IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARC GLOBAL INVESTMENTS II, LLC,

Appellant/Plaintiff-Below/Cross-Appellee,

v.

DIGITAL WORLD ACQUISITION CORP.,

Appellee/Defendant-Below/Cross-Appellant.

No. 375, 2025

Court Below: Court of Chancery of the State of Delaware

C.A. No. 2024-0186-LWW

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

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NATURE OF PROCEEDINGS

This appeal arises from efforts by a faithless fiduciary, Patrick Orlando, to take what is not his. Appellant/Plaintiff-Below/Cross-Appellee ARC Global Investments II LLC ("ARC") is an entity under Orlando's sole control, and it was the sponsor of Appellee/Defendant-Below/Cross-Appellant Digital World Acquisition Corp. ("DWAC"), the SPAC through which Trump Media & Technology Group Corp. ("TMTG") went public. Orlando was also DWAC's CEO, before he was forced to resign after violating the securities regulations and trapping the SPAC in years of regulatory limbo. Following Orlando's dismissal, the Securities & Exchange Commission permitted DWAC and TMTG to merge.

But Orlando had other plans. In the months leading up to the merger, Orlando sought to leverage his control over ARC and his position as a DWAC director to extort the companies as a condition for the merger. The "Conversion Ratio" at the center of this appeal was one such cudgel. Enshrined in DWAC's Amended and Restated Certificate of Incorporation ("Charter"), the Conversion Ratio governs how DWAC Class B shares convert into common stock at the closing of a merger. When DWAC merged with TMTG, ARC's Class B shares—purchased for a mere $25,000—transformed into 7.4 million shares of common stock, valued at over $100 million today.

For ARC and Orlando, that was not enough, and they waged a relentless campaign to twist the Conversion Ratio in their favor. In the months leading up to the merger, ARC offered *four different calculations* of the Conversion Ratio—with the number escalating with each new demand. The only theme: Each demand flouted the Charter's plain text, and would have awarded ARC tens of millions of dollars in extra shares. ARC eventually sued, and attempted to block the merger.

The trial court saw through Orlando's gambit, established an escrow that enabled the deal to close, and eventually rejected ARC's shifting contentions regarding the Conversion Ratio. For example, the Conversion Ratio explicitly excludes DWAC shares issued to "any seller" in the merger. DWAC interpreted "seller" the way any reasonable person would: TMTG stockholders who got paid for their shares when the merger with DWAC closed. DWAC applied this plain reading, excluding DWAC shares issued to TMTG stockholders—including those who became stockholders by converting TMTG-issued promissory notes ("Convertible Notes") into TMTG shares before the merger. After initially conceding to this plain-text understanding, ARC flipped its position and demanded that these former-noteholder "sellers" be excluded so that it could receive even more shares in the merger. Faithful to the plain text, the trial court rejected ARC's flip-flop, enforced the Charter as written, and endorsed DWAC's consistent position that "seller" includes all TMTG stockholders who received merger consideration for their shares, including former Convertible Noteholders.

ARC's main argument on appeal is to ask the Court to look beyond the Charter's plain text. Relying on extrinsic evidence (that is also irrelevant), ARC urges the Court to draw arbitrary distinctions among TMTG stockholders, deciding who counts as a "seller." But the Charter contains no such distinctions. On the contrary, the Charter excludes shares issued to "*any seller*." The Court should thus affirm the trial court's plain-text interpretation that excluded all shares issued to TMTG stockholders.

ARC's second argument on appeal involves an effort to relitigate the trial court's factual findings, which this Court reviews for clear error. Throughout discovery below, ARC did not dispute—and thus accepted—that the TMTG convertible notes actually converted to TMTG shares prior to the merger. Despite that inescapable factual reality, ARC nevertheless argued—against the plain text—that the term "seller" excludes former TMTG Noteholders. But after discovery had closed, ARC began to advance a new theory, insisting that TMTG's Convertible Notes had never actually converted. The trial court rejected that untimely argument as a factual matter, finding that a swell of business records and public filings uniformly confirmed the conversion happened.

ARC now argues that the trial court clearly erred. But ARC brings nothing to the table—no evidence to counter the voluminous record relied upon by the trial court. Instead, ARC flips the standard of review on its head, speculating that each piece of evidence, when viewed in isolation, does not conclusively prove conversion. In that same vein, ARC claims that the trial court abused its discretion by admitting a highly probative spreadsheet and by misplacing the burden of proof.

All of these arguments miss the mark. The trial court grounded its factual finding of conversion on the totality of evidence before it; and every single thread of that evidence cuts against ARC's late-breaking contention of non-conversion. In addition, the trial court made clear that its factual finding would remain the same, regardless of whether a single spreadsheet was admitted or who bore the burden of proof because the record contains more than sufficient evidence to show conversion happened. The Court should affirm the trial court's factual finding and reject ARC's efforts to distort the Charter's plain text.

While the trial court largely rebuffed ARC's war on the text, there is one interpretive point on which the court was led astray. On cross-appeal, DWAC challenges the trial court's construction of a subtle (and grammatically complex) provision: The Conversion Ratio's inclusion of Class A shares "*issuable (upon the conversion or exercise of any Equity-linked Securities or otherwise)*." The Conversion Ratio further defines an "Equity-linked Security" as one issued in a financing transaction in connection with a merger closing. DWAC properly excluded three categories of issuable Class A shares—i.e., compensation notes issued to directors and legal counsel, and warrants issued to settle threatened litigation—because they were not issued in such a financing transaction. ARC took issue with DWAC's approach, claiming that the phrase "or otherwise" effectively erased the requirement that the shares be issuable "upon the conversion or exercise of any Equity-linked Securities."

The trial court concluded that the text was ambiguous and, specifically, that the phrase "or otherwise" could bear either party's construction. In light of that purported ambiguity, the trial court looked to the Conversion Ratio's supposed "purpose" as a broad anti-dilution provision and adopted ARC's reading.

The trial court's ruling on this point was flawed and should be reversed because the Charter's plain text forecloses ARC's overbroad interpretation. When "*otherwise*" means "in a different way," as the trial court believed it did here, the term must act as an *adverb*, and not as an *adjective*. The trial court overlooked that elemental rule of grammar, when it concluded incorrectly that "or otherwise" modifies the noun "Equity-linked Securities" to include all securities. That errant reading of the text—which holds that *all* issuable Class A shares are included within the Conversion Ratio—is also incompatible with the Charter's structure, as it would render multiple phrases and paragraphs complete surplusage. Finally, the trial court's view is also inconsistent with the purpose of the Conversion Ratio, which includes many restrictive conditions that undermine the trial court's view of the ratio as a sweeping antidilution mechanism. This Court should read the Charter as written and reverse.

Finally, DWAC appeals the trial court's $75,000 mootness fee award to ARC for minor supplemental disclosures DWAC made during this litigation. The disclosures provided no material benefit to stockholders, falling short of the "substantial" benefit required for such an award. The Court should reverse.

SUMMARY OF ARGUMENT ON APPEAL

I. DENIED. The Conversion Ratio excludes DWAC shares issued "*to any seller in the initial Business Combination*." Under ordinary usage—and the dictionary definitions that confirm it—a "seller" is the party transferring property in a sale. Here, those parties are the TMTG stockholders who surrendered their shares in the merger. Because the TMTG Convertible Notes converted into TMTG shares *before* the merger, their holders became TMTG stockholders too. The DWAC shares issued to them in the merger are thus shares issued to a "seller," as the trial court correctly concluded. ARC's contrary argument flouts the plain text, relies on extrinsic evidence that is irrelevant, and cites caselaw that is inapposite.

II. DENIED. The trial court's factual finding that TMTG Convertible Notes converted into TMTG shares before closing was not clearly erroneous. Multiple pieces of evidence confirm the trial court's finding: the Notes' own terms, the Merger Agreement, TMTG's post-closing Registration Statement confirming the conversion, and a TMTG spreadsheet listing the ex-Noteholders as TMTG stockholders. The trial court did not abuse its discretion in admitting the spreadsheet because ARC waited until after discovery to dispute whether conversion occurred. The court also did not fault ARC for failing to prove a negative; it faulted ARC for offering zero evidence to contradict DWAC's proof that conversion occurred.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. The trial court erred in holding that the Conversion Ratio includes notes and warrants, even if they do not qualify as Equity-linked Securities. The Ratio includes only "issuable" Class A shares "upon the conversion or exercise of Equity-linked Securities or otherwise." The trial court misread "otherwise" (an adverb) as modifying the regular noun "Equity-linked Securities," instead of modifying the nominalized verbs "conversion or exercise." Not only is the trial court's reading grammatically incorrect, but it also renders large portions of the Conversion Ratio surplusage in contravention of basic rules of contract construction. The trial court's ruling appears to have been driven by a misperception of the Conversion Ratio as a sweeping anti-dilution provision.

II. The trial court erred in awarding mootness fees to ARC for DWAC's supplemental disclosures. These additions were neither significant nor substantial. The original disclosures had already flagged ARC's 1.69:1 conversion-ratio claim—and warned investors not to rely on DWAC's preferred 1.34:1 ratio. The additional disclosure merely recited ARC's later claims to even higher ratios (1.78:1 and 1.8:1), and also included a table calculating the math for various scenarios. There was no corporate benefit here that could support a mootness fee.

STATEMENT OF FACTS

A. ARC Forms DWAC and Receives Class B Shares

DWAC was special purpose acquisition company ("SPAC"), formed to raise capital for a future business combination. (Memorandum Opinion dated September 16, 2024, Ex. D ("Op.") at 3.) SPACs are established by "sponsors" who supply initial funds for operational expenses. (*Id.*) ARC became DWAC's sponsor, and Patrick Orlando holds himself out as ARC's managing and controlling member. (*Id.* at 3–4.) ARC incorporated DWAC in Delaware on December 11, 2020. (*Id.* at 3.) In early 2021, ARC received Class B shares, known as founder shares, in exchange for its startup capital. (*Id.*) The Class B shares were to represent 20% of the total shares after DWAC completed its initial public offering ("IPO"). (*Id.*)

B. DWAC's Charter is Amended and Establishes the Conversion Ratio

Before its IPO, DWAC filed its amended and restated certificate of incorporation ("Charter"). (*Id.* at 4; A569.) Section 4.3(b) of the Charter provides that, following the IPO, and upon a business combination closing, the Class B shares convert into Class A shares at a 1:1 ratio, assuming no additional Class A shares are issued between the IPO and closing. (*Id.* at 5.) If additional Class A shares *are* issued during that period—for financing, as consideration to the acquired company, or even for operational expenses that ARC did not cover—Section 4.3(b) triggers an adjustment referred to as the "Conversion Ratio." (*Id.* at 1, 5, 9–10; A572–73.)

The Conversion Ratio offers Class B stockholders some protection against dilution from post-IPO financing-related issuances by allowing Class B shares to convert upon closing into Class A shares at a ratio potentially exceeding 1:1. (Op. at 6; A572–73.) The Conversion Ratio is calculated through a "Denominator" and "Numerator." (Op. at 6.) The Denominator—fixed and undisputed—is the number of issued and outstanding Class B shares. (Op. at 1, 6.) The Numerator, and the resulting ratio, are variables: the larger the numerator, the higher the ratio, and the more Class A shares Class B holders receive. (*Id.*)

The Numerator equals the Denominator, plus 25% of qualifying Class A shares—issued or issuable—subject to four conditions: (1) if "issuable," the shares must stem from "the conversion or exercise of any Equity-linked Securities or otherwise"; (2) they must be "related to or in connection with the consummation of the initial Business Combination"; (3) they cannot be "securities issued or issuable to any seller; and (4) they cannot be "private placement units . . . issued to ARC." (A572–73 at § 4.3(b)(ii); Op. at 6–7.)

The Numerator, then, is not simply 25% of <u>*all*</u> Class A stock plus the Class B stock. (A572–73.) Instead, it is tightly confined to 25% of Class A shares meeting those four conditions. (*Id.*)

C. <u>The Initial Public Offering</u>

In September 2021, DWAC conducted its initial public offering. (Op. at 4.) DWAC sold 28.75 million units, with each IPO unit including one DWAC Class A Common Stock and one-half redeemable warrant. (*Id.*) A whole warrant grants the holder the right to purchase an additional Class A share. (*Id.*)

D. <u>The Business Combination With TMTG</u>

On October 20, 2021, DWAC entered into a Merger Agreement with Trump Media & Technology Group Corp. ("TMTG") (the "Business Combination"). (Op. at 7; A454, A679.) The deal stalled when the U.S. Securities and Exchange Commission launched an investigation into Orlando's conduct as DWAC's Chairman and CEO. (Op. at 8; B133, B141–52.) After the investigation began, TMTG prepared to walk away from the Merger Agreement, pending renegotiation. (Op. at 8; A681–83; B046–47.) DWAC terminated Orlando in March 2023 and settled with the SEC in July 2023, paying $18 million in penalties on top of millions already spent on legal fees. (Op. at 8; A682; B151.) Only after the DWAC Board resolved the investigation and removed Orlando as CEO did TMTG reengage, and the parties amended the Merger Agreement in August 2023. (Op. at 8.)

E. <u>The TMTG Convertible Notes</u>

The Merger Agreement stated that TMTG stockholders would receive DWAC shares as consideration. (*Id*. at 7.) It also allocated DWAC stock to holders of TMTG convertible promissory notes ("Noteholders" and "TMTG Convertible Notes," respectively) "if not exercised or converted prior to [closing]." (*Id*.; A462.) By design, however, the TMTG Convertible Notes were structured to automatically convert into TMTG shares <u>*before*</u> any TMTG business combination closed. (Op. at 8–9, 27; A698–99.) At closing, the notes would no longer exist, and the Noteholders would stand as TMTG stockholders. (Op. at 27.) The Merger Agreement's August 2023 amendment drove this dynamic home: the Notes would "<u>*shall automatically convert immediately prior*</u>" to the Business Combination into TMTG common stock (emphasis added). (A589; Op. at 8–9.) These former Noteholders would then receive DWAC stock as merger consideration in exchange for their TMTG shares. (A588–89.) The shares issued to these former Noteholders are at the core of this appeal.

F. <u>The Relevant Post-IPO Issuances</u>

DWAC, as a public company, incurred operational expenses regardless of whether and when a merger closed. (Op. at 9–11.) To cover some of these costs (which ARC should have covered), DWAC issued convertible notes. (*Id*. at 9–10.)

DWAC also issued warrants to settle threatened litigation. (*Id*. at 10–11.) These notes and warrants are the subject of DWAC's cross-appeal.

1. **Director and Officer Compensation Notes**

In November 2023, DWAC's Compensation Committee proposed compensating directors and officers, who (thanks to Orlando) were otherwise uncompensated, through convertible notes. (*Id*.. at 9; B134–35.) The Board and Class A stockholders approved the plan. (Op. at 9.) DWAC issued these convertible notes ("Compensation Notes"). (*Id*.)

2. **Legal Services Notes**

DWAC also issued a $500,000 convertible note to compensate an attorney for legal services. (*Id.* at 10.) The need for legal counsel stemmed from Orlando's misconduct and ensuing federal investigations. (*Id*.; B002–03.) The attorney was hired for that purpose, nothing more, and the legal service note served as payment for those services. (Op. at 10; B002–03.)

3. **Alternative Warrants**

In early 2024, DWAC issued warrants to certain investors to settle threatened litigation. (*Id*.; B134.) Back in December 2021—under Orlando's direction as Chairman and CEO—DWAC entered a private investment in public equity ("PIPE"). (B137–38; Op. at 10.) The PIPE could not close, including due to SEC guidance and a breached representation in the PIPE agreement, so DWAC terminated the PIPE. (B135.) When some of these PIPE investors threatened to sue, DWAC settled with them by entering into warrant subscription agreements. (Op. at 11.) These investors did not make any monetary investment or cash payment to DWAC for the warrants. (*Id.*; *see also e.g.*, B051–92 (Alternative Warrant Agreements).)

G. <u>**The Proxy Statements and Conversion Ratio Calculations**</u>

As the TMTG Merger neared, DWAC began to prepare its Proxy Statement, which required an estimated Conversion Ratio. (*Id.*) From the start, Orlando maneuvered to sway the Conversion Ratio to ARC's benefit. On February 4, 2024, Orlando informed DWAC that the ratio was 1.58:1. (*Id.*) He included in the Numerator shares associated with the Compensation Notes and Alternative Warrants. (*Id.*) But he conceded shares issued to former TMTG Convertible Noteholders, as well as certain post-IPO units issued to ARC upon the conversion of loans from ARC to DWAC ("ARC Note"), were excluded. (*Id.*) Later that afternoon, Orlando sent an email acknowledging the Conversion Ratio could be "lower" but demanding cash in exchange for ARC's consent to lower ratios, including 1.4:1 and even 1:1. (B153–54.)

DWAC responded with a spreadsheet calculating a 1.34:1 ratio. (Op. at 12.) The spreadsheet included in the Numerator Class A shares issuable in relation to post-IPO financing, but it excluded Compensation Notes, Legal Services Notes, Alternative Warrants, TMTG Convertible Notes, and the ARC Notes. (*Id.*) In response, and without explanation, ARC upped its proposed ratio from 1.58:1 to 1.69:1. (*Id.*)

DWAC filed its Proxy Statement on February 16, 2024. (*Id.*; B132.) The Proxy Statement disclosed the anticipated Conversion Ratio of 1.34:1 and explained why certain securities were excluded. (Op. at 13.) It also noted DWAC's Board might exclude additional Post-IPO Financings, which would result in an even lower conversion ratio at the time of closing. (*Id.* at 14.)

The Proxy Statement also warned investors against "relying on" the disclosed ratio. (*Id.* 14, 37.) It emphasized that there was "no assurance that the current conversion ratio [would] not materially differ" when the Board calculated the final Conversion Ratio at the time of closing. (*Id.* at 14.) It also highlighted ARC's proposed 1.69:1 ratio, warning investors that should Orlando and ARC prevail, additional share issuances would dilute public stockholders. (*Id.*)

The Proxy Statement reiterated that "[p]rior to the [merger's] Effective Time, the issued and outstanding TMTG Convertible Notes will be converted into share of TMTG common stock, such that, at the Effective Time, holders of such TMTG common stock will be entitled to receive . . . shares of [DWAC] stock[.]" (B136.) The Proxy Statement also announced a special meeting on March 22, 2024 to approve the Business Combination with TMTG. (Op. at 12.)

H. <u>This Litigation and Closing</u>

On February 29, 2024, ARC filed this lawsuit and proposed yet another increased Conversion Ratio—this time 1.78:1. (*Id.* at 16.) Its complaint asserted breach of the Charter, sought declaratory relief, and asserted fiduciary duty claims over alleged misstatements in the Proxy Statement. (*Id.*) It also alleged the Numerator should include shares from the Director Compensation Notes, Legal Services Notes, Alternative Warrants, ARC Notes, and TMTG Convertible Notes. (A36.)

DWAC responded promptly. On March 1, 2024, it filed a Form 8-K with supplemental disclosures. (*Id.* at 14; B093.) The filing reiterated the company's view that 1.34:1 was correct, again warned that a lower ratio might apply at closing, and reiterated that certain Class B holders might dispute it. (Op. at 14–15.) The supplemental disclosure also provided a table, calculating possible ranges under differ ratios. (Letter Opinion dated July 14, 2025, Ex. F at 13–14.) To address ARC's claimed harm, DWAC also offered to escrow the share difference between its 1.34:1 ratio and a 2:1 ratio pending litigation. (Ex. F at 5.) The trial court approved the escrow. (Op. at 16.)

The Business Combination closed on March 25, 2024. (*Id.* at 15.) [1] Following closing, TMTG's Registration Statement explained that "immediately prior to the [Business Combination] the TMTG Convertible Notes were converted into TMTG Common Stock." (Op. at 15; B130–31.) Those "former holders of the TMTG Convertible Notes"—i.e., current TMTG stockholders—then received DWAC stock as consideration. (Op. at 15.)

ARC filed its amended complaint on June 7, 2024, now demanding an even higher 1.81:1 ratio. (Op. at 17.) During discovery, ARC never requested any documents about whether the TMTG Notes converted—although it did seek discovery about the "terms," "issuance," "negotiation," or "amendment" of the Notes. (B018–22;[2] *see also* Op. at 28 n.122.) Only after discovery closed—in pre-trial briefing—did ARC first claim the conversion never happened. (*Id.*)

[1] DWAC renamed itself Trump Media & Technology Group Corp. after the business combination closed, with TMTG becoming a wholly owned subsidiary now known as TMTG Sub Inc. (Op. at 6.) To avoid confusion, this brief uses "DWAC" for the public company before and after the merger, and "TMTG" for the pre-closing privately held company DWAC acquired.

[2] *See* Request for Production ("RFP") No. 5: documents "evidencing the terms of the issuance or potential issuance of the TMTG Convertible Notes" (B019); RFP No. 6: documents "relating to the negotiations of the TMTG Convertible Notes" (B019); RFP No. 7: documents "concerning the negotiation of the Second Amendment to Agreement and Plan of Merger," including documents "evidencing why the Additional TMTG Convertible Notes were issued" (B019–20); RFP No. 9: documents "regarding any anticipated, potential, or actual amendment or change to

After a July 29, 2024 trial, the Court of Chancery issued an opinion calculating the Conversion Ratio at 1.4911:1. (*Id.* at 32.) It excluded two categories of post-IPO securities that ARC advocated for: the TMTG Convertible Notes and ARC Notes.[3] (*Id.* at 32-33.) It also rejected ARC's fiduciary duty claims tied to the Proxy disclosures. (*Id.*) But the trial court held that the Compensation Notes, Legal Services Notes, and Alternative Warrants did belong in the Numerator.

I. <u>The Attorneys Fee Award</u>

Following trial, ARC moved for a <u>*$1 million*</u> fee award under the corporate benefit doctrine. (Ex. F at 1.) The trial court denied the request because "ARC set out primarily to benefit itself." (Ex. F at 11; *see also id*. at 11.) The trial court did, however, award ARC a $75,000 mootness fee resulting from DWAC's supplemental disclosures. (*Id*. at 8.)

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the terms of any DWAC or TMTG warrant or note (convertible or otherwise)" (B020).

[3] ARC's Opening Brief does not raise the argument that the trial court erred by excluding the ARC Notes. That issue is thus waived. *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("[F]ailure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal.").

ARGUMENT ON APPEAL

I. THE TRIAL COURT PROPERLY EXCLUDED FROM THE CONVERSION RATIO DWAC SHARES ISSUED TO *ALL* TMTG STOCKHOLDERS

A. Question Presented

Did the trial court correctly hold that, when the Numerator excludes "securities issued or issuable to any seller in the initial Business Combination," it excludes DWAC stock issued as merger consideration to former TMTG Convertible Noteholders, who had become TMTG stockholders before closing? (Preserved at A298-309.)

B. Scope of Review

The Court "review[s] questions of law and interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

"An interpretation that conflicts with the plain language of a contract is not reasonable." *Bank of New York Mellon v. Commerzbank Cap. Funding Trust II*, 65 A.3d 539, 555 (Del. 2013). "Delaware law adheres to the objective theory of contracts," meaning that "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) (citation omitted). Here, under any reasonable definition, former TMTG Convertible Noteholders were "sellers" because they became TMTG stockholders before closing and received consideration for their shares in the

Business Combination. ARC asks this Court to disregard that unambiguous meaning and instead rely on extrinsic evidence to rewrite the parties' bargain. The trial court rightly rejected ARC's arguments, and this Court should do the same.

1. TMTG Convertible Noteholders Were "Sellers" Because They Became TMTG Stockholders and Received Consideration For Their Shares in the Business Combination

The Conversion Ratio excludes from the Numerator DWAC shares that were issued "*to any seller in the Business Combination*." (Op. at 7 (emphasis added); *see also* A572, § 4.3(b)(ii).) The Charter leaves "seller" undefined, so the term takes its ordinary meaning. (Op. at 26); *see also Towerhill Wealth Mgmt. LLC v. Bander Fam. P'ship LP*, 2010 WL 2284943, at *7 (Del. Ch. June 4, 2010) ("[W]hen a plain, common and ordinary meaning of the words lends itself to only one reasonable interpretation, that interpretation controls the litigation.") (citation omitted).

A "seller" is "one who sells anything" or, more precisely, "the party who transfers property in the contract of sale." (Op. at 26 (quoting *Seller*, Black's Law Dictionary (10th ed. 2014).)[4] ARC concedes this definition is correct and the term "seller" is unambiguous. (OB at 21.) The "sellers" here are TMTG stockholders

[4] This is consistent with the ordinary dictionary definition. *Oxford Advanced American Dictionary* ("seller" means "a person who sells something"); *see also Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms not defined in a contract.").

who transferred their property—TMTG shares—in the Business Combination. (Op. at 26.)

The trial court correctly concluded that former TMTG Noteholders were also "sellers." (Op. at 25–28.) The TMTG Convertible Notes, by their own terms, "'automatically converted' into TMTG shares 'immediately prior to the closing' of the business combination." (Op. at 27 (quoting TMTG Convertible Note terms); A698–99.) The TMTG noteholders thus became TMTG stockholders—and then surrendered their shares for DWAC stock as merger consideration, making them "sellers." *See Brown v. Bldg. Engines*, 2022 WL 3274124, at *2 (S.D.N.Y. Aug. 11, 2022) (applying Delaware law and also describing an entity's former "equity holders" as "the sellers").

The Merger Agreement and DWAC's SEC filings confirm this sequence. The Second Amendment to the Merger Agreement provides that TMTG Notes "shall automatically convert immediately prior to the Effective Time into a number of shares of [TMTG] Common Stock." (A588–89.) And TMTG's Registration Statement—issued after the Business Combination closed—verified that "*immediately prior to the [Business Combination] the TMTG Convertible Notes were converted into TMTG Common Stock*." (B130 (emphasis added).)

Contemporaneous transaction documents further confirm that former TMTG Convertible Noteholders became "sellers" of TMTG shares. Following the merger, the transfer agent was directed to issue DWAC shares to "Holders of TMTG Common Stock," who were identified as individuals listed in an attached Excel spreadsheet titled "Annex D." (Op. at 27–28; *see also* A705.) The individuals listed in Annex D included former TMTG Convertible Noteholders alongside other TMTG stockholders. (Op. at 27–28; A687–88.)

To recap: TMTG's Notes converted into TMTG stock. (Op. at 27–28.) This conversion happened before the Business Combination closed, making the former TMTG Noteholders TMTG stockholders. (*Id.* at 26–28.) Like any other TMTG stockholder swapping shares for DWAC stock, these ex-noteholders were "sellers" in the Business Combination. (*Id.* at 26.) The shares issued to them were thus properly excluded from the Conversion Ratio Numerator. (*Id*. at 28.)

2. ARC's Interpretation of "Seller" Contradicts the Plain Text of the Charter and Is Arbitrary

ARC's contrary interpretation runs headlong into the Charter's plain language. ARC insists former TMTG Noteholders cannot be "sellers" because their conversion from debt to equity holders was done as a mere "accounting mechanic." (OB at 20.) The trial court rightly rejected this argument. (Op. at 27.) Mechanical or not, the reality cannot be denied: TMTG Noteholders became TMTG stockholders before the Business Combination closed—and so, when they exchanged their TMTG shares for merger consideration, they transferred their property as "sellers." (Op. at 27.)

ARC claims the "substance of the transaction should control." (OB at 21.) But here, form and substance align: TMTG Noteholders received TMTG shares, and then gave up those shares for DWAC stock. (Op. at 27–28.) Under any commonly understood definition of "seller," they were sellers of TMTG stock.

Unable to prevail on the text, ARC asks the Court to rewrite it. ARC urges that the term "sellers" in DWAC's Charter be limited to TMTG equity holders who voted on the Business Combination. (OB at 21.) Alternatively, ARC proposes that "sellers" be confined to those with appraisal or books-and-records rights.[5] (*Id.*) But courts do not read limitations into clear contract language. *Nw. Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d. 41, 44 (Del. 1996) (rejecting an interpretation because "it adds a limitation not found in the contract language"). And the Conversion Ratio itself imposes no such limits. It excludes shares issued to "*any*" seller" (A572)—and "any" encompasses "every" or "all" within the category. *EMSI Acquisition, Inc. v.*

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[5] ARC also insists "seller" should be limited to those with a fiduciary relationship to TMTG. (OB at 21.) Putting aside that this conflicts with the ordinary definition of "seller," this argument goes nowhere: the Conversion Ratio says nothing about sellers being owed fiduciary duties. And in any event, the former TMTG Noteholders were owed such duties after their notes converted and they became TMTG shareholders.

Contrarian Funds, LLC, 2017 WL 1732369, at *11 n.65 (Del. Ch. 2017) (quoting *Alley v. US Dep't of Health & Human Servs.*, 590 F.3d 1195, 1207 (11th Cir. 2009)).

Nor does the "intent" of the Conversion Ratio support ARC's reading. (*Contra* OB at 22.) "It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract." *Twin City Fire Ins. Co. v. Delaware Racing Ass'n,* 840 A.2d 624, 628 (Del. 2003). Here, the Conversion Ratio excludes shares issued to "*any seller*" in the Business Combination, with no limiting language, thus showing no intent to differentiate among the selling company's stockholders. (A572.) This broad exclusion ensures the Conversion Ratio does not dilute the ownership stake of the target company's stockholders in the merged entity. The Conversion Ratio was thus neither designed nor intended to fully protect Class B stockholders from dilution. *See infra* Argument on Cross Appeal, Section C.1 (discussing the many ways in which the Conversion Ratio is not a broad anti-dilution provision).

ARC's interpretation also defies common sense. ARC insists "a seller is frequently defined by the property being sold" and that a "seller of apples is one who owns apples and is able to transfer them in a contract." (OB at 21 (citing nothing).) But if DWAC had merged with a company whose preferred stockholders lacked voting rights, ARC's interpretation of "shares issued to a seller" would exclude shares issued to those preferred stockholders. ARC offers no explanation (nor could it) for why voting rights should be necessary to make an equity holder a "seller." Instead, it pivots and argues those rights are necessary to qualify as an "owner." (OB at 21.) But that term is even worse for ARC, because TMTG stockholders are indisputably TMTG's "owners." In any event, the Charter never mentions the term "owner," and ARC's argument adds nothing to the analysis.

ARC's admissions in discovery reveal the *ad hoc* nature of its position. ARC argued below that "sellers" means TMTG stockholders as of October 20, 2021—the Merger Agreement's signing date—but not later stockholders, even if they acquired their shares before the March 25, 2024 closing and with full stockholder rights. (B123 (RFA No. 9).) This arbitrary line drawing finds no support in the Charter, makes no sense, and was correctly rejected by the trial court.

ARC's cases do not support its argument about the interpretation of "sellers." *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, LP*, 2011 WL 549163, at *4 n.24 (Del. Ch. Feb. 16, 2011) (cited in OB at 22), was about a term with "more than one general meaning." But the trial court found that "ARC concedes that 'sellers' is unambiguous." (Op. at 26 n.116.) And ARC does not argue otherwise on appeal. (OB at 21.) Next, *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913–14 (Del. 2017) (cited in OB at 21), was about interpreting a true-up provision in a sale with a $0 closing price. Neither case has anything to say about defining "sellers."

Finally, ARC's hypothetical—arguing that had the TMTG Convertible Noteholders been paid in cash, they would not have been "sellers"—is beside the point. (OB at 22.) As the trial court explained, these TMTG Noteholders were paid in TMTG shares, as originally contemplated by the notes. (Op. at 27.) So they became equity holders and were "sellers" when the Business Combination closed. (Op. at 28.)

3. ARC's Interpretation of "Seller" Relies on Irrelevant and Unpersuasive Extrinsic Evidence

ARC's reliance on extrinsic evidence is both legally and factually unavailing. (OB at 23–26.) ARC cites *Greenstar IH Rep, LLC v. Tutor Perini Corp*., 2019 WL 6525206, at *9 (Del. Ch. Dec. 4, 2019), *aff'd*, 240 A.3d 1 (Del. 2020) (TABLE), to claim courts can consider commercial context "regardless" of ambiguity. (OB at 24.) But *Greenstar* says the opposite: "The court's first and often last stop is the contract itself." 2019 WL 6525206, at *9. If the contract is "unambiguous," then "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create ambiguity." *Id.* (citation omitted). And *Greenstar* supports DWAC—it rejected an interpretation like ARC's that "adds limitations . . . that appear nowhere" in the contract. *Id.* at *13.

Even if considered, ARC's extrinsic evidence is irrelevant and unpersuasive, as the trial court correctly held. (Op. at 26 n.116.) ARC cites the August 2023 amendment to the Merger Agreement, DWAC's 2024 public filings, and a preconversion letter from a TMTG Noteholder. (OB at 23–26.) All these documents postdate the Charter by years, were drafted and executed between different parties, and therefore shed no light on the meaning of "sellers" in the Conversion Ratio. (Op. at 26 n. 116); *see also e.g.*, *SeaWorld Entertainment, Inc. v. Andrews*, 2023 WL 3563047, at *9 (Del. Ch. 2023) ("I cannot conclude that multiple agreements that have been titled differently and were executed years apart nevertheless are the same."); *see also id.* ("I must interpret the unambiguous terms of Defendants' contract, not someone else's contract.").

ARC's extrinsic evidence is unpersuasive for other reasons, too. Even if the "Seller Representative" in the Merger Agreement did not represent TMTG Convertible Noteholders, that is a function of timing—the representation predated the conversion of the notes. (A454.) It does not mean that, post-conversion, former TMTG Noteholders who became stockholders were not "sellers" at closing under the Charter, as the trial court rightly held. (Op. at 26 n.116.) Equally irrelevant is ARC's reliance on a noteholder's self-description as a "creditor" <u>*prior to conversion*</u>. (OB at 25–26.) That description says nothing about the status of TMTG Noteholders <u>*post-conversion*</u>. As the trial court correctly found, post-conversion, the Noteholders were no longer creditors, as they became stockholders and therefore "sellers." (Op. at 26.)

Finally, ARC relies on DWAC's other public filings to argue that "seller" in the Conversion Ratio did not include former TMTG Noteholders. (OB at 25 (citing the Proxy Statements and Registration Statement).) But none of those documents use the term "seller," much less define it to exclude former Noteholders. (*Id.*) Instead, these public filings further confirm that "immediately prior to the [Business Combination] the TMTG Convertible Notes were converted into TMTG Common Stock." (B130.)

4. *Contra Proferentem* requires any ambiguity to be interpreted against ARC—the drafter of the Conversion Ratio

The trial court correctly concluded that the Conversion Ratio unambiguously excludes shares issued to ex-TMTG Convertible Noteholders from the Numerator. (Op. at 43.) This Court should affirm that holding. But regardless, *contra proferentem* does not favor ARC. Delaware courts resolve ambiguities "against the drafting party and interpret the contract in favor of the non-drafting party." *Osborn* 991 A.2d at 1160. Back when DWAC's Charter was amended, ARC, as DWAC's sponsor, owned 100% of its common stock. (B140.) ARC thus controlled the Conversion Ratio's drafting. Any ambiguity resolves in DWAC's favor.

ARC contends that *contra proferentem* favors stockholders. (OB at 26 (citing *Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 936–37 (Del. Ch. 2012)).) That blanket proposition is wrong. *Shiftan* flagged the "tension in applying the doctrine of *contra proferentem* to interpret a certificate addressing preferred stock." 57 A.3d at 936 (citing *Elliot Associates LP v. Avatex Corp.*, 715 A.2d 843, 852 (Del. 1998)). Preferred rights, explained this Court in *Elliot*, "must be expressly and clearly stated" and "will not be presumed or implied." 715 A.2d at 852. This presumption against expanded rights is why *Shiftan* itself declined to apply *contra proferentem* for preferred stockholders, because "these interpretive principles come into direct conflict." 57 A.3d at 937.

The presumption against preferred stockholder rights also applies here. *Cf. McRitchie v. Zuckerberg*, 315 A.3d 518, 548 (Del. Ch. 2024) ("If a certificate of incorporation grants a particular class or series of stock . . . special rights superior to the common stock, then that class or series is known as preferred stock.") (quotation omitted); *Shintom Co., Ltd. v. Audiovox Corp.*, 888 A.2d 225, 228 (Del. 2005) ("The word 'preferred' conveys no special meaning in the abstract."). ARC cannot wield *contra proferentem* to gain a preferred dilution ratio at Class A common stockholders' expense. *Contra proferentem* thus favors DWAC as non-drafter. At worst for DWAC, the doctrine sits in equipoise—favoring no one.

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Respectfully, the Court should affirm the trial court's holding that all TMTG stockholders were "sellers," and thus DWAC shares issued as merger consideration to former TMTG noteholders were rightfully excluded from the Conversion Ratio's Numerator.

II. THE TRIAL COURT PROPERLY FOUND THAT THE TMTG CONVERTIBLE NOTES WERE CONVERTED TO TMTG SHARES BEFORE THE BUSINESS COMBINATION CLOSED

A. Question Presented

Did the trial court clearly err when it found that TMTG Convertible Noteholders became TMTG stockholders immediately before merger closed? (Preserved at A298-309.)

B. Scope of Review

"This Court will uphold the trial court's factual findings unless they are clearly erroneous." *Gatz Properties, LLC v. Auriga Cap. Crop*., 59 A.3d 1206, 1212 (Del. 2012).

The standard of review for evidentiary issues on appeal is abuse of discretion. *Sammons v. Doctors for Emergency Servs*., P.A., 913 A.2d 519, 535 (Del. 2006). "[T]o find reversible error in an evidentiary ruling, [the Court] must find not only error in the ruling, but that a 'substantial right of the party is affected.'" *Mercedes-Benz of N. Am., Inc. v. Norman Gershman's Things to Wear, Inc*., 596 A.2d 1358, 1365 (Del. 1991) (quoting D.R.E. 103(a)); *see also Firestone Tire and Rubber Co. v. Adams,* 541 A.2d 567, 570 (Del. 1988) (requiring an erroneous evidentiary ruling to have caused "significant prejudice" resulting in the denial of a fair trial).

C. <u>Merits of Argument</u>

1. <u>The Trial Court's Factual Finding that the TMTG Convertible Notes Were Converted Into TMTG Stock Was Not Clearly Erroneous</u>

As the trial court explained, multiple pieces of evidence confirm the TMTG Convertible Notes converted to TMTG shares <u>*before*</u> the Business Combination closed:

- The TMTG Convertible Notes themselves provide that they "<u>*shall be automatically converted*</u>" to shares "<u>*immediately prior*</u>" to the Business Combination. (A698–99 (emphasis added).)
- The Second Amendment to the Merger Agreement states TMTG Convertible Notes "<u>*shall automatically convert immediately prior*</u>" to the Business Combination into shares of TMTG common stock. (A589 (emphasis added).)
- DWAC's February 2024 Proxy Statement specifies that, "<u>*prior to the Effective Time*</u>, the issued and outstanding TMTG Convertible Notes <u>*will be converted*</u> into shares of TMTG common stock," such that they "will be entitled to receive" shares of New Digital World common stock. (B136 (emphasis added).)

In addition, TMTG's April 15, 2024 Registration Statement—issued after the Business Combination closed—certified that "[a]s a result of, and in connection with the Closing . . . <u>*the TMTG Convertible Notes were converted into TMTG Common Stock*</u>." (Op. at 15 (emphasis added) (citing B130).) Specifically, the Registration Statement explained:

> (i) immediately prior to the [Business Combination] the TMTG Convertible Notes were converted into TMTG Common Stock and all of the outstanding TMTG Common Stock that was issued upon such conversion was automatically cancelled and ceased to

> exist . . . [and] (iii) Public TMTG issued an aggregate of 95,354,534 shares of Public TMTG Common Stock to TMTG securityholders as of immediately prior to the Effective Time (which amount includes (x) 7,854,534 shares of Public TMTG Common Stock to the former holders of the TMTG Convertible Notes).

(*Id.*) The Registration Statement thus confirms that TMTG actually issued 7,854,534 shares of TMTG shares to former TMTG Noteholders before the merger closed. (*Id.*)[6] "Where the records of a corporation show that action was taken, 'it is presumed that such records are correct and regular.'" *Oberly v. Howard Hughes Medical Inst.*, 472 A.2d 366, 385 (Del. Ch. 1984) (quoting 31A *C.J.S.,* Evidence § 150(a)(1)).

Finally, Annex D is yet another compelling piece of evidence supporting the trial court's finding. Annex D is an Excel spreadsheet attached to a Transfer Agent Instruction Letter from March 25, 2024—the date of closing. (Op. at 28 n.122;

[6] Such conversion timing is commonplace and unsurprising. In *Salladay v. Lev*, (cited in Op. at 27 n.121), the court explained that the "ownership stake at the effective time" of the merger included "[n]otes [that] would automatically convert into shares of [the company's] common stock immediately prior to the consummation of the [t]ransaction." 2020 WL 954032, at *15 & n.172 (Del. Ch. 2020). And the timing makes sense, as noteholders would seek to maintain noteholder status as long as possible before transforming into stockholders given the former's prioritized liquidation rights over the latter. *See, e.g.*, *Allied Cap. Corp. v. GC-Sun Holdings, LP*, 910 A.2d 1020, 1031 (Del. Ch. 2006) ("[D]ebt naturally takes liquidation priority over equity.").

A688–89, A705–07.) Under "Holders of TMTG common stock," the letter directs the transfer agent to:

> Issue an aggregate of 94,739,8941 shares of New Digital World common stock to the persons and in the amounts listed on the New Digital World Master Distload File attached as Annex D hereto, in book entry form, bearing the legends set forth in Annex D.

(A706.) Annex D then lists former TMTG Convertible Noteholders alongside other TMTG Stockholders. (A688.) A "TMTG Shares" columns shows the "Number of Shares, whether held in Certificate, Book, or DRS" that each former TMTG Convertible Noteholder received upon conversion. (*Id.*) And "issue date" column marks the date of conversion as March 25, 2024. (*Id.*) Annex D thus shows that holders of TMTG Notes became TMTG stockholders before the Business Combination closed.

For its part, ARC fails to offer any affirmative evidence that the conversion did not happen. Instead, ARC speculates the parties ignored their own clear agreements (OB at 38–40), or that Annex D somehow does not mean what it says. (OB at 41.) But "unsupported conclusions and speculations are not a substitute for facts." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1173 (Del. 2000). And, in any event, the TMTG Registration Statement confirms the conversion occurred as planned—which is presumably why ARC's Opening Brief completely ignores TMTG's Registration Statement. ARC's failure to address the Registration Statement constitutes waiver and provides yet another independent basis to affirm.

Roca v. E.I. du Pont de Nemours and Co., 842 A.2d 1238, 1242 (Del. 2004) ("This Court has held that the appealing party's opening brief must *fully* state the grounds for appeal.") (emphasis in original).

ARC's fallback is to cite *United Atlantic Ventures v. TMTG Sub*, 2025 WL 2505325 (Del. Ch. Sept. 2, 2025). (OB at 41.) But that factually dissimilar case involved the *post-closing* issuance of *DWAC* shares. It does not undermine the fact that *TMTG* shares were issued to former TMTG noteholders *pre-closing*.

For all these reasons, the trial court's factual finding was not clearly erroneous and should therefore be affirmed.

2. The Court Need Not Decide Annex D's Admissibility, But the Trial Court Properly Admitted It

There is no merit to ARC's claim that the trial court's factual finding "depends largely—if [not] exclusively"—on Annex D. (OB at 30.) This contradicts and distorts the trial court's *express alternative holding* that, "[e]ven without Annex D, I would conclude that the TMTG Convertible Noteholders were 'sellers.'" (Op. 28 n. 122.) As discussed above, the notes, merger agreements, proxy statements, and registration statement all uniformly support the trial court's finding. *See supra*, Section II.C.1. This Court can thus affirm the trial court's holding without regard to Annex D's admissibility.

In any event, the trial court plainly acted within its discretion in admitting Annex D. ARC insists Annex D should not have been admitted because it was not produced by DWAC until the pre-trial briefing stage. (OB at 30–31.) But excluding evidence is a "severe sanction reserved for instances where a litigant behaved inequitably or with willful disregard of his adversary's rights." *In re Jarden Corp.*, 2018 WL 4263308, at *1 (Del. Ch. Sept. 7, 2018) (quotations omitted). The trial court acted appropriately in admitting the evidence here because ARC did not press its factual theory of non-conversion until well after discovery, and ARC itself had notice of Annex D for months. (Op. at 28 n.122.)

First, ARC treated the conversion of the TMTG Convertible Notes as a given and never requested the document it now claims DWAC withheld. ARC vaguely suggests it requested "documents . . . regarding the TMTG Convertible Notes." (OB at 34.) But this is misleading. ARC's discovery requests focused on the "terms," "negotiation," "issuance," and "amendment" of the TMTG Convertible Notes. (B019–20 (RFP Nos. 5, 6, 7, 9).) ARC did *not* request documents about the later "conversion" of the TMTG Notes to TMTG shares. (B018–22.)

ARC's motion to compel TMTG's documents in discovery confirms it treated conversion as an established fact (which it is). ARC argued it needed TMTG documents because they would reveal "why the TMTG Convertible Notes were issued and how their issuance would affect the total merger consideration . . . and whether TMTG believed its creditors constituted the 'seller' in the Business Combination." (A64.) ARC never even hinted they might support an argument of non-conversion.

Not until ARC's post-trial reply briefing did it dispute whether conversion occurred. In its opening brief, it stated: "there is no evidence" that "noteholders ever became TMTG stockholders." (A161 n.16.) And in its reply brief it went even further, claiming it "is not true" that the TMTG Notes "converted to TMTG stock" before the Business Combination closed. (A222.) Because ARC sat on this factual theory, the trial court correctly held that DWAC could not have known that the conversion was at issue and that it needed to produce Annex D. (Op. 28 n.122.)

Rather than address this failure, ARC nitpicks the trial court's opinion. The trial court stated: "ARC first raised its theory that the TMTG Convertible Noteholders were not 'sellers' after discovery closed." (*Id.*) ARC claims this is wrong because its complaint sought to include shares issued to former TMTG Noteholders in the Numerator. (OB at 34.) But the trial court knew that, because it had granted ARC's motion to compel documents from TMTG, finding such documents relevant. (A107.) Read in context, the court meant ARC first raised its new *factual* theory about why the Noteholders were not sellers until after discovery closed. The trial court was thus simply agreeing with DWAC, which had argued below that Annex D should be admitted because ARC "did not put the actual conversion of TMTG Convertible Notes at issue until pre-trial briefing." (A364; *see also* A362 –367.)

Second, if anyone should have grasped Annex D's significance, it was ARC. ARC does not dispute that it was "on notice of the existence of Annex D for months after receiving it in a production from the transfer agent." (Op. at 28 n.122.) Courts do not exclude evidence when the party seeking its exclusion was "well aware of these documents in advance of trial." *See Jarden*, 2018 WL 4263308, at *1.

ARC claims the transfer letter gave no hint that Annex D would list the former TMTG Noteholders as TMTG stockholders. (OB at 35.) But that is obviously wrong. ARC was aware the letter directed the transfer agent to issue DWAC shares to "Holders of TMTG Stock" listed in Annex D. (A705.) Any reasonable litigant would understand that Annex D proves conversion if former Noteholders are listed as "Holders of TMTG Stock" (which they were), and undermines conversion if they were not.

Equally unavailing is ARC's protest about its inability was depose witnesses about Annex D's production. (OB at 37.) ARC could have chosen to depose the transfer agent—or any other party—about the actual conversion of the TMTG Notes. It could have also sought the production of Annex D and explored its circumstances during discovery. ARC's failure to do so is its fault alone. By contrast, DWAC had no reason to produce Annex D sooner. The dispute over the actual conversion had not yet arisen, so DWAC was unaware of its relevance. When the dispute arose in pre-trial briefing, DWAC flagged Annex D (along with other evidence)—and produced it the day after ARC notified it that the document was not produced. (B026–28.)

ARC's cases do not support finding the trial court abused its discretion. *Terramar Retail Ctrs., LLC v. Marion*, 2018 WL 6331622, at *13 (Del. Ch. Dec. 4, 2018) (cited in OB at 31), involved a defendant who produced over 30,000 pages the day after a key deposition. ARC's other cases (OB at 31, 36) involve similarly serious misconduct. *See*, *e.g.*, *In re ExamWorks Grp., Inc. S'holder Appraisal Litig.*, 2018 WL 1008439, at *8 (Del. Ch. Feb. 21, 2018) (68,052 pages dumped after discovery cutoff); *Digiacobbe v. Sestak*, 1998 WL 684149 at *17 (Del. Ch. July 7, 1998) (key evidence intentionally withheld until after the start of trial); *Hoey v. Hawkins*, 332 A.2d. 403, 405–07 (Del. 1975) (same).[7]

In sum, the record shows ARC is to blame for the late production of Annex D. ARC waited until after discovery to argue the conversion had not occurred. It then sought to prevent DWAC from introducing evidence that the conversion did occur. There is no reason why DWAC would withhold Annex D when it bolsters the fact

[7] ARC also cites *IQ Hldgs., Inc. v. Am. Com. Lines Inc.*, 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012) (OB 31, 36.). But that case involved supplementing expert discovery and had nothing to do with admitting documentary evidence.

that the conversion occurred. Indeed, ARC seeks to exclude it precisely because it undercuts ARC's new theory which ARC did not raise until pre-trial briefing. The trial court did not abuse its discretion in rejecting ARC's gamesmanship and admitting Annex D.

3. **The Court Need Not Decide Who Bore the Burden of Proof, But the Trial Court Properly Placed It On ARC**

The Court need not decide the burden of proof issue to affirm the trial court. It is true, of course, that the trial court invoked ARC's burden as an independent basis for admitting Annex D. (Op. at 28 n.122.) But as already explained, Annex D was properly admitted for other reasons, including ARC's failure to challenge conversion until after discovery. *See supra*, Section II.C.2.

Moreover, even without Annex D, and even if DWAC bears the burden, there is more than enough evidence in the record to support the trial court's factual finding that the conversion occurred. *See supra* Section II.C.1. This includes the terms of the notes themselves, which provide that they "*shall be automatically converted*" to shares "immediately prior" to the Business Combination. (A698–99 (emphasis added).) It also includes TMTG's Registration Statement, which disclosed that "*the TMTG Convertible Notes were converted into TMTG Common Stock*." (Op. at 15 (citing B130).) For these reasons, the Court can affirm the trial court and need not consider the burden of proof issue.

In any event, the trial court correctly placed the burden on ARC. A plaintiff and must prove its breach of contract claim by a preponderance of the evidence. *See VH5 Cap., LLC v. Rabe*, 2023 WL 4305827, at *13 (Del. Ch. June 30, 2023). ARC's breach theory rests on the assertion that the TMTG note conversion never happened—so it carries the burden on that point.

ARC's burden does not shift to DWAC just because the allegation is negative. (*Contra* OB at 32.) As the trial court correctly recognized, *Oberly v. Howard Hughes Medical Institute* is directly on point and persuasive. (Op. at 28 n.122.) There, plaintiff claimed there was "no proof" that a bylaw provision had been adopted by the defendant corporation. *Oberly*, 472 A.2d at 377. Yet *Oberly* held that where "nonexistence of a fact" was required to prevail, the "burden of proof as to a negative proposition also rests upon the party asserting it." *Id.* at 387. *Oberly's* rule makes sense; otherwise, any plaintiff alleging breach via nonperformance could flip the burden to defendants to prove performance. *See* 29 Am. Jur. 2d *Evidence* § 173 ("[W]hoever asserts a claim [that] depends upon a negative proposition has the burden of establishing the truth of the assertion . . . .").

ARC effectively concedes the point, but argues this case is different. (OB at 33.) ARC claims the facts here are "peculiarly within the knowledge" of DWAC, making it impossible for ARC to prove conversion did not happen. (*Id*. (citing 29 Am. Jur. 2d *Evidence* § 173).) But the evidence of conversion—records from the transfer agent and former TMTG noteholders—is accessible to ARC, not just DWAC. And the evidence shows conversion did happen. (Op. at 27–28, 28 n.122.)

Nor does this case even involve a true "negative" proof burden. ARC was not asked to prove that an event never occurred. The issue is much narrower: whether the TMTG Notes converted to TMTG shares immediately before the Business Combination closed. ARC could have probed this discrete event in discovery and, if it did not occur, proven it with evidence. But ARC failed to raise this factual theory and, in any event, the conversion did occur, as all the evidence shows.

Finally, ARC misapplies the "exception" doctrine in contract law. It argues the Conversion Ratio's exclusion of shares issued to "seller[s]" is an "exception," shifting the burden to DWAC to prove it. (OB at 33–34.) But the "exception" doctrine—much like conditions subsequent doctrine—applies only when a party seeks to extinguish an already matured duty or right. *See AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, 2020 WL 7024929, at *51 & n.196 (Del. Ch. 2020) (collecting cases), *aff'd*, 268 A.3d 198 (Del. 2021). That is not this case. Here, the Charter defines the Conversion Ratio Numerator's scope, and shares issued to "seller[s]" were never included. *Cf. S'holder Representative Services LLC v. Shire US Holdings, Inc.*, 2020 WL 6018738, at *19 (Del. Ch. 2020) ("The difference between a condition precedent and a condition subsequent 'is one of substance and not merely of the form in which the provision is stated.'") (citing *Restatement*

(Second) of Contracts § 230). Accordingly, the trial court correctly placed the burden on ARC, as plaintiff, to prove its breach of contract claim.

*   *   *

Respectfully, the Court should affirm the trial court's factual finding that the TMTG Notes converted into TMTG shares immediately before the Business Combination closed.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT ERRED BY NOT EXCLUDING LEGAL SERVICES NOTES, COMPENSATION NOTES, AND ALTERNATIVE WARRANTS FROM THE CONVERSION RATIO NUMERATOR

A. Question Presented

Did the trial court err in holding that the Conversion Ratio Numerator includes notes and warrants not issued in a financing transaction connected to the initial Business Combination? (Preserved at A265–293.)

B. Scope of Review

The Court "review[s] questions of law and interpret[s] contracts *de novo*." *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

1. The Operation and Scope of the Conversion Ratio

The Conversion Ratio is a narrow anti-dilution mechanism. Start with when and how it activates:

Conversion Ratio Trigger
[I]n the case that additional shares of Class A Common Stock, or Equity-linked Securities (as defined below), are issued or deemed issued in excess of the amounts sold in the Corporation's initial public offering of securities (the "Offering"), in connection with the closing of the Corporation's initial Business Combination, all issued and outstanding shares of Class B Common Stock shall automatically convert into shares of Class A Common Stock at the time of the closing of the initial Business Combination at [the conversion] ratio.

A572, § 4.3(b)(ii) (highlighting added). Equity-linked securities is a narrowly defined term:

Conversion Ratio Definition of Equity-Linked Securities
As used herein, the term "Equity-linked Securities" means any debt or equity securities that are *convertible*, *exercisable or exchangeable* for shares of Class A common stock *issued in a financing transaction in connection with the initial Business Combination* . . . .

(*Id.* (emphasis added).)[8]

The Conversion Ratio thus applies in only two limited scenarios: if post-IPO, DWAC issued (1) Class A stock or (2) Equity-linked Securities—but only if issued "in connection with the *closing* of the Corporation's initial Business Combination." (*Id.* (emphasis added).)

[8] DWAC triggered the Conversion Ratio because it issued Equity-linked Securities, such as post-IPO notes and warrants, to various investors in connection with the Business Combination's closing. (Op. at 10; B106–08.) DWAC included those post-IPO notes and warrants in its Conversion Ratio calculation. (*Id.*)

The Conversion Ratio's Numerator is similarly narrow:

Conversion Ratio Numerator
[T]he numerator shall be equal to the sum of (A) 25% of all shares of Class A Common Stock issued or issuable (upon the conversion or exercise of any Equity-linked Securities or otherwise) in each case by the Corporation related to or in connection with the consummation of the initial Business Combination (excluding any securities issued or issuable to any seller in the initial Business Combination and any private placement units (or underlying securities) issued to ARC Global Investments II LLC (the "Sponsor") or its affiliates upon conversion of loans made to the Corporation) plus (B) [the denominator, i.e., issued and standing Class B shares].

(A572-73, § 4.3(b)(ii) (highlighting added).)

The Numerator thus counts only 25% of Class A issued or issuable shares meeting *four* conditions:

1	If "Issuable," only "upon the conversion or exercise of any Equity-linked Securities or otherwise"
2	In all cases, must be "related to or in connection with the consummation of the Business Combination"
3	Excluding shares issued to a "seller" in the Business Combination
4	Excluding shares issued to ARC as "private placement units"

Each condition is significant. *See E.I. duPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) ("[A] court should give effect to all contract provisions."). The Conversion Ratio could have simply said the Numerator is all Class B shares plus 25% of Class A shares issued or issuable. Had it done so, it would have ensured that Class B stockholders maintained a 20% stake in the company post-Business Combination (by giving them one additional share for every four issued to Class A). It did not do so. And the trial court was wrong to hold that "the point" of the Conversion Ratio is "for the Class B stockholders to maintain 20% of the company's common stock." (Op. at 24.)

2. The Numerator Is Limited to Class A Shares Issuable via Equity-Linked Securities

The first Numerator condition limits Class A stock to those issued or, if not issued, "*issuable []upon the conversion or exercise of any Equity-linked Securities or otherwise*." (A572, § 4.3(b)(ii) (emphasis added).) The term "otherwise" is an adverb, meaning "in a different way," "in another manner," or "by other causes or means." *Otherwise*, Black's Law Dictionary (12th ed. 2024) ("adv."). So it modifies the nominalized verbs "conversion or exercise," meaning "issuable" shares must stem from converting or exercising Equity-linked Securities, or through a similar mechanism, to be included in the Numerator.

This reading is both grammatically correct and internally consistent. The Conversion Ratio defines Equity-linked Securities as those "convertible, exercisable, *or exchangeable* for shares of Class A common stock issued in a financing transaction in connection with the initial Business Combination." (A573, § 4.3(b)(ii) (emphasis added).) "Otherwise" thus captures the additional way besides conversion and exercise—such as exchanging—that Equity-linked securities could yield Class A stock.

DWAC correctly applied the first Numerator condition when it excluded Class A shares issuable via Compensation Notes, Legal Notes, and Alternative Warrants. (Op. at 13.) The Compensation Notes compensated DWAC's officers and directors. (*Id*. at 9.) The Legal Services Note was payment to an attorney who provided litigation-related legal services while DWAC was investigated for Orlando's unlawful conduct. (*Id*. at 10.) And the Alternative Warrants secured the release of threatened litigation by former PIPE investors. (*Id*. at 10–11.) None were issued in a financing transaction in connection with the Business Combination. So they fell outside the definition of Equity-linked Securities and were properly excluded from the Numerator.

3. The Trial Court's Reading of the Numerator Ignores Rules of Construction

The trial court never reached the question of whether the Compensation Notes, Legal Services Notes, and Alternative Warrants met the definition of "Equity-linked Securities." (Op. at 25.) Instead, it held that even if these notes and warrants were not issued in a financing transaction in connection with the Business Combination, they "must be included in the numerator of the Conversion Ratio regardless." (*Id*.) The court reasoned that the term "or otherwise" modified the regular noun "Equity-linked Securities," thus sweeping in "*all* Class A shares . . .

regardless of the form in which the right to that right is created." (Op. at 24 (emphasis added.)

The trial court's ruling is wrong for at least four reasons.

First, the trial court's construction flouts basic rules of grammar. The phrase preceding "or otherwise" includes nominalized verbs ("conversion or exercise") and a regular noun ("Equity-linked Securities."). (A572.) Because "otherwise" is an adverb, it modifies the actions described by the nominalized verbs "conversion or exercise"—not the noun "Equity-linked Securities." *Adverb*, Oxford English Dictionary ("A word or lexical unit that modifies the meaning of a verb, adjective, or another adverb, expressing manner, place, time, or degree."); *Otherwise*, Black's Law Dictionary (12th ed. 2024) (defining "otherwise" as an adverb to mean "in a different way," "in another manner," or "by other causes or means").

Second, the trial court's reading creates extensive surplusage across the Charter. *Osborn*, 991 A.2d at 1159 (courts must "not [] render any part of the contract mere surplusage"). By reading "otherwise" to mean all "issuable" Class A shares are included in the Numerator, the trial court nullified the entire Numerator condition in the parenthetical—"upon the conversion or exercise of any Equity-linked Securities or otherwise." (A572); *see Julian v. E. States Const. Servs., Inc.*, 2008 WL 2673300, at *13–14 (Del. Ch. 2008) (rejecting contract interpretation that "would render [a] parenthetical little more than mere surplusage").

Worse, the trial court also erased the Conversion Ratio's deliberate definition of the term "Equity-linked Securities." At the end of the Conversion Ratio, the Charter defines Equity-Linked Securities to mean those "issued in a financing transaction in connection with the initial Business Combination." (A573.) <u>*The only time the Charter uses the term "Equity-linked Securities" is in the Conversion Ratio*</u>. (A571–81.) And that usage and definition must have some meaning. *Osborn*, 991 A.2d at 1159 ("We will not read a contract to render a provision or term meaningless or illusory.") (quotations omitted). Yet, trial court's interpretation nullifies the Charter's deliberate use of the term Equity-linked Securities by sweeping in all issuable shares, even those outside the definition. (Op. at 25.)

DWAC's reading, by contrast, gives meaning to all of the Charter's terms and avoids all of this pervasive surplusage. The adverb "otherwise" adds "exchange" to the mechanism of "conversion and exercise" of Equity-linked Securities. The trial court criticized DWAC for not offering an example of the exchange mechanism. (Op. at 25.) But that criticism is misplaced. The Conversion Ratio itself defines Equity-linked Securities as "convertible, exercisable <u>*or exchangeable*</u>" for Class A stock. (A573 (emphasis added).) "<u>*Otherwise*</u>" plainly captures "exchangeable" as an additional mechanism. If any overlap exists, it stems from the Charter's own definition—not DWAC's interpretation. In any event, it is better to tolerate one potentially redundant word than to nullify entire provisions of the Charter, as the trial court's reading does.

Third, Delaware courts reject efforts to stretch the term "or otherwise" into a catch-all. The principle of *ejusdem generis* instructs that "general words" following specific items should be interpreted to include only items "of the same general kind or class as those specifically mentioned." *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427–28 (Del. 2012). Relying on *ejusdem generis*, the court in *Sullivan Money Management, Inc. v. FLS Holdings Inc.*, explained that when "otherwise" follows a single particular, it should be "construed narrowly," such as "in like manner." 1992 WL 345453, at *4 (Del. Ch. Nov. 20, 1992), *aff'd*, 628 A.2d 84 (Del. 1993). That holding squarely applies here. "Otherwise" follows a single type of security—"Equity-linked Securities." It must be read narrowly, modifying "conversion or exercise" to include similar mechanisms (like exchange), not broadly to sweep in all securities.

Delaware is not alone in cautiously treating the word "otherwise." In *Fischer v. United States*, the U.S. Supreme Court rejected the argument that the term "or otherwise" can be untethered from the words preceding it. 603 U.S. 480, 490 (2024). *Fischer* explained this would get the analysis "exactly backwards, eliminating specific terms because of broad language that follows them, rather than limiting the broad language in light of narrower terms that precede it." *Id.*

The trial court misapplied these rules of construction by misjudging the Conversion Ratio's scope. It wrongly assumed the provision's purpose was to ensure Class B stockholders retained 20% of the company's common stock after closing. (Op. at 24.) This is why it wrongly held that notes and warrants—even if not issued in connection with the Business Combination or qualifying as Equity-linked Securities—must be included in the Numerator. (*Id.*).

But the Conversion Ratio is not a broad provision. It activates only for shares issued "in connection with the closing" of an initial Business Combination. (A572.) The second Numerator condition provides that even issued Class A shares are excluded unless "related to or in connection with the consummation of the initial Business Combination." (A572.) The third Numerator condition excludes shares issued to a "seller." (*Id.*) And the fourth excludes ARC's private placement units. (*Id.*) There is thus no basis to sidestep ordinary rules of construction and ignore the first Numerator condition, which limits issuable Class A shares to "Equity-linked Securities."

Fourth, the trial court's holding is wrong because it disregards the second Numerator condition. The trial court declined to assess whether Compensation Notes, Legal Services Notes, and Alternative Warrants were "in connection" with the Business Combination's closing, holding they could be included "regardless." (Op. at 25.) But the second Numerator condition is very clear that every Class A share—issued or issuable—must be "related to or in connection with the consummation of the initial Business Combination." (A572.) In other words, not only did the trial court's reading nullify the first Numerator condition, its holding contradicts the second Numerator condition and is therefore incorrect.

In sum, the following shows how the trial court reads the Conversion Ratio.

Conversion Ratio
[T]he numerator shall be equal to the sum of (A) 25% of all shares of Class A Common Stock issued or issuable ~~(upon the conversion or exercise of any Equity-linked Securities or otherwise)~~ in each case by the Corporation ~~related to or in connection with the consummation of the initial Business Combination~~ (excluding any securities issued or issuable to any seller in the initial Business Combination and any private placement units (or underlying securities) issued to ARC Global Investments II LLC (the "Sponsor") or its affiliates upon conversion of loans made to the Corporation) plus (B) [the denominator, i.e., issued and standing Class B shares]. . . . ~~As used herein, the term Equity-linked Securities" means any debt or equity securities that are convertible, exercisable or exchangeable for shares of Class A common stock issued in a financing transaction in connection with the initial Business Combination . . . .~~

No other reading would permit it to hold that Compensation Notes, Legal Services Notes, and Alternative Warrants are included "regardless." (Op. at 25.)

For all these reasons, the Court should reverse the trial court's holding that the Numerator includes the Compensation Notes, Legal Services Notes even if not Equity Linked Securities. On remand, the Court should instruct the trial court to determine whether these notes and warrants were issued "in a financing transaction" that was "in connection" with the Business Combination closing.

II. THE TRIAL COURT ERRED BY AWARDING ARC A MOOTNESS FEE

A. Question Presented

Did the trial court err when it awarded ARC a mootness fee for DWAC's additional disclosures. (Preserved at B030–44.)

B. Scope of Review

The Court reviews an attorney fees award for abuse of discretion. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

C. Merits of Argument

The trial court erred when it awarded ARC a $75,000 mootness fee for the supplemental disclosures in DWAC's Form 8-K. Delaware courts follow the "American Rule" that parties to litigation are generally responsible for paying their own attorneys' fees. *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1164 (Del. 1989). "Delaware courts have been very cautious in granting exceptions to [this] rule," construing such exceptions narrowly. *CM&M Grp., Inc. v. Carroll*, 453 A.2d 788, 795 (Del. 1982).

One such exception is the corporate benefit doctrine, which allows a party to recover attorneys' fees and costs where litigation conferred a "significant and substantial" common benefit upon an ascertainable class of stockholders. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *6 (Del. Ch. Aug. 30, 2007); *see also Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966) (requiring claim to have "substantially benefited" the class). Supplemental disclosures confer a "substantial" benefit when they address a "plainly material misrepresentation or omission" in the original disclosure. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 898 (Del. Ch. 2016).

The party invoking the corporate benefit doctrine must also show: "(i) the suit was meritorious when filed; (ii) the action producing the benefit was taken by defendant before a judicial resolution of the claims; and (iii) the resulting benefit was causally related to the suit." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010). These requirements also apply when the corporation took an action after the suit was filed that mooted a claim. *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980) (applying this test in the mootness context). The party seeking the fee also bears the burden of proving that it is reasonable under the *Sugarland* factors. *See, e.g.*, *In re Am. Real Est. P'rs., LP Litig.*, 1997 WL 770718, at *6 (Del. Ch. Dec. 3, 1997).

Putting aside that this is not a representative action (*i.e.*, class or derivative), DWAC's pre-litigation Proxy Statement already disclosed the anticipated 1.34:1 Conversion Ratio and explained why certain securities were excluded from the calculation. (Op. at 13.) It also warned that the Board might exclude Post-IPO Financings—lowering the ratio—and noted ARC's push for 1.69:1. (*Id.* at 14.) Because there were "no assurance that the current conversion ratio [would] not materially differ" at closing, DWAC's Proxy Statement explicitly cautioned investors against relying on it. (*Id.* at 14, 37 n.160.) It also flagged that a lower ratio "could potentially lead to prolonged disputes with some holders of Class B common stock."

DWAC's post-litigation supplemental disclosures were not "plainly material" and thus did not confer a "substantial" benefit. (*Contra* Ex. F at 14.) The trial court cited just two pieces of information: (1) ARC's new claim for a 1.78:1 or 1.81:1 Conversion Ratio—raised *after* the original disclosures; and (2) a table with mathematical calculations under various ratio scenarios. (*Id.* at 13.) These hardly qualify as the "substantial" benefit needed for a mootness fee award—especially when the original Proxy already warned investors not to rely on the initial ratio. *See Franklin Balance Sheet Inv. Fund*, 2007 WL 2495018, at *6. And even the trial court described the disclosures as merely helping stockholders "contextualize" the ratios, not delivering genuinely valuable new information. (Ex. F at 14.) The Court should therefore reverse the trial court's $75,000 fee award to ARC.

CONCLUSION

For the foregoing reasons, the Court should (i) affirm the trial court's holding that all TMTG equity holders were "sellers"; (ii) affirm the trial court's factual finding that TMTG Convertible Notes converted into TMTG shares before the Business Combination closing; (iii) reverse the trial court's ruling that the Conversion Ratio included Legal Notes, Compensation Notes, and Alternative Warrants, and remand for further proceedings; and (iv) reverse the trial court's $75,000 mootness fee award to ARC.

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