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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' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal seeks to remedy the Court of Chancery's flawed interpretation of industry-standard transfer restrictions (the "Transfer Restrictions") that Matterport, Inc. ("Matterport") adopted in a stock-for-stock merger with a SPAC (the "Business Combination"). On their face, the Transfer Restrictions apply to *all* Matterport shares issued as consideration in the Business Combination to stockholders of the pre-merger private company, n/k/a Matterport Operating, LLC ("Legacy Matterport"). Ignoring the full text of the Transfer Restrictions, the merger agreement, the commercial context, and the clear intent of the parties, the trial court construed one defined term within the Transfer Restrictions—"Lockup Shares"—in a manner that effectively nullifies the Transfer Restrictions. The trial court's construction defied fundamental principles of Delaware contract law and constitutes reversible error.

Appellee William Brown, Legacy Matterport's former CEO, brought this lawsuit contending initially that the Transfer Restrictions were invalid under Section 202(b) of the DGCL because Matterport had adopted the restrictions without obtaining his consent (the "Section 202 Claim"). To assert this claim, Brown necessarily conceded that the Transfer Restrictions applied to the Matterport shares he would receive in the Business Combination—in fact, that premise was the very basis for his Section 202 claim.

On the eve of trial—and faced with indisputable evidence refuting his Section 202 Claim—Brown asserted a new and entirely inconsistent theory: that the Transfer Restrictions did not apply to the shares he would receive as merger consideration because his shares were not "Lockup Shares" (the "Lockup Shares Claim"). The bylaws imposing the Transfer Restrictions include language that Lockup Shares are "shares of [Matterport] stock *held* by [Legacy Matterport stockholders] *immediately following* the closing of the Business Combination." (emphasis added). Brown theorized that he did not "hold" Matterport shares "immediately following" closing because he had delayed in submitting the required letter of transmittal ("LOT") to Matterport's transfer agent, through which he exercised his right to receive Matterport shares pursuant to the merger agreement. In other words, Brown relied on his own delay and gamesmanship to claim exemption from the Transfer Restrictions.

Based on this single phrase within the definition of Lockup Shares, the trial court found that the Transfer Restrictions only applied to Matterport shares that Legacy Matterport stockholders had "possession or ownership" of "without delay" after the closing of the Business Combination. This interpretation of "Lockup Shares" is divorced from the plain language of Matterport's bylaws, and the commercial context in which the Transfer Restrictions were adopted. As Brown's expert, Professor Guhan Subramanian, testified at trial, lockups on shares of newly

public companies solve "a collective action problem … created when too many shareholders sell stock when trading first opens…," among other widely acknowledged benefits. A420-21/108:17-109:6. The trial court's ruling would allow an individual stockholder to opt out of lockups by unilaterally delaying the submission of a LOT and receipt of new shares, thereby recreating the very collective action problem the restrictions are intended to solve. Nor could a company ever administer such a lockup subject to gaming by stockholders, as there would be no way to know how long after closing a stockholder could receive shares and still be subject to the restrictions (a problem the trial court acknowledged resulted from its interpretation but did not address).

The proper meaning of "Lockup Shares" includes all Matterport shares acquired as consideration through the Business Combination, as distinguished from shares that Legacy Matterport stockholders may have acquired by other means. Put differently, "Lockup Shares" links the Transfer Restrictions to *how* (not *when*) a Legacy Matterport stockholder acquired possession of Matterport shares. Brown acquired nearly all his Matterport shares through the Business Combination. These are Lockup Shares subject to the Transfer Restrictions. By contrast, the Matterport shares Brown acquired on the open market are not, illustrating how the industry-standard lockup was tailored to accomplish the wealth-maximizing goals of the Transfer Restrictions.

The Court of Chancery also erred by holding that Brown could present his eleventh-hour Lockup Shares Claim at trial. Although Brown raised this claim only eight days beforehand and weeks after the close of discovery, the trial court found that Appellants had sufficient notice of the Lockup Shares Claim because Brown had generally placed the Transfer Restrictions at issue. This minimal notice standard, which Delaware courts apply at the pleading stage, was improper in this posture. Because Brown asserted a new claim on the eve of trial that conflicted with the factual premise of his existing claim, the trial court should have applied the Rule 15 standard for amendments to pleadings. Brown cannot meet this standard because Appellants were prejudiced by Brown's deliberate, last-minute assertion of the Lockup Shares Claim. In particular, in reaching its conclusion, the trial court credited selective extrinsic evidence presented by Brown, which Appellants did not have the chance to refute because of his delay.

Accordingly, Appellants respectfully request that this Court reverse the trial court's decision.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in nullifying Matterport's Transfer Restrictions by construing the definition of "Lockup Shares" to exclude the Matterport shares that Brown received as merger consideration. Read in context, the "Lockup Shares" provision addresses *how* Matterport shares were acquired: it distinguishes between Matterport shares that former Legacy Matterport stockholders would receive as consideration in the Business Combination, and those acquired by other means (such as through purchase in public markets). The trial court's construction of this term is irreconcilable with the full text of the Transfer Restrictions and the widely understood purposes of stockholder lockups. Moreover, because LOTs take days or weeks to process, and *all* Legacy Matterport stockholders had to submit one, it yields the unreasonable result that the Transfer Restrictions applied at most to a small (and unknown) group of stockholders depending on when stockholders received Matterport shares. At a minimum, the trial court's construction of the definition of "Lockup Shares" gives rise to an ambiguity in the Transfer Restrictions, and the extrinsic evidence overwhelmingly supports Appellants' reading.

2. The Court of Chancery erred by allowing Brown to present his Lockup Shares Claim at the December 2021 trial. Rather than the minimal notice standard applied at the pleadings stage, the trial court should have applied Rule 15's standard

for leave to amend. Brown cannot meet this standard. Appellants were prejudiced by Brown's delay because they were unable to present evidence rebutting the Lockup Shares Claim (including evidence relied on by the trial court in its ruling), and Brown acted with a dilatory motive by deliberately concealing the Lockup Shares Claim until eight days before trial.

STATEMENT OF FACTS

A. The Parties

Appellant Matterport is a spatial data company that creates 3D technologies to provide remote, virtual tours of physical spaces. Through the Business Combination, a special purpose acquisition company named Gores Holding VI, Inc. (the "Gores SPAC"), whose sponsor was affiliated with the private equity firm The Gores Group, LLC ("Gores"), took the name Matterport. A369, ¶ 11; A460/262:13-18 (Fay).

Appellant Legacy Matterport is a wholly-owned subsidiary of Matterport. Prior to the Business Combination, Legacy Matterport's corporate predecessor was a privately held corporation named "Matterport, Inc." A369-70, ¶ 12.

Appellee Brown was Legacy Matterport's Chief Executive Officer from November 2013 to December 2018. Prior to the Business Combination, he held 1,387,000 Legacy Matterport shares and options. A369, ¶ 10.

B. De-SPAC Transactions and Stockholder Lockups.

In the fall of 2020, Legacy Matterport elected to go public through a merger with a SPAC, known as a de-SPAC transaction. In a de-SPAC, a private company (the "legacy company") merges with a "blank check" public company that is formed for the purpose of acquiring a private operating company (the "SPAC"). The legacy company's stockholders are issued the SPAC's stock as consideration for their

shares, thus becoming stockholders in the SPAC along with the SPAC's pre-existing stockholders, the SPAC's sponsor, and often private investors who provide additional capital ("PIPE investors"). Economically, the result for the legacy company is the same as going public through an IPO. *See* A1726-29.

Like initial public offerings ("IPOs"), de-SPACs universally include temporary transfer restrictions (or "lockups") on the SPAC shares held by the legacy company's stockholders once the company goes public. A1745. This is because, as both parties' experts agreed at trial, lockups serve important purposes for newly public companies. They serve "a signaling function" to outside investors that insiders do not possess negative, non-public information about the business. A444/203:14-204:18 (Ritter); *accord* A1639-41. As Brown's expert Professor Guhan Subramanian explained, they also solve "a collective action problem . . . created when too many shareholders sell stock when trading first opens," which puts "downward pressure on the stock price." A420-21/108:17-109:6. For these reasons, among others, lockups "maximize [stockholder] wealth." A421/109:7-16 (Subramanian); *accord* A444/203:13-22 (Ritter).

In both IPOs and de-SPACs, transaction planners sometimes implement lockups through individual agreements with stockholders. For example, Brown's contract with Matterport provided that he would be subject to a 180-day lockup if Matterport went public through an underwritten IPO. A731. Depending on the

composition of a company's stockholder base, however, implementing a lockup through individual agreements may entail significant transaction costs or otherwise be unworkable in practice.

Accordingly, parties often implement lockups by amending the SPAC's certification of incorporation or bylaws prior to the closing of the merger. Delaware corporations have long created transfer restrictions this way in other situations (*see* A433-34/159:12-163:7 (Honaker)), and it has quickly become a regular practice in de-SPAC transactions. As of August 2021, approximately 30% of de-SPAC transactions adopted transfer restrictions by amending the SPAC's certificate or bylaws. A1745.

C. Matterport Negotiates a de-SPAC that Includes a Bylaw Lockup.

In December 2020, Legacy Matterport and Gores began negotiating a de-SPAC transaction. Consistent with market practice, Gores's first letter of intent requested a six-month lockup of all shares received by Legacy Matterport stockholders in the transaction. *See* A738. Legacy Matterport agreed to the lockup, and the parties thereafter determined to implement it through a bylaw amendment. A460/263:7-264:16; A462/270:8-24 (Fay).

On February 7, 2021, Legacy Matterport and the Gores SPAC agreed to enter into the Business Combination pursuant to a merger agreement (the "Merger

Agreement"). A374; A961. Legacy Matterport stockholders approved the Merger Agreement by written consent. A374; A742.

The Merger Agreement provided that, upon closing, each Legacy Matterport share was "converted into the right to receive, and the holder of such share of Company Common stock shall be entitled to receive," 4.1193 Class A shares in post-closing Matterport. A376; A982. Legacy Matterport stockholders also have the right to receive certain earn-out shares. A982.

The Merger Agreement included a covenant by the Gores SPAC that "prior to the consummation of the Mergers, [the Gores SPAC/Matterport] will adopt the amended and restated bylaws." A966; *see also* A1027. The parties defined the earn-out period as beginning on the "Lockup Expiration Date," which was "180 days after the Closing Date." A970; A972.

The form of the amended and restated bylaws was a Merger Agreement exhibit, and this form is substantively identical to the bylaws that Matterport adopted (the "Bylaws"). Section 7.10(a) of the Bylaws sets forth the Transfer Restrictions:

> Subject to Section 7.10(b), the holders (the **"Lockup Holders"**) of shares of Class A common stock, par value $0.0001 per share (**"Class A common stock"**), of the Corporation issued (i) as consideration under [the Merger Agreement] or (ii) to directors, officers and employees of the Corporation upon the settlement or exercise of restricted stock units, options or other equity awards outstanding as of immediately following the closing of the Business Combination Transaction in respect of awards of [Legacy Matterport] outstanding immediately prior to the closing of the Business Combination Transaction (such shares referred to in Section 7.10(a)(ii), **"Legacy**

> **Equity Award Shares"**), may not Transfer any Lockup Shares until the end of the Lockup Period (the **"Lockup"**).[1]

A1459. "Lockup Shares" is defined as

> the shares of Class A common stock held by the Lockup 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.

James Honaker, an experienced Delaware corporate-law practitioner, testified at trial that the Transfer Restrictions, including the definition of Lockup Shares, matched "one of a few template definitions either that ends up in a signed deal or that parties might consider…." A430/147:12-20. Evidence at trial revealed at least nineteen other de-SPAC transactions between just January and November 2021 implemented lockups using the same language. *See* A1336; A1825; A1855; A1884; A1912; A1941; A1964; A1994; A2029; A2074; A2107; A2138; A2153; A2174; A2205; A2222; A2243; A2260; A2273.

[1] Section 7.10(d) defines the "Lockup Period" as ending "180 days after the closing date of the Business Combination." A1461.

D. Brown Seeks to Enjoin the Transfer Restrictions Under Section 202.

On July 13, 2021, Brown filed this lawsuit and moved for expedition and a TRO enjoining the Transfer Restrictions. Brown contended that the restrictions were invalid under Section 202(b) of the DGCL. *See* A51-59. The Court of Chancery denied Brown's Motion for a TRO and granted his Motion for Expedition in part, ordering a December 2021 trial on Brown's Section 202 Claim. *See* A119-122.

E. After Closing, Legacy Matterport Stockholders Can Submit LOTs to Claim their Matterport Shares.

On July 20, 2021, the Gores SPAC's stockholders voted to approve the Business Combination. A1440. The Business Combination closed on July 22. A381.[2]

Pursuant to the Merger Agreement, upon the closing of the Business Combination, Legacy Matterport common stock was "converted into the right to receive" Matterport shares. A982. Legacy Matterport stockholders exercise this right by submitting a LOT to Matterport's transfer agent surrendering the stockholder's Legacy Matterport shares. Matterport's transfer agent then issues the stockholder restricted Matterport shares. A983-84; A432/153:3-20 (Honaker).

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[2] At trial, this sequencing of closing was a major focus because of Brown's Section 202 Claim, but of little relevance to the lower court's ruling and this appeal. Appellants respectfully refer the Court to Honaker's trial testimony and the accompanying presentation. A431-32/150:7-154:18; A2277-2301.

F. Brown Demands Appraisal While Continuing to Assert His Section 202 Claim.

On August 13, 2021, Brown demanded appraisal for 1,347,000 of his Legacy Matterport shares (the "Appraisal Shares"). A1481. To retain standing in this litigation, Brown did not seek appraisal for 40,000 shares (the "Non-Appraisal Shares"). A1481; A1570. Brown did not submit any LOTs at this time.

On September 5, 2021, Brown filed his Verified Amended Complaint, which was the operative pleading (the "Amended Complaint"). A124. Brown continued to assert only his Section 202 Claim and did not claim that he did not hold Lockup Shares. The definition of "Lockup Shares" was not quoted in the Amended Complaint, and the term "Lockup Shares" only appears once, as part of a block quote of the Transfer Restrictions. *See* A148, ¶ 60.

G. Brown Manufactures the Lockup Shares Claim.

The sequencing of corporate actions in the Business Combination, which Brown stipulated to in the pre-trial order, established that Matterport had adopted the Transfer Restrictions before closing, thus defeating the Section 202 claim. *See* A379-382; A1343-1438.

Brown thus created two new, unpled claims, one of which was the Lockup Shares Claim.[3]

[3] The other claim was that the merger violated Section 251 of the DGCL. Brown did not seriously press this theory, and the trial court did not address it.

In anticipation thereof, Brown submitted two LOTs to take possession of his Matterport shares just before his November 19, 2021 deadline to file an appraisal petition. *See* 8 *Del. C.* § 262(e). First, on November 5, Brown submitted a LOT for 37,000 of the Non-Appraisal Shares. A1676. Then, no later than November 16, Brown finalized a second LOT for the Appraisal Shares and the remaining 3,000 Non-Appraisal Shares, with the same alterations. A401/31:15-24 (Brown); A2036; A627. Brown surreptitiously altered both LOTs and did not inform Matterport that he had submitted them.

On November 17, 2021 Brown purported to file a Verified Second Amended Complaint. A167.[4] This pleading added factual allegations to address Appellants' pending dispositive motions against some of Brown's claims. It did not assert the Lockup Shares Claim. Nor did Brown's second amended complaint disclose that Brown had submitted or finalized LOTs. *See id.*

On November 18, 2021, Brown took possession of all the Matterport shares represented by both of his LOTs when Matterport's transfer agent transferred him the shares in book-entry form. A2043.

Between November 19 and November 23, 2021, the parties negotiated the Pre-Trial Order. Brown did not assert the Lockup Shares Claim in the order and

[4] Brown's pleading is invalid because he did not obtain Appellants' consent or leave of court to file it. *See* Ct. Ch. R. 15(a).

stipulated that he did not "contemplate[] any amendments to [his] pleadings as to Count I." A384.

Only on the evening of November 22, 2021 did Brown at last inform Matterport that he had submitted LOTs. Brown did not produce the LOTs until November 23 and asserted the Lockup Shares Claim for the first time when he filed his pre-trial brief later that day.

At the pre-trial conference held on November 24, 2021, Appellants objected to Brown's last-minute assertion of the Lockup Shares Claim. The parties and the trial court agreed to address this objection in post-trial briefing, which they did. A363-364/7:17-8:11.

H. The Trial Court Releases Brown from the Transfer Restrictions.

Trial was held on Count I of the Amended Complaint on December 1 and 2, 2021. On January 10, 2022, the trial court issued its Memorandum Opinion. Ex. A. (Op.). The Memorandum Opinion addressed only the Lockup Shares Claim and did not address the merits of the Section 202 Claim.

The Memorandum Opinion found the definition of Lockup Shares—"the shares of Class A common stock held by the Lockup Holders immediately following the Business Combination"—unambiguous. Op. 7. The trial court rested this finding on what it deemed to be the plain meaning of two words: "held" and "immediately." "Held," the trial court reasoned, must mean "to have possession or

ownership," and "immediately" must mean "without delay." *Id.* at 7-8. The trial court thus concluded, without considering the rest of the Transfer Restrictions, that "Lockup Shares" limited the Transfer Restrictions to shares that Legacy Matterport stockholders had "possession or ownership" of "without delay" after the closing of the Business Combination. The trial court found it "unnecessary to define the precise time period" after closing that a stockholder could receive shares subject to the Transfer Restrictions, finding that Brown "[o]btaining shares over 100 days after closing is not 'immediately.'" *Id.* at 9. Accordingly, the trial court found that Brown did not hold Lockup Shares. The trial court also held that Brown had provided Appellants sufficient notice of the Lockup Shares Claim. *Id.* at 10-11.

On January 12, the Court entered partial final judgment. Ex. B.

The Transfer Restrictions expired on January 22, 2022. Brown has informed Matterport that he intends to assert claims against Matterport and its fiduciaries for enforcing the Transfer Restrictions against him, including for the lost value of the shares between when Brown claims he would have sold the shares and the trial court's ruling.

ARGUMENT

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

A. Question Presented.

Did the trial court err by reading the definition of Lockup Shares in isolation from the Transfer Restrictions as a whole, and thus holding that Brown's Matterport shares received through the Business Combination are not subject to the Transfer Restrictions? Appellants raised this issue below at A614-22, and the trial court considered it at Op. 5-10.

B. Standard of Review.

"The construction or interpretation of a corporate certificate or by-law is a question of law subject to *de novo* review by this Court." *Centaur P'rs IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990).

C. Merits Argument.

Corporate bylaws, like the Transfer Restrictions here, are construed pursuant to the "rules of contract interpretation." *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). The Court must "give effect to the intent of the parties as revealed by the language of the [bylaws] and the circumstances surrounding [their] creation and adoption." *Id.* at 1190 (internal quotations omitted); *accord In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (noting courts must "give priority to the parties' intentions as reflected in the four corners of the agreement,

construing the agreement as a whole and giving effect to all its provisions") (internal quotations omitted). The plain language must therefore be "situated in the commercial context between the parties." *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017); *see also Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1034 (Del. 2013) (observing certificates and bylaws "must be read in context").

"Words and phrases used in a bylaw are to be given their commonly accepted meaning unless the context clearly requires a different one . . . ." *BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020). Bylaws are ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, __ A.3d __, 2022 WL 619700, at *5 (Del. Mar. 3, 2022) (internal quotations omitted); *accord Hayes*, 106 A.3d at 1033-34. "[A] provision may be ambiguous when applied to one set of facts but not another." *Hayes*, 106 A.3d at 1034 (internal quotations omitted). Finally, "[a]n interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering the contract." *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1208 (Del. 2021) (internal quotations omitted).

1. The Transfer Restrictions Unambiguously Apply to Brown's Matterport Shares Issued as Consideration in the Business Combination.

The unambiguous language of the Transfer Restrictions, read as a whole and in context, dictate that they apply to the Matterport shares that Brown received as consideration in the Business Combination.

The commercial context of the Transfer Restrictions was their adoption as part of the Business Combination. The parties implemented a lockup to signal confidence to the market and to prevent the "collective action problem [] created when too many shareholders sell stock when trading first opens…." A420/108:20-24 (Subramanian). As Professor Subramanian explained, to achieve these purposes, transfer restrictions must apply to at least all "insiders' shares, plus additional shares as needed to mitigate the collective action problem." A1642, ¶ 45.

Accordingly, the Transfer Restrictions begin by using the term "Lockup Holders" to broadly apply the Transfer Restrictions to *all* holders of Matterport Class A stock "issued [] as consideration under [the Merger Agreement]." A1459. The Transfer Restrictions then introduce the term "Lockup Shares" to confirm which Matterport shares held by the Lockup Holders are subject to the restrictions, namely "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination." A1461.

Reading the Lockup Shares definition in isolation, the trial court interpreted it as a time-based limitation—concluding it means the Matterport shares "owned or possessed" by Legacy Matterport stockholders "without delay" after closing and excludes all other shares. Op. 8-9. This construction cannot be reconciled with "the purpose of the [bylaws], as evidenced by [their] text." *Salamone v. Gorman*, 106 A.3d 354, 372 (Del. 2014). It creates the exact collective action problem that Transfer Restrictions are intended to solve by allowing each individual Lockup Holder to choose whether to be bound by delaying submission of a LOT, thus allowing a Legacy Matterport stockholder to escape the Transfer Restrictions through gamesmanship and delay, as Brown did. Moreover, it elevates the ministerial act of submitting a LOT (which Brown agrees is "merely a mechanism for stockholders to claim their merger consideration" (A154)), into the decisive act for determining whether the Transfer Restrictions apply. Finally, it renders the Transfer Restrictions vague and likely unenforceable, as it is unclear from the plain language how long after closing a stockholder could receive book-entry Matterport shares and still be subject to the lockup. "[A] reasonable person in the position of the parties" would have never understood the definition of Lockup Shares to operate in this way. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992).

Read in context, "Lockup Shares" is a category-based limitation—it means the Transfer Restrictions apply to all the Matterport shares that Lockup Holders received as consideration through the Business Combination and excludes all other shares. Legacy Matterport stockholders "hold" the Matterport shares received through the Business Combination "immediately following" closing because, at that time, they had the unconditional right to receive the shares. *See, e.g.*, *Roam-Tel P'rs v. AT&T Mobility Wireless Ops. Hldgs., Inc.*, 2010 WL 5276991, at *6 (Del. Ch. Dec. 17, 2010) (explaining the submission of a LOT does not create a contract because the company "ha[s] the legal obligation to pay each minority stockholder" the merger consideration). This reading accords with the language of the Transfer Restrictions as a whole and the commercial context in which those restrictions were adopted.

First, Appellants' reading accords with the definition of Lockup Holder that is a part of the definition of Lockup Shares. Lockup Holder demonstrates the parties' clear intention to apply the Transfer Restrictions to *all* Legacy Matterport stockholders. Moreover, the definition of Lockup Holder equates the right to receive Matterport shares with the shares themselves by referring to the shares as the "consideration under [the Merger Agreement]." A1459. The intervening clerical act—the submission of a LOT—is disregarded. Lockup Shares symmetrically equates the Matterport shares with the right to receive those shares when it refers to

what is "held" by the Lockup Holders "immediately following the closing of the Business Combination." A1461.

Second, Appellants' reading accords with the exclusions from the definition of Lockup Shares: "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 [*i.e.*, shares held by PIPE investors]." *Id.* These are the two most likely categories of Matterport shares that Lockup Holders might own "immediately following the closing of the Business Combination," other than shares acquired through the Business Combination. For example, Brown bought a small number of Matterport shares on the public market pre-closing. A1615/64:16-65:7 (Brown). The definition of Lockup Shares ensures that the Transfer Restrictions do not apply to these shares, but rather only to the 5,713,441 Matterport shares Brown received through the Business Combination.

Third, Appellants' reading of "Lockup Shares" accords with the Merger Agreement. *See Comerica Bank v. Glob. Payments Direct, Inc.*, 2014 WL 3567610, at *7 (Del. Ch. July 21, 2014) ("[C]ontemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract."). The Merger Agreement defines the "Earn-Out Period" as beginning on the "Lockup Expiration Date," which was in turn defined as "180 days after the Closing Date." Matterport chose this date because it was when the Transfer Restrictions would

expire on the shares received by all the Legacy Matterport stockholders that stood to benefit from the earn-out.

Finally, Appellants' reading situates the definition of Lockup Shares "in the commercial context between the parties." *Chi. Bridge & Iron Co.*, 166 A.3d at 926-27. Applying the Transfer Restrictions to all shares received by the Lockup Holders as merger consideration (which collectively amounted to 75% of the shares of the post-transaction entity, *see* A1257) efficiently achieves a lockup's widely-recognized purposes of reducing trading volatility and bolstering market confidence. Excluding Matterport shares acquired outside of the Business Combination is also logical because these shares do not implicate the market-signaling or other purposes of the lockup.[5] Moreover, trying to restrict these shares would create the kind of transaction costs that bylaw-imposed Transfer Restrictions are designed to solve, because Matterport could require individual stockholder agreement to restrict shares issued prior to the Business Combination. *See* 8 *Del. C.* § 202(b).

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[5] In addition to Brown's Matterport holdings (*see supra*, at 23), the Matterport holdings of Lux Capital, the only Legacy Matterport stockholder who was a PIPE investor, evidence this fact. Lux received 99.6% of their Matterport shares as consideration through the Business Combination, compared to only 0.4% through the PIPE. A450/227:5-10 (Ritter). The PIPE investors were effectively locked up for 30 days, and their different lockup period reflects the value to Matterport and its stockholders provided by the almost $300 million in new capital they provided. *See* A462/273:6-275:8 (Fay). Lux was subject to the same Transfer Restrictions as every other Legacy Matterport stockholder on the 99.6% of its holdings that came from Legacy Matterport shares.

In short, Lockup Shares does not limit the Transfer Restrictions depending on *when* a Lockup Holder acquired Matterport shares after submission of a LOT. Rather, Lockup Shares limits the Transfer Restrictions depending on *how* a Lockup Holder acquired Matterport shares—only shares acquired through the Business Combination are subject to the restrictions, and other shares are excluded. This is the only reasonable construction of Lockup Shares, and it is therefore that term's unambiguous meaning.

2. The Trial Court's Reading of the Plain Language Was Flawed.

The trial court's erroneous interpretation rested on its reading of two words within the definition of Lockup Shares: "held" and "immediately," as used in the phrase "the shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination Transaction." Neither word inexorably has the meaning the Vice Chancellor gave them. Their meaning is contextual.

Starting with "held," the concept of "holding" stock is an abstraction because stock is "intangible property incapable of manual seizure and delivery." *Bush v. Hillman Land Co.*, 2 A.2d 133, 135 (Del. Ch. 1938). It therefore does not have a fixed meaning. In certain contexts, such as voting of shares, Delaware law uses the same kind of "inflexible basis of stockholder identity" as the trial court's reading. *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 112 (Del. Ch. 1948); *see, e.g.*, 8 *Del.*

C. § 219(c). But in other contexts, including the delivery and ownership of shares, such "rigidity is not needed" and can lead to problematic results. *Burry Biscuit Corp.*, 60 A.2d at 112; *see, e.g.*, *id.* (holding a beneficial owner is a "stockholder" for purposes of derivative standing); *Kallop v. McAllister*, 678 A.2d 526, 527 (Del. 1996) (explaining a person may hold shares through "constructive delivery").

Indeed, Delaware law adopts a more flexible understanding of "holding" stock following a merger. In *Roam-Tel Partners*, the Court of Chancery construed the interaction between two sections of the appraisal statute that (i) require an appraisal claimant "hold shares" on the date of an appraisal demand, 8 *Del. C.* § 262(a), but (ii) allow, for certain kinds of mergers, a stockholder to make an appraisal demand after a merger closes. *Id.* § 262(d)(2). *Roam-Tel* observed that "no . . . minority stockholder held 'shares' in the sense of the word's ordinary meaning" after closing because the merger had eliminated their shares. 2010 WL 5276991, at *7. But applying that "ordinary meaning" would be illogical because that would mean that "no . . . minority stockholder would be entitled to an appraisal." *Id.* Rather, "[t]he only way to make sense of the statute" is to interpret a "holder" of stock to mean "those stockholders of record who held shares immediately before the effective date of the short-form merger." *Id.*

The Merger Agreement used this flexible meaning of "holder" when describing Legacy Matterport shares. Section 3.01(a) of the Merger Agreement

provides that, upon the closing of the Business Combination, "the ***holder*** of [each] share of [Legacy Matterport stock] . . . shall be entitled to receive" the merger consideration. A982 (emphasis added). The Merger Agreement clearly did not require Legacy Matterport stockholders to still possess Legacy Matterport shares to receive the merger consideration—they could not, as the Business Combination had just eliminated the shares. The drafters colloquially described them as Legacy Matterport "holders" because they *had* possessed those shares "immediately before the effective date of the [] merger." *Roam-Tel*, 2010 WL 5276991, at *7.

Likewise, the experienced drafters used this same, flexible meaning of "holder" in the Transfer Restrictions. They described these shares as "held by the Lockup Holders immediately following the closing of the Business Combination" because the Lockup Holders had "the right to receive, and . . . were entitled to receive" these Matterport shares under the Merger Agreement. A1461. The drafters again used the word "held" colloquially because the Lockup Holders *would* possess those shares once they submitted a LOT, a ministerial task which simply provided a process for exchanging Legacy Matterport shares for Matterport shares.[6]

[6] Brown used this same meaning of "holder" in prosecuting his Section 202 Claim. Brown specifically did not seek appraisal for the Non-Appraisal Shares because he understood that, so long as he had the right to receive Matterport shares, he would be a "holder of the restricted security" with standing to bring that claim. 8 *Del. C.* § 202; *see* A1570.

The word "immediately" must likewise be understood in the context of the LOT process, which includes some delay after closing before a stockholder receives shares. Understanding this process, the drafters did not use the word "immediately" to mean "without delay," which would allow individual Matterport stockholders to opt-out of the Transfer Restrictions by delaying their LOTs. *See Symbiont.io, Inc. v. Ipreo Hldgs, Inc.*, 2021 WL 3575709, at *35 (Del. Ch. Aug. 13, 2021) (Delaware law does "not allow the imprecise placement of adverbs . . . to alter the otherwise plain meaning of a contractual provision or to frustrate the overall plan or scheme memorialized in the parties' contract.") (citation omitted).

Rather, the drafters intended the word "immediately" to have the more expansive meaning set forth in the same dictionary definition used by the trial court: "in direct connection or relation." *Immediately*, Merriam-Webster, https://www.merriam-webster.com/dictionary/immediately (last visited March 29, 2022); *see also State v. Bitz*, 404 P.2d 628, 631 (Idaho 1965) ("[I]mmediately" does not "necessarily mean 'without any intervening lapse of time.'"); *Foley v. New World Life Ins. Co.*, 52 P.2d 1264, 1266 (Wash. 1936) ("[Immediately] does not necessarily mean 'upon the instant,' 'forthwith,' or 'without any intervening lapse of time,' but [] there is a certain latitude to be given the significance of the word."); *accord Wilm. Amusement Co. v. Pac. Fire Ins. Co.*, 21 A.2d 194, 195 (Del. Super. 1941). Legacy Matterport stockholders received Matterport shares "immediately"

following the closing of the Business Combination because, at that time, they were entitled to them under the Merger Agreement and would possess them after the administrative submission of a LOT.

The trial court's narrow interpretation of "held" and "immediately" instead produce an absurd result. Because *no* Legacy Matterport stockholder "possessed" Matterport shares "without delay" following the closing of the Business Combination, the logical implication of the trial court's strict reading is that *no* former Legacy Matterport stockholders held Lockup Shares. This renders the Transfer Restrictions "meaningless or illusory." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *accord In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 575 (Del. 2019).

Recognizing these problematic implications, the trial court improperly reached for extrinsic evidence to support what it had found to be unambiguous contractual language. That evidence was deposition testimony from Matterport's CFO acknowledging that some Legacy Matterport stockholders returned their executed LOTs prior to closing. A1607/78:23-79:2 (Fay). From this generic bit of testimony (and without considering other extrinsic evidence), the trial court inferred that "some Legacy Matterport stockholders would have received their Matterport shares within a few days of closing." Op. at 8-9. The trial court found that this

"timing *could be* viewed as consistent" with the Court's reading of Lockup Shares, without deciding whether it actually would be consistent. Op. at 9 (emphasis added).

Even if the Vice Chancellor's factual finding were correct (and there is no record evidence that any stockholders actually did *receive* Matterport shares from the transfer agent "within a few days of closing"), this interpretation of Lockup Shares would remain unreasonable. There is no reason to believe that a meaningful number of Legacy Matterport stockholders submitted LOTs pre-closing. Although no discovery was taken on this issue because of Brown's delay (*see infra*, at 36-37), it is reasonable to assume that most stockholders would not risk surrendering their shares until they knew the Business Combination had closed, and the Gores SPAC's stockholders only approved the transaction two days before closing. A1439. The trial court's interpretation would thus mean that the Transfer Restrictions applied to, at most, a small percentage of Legacy Matterport's stockholders—far too few to achieve the purpose of the lockup. *See* A1642, ¶ 45. Moreover, under the trial court's interpretation, no one would know which shares the Transfer Restrictions applied to, creating a cloud of uncertainty over trading to the detriment of all stockholders.

Accordingly, the only reasonable interpretation of Lockup Shares is as all Matterport shares that Legacy Matterport stockholders would receive as merger consideration after submitting LOTs.

3. Alternatively, the Meaning of Lockup Shares Is Ambiguous, and Extrinsic Evidence Refutes the Trial Court's Interpretation.

Given the illogical implications of the trial court's construction, at a minimum the Transfer Restrictions are "susceptible to two meanings"—the trial court's reading, and Appellants' interpretation. *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 (Del. 2019). The trial court accordingly should have found the definition ambiguous and considered *all* extrinsic evidence. *See, e.g.*, *id.* at 848 (finding a contract ambiguous where there was a "mix of practical and textual support" for one interpretation contradicted by another part of the contract); *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013) (language is ambiguous when "a literal reading of its terms would lead to an unreasonable or absurd result.") (internal quotation marks omitted); *Dolan v. Altice USA, Inc.*, 2019 WL 2711280, at *9 (Del. Ch. June 27, 2019) (holding contract ambiguous where construction which "fairly track[ed] the plain language of" one provision rendered another provision "superfluous" and created an "arguably absurd result") (internal quotations omitted). The extrinsic evidence overwhelmingly refutes the trial court's reading.

There is no evidence that anyone contemplated the trial court's interpretation of the Transfer Restrictions before Brown raised the issue on the eve of trial. That includes Brown. The foundation of Brown's Section 202 Claim was that the

Transfer Restrictions were overbroad because they applied to all Legacy Matterport stockholders, including those who, like him, did not agree to them. *See, e.g.*, A175; A196; A415/85:8-19 (Brown).

All contemporaneous evidence likewise contradicts the trial court's construction. The proxy statement disclosed 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. Following the expiration of such 180 day period, shares of Class A Stock received by [Legacy] Matterport Stockholders in the Business Combination are expected to be freely tradable.

A1283; *see also* A1298. Matterport's CFO's unchallenged trial testimony was that the company applied the Transfer Restrictions to all Legacy Matterport stockholders because it was "fairer to cover everyone equally and not to try to make judgments about which stakeholders or shareholders would have lockups and which would not." A462/270:8-14 (Fay).

As this Court has recognized before, "practice and understanding in the real world" is relevant extrinsic evidence, which here further supports Appellants' position. *Airgas*, 8 A.3d at 1191. In *Airgas*, the Delaware Supreme Court construed certificate and bylaw provisions which stated that directors' terms expired at the "annual meeting of stockholders held in [the] third year following the year of their election." *Id.* at 1186. This Court found this language prohibited stockholders from

advancing the corporation's annual meeting to eight months before the expiration of a director's full three-year term (but during the same calendar year). *Id.* at 1186, 1194. It observed that Airgas's certificate and bylaw provisions were clearly intended to create a staggered board, and that fifty-eight other Fortune 500 companies had used the same template language as Airgas. *Id.* at 1190. The Court found that it could not "ignore this widespread corporate practice and [the] understanding it represents"—that the bylaw was "intended to provide that each class of directors serves three year terms." *Id.* at 1191.

A similar widespread corporate practice exists with respect to the language of the Transfer Restrictions. At least nineteen additional de-SPACs between January and November 2021 used the same template language as Matterport to adopt lockups. *See* A1336; A1825; A1855; A1884; A1912; A1941; A1964; A1994; A2029; A2074; 2107; A2138; A2153; A2174; A2205; A2222; A2243; A2260; A2273. All these companies, including Matterport, intended to apply their Transfer Restrictions to all legacy company stockholders reflecting the industry-wide understanding of lockups.

The trial court observed that "[l]anguage in the bylaws of certain other post-de-SPAC corporations clearly restricts all shares issued to the targets' stockholders." Op. 7 n.28. But *Airgas* addressed this issue too. In that case, another widely used form provision implementing a staggered board unambiguously required the

directors to serve full three-year terms. The Court nonetheless found that Airgas's did as well, because it was clearly "intended, and has been commonly understood, to provide for three year terms." *Airgas*, 8 A.3d at 1194.

Similarly, in this case, the evidence at trial demonstrated that the definition of Lockup Shares was similarly "one of a few template definitions." A430/147:12-20 (Honaker). While other templates might use different words to define "Lockup Shares" to include all shares received in the merger, the "widespread corporate practice" of lockups in de-SPAC transactions establishes that the template Matterport and nearly two dozen other companies used does as well. *Airgas*, 8 A.3d at 1191.

II. THE TRIAL COURT ERRED BY ALLOWING BROWN TO ASSERT HIS LOCKUP SHARES CLAIM

A. Question Presented.

Did the trial court err in holding that Brown provided adequate notice of the Lockup Shares Claim and thus could present it at the December 2021 trial? Appellants addressed this issue below at A363-64/7:17-8:15 and A606-11, and the trial court considered it at Op. 10-11.

B. Standard of Review.

Appellants challenge the legal standard that the Court used when concluding that Brown provided adequate notice of the Lockup Shares Claim. This is a legal question that the Court reviews *de novo. KT4 P'rs LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 748-49 (Del. 2019).

C. Merits Argument.

The trial court based its ruling that Brown had preserved his Lockup Shares Claim on the minimal notice-pleading standard that Delaware courts have applied at the pleadings stage. This was erroneous.

At the pleading stage, a plaintiff need only "put a defendant on fair notice in a general way of the cause of action asserted, which shifts to the defendant the burden to determine the details of the cause of action by way of discovery." *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952). A plaintiff need not "plead a

particular legal theory." *HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2529806, at *26 (Del. Ch. May 19, 2020), *aff'd*, 263 A.3d 1013 (Del. 2021) (TABLE).

While a party need not "perceive the true basis of [its] claim at the pleading stage," it cannot make "a late shift in the thrust of the case" that will "prejudice the other party in maintaining a defense upon the merits." *Altenberg*, 2020 WL 2529806, at *36 (citation omitted). Instead, "when a plaintiff attempts to add a new theory—a new cause of action—late in the game, the issue [is not] whether the legal theory should be read into the complaint, but whether an amendment to the complaint should be permitted." *Zokari v. Gates*, 561 F.3d 1076, 1086 (10th Cir. 2009). Court of Chancery Rule 15(b) reflects this principle by providing that the court should only grant a motion to amend the pleadings to conform them to the evidence if doing so will not "prejudice the [objecting] party in maintaining an action or defense upon the merits." Ct. Ch. R. 15(b).

The trial court accordingly should have applied Rule 15's standard when determining whether Brown could present the Lockup Shares Claim at trial. *See, e.g.*, *Altenberg*, 2020 WL 2529806, at *39-41 (refusing to allow plaintiff to assert unpled claim in post-trial briefing; "[g]iven the posture of the case . . . the plaintiffs should have moved under Rule 15(b) to amend the pleadings to conform to the evidence presented at trial"). Under Rule 15, leave to amend "may be denied if there is a showing of substantial prejudice, bad faith, [or] dilatory motive." *OptimisCorp*

v. Waite, 2015 WL 357675, at *2 (Del. Ch. Jan. 28, 2015). Had the trial court applied this standard, Brown should have been denied leave to assert the Lockup Shares Claim for two reasons.

First, Appellants were substantially prejudiced by Brown's failure to raise the Lockup Shares Claim until eight days before trial. Appellants had no practical notice of the Lockup Shares Claim merely because Brown block-quoted the Transfer Restrictions in his pleading. *See Altenberg*, 2020 WL 2529806, at *37 (finding "isolated snippets" insufficient to provide notice of claim). Moreover, the Lockup Shares Claim was fundamentally inconsistent with the Section 202 Claim Brown had pled. The Section 202 claim contended that the Transfer Restrictions were facially invalid because they applied to all Matterport shares (including stockholders, like Brown, who had not agreed to them), whereas the Lockup Shares Claim contended that the Transfer Restrictions did not apply to Brown's shares by the restrictions' terms. As Appellants could not have anticipated the Lockup Shares Claim before Brown asserted it, Appellants were unable to take relevant discovery. *See Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 140 (Del. 2019).

This prejudice is manifest in the lower court's ruling. The trial court selectively considered extrinsic evidence—Matterport's CFO's deposition testimony about the timing of the LOTs—in support of its construction of Lockup

Shares. The record not only did not contain the necessary evidence for Matterport to refute it; it was inadequate for the Court to draw definitive conclusions, as the Memorandum Opinion acknowledged. Op. 9-10; *see supra* 28-29.

Second, Brown acted with a dilatory motive. Brown deliberately delayed in raising his Lockup Shares Claim to maximize surprise and minimize Defendants' ability to respond at trial. Despite submitting one LOT on November 5, 2021, and finalizing another on November 16, Brown's Verified Second Amended Complaint, filed on November 17, made no mention of his Lockup Shares Claim. *See* A167. Brown did not inform Appellants that he had submitted his LOTs until the evening of November 22. And in the Pre-Trial Order, finalized on November 23, Brown made no reference to his Lockup Shares Claim and stipulated that he did not "contemplate[] any amendments to [his] pleadings." A384, ¶ 76; *see also Realty Enters., LLC v. Patterson-Woods & Assocs., LLC*, 11 A.3d 228, 2010 WL 5093906, at *4 (Del. Dec. 13, 2010) (ORDER) ("A party waives a claim where the party does not plead it in the pretrial stipulation."). Particularly given that his delay was both deliberate and tactical, Brown should not have been permitted to present the Lockup Shares Claim at trial. *See E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999) ("Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process. The rules of discovery demand no less."); *Hoey v. Hawkins*, 332 A.2d 403,

406 (Del. 1975) (excluding undisclosed evidence because "[t]he obvious tactical objective sought was surprise and that does not comport with the spirit of the Discovery Rules").

CONCLUSION

The ruling of the Court of Chancery should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 29, 2022, true and correct copies of the Appellants' Opening Brief were caused to be served on the following counsel of record via File & ServeXpress.

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