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Case Number 43,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTERPORT, INC. and MATTERPORT OPERATING, LLC,	§	
	§	No. 43, 2022
Defendants Below, Appellees,	§	Court Below–Court of Chancery of the State of Delaware
v.	§	
	§	C.A. No. 2021-0595-LWW
WILLIAM J. BROWN,	§	
Plaintiff Below, Appellee.	§	

APPELLEE'S ANSWERING BRIEF

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May 2, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

NATURE OF PROCEEDINGS

This case arises from Appellants' failed efforts to impose transfer restrictions on stock in a de-SPAC transaction using a novel, untested procedure. The entity now called Matterport Operating, LLC ("Legacy Matterport") went public through a de-SPAC. Its former CEO, Appellee William J. Brown ("Brown"), was a significant shareholder of Legacy Matterport, having received equity as the bulk of his compensation for his years of service. In the transaction, Appellants wanted to impose a lockup on shareholders of Legacy Matterport, but rather than follow the typical process of seeking agreement, they attempted to do so by diktat.

As Legacy Matterport prepared for the de-SPAC by merging with Gores Holdings VI, Inc., now named Matterport, Inc. ("Matterport"), Appellants sought to exploit a perceived de-SPAC merger loophole to impose trading restrictions retroactively on existing shareholders through bylaws. Using this same purported loophole, Appellants also attempted to prohibit any form of derivative trading.

The manner by which Appellants imposed the bylaw restrictions to limit activity of shareholders of a private company going public is nearly unprecedented. Appellants' procedure does not conform to any established market practice. As Brown's expert, Professor Guhan Subramanian,

testified, beginning in late 2020, some companies going public by de-SPAC began to impose the traditionally negotiated transfer restrictions through a bylaw amendment procedure. Doing so undercuts the protections against unilaterally imposed transfer restrictions embodied in 8 *Del. C.* § 202(b). Prof. Subramanian's analysis showed that the de-SPAC at issue here is the first time the procedure was used to unilaterally impose such restrictions without some type of consent. Neither Appellants' variant of this procedure, nor the procedure itself, has ever been countenanced by a Delaware court.

As the case developed, it became clear that, contrary to Appellants' assertions, the bylaw language chosen by Appellants did not impose transfer restrictions on the shares Brown would receive as merger consideration. Though he had previously demanded appraisal under 8 *Del. C.* § 262, Brown therefore decided to forgo filing an appraisal proceeding, which would have given him an independent judicial determination of the fair value of his Legacy Matterport shares. By forgoing appraisal, Brown subjected all of his shares received as merger consideration to the Court of Chancery's decision below.

The trial below decided Count I of Brown's complaint, which sought a declaration that Section 7.10 (the "Lockup" or "transfer restriction") of Matterport's Amended and Restated Bylaws (the "A&R Bylaws") was

"unenforceable as to Brown." Count I further alleged that "Brown seeks a judicial declaration of his rights under the [Matterport] Bylaws, the Matterport Agreements, and Section 202." At trial, Brown demonstrated that the Lockup was unenforceable as to him, both under Section 202 and under the plain language of the Lockup. The Court of Chancery found the plain language dispositive and did not address Section 202.

Appellants argue that interpreting the bylaws presented an entirely new claim. To the contrary, the meaning of the bylaws was always at issue in this case, as set forth in the pleadings and the pretrial stipulation. Delaware's minimal notice pleading standards did not require Brown to assert all possible legal arguments in his pleadings.

The Court of Chancery's analysis was straightforward. As drafted by Matterport, the transfer restriction applies only to "Lockup Shares," defined as "the shares of Class A common stock ***held*** by the Lock-up Holders ***immediately following*** the Business Combination Transaction." A1461 (emphasis added). The Court of Chancery found this language unambiguous. Brown did not "hold" any Class A common stock in Matterport "immediately following the "Business Combination." Indeed, Brown did not hold the shares until four months after the merger, when he submitted letters of transmittal.

Appellants' own arguments before the Court of Chancery underscore this conclusion. Section 202(b) provides in relevant part that "[n]o restrictions . . . shall be binding with respect to securities issued ***prior to*** the adoption of the restriction . . . ." (emphasis added). Appellants' Section 202(b) arguments therefore depended upon the precise timing of the merger mechanics, such that the securities be issued ***after*** the A&R Bylaws were adopted. Thus, under Appellants' argument, even though non-consenting shareholders like Brown did not agree to the lockup, they were bound by it because the securities were not issued "prior to the adoption of the restriction." Before this Court, however, Appellants throw their previous precision, technical readings and attention to timing out the window, dismissing text as flexible, timing as ministerial, and words as having "colloquial[]" meanings. OB at 25-26.

Appellants' Section 202(b) arguments were wrong for a number of reasons, but that issue was not the basis for the decision below and is not on appeal. Nor is Brown's additional argument, that the merger violated 8 *Del. C.* § 251, on appeal. The issue in this appeal is whether the Lockup, which imposes transfer restrictions only on shares held immediately following the closing of the merger, applied to shares that Brown did not hold until four months after the merger.

As to that, Appellants offer no reasonable alternative to the Vice Chancellor's ruling of what "held . . . immediately following" means. Instead, Appellants rewrite the bylaws, arguing "held" means "right to receive," and that "immediately following" means "in direct connection or relation." Appellants' reading would upend Delaware law, which requires that courts honor the plain language of bylaws.

Appellants also resort to "extrinsic evidence." OB at 30-33. But extrinsic evidence cannot be used to vary or reinterpret unambiguous language. Moreover, Appellants' evidence consists largely of similarly-drafted lockup provisions in other de-SPAC transactions (OB at 32), many of which were drafted by the same deal counsel that drafted Matterport's. A1825, A1855, A1884, A1941, A2029, A2205, A2260. This shows nothing more than that the same deal counsel repeatedly used their own template language. No shareholder in any of these de-SPACs objected to the lockup to test the language (A1653-A1654), and the only evidence as to what these companies intended is the plain meaning of the language they selected. Further, several other de-SPACs used different language that, unlike Appellants' language, locked up all shares received as merger consideration. B0883-84; B0908-10; B961-963; B0985-88.

If Appellants now wish to rewrite the bylaws, they should do so by lawful amendment, not ask the judiciary to do it for them retroactively. If corporations can cast aside the plain terms of their own bylaws when it suits them, no transaction will be safe from reappraisal, and commercial dealings will take on needless new uncertainty.

Appellants also make a new argument that the Court of Chancery should have treated Brown's textual argument as an amendment to the pleadings under Rule 15. Because Appellants never presented this argument to the Court of Chancery before, during, or after trial, the argument is waived. *See* Rule 8. Appellants make no attempt to avoid this waiver by demonstrating that the interests of justice would require appellate review.

On its merits, Appellants' Rule 15 argument is odd and convoluted. It posits that one of Brown's legal arguments for entitlement to relief in Count I should have been presented as a new cause of action (duplicative of Count I), the new cause of action should have been presented in an amended complaint, and the Court of Chancery, when presented with a request to add this new cause of action that sought the relief of Count I, should have prohibited the amendment because of some unestablished prejudice to Matterport, who should not have been required to defend the workings of it own bylaw's plain language. Had this string of argument been presented below, it would have

made little sense. But it was not and, moreover, Appellants cannot demonstrate prejudice because Appellants were on notice as to the plain meaning of their own bylaws and what was at issue at trial.

The Court of Chancery correctly ruled that the Lockup does not apply to Brown and that his shares in Matterport were freely tradable. The judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the plain text of the Lockup is unambiguous and means what it says. Brown did not hold any shares of Matterport's Class A common stock "immediately following the closing of the Business Combination Transaction." Therefore the Lockup did not restrict his ability to freely trade his shares upon receipt approximately four months after closing.

2. Denied. The Court of Chancery correctly held that Brown did not waive a legal argument asserting the plain language reading of the bylaw at the center of the case. Brown never amended the claim that was tried, nor did he have to. The issue was fairly raised in the Amended Verified Complaint, the Pre-Trial Stipulation and Order and Brown's Pre-Trial Brief, and the trial proceeded on that basis. Appellants did not present an argument under Rule 15(b) to the Court of Chancery, and do not argue on appeal that the interests of justice warrant review. In any event, Brown's interpretation was a legal argument, not a new claim, and Appellants fail to show prejudice.

COUNTERSTATEMENT OF FACTS

a. Legacy Matterport Ties Brown's Compensation To The Company's Long-Term Performance

Brown served as Legacy Matterport's CEO from November 2013 to December 2018. A396-A397. When Brown began his tenure at Legacy Matterport, the company had no revenue and no marketable product. A396. Through Brown's stewardship, the company conducted significant fundraising, signed up numerous customers, and built a revenue run rate of roughly $50 million per year. A397.

The vast majority of Brown's compensation over his five-year tenure was illiquid and concentrated in the form of options and restricted stock, comprised of two stock option grants for the right to purchase 655,000 shares and 695,000 shares respectfully, which he exercised in December 2020 (A398), and 37,000 restricted shares of common stock that Brown purchased. A399.

Brown is a signatory to agreements with Matterport and certain key holders and investors that govern the parties' rights and obligations with respect to these shares. *See* B0913; B0001; B0006; B0051. None of these agreements impose a lockup period or other trading restrictions on Brown's shares in the event they convert into shares of a publicly-listed company via a de-SPAC transaction. *See id.*

b. Legacy Matterport And Gores-Matterport SPAC Announce A De-SPAC

On February 8, 2021, Gores-Matterport SPAC and Legacy Matterport announced their agreement to the business combination. B0074. The combined entity, as Matterport, would list the Class A stock on the NASDAQ and continue operating Legacy Matterport's business with Legacy Matterport's executive team under the Matterport name. The business combination closed on July 22, 2021. B0696.

Appellants structured the transaction so that Legacy Matterport shareholders like Brown did not automatically or immediately receive or hold shares in Matterport. Instead, they received a "right to receive" Matterport shares as merger consideration if they complied with certain conditions. A375; A982. To receive the merger consideration, Brown had to sign a letter of transmittal and deliver that letter along with his share certificates to Matterport's exchange agent. A376; A982; A983-A984. Only after this submission, would Brown at some point receive Matterport shares. *See id.*

c. The New A&R Bylaws Contain Transfer Restrictions On Merger Consideration Shares "Held . . . Immediately Following" The Close

The A&R Bylaws imposed the transfer restrictions only on "Lockup Shares." A1461. "Lockup Shares" is defined in Section 7.10(d)(ii) as:

> shares of Class A common stock **held by the Lock-up Holders immediately following the closing of the Business Combination Transaction** (other than shares of Class A common stock acquired in the public market or pursuant to a transaction exempt from registration under the Securities Act of 1933, as amended, pursuant to a subscription agreement where the issuance of shares of Class A common stock occurs on or after the closing of the Business Combination Transaction) and the Legacy Equity Award Shares;

A1461 (emphasis added).

d. Appellants' Attempt To Impose The Lockup On Brown Forces Him To File Suit

On July 13, 2021, Brown filed his Verified Complaint commencing this action (A1), asserting that the Lockup was invalid as to him. A53.

Count I alleged that "[a] current and actual controversy has arisen and now exists between Brown and Defendants regarding Brown's rights to freely-transfer his shares in [Matterport]." A75. Count I sought "a declaration that: (1) Section 7.10 of the [Matterport] Bylaws is unenforceable as to Brown; (2) upon close of the Reorganization, Brown may freely transfer his shares in [Matterport]." A76. Count I further sought "a judicial declaration of his rights under the [Matterport] Bylaws, the Matterport Agreements, and Section 202." A77.

On September 3, 2021, after the merger closed, Brown filed an Amended Verified Complaint (the "Complaint"). A124. In Count I, Brown continued to seek a declaration that "Section 7.10 of the [A&R] Bylaws is

unenforceable as to Brown" and that he "may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions." A159.

e. Brown Delivers An Appraisal Demand To Matterport To Hedge His Risk But No Appraisal Action Is Filed

On July 29, 2021, Legacy Matterport circulated to stockholders a Notice of Appraisal Rights. A1470. On August 13, 2021, Brown gave notice of his exercise of appraisal rights with respect to 1,347,000 of his Legacy Matterport shares, but not as to 40,000 of his Legacy Matterport shares. A1481. Through an appraisal action, Brown could somewhat hedge against a decline in the market value of Matterport's stock by having the option of obtaining the fair value of his shares in Legacy Matterport. *See* 8 Del. C. § 262(h). No appraisal action was filed by Brown or Matterport by the November 19, 2021 deadline.[1]

f. Brown Submits Letters Of Transmittal

On November 9, 2021, Brown delivered to AST a letter of transmittal and certificate for 37,000 of his shares that were not included in the appraisal demand. A1676-A1684. Prior to delivery, Brown revised the letter of transmittal to, among other things, clarify that Brown did not waive his

[1] Under *8 Del. C.* § 262(k), a stockholder's right to appraisal ceases if an appraisal petition is not filed within 120 days of the merger.

rights and claims with respect to this litigation, that AST should process Brown's request promptly, and that Brown still held additional shares subject to an appraisal demand. *Id.* Brown indicated in bold at the top of the letter that it was "**REVISED**." A1676.

On November 19, 2021, when the time to file an appraisal petition expired, Brown submitted a second letter of transmittal to AST, for his remaining 1,350,000 Legacy Matterport shares. A2036-A2041. As with the first letter, Brown revised the second letter of transmittal and inserted "REVISED" in bold at the top to make that clear. *Id.* Appellants assert that Brown "surreptitiously altered both LOTs and did not inform Matterport that he had submitted them." OB at 14. But as noted, Brown conspicuously noted that both letters were "REVISED," and delivered the letters to Appellants' transfer agent, AST. A470.

On November 27, 2021, Brown received a Direct Registration Book-Entry Advice that showed AST had processed all of Brown's Legacy Matterport shares and that Brown now held 5,713,441 shares of Matterport Class A common stock. A401-A402; A2043-A2044. Before receiving this Advice, Brown did not hold any Matterport Class A shares other than the 100 shares that he had purchased in the open market in April 2021. A401-A402. The trial commenced shortly thereafter.

g. Brown Prevails At Trial On Count I For Declaratory Relief

On January 10, 2022, the Court of Chancery issued its Memorandum Opinion. OB Ex. A. The Vice Chancellor held that Brown had proven, by a preponderance of the evidence, that he was not subject to the transfer restrictions in Section 7.10 of the A&R Bylaws. *Id.* Ex. A at 6. The Vice Chancellor found the language of Section 7.10 to be unambiguous. *Id.* at 7. The Vice Chancellor further held that it was "unnecessary to define the precise time period that the 'immediately following' language covers" because "[t]he only question presently before the court is how (and whether) the transfer restrictions apply to the plaintiff." *Id.* at 9. Appellants argued that Brown had waived the argument that Section 7.10 did not apply to his shares, but the Vice Chancellor rejected this, explaining "that Brown could not have waived an argument about the meaning of the very contractual language upon which he sought declaratory relief." *Id.* at 10-11.

ARGUMENT

1. The Court of Chancery Correctly Held That Brown's Matterport Shares Are Not "Lockup Shares" And Are Therefore Freely Tradable

a. Question Presented

Did the Court of Chancery correctly hold that Brown's Matterport shares were not Lockup Shares under Section 7.10 of the A&R Bylaws?

b. Scope of Review

This Court reviews legal issues *de novo*. *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 508 (Del. 2005). This Court reviews factual findings for clear error and "will not set aside a trial court's factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021).

c. Merits of Argument

1. The Plain Language Of "Lockup Shares" Governs

Appellants argue the term "Lockup Shares" is "a category-based limitation" and that the transfer restrictions "apply to all the Matterport shares that Lockup Holders received as consideration through the Business Combination and excludes all other shares." OB at 21. Appellants further argue that the transfer restrictions apply depending on "how" the shares were acquired, not when. The problem with both of these arguments is that they are contrary to the plain language of the term "Lockup Shares" in Section

7.10. That language is unambiguous, and "[i]f a bylaw is unambiguous in its language, a court need not interpret it, or search for the parties' intent behind the plain language." *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983). A court rather "construe[s] the bylaw as it is written," giving language that is "clear, simple, and unambiguous" the force and effect required. *Id*.

Construing "Lockup Shares" as written, the term does not apply to Brown's shares at issue. This is because he "held" none of them "immediately following the closing of the Business Combination."

Appellants argue for a counter-textual reading of Lockup Shares, relying on the supposed extrinsic evidence of "commercial context" to make up mean down, or, in this case, "immediately following" mean four months later. OB at 19. According to Appellants, because a lockup is designed to prevent too many shareholders from selling, the Court of Chancery's reading is flawed because it does not definitively lock up all Legacy Matterport shareholders. *Id.* at 20. But to serve its purpose, a lockup need not be an all-or-nothing affair. As Prof. Subramanian explained, "a partial shareholder lockup is perfectly workable" and a lockup "that captures insiders and other shares as needed is the value-maximizing outcome, because such a lockup is narrowly tailored to achieve the business objectives." A1648-A1649.

Accordingly, that Section 7.10(d)(ii) does not automatically lock up every share is commercially sensible, not an absurd result.

Appellants also complain that the Court of Chancery's reading "elevates the ministerial act" of submitting a letter of transmittal into a "decisive act." OB at 20. But it was Appellants—not the Court of Chancery or Brown—that drafted Section 7.10 and made submission of the letter of transmittal critical to the structure of the de-SPAC. Appellants required that a letter of transmittal be submitted before shares were issued as merger consideration. This act was indeed "decisive" for Appellants. It was part of the reason why Appellants contended before the Court of Chancery that the restrictions in Section 7.10 fit the perceived loophole in Section 202(b) for bylaws adopted prior the issuance of the shares. It was thus Appellants themselves that "elevated" the act of submitting a letter of transmittal. Indeed, before the Court of Chancery, Appellants repeatedly stressed just how important the letter of transmittal and "right to receive" were to the de-SPAC transaction. In Appellants' view, these technical requirements made the imposition of lockup restrictions lawful (supposedly) under Section 202(b) because Brown would receive no shares until after the new bylaws were adopted. *See, e.g.*, A312 ("After receiving a letter of transmittal, Matterport's transfer agent issues Matterport Class A shares to the Legacy

Matterport stockholders. These are the Matterport Class A shares that are subject to the Transfer Restrictions.").

Appellants also argue that the plain reading of "Lockup Shares" would render the provision vague because "immediately following" is imprecise. OB at 20. But to resolve this appeal, this Court need not issue advisory opinions about how Section 7.10(d)(ii) applies to hypothetical shareholders who received their merger consideration minutes, hours, days, or weeks after the close. Brown did not receive or hold his Matterport shares until more than four months after the close of the transaction. Even Appellants do not contend that such a lengthy period would satisfy the ordinary meaning of "immediately following."

The Court should reject Appellants' efforts to evade their own language. Holding Appellants to the language they chose would be consistent with their insistence that practitioners rely on "literal" readings of statutory text, and that "Delaware courts strive to provide transactional planners with rules and guidance in structuring corporate transactions, to promote as much certainty of result as possible." A1706. That same rationale in favor of "literal" readings and the importance of certainty equally applies to corporate bylaws.

Bylaws are "hard facts" on which market participants like Brown must rely in shaping their business affairs. And Brown did rely on the bylaws by not proceeding with appraisal. A401. When courts reinterpret corporate bylaws in a manner that changes their plain meaning, it produces unpredictable outcomes and undermines the "certainty of result" that Appellants themselves recognize as important.

2. The Plain Meaning Of "Lockup Shares" Is Buttressed By Matterport's Transaction Documents, Appellants' Representations In Court, And Appellants' Expert Witness.

Appellants criticize the Court of Chancery for reading Section 7.10(d)(ii) "in isolation" (OB at 20) but point to no other language in the bylaws or any transaction document that could possibly modify the plain meaning of "held . . . immediately following." The only other provision in the A&R Bylaws that Appellants reference is the definition of "Lockup Holder" in Section 7.10(a). OB at 21. But this provision only underscores the plain meaning of "Lockup Shares."

The definition of "Lockup Holder" is over-inclusive, as it includes ***any*** holder of shares of the Company's Class A Common Stock issued as merger consideration in the Business Combination, even if the stockholder also holds additional Class A common stock beyond that received as merger consideration, though a loophole was created for investors in the PIPE.

A418-A419. The definition of "Lockup Shares" serves to limit the scope of the transfer restrictions to particular shares "held" by "Lockup Holders." Among other limitations, "Lockup Shares" limits the transfer restrictions to merger consideration shares "held by Lock-up Holders immediately following" the close of the business transaction.

Appellants argue that the definition of "Lock-up Holder" "demonstrates the parties' clear intention to apply the Transfer Restrictions to *all* Legacy Matterport stockholders." OB at 21. But as the actual language makes evident, the definitions of "Lockup Holder" and "Lockup Shares" confirm that the transfer restrictions were to be imposed on only some shares. If it had been Appellants' intention to apply the transfer restrictions to all merger consideration to which "*all* Legacy Matterport stockholders" had a right to receive, it was incumbent upon Appellants to draft language specifically to say so. They could have done this easily.

As the Court of Chancery correctly found, companies in several de-SPAC transactions, unlike Matterport, did exactly that. These companies specifically drafted the bylaw lockup restriction to cover any shares issued as deal consideration to target stockholders, regardless of when a target stockholder actually held or received them. For instance, the definition of Lockup Shares in the bylaws of 23andMe Holding Co. reads as follows:

> the term "Lock-up Shares" means the shares of common stock received by the stockholders of the Corporation after the date of the adoption of these Bylaws as consideration in the VGAC Transaction; provided, that, for clarity, shares of common stock issued in connection with the Domestication (as defined in the Merger Agreement) or the PIPE Financing (as defined in the Merger Agreement) shall not constitute Lock-up Shares;

B0884. Appellants used the phrase "held . . . immediately following—not the phrase "received . . . after," or anything similar.

Applying the plain meaning of "immediately following" is also consistent with the "context" of how the term is used throughout the resolution adopting A&R Bylaws. For instance, the A&R Bylaws are "to become effective ***immediately following*** the effectiveness of the Second Amended and Restated Certificate of Incorporation of the Company" and the directors are to resign "***immediately following*** the effectiveness of the Closing Company A&R Bylaws." A1343, A1347, A1348 (emphasis added). Appellants offer no explanation as to why "immediately following" should have different meanings in different parts of the same A&R Bylaws. *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at *5 (Del. Ch. Oct. 11, 2019) ("[A]bsent anything indicating a contrary intent, the same phrase should be given the same meaning when it is used in different places in the same contract.").

Further, the terms of the Merger Agreement, the Letter of Transmittal, and Appellants' representations to the Court of Chancery all indicate that no shares of the Company's Class A Common Stock would be delivered to Brown unless and until he waived or let lapse his appraisal rights and followed the procedures set by Appellants in the Merger Agreement. Section 3.04 of the Merger Agreement (which is entitled "Delivery of Per Share Company Common Stock Consideration and Per Share Company Preferred Stock Consideration") sets forth the procedures for letters of transmittal in detail and provides in part, "Until surrendered as contemplated by this Section 3.04(b), each share of Company Stock shall be deemed, from and after the Effective Time, to represent only the right to receive . . . ." A787.

Under this provision, there could have been no delivery of Matterport's Class A Common Stock to Brown until he surrendered to the exchange agent a completed letter of transmittal along with any certificates representing common stock in Legacy Matterport. Likewise, the Letter of Transmittal states that Legacy Matterport stockholders would not "receive" any shares of the Company's Class A Common Stock without complying with the aforementioned procedures. A1794. To ensure the stockholders of Legacy Matterport are made aware of this fact, the Letter of Transmittal states this in all capital letters:

> UNTIL YOU HAVE SURRENDERED YOUR SHARES (INCLUDING ANY STOCK CERTIFICATE(S) OR AFFIDAVIT OR OTHER DOCUMENTATION RELATING TO LOSS OF STOCK CERTIFICATE(S), AS APPLICABLE, TO THE ADDRESS SET FORTH ABOVE, YOU WILL NOT RECEIVE PAYMENT OF THE PER SHARE CONSIDERATION IN RESPECT OF THE MERGERS.

Id.

Appellants' expert witness agreed that Legacy Matterport shareholders did not "hold" merger consideration until they executed letters of transmittal:

> Q. And, again, at your deposition I asked you this question: "And so -- once the letter -- unless the letter of transmittal is executed" -- and this is on page 19, beginning at line 17 -- "unless the letter of transmittal is executed, Legacy Matterport shareholders do not hold any Matterport stock; is that how it works?"
>
> And you said, "Yes, that is my view." And I asked you, "And what happens if they never execute a letter of transmittal?" And you said, "I will say it rarely comes up in practice. When I've been asked this question before, the conclusion I've come to is, if it is unclaimed, it may escheat to the state." Do you remember that testimony?
>
> A. I do.
>
> Q. And are you changing that testimony now?
>
> A. No, I'm not changing the testimony. I guess the caveat would be I go back to my deposition where I said this doesn't come up very often and I'm not an escheat expert. **So they don't own the stock**

> **for purposes of the DGCL. I still believe that's the case.** I'd have to look at the escheat law to figure out exactly when something is abandoned or becomes unclaimed property. So it's a little bit hard to answer that in a vacuum.

A439-A440 (emphasis added).

Appellants' arguments also ignore DGCL Section 262(l), which states that, when appraisal has been demanded, "[t]he shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall *have the status of authorized and unissued shares of the surviving or resulting corporation*." (emphasis added). Under 262(l), shares that will be received as merger consideration are unissued, and therefore not "held" by a stockholder such as Brown (who had demanded appraisal). By not submitting a letter of transmittal to receive merger consideration, and then again by demanding appraisal, Brown never "held" merger consideration "immediately following" the close of the Business Combination.

Appellants argue that the Court of Chancery's interpretation allows a Legacy Matterport stockholder "to escape the Transfer Restrictions through gamesmanship and delay." OB at 20. But Brown merely exercised his statutory right to appraisal. Brown would have risked waiving his appraisal rights by submitting letters of transmittal. *See, e.g.*, A1471 ("***In lieu of***

accepting the Merger Consideration as set forth in the Merger Agreement, pursuant to Section 262 of the DGCL, former holders of Legacy Matterport Stock . . . have the right to seek appraisal.") (emphasis added); A1790 ("The undersigned hereby represents and warrants to Parent that: . . . as of immediately prior to the Effective Time, the undersigned does not hold any (i) shares of Company Stock other than the shares of Company Stock set forth in the 'Description of Company Stock Surrendered' below"); A1790-A1791 ("By executing and delivering this Letter of Transmittal, the undersigned hereby expressly and irrevocably . . . (f) waives, to the extent not already waived, any right to assert dissenters' rights under the General Corporation Law of the State of Delaware.")

3. The Court Of Chancery Correctly Interpreted "Held" and "Immediately" Pursuant To Their Plain Meaning

Appellants fault the Court of Chancery for applying the ordinary meaning of the terms "held" and "immediately." Appellants fail, however, to provide any reasonable alternative meaning. Appellants argue that "held" has "no fixed meaning," and that the drafters of the A&R Bylaws used the term "colloquially" because the Lockup Holders would eventually possess those shares. In practical effect, Appellants argue that "held" means whatever they want it to mean after the fact, depending on the circumstances. As for "immediately," Appellants argue the term should have

the less common meaning of "in direct connection or relation"—e.g., "the parties immediately involved in the case." OB at 27. But "immediately" modifies "following" and thus clearly is temporal in significance. Indeed, as noted above, Appellants used "immediately following" in at least two other sections of the A&R Bylaws to signify closeness in time between events.

Appellants argue for a more "flexible understanding" of "holding" under *Roam-Tel Partners v. AT&T Mobility Wireless Ops. Hldgs., Inc.*, 2010 WL 5276991 (Del. Ch. Dec. 17, 2010). At issue in *Roam-Tel* was the meaning of "stockholder" under Delaware's appraisal statute, 8 Del. C. § 262(a), not "held" in a bylaw. That statute affords appraisal rights to "[a]ny stockholder . . . who holds shares of stock on the date of the making of a demand. . . ." Contra to the issue here whether certain shares of an acquiring company are "locked up" under the terms of a bylaw, *Roam-Tel* examined the meaning of "hold" in the context of valuing a minority shareholder's stock at the time of the merger.

The Chancery Court decided the narrow issue of "whether a stockholder who has lost its stockholder status in a short-form merger and, within the 20 day statutorily prescribed period to demand an appraisal, elects to receive the merger consideration in lieu of demanding an appraisal may nonetheless change its mind, return the uncashed and unnegotiated check for

the merger consideration to the surviving corporation, and make a demand for an appraisal within the same 20 day statutory election period." 2010 WL 5276991, at *2.

The Court of Chancery rejected the argument that the physical surrender of stock certificates extinguished appraisal rights in order to "make sense of the statute." *Id.* at 7. Under the terms of the merger, each share in the target company was cancelled and the court reasoned that if "hold" required "physical possession," no shareholder would have appraisal rights because their shares were cancelled in the merger. *Id.* The court therefore "read the term 'stockholder,' in a case like this one where the effect of the short-form merger was to cancel immediately the shares of the minority investors, as including those stockholders of record who held shares immediately before the effective date of the short-form merger." *Id.* That reading makes sense given that the appraisal statute was designed, in part, to protect the rights of dissenting shareholders of a target company.

Appellants' reliance on *Roam-Tel* is therefore misplaced. *Roam-Tel* merely recognized that the purpose of the appraisal statute would be thwarted if it were not read to provide dissenting shareholders of a target company the ability to appraise the value of their stock in the target company at the time of the merger.

In contrast, the Court here need not rewrite Appellants' bylaws in order to "make sense" of them by changing "held…immediately following" to "held…immediately preceding" or some other alternative meaning. The transfer restrictions do not have to apply to all shares issued as merger consideration to serve the purpose of a lockup. And some Legacy Matterport stockholders returned their executed letters of transmittal before the close of the business combination. OB at Ex. B at 9. Nor is there any compelling statutory (or other policy) reason to protect Appellants from the apparent imprecision of their own drafting choices.

Also inapposite is *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106 (Del. Ch. 1948). Appellants argue under *Rosenthal* that "rigidity" in the meaning of stockholder identity is not always necessary. OB at 25. At issue in *Rosenthal* was whether an equitable owner of stock could maintain a derivative action. 60 A.2d at 111. The court held that in some circumstances such as appraisal proceedings, "the corporation must have a rather inflexible basis of stockholder identity," such "rigidity is not needed where the equitable owner of stock is seeking to protect the corporate interests" because the owner must still "prove his ownership in order to maintain the action." *Id.* at 112. *Rosenthal*'s holding did not involve the interpretation of a bylaw, did not involve language similar to "held . . . immediately

following," and involved a shareholder attempting to protect corporate interests. The transfer restriction here turns on when shares were "held," not "stockholder identity." *Rosenthal* has no application here.

Appellants' inability to offer any plausible alternative reading of "held" and "immediately following" underscores the soundness of the Court of Chancery's approach. The term "held" is not defined in the A&R Bylaws; therefore, it must be given its ordinary meaning. The Court of Chancery looked to Merriam-Webster's definition, which is consistent with the Oxford English Dictionary. *See* Oxford English Dictionary, www.oed.com (2021) (defining "hold" as "[t]o have or keep as one's own absolutely or temporarily; to own, have as property; to be the owner, possessor, or tenant of; to be in possession or enjoyment of").

As with "held," the A&R Bylaws do not define "immediately following," so the ordinary meaning must apply. The Merriam-Webster and Oxford English Dictionary definitions make clear, that the meaning of "immediately following" in this case is "upon" or "in the initial moments after the transaction's closing." *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/immediately ("without delay"); Oxford English Dictionary (2021) (defining "immediately" as "[w]ithout any delay or lapse of time; instantly, directly, straightway; at

once"). And as noted above, this interpretation is consistent with the use of the same language in the resolutions adopting the A&R Bylaws.

The Court should honor the plain terms of "Lockup Shares" and reject Appellants' invitation to define "held" and "immediately following."

4. The Plain Meaning Of "Lockup Shares" Is Commercially Sensible And Does Not Lead To Absurd Results

In yet another admission that the plain language defeats their claims, Appellants argue that the Court of Chancery's "narrow" reading produces an absurd result because it means no shareholders receiving Class A common stock as merger consideration are locked up. OB at 29. But the premise of that assertion is false. "Lockup Shares" includes Legacy Equity Award Shares regardless of when held (A1461), so Section 7.10 has utility according to its unambiguous terms.

Further, there is no reason to conclude that only an insignificant number of Legacy Matterport shareholders held shares received as merger consideration "immediately following" the close of the merger. Matterport's CFO, Mr. Fay, testified at deposition that the transmittal letter went out shortly before or after the closing and some Legacy Matterport shareholders sent in executed transmittal letters before receiving the July 29, 2021 Notice of Appraisal. B0730 (78:1-79:1). Data as to how many transmittal letters were submitted and when they were submitted is obviously within

Matterport's possession. If Mr. Fay had misspoken at his deposition, he could have said so at trial. Appellants never elicited such testimony, nor ever suggested to the Court of Chancery that, had they had additional time, they would have submitted favorable evidence regarding when letters of transmittal were submitted.

As noted in the Merger Agreement, the letters of transmittal were distributed on the day the proxy statement went out, so many shareholders may have submitted their letters of transmittal prior to the closing. And because Appellants' stock is held in book-entry form, the transfer of shares could be done immediately. For a closely-held firm like Legacy Matterport, if the founders, executive team and venture capital investors (all or most of whom consented to the merger), submitted their letters of transmittal around the closing day, a large percentage of shares would meet the definition, and the purpose of the lockup would have been easily achieved. The same class of holders typically enter into consensual agreements restricting transfers after an IPO. A414, A416.

Regardless, the fact remains that Matterport's "experienced drafters" (OB at 26) made the decision to use "held" and "immediately following." Market participants responsibly organize their affairs under Delaware law on the premise that it is a judge's "duty to call balls and strikes[.]" *Lomax v.*

Ortiz-Marquez, 140 S. Ct. 1721, 1724 (2020). Doing so is good policy, as it encourages clear and precise drafting. That policy, and the predictability upon which market participants rely, is seriously undermined if the judiciary's role expands to change the text of the bylaws according to what the drafters say they subjectively intended or must have really meant, according to litigation-made arguments.

5. Appellants Cannot Alter The Plain Meaning Of The A&R Bylaws Through "Extrinsic Evidence"

Finally, Appellants argue in the alternative that "Lockup Shares" is ambiguous and extrinsic evidence "refutes" the Court of Chancery's reading. OB at 30. But courts do not consider extrinsic evidence unless they "find that the text is ambiguous." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 2022 WL 619700, at *5 (Del. Mar. 3, 2022). Appellants' assertions of ambiguity are predicated not on the text of the A&R Bylaws but on "commercial context" and what Matterport supposedly intended to achieve via the transfer restrictions. In other words, Appellants argue that extrinsic evidence renders "Lockup Shares" ambiguous. "But it is axiomatic that the Court cannot consider extrinsic evidence in order to 'find' an ambiguity that is not apparent on the face of the contract." *Lennox Indus., Inc. v. All. Compressors LLC*, 2021 WL 4958254, at *6 (Del. Super. Ct. Oct. 25, 2021). Under the plain terms of Section 7.10(d)(ii), no guesswork is needed to

determine whether Brown "held" his shares "immediately following the Business Combination." He did not. Brown held no shares until four months after the merger.

Even if the Court were to consider extrinsic evidence, the Court of Chancery's plain language interpretation still prevails. The most compelling evidence the Court could consider beyond the plain language of "Lockup Shares" is the testimony of Matterport's CFO, Mr. Fay. As noted above, Mr. Fay admitted in deposition that at least some Legacy Matterport stockholders submitted their letters of transmittal before the close of the Business Combination. B0730 (78-79). This evidence is consistent with the Court of Chancery's interpretation that the plain language produced no absurd result.

Rather than address Mr. Fay's testimony, Appellants first contend that there is "no evidence anyone contemplated" the straightforward reading argued by Brown and adopted by the Court of Chancery. But this is legal argument, not evidence. Appellants further argue Brown's reading is inconsistent with his initial argument that the transfer restrictions "were overbroad because they applied to all Legacy Matterport shareholders." OB at 31. Again, legal arguments by Appellants are not "extrinsic evidence." Appellants are also wrong. Brown commenced this action because

Matterport insisted they could impose lockup restrictions on Brown unilaterally. When Appellants argued that their unilateral restrictions were lawful under Section 202(b) because they would only apply to new shares which Brown did not yet hold and only had a "right to receive," Brown merely pointed out that, under Matterport's own A&R Bylaws, Brown held no "Lockup Shares."

Permissible sources of extrinsic evidence "may include overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry." *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). Appellants' legal assertions do not qualify. For similar reasons, Appellants' reliance on Mr. Fay's rationalizations at trial about what he believed was "fairer" (OB at 31) is also misplaced. "[T]he private, subjective feelings" of contract "negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common." *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).

Appellants also cherry-pick a snippet from a June 21, 2021 proxy statement, which states that "all [Legacy] Matterport stockholders who will receive shares of Class A Stock in connection with the Business

Combination . . . will be bound by certain restrictions on their ability to transfer such shares of Class A stock for a period of 180 days after the closing of the Business Combination." OB at 31. Appellants' characterizations of their own A&R Bylaws after the parties' dispute arose only provide evidence of Appellants' legal arguments, not what the language means.

Importantly, the very same proxy statement also states, "[i]f the Business Combination is approved, the shares of Class A Stock that non-consenting Matterport Stockholders receive in connection with the Business Combination will be freely tradable without restriction or further registration under the Securities Act, except for any shares issued to affiliates of the Post-Combination Company within the meaning of Rule 144." A1298. Brown was a non-consenting stockholder and was not an affiliate of the Post-Combination Company within the meaning of Rule 144, so according to this statement he would receive shares that will be "freely tradable without restriction."

Finally, Appellants refer to a "widespread corporate practice" in which other de-SPAC transactions use the same "template" as Matterport to define "Lockup Shares." Matterport speculates that "[a]ll these companies . . . intended to apply their Transfer Restrictions to all legacy company

stockholders reflecting the industry-wide understanding of lockups." OB at 32. As a threshold matter, the only evidence about what these other companies "intended" comes from the language of their lockup provisions. And according to that language, those companies likewise intended that the lockups apply only to merger consideration "held . . . immediately following" the close of the transaction. A1336; A1825; A1855; A1884; A1912; A1941; A1964; A1994; A2029; A2074; 2107; A2138; A2153; A2174; A2205; A2222; A2243; A2260; A2273. There is no reason to conclude that the drafters of these bylaws intended for that language to mean something other than what it says, and in none of these other cases did a shareholder object to the transfer restriction. Moreover, expert testimony at trial established that partial lockups are "perfectly workable," "eliminate the collective action problem," and their "business purpose is achieved by locking up only a specific subset of shares: insiders' shares, plus additional shares as needed to mitigate the collective action problem." A421, 1642.

Appellants also neglect to mention that the use of a bylaw lock-up was closely related to the identity of the outside counsel listed on the Form S-4 Registration Statement used to register the SPAC shares issued in the merger. Deals involving Latham & Watkins, LLP and Skadden, Arps, Slate, Meagher & Flom LLP were especially likely to use a bylaw lock-up (and

usually with wording that was virtually identical). In the nineteen transactions identified by Appellants, Appellants' deal counsel Latham & Watkins appeared in the Form S-4 in seven of them. *See* A523; A1825; A1855; A1884; A1941; A2029; A2205; A2260.[2]

[2] *See* Form S-4, Forest Road Acquisition Corp. (as filed with the SEC on February 16, 2021) available at https://www.sec.gov/Archives/edgar/data/1826889/000119312521044702/d111487ds4.htm (de-SPAC with The Beachbody, Inc.);
Form S-4, Newhold Investment Corp. (as filed with the SEC on April 2, 2021), available at https://www.sec.gov/Archives/edgar/data/0001805385/000121390021019983/fs42021_newholdinvestment.htm (de-SPAC with Evolv Technologies, Inc.);
Form S-4, TS Innovation Acquisitions Corp., (as filed with the SEC on March 10, 2021) available at https://www.sec.gov/Archives/edgar/data/0001826000/000119312521076431/d116165ds4.htm (de-SPAC with Latch, Inc.);
Form S-4, Colonnade Acquisition Corp. (as filed with the SEC on December 22, 2020), available at https://www.sec.gov/Archives/edgar/data/0001816581/000119312520324674/d10549ds4.htm (de-SPAC with Ouster Technologies, Inc.)
Form S-4, Hudson Executive Investment Corp. (as filed with the SEC on February 1, 2021), available at https://www.sec.gov/Archives/edgar/data/0001803901/000119312521025013/d119648ds4.htm (de-SPAC with Talkspace, Inc.);
Form S-4, Locust Walk Acquisition Corp. (as filed with the SEC on June 14, 2021), available at https://www.sec.gov/Archives/edgar/data/0001828522/000119312521190191/d159695ds4.htm (de-SPAC with eFFECTOR Therapeutics, Inc.);
Form S-4, Social Capital Hedosophia Holdings Corp. II (as filed with the SEC on October 5, 2020), available at https://www.sec.gov/Archives/edgar/data/0001801169/000110465920112009/tm2030455-1_s41.htm (de-SPAC with Opendoor Technologies Inc.).

The repeated use of a template by Matterport's deal counsel in other deals hardly shows some industry-wide, commonly understood meaning of "held . . . immediately following" at odds with the plain language. Indeed, given that the imposition of transfer restrictions via bylaw amendments in SPAC deals is a novel and untested procedure, any suggestion that such language has any universally-understood, industry-settled definition is not credible.

Appellants' "template" is also different from the lockup provisions in several other transactions that clearly restrict all shares, regardless of when they were received as merger consideration. OB at 32; Op. 7 n.28. Indeed, by the time of trial at least thirteen different de-SPACs did so. B0883-84; B0908-10; B961-963; B0985-88, A490; A543-A544. Appellants' own counsel drafted two of these versions. A490.[3] Accordingly, "corporate practice" shows that counsel—including Appellants'—knew how to draft bylaw restrictions to cover all target stockholders when they wanted to. Appellants try to turn this damning fact on its head, arguing that because

[3] *See* Form S-4, DFP Healthcare Acquisitions Corp. (as filed with the SEC on July 23, 2021), available at https://www.sec.gov/Archives/edgar/data/1799191/000110465921095491/tm2122352-1_s4.htm#t712Rev1; Form S-4, Khosla Ventures Acquisition Co. (as filed with the SEC on June 30, 2021), available at https://www.sec.gov/Archives/edgar/data/1841873/000119312521205475/d193808ds4.htm#romb193808_103.

these other transactions used language expressly covering all shareholders, this is evidence of what Appellants intended as well. OB at 32-33. But Delaware courts apply the unambiguous text of the bylaws, not litigation-made interpretations after a dispute has arisen as to what the corporation supposedly "really" meant. Courts "will not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). Under Appellants' approach, corporations would have no responsibility for their drafting decisions, drafting would have no consequences, and bylaws would have no fixed meanings. If that were the case, a corporation could always escape its own bylaws by arguing after the fact that notwithstanding the plain language, they meant something else because another company used language they now prefer.

Appellants rely heavily on *Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182 (Del. 2010), which invalidated a stockholder-adopted bylaw that scheduled the company's annual meeting just four months after its last annual meeting to prematurely terminate director terms as inconsistent with Airgas's certificate of incorporation. *Id.* at 1194. But that case has little bearing here. The court in *Airgas* found the charter language at issue ambiguous, because it was unclear if directors were to serve three-year terms

or terms that started in year one and ended in year three. Here, the plain language of the A&R Bylaws admits only one meaning, and thus resort to extrinsic evidence is improper. Further, Appellants fail to cite the most relevant holding from *Airgas*: "If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholders' electoral rights." *Id*. at 1188; *see also Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *4, *6 n.37 (Del. Ch. Apr. 14, 2008) (observing that the doctrine of *contra proferentem*, construing against the corporation as drafter of bylaw, would apply if term was ambiguous).

Even if this Court were to conclude that Section 7.10(d)(ii) was ambiguous—and it is not—*Airgas* is of no assistance to Appellants. In *Airgas*, the court did look to industry practice, but noted that "[industry] practice and understanding do[] not control" the issue before the court. *Id*. at 1191. The *Airgas* court examined the proxy statements of Fortune 500 Delaware companies, finding that the vast majority using the same template language represented in their proxy statements that their directors served three-year terms. *Id.* Because these proxy statements explained what was intended by the template, *Airgas* court thus concluded that the language was "intended, and has been commonly understood, to provide for three year terms." *Id.* at 1194.

Here, there is no "widespread" or "commonly understood" practice, nor outward representations of what the language means. There is just a template repeatedly used over the course of a year by a handful of law firms, over a short period of time, for a type of transaction that has already become last season's fad. There is no evidence that any other company using that template actually intended to lockup all shareholders receiving merger consideration.

Appellants tried to thread the needle to avoid Section 202(b) and impose retroactive transfer restrictions with respect to Brown's shares without consent. In doing so, Appellants opted against the broader language that other deal practitioners used. Appellants' choice has consequences because bylaws must mean what they say or the legal certainty prized by Delaware practitioners and Courts will be significantly diminished.

2. The Court Of Chancery Properly Considered Brown's Straightforward, Plain Language Reading Of Matterport's Bylaws

a. Question Presented

Did the Court of Chancery correctly conclude that, consistent with Delaware's minimal notice pleading standards, Brown could assert his legal interpretation of the bylaws Matterport drafted?

b. Scope of Review

The Court of Chancery's determination that Brown did not waive his interpretation of Matterport's bylaws is reviewable for abuse of discretion. *See Realty Enters., LLC v. Patterson-Woods & Assocs., LLC*, 11 A.3d 228 (Table), 2010 WL 5093906, at *4 (Del. Dec. 13, 2010). Arguments not presented to the trial court are waived on appeal. Del. Supr. Ct. R. 8. This Court will only consider questions not presented to the trial court "when the interests of justice so require." *Id*.

c. Merits of Argument

1. Appellants Had Clear Notice Of Brown's Interpretation Of Their Own Bylaws

The Court of Chancery correctly ruled that Brown satisfied Delaware's minimal notice pleading standard and, in seeking declaratory relief as to the meaning of Section 7.10, did not waive his reading of that provision at trial. OB Ex. A at 10-11. The Pre-Trial Stipulation Matterport

negotiated quotes the definition of "Lockup Shares" (A380) and states that the issues to be decided include whether "Brown may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions." A383. This broad language encompasses the threshold question of whether Brown's shares fell outside the definition of "Lockup Shares" and thus Brown could "freely transfer" them.

Appellants' feigned surprise at Brown's plain reading of Appellants' own language defies belief. Brown's reading relies not on any drafting history or extrinsic evidence, but exclusively on the language of Section 7.10 itself and Appellants' own "right to receive" arguments. Appellants, who concede they are "sophisticated drafters" (A617), were actually aware, or reasonably should have been aware, of this straightforward reading. In fact, in other de-SPAC transactions imposing lockup restrictions via bylaws, both Matterport's own legal counsel, and other legal counsel, have used different language without the "held . . . . immediately following" phrasing when it suited their needs. Matterport itself submitted trial exhibits reflecting this alternative approach. B0868,-83-84.

2. Brown Satisfied Delaware's Notice-Pleading Standard

Brown's pleadings satisfied Delaware's "minimal" notice-pleading standard. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 895, 897 (Del. 2002).

This standard does not require 100-page long complaints or legal argument and did not require Brown to plead every possible interpretation of Matterport's own bylaws. "A complaint that gives fair notice 'shifts to the defendant the burden to determine the details of the cause of action by way of discovery for the purpose of raising legal defenses.'" *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

In Count I, Brown alleged a short and plain statement of his claim and the relief sought:

> "A current and actual controversy has arisen and now exists between Brown and Defendants regarding the facial validity of the transfer restrictions and Brown's rights to freely transfer shares he is entitled to receive in Matterport, and/or engage in derivative trading of Matterport."

A158. Brown further alleged:

> "Brown is therefore entitled to a declaration that: (1) Section 7.10 of the Public Matterport Bylaws is unenforceable as to Brown and (2) Brown may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions."

A159.

This was sufficient to put Appellants on notice that they would have to defend the enforceability of Section 7.10 and Brown's claim that he was entitled to freely trade his shares when received. Appellants argue under *HOME II Inv. Corp. v. Altenberg*, 2020 WL 2529806, at *36 (Del. Ch. May

19, 2020), that a plaintiff "cannot make 'a late shift in the thrust of the case.'" OB at 35. Brown was not making a "late shift" with a new cause of action. He was arguing, consistent with his request for declaratory relief, to apply the plain language of Matterport's own bylaws.

Under Delaware's notice-pleading regime, "plaintiffs need not be concerned that they will be drawn into lengthy 'battles' over the form of their statement of the claim." *In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super. Ct. Feb. 26, 2007); *see also Michelson v. Duncan*, 407 A.2d 211 (Del. 1979) ("[s]o long as claimant alleges facts in his description of a series of events from which [alleged wrongdoing] may reasonably be inferred and makes a specific claim for the relief he hopes to obtain, he need not announce with any greater particularity the precise legal theory he is using"). Brown's Complaint and Amended Complaint, not to mention the Pre-Trial Stipulation, clearly provided Appellants "fair notice" that he was challenging Appellants' interpretation of their own bylaws. Had Appellants wanted more detailed information about the specific ways in which Brown could "freely trade" his shares, Appellants could have moved for a more definite statement under Rule 12(e). They also could have taken discovery of Brown at any time prior to trial regarding his specific understanding of Lockup Shares.

Appellants, however, did neither of these things, though they served written discovery on Brown and took his deposition.

Through legal argument, analysis, and discovery, the development of Brown's legal theories as applied to the facts and Appellants' own legal arguments emerged. This crystallized for Brown that the plain meaning of "held" and "immediately following" did not apply to him. It was Appellants that argued that shareholders were "entitled to receive" Class A common stock only "**after** submitting their letter of transmittal." A324-A325 (emphasis added). It was Appellants ' own expert who testified that in "my view," "unless the letter of transmittal is executed, Legacy Matterport shareholders do not hold any Matterport stock." B0822 (19:17-20). It was Appellants who introduced trial exhibits evidencing alternative definitions of Lockup Shares in other de-SPAC transactions. *See* B0868,-83-84.

3. The Interests Of Justice Do Not Require This Court To Consider Matterport's Waived Rule 15 Argument

Appellants now argue for the first time that the Court of Chancery should have applied Rule 15 to determine whether Brown could assert his interpretation of Section 7.10 at trial. That issue has been waived. Del. Supr. Ct. R. 8.

"This Court may excuse a waiver, however, if it finds that the trial court committed plain error requiring review in the interests of justice."

Turner v. State, 5 A.3d 612, 617 (Del. 2010) (citation omitted). "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

There is no reason to excuse Appellants' waiver here as they do not present any plain errors or "serious and fundamental" defects, nor argue that the interests of justice warrant review. Accordingly, the argument is waived in its entirety. *See Hardin v. State*, 844 A.2d 982, 990 (Del. 2004).

Had Appellants presented the argument to the Court of Chancery, it would not have been an abuse of its discretion to grant leave to amend. As with Rule 8, the standard for leave to amend under Rule 15 is "liberal." *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd sub nom. Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc*., 962 A.2d 916 (Del. 2008). An amendment "may be made upon motion of any party at any time, even after judgment." Ct. Ch. R. 15(b).

In addition to Rule 15(b)'s permissive standard for amendments, Rule 15(b) authorizes amendment of the pleadings to conform to issues "tried by express or implied consent of the parties." As noted, the Pre-Trial Stipulation quoted the Lockup Shares definition (A380) and included whether "Brown

may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions." A383.

To oppose an amendment, Appellants would have had to show that their ability to refute the plain language interpretation of Lockup Shares depended upon new evidence not already available to the parties. *See Bellanca Corp. v. Bellanca,* 169 A.2d 620, 622 (Del. 1961). Though Brown's pre-trial brief articulated the interpretation issue, and Rule 15(b) provided the Court of Chancery discretion to grant a continuance to Appellants to address any purported new evidence (of which there was none), Appellants proceeded with trial rather than asking for a continuance.

Appellants do not allude to any additional discovery they would have conducted. Gathering the proof (if any existed) would have been easy, because Appellants drafted the bylaws, and Appellants possessed direct knowledge and all relevant information prior to trial regarding letters of transmittal and any potential extrinsic evidence as to what "Lockup Shares" meant.

CONCLUSION

This Court should affirm the Court of Chancery's Opinion and Partial Final Judgment and hold that Brown's Matterport shares are not Lockup Shares under Section 7.10 of the A&R Bylaws. In the event the Court reverses the Court of Chancery's judgment, the case should be remanded to allow the Court of Chancery to decide the Section 202(b) and 251 issues.

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