EFiled: May 16 2025 02:01PM EDT
Filing ID 76286646
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

APPELLANTS' REPLY BRIEF

K&L GATES LLP
Steven L. Caponi (#3484)
Matthew B. Goeller (#6283)
600 N. King Street, Suite 901
Wilmington, DE 19801
(302) 416-7000

Attorneys for Plaintiffs Below, Appellants

POTTER ANDERSON & CORROON LLP
Kevin R. Shannon (#3137)
Daniel M. Rusk, IV (#6323)
Heather S. Townsend (#7274)
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Plaintiffs Below, Appellants

Dated: May 16, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

This appeal presents a single question of contract interpretation.[1] The Notes provided that principal and interest "shall be *payable*" (rather than "*due and* payable") at Maturity. Vistar did not attempt to pay the Notes at Maturity and no Investor requested repayment. Thus, the Notes remained "outstanding" after Maturity -- and the unqualified contract language provided that all "outstanding" principal and interest "automatically" converts to equity upon a Qualified Financing. In its Cutoff Date Holding, however, the trial court ruled the Investors' conversion rights ended at Maturity.

This appeal challenges only the Cutoff Date Holding. As explained in Appellants' Opening Brief, the Cutoff Date Holding should be reversed for several independent reasons, including that the trial court conceded its interpretation of the ambiguous language was inconsistent with the parties' basic business relationship. The Cutoff Date Holding also was contrary to the language of the Notes and the undisputed extrinsic evidence, including Vistar's and its principals' contemporaneous communications and actions.

In its Answering Brief ("AB"), Vistar largely fails to address Plaintiffs' arguments and instead reverts to many of the same flawed arguments it raised below.

---

[1] Unless otherwise noted, capitalized terms shall have the meaning ascribed to them in Appellants' Opening Brief ("OB").

Vistar's omissions are both striking and fatal. For example, Vistar fails to address both the trial court's acknowledgement that the Cutoff Date Holding conflicts with the parties' business relationship and the controlling Delaware law on this point (*e.g.*, *Chicago Bridge*).

Vistar also ignores its own ***post-Maturity*** communications with the Investors acknowledging that the Notes remained outstanding and were expected to convert. Nor does Vistar address its principals' testimony that they attempted to repay the Notes ***after Maturity*** because they were concerned about dilution when the Notes converted. This undisputed evidence is directly contrary to the Cutoff Date Holding.

It should be a very rare case in which a court interprets an ambiguous contract in a manner that admittedly contradicts the parties' business relationship. In such a case, the trial court must be presented with compelling evidence that the parties intended this unusual result. Here, the undisputed evidence was to the contrary -- and demonstrated that all parties understood the Investors' conversion rights continued after Maturity if the Notes remained outstanding.

As explained herein (and in the Opening Brief), there are other reasons to reverse the Cutoff Date Holding, but Vistar's failure even to address the points raised above alone is sufficient to require reversal. Plaintiffs respectfully request that the Cutoff Date Holding be reversed.

ARGUMENT

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

Vistar agrees that the parties' dispute largely centered on what was meant by the phrase "shall be payable." AB.23. It is important, however, to correctly identify the contract dispute that was presented to the trial court and is now before this Court.

Vistar asserts its "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." AB.23-24. But there was no question that the Notes were "payable" upon Maturity -- the dispute centered on what that language meant regarding the parties' rights and obligations when the Notes remained outstanding after Maturity.

Following trial, the Vice Chancellor correctly determined that the Investors could continue to hold the Notes after Maturity, and that they could reject Vistar's attempt at repayment such that the Notes remained outstanding. OB.22-24. *No party appealed those rulings.* The only issue before this Court relates to the separate Cutoff Date Holding, a declaration which no party requested, finds no support in the contract language or the extrinsic evidence, is admittedly contrary to the parties' business relationship, and defies economic sense. That holding should be reversed.

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

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

The trial court repeatedly held the Notes were ambiguous, and therefore, it should consider extrinsic evidence to determine the parties' intentions. OB.21-22.[2] Because that extrinsic evidence contradicted the Cutoff Date Holding, Vistar now argues for the ***fourth time*** that the Notes are unambiguous, and therefore, this Court should reverse the trial court's repeated findings of ambiguity and instead affirm based on the plain language. AB.44-45. Vistar's unusual argument -- that this Court should affirm the Cutoff Date Holding based on an argument the trial court repeatedly rejected -- fails for numerous reasons.

First, Vistar failed to explain ***why*** the trial court's three previous rulings on ambiguity were incorrect. A214; A451; Op.34, 37-38. Nor does Vistar cite any authority to support its argument. Vistar's failure to address the trial court's reasoning, much less explain why it was wrong, is fatal.

Second, Vistar's argument is premised on the contention that "the Notes unambiguously provide that Vistar could repay the Notes after [M]aturity." AB.44-

[2] The trial court's ambiguity finding is reasonable given the Notes, although stating they "shall be payable," do not clearly address the parties' rights and obligations upon Maturity. OB.21.

45. But the trial court ***rejected*** that interpretation. Op.52 (holding the Notes "do[] not state an obligation on the part of the [Investors] to accept repayment at any particular time or in any particular way"); *see also* OB.23-24. Thus, Vistar contends that the only reasonable interpretation is one the trial court rejected. This meritless argument highlights that, to support the Cutoff Date Holding, Vistar is relegated to arguing the trial court's other rulings were wrong.

Third, although asserting that several of the trial court's rulings were wrong, Vistar "did not appeal th[ose] ruling[s]. Thus, [they are] the law of the case." *Fisher v. State*, 959 A.2d 27 (TABLE), 2008 WL 4216365, at *1 (Del. Sept. 16, 2008). Vistar concedes the trial court's determination that Plaintiffs were not required to accept repayment after Maturity was made in connection with dismissing Vistar's counterclaim -- a ruling that Vistar admittedly did not cross-appeal. AB.19. This Court should not entertain Vistar's attempts to challenge rulings it did not cross-appeal. *See Barker v. Huang*, 610 A.2d 1341, 1351 n.7 (Del. 1992) ("we do not reach the issue due to ICA's failure to cross-appeal").

Finally, contrary to Vistar's assertion, Plaintiffs do not seek judgment as a matter of law based solely on the contract language. AB.20, 30. Plaintiffs' argument remains that the Notes are ambiguous, the Court must consider the extrinsic evidence, and the extrinsic evidence resolves any ambiguity in the Investors' favor. OB.6, 21-22, 33-34; A2027 ("We absolutely submit that the Court can and should

interpret the notes in plaintiff's favor, clear up the ambiguity by reference to the overwhelming evidence in the record."). The Investors appropriately rely upon (rather than challenge) the trial court's factual findings relating to the extrinsic evidence, which support their interpretation of the Notes and require reversal of the Cutoff Date Holding.[3] OB.33-42.

2. 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

The trial court held that "[t]he most reasonable way to interpret 'shall be payable' is that Plaintiffs had the right to be repaid (with interest)," but "the language, even as Vistar interprets it, does not state an obligation on the part of the holder of the [Notes] to accept repayment at any particular time or in any particular way." Op.45, 52. The trial court's ruling was consistent with the declaration sought by Plaintiffs (that they could continue to hold the Notes after Maturity) -- and rejected Vistar's request for a declaration that it had the right to tender repayment at any time after Maturity and thereby "fully extinguish[]" the Notes. OB.22-24; A477; A385-86.

[3] Vistar's argument appears based on Plaintiffs' recognition that the Supreme Court reviews questions of contract interpretation *de novo*. OB.19. Plaintiffs acknowledge that factual determinations are reviewed for clear error (AB.21), but Plaintiffs do not seek to disturb any factual findings.

The trial court's interpretation was supported by the contract language: (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; OB.22. The interpretation was further supported by the extrinsic evidence, including that, for nearly a year after Maturity, Vistar did not attempt to repay the Notes, no Investor requested repayment, and the parties continued to operate as if a conversion event was forthcoming. Op.27-29.

Pursuant to the trial court's rulings, the Investors could continue to hold the Notes after Maturity such that the principal and interest remained "outstanding." OB.23. Vistar does not dispute this ruling. Nor does Vistar even address the unqualified contract language providing 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 (emphasis added). That language is dispositive.

Vistar attempts to avoid the consequences of the above quoted rulings by misstating them so that they are the ***opposite*** of the trial court's actual holdings. Vistar contends that: (i) "[t]he Court of Chancery properly held that 'shall be payable' upon maturity means that unless the Notes had converted, Vistar had a right to repay" (AB.4); (ii) "the clause 'shall be payable' by Vistar does not grant the payee any discretion" (AB.26); and (iii) the trial court did not find that the

"Noteholders…had a right to reject Vistar's repayment." AB.40. Vistar, however, cannot prevail on appeal by rewriting the Opinion.

Vistar's arguments are meritless in any event. For example, the Note's one-sentence boilerplate limitation on prepayment does not even mention Maturity -- and Vistar ignores that the Notes were not "due" upon Maturity. AB.26-27 (citing A2511). The trial court rightfully gave this argument no weight -- correctly holding the Investors were not required to accept Vistar's purported repayment after Maturity. Op.52.

Moreover, unlike the cases Vistar cites, the Notes were not "due and payable" -- only "payable" -- upon Maturity, and Vistar made no attempt to repay the Notes until almost a year after the Maturity Date. OB.13-14.[4] Thus, Vistar's assertion that the principal and interest were "required to be repaid upon [M]aturity" is both wrong and contrary to its undisputed conduct. AB.10.

Faced with the fact that it made no attempt to pay the Notes until almost a year after Maturity, Vistar suggests only that one of its principals (Ozen) was "distracted." AB.13-14. Nonsense -- the same principal repeatedly acknowledged

[4] Vistar attempts to downplay that the failure to repay the Notes upon Maturity was not an "Event of Default." AB.27. But again, the omission of such standard language, which Vistar fails to explain, highlights that the Notes were not actually due at Maturity.

post-Maturity that the Notes were still expected to convert. *See, e.g.*, Op.28-30; A2559; A2556.

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

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

No party requested a declaration that the Investors' conversion rights cut-off at Maturity. OB.25-27. The Investors 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. Conversely, 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; A385-86.

In its Answering Brief (at 33), Vistar vaguely asserts that "[w]hether conversion ended at maturity was argued throughout this case, which centered on Vistar's repayment rights."[5] But that misses the point (as explained above) -- Vistar actually sought a declaration that the Investors were required to accept its purported repayment almost a year after Maturity so that the Notes were "extinguished," which

[5] The only record cite for this assertion is A1964-68 (Vistar's Post-Trial Answering Brief), but Vistar does not dispute it never requested such a declaration.

the trial court rejected. Op.52. It remains undisputed that, in rendering the Cutoff Date Holding, the trial court issued a declaration that no party requested.

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

Plaintiffs identified three primary reasons why the Cutoff Date Holding was not supported by the language of the Notes: (i) nothing in the Notes states that conversion rights end at Maturity if the principal and interest remain "outstanding"; (ii) the Notes provide for "automatic[]" conversion of "outstanding principal and interest" upon a Qualified Financing, and the Cutoff Date Holding renders these automatic conversion rights a nullity; and (iii) the structure of the "shall be payable" clause subordinates repayment rights to conversion rights. OB.27-30. Vistar does not address the first two points in its Answering Brief, and any arguments are waived.[6] Even if not waived, Vistar cannot credibly dispute the explicit contract language relied upon by Plaintiffs.

As to the Notes' structure, Vistar argues the introductory language -- "[s]ubject to the provisions related to the conversion of this Note" -- must be read as "*if* or *to the extent that* the Notes have not already converted." AB.28-29 (emphasis in original). But that is not what the Notes say, and Vistar does not offer any authority to support its interpretation of "subject to." And Vistar fails to address *any*

[6] *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

of the cases cited by Plaintiffs, which are inconsistent with Vistar's proposed interpretation. OB.29-30 (citing cases).

Rather than addressing the contract language, Vistar misleadingly cites inapposite cases involving materially different language. For example, Vistar relies on *Nol v. Vetz Inc.* notwithstanding it involved a note providing that "***[t]o the extent not previously converted***…, all unpaid principal … ***shall be due and payable*** on the earlier of" the maturity date or an event of default. 2023 WL 7517005, at *1 (Del. Super. Nov. 14, 2023) (emphasis added). In stark contrast to the Notes, *Volz* cabined conversion rights "to the extent not previously converted" before maturity and expressly made the note "due and payable" upon maturity.

Equally meritless is Vistar's reliance (AB.25) on *Toptal, LLC v. Grosz,* in which the note provided that "***[u]nless earlier converted into Conversion Shares…***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." 2023 WL 9503570, at *5 (D. Nev. Oct. 11, 2023) (emphases added). The note further provided that the noteholder could convert the note "[a]t any time on or after the fifteenth (15th) day prior to the Maturity Date, if the Next Equity Financing has not occurred by that time." *Id.* at *2. Again, the Notes contain no such language.

Vistar's other cases also contain materially different language. *See, e.g.*, *Prime Victor Int'l Ltd. v. Simulacra Corp.* 682 F. Supp. 3d 428, 439, 444 (D. Del.

2023) (providing "***[i]f not repaid or converted earlier***, the Outstanding Balance shall be immediately due and payable on the Maturity Date" and "the parties agreed only '[i]f there is a Qualified Financing before the termination of this Note ... the Outstanding Balance shall be automatically converted into Conversion Shares'") (emphasis added); *Coll. Health & Inv., L.P. v. Diamondhead Casino Corp.*, 2015 WL 5138093, at *2-3 (Del. Super. July 2, 2015) (referencing the company's ability to convert "prior to the Maturity Date," and a document incorporated by reference into note stating that the note would be due and payable at maturity "***unless previously converted***") (emphasis added).

Remarkably, Vistar does not acknowledge (much less address) the critical differences in the contract language. Rather than supporting Vistar's argument, these cases highlight that these sophisticated parties could have included language stating that the Notes were "due and payable" and that conversion rights terminated at Maturity, but they did not.

c. 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

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, because the Investors rejected

Vistar's repayment attempt, the Notes remained "outstanding." The Notes therefore automatically converted into equity at the time of the Lamar Transaction (a Qualified Financing). OB.23-24.

Under the Cutoff Date Holding, however, the Notes (although admittedly still "outstanding") did not automatically convert into equity upon the Lamar Transaction because the trial court erroneously determined the Investors' conversion rights "cut-off" at Maturity. Op.46-47. This holding cannot be reconciled with the clear and unqualified language of the Notes requiring that all "outstanding" Notes "automatically" convert upon a Qualified Financing. OB.30-32 (citing cases).

Vistar fails to address this inconsistency, and focuses instead on the trial court's statement that the Notes "did not provide Plaintiffs a unilateral right to extend the [M]aturity [D]ate." AB.42-43 (citing Op.4). The Investors, however, acknowledged that Maturity had occurred on March 31, 2016 (and was not extended) -- and the Investors did not seek a declaration that they had the right to extend the Maturity Date. OB.25-26. The relevant question was different: whether the Investors could convert the Notes *after Maturity* if they remained "outstanding." *Id.*[7]

[7] Extending the Maturity Date and continuing to hold the Notes post-Maturity are two different concepts. *See, e.g.,* JOp.6 ("Absent these extensions . . . Vistar would have been then liable for the repayment of the Second Round Notes together with interest.").

Because it cannot harmonize the Cutoff Date Holding with the trial court's other rulings, Vistar attempts to minimize the Cutoff Date Holding by asserting it "is simply the trial court's rejection of Vistar's counterclaim for damages" and just addressed "causation" issues. AB.43. The Cutoff Date Holding, however, was not some inconsequential ruling limited to damages issues -- it fundamentally changed the business relationship between the parties and effectively caused a forfeiture of the Investors' valuable conversion rights. *See, e.g.*, *Thompson St. Cap. P'rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 2025 WL 1213667, at *1 (Del. Apr. 28, 2025) ("Delaware is a contractarian state, but our common law abhors a forfeiture.").

d. The Cutoff Date Holding Defies Economic Sense

Vistar concedes that the interpretation of the Notes must be "economically sensible." AB.37. The trial court's interpretation is not. OB.31-33.

Vistar does not address, and therefore concedes, Plaintiffs' primary argument as to why 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. OB.31-32. But no reasonable investor would continue to hold the Notes in that circumstance, which Vistar concedes by ignoring the issue.

Rather than addressing Plaintiffs' argument, Vistar cites the trial court's statement that it would be "reasonable" to include a cutoff date for conversion rights.

AB.37-39. Vistar, which neither asked for such a finding nor argued it was "reasonable," ignores that the Notes contain no such cutoff and the extrinsic evidence contradicts Vistar's assertion that the parties understood the conversion rights lasted only until Maturity. OB.36-40; Op.44. Nor would a cut-off of conversion rights while Vistar is performing well and the Notes remain outstanding make any sense given the Investors' purpose in acquiring and holding the Notes. *See, e.g.*, Op.1-2 (the Investors "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").

Vistar also asserts it "was reasonable for the Noteholders to have negotiated a right to repayment" in return for giving up conversion rights, but offers no evidence that any Investor (or Vistar) actually *did* negotiate such a purported "trade-off" that was contrary to the parties' basic business relationship. AB.37-39. The testimony Vistar cites for this proposition says no such thing.[8] And negotiating for a "right to repayment" if Vistar fails is very different than agreeing to give up conversion rights if Vistar is successful and the Notes remain outstanding.

[8] A582 ("[w]e don't pay much attention to [the repayment provision]…[b]ecause…Valhalla is not in the business of giving money, getting interest back. That is not the model."); A726 ("Q: Is the return on that interest the reason you invest in a convertible note? A. No. Not in an early-stage company."). Vistar's remaining citations are to the testimony and report of its ***own expert***.

Vistar's next argument -- that allowing the Investors to convert outstanding Notes after Maturity provides them with a "perpetual option" -- ignores the economic realities of the investment. AB.37-38. As the trial court explained, start-ups (like Vistar) often fail and file for bankruptcy (Op.1) -- so the Notes never convert and no "perpetual option" exists. If it did not fail, Vistar acknowledges the parties expected "it would need another cash infusion, resulting in a conversion event." AB.38 (citing testimony). Thus, rather than granting the Investors a "perpetual option," Vistar determined when the Notes converted by electing when to consummate a Qualified Financing.[9]

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

After summarizing the extrinsic evidence, the trial court reverted to the "words of the contract" -- the same words it previously held to be ambiguous. Op.45. That was an error. *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2025 WL 251472, at *11 (Del. Ch. Jan. 21, 2025) ("When 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.").

[9] Vistar's reliance on *Toptal* is again unavailing because the Investors did not have a perpetual option. AB.37-38 (citing *Toptal*, 2023 WL 9503570, at *4).

Vistar fails to directly address this point and also does not address the numerous cases stating the trial court is "not free to disregard extrinsic evidence of what the parties intended." OB.33 (citing cases). Vistar instead argues the extrinsic evidence "should be reconciled, to the extent possible, with the text of the contract." AB.23 (citing cases). That misses the point. The Cutoff Date Holding disregarded the extrinsic evidence, rather than reconciling it with the contract language. As a result, the trial court interpreted the Notes in a manner that failed to reflect all parties' intentions and disregarded the automatic conversion features of the Notes that applied as long as the Notes remained outstanding, which requires reversal.

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

Vistar does not (and could not) dispute that the "basic business relationship between the parties must be understood to give sensible life to any contract." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017). Nor does Vistar even mention the cases cited by Plaintiffs (OB.34-36), which make clear that "[t]he court may [] reject an interpretation that runs contrary to '[t]he basic business relationship.'" *Comcast Cable Commc'ns Mgmt., LLC v. CX360, Inc.*, 2024 WL 5251997, at *9 (Del. Ch. Dec. 31, 2024). Here, the trial court admittedly interpreted the ambiguous contract language so it conflicted with the parties' business relationship. Op.6, 48 (acknowledging that its interpretation "is

inconsistent with the general business model of Plaintiffs" and "is difficult for a judge in equity"); *see also* OB.34-36.

It is reasonable to conclude that, to interpret an ambiguous contract in a manner that admittedly contradicts the parties' business relationship, there must be compelling evidence the parties intended this result. Here, however, the evidence was to the contrary, including Vistar's own post-Maturity communications acknowledging the Notes remained outstanding and were expected to convert in the future. *See* Section I.A.3.e.(ii), *infra*. This point ***alone*** requires reversal of the Cutoff Date Holding. *Chicago Bridge*, 166 A.3d at 915, 926-27 (reversing trial court decision that did not comport with the "basic business relationship between parties" and the "commercial context between the parties").

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

Vistar concedes the parties' conduct is "given great weight" in determining the correct contract interpretation. AB.36 (citing cases); *see also* OB.36 (citing cases). The trial court's factual findings demonstrated that the parties intended for conversion rights to survive Maturity. OB.36-38. For example, ***months after the Maturity Date***, Ozen told an Investor that Vistar "expected to do a qualified financing that would convert the Second Round Notes …'over the next 6 months.'" Op.28; A2559; Op.30 n.127 & A2797 (Ozen describing Note in February 2017 as not converted yet and "is still outstanding"). And both Provenzano and Ozen

testified they sought to repay the Notes -- ***long after the Maturity Date*** -- to avoid stockholder dilution, which demonstrates that they (like Plaintiffs) understood the Notes could convert after Maturity. A1558-60; A1400.

The trial court disregarded these facts in making the Cutoff Date Holding, and Vistar failed to address any of these facts in its Answering Brief. Instead, Vistar asserts (in a footnote) that the trial court "recognized" that the post-Maturity communications in which Vistar's principals acknowledged the Notes remained outstanding and still could be converted "do not constitute a 'post-maturity course of performance,'" because not all the Noteholders participated in such communications. AB.37, n.5. The trial court made no such determination -- the Opinion pages cited by Vistar relate to Plaintiffs' estoppel claim and have nothing to do with the trial court's consideration of extrinsic evidence in construing the Notes. *Id.* (citing JOp.15-16).

Moreover, Vistar cannot disavow its own post-Maturity communications simply by asserting that those undisputed communications were made to only some Investors.[10] Nor can Vistar dispute the trial court's finding that "Vistar's [post-

[10] Vistar's reliance on *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998), is misplaced. AB.37, n.5. In *Wininger*, the court did not reject the extrinsic evidence, but rather recognized that evidence that speaks to some but not all contract parties may provide an "incomplete guide" to interpretation. 707 A.2d at 43. There is no such problem here because the Investors rely on Vistar's own communications.

maturity] statements indeed held out the hope of equity financing." JOp.16. And Vistar offers no response whatsoever to the sworn trial testimony of its principals that they attempted to repay the Notes in February 2017 (long after the Maturity Date) to avoid stockholder dilution -- which could occur only if the Notes remained outstanding and subject to conversion. OB.37 (citing testimony).

The only "course of conduct" that Vistar addresses relates to the two extensions of the Maturity Date. AB.35-37. But those extensions do not change the undisputed facts showing that Vistar repeatedly acknowledged post-Maturity that the Notes remained outstanding and were still expected to convert. Vistar cites no evidence showing any party believed the extensions were necessary to preserve conversion rights.[11] To the contrary, Vistar acknowledges the first extension was agreed upon after the initial Maturity Date. AB.12. And the trial court found the Maturity extensions were made at Vistar's request (Op.26-27), and were for Vistar's benefit. *See* JOp.6 ("Absent these extensions . . . Vistar would have been then liable for the repayment of the Second Round Notes together with interest.").

[11] Vistar suggests that Plaintiffs testified at trial that they extended the Maturity Date to "'preserve the upside participation…until the next negotiated maturity date.'" ***But this quoted testimony comes from Vistar's expert witness***. A1777-78. The remaining testimony, coming from one Noteholder, does not state that the Investors believed a Maturity extension was necessary to preserve conversion rights.

In summary, as Vistar concedes, the court will reject a party's interpretation if the course of "conduct reveals an understanding of the [contractual terms] that is at odds with the one it advances here." AB.36-37 (quoting *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 56 A.3d 1072, 1119 (Del. Ch. 2012)). That is exactly the situation here -- Vistar advances an interpretation at odds with its contemporaneous communications and the trial testimony of its principals.

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

Vistar does not challenge the trial court's finding 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 … Notes." Op.44. That testimony (from 11 separate Investors) was entirely consistent with the parties' business relationship, and it is persuasive evidence of their intentions. OB.38-39 (citing cases that Vistar does not address).

Vistar asserts (without a record citation) this undisputed testimony is "not persuasive" regarding the interpretation of the Notes because some Investors could not recall reading the Notes before investing. AB.39. Other Investors, however, did recall reading the Notes (*see, e,g.*, A1249-50; A1653-54), and no Investor offered testimony that even remotely suggested they intended (or believed) that their conversion rights would cut-off at Maturity. Rather than being "hindsight bias" (as Vistar suggests (AB.39-40)), the Investors' testimony was consistent with Vistar's

own post-Maturity communications, which acknowledged the Notes remained outstanding and would likely convert in the near future. OB.36-37 (citing documents).

Moreover, Provenzano testified it was not until late 2016 (long after Maturity) that Vistar apparently first came to the erroneous view it could repay and terminate the Notes, and it did this to avoid dilution of the founders. OB.39-40 (citing testimony). Vistar fails to address this testimony -- which demonstrates Vistar (like the Investors) understood that conversion rights survived Maturity.[12]

Finally, Plaintiffs did not offer the trial testimony and Vistar's own contemporaneous documents in an attempt to "rewrite" or "alter the language" of the Notes. AB.39-40. Plaintiffs appropriately offered this undisputed evidence to assist the Court in interpreting the language found to be ambiguous so as to achieve the parties' intent. *See, e.g.*, *Salama v. Simon*, 328 A.3d 356, 366 (Del. Ch. 2024) ("[A] court looks to extrinsic evidence with the expectation that the evidence provides insight into the parties' shared understanding."). The Cutoff Date Holding was contrary to the undisputed evidence and should be reversed.

[12] Rather than addressing the testimony of the parties, Vistar refers to the views of "several non-parties." AB.24. Vistar fails to cite any case in which a court ignored the undisputed testimony of the contract parties regarding their understanding of the contract terms, and instead gave weight to the views of third parties.

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

The negotiation history of the ambiguous language was limited to a few emails and draft Notes exchanged between Valhalla and Ozen. Op.40-44. The trial court deemed that evidence not "enlightening" (Op.45), and determined it did not clearly support either side's interpretation of the Notes. Op.44 (describing each parties' view of the negotiation history as "implausible").

Vistar now asserts the trial court's finding is clearly erroneous -- and the negotiation history "confirms the parties' intent for conversion rights to end at Maturity." AB.33. Vistar wildly distorts the record below. To start, Vistar's argument is premised on the assertion that, when it responded to Valhalla's initial comments saying that it "include[ed] the changes requested in your email," Vistar actually meant that it "rejected three of the four items sought." AB.9.

Vistar's argument also requires this Court to find that, although Valhalla responded to Vistar's draft by saying it had "cleaned up some of the language," Valhalla actually meant that it had made numerous "material changes" to the contract terms. AB.9-10. Worse yet, Vistar's argument is premised on the assertion that "Valhalla countered with a[n] … option that appeared to be worse for Valhalla

than what Vistar had offered." Op. 44. As the trial court recognized, Vistar's interpretation of the negotiation history is "implausible." *Id.*[13]

Ultimately, the trial court reasonably determined that the negotiation history did not shed light on the appropriate interpretation of the ambiguous contract language. Op.41-44. Vistar itself argues that "the negotiation history showed no meeting of the minds before the final Repayment Clause." AB.19. It is important to emphasize, however, that nothing in the limited negotiation history suggested any party proposed (much less agreed) the Investors' conversion rights would "cut-off" at Maturity even if the principal and interest remained outstanding. OB.42. Vistar does not dispute this fact, which is fatal to its attempt to invoke the negotiation history to support the Cutoff Date Holding.

[13] Vistar contends that the negotiation history shows the Investors did not have "a unilateral right to extend Maturity." AB.32. Again, Plaintiffs did not contend the Maturity Date had been extended.

CONCLUSION

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

K&L GATES LLP

By: */s/ Steven L. Caponi*
Steven L. Caponi (#3484)
Matthew B. Goeller (#6283)
600 N. King Street, Suite 901
Wilmington, DE 19801
(302) 416-7000

Attorneys for Plaintiffs Below, Appellants

POTTER ANDERSON & CORROON LLP

By: */s/ Kevin R. Shannon*
Kevin R. Shannon (#3137)
Daniel M. Rusk, IV (#6323)
Heather S. Townsend (#7274)
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Plaintiffs Below, Appellants

Dated: May 16, 2025