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Case Number 43,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTERPORT, INC., and MATTERPORT OPERATING, LLC,	)	
Defendants Below/Appellants,	)	No. 43, 2022
v.	)	Case Below: Court of Chancery of the State of Delaware
WILLIAM J. BROWN,	)	C.A. No. 2021-0595-LWW
Plaintiff Below/Appellee.	)	

APPELLANTS' REPLY BRIEF

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INTRODUCTION[1]

Brown's opposition confirms that his (and the trial court's) construction of Matterport's bylaws rests on the supposedly fixed, dictionary-definition meaning of two individual words, wholly disregarding the full text of the bylaws or their commercial context. This is not what Delaware law provides.

Under Delaware law, bylaws and other contracts are not construed by mechanically assigning a particular dictionary definition to each word, especially when that definition *undoes* the purpose of a contractual provision. Rather, courts undertake a careful, holistic reading to ensure that hyper-technical interpretations urged by opportunistic litigants do not thwart the parties' obvious intent. Delaware law accordingly requires "construing the agreement as a whole and giving effect to all its provisions." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016). It requires examining "the overall structure of the contract." *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). And it requires situating the plain language "in the commercial context between the parties." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017).

The trial court disregarded these well-established tenets. Instead, it fixated on one of several possible dictionary definitions for two words ("held" and

[1] Defined terms have the meaning assigned to them in Appellants' Opening Brief ("Op. Br."). Citations to Appellee's Answering Brief are styled "Ans. Br."

"immediately") and then applied those definitions to a single defined term in the Transfer Restrictions ("Lockup Shares"). The trial court did not adequately consider the broader text of the Transfer Restrictions or the Merger Agreement, both of which demonstrate that Matterport (and Gores, its SPAC counter-party) intended to apply the lockup to all shares issued as merger consideration. The trial court's interpretation of Lockup Shares (i) nullified the Transfer Restrictions by giving each individual stockholder the option to easily avoid them through delay; (ii) makes it impossible for Matterport to administer a lockup with no clear guidelines about which shares were subject thereto; and (iii) renders the Transfer Restrictions inapplicable to nearly all Legacy Matterport stockholders. The trial court did not explain why any reasonable person would adopt such a meaningless lockup.

Brown's opposition does not seriously grapple with the absurd implications of the trial court's ruling. He simply claims that Delaware law mandates applying the exact dictionary definitions that the trial court used and that "market participants like [him]" rely on such a rigid reading of bylaws. Ans. Br. 19; *see also id.* 31-32, 41. Nothing could be further from the truth. Until he manufactured the Lockup Shares Claim on the eve of trial, Brown agreed that the Transfer Restrictions applied to all the Matterport shares he received as merger consideration. No other Matterport stockholder has filed a lawsuit or otherwise challenged the Transfer Restrictions' application to their merger-consideration shares.

Market participants expect Delaware courts to undertake a common-sense reading of corporate bylaws. When that is done here, the only reasonable interpretation of Matterport's Transfer Restrictions is that they apply to all Matterport shares issued to Legacy Matterport stockholders as consideration in the Business Combination. By mechanically applying dictionary definitions without accounting for the Bylaws' complete language or purpose, the trial court reached an illogical conclusion that clearly does not comport with the parties' intentions and has created uncertainty about which Matterport shares were ever subject to the Transfer Restrictions. This is reversible error.

Brown's opposition also confirms that Appellants were deeply prejudiced by Brown's eleventh-hour assertion that he did not hold Lockup Shares. Until eight days before trial, nothing in the case suggested that Brown intended to argue that the Transfer Restrictions as written did not apply to any of his Matterport shares. On the contrary, the premise of Brown's Section 202 Claim—reiterated in Brown's pleadings, discovery requests, deposition, and expert's report—was that the Transfer Restrictions *applied* to his merger-consideration shares but violated Section 202. As a result, neither party took discovery on issues relevant to Brown's Lockup Shares Claim, including how many Legacy Matterport stockholders received Matterport shares before or shortly after closing. Due to Brown's delay, Appellants lack the

necessary evidence to rebut either the trial court's flawed conclusion or the rank speculation that Brown offers to support it.

Appellants should have never been placed in this unfair position. Court of Chancery Rule 15 required the trial court to consider the prejudice to Appellants from allowing Brown to assert a new legal theory on the eve of trial that was inconsistent with the claim he had pled. Rule 15 also required the trial court to consider that Brown had deliberately concealed his intention to assert the Lockup Shares Claim for tactical gain (a point Brown does not contest). The trial court's failure to consider these factors was error.

The judgment of the Court of Chancery should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY CONSTRUED THE DEFINITION OF "LOCKUP SHARES"

A. The Trial Court's Interpretation Cannot be Reconciled with the Commercial Context or the Broader Language.

This Court's decisions teach that "[i]n giving sensible life to a real-world contract," courts must "read the specific provisions of the contract in light of the entire contract," so as to understand "[t]he basic business relationship between [the] parties." *Westinghouse Elec. Co.*, 166 A.3d at 913-14, 927; *accord Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1190 (Del. 2010) ("[W]e must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption."). The business context here is clear: the adoption of a stockholder lockup for a company that was going public. As Brown's own expert explained, lockups in this context are designed to solve "a collective action problem . . . created when too many shareholders sell stock when trading first opens." A420-21/108:17-109:6. Accordingly, to be effective, a lock-up must cover at least a meaningful percentage of the shares of the newly public company. And, critically, the company and its stockholders must know which shares are subject to the lockup.

Brown's brief carefully elides that Matterport's Transfer Restrictions, as construed by the trial court, could never achieve these fundamental goals. Brown argues only that "a lockup need not be an all-or-nothing affair." Ans. Br. 16-17. But

this is not what the trial court decided, and a lockup based on when stockholders submit a LOT would not achieve what Brown calls a "perfectly workable" partial lockup limited to "insiders' shares, plus additional shares as needed." *Id.* at 36. Rather, it creates a lockup that depends on the actions of each individual stockholder and can be easily evaded by insiders and outsiders alike. If a stockholder is on vacation when she receives her LOT, the stockholder escapes the lockup. If a LOT is lost in the mail, the stockholder escapes the lockup. If the transfer agent neglects to promptly process the LOT, the stockholder escapes the lockup. If every stockholder knows that they can evade the lockup by delaying submitting a LOT, then logically every stockholder will do so and escape the lockup. The trial court's construction renders Matterport's Transfer Restrictions meaningless. And it has the effect of *punishing* stockholders who act diligently, as only those who submit a LOT promptly at closing would be subject to a 180-day lockup, while other stockholders could choose a shorter lockup by opting for inaction.

Brown also has no response for why a company would ever draft, or how a company could ever enforce, a lockup that does not clearly specify who is subject to it. *See* Op. Br. 20. Under the trial court's interpretation, neither Matterport nor its stockholders have any principled way of determining whether a stockholder who received shares one day, one week, or one month after closing holds "Lockup Shares." Brown's argument that the Court need not "issue an advisory opinion" on

the precise contours of the Transfer Restrictions misses the point. Ans. Br. 18. The trial court must interpret the Bylaws in a way that provides a single, sensible meaning, yet the impossibility of answering the questions the trial court's decision creates shows that its interpretation was fundamentally flawed. *See Manti. Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1211 (Del. 2021) ("[I]nterpretations that are commercially unreasonable or produce absurd results must be rejected.").

By contrast, it makes perfect sense that the parties to the Business Combination would structure the Transfer Restrictions to exclude shares that Legacy Matterport stockholders acquired outside of the Business Combination. These shares (i) are relatively few in number; (ii) do not implicate the purpose of the lockup; and (iii) cannot be restricted without incurring the kind of transaction costs that bylaw-imposed lockups seek to avoid. *See* Op. Br. 23.

The text of the Transfer Restrictions as a whole demonstrates that these non-merger consideration shares are what the parties intended "Lockup Shares" to exclude from the Transfer Restrictions. As Brown correctly notes, the separately defined term "Lockup Holders" 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." Ans. Br. 19.[2] The

[2] Brown's conspiracy theory that Lockup Holder was "a loophole [] created for

function of "Lockup Shares" is thus to exclude from the Transfer Restrictions any "additional Class A common stock beyond that received as merger consideration." That construction is evident in the remainder of the definition of Lockup Shares, which specifically excludes any "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." A1461.

Brown contends that Appellants chose to "elevate[] the act of submitting a [LOT]" by providing in the Merger Agreement that Legacy Matterport stockholders were required to submit one before receiving their shares. Ans. Br. 17. Brown is wrong. The LOT process is common and serves salutary purposes, including minimizing the risk that a corporation issues shares to the wrong person and is thereafter forced to issue additional shares to the true owner. *See* 6 *Del. C.* §§ 8-303; 8-401. Matterport's adherence to this practice does not suggest that Matterport intended to tie the Transfer Restrictions to the submission of a LOT, nor does any other part of the Merger Agreement suggest such an intention. The Merger Agreement instead contemplates the Transfer Restrictions applying to all Legacy

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investors in the PIPE" (Ans. Br. 19) is false, unsupported by any evidence, and more than a little ironic, considering the truck-sized loophole Brown argues Matterport created in the Transfer Restrictions by virtue of his urged construction of Lockup Shares.

Matterport stockholders by tying the earn-out to the "Lockup Expiration Date." *See* Op. Br. 22-23.

B. The Plain Meaning the Trial Court Assigned to "Held" and "Immediately" Was Erroneous.

Brown's argument rests on the purportedly plain language meaning of the words "held" and "immediately," as used in the first portion of the definition of Lockup Shares: "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination." Brown fails to rebut Appellants' arguments that these words cannot carry the rigid dictionary definitions assigned below.

1. "Held"

Brown contends that the word "held" must be "given its ordinary meaning," which he argues the trial court found to be "ownership" and "possession." Ans. Br. 29. Brown ignores that "held" carries a wide variety of ordinary meanings depending on the context. *See, e.g.*, *Daniels v. State*, 246 A.3d 557, 562 (Del. 2021) ("To be sure, dictionary definitions are helpful. But dictionaries may also reveal a linguistic problem[;] that is, a word can have a broad range of possible meanings.") (internal quotations and alterations omitted); *Pharma. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163, at *4 n.24 (Del. Ch. Feb. 16, 2011) ("Given the reality that the same word can have more than one general meaning and that the commercial context can influence which meaning the parties intended, the court

must take cognizance of the existence of those general meanings in determining whether the contract has only one plausible meaning."). The same dictionary the trial court used contains over thirty different definitions of "hold," which include, *inter alia*, "to have at one's disposal" and "a nonphysical bond that attaches, restrains, or constrains or by which something is affected, controlled, or dominated." *Hold*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hold (last visited May 20, 2022). These definitions describe the condition of Brown's Matterport shares as of closing. At that time, Brown had an unqualified right to receive the shares under the Merger Agreement by simply submitting a form. *See* A982-84. He thus "held" the stock.

The trial court instead narrowly focused on the definition that describes an object someone physically possesses. But Delaware law will not assign a word a specific meaning if "the context clearly requires a different one." *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020). The context here demonstrates that Matterport did not intend to tie the restrictions to when stockholders submitted LOTs, as such a lockup would be easily evaded and would apply to an unknowable number of shares. *See supra*, at 5-8.

Importantly, the property being "held" here cannot be physically possessed. Delaware courts have recognized that the strictly possessory definition of "holding" property therefore can be inappropriate when applied to stock. *See* Op. Br. 24-25.

Most pertinently, in *Roam-Tel Partners v. AT&T Mobility Wireless Holdings, Inc.*, the Court of Chancery found that applying this definition would be "illogical" after a stock-for-stock merger, and that, in this context, the stockholders "hold" the stock that had been eliminated by the merger. 2010 WL 5276991, at *6 (Del. Ch. Dec. 17, 2010). Legacy Matterport stockholders likewise "hold" the stock that they have the right to receive upon submitting a LOT. *See* Op. Br. 25-27. Brown's response that *Roam-Tel* and Appellants' other cases arose under different facts is beside the point. The consistent theme in these cases is that courts interpret "held" in a flexible, context-specific manner, particularly where the property being "held" is intangible corporate stock.

Brown also suggests that Appellants' interpretation of "held" is inconsistent with their Section 202 arguments. Ans. Br. 17. Not so. Brown's Section 202 Claim turned on whether his Matterport shares had been "issued prior to the adoption of the" Transfer Restrictions. 8 *Del. C.* § 202(b). The Transfer Restrictions were adopted before the closing of the Business Combination. Then, as Brown notes, his book-entry shares were not "delivered" to him until he submitted his LOT. Ans. Br. 22, 24. The fact that the shares were not issued to him during the pendency of his appraisal demand (*see* Ans. Br. 24) does not mean that Brown did not "hold" the

shares at that time. Brown's entitlement to the stock never changed, nor did the amount to which he was entitled.[3]

2. "Immediately"

Brown likewise contends that the word "immediately" has the singular meaning applied by the trial court: "without delay." Brown rejects the alternative dictionary definition—"in direct connection or relation"—as inapplicable because "'immediately' modifies 'following' and thus clearly is temporal in significance." Ans. Br. 25-26. Even when used temporally, however, both Brown and the trial court acknowledge that "immediately following" does not necessarily mean two actions that occur in quick succession. *See* Ans. Br. 31; Memo. Op. 8-9. The alternative definition demonstrates the word's flexibility in this regard. The drafters used the phrase "immediately following" in the definition of Lockup Shares to draw a connection between the Matterport shares received by the Lockup Holders and *how* they acquired ownership of the shares (*i.e.*, through the Business Combination), rather than *when* the Lockup Holders possessed the shares. *See* Op. Br. 27.

[3] Brown attempts to take Mr. Honaker's testimony out of context (Ans. Br. 23-24) and ignores that Mr. Honaker's opinion was that transfer restrictions imposed before closing are validly applied to stock issued post-closing, and that that is a common market practice. *See* A432-36. That opinion and his testimony regarding stock ownership are unrelated to the interpretation of the Bylaws. Mr. Honaker did not opine on when a person "holds" stock in that context.

Brown next claims that the written consent adopting the Bylaws used "immediately following" to signify two events occurring without intervening delay, and that "Appellants offer no explanation as to why 'immediately following' should have different meanings in different parts of the same [] Bylaws." Ans. Br. 21. Brown's argument ignores that the written consent is not "part of" the Bylaws—despite Brown's constant refrain that the Transfer Restrictions are unambiguous, he relies on extrinsic evidence to interpret them. Regardless, Brown's point simply underscores the importance of contextual reading, which, as Brown's cited case recognizes, can result in different words having different meanings in different parts of a contract. *Id.*; *see, e.g.*, *Motors Liquid. Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *13 (Del. Super. June 8, 2017) ("[W]hen it is clear from the context that the term has obviously different meanings throughout the contract and these cannot be reconciled, th[e] [canon of consistent usage] does not apply."), *aff'd sub nom. Motors Liquid. Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018) (TABLE); *see also S'holder Rep. Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at *20 (Del. Ch. Mar. 15, 2017) ("[A]scertaining the shared intent of the parties does not mandate slavish adherence to every principle of contract interpretation."). Referring to the sequence of corporate actions before closing, the written consent used "immediately" to describe two near-instantaneous actions. *See* A431-32/150:7-154:118; A2277-2301. Even Brown concedes that the Transfer

Restrictions did not adopt this "literal" definition of "immediately"—if they had, the lockup would apply to ***no*** shares.

Brown instead suggests that "immediately" could encompass shares received by stockholders who submitted LOTs pre-closing or before receiving the Notice of Appraisal one week after closing. Ans. Br. 30. This ignores that there are additional steps in the process: the transfer agent must then process the LOT and issue the shares. Brown, for example, did not receive book-entry shares until nearly two weeks after he submitted a LOT. *See* A1676; A2043. Brown offers no principled reason why a stockholder who receives shares several weeks later possessed them "without delay" following closing, but another stockholder who receives shares several months after closing did not.

C. The Extrinsic Evidence Confirms the Trial Court's Reading Is Erroneous.

A contextual reading demonstrates that the Transfer Restrictions unambiguously include all Matterport shares issued to Legacy Matterport stockholders as merger consideration in the Business Combination. At a minimum, the absurd implications of the trial court's construction renders the Transfer Restrictions ambiguous and requires examining all relevant extrinsic evidence. That evidence contradicts the trial court's reading.

1. Course-of-Dealing Evidence Contradicts the Trial Court's Reading.

Brown first seeks to dismiss the lack of evidence that anyone else contemplated his interpretation of the Transfer Restrictions (including his own prior, contradictory position) as "legal argument, not evidence." Ans. Br. 33. This is incorrect. The fact that neither of the sophisticated parties who negotiated the deal understood the Transfer Restrictions to operate as the trial court held is evidence that interpretation is wrong. *See, e.g.*, *Gilead Sciences, Inc.*, 2017 WL 1015621, at *20 (crediting testimony that "no one at [a party] evinced, in words or deeds," the contractual interpretation later urged in litigation). Brown also ignores the testimony of Matterport's Chief Financial Officer, James Fay, who testified that the parties intended to apply the Transfer Restrictions to all merger-consideration shares. *See* A462/270:8-14. Contrary to Brown's suggestion, Fay's testimony does not reflect his "private, subjective feelings" (Ans. Br. 34), but rather reflects what one of the primary negotiators of the Business Combination discussed and contemplated at the time of contracting. *See also* A738; AR7. Similarly, that Brown himself previously articulated the view that the Transfer Restrictions applied to all merger-consideration shares demonstrates that his newfound interpretation is purely tactical. *See, e.g.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1119 (Del. Ch.) (finding persuasive extrinsic evidence showing that party's

contemporaneous reading of contract "directly contradicts [its] current, litigation-driven position"), *aff'd*, 68 A.3d 1208 (Del. 2012).

Brown next accuses Appellants of "cherry-pick[ing] a snippet" of the proxy statement that contradicts the trial court's interpretation of the Transfer Restrictions, and he instead points to a different excerpt which he claims says that, as a "non-consenting stockholder," his shares were "freely tradeable without restriction." Ans. Br. 34-35. As Brown no doubt understands, his excerpt has nothing to do with the lockup in Matterport's Bylaws, and instead refers to statutory transfer restrictions "*under the Securities Act*." A1297-98. Neither that portion of the proxy statement nor any other suggests that stockholders who delay in submitting their LOT are exempt from the Transfer Restrictions. Rather, the proxy statement unequivocally states that the Transfer Restrictions apply to "all Matterport Stockholders who will receive shares of Class A Stock in connection with the Business Combination." A1283; *see also Centaur P'rs, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (finding the proper construction of a bylaw "inescapable" given "the clear language of the proxy materials").[4]

[4] Brown's claim that the proxy's description of the Transfer Restrictions was tainted by this litigation is nonsense. Ans. Br. 35. At the time the proxy was filed, Brown had not yet asserted the Lockup Shares Claim, nor even conceived of it. *See id.* 46.

2. Widespread Corporate Practice Contradicts the Trial Court's Reading.

As explained in Appellants' opening brief, the definition of Lockup Shares is template language that is widely used in other de-SPAC transactions (the "Lockup Shares Template"). *See* Op. Br. 11, 32. Brown seeks to downplay this powerful evidence contradicting the trial court's conclusion by claiming that the Lockup Shares Template was limited to deals involving a "handful of law firms over a short period of time," including Matterport's counsel. Ans. Br. 41.

Brown's argument fails. Brown concedes that Matterport's counsel was involved in only a minority of the transactions using the Lockup Shares Template. Ans. Br. 37. Moreover, in all of these transactions, the language was approved by sophisticated counterparties and their counsel, who had an equal incentive to ensure that the lockup achieved its intended purposes. In total, the nineteen other de-SPAC transactions cited by Appellants that used the Lockup Shares Template involved seventeen different law firms, including many of the leading mergers and acquisitions firms in the country. *See* Ex. A.

Brown argues that there is no evidence that the other companies that used the Lockup Shares Template intended for their lockups to apply to all merger-consideration shares. Ans. Br. 36, 41. Many of these companies' proxy statements, like Matterport's, say exactly that. A1283; A1298; *see also, e.g.*, AR42-46; AR107-09; AR122-24; AR130-31; AR140-43. Their proxy statements are also,

like Matterport's, clear about which shares were subject to the lockup. This is unsurprising: there is no reason a company would adopt an easily evaded lockup that applies to indeterminate shares, as the trial court's interpretation would create. *See supra*, at 5-9.

Brown next points to the existence of another lockup template that he argues "clearly restricts all shares, regardless of when they were received as merger consideration." Ans. Br. 38. Brown ignores this Court's rejection of a similar argument in *Airgas*. In that case, the trial court "heavily relied on the different wording" between Airgas's template language implementing a staggered board—which was ambiguous on whether directors were required to serve full, three-year terms—and the template language used by some other corporations—which was unambiguous on this point. 8 A.3d at 1193. This Court found that "the Court of Chancery erred, because it failed to give proper effect to the overwhelming and uncontroverted extrinsic evidence that establishes, and persuades us, that [Airgas's ambiguous template language] and the [alternative, unambiguous template language] mean the same thing: that each class of directors serves three year terms." *Id.* at 1194. Likewise, the Lockup Shares Template and the other template cited by Brown mean the same thing: the shares received by the specified stockholders as merger consideration are locked up.

Brown's citation to *Airgas*'s statement that ambiguities are resolved "in favor of the stockholders' electoral rights" (Ans. Br. 40) is inapposite. Transfer restrictions are not voting restrictions. Further, the doctrine of *contra proferentem* is a tool "of last resort, such that a court will not apply it if a problem in construction can be resolved by applying more favored rules of construction." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985). It does not apply where, as here, there is "overwhelming extrinsic evidence" supporting one reading. *Airgas*, 8 A.3d at 1189.

II. THE TRIAL COURT ERRED IN PERMITTING BROWN TO ASSERT HIS LOCKUP SHARES CLAIM.

A. Appellants Did Not Have Notice of a Claim That Contradicted Brown's Theory of the Case.

Brown admits that his Lockup Shares Claim only "emerged" after his Amended Complaint. Ans. Br. 46. Brown nonetheless argues that Count I of his Amended Complaint (the only claim tried below) "put Appellants on notice that they would have to defend the enforceability of" the Transfer Restrictions as to Brown. Ans. Br. 44. Any fair reading of the Amended Complaint defeats this argument.

As its title states, Count I challenged the "*facial validity*" of the Transfer Restrictions. A158. A facial challenge addresses whether a bylaw "can never operate consistently with law." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020). The law Brown alleged rendered the Transfer Restrictions facially invalid was Section 202(b) of the DGCL. It is on this basis that Brown sought "a declaration that (1) Section 7.10 of the [Bylaws] is unenforceable as to Brown." A159; *see also* A136. Brown's claim necessarily posited that the Transfer Restriction applied to his shares.

The belated Lockup Shares Claim does not challenge the Transfer Restrictions' facial validity. It challenges Appellants' interpretation of the Transfer Restrictions and their application to Brown's shares at all. Confirming this fact, the Final Judgment states that "Brown's Matterport shares are not Lockup Shares under

Section 7.10 of the A&R Bylaws." Op. Br. Ex. B. The trial court rejected Brown's proposed form of final judgment, which instead stated that "Section 7.10 of Matterport's Bylaws is unenforceable as to William J. Brown." AR5.

In essence, Brown's argument is that, without any indication of an intent to plead in the alternative, a defendant sued on a claim that a contract is unenforceable is also on notice of a claim for breach of that contract. This defies both law and logic—the two claims are squarely inconsistent with one another. *See BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *8 (Del. Ch. Feb. 3, 2009) ("A right to plead alternative theories does not obviate the obligation to provide factual support for each theory."); *compare Chrysler Corp. (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1031 (Del. 2003) (permitting alternative claims where pleading "set forth distinct claims based upon contract principles and upon the doctrine of promissory estoppel"). Brown's argument that Appellants "could have taken discovery" regarding Brown's "specific understanding of Lockup Shares" (Ans. Br. 45) ignores that Brown pled no facts supporting the Lockup Shares Claim, such as when he had submitted LOTs.

Brown also ignores that, at every turn of discovery, he reiterated that the Transfer Restrictions covered his shares. At his deposition, Brown testified that, apart from Lux Capital (a PIPE investor he mistakenly believes was exempted from the Transfer Restrictions), he was not "aware of any other Legacy Matterport

stockholder who is not locked up." AR10/45:16-20. Brown also testified that "companies aren't allowed to embed [a] forced lockup into a transaction like this, and the biggest reason is because the insiders know they'll be locked up and so of course they're going to want everyone locked up." AR12-13/81:24-82:10. Likewise, the basis of Professor Subramanian's expert report was that the Transfer Restrictions "restrict legacy Matterport shareholders, including Mr. Brown, from transferring their shares for a period of 180 days following the close of the Transaction." A1630. Brown's claim that Defendants should have disregarded all of these statements is particularly disingenuous given his concession that the Lockup Shares Claim only "emerged" for him later in the case. Ans. Br. 46. Defendants could not have uncovered through discovery, let alone be expected to defend, a claim that Brown had not yet invented.

B. Brown's Opposition Confirms Appellants' Prejudice.

Brown argues that Appellants were not prejudiced by his delay because Appellants "do not allude to any additional discovery that they would have conducted." Ans. Br. 48. But, as Brown concedes, the record did not include any "[d]ata as to how many transmittal letters were submitted and when they were submitted" (*id.* 30-31) and contained only limited course-of-dealing evidence about how the Transfer Restrictions were intended to function (*id.* 33). Lacking this evidence, the trial court turned to an isolated quote from a deposition taken before

Brown had even asserted the Lockup Shares Claim. Had they known that Brown intended to assert this claim, Appellants would have conducted additional discovery to rebut the trial court's later reliance on this selective piece of extrinsic evidence, including, at a minimum, discovery on the negotiating history and the LOT process.

Astonishingly, Brown faults Matterport for failing to gather the necessary evidence to rebut the Lockup Shares Claim after Brown first raised it eight days before an expedited trial. *Id.* 30-31. There was no way that Matterport could have marshalled this evidence while simultaneously preparing for trial (over the Thanksgiving holiday, no less). Particularly so because, contrary to Brown's suggestion, much of the evidence was not in Matterport's possession, but rather is controlled by the transfer agent and other third parties.[5]

Brown's attempt to blame Appellants for the evidentiary gap rings especially hollow given that Brown deliberately delayed raising the Lockup Shares Claim, a point which Brown does not contest. Brown clearly intended to assert this claim when he filed his purported Second Amended Complaint on November 17, 2021. A167. Brown had already submitted one letter of transmittal and had finalized another. A1676, A2036. Yet Brown still did not make any allegations in support of

[5] Brown's related claim that Defendants could have sought a continuance (Ans. Br. 48) ignores that the trial court expedited the case to provide a ruling before the Transfer Restrictions expired in January 2022. *See* A121-22. There was no time for additional discovery.

his Lockup Shares Claim, including that he had already submitted a letter of transmittal. Brown's verified pleading instead falsely alleged that he "has exercised appraisal for much of his stock," A208-09, and requested damages for the costs of "pursu[ing] an appraisal action entirely on his own." A225; *see also* A184-85, A204-06, A210-11. Not until six days after filing this pleading, when the parties filed simultaneous pre-trial briefs, did Brown finally reveal his intention to assert a claim contradicting that which he had pled. Brown's gamesmanship in concealing his Lockup Shares Claim provides an independent reason to bar his claim. *See OptimisCorp v. Waite*, 2015 WL 357675, at *2 (Del. Ch. Jan. 28, 2015) (holding that "dilatory motive" warrants prohibiting amendment).

C. Appellants Fairly Presented Their Argument Below.

Finally, Brown contends that Appellants waived their argument that the trial court should have applied Court of Chancery Rule 15. Ans. Br. 46. Brown is incorrect. Appellants raised below that Brown "waived his new theories," including the Lockup Shares Claim, because he had not pled them. A606-11; *see also* A363:21-24. Appellants also argued that the reasons for Brown's waiver included that Appellants had been prejudiced by Brown's delay and that Brown had acted with a dilatory motive. A606-08. Appellants are not required to assert their argument in the exact same form as they did below. *See Kerbs v. Cal. E. Airways,* 90 A.2d 652, 659 (Del. 1952).

Even if Appellants had not fairly presented the issue below (they did), the interests of justice would favor allowing them to do so here. Due to Brown's delay, Appellants' only opportunity to address this issue was in their post-trial brief following an expedited trial. The trial court committed plain error by allowing Brown to assert a claim contradicting the theory he had pled, thereby depriving Appellants of an opportunity to fairly defend themselves. *See Beck & Panico Builders, Inc. v. Straitman*, 2009 WL 5177160, at *5 (Del. Super. Nov. 23, 2009) ("As a matter of procedural due process, the defendant is entitled to be apprised of the nature of the claim."). Finally, the issue "may have significant implications for future cases." *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994). Given Delaware law's interest in preventing gamesmanship, the trial courts would benefit from this Court's guidance on the standard governing the assertion of a new, inconsistent theory on the eve of trial.

CONCLUSION

The ruling of the Court of Chancery should be reversed.

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