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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTERPORT, INC., and MATTERPORT OPERATING LLC, Defendants Below, Appellants/Cross-Appellees, v. WILLIAM J. BROWN, Plaintiff Below, Appellee/Cross-Appellant.	Case No.: 294, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2021-0595-LWW

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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It is remarkable that Matterport's response to the cross-appeal continues to focus on "law of the case," insisting that damages should have been measured based on a hypothetical trading period starting in July 2021. *See* Cross-Appellees' Answering Br. 33–35. The law-of-the-case argument does not justify ***any*** of Matterport's positions. Indeed, if anyone is seeking to relitigate settled matters, it is Matterport itself. The trial court found in Phase I that Matterport had improperly imposed restrictions on shares Brown received for the first time ***in November 2021***—restrictions that prevented him from trading ***at that time***. This Court affirmed. That much is settled—and it cannot now be disturbed. The central question in Phase II was what the financial remedy should be for that improper ***November 2021*** restriction.

Matterport's insistence on an earlier period ignores both the binding resolution in Phase I and the trial court's factual findings in Phase II—including its finding that but for the restriction, Brown would have sold his shares ***in November 2021*** and not before. Those factual findings—which are not challenged here—conclusively dispose of Matterport's effort to refocus the damages analysis on a hypothetical trading period many months earlier. What happened or didn't happen in July and August is simply not at issue in this case.

Yet while the trial court's Phase II factual findings are not in dispute, its legal conclusions reflect a number of errors that this Court should correct. As

Brown's cross-appeal brief explained, the trial court failed to apply *Duncan*'s bright-line legal rule that the "presumed sale price" for purposes of calculating damages is the highest intermediate value during the reasonable trading period. *See Duncan v. TheraTx, Inc.*,775 A.2d 1019 (Del. 2001). The trial court also applied the wrong legal standard for Brown's 6 Del. C. §8-401 claim, incorrectly requiring him to prove that Matterport's refusal was unreasonable. Matterport's brief does not provide an adequate answer on either point.

On the issue of interest, Matterport all but concedes that the trial court applied an interest rate different from the one called for under Delaware law. As this Court has recently made clear, the "judgment" for purposes of calculating post-judgment interest must contain a "sum certain," which "consists of the factfinder's award of damages, the costs assessed by the court, and prejudgment interest." *NGL v. LCT Cap.*, 319 A.3d 335, 341, 345 (Del. 2024). Here, that is necessarily the Phase II final judgment. The trial court erred by basing its award on the interest rate in effect on the date of the Phase I declaratory judgment instead.

This Court should reject Matterport's arguments and grant Brown's cross-appeal in full.

I. The trial court erred as a matter of law when it failed to apply *Duncan*'s highest intermediate value rule.

In *Duncan*, this Court held that when a defendant has improperly restricted a stockholder's ability to sell stock, damages must be calculated by "identifying a reasonable period after the restriction was imposed during which the stockholder[] could have sold the shares and then selecting the 'highest intermediate price' during that period as the presumed sale price." 775 A.2d at 1023. Here, the trial court correctly followed *Duncan*'s first step and "identif[ied] a reasonable period after the restriction was imposed during which the stockholder [Brown] could have sold the shares." *See id.* at 1023; Phase II Op. 41; *id.* at 37 (finding Brown could and would have sold between November 22 and 29).

But then, the trial court committed legal error by failing to apply *Duncan*'s "bright line" rule, which required basing the damages calculation on the highest intermediate value. That legal error is subject to *de novo* review.

A. This Court reviews *de novo* whether the trial court applied the correct legal standard to determine Brown's damages.

Whether a remedy is calculated "using the correct standards" is "an issue of law" that is "reviewed *de novo*." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999); *see SIGA Techs. v. PharmAthene*, 132 A.3d 1108, 1139–40 (Del. 2015) (Valihura, J., concurring in part) (this Court's "review of embedded legal issues [in damages determinations] is *de novo*").

Matterport erroneously claims the *de novo* standard does not apply to Brown's "money damages" because it "is not an equitable remedy." *See* Cross-Appellees' Answering Br. 25. This makes no sense. The trial court correctly awarded money damages because "[a]n appropriate remedy in a declaratory judgment proceeding 'clearly includes an award of damages.'" Phase II Op. 26–27 (quoting *Sullivan v. Local Union 1726*, 464 A.2d 899, 903 (Del. 1983)); *see Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993) (equitable relief "includ[es] damages"); 10 Del. C. §6508. And none of this undermines the basic proposition that questions about legal standards embedded in remedies are ***always*** reviewed *de novo*. *See Schock*, 732 A.2d at 232.

The only authority Matterport cites on this point, *PharmAthene* (132 A.3d 1108), is inapposite. In *PharmAthene*, the Court merely stated that damages determinations are generally reviewed for abuse of discretion. But as Justice Valihura made clear in that very decision, this Court's "review of embedded legal issues" in damages determinations "is *de novo*." *Id*. at 1139–40 (Valihura, J., concurring in part). Here, Brown does not challenge any of the trial court's factual findings about the calculation of damages. The only issue he raises on appeal in this regard is whether the trial court applied the correct legal standard in calculating damages. That is a legal issue, and it is necessarily reviewed *de novo*.

In any event, this is all academic. Courts have no discretion to disregard the law. *See Heartland Payment Sys. v. Inteam Assocs.*, 171 A.3d 544, 570 (Del. 2017) ("An abuse of discretion occurs when a court has … ignored recognized rules of law or practice so as to produce injustice."). Even if a damages award would otherwise be reviewed through the lens of discretion, this appeal still turns on whether the trial court applied the right standard—which is necessarily a question that this Court must decide for itself. That is the very definition of *de novo* review.

B. *Duncan* announced a legal rule that must be applied.

In *Duncan,* this Court pronounced a bright-line rule that, where a defendant has improperly restricted a stockholder's right to sell shares, damages must be calculated using the highest intermediate value over a reasonable trading period. 775 A.2d at 1029. This rule ensures that "the issuer-defendant … bear[s] the risk of uncertainty in the share price" that its improper restriction created. *Id.* at 1023.

Matterport incorrectly asserts that "[t]he foundation of Brown's cross-appeal is that the Court of Chancery had no discretion when calculating damages." Cross-Appellees' Br. 26. Not so. The trial court properly exercised its discretion in determining a reasonable trading period of November 22 to November 29, 2021, based on factual findings that have ample support in the record and are not challenged on appeal. *See, e.g.*, Phase II Op. 37, 41. Once it determined the reasonable trading period, however, the trial court was bound to apply *Duncan*'s

legal standard and calculate Brown's damages based on the highest intermediate value within that period. *See* Cross-Appellant's Br. 42–44. Matterport does not (and cannot) argue that there was "any degree of certainty" as to what price Brown would have received had Matterport not improperly restricted his trading. Thus, as Matterport concedes, "[i]n such situations … the defendant bears the risk of the uncertainty created by their actions." Cross-Appellees' Answering Br. 26 (citing *PharmAthene*, 132 A.3d at 1131 & n.132).[1]

Matterport's concession is unsurprising given the plethora of authority for the proposition that the risk of price uncertainty must fall on the defendant. *See, e.g.*, *Comrie v. Enterasys Networks,* 837 A.2d 1, 20 (Del. Ch. 2003) (highest intermediate value rule is meant to ensure the "issuer-defendant[s] should bear the risk of uncertainty in the share price"); *BioLife Sols. v. Endocare*, 838 A.2d 268, 284 (Del. Ch. 2003), *as revised* (Oct. 6, 2003) ("[The] defendant should bear the risk of uncertainty in the share price."); *Am. Gen.*, 622 A.2d at 10 ("Because it is the defendant who creates this uncertainty, fundamental justice requires that … the perils of such uncertainty should be laid at defendant's door." (cleaned up)).

As detailed in Brown's cross-appeal brief, the highest intermediate value is the appropriate measure because "[t]he injury here is not the loss of a specific

[1] Footnote 132 of *PharmAthene*, 132 A.3d at n.132, collects cases supporting this position. *See, e.g.*, *Am. Gen. v. Cont'l Airlines,* 622 A.2d 1, 10 (Del. Ch. 1992), *aff'd*, 620 A.2d 856 (Del. 1992).

transaction but the loss of the ability to trade the shares as desired." *Duncan*, 775 A.2d at 1022 n.7. "[T]he primary effect" of defendant's actions "is to cause a deprivation of the stockholder's range of elective action." *Id*. This loss of "elective action" mandates the highest intermediate value as the "presumed sale price." *Id.* at 1022 n.7, 1023.

Matterport's only answers, without any factual support, that Brown "did not lose the ability to trade the shares as desired." Cross-Appellees' Answering Br. 29. This is baseless. This entire action is based on the now-established fact that Matterport improperly restricted the shares Brown received for the first time in November 2021. The trial court found that "Brown's right to freely trade was impaired by Matterport[]" and "Matterport is responsible for fairly compensating him." Phase II Op. 33; *see id.* at 26 (discussing "Brown's entitlement to damages of any losses caused by Matterport's initial refusal to issue freely transferable shares"). And it also found Brown "was consistent in his desire to ascertain the optimal time to trade" (Phase II Op. 40 n.190 (citing B133 (JX 1068), B134 (JX 1071), A854–96 (JX 240)), and he spent "'hundreds of hours' on his stock price model," as he "was singularly focused on making an optimal trade" (*id*. at 11, 39)—not just a quick one. Matterport's assertion that Brown did not lose a "range of elective options" or "the ability to trade the shares as desired" is meritless.

Matterport's attempt to distinguish *Duncan* also fails for at least two reasons. Cross-Appellees' Answering Br. 29–33. ***First,*** as detailed in Brown's opening brief, the fact that the court could use the factual record to determine a reasonable trading period does not permit departing from *Duncan*. Far from it. Indeed, *Duncan* identified a short reasonable trading period (January 13 to January 23) based on multiple considerations, including the "time in which the plaintiff could have disposed of its shares without depressing the market had it been able to do so." 775 A.2d at 1023 n.9. Nevertheless, the Court applied the highest intermediate value rule, because the defendant must "bear the risk of uncertainty" during this short period. *Id.* at 1023. The same is true here.

Second, Matterport now appears to concede (as it must) that *Duncan* does not require any level of wrongdoing on the defendant's part beyond improperly restricting a plaintiff's ability to trade—exactly what Matterport did here.[2] *See* Phase II Op. 33 ("Brown's right to freely trade was impaired by Matterport[]"). Having conceded the matter, Matterport urges this Court to ignore the trial court's

[2] As previously explained, *Duncan* and the highest intermediate value rule are not limited to cases involving wrongdoers. *See* Cross-Appellant's Br. 41–48. Nor does *PharmAthene* hold that some additional level of wrongdoing is required. It refers to "the established presumption that doubts about the extent of damages are generally resolved against the breaching party," noting that where a defendant's actions were willful, applying the rule could require an even "a lesser degree of certainty." 132 A.3d at 1131.

"wrongdoer" requirement, saying that it "was not essential to its ultimate holding and so does not constitute reversible error." Cross-Appellees' Answering Br. 32.

But the trial court's mistaken view on the level of wrongdoing required was central to its failure to apply *Duncan*—and it reflects the error that Brown asks this Court to correct. *See, e.g.*, Phase II Op. 2 ("There is also no wrongdoer to fairly construe uncertainty against since Matterport's only offense was adopting a bylaw with a loophole … [and] the highest intermediate price framework would unfairly … punish Matterport in this unique context."); *id*. at 30 ("A common thread through the cases is considerable uncertainty—fairly borne by a wrongdoer…."); *id*. at 31 ("The circumstances prompting courts to award damages using the highest intermediate price are missing here. Matterport was not found to have breached a contract, committed a tort, or violated positive law."). This was reversible legal error.

Matterport also erroneously argues that *Duncan*'s "bright-line rule" applies only to the back half of the damages calculation—referring to the subtraction of the actual proceeds of the sale. *Duncan*'s unambiguous language provides otherwise:

> We conclude that, under Delaware law, the appropriate measure of the damages … is the difference between the highest price of the shares during a reasonable time after the registration is suspended and the average price of the shares during a reasonable period after the registration is reinstated. This is a sensible "bright line" rule that is fair and achieves more certainty than the alternatives.

775 A.2d at 1029. *Duncan* could not be clearer: the highest intermediate

value is part of the bright-line rule. The court erred in rejecting it.

C. Matterport's efforts to push the trading period to July ignore the trial court's factual findings and distort the outcome of Phase I.

As a last-ditch argument, Matterport argues that if this Court does apply *Duncan*, it should revisit the trial court's finding that the reasonable trading period began in November. *See* Cross-Appellees' Br. 33–38. In doing so, Matterport improperly attempts to reopen the findings of Phase I and challenge the factual findings of Phase II. It is too late for both. The Phase I findings cannot be reopened, and Matterport waived any challenge to the Phase II findings by not raising it properly in its opening brief. *See* Rule 14(b)(vi)(A)(3) ("[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal"); *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (explaining preserved issues must be "in the text of an opening brief constitutes a waiver of that claim on appeal").

Nor could such challenge succeed here. This Court "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*, 246 A.3d 81, 94 (Del. 2021). Here, based on the extensive evidence in the record and "the findings of the Phase One Opinion" (already affirmed on appeal), the trial court found that

"November 22 is the most realistic first day Brown could have traded his Matterport shares had they lacked a restrictive legend." Phase II Op. 41.

Ample record evidence supporting this conclusion includes the fact that Brown was not a Matterport stockholder at all until "November 2021," when he "sen[t] letters of transmittal to AST." Phase II Op. 16. As the Phase I proceedings established, when the merger closed, "Brown held only the right to receive Matterport Class A common shares," and "did not hold Matterport Class A shares 'immediately following' the transaction …." A98 (Phase I Op.).

Recognizing that this evidence is both unchallenged and indisputable, Matterport erroneously asserts that it doesn't matter when Brown became a stockholder. Cross-Appellees' Answering Br. 34. That is wrong. Even Matterport concedes that "under *Duncan*, the highest intermediate value is measured starting from the 'reasonable period after the restriction was imposed during which the ***stockholders could have sold*** the shares … absent the restrictions.'" *Id.* at 33 (emphasis added). It is undisputed that Brown was not a Matterport stockholder until November 2021, and he "could [not] have sold the shares" until then. *See* A98 (Phase I Op.); Phase II Op. 16. One cannot sell shares that one does not own.

Matterport also rehashes the factual argument it made at trial—that Brown wanted to sell the shares (he did not yet own) as quickly as possible after the merger. However, the trial court correctly found as a matter of fact that Brown did

not intend to sell as quickly as possible but rather "was singularly focused on making an ***optimal*** trade—spending hundreds of hours developing a predictive model [and] researching various trading strategies." Phase II Op. 39 (emphasis added). Though the court found that "Brown wanted to receive his shares as soon as possible," it specifically found this was "***not*** a commitment to sell in July or August.'" Phase II Op. 40 n.109 (emphasis added). Rather, Brown "was consistent in his desire to ascertain the optimal time to trade," and his model showed that similar stocks "experienced a run-up in stock price within the first 160 days post-closing, with prices falling as the lockup expiration approached." Phase II Op. 10, 40 n.109. The reasonable trading period—November 22 to November 29—falls within Brown's model for optimal trades.

Matterport also insists that the trial court "made no findings regarding the reasonable trading period" during which "Brown could have traded if he were not incorrectly locked up" (Cross-Appellees' Answering Br. 35), but the record shows otherwise. The court stated that "[t]he first step in assessing Brown's damages is to determine when a reasonable trading period began." Phase II Op. 38. It then spent 10 pages of its Phase II Opinion on its "reasonable trading period" analysis, relying on *Duncan* for the "reasonable period during which [a] stockholder[] could have sold the[ir] shares." Phase II Op. 42 (quoting 775 A.2d at 1023).

Nor can Matterport avoid the Phase II factual findings by exclaiming "law of the case." Cross-Appellees' Answering Br. 33–34 (citing Section I of Matterport's reply on its appeal). In his answer, Brown explained why Matterport's law-of-the-case argument is utterly baseless. Cross-Appellant's Br. 33. It fails here for the same reasons. Not only did Matterport waive the argument by failing to present it to the trial court (*see id.* at 24–26), but law-of-the-case "only applies to issues that the court ***actually decided***." *Washington v. Del. Transit Corp.*, 226 A.3d 202, 213 (Del. 2020) (emphasis added). A decision on "different, albeit related issues" is not sufficient. *Id*. Here, the issue Matterport relies on for law-of-the-case was not resolved at all. Instead, the trial court expressly found it "***unnecessary*** to define the precise time period that the 'immediately following' language covers" because "the only question presently before the court is how (and whether) the transfer restrictions apply to plaintiff," who received his shares in November, ***not*** in July.[3] A98 (Phase I Op.); *see* Cross-Appellant's Br. 27–32.

Ultimately, the court awarded damages based on "a reasonable time period that [Brown] would have traded had the transfer restrictions been removed" (Phase II Op. 27–28)—an approach that closely tracked *Duncan*'s framework for "a

[3] No one received shares in July; the earliest was August 13, 2021. Phase II Op. 14. This timing clarifies the court's observation: had Brown submitted a letter of transmittal in July (immediately after the transaction closed) and received shares in August, those shares would likely have been lockup shares. *See* Phase II Op. 41.

reasonable period after the restriction was imposed during which the ***stockholders*** [*i.e.*, those who actually held stock] could have sold the shares." 775 A.2d at 1023 (emphasis added). So far, so good. It was only ***after*** the court correctly outlined the reasonable period that it committed legal error—rejecting *Duncan*'s highest intermediate value rule for a volume weighted average price (VWAP) analysis. *See* Phase II Op. at 38.

The trial court's legal error cannot stand. This Court should vacate the judgment and instruct the trial court to set damages of at least $110,858,865, based on the highest intermediate value of $33.48 during the reasonable trading period. *See* Phase II Op. 46 (table containing high price on each date in the reasonable trading period).

II. The trial court applied the wrong legal standard for 6 Del. C. §8-401(b) claims when it required Brown to show that Matterport's actions were "unreasonable."

The trial court also erred when it rejected Brown's §8-401(b) claim on the ground that it did not consider Matterport's refusal to transfer Brown's shares "unreasonable." This imposed a requirement that the law does not contemplate. *Jodek Charitable Tr. v. Vertical Net*, 412 F. Supp. 2d 469, 482 (E.D. Pa. 2006) ("8-401 imposes liability … for 'failure or refusal' to register, without regard for whether this failure or refusal is reasonable."). Brown did not need to prove that Matterport's failure or refusal was "unreasonable" to prevail on his claim.

Again, §8-401(b) provides as follows:

> If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from ***unreasonable delay in registration or failure or refusal to register the transfer***. (Emphasis added.)

A plain reading of this language demonstrates that the word "unreasonable" modifies only "delay," not "failure or refusal." *See Jodek.*, 412 F. Supp. 2d at 482 ("The word 'unreasonable' merely modifies and describes the word 'delay'"). Thus, courts have consistently considered "unreasonable delay in registration" ***or*** "failure or refusal to register" as separate, alternative ways to incur liability under

the statute.[4] This makes sense because "unreasonable delay" refers to a temporal period, whereas refusal is just that.

This interpretation also aligns with ordinary principles of statutory construction. 1A Sutherland Statutory Construction §21:14 (7th ed.) ("when a list exists, the 'or' between two subsections makes it necessary to read 'or' as a disjunctive" and "[t]he use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately"); *see Loughrin v. United States*, 573 U.S. 351, 357 (2014) (declining to construe "two entirely distinct statutory phrases that the word 'or' joins as containing an identical element" because or's "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings."); *Elliot Coal Min. v. Dir., Off. of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994) ("Under the normal rules of English punctuation for words in a series, it is the absence of a comma or other punctuation before the coordinate conjunction 'or' that would indicate it and

[4] *See, e.g.*, *Loretto*, 444 A.2d at 259 (explaining there are two different liability "standards" under §8-401(b)); *Bender v. Memory Metals*, 514 A.2d 1109, 1118 (Del. Ch. 1986) (issuer may "be held liable for an unreasonable delay, or for wrongful failure, to register the transfer"); *Jing v. Weyland Tech*, 2017 WL 2618753, at *2 (D. Del.) ("Section 8-401(b) provides liability 'if an issuer is under a duty to register a transfer' and either refuses or causes unreasonable delay."); *Kolber v. Body Cent.*, 2012 WL 3095324, at *2 (D. Del.) (similar); *Jodek*, 412 F. Supp. 2d at 482 ("8–401 imposes liability … for 'failure or refusal' to register, without regard for whether this failure or refusal is reasonable").

its modifier, the limiting adjective clause, are to be treated separately rather than as part of the whole series").[5]

Matterport's contrary argument relies almost exclusively on *Loretto* (444 A.2d 256, 259 (Del. Ch. 1982)). Cross-Appellees' Answering Br. 38. But *Loretto* clearly explains the difference in the two standards:

> The first standard, loss occasioned by unreasonable delay, envisions a situation where the issuer undertakes to register the security but unreasonably delays in effecting the registration.
>
> The second standard, loss occasioned by a refusal to transfer, is self-explanatory: it applies when the issuer for a wrongful reason refuses to register the security.

444 A.2d at 259. Thus the "unreasonableness" is a measure of ***time***—relevant only to "delay." It does not refer to the defendant's motivation.

Other Delaware courts read the statute in this manner, recognizing two separate standards for liability. For example, in *Jing*, the court differentiated refusal to transfer from the temporal nature of "caus[ing] unreasonable delay." 2017 WL 2618753, at *2 (liability where an issuer "either refuses or causes unreasonable delay."); *see Kolber*, 2012 WL 3095324, at *2 ("a wrongful refusal or unreasonable delay" is "actionable under 6 Del. C. §8-401(b)"); *Bender*, 514 A.2d

[5] Even Matterport's authority supports Brown's reading: courts "must give meaning to every word in the statute" and "construe statutes to avoid surplusage if reasonably possible." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117–18 (Del. 2020). Here, Matterport reads out the disjunctive "or" in §8-401(b) and §8-401(a).

at 1118 (explaining liability "for an unreasonable delay, or for wrongful failure, to register the transfer").

Matterport claims these cases "merely paraphrase… the language of Section 401(b)," but that proves the point. Cross-Appellees' Answering Br. 38. The straightforward language of §8-401(b) provides two separate standards of liability, and "unreasonable" applies only to the length of a delay in registration,[6] not to a failure or refusal to transfer.

Matterport next argues that reading a "reasonableness requirement" into "refusals to register transfers" will "harmonize[]" §8-401(b) with §8-401(a). Cross-Appellees' Answering Br. 39–40. But nothing in §8-401(a) allows an issuer to refuse a transfer on reasonableness grounds. Rather, §8-401(a) provides that if conditions are met, "the issuer ***shall*** register the transfer." §8-401(a).

Recognizing that the statute does not contain a reasonableness exception for its refusal to register Brown's transfer, Matterport pivots and argues that "it only delayed the transfer of shares to Brown." Cross-Appellees' Answering Br. 41. This is baseless. Just a page before making this new argument, Matterport concedes that it "refused to transfer Brown's unrestricted shares pending an expedited trial." *Id*. at 40. And the record shows Matterport ***refused*** Brown's

[6] *Jodek*, 412 F. Supp. 2d at 482 ("unreasonable' merely modifies and describes the word 'delay'; it does not invite an inquiry into whether it was "reasonable" for a party to have caused the delay").

transfer request. *See* AR13 (Matterport requested AST remove shares from Brown's account). The trial court found that Matterport "***den[ied]*** Brown's November 2021 demands for unrestricted Matterport shares" (Phase II Op. 25 (emphasis added)), focusing its analysis solely on §8-401(b)'s refusal standard (*id.* at 23–26). This was not delay.

Finally, the judgment for Brown on the declaratory relief claim does not render the UCC claim moot. Nor is Brown arguing for double recovery. Rather, Brown's damages would increase had the trial court correctly found Matterport liable under §8-401(b).

Matterport does not dispute that §8-401 claims accrue "at the moment of the wrongful act," which occurred on November 24, 2021, when Matterport first refused Brown's request to lift restrictions. *See Barbara v. MarineMax*, 2012 WL 6025604, at *6 (E.D.N.Y.) (applying Delaware law, citing *Fike v. Ruger*, 754 A.2d 259, 260 (Del. Ch. 1999); *Mastellone v. Argo Oil*, 82 A.2d 379, 383–84 (Del. 1951)); *Guilfoyle v. Olde Monmouth Stock Transfer*, 335 P.3d 190, 195–96 (Nev. 2014) ("Presentation of a properly supported 'request to register transfer' (or here, request to remove a legend) is the sine qua non of an NRS 104.8401 claim."). Assuming the same participation rate, and a five-day trading period, Brown's damages under the UCC claim set a reasonable trading period of no earlier than November 24 to December 1. *See Loretto*, 444 A.2d at 259 (damages under §8-

401 are measured by "the date of refusal to record the transfer"). The highest intermediate value during this period was $37.60, resulting in higher damages.[7] Brown's UCC claim is not moot.

[7] Damages would also be higher using the trial court's VWAP calculation.

III. The court erred as a matter of law by failing to apply the post-judgment interest rate in effect on the date it entered final judgment.

Finally, the trial court erred when it awarded post-judgment interest using the federal discount rate in effect on January 12, 2022, rather than the rate in effect on July 1, 2024, the date of the final judgment awarding Brown $79,092,133.12 in damages. "Section 2301(a) unambiguously ***requires*** that post-judgment interest accrue at the legal rate that was in effect on the date of judgment." *Noranda Alum. Holding Corp. v. XL Ins. Am.*, 269 A.3d 974, 979 (Del. 2021). Recently, this Court explained the "judgment" for purposes of calculating post-judgment interest must "consist[] of the factfinder's award of damages, the costs assessed by the court, and prejudgment interest." *NGL*, 319 A.3d at 341, 345. The judgment must contain a "sum certain." *Id.* Here, the judgment for calculating post-judgment interest is the July 1, 2024 Phase II judgment, because it is the only one containing an damages award or a sum certain.

Matterport does not and cannot meaningfully dispute this. Rather, it proposes overlooking the error by applying an abuse of discretion standard it contends is not met here. This is wrong for several reasons.

First, this Court reviews the application of §2301 and post-judgment interest calculations *de novo*. *Noranda*, 269 A.3d at 977 (reviewing the selection of prevailing interest rates *de novo*); *see Gotham Partners v. Hallwood Realty*

Partners, 817 A.2d 160, 173 (Del. 2002) (reviewing interest calculation *de novo* because it is an "interpretation of Delaware law").

Indeed, the trial court correctly recognized that post-judgment interest "is ***not*** dependent upon the trial court's discretion" (Phase II Op. at 51, n.240 (emphasis added)) and that "§2301 ***requires*** the rate of post-judgment interest to be based on the legal rate in effect when a judgment is entered" (B131 at 2 (emphasis added)). Yet the trial court erred in using the date of the Phase I declaratory judgment—which did not contain a damages award or sum certain—as the date to determine the applicable interest rate under §2301. This was a legal error that this Court reviews *de novo*. *See Noranda*, 269 A.3d at 977; *Gotham*, 817 A.2d at 173.

Second, under any standard of review, the misapplication of §2301 requires reversal. As noted, §2301 ***requires*** that post-judgment interest follow the prevailing rate on the date of a final judgment that provides a "sum certain" consisting of an award of damages, costs, and prejudgment interest. *NGL*, 319 A.3d at 341, 345. Here, that can only be the July 1, 2024 Phase II judgment.

Matterport's authorities are inapposite. *Energy Transfer, LP v. Williams Companies* involved a contractual interest provision, not Delaware's statutory interest. *See* 2023 WL 6561767, at *22 (Del. Oct. 10, 2023) (rejecting argument that contractual provision "should be interpreted in the same manner as Delaware's prejudgment interest statute"). Further, Matterport selectively quotes from the

case, omitting that the Court's statement regarding the trial court's discretion related to "the rate of ***pre-judgment*** interest to be applied," not post-judgment interest as at issue here. *Id.* (cleaned up). Likewise, *In re Columbia Pipeline* rejected tolling ***prejudgment*** interest based on plaintiff's purported delay; it says nothing about the calculation of post-judgment interest or the standard of review. 31 A.3d 359, 406 (Del. Ch. 2024). And *Summa Corp. v. Trans World Airlines* similarly commented only on discretion to award ***prejudgment*** interest. 540 A.2d 403, 409 (Del. 1988).

Finally, Matterport wrongly suggests that "*Noranda Aluminum* does not address *which judgment* must be used to determine the statutory rate." Cross-Appellees' Answering Br. 44. *Noranda* explains the "statutory text [of Section 2301(a)] forecloses the use of … a single rate of interest calculated on the date of liability and extending through final payment." 269 A.3d at 979. As *NGL* explained, *Noranda* "held that post-judgment interest should be awarded at the legal rate in effect on the date judgment is entered as opposed to the date on which the underlying liability arose" and the judgment must contain "the factfinder's award of damages." *NGL*, 319 A.3d at 341.

Here, it is undisputed that the Phase I declaratory judgment considered only whether the shares Brown received in November 2021 were lockup shares and expressly reserved all other aspects of Brown's claims, including whether and how

much he was entitled to damages under Count I. B3 ¶4 (Brown's "claims other than the declaratory relief aspect of Count I remain active"); Phase I Op. 12 ("The court finds that Brown's Matterport shares are not Lockup Shares … All other relevant issues remain for the second phase of this litigation"); Phase II Op. 16–17 (same); *see Tyson Foods v. Aetos Corp.*, 809 A.2d 575, 580 (Del. 2002) ("the mere use of the term 'final judgment' may not be determinative if a party, with the acquiescence, tacit or otherwise, of the court has left the docket open for further proceedings"). It was only after the Phase II trial that the trial court determined Brown was entitled to damages and set a sum certain. *See* B131-B132 (the "final order I have yet to enter concerns the amount of damages" for Brown under Count I). The court erred as a matter of law in calculating interest based on the Phase I declaratory judgment, rather than the final judgment entered after Phase II.

* * *

For all these reasons and those in the cross-appeal brief, this Court should grant Brown's requested relief on cross-appeal.

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Respectfully submitted,

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