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IN THE SUPREME COURT OF THE STATE OF DELAWARE

YATRA ONLINE, INC., Plaintiff-Below, Appellant, v. EBIX, INC., EBIXCASH TRAVELS, INC., REGIONS BANK, BMO HARRIS BANK N.A., BBVA USA, FIFTH THIRD BANK, NATIONAL ASSOCIATION, KEYBANK NATIONAL ASSOCIATION, SILICON VALLEY BANK, CADENCE BANK, N.A., and TRUSTMARK NATIONAL BANK, Defendants-Below, Appellees.	)	No. 294, 2021 Court Below: The Court of Chancery of the State of Delaware C.A. No. 2020-0444-JRS

APPELLEES' ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

Yatra and Ebix entered into a merger agreement that provides for the closing of a stock-for-stock merger following the satisfaction of certain specifically enumerated conditions. While the parties were working toward satisfying the closing conditions, the global pandemic intervened, which led the parties to discuss altering the terms of the merger. The parties attempted to negotiate alternative terms to their agreement; however, after several weeks of negotiating, they were unable to reach new terms. In response, Yatra terminated the merger agreement, which was an express remedy available to Yatra under the merger agreement.

Instead of going its separate way following termination, as the merger agreement contemplates, Yatra sued Ebix for damages for breach of contract, asserting that Ebix had failed to satisfy certain representations, warranties and covenants in the merger agreement. But the merger agreement does not allow a party to terminate and still sue for contract damages. The unambiguous language of the merger agreement allows for unilateral termination, but renders such termination the exclusive remedy for representations, warranties and covenants, except in the case of fraud. In other words, when Yatra terminated, it voluntarily relinquished any right to sue for breach of contract.

When Ebix pointed out this flaw in its briefing in support of its motion to dismiss Yatra's original complaint for breach of contract, Yatra realized its blunder

and filed an Amended Complaint that asserted fraud. Searching for some way to salvage a claim, Yatra latched onto an amendment to Ebix's credit facility with certain of its lenders (the precise terms of which Yatra asserts it did not know until after it filed its original complaint). Yatra attempted to use that amended credit facility to contrive a claim for fraud, which would not be barred by its decision to terminate the merger agreement under the controlling language of the termination clause.

Tellingly, however, Yatra did not allege that Ebix defrauded it into entering the merger agreement or into terminating the merger agreement. Instead, Yatra's supposed claim for fraud focused solely on the parties' attempts to renegotiate the terms of the merger agreement and the natural consequences of Yatra's decision to delay suing for Ebix's supposed breaches. Yatra's contrived fraud claim alleges that the amendment to the credit agreement eliminated its ability to specifically enforce the terms of the merger agreement, including the put right that formed part of the contemplated consideration. Yatra says that it would have sued to specifically enforce those rights before the amendment to the credit agreement became effective, but, not knowing of the amendment, it was persuaded instead to pursue renegotiations. But the amendment to the credit agreement could not have affected Yatra's actions because Yatra concedes that it did not learn of that amendment before it elected to terminate the merger.

The Court of Chancery saw right through Yatra's tortured reading of the contract and its nonsensical fraud theory, which fails to overcome the agreed-upon consequences of Yatra's voluntary termination. In a lengthy, well-reasoned Memorandum Opinion,[1] the Court of Chancery dismissed Yatra's claims in their entirety. *First*, the trial court correctly dismissed Yatra's breach of contract claims because they were barred by its decision to terminate the merger agreement. The termination clause provided that "[i]n the event of any termination of this Agreement as provided in Section 8.1, the obligations of the parties shall terminate and ***there shall be no liability on the part of any party with respect thereto***…." Moreover, because the extension agreement the parties executed was a "writing pursuant" to the merger agreement, it was subject to the merger agreement's terms as well, including the survival clause which provided that any representations, warranties and covenants would not survive termination of the merger agreement.

Second, the Court of Chancery correctly dismissed Yatra's contrived fraud claim for failing to plead loss causation. The court recognized that it was not reasonably conceivable that Yatra was defrauded into not filing suit for specific performance. Instead, by its own admissions, Yatra could not sue for specific performance to close the merger because the SEC had not yet declared Ebix's

[1] The "Opinion," OB Ex. A, is cited herein as "(Op. at __)". Yatra's Opening Brief on Appeal (the "Opening Brief") is cited herein as "(OB at __)".

registration statement on Form S-4 effective, a necessary pre-condition to closing the proposed merger. On appeal, Yatra offers a new theory, not raised below, that it could have sought specific performance of Ebix's obligations leading up to closing. But that argument fails due to a lack of loss causation as well: Yatra never sought specific performance prior to terminating the merger agreement, even though, by that time, (i) it allegedly no longer expected the renegotiations to succeed; (ii) it knew all about Ebix's supposed breaches of its obligations; and (ii) it was allegedly unaware of the supposed impediment to the put right contained in the amendment to the credit agreement. A party cannot allege that fraud induced it to refrain from taking a certain action, when it failed to take that action while admittedly unaware of the supposed fraud.

Finally, the Court of Chancery correctly dismissed Yatra's claim for breach of the implied covenant of good faith and fair dealing, which was also added in the Amended Complaint. The implied covenant exists to address contractual gaps and does not apply to subjects covered by a contract's express terms. The Court of Chancery properly recognized that Yatra's supposed implied covenant claim recycled the same allegations used to support its claims that Ebix breached the express provisions of those agreements.

For all of the foregoing reasons, as explained further below, the Vice Chancellor's dismissal of the Amended Complaint should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Everyone agrees that Yatra terminated the Merger Agreement. The Effect of Termination provision found in Section 8.2 of the Merger Agreement clearly and unambiguously provides that "'[i]n the event of ***any termination*** of this Agreement as provided in Section 8.1, ***the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto***.'" (Op. at 21-22) The Court of Chancery correctly read and applied this language based on settled principles of Delaware law. Its reading was the only reading that harmonized the other provisions of the Merger Agreement, including Sections 9.1 and 9.9(c). Yatra's asserted reading of Section 8.2 "stretche[d] the words beyond their tolerance" and its asserted reading of Sections 9.1 and 9.9(c) "cannot be squared with Section 8.2's broad elimination of liability following termination." (Op. at 23, 29) The Court of Chancery, therefore, correctly held that the Merger Agreement unambiguously provided that Yatra's termination extinguished any potential liability for alleged breaches of the representations, warranties and covenants that Yatra sued upon. (Op. at 26, 29) Accordingly, the Court of Chancery properly dismissed Yatra's post-termination claims for breach of the Merger Agreement.

2. Denied. The Court of Chancery correctly read and applied the language of the Merger Agreement's Section 9.1 which explicitly contemplates "'other writing[s] delivered pursuant'" to the Merger Agreement and states that any

representations in such "'other writing[s]'" "'shall not survive the consummation of the Merger or the termination of this Agreement.'" (Op. at 28) The Court of Chancery correctly concluded that the Extension Agreement is a "writing delivered pursuant" to the Merger Agreement because, among other things, it "refers to the Merger Agreement in its very first sentence, incorporates the capitalized terms in the Merger Agreement and is replete with references to the Merger Agreement." (Op. at 31) Yatra's assertion that the Extension Agreement contains "new and independent obligations" does nothing to disturb the Court of Chancery's conclusion and is unsupported by legal authority. (OB at 35) Accordingly, the Court of Chancery properly dismissed Yatra's post-termination claims for breach of the Extension Agreement.

3. Denied. The Court of Chancery correctly held that Yatra's breach of the implied covenant of good faith and fair dealing claim improperly relies on the exact same allegations that form the basis of its breach of contract claims. The Court of Chancery identified express provisions of the Merger Agreement that covered the same acts Yatra said constituted breaches of the implied covenant and pointed out that Yatra had already sued for breach of those express provisions. (Op. at 33-37) Accordingly, the Court of Chancery properly dismissed Yatra's post-termination claims for breach of the implied covenant because the Merger Agreement "occupies the space Yatra seeks to fill with the implied covenant." (Op. at 35)

4. Denied. The Court of Chancery properly dismissed the fraud claim for failure to plead loss causation. Yatra's fraud theory, that it would have "sued for specific performance of the Merger Agreement" but for Ebix's supposed fraudulent renegotiations and entry into the Tenth Amendment, was impossible to square with its own pleading. (Op. at 40) The Court of Chancery correctly concluded that "[t]he problem with Yatra's theory is that specific performance of the Merger Agreement was never an option in any event because, ***as Yatra affirmatively pleads***, the SEC never declared the S-4 effective." (Op. at 41 (emphasis added)) On appeal, Yatra changes its supposed theory of fraud to one never fairly presented below. Yatra now says that it could have pursued different relief by seeking to specifically enforce Ebix's obligations leading up to closing. (OB at 6, 43-44) This new theory violates Supreme Court Rule 8. Even if considered, Yatra's new theory fails for the same reason as its old one: namely, that "Yatra's own pleading belies its effort to pin its inability to sue for specific performance on [Ebix]." (Op. at 41-42) Yatra never sued for specific performance despite knowing about Ebix's supposed failure to cause the S-4 to be declared effective. Instead, Yatra terminated the Merger Agreement, which foreclosed its ability to sue for specific performance.

STATEMENT OF FACTS

A. The Merger Agreement.

During 2019, Yatra and the Ebix Defendants engaged in discussions and negotiations directed at a potential strategic transaction. (Op. at 1, 8-9; A177-179 ¶¶33-39) The parties "conducted mutual due diligence investigations aided by legal and financial advisors" and "heavily negotiated" the terms of a merger agreement. (A178-180 ¶¶38, 41; Op. at 10)

On July 16, 2019, Yatra and the Ebix Defendants entered into a merger agreement (the "Merger Agreement"), by which the Ebix Defendants agreed to acquire Yatra (the "Merger"). (A179 ¶39; Op. at 10) Under its terms, upon closing, each Yatra share would be converted into the right to receive Ebix convertible preferred stock. (A179 ¶40; Op. at 10) In addition, it provided for a put right (the "Put Right"). (A179 ¶40; Op. at 11) The Put Right allowed any Yatra stockholders who had not exercised the conversion feature of their preferred stock to have their stock redeemed for $5.31 per share during the 25th month after closing. (Op. at 1, 11; A179 ¶40)

Beyond the economic terms, the Merger Agreement "included a number of representations and warranties by Yatra and Ebix" and "pre-Closing covenants." (A180 ¶43; Op. at 11-12) Sections 4.8 and 4.10 set forth the representations and

warranties at issue in this case (Op. at 12; A180-181 ¶¶44, 46), and Sections 6.1 and 6.5 set forth the covenants at issue in this case. (Op. at 13; A182-183 ¶¶48, 50)

In Section 4.8, Ebix represented and warranted that all prior and future public disclosures complied or would comply with SEC rules and regulations and federal securities laws. (Op. at 12; A061-062 §4.8; A180 ¶44)

In Section 4.10, Ebix represented and warranted that (a) its financial statements complied or would comply with applicable accounting requirements, and (b) between December 31, 2018 and the date of the Merger Agreement, it had not received regulatory inquiries into its accounting practices. (A181-182 ¶46; A062 §4.10; Op. at 12)

In Section 6.1, Ebix agreed to file a registration statement on Form S-4 (the "S-4") with the SEC as "'promptly as practicable,'" and no later than 45 days after the Signing Date. (Op. at 12) Ebix also agreed to use "reasonable best efforts to have the Form S-4 declared effective by the SEC…." (A182-183 ¶48; A070-071 §6.1; Op. at 12-13)

In Section 6.5, both Yatra and the Ebix Defendants agreed to use "reasonable best efforts" to close the deal, including to "cause all of the conditions to Closing [to] be satisfied." (A183 ¶50; A076-078 §6.5; Op. at 13) Closing would take place on the third business day following the date on which each of the closing conditions were satisfied or waived, but in any case before April 12, 2020. (A184 ¶54; A086-

087 §8.1; Op. at 13) To trigger Yatra's obligation to close the Merger, Ebix's representations and warranties, including Sections 4.8 and 4.10 had to be "true and correct" as of the Closing Date, and the covenants, including Sections 6.1 and 6.5 had to be performed "in all material respects." (Op. at 36; A085 §§7.3(a)(iii), 7.3(b))

In the event that Ebix's representations and warranties were not "true and correct" such that a material adverse effect, as defined in the Merger Agreement, had occurred, or if Ebix's covenants had not been performed "in all material respects," the parties agreed that Yatra could refuse to effect the Merger and terminate the Merger Agreement. (A085-087 §§7.3, 8.1(d)(i); Op. at 36)

The parties agreed that in the event Yatra terminated the Merger Agreement, the Ebix Defendants ***would face no liability whatsoever*** (except for liability arising out of enumerated provisions not relevant here, or in the event of fraud). (A087 §8.2) The parties' agreement in this respect is reflected in several of the Merger Agreement's provisions, including its "Effect of Termination" provision, which states:

> **Section 8.2 Effect of Termination.** In the event of any termination of this Agreement as provided in Section 8.1, the obligations of the parties shall terminate and ***there shall be no liability on the part of any party with respect thereto***, ***except for the confidentiality provisions of Section 6.4 (Access to Information) and the provisions of Section 3.26 (No Other Representations and Warranties; Disclaimers), Section 4.17 (No Other Representations and Warranties; Disclaimers), Section 6.7 (Expenses), this Section 8.2, Section 8.3 (Termination Fees) and Article IX (General Provisions), each of which shall survive the termination of this Agreement and remain in full force***

> ***and effect; provided, however, that, subject to Section 8.3(a)(iii), nothing contained herein shall relieve any party from liability for damages arising out of any fraud*** occurring prior to such termination, in which case the aggrieved party shall be entitled to all rights and remedies available at law or equity. The parties acknowledge and agree that nothing in this Section 8.2 shall be deemed to affect their right to specific performance under Section 9.9 prior to the valid termination of this Agreement. In addition, the parties agree that the terms of the Confidentiality Agreement shall survive any termination of this Agreement pursuant to Section 8.1 in accordance with its terms.

(*Id.* §8.2 (emphasis added))

The Merger Agreement's Survival Clause made clear that, other than certain enumerated provisions not relevant here, all representations, warranties, covenants and agreements did not survive termination:

> **Section 9.1 Survival.** This Article IX and the agreements of the Company, Parent and Merger Sub contained in Article II and Section 6.8 (Directors' and Officers' Indemnification and Insurance) shall survive the consummation of the Merger. This Article IX (other than Section 9.7 (Modification or Amendment) and Section 9.8 (Extension; Waiver)) and the agreements of the Company, Parent and Merger Sub contained in Section 6.4 (Access to Information), Section 6.6 (Employee Matters), Section 6.7 (Expenses), Section 6.10 (Transaction Litigation), Section 6.18 (Tax Matters), Section 8.2 (Effect of Termination) and the Confidentiality Agreement shall survive the termination of this Agreement. ***All other representations, warranties, covenants and agreements in this Agreement and in any certificate or other writing delivered pursuant hereto shall not survive the consummation of the Merger or the termination of this Agreement,*** subject to Sections 8.2 and 8.3.

(A089 §9.1 (emphasis added))

B. The Parties Work To Prepare The S-4 In Anticipation Of Closing.

The parties worked to prepare the S-4 filing, which was essential to the closing because the Merger consideration consisted of newly issued Convertible Preferred Stock that had to be registered. (Op. at 14) But while Ebix historically prepared its financials in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"), Yatra, a company operating primarily out of India, historically prepared its financials under the International Financial Reporting Standards ("IFRS"). (Op. at 15; A469) Ebix conducted a "significance test" analysis, then informed Yatra that *pro forma* financials were necessary in order to convert Yatra's financials from IFRS to GAAP. (Op. at 15) While the parties were preparing the S-4, Ebix addressed various comments from the SEC and responding to SEC comment letters. (Op. at 43 n.149; A195-196, A198-199, A201 ¶¶93-94, 96, 103, 110)

C. The Parties Extend The Outside Date And Negotiate Alternative Terms To The Merger Agreement.

"[A]fter the COVID-19 pandemic hit, causing unprecedented disruption across global markets," and as the Outside Date approached, the SEC had not declared the S-4 effective. (Op. at 16; A205-206 ¶¶126-27) In addition, market disruption had potential implications for the consideration provided for in the Merger Agreement. Specifically, the Put Right that the parties agreed to, which equaled approximately 17.50% of Ebix's market capitalization at the time the

Merger Agreement was signed, became approximately 44.17% of Ebix's market capitalization around May 1, 2020. (Op. at 11 n.41; A179-180 ¶41)

Yatra alleges that, in April 2020, it was told, in no uncertain terms, that "the deal reflected in the Merger Agreement, including the Put Right, could not happen." (A208 ¶133; Op. at 16) Thereafter, the parties agreed to renegotiate the Merger Agreement and extended the Outside Date several times, while Yatra reserved all of its rights under the Merger Agreement. (A209-211 ¶¶136, 138-40, 142; Op. at 2, 16)

The parties discussed various alternative terms for the Merger Agreement, such as a proposal that Ebix would grant Yatra a stock dividend in exchange for elimination of the Put Right (the "Heads of Terms"). (Op. at 16, 18 n.69; A211 ¶¶143-44) The parties did not formally execute the Heads of Terms but instead discussed a plan for preparing definitive documentation on a revised deal. (Op. at 18 n.69; A212-213 ¶¶147-48)

D. Ebix Amends Its Credit Agreement With The Lender Defendants.

On May 7, 2020, Ebix entered into a Tenth Amendment to a credit agreement with certain of its lenders. (A216 at ¶157; A425-452 (the "Tenth Amendment")) The purpose of the Tenth Amendment was to provide increased flexibility to Ebix under financial maintenance covenants, due in part to the unforeseen negative effects of the COVID-19 pandemic. (A216-217 ¶¶158-59) However, in light of Ebix's renegotiations with Yatra over the Merger consideration – and, in particular, Ebix's

and Yatra's mutual understanding that Ebix was not going to close the Merger with the Put Right in place – the Tenth Amendment modified certain terms of the Credit Agreement that had been added in the prior amendment executed just after the Merger Agreement was signed. (A214-219 ¶¶153-55, 162-64)[2] Thus, where the Ninth Amendment to the Credit Agreement had carved out the Put Right from the definition of indebtedness, the Tenth Amendment removed that carve-out. (*Id.* ¶¶153, 155, 164; A426-452)

E. The Parties Sign The Extension Agreement.

On May 14, 2020, the parties executed an Extension Agreement, further extending the Outside Date until June 4, 2020 (the "Extension Agreement"). (Op. at 17; A223-224 ¶180; A750-754) In it, Ebix agreed to (i) make its officer and legal counsel available for diligence sessions; (ii) provide Yatra a proposed draft of the revised Certificate of Designations of Ebix's preferred stock to be issued in the Merger; and (iii) "'promptly provide revised drafts of transaction documents … and negotiate in good faith with Yatra.'" (*Id.*)

The Ebix Defendants and Yatra also agreed in the Extension Agreement that "'[w]ith the sole exception of the amendment to the Outside Date set forth in this

[2] Although Ebix had publicly disclosed on May 11, 2020 that it had executed the Tenth Amendment, Yatra alleges that it did not become aware of the terms until August 7, 2020, when Ebix attached a copy of the Tenth Amendment to its Form 10-Q. (A168 ¶3)

letter agreement, the Merger Agreement remains unchanged and continues in full force and effect.'" (Op. at 32; A751) The parties further agreed that "'[b]y entering into this letter agreement, neither Party shall be deemed to waive or otherwise impair any of its rights under the Merger Agreement or preclude any other or further exercise of such rights or any other rights under the Merger Agreement.'" (*Id.*)

F. Yatra Abandons The Renegotiations, Terminates The Merger And Files Suit.

On May 18, 2020, the parties met for a diligence session. (A225 ¶185) That same day, Ebix sent a proposed draft amendment to the Merger Agreement. (A226 ¶186) On May 26, 2020, Yatra sent a term sheet for a revised deal to Ebix's counsel. (A227-228 ¶190) Ebix requested additional information before responding to the revised term sheet, and Yatra responded on May 31, 2020. (A228 ¶191) When Ebix thereafter requested further information, Yatra did not respond, and the June 4, 2020 Outside Date lapsed. (A228-229 ¶192-93)

On June 5, 2020, at 4:02 p.m., Yatra terminated the Merger Agreement. (A755-757 (the "Termination Notice")) (*See also* A228-229 ¶193) The Termination Notice was signed by Yatra's CEO, with a copy provided to Yatra's deal counsel at Goodwin Procter LLP. It stated:

> In accordance with Sections 8.1(d)(i) and 9.2 of the Merger Agreement, the Company hereby notifies [Ebix] and [EbixCash] that the Merger Agreement is terminated effective as of the date hereof due to [Ebix's] ongoing breaches of its representations, warranties and obligations under the Merger Agreement, including without limitation, under

> Sections 4.8, 4.10, 6.1, and 6.5 thereof, which breaches and failures to perform (i) have resulted in a failure of the conditions in Section 7.3(a) and Section 7.3(b) of the Merger Agreement to be satisfied and (ii) are incapable of being cured by the Outside Date.

(A757)

After sending the Termination Notice, Yatra's litigation counsel at Bernstein, Litowitz, Berger & Grossmann LLP filed the original complaint on behalf of Yatra, seeking money damages for the same supposed breaches of the representations, warranties and covenants listed in the Termination Notice. (A024-025 Dkt. 1)

On June 19, 2020, Ebix received notice from the SEC that it had completed its review of Ebix's 10-Ks. (Op. at 18; A483-484) The SEC took no action with respect to Ebix's 10-Ks. This resolved all of the other comments for Ebix's various 10-Qs and 8-Ks because the information under review in those documents was the same as was under review in Ebix's 10-Ks. (A229 at ¶194; A484; Op. at 18)

G. After Realizing The Consequences Of Its Decision To Terminate, Yatra Amends Its Complaint And Contrives A Claim For Fraud.

The Ebix Defendants moved to dismiss the original complaint on June 30, 2020. (Op. at 3; A022 Dkt. 13) In their opening brief, the Ebix Defendants argued that Yatra's breach of contract claims were barred by its termination of the Merger Agreement. (Op. at 3) Rather than opposing that motion, Yatra invoked its right to file an Amended Complaint, which it did on September 25, 2020. (Op. at 3, 19; A164-244)

In the Amended Complaint, Yatra asserted the same breach of contract claims as in its original complaint. However, Yatra also added claims for fraud and breach of the implied covenant of good faith and fair dealing. In addition, Yatra asserted a claim for tortious interference against the Lender Defendants. (Op. at 3-4, 19)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT TERMINATION OF THE MERGER AGREEMENT TERMINATED LIABILITY FOR BREACH OF CONTRACT.

A. Question Presented.

Did the Court of Chancery err in holding that termination of the Merger Agreement foreclosed liability for breach of the representations, warranties and covenants that Yatra sued on according to the clear and unambiguous Effect of Termination provision contained in Section 8.2 of the Merger Agreement? (A487, A489-495)

B. Scope Of Review.

The Court should review the Court of Chancery's dismissal "*de novo* to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (citation omitted). Yatra, however, also asserts new arguments on appeal that were not fairly raised below. Pursuant to Supreme Court Rule 8, those new arguments should not be considered on appeal. Del. Sup. Ct. R. 8.

C. Merits Of Argument.

The Court of Chancery accepted as true all well-pled allegations in the Amended Complaint and drew all reasonable inferences in Yatra's favor. (Op. at 20) The Court of Chancery then carefully analyzed the Merger Agreement's plain language, reading it as a whole, and properly applied well-settled principles of

Delaware contract law, including recent authority applying "a substantively similar effect of termination provision." (Op. at 25) Based on that careful analysis and proper application, the Court of Chancery correctly determined that termination of the Merger Agreement extinguished liability for all claims arising from the contract (except not relevant provisions specifically carved-out and fraud) pursuant to its "Effect of Termination" provision in Section 8.2. (Op. at 25-26, 28) Accordingly, the Court of Chancery dismissed Yatra's post-termination claims for breach of the Merger Agreement, as stated in Count I of the Amended Complaint. (Op. at 31)

On appeal, Yatra says that the Court of Chancery erred in so holding because it (1) "[m]isapplied" the Merger Agreement's Section 8.2 "Effect of Termination" provision; and (2) "erred in its interpretation of at least two additional provisions of the Merger Agreement – Sections 9.1 and 9.9(c)." (OB at 22, 28) Yatra is wrong.

1. The Court Of Chancery Correctly Applied Section 8.2 And Delaware Contract Law.

The Court of Chancery recognized that where contracting parties include a provision stating that "there 'shall be no liability on the part of *any* party' in the event of termination" they "'alter[] the common law rule'" that remedies survive and "broadly waive contractual liability and all contractual remedies." (Op. at 25-26 (emphasis in original) (citing *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *103-04 (Del. Ch. Nov. 30, 2020))) The Court of Chancery then applied this principle of Delaware law to the clear and unambiguous

language of Section 8.2. (Op. at 28) That language provides that "'[i]n the event of any termination of this Agreement …, the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto,'" except for certain enumerated contractual provisions not at issue here and fraud. (Op. at 14) Based on this language, the Court of Chancery correctly concluded that "Yatra agreed that termination of the Merger Agreement would terminate liability for breach of that contract" with respect to the contractual provisions at issue here. (Op. at 30-31 ("This is a perfectly logical way for parties contractually to manage risk, and it is not for this Court to redline the parties' bargained-for limitations of liability because one party now regrets the deal it struck.")) The Court of Chancery noted that its conclusion here was consistent with the Court of Chancery's recent conclusion in *AB Stable*, which involved a "substantively similar effect of termination provision." (Op. at 25)

On appeal, Yatra does not dispute the existence or operation of the governing principle. Instead, Yatra says that "Section 8.2's language is more limiting than what the Court of Chancery described as the language of *AB Stable*." (OB at 24) According to Yatra, "Section 8.2 does ***not*** say that there shall be 'no liability on either party; it says that there will be 'no liability … with respect' to the 'obligations of the parties.'" (OB at 24 (emphasis in original)) But this supposed distinction is of no consequence.

First, Yatra is wrong that the exact language in *AB Stable* is the only language sufficient to displace the common law and waive contractual liability. As the Court of Chancery observed, "the point to draw from *AB Stable* is how an effect of termination provision with the 'no liability' language operates." (Op. at 26 n.100) Yet even if exact language were required, Section 8.2 has it. *AB Stable* turned on language nearly word-for-word identical to the language in Section 8.2:

Language in *AB Stable* Opinion	**Excerpt from Section 8.2**
"The Effect-Of-Termination Provision alters the common law rule by stating that ***upon termination***, subject to two exceptions, ***'there shall be no liability on the part of either party.'*** Setting aside the exceptions, the Effect-Of-Termination Provision broadly waives contractual liability and all contractual remedies." *AB Stable*, 2020 WL 7024929, at *103 (emphasis added).	"***In the event of any termination*** of this Agreement as provided in Section 8.1, the obligations of the parties shall terminate and ***there shall be no liability on the part of any party*** with respect thereto." (A087 §8.2 (emphasis added))

The Court of Chancery correctly followed the plain meaning of the contract language and the applicable law when it determined that Section 8.2 displaced the common law and waived contractual liability and remedies in the event of termination. (Op. at 25-26)

Second, parsing the phrases "with respect thereto" and the "obligations of the parties" contained in Section 8.2, as Yatra attempts to do on appeal, does nothing to change the consequences of the Effect of Termination provision. According to Yatra, "Section 8.2 does ***not*** say that there shall be 'no liability on either party; it says that there will be 'no liability…with respect' to the 'obligations of the parties.'" (OB at 24 (emphasis in original)) This argument is not compelling.

For starters, this is not the reading of Section 8.2 Yatra argued below. Supreme Court Rule 8 prevents Yatra from presenting a new reading on appeal. *See* Del. Sup. Ct. R. 8; *Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 508 (Del. 2019) ("Because this argument was not fairly presented below, however, we decline to reach its merits. Not only was this new plain language theory not fairly presented below, it conflicts with the positions the Minority Members actually did take.") Below, Yatra actually argued that the phrase "'with respect thereto'" modifies "'any termination of this Agreement'" and "makes clear that there is no special liability for 'any termination of this

Agreement.'" (A799; Op. at 22) That reading was properly rejected by the Court of Chancery because it "stretches the words beyond their tolerance." (Op. at 23)[3]

Next, Yatra's new reading does not demonstrate an error below. The Vice Chancellor read "the phrase 'with respect thereto' to modify 'the obligations of the parties'" when construing Section 8.2. (Op. at 23) Thus, because Section 8.2 states that "there shall be no liability on the part of any party with respect" to those obligations, he properly dismissed Yatra's claims which sought to impose liability with respect to Ebix's obligations. (Op. at 14; A166-167 ¶1) (alleging Ebix breached "its obligations under the Merger Agreement"); *see also* (A185 ¶56) ("Ebix breached these obligations…."); A232-233 ¶211 (alleging Ebix "had no intention of performing its obligations").

Yatra appears to argue on appeal, although it is far from clear, that parsing the phrases "'with respect thereto'" and the "'obligations of the parties'" leads to a reading that Section 8.2 merely identifies which contractual obligations carry forward post-termination and which do not. (*See* Op. at 22 (rejecting this argument below)) In its Opening Brief, Yatra says the language relates only "to ongoing

[3] In rejecting this argument, the Court of Chancery pointed out that Section 8.2 contains language "nearly identical" to that in *AB Stable*, "providing that there "'shall be no liability on the part of *any* party' in the event of termination, rendering the basis for Yatra's proffered distinction illusory." (Op. at 26 (emphasis in original))

'obligations'" and that Yatra is not seeking "to compel performance" of "'obligations'" (OB at 22-23) But this argument is easily disposed of. Section 8.2 states *both* that "the obligations of the parties shall terminate" *and* that "there shall be no liability on the part of any party with respect thereto…" (A087 §8.2) The first phrase accomplishes Yatra's reading on its own. Reading the second phrase to mean the same thing would render it surplusage in violation of Delaware law. *See NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE).

Unsurprisingly, Yatra cites no example of any court parsing out similar language to arrive at Yatra's asserted reading. Yet contrary authority is readily available. For example, the effect of termination provision at issue in the recent case of *In re Anthem-Cigna Merger Litigation* contained similar language regarding the obligations of the parties to that found in Section 8.2. 2020 WL 5106556, at *133 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Cigna Corp. v. Anthem, Inc.*, 251 A.3d 1015 (Del. 2021). In *Anthem*, the effect-of-termination provision provided that "[i]n the event of the termination … ***the obligations of the parties*** under this Agreement shall terminate…and there shall be no liability on the part of any party hereto" except for certain enumerated contractual provisions, fraud or "Willful Breach." *Id.*

(emphasis added). The *Anthem* court interpreted the language and reached the same conclusion as the *AB Stable* court and the Court of Chancery; concluding that the common law had been displaced, a mere breach of contract claim did not survive the effect-of-termination provision and only a claim for Willful Breach (as defined in the agreement) survived. *Id.* at *134-35.

Finally, the Court of Chancery did not decide "the effect of the termination of a merger agreement on prior-filed deal litigation" on nothing more than an "'impl[ication] and a '*See*' citation to Section 709 of *American Jurisprudence*, Second Edition" as Yatra flippantly suggests. (*See* OB at 24) As set forth above and as reflected in the Opinion, the Court of Chancery's decision rested on well-settled principles of Delaware contract law and on-point authority from the Delaware courts, including this Court. The Court of Chancery's reliance on *AB Stable* and then-Vice Chancellor Strine's decision in *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011), was particularly appropriate given the large number of secondary sources and respected commentators cited in both cases. *See also Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 933 (Del. 2017) ("'[W]hen the representations and warranties terminate, so does any right to sue on them.'").

The Court of Chancery cited Section 709 only in addressing Yatra's "last gasp" argument that Ebix's reading, which the Court of Chancery agreed with,

"results in absurdity" requiring Yatra to "hold open the Merger Agreement throughout the pendency of this litigation to recover damages." (OB at 26-27) The citation to Section 709 showed that the circumstance was not absurd. (Op. at 24 n.93) In any event, Yatra took the position that its own obligations under the Merger Agreement "ceased, because Ebix materially breached the Merger Agreement," demonstrating that no such absurdity was actually created. (Op. at 30) As the Court of Chancery explained, "the parties contemplated termination as a remedy distinct from others, which makes perfect sense in view of Section 8.2's unambiguous provision that when a party elects to terminate the Merger Agreement, that termination eliminates any party's liability for damages arising from a breach occurring prior to termination." (Op. at 28)

2. The Court Of Chancery Did Not Err In Its Interpretation Of Sections 9.1 And 9.9(c).

The Court of Chancery correctly determined that "[t]here is no discernible conflict" between its reading of Section 8.2, on the one hand, and Sections 9.1 and 9.9(c) on the other. (Op. at 27-31) Yatra says that is wrong. According to Yatra, "the lower court read Section 8.2 in a way that directly conflicts with Section 9.9(c), which expressly contemplates that monetary damages are available to Yatra." (OB at 28) There are several flaws with Yatra's argument.

First, Section 9.9(c) does not create an inalienable right to money damages. Instead, it reflects the parties' agreements with respect to a suit for specific

performance, which is irrelevant because no party has ever sued for specific performance. Section 9.9(c) merely provides, among other standard provisions, that a party need not sue for specific performance before exercising its right to terminate; that suing for specific performance does not prevent a party from changing its mind and terminating; and that commencing a suit for specific performance does not preclude a party from also seeking money damages in the same suit. What Section 9.9(c) plainly does not do is authorize a party to terminate the Merger Agreement and then commence or maintain an action for money damages.

Second, The Court of Chancery's reading of Section 8.2 harmonized that provision with Section 9.9(c). Read together, the provisions reflect "an intent that a party may *either* terminate the Merger Agreement (one contractual remedy for breach) *or* 'pursue any other remedies.'" (Op. at 28 (emphasis in original)) Yatra's supposed reading would result in allowing "a party to terminate the contract and then sue for specific performance," which "would make no sense." (Op. at 27 n.102) Yatra tellingly cites no authority supporting such an absurd reading. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (refusing to "interpret the contract, contrary to both the plain meaning of the document and logic, and to reach an absurd, unfounded result").

Yatra next says that the survival clause in Section 9.1 "cuts off the parties' continuing obligations to comply with certain provisions of the Merger Agreement"

but "does nothing to affect the parties' rights to sue for prior breaches." (OB at 31) Thus, says Yatra, the Court of Chancery erred by reading Section 9.1 "to extinguish remedies." (OB at 30) Not true.

The Court of Chancery's reading of Section 8.2 is consistent with both Section 9.1 and well-settled Delaware authority with respect to survival clauses. It recognized that "'where the contract expressly provides that the representations and warranties terminate upon closing, ***so do any remedies for breach of those representations and warranties***.'" (Op. at 29, quoting *GRT*, 2011 WL 2682898, at *13 (emphasis added)) Yatra attempts to avoid the rule in *GRT* by distinguishing a "termination versus closing of a merger." (OB at 32) But Yatra badly misses the mark. *First*, its distinction fails to reconcile with the plain language of Section 8.2. As the Court of Chancery explained, "[t]he only way to square Section 8.2 with Section 9.1 is to understand the survival clause to provide that termination operates as if the parties consummated the Merger Agreement—eliminating both sides' liability for any claim arising out of the contract." (Op. at 29) *Second*, Yatra's argument retreats to the common law rule that a party can terminate a contract and thereafter maintain a suit for damages. As discussed above, there can be no serious doubt that the parties agreed to displace the common law rule in Section 8.2 of the Merger Agreement. (*See supra* Part I.C)

II. TERMINATION OF THE MERGER AGREEMENT BY YATRA ALSO TERMINATED THE EXTENSION AGREEMENT.

A. Question Presented.

Did the Court of Chancery err in holding that the consequences of the Effect of Termination provision contained in Section 8.2 of the Merger Agreement extended to claims for breach of the Extension Agreement based on the clear and unambiguous language of Section 9.1 of the Merger Agreement? (A487, A495)

B. Scope Of Review.

The Court "review[s] a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton*, 977 A.2d at 895 (citation omitted).

C. Merits Of Argument.

The Court of Chancery correctly concluded that Yatra's termination of the Merger Agreement eliminated liability for prior breaches of contract, including alleged breaches of the Extension Agreement. (Op. at 32-33) The Court of Chancery conclusion rested on the clear and unambiguous language of Section 9.1 of the Merger Agreement, which states that, other than enumerated provisions not relevant here, "[a]ll other representations, warranties, covenants and agreements in this Agreement *and in any certificate or other writing delivered pursuant hereto shall not survive* the consummation of the Merger or *the termination of this*

Agreement." (Op. at 28-29; A089 (emphasis added)) The Court of Chancery correctly concluded that the Extension Agreement was such an "'other writing delivered pursuant' thereto" because "the Extension Agreement refers to the Merger Agreement in its very first sentence, incorporates the capitalized terms in the Merger Agreement and is replete with references to the Merger Agreement." (Op. at 31)

On appeal, Yatra puts forth two arguments. *First*, it says that the Extension Agreement it is not a writing delivered "pursuant to" the Merger Agreement because it creates "new and independent obligations." (OB at 35 (emphasis omitted)) Yatra cites no authority in support of this argument. And, there is nothing in the plain meaning of "pursuant to" that would preclude the adding of "new and independent obligations" in a writing delivered "pursuant to" a merger agreement. *See* Black's Law Dictionary (11th ed. 2019) (defining "pursuant to" as "In compliance with; in accordance with; under, 2. As authorized by; under, 3. In carrying out."). Notably, Yatra does not dispute that these "new and independent obligations" are covered by the plain language of Section 9.1.

Moreover, Yatra's first argument is nonsensical. The Merger Agreement expressly contemplates that the parties may need to "extend the time for the performance of any of the obligations" under the Merger Agreement. (A093 §9.8) The Extension Agreement does that, providing that "the Parties hereby agree that the Outside Date in the Merger Agreement shall be further extended to 11:59 p.m.

(Eastern Time) on June 4, 2020…." (A160) Further, as the Court of Chancery correctly observed, in doing so the Extension Agreement "is replete with references to the Merger Agreement." (Op. at 32)

The Extension Agreement:

- expressly references the Merger Agreement in the first sentence (A160);
- incorporates the defined terms of the Merger Agreement (A160);
- states that "[w]ith the sole exception of the amendment to the Outside Date set forth in this letter agreement, the Merger Agreement remains unchanged and continues in full force and effect" (A161);
- provides that "[b]y entering into this letter agreement, neither Party shall be deemed to waive or otherwise impair any of its rights under the Merger Agreement or preclude any other or further exercise of such rights or any other rights under the Merger Agreement" (A161); and
- notes that "[b]oth Parties expressly reserve their rights under the Merger Agreement." (A161)

For these same reasons, Yatra is wrong to say that "nothing in the subsequently executed Extension Agreement indicates an intent to be bound by the Merger Agreement's limitations on liability."[4] (OB at 36)

Second, Yatra argues that it "initiated this litigation" before it terminated the Merger Agreement, therefore, its termination did not extinguish "liability for pre-termination breaches of the Extension Agreement." (OB at 37) This argument is factually and legally flawed. As an initial matter, Yatra indisputably terminated the agreement ***before*** it filed suit. Yatra tries to extend its termination into the next day by pointing out that Ebix's CEO was in India, which means he would have received it "well after midnight." (A795) The international date line does not save Yatra because the Merger Agreement's Notice provision states that Ebix, Inc., the designated recipient of notices, is located in Johns Creek, Georgia. (A090) Not India. Thus, because Yatra emailed its notice of termination at 4:02 p.m. on June 5, 2020, Ebix would have received it before 5:00 p.m. its local time, and termination would be effective on June 5, 2020. (A482) Yatra filed suit after that termination.

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[4] Yatra's cited authority is unhelpful to it. *Town of Cheswold v. Central Delaware Business Park* holds that "documents or agreements can be incorporated by reference '[w]here a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it.'" 188 A.3d 810, 818-19 (Del. 2018). The Extension Agreement showed an intent to incorporate the details of the Merger Agreement for the reasons recognized by the Court of Chancery.

But Yatra's timing argument has a more fundamental legal flaw. The Court of Chancery properly held that "the Effect of Termination provision" makes clear that the act of termination extinguishes liability then and there." (Op. at 24 n.93)[5] Notably, the *Anthem* court also applied an effect-of-termination provision of a merger agreement to a prior-filed deal litigation. *Anthem*, 2020 WL 5106556, at *3, *81, *89 (termination occurred on May 12, 2017, after litigation had started).

[5] Ebix has never argued that the Merger Agreement created a contractual limitations period within which Yatra had to file suit to preserve its claims. Nor is Ebix relying on a survival clause like those in *ENI Holdings, LLC v. KBR Group Holdings, LLC*, 2013 WL 6186326, at *7 (Del. Ch. Nov. 27, 2013), and *GRT*, 2011 WL 2682898, at *7, upon which Yatra relies. Both of those cases involved provisions identifying a specific period of time post-closing for which representations and warranties would survive.

III. THE COURT OF CHANCERY PROPERLY INTERPRETED THE CONTRACT AS LEAVING NO GAP TO FILL FOR THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

A. Question Presented.

Did the Court of Chancery err in dismissing Yatra's implied covenant claim because that "the Merger Agreement leaves no gap to fill with the implied covenant"? (A510-513)

B. Scope Of Review.

The Court "review[s] a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton*, 977 A.2d at 895 (citation omitted).

C. Merits Of Argument.

The Court of Chancery properly held that there was no gap in the Merger Agreement for the implied covenant to fill and therefore properly dismissed Yatra's implied covenant claim. Yatra says that it asserted two breaches of the implied covenant: (i) Ebix's purported efforts to renegotiate the Merger Agreement in an effort to cause Yatra to forbear from exercising its remedies; and (ii) Ebix's entering into the Tenth Amendment, without informing Yatra. (OB at 38)

Under Delaware law, the implied covenant of good faith and fair dealing is "'a limited and extraordinary legal remedy.'" (Op. at 34 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010))) "'As such, the implied covenant does not apply

when the contract addresses the conduct at issue, but only when the contract is truly silent concerning the matter at hand.'" (Op. at 34 (quoting *Oxbow Carbon*, 202 A.3d at 507))

The Court of Chancery correctly concluded that with respect to Yatra's first supposed implied covenant breach claim, "the contract is not silent as to Ebix's obligations. Section 6.5 of the Merger Agreement requires the parties to 'use their reasonable best efforts to take, or cause to be taken, as promptly as practicable, all actions necessary, proper or advisable to consummate the Merger as promptly as practicable....'" (Op. at 34 (noting that the Extension Agreement contained similar express provision)) The Court of Chancery pointed out that Yatra had sued based on the "reasonable best efforts" provision to remedy the same harm it sought to remedy with its implied covenant claim. (Op. at 34-35) Thus, there was no room for the implied covenant to operate because "[i]t does not apply when the contract addresses the conduct at issue."[6] (Op. at 35 (citing *Nationwide Emerging Managers, LLC v. Northpoint Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015)).

[6] Yatra relies heavily on *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017), which is inapposite here. *Dieckman* addressed the role of the implied covenant in a partnership agreement that had eliminated fiduciary duties in a circumstance in which the general partner "went beyond the minimal disclosure requirements of the LP Agreement." *Id.* at 368. It does not contradict, in fact it repeats, the long-standing rule that the implied covenant addresses "contractual gaps." *Id.* at 367.

Yatra says this holding was in error and relies on a case from New York applying New York law because, according to Yatra, no Delaware court, applying Delaware contract law, has held that a "reasonable best efforts" clause forecloses an implied covenant claim. Not true. In *Fortis Advisors LLC v. Dialog Semiconductor PLC*, the Court of Chancery dismissed an implied covenant claim that was identical to a claim for breach of a "commercially reasonable best efforts" provision in a merger agreement governed by Delaware law. 2015 WL 401371, at *4 (Del. Ch. Jan. 30, 2015); *see also Matthew v. Laudamiel*, 2012 WL 605589, at *20 (Del. Ch. Feb. 21, 2012) (dismissing implied covenant claim duplicative of claim for breach of reasonable best efforts provision in LLC agreement). So too here.

The Court of Chancery properly explained that Yatra's second supposed breach of the implied covenant claim "fails for the same reasons as its first—the contract occupies the space Yatra seeks to fill with the implied covenant." (Op. at 35) It explained that in Section 4.4 of the Merger Agreement, Ebix represented that its "execution, delivery, and performance of the Merger Agreement and its consummation of the Merger … will not … 'constitute a default (or an event which, with or without notice or lapse of time, or both, would constitute a default) under ... any Contract to which [Ebix or EbixCash] is a party.'" (Op. at 36) The Tenth Amendment is such a contract. (*Id.*) Further, Section 7.3 requires Ebix's Section 4.4 representations to be "'true and correct' as of the Signing Date and as of the

Closing." (*Id.*) Thus, the Court of Chancery properly concluded that Yatra's allegation that "the Tenth Amendment prohibits Ebix from closing the Merger with Yatra's Put Right intact" is addressed by Section 7.3 of the Merger Agreement. Accordingly, "the Merger Agreement leaves no gap to fill with the implied covenant." (*Id*. at 37)

Yatra says that Sections 4.4 and 7.3 are not "equivalent to an implicit prohibition on actively interfering with the ability to issue Merger consideration." (OB at 41-42) But Yatra fails to actually demonstrate any daylight between a claim for breach of those provisions and of the implied covenant. *See Nationwide*, 112 A.3d at 896-97 (the implied covenant "does not apply when the contract addresses the conduct at issue").

It is not surprising that Yatra's supposed implied covenant claims are entirely duplicative of its claims for breach of express contractual provisions. The implied covenant claims were only added after Yatra realized that its termination of the Merger Agreement foreclosed claims for breach of that agreement. (*See supra* Nature of the Proceedings). The Court of Chancery was correct to dismiss the implied covenant claim under well-settled Delaware law.

IV. THE COURT OF CHANCERY PROPERLY DISMISSED THE FRAUD CLAIM.

A. Question Presented.

Did the Court of Chancery err in determining that Appellant failed to meet the heightened pleading standard of Court of Chancery Rule 9(b) and therefore failed to plead a promissory fraud claim because the Amended Complaint did not plead loss causation? (A486, A496-505)

B. Scope Of Review.

Yatra asserts new arguments on appeal that were not fairly raised below. Pursuant to Supreme Court Rule 8, those new arguments should not be considered on appeal. Del. Sup. Ct. R. 8. The Court should review the Court of Chancery's dismissal "*de novo* to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton*, 977 A.2d at 895 (citation omitted).

C. Merits Of Argument.

Yatra's fraud claim was "asserted only in its Amended Complaint after Ebix briefed in its original motion to dismiss the consequences of the Merger Agreement's Effect of Termination provision" and "is premised on a theory of promissory fraud, i.e., that [Ebix] made knowingly false 'promises or predictive statements of future intent rather than past or present facts.'" (Op. at 37-38) Yatra's fraud claim was premised on the notion that "but for Ebix's false promises that it would engage in

meaningful negotiations," Yatra would have "sued for specific performance of the Merger Agreement." (Op. at 40) According to Yatra, once Ebix entered into the Tenth Amendment, "any lawsuit for specific performance was pointless because the claim would have triggered an event of default under the Tenth Amendment, rendering Yatra's Put Right worthless." (*Id*.)

The Court of Chancery correctly concluded that "[e]ven assuming *arguendo* that Yatra's premise for its fraud claim is sound" a premise with which there is "serious reason to doubt," the claim "nonetheless fails for lack of loss causation." (Op. at 39-40, 39 n.139) The Court of Chancery explained that "[t]he problem with Yatra's theory is that specific performance of the Merger Agreement was never an option in any event because, as Yatra affirmatively pleads, the SEC never declared the S-4 effective." (Op. at 41 (citing A183 ¶49, A193 ¶84, A195 ¶92)) It further explained:

> [A]s the Complaint acknowledges, "[i]n order for [Ebix] to be able to issue [the Put Right] . . . to Yatra as Merger consideration, the SEC had to declare effective the S-4." Yatra was aware of [Ebix]'s troubles with the SEC well before [Ebix] engaged Yatra in the allegedly fraudulent renegotiations that purportedly frustrated Yatra's right to specific performance. Indeed, this frustration animates Yatra's claim for breach of contract in Count I, where Yatra alleges [Ebix] failed to use its "reasonable best efforts" to have the SEC declare the S-4 effective "as promptly as practicable.

(Op. at 41 (citing A183 ¶49, A197-204 ¶¶98-122, A208 ¶133, A229-230 ¶198))

Thus, the Court of Chancery concluded that "Yatra's own pleading belies its effort to pin its inability to sue for specific performance on [Ebix's] separate renegotiation of the Tenth Amendment and, for that reason, its fraud claim fails." (Op. at 41-42) The Court of Chancery was correct.

On appeal, Yatra says that the Court of Chancery erred because Ebix's purported fraudulent entry into the Tenth Amendment supposedly deprived Yatra not only of a right to seek to specifically enforce Ebix to close but also "an action in specific performance seeking a decree to cause Ebix to take all steps necessary and within its power to effectuate the prompt closing of the Merger." (OB at 44) Yatra does not explain what this means or what relief such a suit would compel.[7]

Even setting that problem aside, the argument does not address the fundamental pleading defect requiring dismissal: "specific performance of the Merger Agreement was never an option in any event because, as Yatra affirmatively

[7] Yatra's only cited authority for this argument is *Engelhardt v. Fessia*, 31 Misc. 2d 127, 219 N.Y.S.2d 631 (Sup. Ct. 1961), which is an utterly irrelevant case from a New York state court under New York law from the 1960s issuing a mandatory TRO requiring a party to withdraw a letter sent to the Interstate Commerce Commission for the purpose of frustrating its approval of a stock sale. The distinctions between it and this action are numerous, including that Ebix is not alleged to have taken such affirmatively disruptive acts and Delaware law governs this matter.

pleads, the SEC never declared the S-4 effective."[8] (Op. at 41) In other words, no matter how Yatra attempts to re-frame the specific performance suit it never brought, it cannot overcome the reality that Ebix's supposed fraudulent entry into the Tenth Amendment did not frustrate Yatra's specific performance rights.

"'Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages ***as a result of a defendant's actions***.'" *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at *8 (Del. Super. Ct. June 6, 2012) (emphasis added). "When the plaintiff 'fail[s] to allege legally cognizable damages suffered as a result of reliance on any false representation,' the claim must be dismissed." *Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *8 (Del. Super. Ct. Aug. 5, 2011) (Slights, J.) (brackets in original) (citation omitted). *See also Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002) (dismissing fraud claim for failing specifically to allege "cognizable damages suffered as a result" of the fraud), *aff'd*, 825 A.2d 239 (Del. 2003) (TABLE).

[8] At oral argument, Yatra's counsel echoed the Amended Complaint in this regard, explaining that "[s]econdly, and I think equally importantly, what you may remember being told earlier, which is correct, is that the SEC had not cleared the S-4; in fact, didn't clear the S-4 until after this litigation was begun. ***And it would have been passing strange for us to sue for specific performance to specifically perform a deal that couldn't be specifically performed because we were getting a publicly traded equity that couldn't be publicly traded***." (A1552 (emphasis added))

Unable to demonstrate any flaw in the Court of Chancery's ruling, Yatra pivots to a new argument not presented below, suggesting that Ebix fraudulently failed to cause the SEC to clear the S-4. (OB at 45 ("but for Ebix's fraud through the extension periods and its failure to clear the Comment Letters, the SEC would have declared Form S-4 effective….")) This argument is meritless. *First*, this contention was never raised below and not fairly presented to the Court of Chancery. Notably, although Supreme Court Rule 14 required Yatra to identify where this argument was raised below, it failed to do so. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(1). Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review," unless justice so requires. Del. Sup. Ct. R. 8. The Court should not consider Yatra's new argument because it was not presented below and Yatra fails to show any reason why justice requires its consideration now. *See Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 989 (Del. 2013) (refusing to consider new argument raised for the first time on appeal because appellant failed to convince the court that the interests of justice required them to consider her argument).

Second, this new argument suffers the same causation failure as Yatra's argument below. Even accepting as true Yatra's assertion on appeal that Ebix in fact caused the SEC not to clear the S-4, the inescapable conclusion remains – *Yatra's* decision to forgo a suit for specific performance and instead terminate the Merger

Agreement caused its purported injury, and nothing else. Because Yatra has not pled that Ebix's conduct, as opposed to Yatra's own decisions, caused harm, its claim for fraud was properly dismissed.[9]

[9] The Court of Chancery correctly recognized that, as pled, "Yatra was aware of [Ebix's] troubles with the SEC well before [Ebix] engaged Yatra in the allegedly fraudulent renegotiations that purportedly frustrated Yatra's right to specific performance." (Op. at 41) The only conceivable explanation remains that Yatra had no desire to sue for specific performance, so it did not, and concocted this theory of fraud after-the-fact, once the consequences of its decision to terminate the Merger Agreement were brought to its attention in Ebix' first motion to dismiss brief below. *See supra* Nature of the Proceedings.

CONCLUSION

For all of the foregoing reasons, the Opinion below should be affirmed.

Respectfully submitted,

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