable,' finding Vistar's reading (confining Plaintiffs' rights at [M]aturity to repayment) plausible, but that the language was not inconsistent with Plaintiffs' insistence that the Second Round Notes provided them an option other than to receive repayment, consistent with Plaintiffs [sic] description of their business model." Op.5.

As a result of finding the language ambiguous, the trial court appropriately "turn[ed] to the extrinsic evidence." Op.38; *see also GMG Cap.*, 36 A.3d at 780 (when there is ambiguity in contractual language, the court "must look beyond the

language of the [ambiguous] contract to ascertain the parties' intentions."). Much of the four-day trial was devoted to such extrinsic evidence, which demonstrated that the Investors' interpretation was consistent with the parties' expectations, their conduct, and their business relationship.

b. The Trial Court Correctly Determined The Investors Could Continue To Hold Their Notes After Maturity, And Vistar Did Not Have The Right To Require The Investors To Accept Repayment

It is important to emphasize that no party argued the Notes were *required* to be paid at Maturity. That is not surprising given the language of the Notes, including that: (i) principal and interest was only "payable," not "*due and* payable" at Maturity; and (ii) the failure to pay the principal at Maturity was *not* an "Event of Default." A2510-11. Upon Maturity, Vistar made no attempt to repay and the Investors made no request for repayment. Op.27-30.

Given the contractual language and the parties' conduct, the trial court correctly concluded that, consistent with the declaration they requested (A475-76), the Investors could continue to hold the Notes after Maturity, which they did. Specifically, the trial court held that "[t]he most reasonable way to interpret 'shall be payable' is that Plaintiffs had a right to be repaid (with interest)" upon Maturity. Op.45. The Investors did not, however, request repayment and they continued to hold the Notes after the Maturity Date -- and Vistar repeatedly acknowledged that the Notes remained outstanding. *Supra*, at pp.12-13.

The related question was how long the Investors could continue to hold the Notes after Maturity: until a conversion event (as the Investors asserted) or until Vistar tendered payment (as Vistar argued). *Compare* A475-76, *with* A477. The trial court once again agreed with the Investors -- holding they did not have to "accept repayment at any particular time or in any particular way." Op.45, 52.[6] Thus, even if Vistar attempted to repay the Notes after Maturity, the Investors were not required to accept repayment. Accordingly, consistent with the declaration requested by the Investors (A475-76), they could continue to hold the Notes until a conversion event.

To state the obvious, if the Investors continued to hold the Notes after Maturity and not accept repayment, the principal and interest under the Notes remained "outstanding." *See, e.g.*, BLACK'S LAW DICTIONARY (defining "outstanding" as "Unpaid").[7] That undisputed fact is critical to the discrete issue now before this Court because the Notes expressly provide that, "upon the closing

[6] The holding that Plaintiffs were not required to accept repayment was made in connection with the trial court's denial of Vistar's counterclaims, which Vistar did not cross-appeal.

[7] "Delaware courts [may] look to dictionaries for assistance in determining the plain meaning of terms that are not contractually defined." *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 (Del. 2007).

of a Qualified Financing …, all of the *outstanding principal and interest under this Note will automatically be converted* into shares …." A2510 (emphasis added).[8]

The trial court's determinations that the Investors could continue to hold the Notes post-Maturity and that they were not required to accept any repayment tendered by Vistar were consistent with the declaration sought by the Investors (and contrary to Vistar's requested declaration). The trial court had thus resolved the parties' conflicting interpretations regarding what was meant by "shall be payable" in favor of the Investors such that they could continue to hold the Notes post-Maturity until a conversion event. Because the Investors' Notes remained outstanding upon the closing of the Lamar Transaction (*i.e.*, a Qualified Financing), pursuant to the express terms of the Notes and the trial court's holdings described above, the "outstanding principal and interest" (A2510) should have "automatically…converted into shares of the sale class and series of capital stock of the Maker issued to other investors in the Qualified Financing." *Id. That should have ended the case.*

c. The Trial Court Erred In Concluding The Investors' Conversion Rights "Cut-off" At Maturity

The trial court should have, but did not, stop its contractual analysis with the holdings described above -- and that is where it erred. While adopting the Investors'

[8] For a Non-Qualified Financing, the Investors have the option to convert the outstanding principal and interest. A2510.

reading of "shall be payable" (and deciding between the competing declarations requested by the parties), the trial court went further to hold that "[i]t is not unreasonable for the right to conversion to have a cutoff date," which the trial court erred by determining was the Maturity Date. Op.46. In support of its Cutoff Date Holding, the trial court cited neither language from the Notes nor extrinsic evidence suggesting that the parties intended for the conversion rights to "cut-off" at the Maturity Date. *They did not.*

As discussed below, the Cutoff Date Holding was in error and should be reversed for several independent reasons.

i. No Party Requested A Declaration That The Conversion Rights "Cut-off" At Maturity

Perhaps the most surprising aspect of the Cutoff Date Holding is that no party requested such a declaration. *See* A471-78; A287; A385-86. The reason was obvious: an interpretation that all conversion rights cut-off at Maturity finds no support in the language of the Notes, defies economic sense, is directly contrary to the parties' basic business relationship, and is irreconcilable with the parties' undisputed post-Maturity conduct and communications.

It appears the Cutoff Date Holding may have resulted from the trial court's belief that the Investors sought a declaration that they had the unilateral right to extend the Maturity Date. *See, e.g.*, Op.45 ("To read in a unilateral right of Plaintiffs to extend at maturity, based on the language present in the Second Round Notes, is

supported by neither the express language of the contract nor the extrinsic evidence."). But the Investors did not contend the Maturity Date had been extended beyond March 31, 2016. The Investors instead requested a declaration that they "maintained discretion to hold or seek repayment of the Notes *after maturity*," and that Vistar could not force the Investors to accept repayment. A1920 (emphasis added); *see also* A475-76. The trial court correctly held in favor of the Investors on this point.

Rather than requesting a declaration that the conversion rights cut-off at Maturity, Vistar argued that "by tendering full payment of outstanding principal and interest on the Notes [almost a year after Maturity], Vistar fully discharged its payment obligation under those instruments and has fully extinguished those instruments." A477; *see also* A385-86. Thus, even under Vistar's proposed interpretation, the Investors' conversion rights would be cut-off not at Maturity, but when the Notes were repaid and extinguished.[9]

Through the Cutoff Date Holding, the trial court erred by venturing beyond what the parties actually disputed. *See, e.g.*, *Webb v. State*, 663 A.2d 452, 460 (Del. 1995) ("It is the nature of the judicial process that we decide only the case before

[9] As previously explained, the trial court rejected Vistar's proposed interpretation holding that, even if Vistar attempted to repay the Notes, there was no "obligation on the part of [the Investors] to accept repayment." Op.52.

us."). For good reason, neither party sought a declaration that the Notes' conversion rights "cut-off" at the Maturity Date, and the trial court's ruling on this point should be reversed.

ii. The Cutoff Date Holding Was Not Supported By The Contract Language

The trial court ruled that "it is not *unreasonable* for the right to conversion to have had a cutoff date," which it determined to be the Maturity Date. Op.46-47 (emphasis added). The relevant question, however, is not whether it would be "unreasonable" for conversion rights to have a cutoff, but whether the parties agreed to and intended such a cutoff. *See, e.g.*, *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) ("In construing a contract, our goal is to give effect to the intent of the parties."). *Again, they did not.*

The Notes contain no provision stating that conversion rights cut-off on the Maturity Date even if the Notes remain outstanding and unpaid. To put it mildly, it would be unusual (and contrary to the parties' business relationship) for the Investors to agree to give up valuable conversion rights when the Notes had not been paid and their principal and interest remained outstanding. If these parties had intended to include such an unusual term in the Notes, they could have expressly so provided, but they did not. *See Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 357 (Del. 2020) ("[A]n interpreting court should be most chary about implying contractual terms

when the contract could easily have been drafted to expressly provide for such terms, limitations or conditions").[10]

Not only do the Notes not state that the Investors would lose their right to convert after Maturity while the Notes remain "outstanding" -- they provide the opposite. The Notes expressly state, without qualification, that all "outstanding principal and interest …automatically" convert to equity in the event of a Qualified Financing. A2510. The Cutoff Date Holding cannot be reconciled with this clear and unqualified language, and thus violates the requirement that the contract be read as a whole and interpreted to give effect to all its terms. *See Alta Berkeley VI C.V.*, 41 A.3d at 385-86 ("It is well established that a court interpreting any contractual provision, including preferred stock provisions, must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."). In effect, the Cutoff Date Holding improperly renders the Investors' automatic conversion rights upon a Qualified Financing to be a nullity. *See Osborn*, 991 A.2d at 1159 ("We will not read a contract to render a

[10] The maturity date in a convertible note could terminate conversion rights where the contract expressly so states. For example, in *College Health & Investment., L.P. v. Diamondhead Casino Corp.*, the Superior Court held that conversion rights ended in a convertible note because the notes *expressly* required conversion to occur "*prior to* the Maturity Date." 2015 WL 5138093, at *2 (Del. Super. July 2, 2015) (emphasis added). The Investors' Notes contain no such (or similar) language.

provision or term 'meaningless or illusory.'"); *Arwood v. AW Site Servs, LLC*, 2022 WL 973441, at *2 (Del. Ch. Mar. 31, 2022) ("courts may not by construction…excise terms").

Moreover, the Cutoff Date Holding disregards the structure of the Notes, which makes the "shall be payable" language "[s]ubject to the provisions related to the conversion of this Note." A2510. The Investors' right to be repaid is subordinate to the conversion terms. *See, e.g., Penn Mut. Life Ins. Co. v. Oglesby,* 695 A.2d 1146, 1150 (Del. 1997) (holding that where the first provision stated it was "subject to all provisions," such language made clear that "these other provisions sublimate or 'trump"' the first provision); *Swan Magnetics, Inc. v. Super. Ct.*, 56 Cal.App.4th 1504, 1510 (Cal. Dist. Ct. App. 1997) ("subject to" means "conditioned upon, limited by, or subordinate to"). By interpreting the Notes so that, upon and after Maturity, the Investors had only the right to repayment, the trial court effectively rewrote the paragraph to begin with "notwithstanding," rather than "subject to." *See Sodano v. Am. Stock Exch. LLC*, 2008 WL 2738583, at *13 (Del. Ch. July 15, 2008) (explaining that use of "'[n]otwithstanding any other provision of this [agreement]'" in indemnification clause ensured that indemnification clause was not "subject to" other contractual provisions that might conflict), *aff'd sub nom. Am. Stock Exch. LLC v. Fin. Indus. Regul. Auth.*, Inc., 970 A.2d 256 (Del. 2009). The trial court, however, may not rewrite a contract under the guise of construing it -- especially

where, as here, the contract is rewritten to fundamentally change the parties' basic business relationship. *See Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983) ("Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it or supply omitted provisions."); *Anderson v. St. Dep't. of Admin. Servs.*, 612 A.2d 157 (TABLE), 1992 WL 183080, at *3 (Del. July 7, 1992) (holding that an "interpretation is legally incorrect" because "it adds a new term").

iii. The Cutoff Date Holding Conflicts With The Trial Court's Separate Holdings That The Investors Could Continue To Hold The Notes Post-Maturity And They Were Not Required To Accept Repayment

As previously explained, the trial court held the Investors could continue to hold the Notes post-Maturity and that, even if Vistar attempted to repay the Notes, there was no "obligation on the part of [the Investors] to accept repayment at any particular time or in any particular way." Op.52. Accordingly, the Investors could reject Vistar's attempts to repay the Notes, such that they would remain "outstanding" as the Investors held out for a conversion event.

Consistent with the trial court's rulings, the Investors rejected Vistar's attempt at repayment and, as a result, their Notes remained "outstanding" -- including as of the closing of the Lamar Transaction (which was a Qualified Financing). Therefore,

pursuant to the express contract terms, the Investors' Notes automatically converted into equity at the time of the Lamar Transaction.

But, under the Cutoff Date Holding, the Notes (although admittedly still "outstanding") would not automatically convert into equity upon the Lamar Transaction because the trial court erroneously determined the Investors' conversion rights were "cut-off" at Maturity. Op.46-47. Not only was that holding an error for all the reasons explained herein, it also conflicts with the trial court's separate rulings that the Investors could continue to hold their Notes and did not have to accept repayment, such that the Notes would remain outstanding. For this additional reason, the Cutoff Date Holding should be reversed. *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012) (proper interpretation "compelled…by the canon of construction that requires all contract provisions to be harmonized and given effect where possible"); *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("[A] court will not adopt [an] interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions.").

iv. The Cutoff Date Holding Defies Economic Sense

The trial court interpreted the Notes such that the Investors could continue to hold the Notes after Maturity -- with the Notes remaining outstanding -- but with no conversion rights. No rational economic actor would agree to such a contractual

structure: to be repaid simple interest at the whim of the maker with no ability to participate in the economic upside. There is no reason why the Investors would continue to hold the Notes after Maturity if they did not retain the ability to convert them into equity consistent with the parties' basic business relationship. The trial court's interpretation is therefore "contrary to both the plain meaning of the document and logic," and would "reach an absurd, unfounded result." *Osborn*, 991 A.2d at 1160-1161 ("It stretches the bounds of reason to conclude that Osborn, a college graduate and professional tax preparer, would sell her property for a mere pittance based on an undefined, unspecified, implicit term. We cannot countenance such an absurd interpretation of the contract.").

Tellingly, in concluding that the conversion rights cut-off at Maturity, the trial court cited no evidence suggesting the parties would have intended to interpret the Notes in this economically nonsensical manner. *They did not*. Accordingly, the Cutoff Date Holding, which defies economic sense and interprets the Notes in a manner that no reasonable party would agree to, should be reversed. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 930 (Del. 2017) (court should adopt an interpretation that "maintains the underlying economics of the parties' bargain"); *Brandin v. Gottlieb*, 2000 WL 1005954, at *24 (Del. Ch. July 13, 2000) (the court's interpretation of the contract "comports with the most reasonable

reading of the contract, because [defendant's] argument . . . makes no economic sense").

v. The Cutoff Date Holding Is Contrary To The Extrinsic Evidence Presented At Trial And Findings Of The Trial Court

"[A] court looks to extrinsic evidence with the expectation that the evidence provides insight into the parties' shared understanding." *Salama v. Simon*, 328 A.3d 356, 366 (Del. Ch. 2024). Here, the extrinsic evidence and trial court's factual findings are directly contrary to the Cutoff Date Holding -- and fully support the Investors' contention that they retained their conversion rights so long as they continued to hold the "outstanding" Notes.

After summarizing the extrinsic evidence from the four-day trial (almost all of which was undisputed), the trial court inexplicably concluded it was not "enlightening" and reverted to the "words of the contract" -- the same words it previously held to be ambiguous. Op.45. That was an error. When a contract is ambiguous, a "court is not free to disregard extrinsic evidence of what the parties intended." *City Investing Co. Liquidating Tr. v. Continental Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993); *see also BitGo Hldgs., Inc. v. Galaxy Digit. Hldgs., Ltd.*, 319 A.3d 310, 323 (Del. 2024) (same). Instead, the trial court, "*must consider* the evidence offered in order to arrive at a proper interpretation of contractual terms." *Eagle Indus., Inc.*, 702 A.2d at 1232 (emphasis added). Indeed, "[w]hen faced with

two reasonable interpretations of a contract, the court does not simply end the inquiry by deciding which of the two reasonable interpretations is 'more' reasonable…The court's role in interpreting a contract is to give effect to the parties' intent." *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2025 WL 251472, at *11 (Del. Ch. Jan. 21, 2025); *see also Terrell v. Kiromic Biopharma, Inc.*, 2025 WL 249073, at *5 (Del. Jan. 21, 2025) ("The trial court cannot choose between two reasonable interpretations of an ambiguous contract…").

Here, the extrinsic evidence was so contrary to Vistar's interpretation that, in post-trial briefing and at post-trial argument, Vistar repeatedly argued the trial court should not consider the extrinsic evidence and should instead focus solely on the contract language that it had found ambiguous. A1840-47; A1954-60; A2033-35. Vistar's desperate attempt to prevent the trial court's consideration of the extrinsic evidence is telling.

(1) The Trial Court Acknowledged The Cutoff Date Holding Was Inconsistent With The Basic Business Relationship Between The Parties

"Before stepping through the specific contractual provisions it is helpful to look at the transaction from a distance" in its commercial context. *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017); *see also Chicago Bridge & Iron Co. N.V.*, 166 A.3d at 927 ("The basic business relationship between the parties must be understood to give sensible life to any contract."). The

analysis begins "by reviewing the context in which the parties negotiated the Agreement." *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188, at *18 (Del. Ch. July 9, 2021). That undisputed business context belies the finding that any party intended for the Investors' conversion rights to cut-off at Maturity.

As found by the trial court and detailed above (*supra*, p.7), the Investors "make investments in early-stage companies as an investment strategy." Op.8-9, 14. The Investors know that many of the companies they invest in will fail, but "hope that a few companies will be outsized successes that deliver more than offsetting returns." Op.15. "To capture those returns, the Investors want to hold equity in the successful companies they invest in (as opposed to holding debt, which would typically only return a specified interest rate)." Op.15.

In this case, there is no dispute that the Cutoff Date Holding was directly contrary to the basic business relationship of the parties. In fact, the trial court acknowledged its interpretation "is inconsistent with the general business model of Plaintiffs" and "is difficult for a judge in equity." Op.6, 48. Under Delaware law, "[t]he court may [] reject an interpretation that runs contrary to '[t]he basic business relationship between parties.'" *Comcast Cable Commc'ns Mgmt., LLC v. CX360, Inc.*, 2024 WL 5251997, at *9 (Del. Ch. Dec. 31, 2024). Rather than doing so, however, the trial court interpreted the contract language that it found ambiguous in a manner that admittedly conflicted with the parties' business relationship. That was

an error, which requires reversal of the Cutoff Date Holding. *See Chicago Bridge*, 166 A.3d at 926-27 (reversing trial court decision that did not comport with the "basic business relationship between parties" and the "commercial context between the parties").

(2) The Cutoff Date Holding Conflicts With The Parties' Course of Performance After Maturity

"The parties' course of performance under a contract is a powerful indication of what the correct interpretation of that contract is." *Sunline Com. Carriers v. Citgo Petroleum Corp.*, 206 A.3d 836, 851 n.95 (Del. 2019) (citation omitted); *see also In re Viking Pump, Inc.*, 148 A.3d 633, 649 (Del. 2016) ("In addressing the perceived ambiguity, the Court of Chancery properly considered the course of performance following the closing[.]"); *Pers. Decisions, Inc. v. Bus. Plan. Sys., Inc.*, 2008 WL 1932404, at *5 (Del. Ch. May 5, 2008) ("after plain meaning, the most persuasive evidence of the parties' agreement is the course of its performance"), *aff'd*, 970 A.2d 256 (Del. 2009). Here, the parties' undisputed conduct "confirms Plaintiffs' interpretation." *Pacira BioSciences, Inc.*, 2025 WL 251472, at *12-13.

As the trial court acknowledged, Vistar's conduct post-Maturity demonstrated that the parties intended for conversion rights to survive Maturity. *See* JOp.15 (describing post-maturity statements by Vistar suggesting conversion of Notes was still on the table). For example, on May 10, 2016 (over two months after Maturity),

Ozen told Great Oaks that Vistar "expected to do a qualified financing that would convert the Second Round Notes…'over the next 6 months.'" Op.28; A2559.[11] And on October 13, 2016, nearly seven months post-Maturity, Ozen told Becker that "the second convertible is *still outstanding* with a face value of $100k (plus accrued interest). Hard to say what the estimated current value is." A2556 (emphasis added); Op.29-30. Of course, if Vistar believed the conversion rights had lapsed at Maturity, estimating the current value of Becker's Note would have been simple -- $100,000, plus accrued interest.

Importantly, Provenzano (Vistar's CEO) testified he believed that he had a fiduciary duty to repay the Notes in order to avoid stockholder dilution. A1558-60. Ozen similarly testified that repaying the Second Round Notes "was the best thing to do … [b]ecause otherwise, you would dilute the existing shareholders unnecessarily." A1400. *But there would be no risk of dilution at the time Vistar attempted to repay the Notes (early 2017) if the Investors' conversion rights "cutoff" at Maturity (March 2016).*

Faced with the extrinsic evidence making clear that *all* parties continued to expect post-Maturity that the Notes would convert into equity, the trial court

[11] Great Oaks followed-up again in July and October 2016 to inquire on the status of the Notes; Vistar never stated that they did not remain outstanding or that conversion rights had lapsed. Op.28; A2558-59.

correctly found that "Vistar's [post-maturity] statements indeed held out the hope of equity financing." JOp.16. That finding -- based on undisputed evidence presented at trial showing the contemporaneous understanding of all parties that conversion rights continued post-Maturity -- is directly contrary to the Cutoff Date Holding and alone is sufficient to require its reversal. *See Bd. of Educ. of Appoquinimink Sch. Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *8 (Del. Ch. Oct. 6, 1999) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981)) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 58 (Del. Ch. 2013) ("The contemporaneous documents overwhelmingly support this account").[12]

(3) The Cutoff Date Holding Was Inconsistent With The Parties' Reasonable Expectations

The trial court acknowledged that the Investors "uniformly testified that if they had thought an option existed where Vistar would succeed but nonetheless Plaintiffs would receive no equity, they would not have entered the Second Round

[12] With respect to pre-Maturity conduct, there was no evidence to suggest that any party believed that extension of the Maturity Date was necessary to preserve conversion rights. The Maturity extensions were made at Vistar's request (Op.26-27), consistent with the trial court's finding that Maturity extensions protected Vistar. *See* JOp.6 ("Absent these extensions . . . Vistar would have been then liable for the repayment of the Second Round Notes together with interest.").

Notes." Op.44.[13] That testimony (from 11 separate Investors) was entirely consistent with the business relationship between the parties, and it is persuasive evidence of the parties' intentions when the contract was formed. *See Salamone v. Gorman*, 106 A.3d 354, 381 (Del. 2014) (finding that a witness's testimony "undermines the Court of Chancery's interpretation"); *Eagles Indus., Inc.*, 702 A.2d at 1233 (noting that party "affidavit… provide[s] insight into the type of risk allocation that the parties intended the Agreement to reflect"). No Investor offered testimony at trial even remotely suggesting they intended (or believed) that their conversion rights would cut-off at Maturity.

Nor did the Company's witnesses testify they believed that the conversion rights cut-off at Maturity -- just the opposite. For example, Provenzano conceded it was not until late 2016 that Vistar apparently first came to the erroneous view that it could simply attempt to repay and terminate the Notes. A2287-89, A2298, A2302-04, A2321-22; A1481; *see also* A2123, A2128, A2130-31, A2133. And as previously explained (*supra*, p.37), Provenzano and Ozen testified that, almost a

[13] For example, one of Valhalla's representatives explained he never understood the Maturity Date meant the Investors' conversion rights terminated; rather, he testified the "entire goal was to wait for an M&A event or a strong equity event so that [the] convertible note[s] convert[] into equity," and "[n]ever had it come up that [Vistar] could repay or [that] [Investors] wanted to be repaid" (A657-58), and purpose of the Maturity Date was to give the Investors the discretion to demand repayment. A638-40. Many other Investors offered similar testimony. *See, e.g.*, A506-07; A584-85; A691; A729-30; A735; A806-08; A830-31; A977-78; A1130-32; A1595; A1654.

year after Maturity, they attempted to repay and terminate the Notes to avoid the dilution that would result to Vistar's existing stockholders (primarily Vistar's founders who owned 87% of Vistar) if the Notes continued to remain outstanding at the time of a conversion event. Thus, based on the sworn testimony of its founders, Vistar (like the Investors) clearly believed and understood that the Investors retained their conversion rights after Maturity. All this undisputed evidence stands in stark contradiction to the Cutoff Date Holding and requires reversal.

(4) The Cutoff Date Holding Was Inconsistent With The Parties' Negotiation History

"[T]he drafting history of particular disputed provision(s) is often especially revealing of the process by which the parties reached a meeting of the minds and the ground on which that meeting occurred." *Zayo Gp., LLC v. Latisys Hldgs., LLC*, 2018 WL 6177174, at *12 (Del. Ch. Nov. 26, 2018). Here, the negotiation of the "shall by payable" language further supports the Investors' interpretation that both sides understood -- and agreed -- that the Investors maintained discretion after Maturity to continue to hold the Notes until a conversion event.

The trial court carefully reviewed the relevant negotiation history, which consisted of a few emails and draft Notes exchanged between Valhalla and Ozen. Op.40-44. In negotiating the Notes, Valhalla rejected Vistar's initial proposal for automatic conversion into common stock at Maturity as "not market," and stated further that "we would not want automatic conversion if you fail to raise a Qualified

Financing – instead, we would want to be repaid or extend the maturity at our discretion." A2477; Op.18-19. Vistar did not reject Valhalla's expressed intentions; instead, Vistar added a phrase indicating repayment was "at the discretion of the Holder" into the Note. Op.19. Thus, all sides understood that the Investors' discretion concerning conversion was important, and Vistar never rejected that expressed intention.

As the trial court recognized, some of the parties' edits to the Notes were not consistent with their stated intentions in the contemporaneous emails. For example, when "clean[ing] up some of the language," Valhalla deleted from the final Notes the "at the discretion" language *that it had requested*, while making other "clean up" revisions. Op. 20; A2487; A2503; A2510. The trial court correctly concluded it "is implausible" that Valhalla would have "countered with a third option that appeared to be worse for Valhalla." Op.44.

The trial court ultimately determined that the negotiation history does not clearly support either side's interpretation of the Notes. Op.44 (describing each parties' view of the negotiation history as "implausible"). The contemporaneous communications, however, are illustrative of the Investors' intentions regarding the Notes -- maintaining discretion over whether and when the Notes would convert or be repaid. In the words of the lead investor, Valhalla, maintaining discretion was "super important." A603; *see also* A527-28 (Valhalla wanted the conversion "to be

at our discretion" because it "wanted to control whether or not we get equity in the Company").

Importantly, there is nothing in the negotiation history suggesting that any party proposed (much less agreed) that the Investors' conversion rights would "cut-off" at the Maturity Date even if the principal and interest remained outstanding. That is because there was no such agreement.

* * *

In conclusion, the purpose of extrinsic evidence is to help the trial court determine the intent and expectations of the parties. *See SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("[I]f there existed an ambiguous provision in a negotiated bilateral agreement, extrinsic evidence should be considered if it would tend to help the court interpret such a provision."). As detailed above, the extrinsic evidence presented at trial clearly demonstrated that no party intended or ever believed that the Investors' conversion rights "cut-off" at Maturity. Accordingly, the extrinsic evidence "conclusively resolve[s] [any] ambiguity in [the Investors'] favor," and requires that the Cutoff Date Holding be reversed. *See Sunline Com. Carriers*, 206 A.3d at 849.

CONCLUSION

For all the foregoing reasons, the Investors respectfully request that this Court reverse the Cutoff Date Holding, and remand to the trial court with instructions to enter judgment that the Notes converted to equity at the time of the Qualified Financing in 2021.

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