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Case Number 65,2025

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

APPELLEE VISTAR MEDIA, INC.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In 2012, Defendant Vistar Media, Inc. ("Vistar" or the "Company") was a pre-revenue startup co-founded by three recent college graduates. Plaintiffs ("Plaintiffs" or "Noteholders," and with Vistar, the "Parties") were fifteen sophisticated institutional venture-capital funds and individual angel investors who invested in convertible notes issued by the Company (the "Notes").

Convertible notes are used to invest in early-stage companies. They provide capital contributors with the ability to convert the investment into equity under certain circumstances prior to maturity, while providing downside protection at maturity in that the debt becomes repayable in the form of principal-plus-interest. Convertible notes are heavily negotiated, bespoke agreements that reflect the parties' priorities and risk appetites.

Among the Plaintiffs, Valhalla Partners II, L.P. ("Valhalla"), took the lead in negotiating the Notes with Vistar, though other Plaintiffs provided comments and edits. Ultimately, each Note contained the same material terms, as is customary with convertible note financing rounds.

This years-long dispute is over the meaning of one sentence in these Notes:

> Subject to the provisions related to the conversion of this Note, the outstanding principal balance of this Note[], 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).

("Repayment Clause"). (Op.22[1]; A2510-514; B563-603; B639-53; B669-78; B822-26.) The most reasonable reading of the Repayment Clause is that in the event no conversion event occurs prior to maturity (or a Sale or Event of Default), the Notes become payable. That reflects what all Parties expected: (i) if Vistar was successful, it likely would complete an equity financing round that would trigger Plaintiffs' conversion rights; and (ii) if no equity financing occurred prior to maturity, that generally would mean Vistar was not successful and Plaintiffs would receive a return of their capital plus interest.

Vistar proved to be that unusual startup that was so successful so quickly that an equity financing was unnecessary prior to the maturity date. The Parties thus agreed to extend the maturity date twice by written agreement to allow Plaintiffs more time to possibly convert and to delay Vistar's burden to repay. The final maturity date passed, however, with no conversion event having occurred. In accordance with its contractual right, Vistar repaid the Notes.

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[1] "Op." refers to the Post-Trial Memorandum Opinion dated December 9, 2024, attached as Exhibit A to Appellants' Opening Brief. "JOp." refers to the letter opinion dated January 17, 2025, attached as Exhibit B to Appellants' Opening Brief ("OB"). Deposition and trial testimony is cited "[appendix number].[page:line]."

Plaintiffs, a group of successful, wealthy investors, were not content to receive their bargained-for principal-plus-interest as opposed to an equity stake in the now-growing Company, and they contested the repayment.

The trial court provided Plaintiffs with every opportunity to develop evidence to support their claim that the Repayment Clause means that: (i) each Plaintiff had discretion to reject repayment at maturity, and (ii) if a Plaintiff rejected repayment, they could await conversion indefinitely, potentially forever. For Plaintiffs to get the remedy they seek—conversion to equity based on a financing **five years** after maturity—they would have had to prove that when the Parties agreed the Notes "shall be payable" at maturity absent a prior conversion event, they actually meant the Notes "shall not be payable" at maturity. Unsurprisingly, the trial court declined to make such a finding. The plain language of the Notes and the extensive extrinsic evidence show that is not the agreement the Parties struck. The trial court's well-reasoned ruling assessing facts pertinent to fifteen different Plaintiffs should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery properly held that "shall be payable" upon maturity means that unless the Notes had converted, Vistar had a right to repay the Notes after maturity. In so holding, the court properly rejected Plaintiffs' arguments that "shall be payable" was intended to mean that: (i) Plaintiffs had discretion to reject repayment, (ii) conversion rights survived indefinitely post-maturity, and/or (iii) Plaintiffs had a unilateral, unwritten right to extend the maturity date. The trial court's findings are supported by the factual record, including live testimony from the Parties themselves, which the court carefully considered. Plaintiffs present selective snippets of the trial court's ruling to manufacture internal inconsistency, but those snippets are taken out of context and do not conflict with the trial court's actual conclusions. The trial court's ruling should be affirmed.

2. In the alternative, the Court can affirm based solely on the Notes' plain language. The term "payable" is not ambiguous; it means "that is to be paid." Because the Notes were payable at maturity and Vistar tendered repayment after maturity and prior to any conversion event, the Noteholders are not entitled to the relief they seek.

STATEMENT OF FACTS

I. USE OF CONVERTIBLE NOTES IN EARLY-STAGE COMPANIES.

Convertible promissory notes are used to finance early-stage companies. (A1769.1276:6-24.) A convertible note is an unsecured debt instrument with terms like those of other debt instruments, including a maturity date: "[D]ebt holders need to get repaid at some point. And, therefore, all debt instruments have a maturity date to ensure that there is a repayment." (A1771.1278:16-A1772.1279:16.) However, such notes are, as their name would indicate, "convertible, meaning that, under some conditions"—frequently the occurrence of a later equity financing—"it can convert into equity." (A1771.1278:16-A1772.1279:4; B787.) Thus, convertible notes typically provide that if a company "shows initial success and gets to an equity financing round, the notes convert to equity; if the notes mature without an equity financing round, usually that indicates that the business is not a success. In that case, the note is payable, at the face amount together with modest interest, or (if the contract so provides) may convert to equity or provide the option to extend maturity." (Op.1.)

In other words, convertible notes provide the noteholder with the opportunity to participate in a company's upside through a pre-maturity conversion event but also provide downside protection through repayment if no conversion event occurs before maturity. (Op.15; A1774.1281:9-A1776.1283:5; B800.) That baseline debt status and related downside protection is significant. Because early-stage companies

have a high failure rate, convertible debt being senior to equity and having priority in the event of liquidation is an important investor protection. (Op.14-15; A1775.1282:17-A1776.1283:20; B793-94; B800.)

Convertible notes' specific terms, including interest rate and conversion triggers, are "bespoke" (Op.2), as confirmed by the variety of terms in the hundreds of notes produced by Plaintiffs in discovery in this case and admitted into evidence at trial. (B1-47; B795-800.) Each note's unique conversion and repayment rights reflect economic tradeoffs negotiated by the investor and the issuer. (A1774.1281:5-A1776.1283:20; B801-02.)

II. THE PARTIES

A. Vistar

Vistar is a software company in the out-of-home advertising business. (Op.10.) It was founded in 2012 by Michael Provenzano ("Provenzano"), Mark Chadwick ("Chadwick"), and Jeremy Ozen ("Ozen"). (Op.10.)

Vistar was initially funded with "friends and family" financing, including convertible notes issued in January and February 2012 ("First-Round Notes"). (A1455.926:20-A1456.923:21; Op.11.) Each of those First-Round Notes was identical except for principal amount, holder name, and issue date. (Op.12.) Unlike the Notes at issue on this appeal, upon maturity the First-Round Notes automatically converted into Vistar stock pursuant to a pre-set formula. (Op.12.) Consistent with

their terms, the First-Round Notes converted into stock on their January 31, 2014 maturity date. (Op.11-13, 25.)

B. The Noteholders

Plaintiffs are sophisticated, accredited institutional investors and venture capitalists. (Op.14-16.) For example:

- Valhalla is managed by an institutional venture-capital firm founded in 2002 that has made at least 88 venture-capital investments through at least 35 convertible notes, resulting in "47 M&As, 22 IPOs, and over $1.2 billion in investment proceeds." (A498.5:14-20; A563.70:16-21; A575.82:8-13; B70.23:16-B71.24:6; B799.)

- James Pallotta is an ultra-high-net-worth individual, co-owner of a professional basketball team, and founder of the Raptor Group, which has invested in approximately 50-75 convertible notes. (Op.8; B311.12:17-B31314:6; B799.)

- Great Oaks Venture Fund LP is a $40 million investment fund that has invested in approximately 125 convertible notes and approximately 200 startups. (A851.358:4-A855.362:8; B799.)

- Occam's Razor, LLC has invested in 100 to 150 early-stage companies and entered into 40 to 50 convertible notes. (Op.9; A1585.1092:12-A1586.1093:22; A1587.1094:24-A1588.1095:4.)

III. IN LATE 2012, VISTAR ISSUES CONVERTIBLE NOTES TO 20 SECOND-ROUND INVESTORS.

In late 2012, Vistar sought additional financing. (Op.13.) The Company considered and rejected two offers for a straight equity deal because it was not happy about the dilution associated with issuance of additional shares and it could not agree on a stock valuation with either venture capital firm. (Op.13.) Vistar moved towards another convertible note and invited the Noteholders (two of whom had participated

in the First-Round Notes), among others, to participate. (Op.11-14.) Ozen was Vistar's key negotiator and point of contact with respect to the Notes. (Op.32.)

Vistar initially circulated a proposed note with the same basic terms as its First-Round Notes. (Op.16.) One of the potential investors, Valhalla, insisted on several changes, some of which Vistar accepted and others which Vistar rejected.

Specifically, on December 17, 2012, Valhalla commented on the draft Note, including that:

> 1) Upon maturity (i.e., January 31, 2014), the principal and 4% accruing interest on the note automatically converts into Common Stock at a $6 million pre-million. This is not market. We would not want Common Stock and 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.
>
> . . .
>
> 3) There should be optional conversion of Notes if you raise less than $2 million in an equity financing (this, for example, avoids a situation where you could raise multiple $1.99 million financings to avoid conversion) [a "Non-Qualified Financing"].
>
> . . .
>
> 8) There are no acceleration provisions upon an event of default (i.e., the note does not accelerate even if the company has a bankruptcy, etc.).

(A2477-78; Op.18-19.) In seeking an election to be repaid or extend the maturity date at their discretion, Valhalla acknowledged the well-understood outcomes of convertible notes: At maturity, conversion rights end and the result is either automatic conversion (as with the First-Round Notes), repayment, or an extension

of the maturity date, which leads back to one of the other options at final maturity. (Op.1; A1778.1285:17-A1779.1286:24.)

On December 24, 2012, Vistar responded stating, in part: "Please find a red line including the changes requested in your email below." (Op.19; B493.) Vistar's counterproposal incorporated some, but not all, of Valhalla's proposed edits. (Op.19-20; B493-514.) As to Valhalla's first enumerated request, Vistar rejected three of the four items sought: Vistar's revised draft continued to provide for conversion to common stock (as opposed to preferred stock) in some circumstances; continued to offer pre-maturity automatic conversion in some circumstances absent a Qualified Financing; and rejected Valhalla's request to extend the maturity date at its discretion, instead providing the noteholder an option to be repaid at maturity upon 90-days' notice. (B505; A672.179:21-A675.182:9, A678.185:15-A683.190:9, A684.191:18-A686.193:2.) Vistar also rejected Valhalla's third enumerated comment by providing for automatic conversion at maturity if a Non-Qualified Financing had occurred. (B505.) Vistar did incorporate the eighth request for an Event of Default, allowing a majority of the holders to accelerate the note (i.e., require that the note be repaid) if Vistar were to file for bankruptcy before maturity. (B506.)

On December 28, Valhalla replied: "We reviewed [your redline] and cleaned up some of the language in the attached clean and redline copy." (A2487; Op.20.)

Valhalla's reviewers included their attorneys, DLA Piper LLP. (A678.185:15-A679.186:21.) Despite the minimizing language of the cover email, Valhalla and its counsel made material changes to Vistar's counterproposal, including rejecting: (i) conversion into common stock; (ii) automatic conversion upon failure to raise a Qualified Financing; and (iii) the election between conversion and repayment before maturity. (Op.20; A2503.) Valhalla's draft instead provided that—absent a conversion event—repayment would occur at the earlier of (i) the maturity date, (ii) a Sale, or (iii) an Event of Default. (Op.20; A2503; A663.170:8-24.) Valhalla and its counsel also deleted the provision requiring notice if a noteholder intended to demand repayment, as the note was now required to be repaid upon maturity. (Op.20; A2503.)

Vistar replied to Valhalla that same day, writing that it was "happy with the language in the latest draft." (Op.21.) That language, drafted in material part by Valhalla and its counsel, became the final version of the Note.

Though Valhalla had the most active role in negotiating the Note terms with Vistar, Valhalla did not act as an agent for or on behalf of any other Noteholder. (Op.21 & n.87.) Some Noteholders did not even know that Valhalla was participating in the investment. (Op.21-22, 21 n.88.)

Thus, other Noteholders—including Eniac, Draper-Mercury, and Advancit—performed independent legal reviews and discussed/negotiated the terms with Vistar,

asking for and, in some cases, receiving edits to the notes. (Op.18 n.77; Op.22 & n.90; A1238.745:3-A1250.757:15; A1661.1168:7-A1665.1172:7; A1692.1199:13-A1693.1200:15.) These negotiations did not, however, pertain to repayment terms. (Op.17-18.)

Other Noteholders took an entirely hands-off approach to the negotiations. Many testified they did not recall even reading the Note before investing. (JOp.17.)[2] At no point during any of Vistar's discussions with potential investors was post-maturity conversion raised.

Vistar issued the Notes on December 31, 2012, March 1, 2013, June 1, 2013, and September 1, 2013. (Op.23.) They had an aggregate principal amount of $1.5 million. (Op.23.) Each of the twenty noteholders received and executed materially identical Notes, as is customary in convertible note financing rounds. (Op.23; A468-69.)

The Notes provided, in relevant part:

> 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., 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).

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[2] B260.31:2-4 (Su); B351.52:6-8 (Pallotta); A908.415:14-A911.418:6 (Great Oaks); A1130.637:8-23 (Becker); A1617.1124:16-A1618.1125:9 (Occam).

(Op.22; A2510.) The Notes further provided that they "may not be prepaid, in whole or in part, without the prior written consent of the [h]older." (Op.24 (emphasis added).) Plaintiffs confirmed at trial that this phrase meant the Notes could not be prepaid **prior to maturity** without prior written consent of the holder. (A848.355:9-A849.356:7.) The "Notes did not contain an express provision regarding extending the maturity date." (Op.24.) Instead, the Notes' terms could be modified or amended only by written instrument executed by Vistar and "the holders of at least a majority of the aggregate amount of outstanding principal under the Notes." (Op.24-25; A2511.)

IV. VISTAR IS UNUSUALLY SUCCESSFUL AND THE PARTIES AGREE TO EXTEND MATURITY.

"Vistar proved to be that unusual start-up that was sufficiently successful that it did not need to do an equity financing round." (Op.3.) As a result, on the initial 2014 maturity date, Valhalla emailed Vistar that the Notes "expired" and should be extended. (Op.22, 25-26; B695.) Vistar responded that it was drafting an extension document. (Op.26; B695.)

In its ensuing email attaching an extension agreement, Vistar explained, "[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." (Op.26; B697.) In response, one Noteholder asked why Vistar did not convert the Notes to equity, to which Vistar responded that conversion only occurred upon a Qualified Financing.

(Op.26.) No one responded that a written extension of the maturity date was unnecessary because the Notes provided for post-maturity conversion. To the contrary, the requisite Noteholders executed the extension agreement. (A469 ¶ 59.)

Vistar continued to perform "extremely well" and was "massively ahead of budget" as of June 2015. (Op.26; A2528.) "As a result of [its] success," Vistar did "not see the need for another funding round before September of [2015] when the convertible note is set to mature." (Op.26; A2528.) Vistar thus suggested another extension of the maturity date. (Op.26; A2528.) Again, no Noteholder questioned whether an extension was necessary to maintain conversion rights and the agreement was executed. (A469 ¶ 59.)

By twice extending the maturity date, the Noteholders expanded their window for a potential conversion event to occur, and Vistar delayed the financial burden of repayment. (JOp.5-6, 14; A1428.935:11-A1429.936:2.)

The Notes matured on March 31, 2016 ("Final Maturity Date"). (Op.27.) Prior to the Final Maturity Date, no "Sale," "Event of Default," or conversion event had occurred. (Op.4, 32.) "The success of Vistar, allowing it to grow without a sale of equity, was unusual, but not unforeseeable." (Op.50.)

V. VISTAR RIGHTFULLY REPAYS THE NOTES FOLLOWING MATURITY.

In 2016, Ozen, who had been responsible for dealing with legal matters such as the Notes, was distracted from his work responsibilities by an unexpected family

tragedy, while Provenzano and Chadwick focused on growing the business in his absence; thus, the maturity date was not top of mind for Vistar's co-founders. (Op.32; A1394.901:17-A1399.906:2; A1482.989:20-A1484.991-9; A1531.1038:6-A1533.1040:11; A2126.44:3-A2127.45:9; A2135.53:14-A2139.57:8; A2319.128:5-A2320.129:15.) In late 2016, Vistar reconvened with its lawyers and determined to repay the Notes. (A1379.886:5-A1380.887:11; A1480.987:1-9; A2130.48:14-2131.49:12.) In February 2017, Vistar's Board approved the repayment. (Op.30.)

On March 16, 2017, each noteholder was notified of Vistar's intent to repay the Notes, as no "Sale," "Event of Default," "Qualified Financing," or "Non-Qualified Financing" had occurred and the Notes had become repayable upon maturity. (Op.31-32.) On March 30, 2017, the Company mailed principal-plus-interest payoff checks to each noteholder. (Op.31-32.)

Some noteholders accepted repayment and are not Parties here. (A468-70; A1438.945:14-20.) Others banded together and engaged counsel, tried to bully Vistar into permitting conversion, and, ultimately, purported to reject the repayment. (*See* Op.31-32.) Based on the language of the Notes, Vistar was "very, very, very surprised" by that response. (A1407.914:10-A1408.915:3; A1496.1003:4-22.)

VI. PROCEDURAL HISTORY

A. The Litigation.

On March 13, 2019, Valhalla, Pallotta, Great Oaks, Becker, Advancit, Eniac, DFJ Mercury, Occam, Su, Buntin, and Ocean Assets jointly filed this lawsuit

bringing claims for: (i) declaratory judgment, (ii) breach of the implied covenant of good faith and fair dealing, (iii) promissory estoppel, and (iv) equitable estoppel. (Op.34; A462 ¶ 6.)

Vistar filed an answer and counterclaims. (Op.34; A462 ¶ 7.) In its First Counterclaim, Vistar sought declaratory relief under Article 3 of the Uniform Commercial Code. (Op.34; A145-62.) In the Second Counterclaim, alleging breach of contract, Vistar contended that the Noteholders' refusal to accept repayment put Vistar's capitalization table in disarray, causing Vistar financial harm. (Op.33-34, 37; A145-62.)

On June 4, 2019, Vistar filed a motion for judgment on the pleadings as to Plaintiffs' complaint. (Op.34.) Vistar argued that the Notes were unambiguous and their plain language permitted Vistar to repay at maturity. (A166.4:16-A168.6:15.) In response, Plaintiffs argued that the Notes were ambiguous and the case should therefore proceed to discovery. (A191.29:5-A192.30:14.)

The trial court denied Vistar's motion on November 4, 2019. (Op.34.) The trial court "struggl[ed] to understand that anybody could have anticipated [the Notes'] language to give an indefinite conversion right or an indefinite lot -- permission to be a rider awaiting some type of conversion event that may happen 10 years in the future." (A195.33:4-9.) Thus, the trial court stated that "it seems to me the defendant's reading of it is much stronger than the plaintiffs'. It tends to indicate

to me that at the time of maturity, if a qualifying event has not taken place, a conversion event, then what is owed to plaintiffs is simply a repayment of interest and principal." (A213.51:4-11.) Nonetheless, in giving Plaintiffs every benefit of doubt, the trial court declined to dismiss the case. (A214.52:9-A215.53:21.)

The Parties proceeded to discovery. (*See* Op.34.) The Complaint was amended to add plaintiffs Draper, Horwitz, and Nat Turner Investments LLC (which later settled and dismissed its claims). (Op.35 & n.156.) Later, years into discovery, Plaintiffs added a claim for reformation of the Notes based on "Mistake," claiming a scrivener's error resulted in the Notes not saying what the Parties supposedly meant for them to say. (Op.35; A218-89.) Appellants have since abandoned that argument.

On December 7, 2022, Vistar moved for summary judgment on all counts of Plaintiffs' Second Amended Complaint and Vistar's declaratory judgment claim. Plaintiffs moved for summary judgment only on Vistar's breach of contract claim, declining to argue that they were entitled to judgment as a matter of law based on the Notes' language. (Op.36.)

The court denied both motions on September 19, 2023, indicating that a trial would be appropriate to provide a full opportunity to present testimony or evidence to aid in the interpretation of the Notes. (Op.36; A451.65:6-A454.68:9.) The court "found Vistar's construction of the contract to be the natural reading of the

contractual language," but allowed for the possibility that "extrinsic evidence might support [Plaintiffs'] reading of the contract." (Op.38.)

The case went to trial in March 2024. (Op.36.) The Parties submitted over 1,050 trial exhibits and offered testimony from 18 witnesses, most of whom testified in person, including unrebutted expert testimony presented by Vistar regarding the operation of convertible notes. (B1-47; A494-A1811.) Each Party filed pre-trial briefs, post-trial opening briefs, and post-trial answering briefs. (A73-79.) The trial court also heard post-trial argument. (Op.36.)

B. The Post-Trial Opinions.

On December 9, 2024, the trial court issued a 53-page Memorandum Opinion ("Memorandum Opinion") resolving the Parties' contractual claims. (Op.5-6.)

The trial court rejected Plaintiffs' declaratory judgment claim, which sought a finding that their conversion rights persisted indefinitely and that on July 2021, long after maturity and long after Vistar tendered payment on the Notes, a Qualified Financing occurred. (Op.4.) The court considered the extrinsic evidence presented—summarized over nearly thirty pages of factfinding—and determined that it did not support Plaintiffs' attempts to alter the "most obvious meaning" of the contract: "**Plaintiffs had conversion rights before the maturity date, if certain occurrences in fact happened. Those occurrences did not happen before maturity, and the [Notes] became payable**." (Op.5-6, 38 (emphasis added).)

Thus, Plaintiffs "are entitled to payment of the face amount together with interest, which is the result they bargained for." (Op.6.) The court also rejected Plaintiffs' claims that the "forthright negotiator" principle should apply. (Op.47.) Although the court declined to apply the doctrine of *contra proferentem*, which had been invoked by both sides, it found that if the doctrine did apply, ambiguous language should be construed against Valhalla as the drafter. (Op.47-48.) In vindicating the language of the Notes and giving proper weight to the concept of a maturity date, the trial court avoided introducing uncertainty in the startup financing market that would have resulted if the language of the investment instrument could not be relied upon.

The trial court rejected as "merely circular" Plaintiffs' argument "that their reading should prevail because it fits within the overall scheme of the [Notes], which they say 'uniformly prioritized'" the Noteholders. (Op.45-46.) The court explained that even if certain rights in the Notes were beneficial to the Noteholders, that "does not mean that the only reasonable interpretation of language in the [Notes] is to prioritize the rights of Plaintiffs in all cases." (Op.46.) As an example, the trial court continued: "***It is not unreasonable for the right to conversion to have had a cutoff date.***" (Op.46 (emphasis added).) Thus, what Plaintiffs loftily refer to as "the Cutoff Date Holding" was simply the trial court explaining that in this negotiated contract, Vistar was within its rights to seek finality with respect to potential conversion and

to reject Valhalla's proposal that would have permitted each Noteholder, post-maturity, to decide whether to demand repayment or indefinitely assert a right to convert. (Op.6-7.) The court similarly denied Plaintiffs' implied covenant claim because the Parties "expressly discussed and negotiated what rights would inure to each at maturity." (Op.48-49.)

The court also rejected Plaintiffs' reformation claim. (Op.50-51.) The negotiation history demonstrated that Vistar specifically rejected any open-ended extension right. (Op.50.) To the extent Vistar had offered limited discretion with respect to repayment, it was to choose—at maturity—between automatic conversion and repayment. (Op.50.) Valhalla rejected that option. (Op.50.) Thus, the negotiation history showed no meeting of the minds before the final Repayment Clause. (Op.50-51.)

After resolving Plaintiffs' contract claims, the court rejected Vistar's counterclaims. (Op.51-52.) Vistar has not filed a cross appeal of that ruling.

The court rejected Plaintiffs' equitable claims in a separate letter opinion dated January 17, 2025 ("Letter Opinion"), wherein the court "adopt[ed] all the facts found in the Memorandum Opinion." (JOp.1, 3.) In denying Plaintiffs' promissory and equitable estoppel claims, the trial court found Plaintiffs failed to identify any promise that conversion would occur (or that would inure to all Plaintiffs), and that reliance on any such alleged promise would be unreasonable as contrary to the

language of the Notes. (JOp.9-18.) The court noted that even if Plaintiffs had a right to equitable relief, the remedy would not be a post-maturity conversion right. (JOp.14-15, 18.)

On appeal, Plaintiffs have limited their many previous arguments to one contention, which they describe as a "question of law": whether Plaintiffs' conversion rights under the Notes ended after the Final Maturity Date. (OB.19, 42.) While contesting much of the trial court's factual analysis, Plaintiffs somehow insist that they "do not challenge the trial court's factual findings." (OB.7.) Thus, after not seeking judgment as a matter of law below, they now say they are entitled to just that. After arguing below that the Note should be reformed because of a "scrivener's error," they now say they are entitled to recover under the language of the document. And after focusing for years on extrinsic evidence and equitable arguments, they now say those equitable claims are "not at issue in this appeal." (OB.1n.1.)

ARGUMENT

I. THE TRIAL COURT PROPERLY WEIGHED THE EVIDENCE AT TRIAL AND RESOLVED THE AMBIGUITY, IF THERE EVEN IS ANY, IN VISTAR'S FAVOR.

At trial, Vistar proved that based on the language of the Notes and the extrinsic evidence, Vistar was entitled to repay Plaintiffs principal-plus-interest after the Final Maturity Date.

A. Question Presented

Whether the Court of Chancery properly found that "shall be payable" at maturity means that the Notes were in fact payable by Vistar at that time. (*See, e.g.*, A474 ¶¶ 82, 83.)

B. Scope Of Review

On mixed questions of fact and law, this Court "review[s] the trial court's factual determinations for clear error and its legal rulings *de novo*." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1228 (Del. 2018). Where, as here, "the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings," the Supreme Court "defer[s] to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 950 (Del. 2005).

C. Merits Of The Argument

Promissory notes are a "contract and are to be so construed and enforced." *Beal Bank, SSB v. Lucks*, 791 A.2d 752, 757 n.13 (Del. Ch. 2000) (citation omitted). "Delaware law adheres 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." *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)). "The Court will interpret clear and unambiguous terms according to their ordinary meaning." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).

Courts should look beyond the contract terms only when the language is ambiguous. *Salamone*, 106 A.3d at 374. "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Moreover, a contract is not ambiguous solely because the parties are in "steadfast disagreement over interpretation." *Osborn*, 991 A.2d at 1160. Ambiguity exists only "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *GMG*, 36 A.3d at 780.

Upon finding a contract ambiguous, courts may resort to extrinsic evidence—including the parties' communications, trade usage, or course of dealing—to discern the parties' intent at the time of the agreement. *Town of Cheswold v. Cent. Del. Bus.*

Park, 188 A.3d 810, 820 (Del. 2018); *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232-33 (Del. 1997). Even then, "[w]hen reviewing the extrinsic evidence submitted, it should be reconciled, to the extent possible, with the text of the contract." *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *18 (Del. Ch. Mar. 30, 2017).

1. "Shall Be Payable" Means Exactly That: The Notes Shall Be Payable.

This dispute boils down to the meaning of one sentence:

> Subject to the provisions related to the conversion of this Note, the outstanding principal balance of this Note[], 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).) Vistar's position has remained consistent since it issued these Notes thirteen years ago: In the absence of a conversion event, the Notes are payable upon maturity.

To get the result they desire, the Noteholders would have to establish that: (i) "shall be payable" means "shall be payable only at each Noteholder's discretion"; ***and*** (ii) in the event that any Noteholder opted not to be paid, that Noteholder could ***either*** (a) unilaterally, indefinitely, and without notice, extend the maturity date, ***or*** (b) exercise post-maturity conversion rights. Both (i) and (ii) must be true for the Notes to be converted to equity based on an alleged Qualified Financing that occurred years after the Final Maturity Date and Vistar's repayment.

The best, and only reasonable, reading of the Repayment Clause is that the Notes were "payable" upon the maturity date. Black's Law Dictionary defines "payable" as "that is to be paid." *Payable*, BLACK'S LAW DICTIONARY (12th ed. 2024). Accordingly, upon the Final Maturity Date, Vistar had a right to repay the Note and Plaintiffs had the right to demand repayment.

Tellingly, the evidence at trial showed that several non-parties, including a Vistar lender and a potential investor (four sets of lawyers in total), all objectively read the Repayment Clause in the same manner as Vistar, including as to the ability to repay.[3] *Rhone-Poulenc*, 616 A.2d at 1196 ("The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."). There was no evidence at trial of any contrary third-party reading.

Unsurprisingly, courts reviewing similar language have agreed with Vistar's reading as well. For example, in *Nol v. Vetz, Inc.*, the plaintiff noteholder filed suit for breach of a convertible note, arguing the defendant's "failure to pay the principal balance and interest on or after the Maturity Date . . . constitute[d] a breach of the contract." 2023 WL 7517005, at *2 (Del. Super. Ct. Nov. 14, 2023). The note had provided that "all unpaid principal, together with any then unpaid and accrued

[3] *See* A1703.1210:17-A1705.1212:10, A1706.1213:17-A1707.1214:17, A1708.1215:22-A1710.1217:1; A1403.910:18-A1406.913:14.

interest and other amounts payable hereunder, ***shall be due and payable on the earlier of*** . . . the 'Maturity Date' or . . . upon or after the occurrence of an Event of Default." *Id.* at *1-2 (emphasis added). The court found that the defendant's failure to repay upon maturity was in fact a breach. *Id*. The Notes here have nearly identical language that they "***shall be payable on the earlier of***" the Maturity Date, a Sale, or Event of Default.

Particularly persuasive is a Nevada court decision that held that convertible note language similar to that of the Notes gave the issuer the right to repay years after maturity, over the noteholder's objection. In *Toptal, LLC v. Grosz*, the court considered whether a company had breached that note by repaying principal-plus-interest after the maturity date. 2023 WL 9503570, at *1, *6 (D. Nev. Oct. 11, 2023). The note provided: "Unless earlier converted [due to a conversion event,] the principal and accrued interest shall be due and payable by the Company on demand by the Lender at any time after the Maturity Date." *Id.* at *5. The court found that the company "did not breach by attempting to pay [noteholder] an amount equal to the principal and accrued interest on March 26, 2020, nearly six years after the Note's Maturity Date." *Id.* The court so held even though the note in that case, unlike in this one, had an "on demand" limitation and the noteholder had not made such a demand. *See id*. In considering the terms of the note, the court stated:

> [M]aturity dates generally rank as among the most staid of contract terms. While one can muster adventurous arguments and debate about all sorts of other terms, what is there to contest about the typical maturity date in a promissory note? Before the date, there is merely an obligation. On or after the date, principal and any interest are owed.

Id. at *6 (citation omitted).

Thus, here, the trial court correctly found that "facially," the Notes "required repayment at maturity." (Op.4.) For the reasons set forth below, "shall be payable" is not "fairly susceptible of" the Noteholders' suggested interpretation. *GMG*, 36 A.3d at 780 (citation omitted).

First, the clause "shall be payable" by Vistar does not grant the payee any discretion. Other provisions in the Note solidify that plain language conclusion. The Notes explicitly could not be "prepaid"—*i.e.*, paid before the maturity date—without prior written consent of the noteholder. (A2511.) This clause strongly supports Vistar's reading under two well-accepted contract interpretation principles: (1) it shows that where Plaintiffs wanted to condition repayment on their consent, they knew how to ask for it, *MicroStrategy Inc. v. Acacia Rsch. Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010) ("The use of different language in the two sections shows the parties knew how to [address an issue] when that was their intent."); and (2) it would be superfluous to say the Notes could not be "pre-paid" before maturity without consent of the Noteholders if the Notes could never be "paid," even at or

after maturity, without consent, *see, e.g.*, *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement . . . ."), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE); *Toptal*, 2023 WL 9503570, at *6 (rejecting argument that note prohibited maker from repaying note after maturity where provision relied upon "is a prohibition on 'prepayment'—not 'repayment'—and it simply stands for the uncontested fact that [the company] was prohibited from paying [noteholder] the principal and accrued interest prior to when it became due and payable on the Maturity Date").

Seeking a contractual hook for their interpretation, Plaintiffs argue that failure to pay at maturity was not an enumerated "Event of Default" under the Notes. (OB.22.) This is a red herring. The Event of Default clause operates to *accelerate* the Notes; in an Event of Default, the Notes "shall be payable." (A2510-11.) Thus, if failure to repay at maturity was specified as an Event of Default, the "remedy" to the Noteholders and the obligation imposed upon Vistar because of that "default" would remain the same: repayment of the Notes at maturity. Accordingly, that failure to repay is not an Event of Default is probative of nothing.

Second, the Notes do not provide each Noteholder a unilateral right to extend the maturity date. To the contrary, each Note states that its terms may be modified or amended only by written instrument executed by Vistar and the Noteholders.

(Op.24-25; A2511.) The parties used this clause—twice—to amend the maturity date.

In the face of this textual challenge, the Noteholders argued earlier in this litigation (later abandoned after the trial court was presented with the common law origins and purpose of the clause) that the following clause allowed them to extend the maturity date indefinitely, at their discretion, without notice to Vistar:

> The Maker hereby waives presentment, demand, protest and notices of every kind and assents to any permitted extension of the time of payment and to the addition or release of any other party primarily or secondarily liable hereunder.

(A2512.) The trial court properly rejected this argument, as this boilerplate,[4] common-law clause applies to "permitted" extensions only, and numerous court decisions squarely reject the Noteholders' earlier position. (Op.24, 45-47; A1846-47 (collecting cases).)

Third, the Notes' plain language provides that conversion rights end at maturity, at which point the Notes—like debt instruments generally—become payable. The Repayment Clause starts with defining the maturity date. (A2510.) It then explains that "[s]ubject to the provisions related to the conversion of this

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[4] *See, e.g.*, Joseph W. Bartlett, *Equity Finance: Venture Capital, Buyouts, Restructurings and Reorganizations* 1229 (2d ed. 2020) (convertible note template); A1361.868:9-16, A1414.921:22-A1415.922:19.

Note,"—that is, *if* or *to the extent that* the Notes have not already converted due to a Qualified Financing or Non-Qualified Financing, as set forth in the paragraphs that follow—the Notes shall be payable at maturity. The trial court agreed, holding that the Notes' "most obvious meaning" is that "Plaintiffs had conversion rights ***before*** the maturity date, if certain occurrences in fact happened." (Op.6.)

This reading gives meaning to the entire contract: the point of convertible notes is that they may convert to equity if certain triggers occur, and if they do not, the notes mature and become payable. (Op.1.) To find otherwise would be inconsistent with expectations in executing a convertible debt instrument. (A1771.1278:13-A1779.1285:6; A1782.1289:23-A1784.1291:6.)

Like the trial court, other courts consistently have found that once a convertible note reaches maturity, there is no right to convert and the obligation is repayment of principal-plus-interest. *See Prime Victor Int'l Ltd. v. Simulacra Corp.*, 682 F.Supp.3d 428, 445-46 (D. Del. 2023) (finding "conversion right ceased when the Maturity Date passed"), *appeal dismissed*, 2024 WL 958377 (3d Cir. Jan. 12, 2024); *Coll. Health & Inv., L.P. v. Diamondhead Casino Corp.*, 2015 WL 5138093, at *3 (Del. Super. Ct. July 2, 2015). Plaintiffs have no right to seek post-maturity conversion into equity because "the clear common sense reading of the [Notes] reflect that the conversion right ends . . . at the date of maturity." *Coll. Health*, 2015 WL 5138093, at *3.

In the face of that caselaw, Plaintiffs, for the first time in this six-year litigation, now claim that—***as a matter of law***—the Noteholders had post-maturity conversion rights. Plaintiffs argued throughout this case that if they could get to trial and present extrinsic evidence, the Court of Chancery could look beyond the text and perceive the "real" meaning of this contract. Now, in an effort to seek a standard of review that would enable them to avoid the trial court's detailed analysis of that evidence, they claim entitlement to judgment as a matter of law. Plaintiffs did not argue this issue at summary judgment or otherwise below and it does not appear to have been preserved for appeal. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . ."); *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377-78 (Del. 2022).

Plaintiffs make this argument, moreover, without identifying any case construing similar contract terms in their favor. To succeed as a matter of law—without evaluation of extrinsic evidence—Plaintiffs must prove as a legal matter that "shall be payable" actually means "shall not be payable." Of course, that is not the case.

The Notes establish Vistar's right to repay following the Final Maturity Date. The Court could affirm on that basis alone and thereby enforce the Notes as written.

2. The Extrinsic Evidence Presented At Trial Supported The Most Obvious Reading Of The Notes: When No Conversion Event Occurred, At Maturity Vistar's Only Obligation Was Repayment And The Noteholders' Only Right Was To Be Repaid.

The trial court afforded Plaintiffs every opportunity to prove their case, including sitting for a one-week trial. The trial evidence—over 1,050 exhibits and testimony from fifteen live witnesses and three video-depositions—supported Vistar's plain language reading of the Notes. For the Noteholders to prevail at trial, they needed to prove either that the Notes provided them with the right to extend maturity *or* the right for post-maturity conversion *and* that the Noteholders properly rejected repayment. The evidence showed that none of these alleged "rights" were bargained for or secured. Plaintiffs' general investment expectations and hindsight bias following Vistar's unusual but foreseeable success cannot alter the contract's plain terms.

The trial court's ultimate finding that Plaintiffs' interpretation "is not contractual, . . . reading the contract as a whole and in light of the extrinsic evidence," (Op.6-7), should be granted substantial deference. Indeed, it appears that Plaintiffs—who urge this Court to apply *de novo* review because they "do not challenge the trial court's factual findings"—have *waived* any challenge to the trial court's findings that are based on that extrinsic evidence. (OB.7.)

i. Plaintiffs Do Not Dispute That The Extrinsic Evidence Did Not Support A Unilateral Right To Extend Maturity.

The Memorandum Opinion reflects extensive factfinding regarding the negotiations between the Noteholders (mainly Valhalla) and Vistar that led to the Repayment Clause. (Op.13-25.) Vistar initially offered automatic conversion at maturity in the absence of a conversion event. (Op.18-19.) Valhalla rejected that, stating that it did "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." (Op.18-19; A2477-78.) Although "Vistar responded, in general, positively to Valhalla's first counter-offer," Vistar rejected Valhalla's proposal and countered. (Op.41, 44.) "Under Vistar's counter-offer draft, significantly, maturity could not be extended unilaterally by the holder; if at maturity the note had not converted to equity, the holder had to make a choice to either take common stock or cash." (Op.42.) Valhalla rejected Vistar's second proposal and provided "its own draft" of the Notes that, significantly, "omitt[ed] the unilateral extension right it had sought in its first counter-offer." (Op.43.)

Given its findings on the negotiation history, the trial court declined to read a unilateral extension right into Plaintiffs' own draft. (Op.43.) Accordingly, the Notes matured on March 31, 2016. (Op.27.) Plaintiffs do not challenge this finding on appeal. (OB.26.) As a result, to secure the relief they seek, they must prove a post-maturity right to conversion.

ii. The Trial Court Correctly Analyzed The Extrinsic Evidence And Found That Conversion Rights End At Maturity, When The Debt Instrument Becomes Payable.

Whether conversion ended at maturity was argued throughout this case, which centered on Vistar's repayment rights. (*Compare* OB.26, *with, e.g.*, A1964-68.) The trial court correctly determined that "[t]he parties negotiated and bargained for a suite of rights (or in some cases, Plaintiffs accepted the suite of rights presented to them), that included conversion to Vistar equity in certain cases ***prior to*** maturity." (Op.45-46 (emphasis added).) The trial court's findings are supported by the record and should be afforded deference.

a. The Negotiation History Confirms The Parties' Intent For Conversion Rights To End At Maturity.

The entire course of Valhalla's negotiation of the Notes confirms the centrality of the maturity date. In fact, Valhalla had sought the right to extend the maturity date ***because*** the right to conversion ended at maturity. (A604.111:23-A605.112:3 ("[T]o maximize our returns through the conversion of equity rights, we would want an extension at our discretion to say that, okay, take some more time, have more momentum on the maturity side of things.").)

In response, Vistar circulated a draft again specifying that conversion rights ended at maturity and that the Noteholders then had a binary choice: automatic conversion or, upon 90-days' notice, repayment.

> If a Non-Qualified Financing has occurred but the Notes have not yet been converted, then at maturity the outstanding principal and interest under this Note will convert into the Non-Qualified Financing Securities as defined below. If a Non-Qualified Financing has not occurred, then at maturity the outstanding principal and interest under this Note will, at the discretion of the Holder, be repaid in full or ~~At the maturity date the Note will~~ convert into shares of common stock at a price per share equal to a pre-money valuation equal to $6.0 million. If the Holder elects to be repaid in full, the Holder must provide written notice to the Maker by July 1, 2014.

(Op.19; B505.)

Valhalla then "cleaned up" the Notes as follows:

> Subject to the provisions related to the conversion of this Note, ~~If a Non-Qualified Financing has occurred but the Notes have not yet been converted, then at maturity~~ the outstanding principal ~~and interest under~~balance of this Note~~ will convert into the Non-Qualified Financing Securities as defined below. If a Non-Qualified Financing has not occurred, then at maturity the outstanding principal and interest under this Note will, at the discretion of the Holder, be repaid in full or convert into shares of common stock at a price per share equal to a pre-money valuation equal to $6.0 million. If the Holder elects to be repaid in full, the Holder must provide written notice to the Maker by July 1, 2014.~~, 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).

(Op.20; A2503.) As Valhalla testified at trial, "basically, you know, if you look in the blue, the 'Subject to the provisions related to the conversion of [the] Note.' Our attempt was to remove all the redundancies, the complications that had crept in, and

just, you know, make it very easy to read by referring to those sections, conversion of the note, in the bottom." (A691.198:4-14.) By replacing the "redundant" conversion language (which appears later in the Notes) with "subject to," Valhalla confirmed that, unless the Notes were converted per the terms below, they would be payable at maturity.

By its own admission, Valhalla "just did a cleanup, no renegotiation or anything." (A620.127:14-22; A656.163:13-19.) Thus, contrary to the Noteholders' position on appeal, the extrinsic evidence proved this language—"subject to"—was not intended to impose a new obligation involving conversion rights surviving maturity, or to convey that conversion trumps repayment after maturity. Furthermore, because Valhalla testified that it was responsible for drafting the Repayment Clause, any ambiguity should be construed against them. (Op.47-48 (finding "it is clear that the ambiguity arises from language provided solely by Valhalla")); *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010).

b. The Parties' Course Of Conduct—Including Two Extensions Of The Maturity Date—Evidences Their Pre-Dispute Understanding That Conversion Rights Ended At Maturity.

The Parties' course of conduct prior to this dispute supports that they understood that conversion rights end at maturity. For example, the first extension

was prompted by an email from Valhalla stating that the Notes "expired" and suggesting that Vistar "may want to extend it by say a year." (B695; Op.25-26.)

When Vistar circulated the first and second extension agreements, no Plaintiff responded that an extension was unnecessary to maintain their rights to conversion; instead, the Noteholders executed the agreements to "preserve the upside participation . . . until the next negotiated maturity date." (A1777.1284:20-A1778.1285:6; *see also* A638.145:6-A640.147:4 ("[I]t was a good thing for Valhalla to exercise its discretion, extend [maturity], so that the company would hit its milestone and raise an equity event."); B179.132:3-10 ("[W]e felt at Valhalla that we needed to extend to" give Vistar "more runway to do the qualified financing event on a big exit so that we could make money through a conversion event."). This conduct and these statements confirm that the Parties understood conversion rights ended at maturity. *See ArchKey Intermediate Holdings Inc. v. Mona*, 302 A.3d 975, 988 (Del. Ch. 2023) ("[A]ny course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." (citations omitted)); *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1119 (Del. Ch.) (rejecting party's position because its course of "conduct reveals an understanding of the" contractual terms "that is at odds with the one it

advances here"), *aff'd*, 45 A.3d 148 (Del. 2012) (TABLE), *and aff'd*, 68 A.3d 1208 (Del. 2012).[5]

c. That The Notes Did Not Provide An Indefinite Option To Convert Comports With Economic Sense.

The trial court's result is also the economically sensible one. The reading now suggested by the Noteholders would give them the ability to hold the Notes indefinitely, in perpetuity. The *Toptal* court rejected that very argument for policy reasons and as a matter of logic: "[O]ptions in perpetuity" are "about as common as polar bear sightings in Death Valley." 2023 WL 9503570, at *3 (citation omitted). Such an option would present companies with tremendous difficulty in managing cash flow (to account for a potential repayment demand) and through capitalization table instability that could (and here, did) interfere with desired business transactions.

Thus, as the trial court found: "[i]t is not unreasonable for the right to conversion to have had a cutoff date." (Op.46.) *Accord Toptal*, 2023 WL 9503570,

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[5] As the trial court recognized, Plaintiffs' citations to a handful of post-maturity statements to two out of fifteen Noteholders (neither of whom recalled reading the Note prior to executing it, *see supra* n.2) do not constitute a "post-maturity course of performance" and cannot overcome the overwhelming evidence that the Parties understood that maturity would end their conversion rights. (OB.36-38; *see also* JOp.15-16); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("[U]nless extrinsic evidence can speak to the intent of *all* parties to a contract, it provides an incomplete guide with which to interpret contractual language.").

at *4 (recognizing "that unless a contract 'unequivocally demonstrate[s] the parties' intent' to grant a perpetual option, a contract should not be read to bind the parties forever" (alteration in original) (citation omitted)). The Noteholders have not cited any case to the contrary.

Correspondingly, it was reasonable for the Noteholders to have negotiated a right to repayment. (A582.89:7-11; A726.233:24-A727.234:3; A1778.128:17-A1779.1286:1-3; A1791.1298:17-A1792.1299:7. A1793.1300:18-19; B763-64.) When the Parties executed the Notes, they presumed Vistar would be like any other risky startup: there was a high likelihood it would fail or, if successful, it would need another cash infusion, resulting in a conversion event. (A1094.601:24-A1095.602:12; A1780.1287:1-16; B713 (Great Oaks noting that "99% of startups" "need[] to beg for funding"); A1347.854:24-855:7 (Ozen testifying that in 2012, Vistar "thought we would operate like a normal startup that needs more capital").)

Given that context, the Notes reflect a rational weighing of potential economic outcomes: The Noteholders had upside participation in the Company until the maturity date. (A1774.1281:9-22; A1775.1283:13-17.) But a startup investment that got to a maturity date with no conversion event presumably was in trouble, and such an investor may prefer to cut its losses and put its money to work elsewhere. (A604.111:11-A605.112:3; A1374.881:3-7 (Ozen testifying "if someone had come up to me in 2012 and said, you're not going to be able to raise a qualified financing,

that would imply you're not succeeding and you wouldn't be able to raise more money").)

As it turned out, that trade-off did not result in maximum return for Plaintiffs. Nonetheless, a successful company repaying a note at maturity is not evidence that, when entered into, the deal lacked economic sense and therefore the contract's "most obvious interpretation" must be wrong. *See, e.g.*, *Catalyst Advisors Invs. Glob. Inc. v. Catalyst Advisors, L.P.*, 2024 WL 1329974, at *14 (Del. Super. Ct. Mar. 28, 2024) ("The Court cannot revise contract terms after the fact, especially when the parties are sophisticated and willingly negotiated and accepted the terms of the [contract].").

d. Neither The Noteholders' General Investment Expectations Nor Their Hindsight Bias Justifies Granting Them A Right They Did Not Bargain For.

The Noteholders rely on their own self-serving testimony to claim that the result in this case was contrary to their general expectations. (OB.34-36, 38-40.) However, the trial court appropriately found that the Notes are "bespoke": "Convertible promissory notes, as demonstrated by the extrinsic evidence, are not uniform and are subject to negotiation." (Op.40.) Thus, while it may be true that Plaintiffs generally believed that a convertible note investment in an ultimately successful company means they would become equity-holders, that is not persuasive as to the terms of this specific Note, which many Plaintiffs could not even recall reading before investing. *Cheswold*, 188 A.3d at 820 (noting that extrinsic evidence

and "background facts cannot be used to alter the language chosen by the parties within the four corners of their agreement"). Their "testi[mony] 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" Notes, is simply hindsight bias. (Op.44.) Perhaps Plaintiffs' testimony that they thought they could continue to hold the Notes stems from confusion related to another investment vehicle called a Simple Agreement for Future Equity, or SAFE, which became common more recently. (Op.15-16 n.63.) Unlike convertible notes, SAFEs are not debt and do not have a maturity date. (A903.410:24-A905.412:14; A1784.1291:7-A1785.1292:16; A735.242:5-A736.243:23 (Horwitz testifying that his understanding was "that this was a conventional, safe, like, note").) In any event, as the trial court aptly found, "that is not, in [its] view, a ground to rewrite the contract." (Op.44.)

iii. The Trial Court Correctly Found That The Extrinsic Evidence Did Not Support Finding That "Shall Be Payable" Meant Plaintiffs Had Discretion With Respect To Repayment.

Another condition precedent to find in favor of the Noteholders is that they had a right to reject Vistar's repayment. As the trial court correctly found, such assertion has no basis in the extrinsic evidence. (Op.45-46.)

During negotiations, a limited repayment right was inserted by Vistar at Valhalla's request. (Op.18-19; A2477-78.) Vistar did not agree to an indefinite right of repayment at the Noteholders' discretion (as requested by Valhalla) but offered

instead repayment at maturity if the noteholder provided 90-days' notice, otherwise the Notes would automatically convert. (Op.19; B493; B505.) Valhalla refused that offer and edited the draft to provide for repayment at maturity. (Op.20, 43; A2503.) Thus, while the drafting history shows that discretionary repayment was discussed, Valhalla did not pursue that language in the final Notes. *Kuhn*, 990 A.2d at 397 (construing contract against party that unilaterally deleted clause it then sought to enforce).

The hundreds of convertible notes Plaintiffs produced in discovery (relating to their other, non-Vistar investments) confirm that when Plaintiffs actually secured the right to be repaid only at their "demand" or at their "discretion," they used clear and specific language to reflect that and they knew what language would be necessary. (*See, e.g.*, JX-62-0001-02 (Eniac note providing that "at any time on or after the Maturity Date, Lender, ***at its sole discretion***, may demand payment of" the note (emphasis added)); A1068.575:23-A1070.577:15; JX-308-0001 (DFJ Mercury note providing "[u]nless this Note is earlier converted in accordance with the provisions hereof, all unpaid principal, together with any then accrued but unpaid interest and any other amounts payable hereunder, shall be due and payable . . . ***fifteen days from the date of a demand by the Holder***, which demand may not be made before January 2, 2014" (emphasis added).) That language was not negotiated for here and its absence is compelling evidence.

iv. The Trial Court's Opinion Is Not Internally Inconsistent.

Plaintiffs' brief suggests there are internal inconsistencies in the Memorandum Opinion that warrant reversal. Not so. The trial court was clear and consistent that:

- "The [Notes] did not provide Plaintiffs a unilateral right to extend the maturity date." (Op.4.)

- "Plaintiffs had conversion rights before the maturity date, if certain occurrences in fact happened. Those occurrences did not happen . . . , and the [Notes] became payable. Plaintiffs are entitled to payment of the face amount together with interest, which is the result they bargained for." (Op.6.)

- "To read in a unilateral right of Plaintiffs to extend at maturity, based on the language present in the [Notes], is supported neither by the express language of the contract nor the extrinsic evidence." (Op.45; *see also* Op.6, 44, 48.)

A month later, in the Letter Opinion, the trial court "adopt[ed] all the facts found in the Memorandum Opinion" and reminded the Parties that the court already had concluded "as a matter of contract" that the Noteholders had not been provided the "unilateral right to extend maturity." (JOp.2-3.) The court again noted that Plaintiffs "seek a finding that the notes remained viable until converted to equity," but could find no basis to so conclude. (JOp.15.)

Plaintiffs' brief cobbles together various phrases from different places in the Memorandum Opinion, the Letter Opinion, and even the colloquy during post-trial argument in asserting that the trial court's ruling "conflicts with the trial court's

separate ruling that the Investors were not required to accept repayment." (OB.5.) If one were to read Plaintiffs' brief only, one might even think Plaintiffs had prevailed at trial on their claims. This is, of course, not the case. The mysterious "separate ruling" is simply the trial court's rejection of Vistar's counterclaim for damages, which conflicted with nothing. In rejecting Vistar's counterclaim, the court first identified causation problems with the alleged damages. (Op.52.) The court then noted that "I found . . . that the language at issue was ambiguous; it was not a breach of contract to contest its meaning." (Op.52.) Thus, the court did not consider it a breach that the Noteholders filed suit to seek judicial review of the Repayment Clause provision that the court itself found was ambiguous and required a trial to resolve. (Op.6, 51-52.) That conclusion did not undermine the trial court's principal holding: "shall be payable" at maturity means that the Notes were in fact payable by Vistar at that time and the Noteholders had no right to unilaterally extend the maturity date.

II. ALTERNATIVELY, THE COURT SHOULD AFFIRM BECAUSE THE NOTES' PLAIN LANGUAGE SUPPORTS THE TRIAL COURT'S HOLDING.

A. Question Presented

Whether the Court of Chancery's opinion should be affirmed because the plain language of the Notes is not fairly susceptible to Appellants' reading. (*See, e.g.*, A474 ¶ 82.)

B. Scope Of Review

This Court reviews "questions of contract interpretation *de novo*." *GMG*, 36 A.3d at 780.

C. Merits Of The Argument

In the alternative, the Court can affirm because the plain language of the Repayment Clause does not provide for the relief the Noteholders seek. As discussed above in Section I.C.1, the Repayment Clause provides that the Notes "shall be payable" at maturity. (A2510.) The term "payable" is not ambiguous; it means "that is to be paid." *Payable*, BLACK'S LAW DICTIONARY (12th ed. 2024).

Nothing in the Repayment Clause or elsewhere in the Notes gives the Noteholders an express (or reasonably inferred) option to decline post-maturity repayment and hold the Notes open indefinitely in hopes of conversion. While Vistar needed Noteholder consent to *prepay* the Notes before the maturity date, it did not need Noteholder consent to *repay* the Notes at any point after the maturity date.

(A2510-11.) Thus, regardless of Plaintiffs' "Cutoff Date Holding" arguments, the Notes unambiguously provide that Vistar could repay the Notes after maturity.

Because the Notes were payable at maturity and Vistar tendered repayment both after maturity and prior to any conversion event, this Court can affirm the trial court's holding based on the Notes' plain language.

CONCLUSION

Vistar respectfully requests that the Court affirm the trial court's decision.

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