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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LGM HOLDINGS, LLC and LGM SUBSIDIARY HOLDINGS, LLC,<br><br>Plaintiffs-Below / Appellants,<br><br>v.<br><br>GIDEON SCHURDER, MENDY SCHURDER, LEAH CHITRIK and IBS PHARMA, INC.,<br><br>Defendants-Below / Appellees. | ) | No. 314, 2024<br><br>APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br>C.A. No. N23C-09-011 EMD CCLD |

# APPELLANTS' CORRECTED OPENING BRIEF

Dated: September 24, 2024

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## NATURE OF THE PROCEEDINGS

Buyer[1] filed the Complaint in this action (the "Complaint") to hold Gideon Schurder ("Gideon"), Mendy Schurder ("Mendy"), Leah Chitrik ("Chitrik"), and IBS Pharma, Inc. ("IBS") (collectively, "Sellers") accountable for a series of lies they told Buyer in an effort to sell their companies at an inflated price, and to conceal serious misconduct that was going on behind the scenes. During the due diligence process before the sale, the Sellers repeatedly lied and hid critical information from the Buyer. Moreover, after the sale, the Sellers repeatedly lied and hid critical information from government investigators. These lies involved the safety and efficacy of pharmaceutical ingredients in the marketplace.

Ultimately, the lies made to government investigators prompted a massive Department of Justice ("DOJ") investigation which imperiled the survival of the Target Companies[2] that Buyer purchased for approximately $35 million. Buyer would never have purchased Sellers' businesses had it known that the founders of the businesses, Gideon and Mendy, engaged in rampant illegal activity and misconduct throughout the businesses. Additionally, Buyers are owed at least $6 million in compensation for the cost of legal fees, investigatory expenses, and remediation stemming from the DOJ investigation instigated by Sellers' egregious

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[1] LGM Holdings, LLC and LGM Subsidiary Holdings, LLC (collectively, "LGM").
[2] LGM Pharma, LLC, Yes Pharma Israel (2008) Ltd., and LGM Pharma (YES Pharma) Ltd. (together the "Target Companies").

misconduct. Notwithstanding this egregious conduct involving pharmaceuticals that placed the public in danger, the trial court granted Sellers' motions to dismiss and denied the Buyer any compensation for Sellers' brazen fraud and deception.

***First***, the Sellers argued that Buyer had waived its right to bring fraud claims in a Confidential Letter Agreement (the "Letter Agreement") entered into by the parties shortly after Buyer discovered the scope and scale of Sellers' misconduct. The Letter Agreement was designed to set forth the relative rights and responsibilities of the parties under the Purchase Agreement in light of the extensive governmental proceedings that accompanied disclosure of the Sellers' widespread misconduct. Section 4(a) of the Letter Agreement "capped" Sellers' liability at $6 million for losses attributable to the governmental proceedings. The Letter Agreement specified that Buyer was required to seek damages for these losses through an indemnification claim as specified in the Purchase Agreement.

For avoidance of doubt, the Letter Agreement clarified that Buyer could not seek to recover losses related to the governmental proceedings that resulted from the false statements that Sellers made to government investigators through claims of fraud, intentional misrepresentation, or willful misconduct by the Selling parties, but was limited to an indemnification claim. This clarification makes sense because the false statements were made to government investigators rather than Sellers, and Sellers retained their right to allege claims of fraud, intentional misrepresentation,

or willful misconduct by the Selling parties that occurred before the sale of the Target Companies under the Purchase Agreement.

The trial court, however, refused to simply read Section 4(a) of the Letter Agreement as limiting the size and scope of claims available to recover losses attributable to the governmental proceedings. Instead, the trial court expanded the meaning of the Letter Agreement to encompass a full waiver of any and all fraud claims that were, in any way, "related" to the governmental proceedings. Under the trial court's interpretation of Section 4(a), Buyer forfeited its right to bring a fraud claim that related to any wrongdoing that occurred.

The trial court's reading of Section 4 of the Letter Agreement ignored the context and plain language of Section 4(a) of the Letter Agreement. Indeed, the trial court disregarded the standards of contractual interpretation on a motion to dismiss. At a minimum, the parties' competing interpretations of Section 4(a) created ambiguity, which precluded dismissal. Moreover, the trial court declined to construe the meaning of Section 4(a) in the light most favorable to Buyer, despite Buyer presenting a reasonable construction supported by the full text of Section 4. The trial court's finding in this regard was reversible error.

***Second***, Sellers argued that Buyer's indemnification claim was untimely because it was brought more than five years after the closing of the transaction. When considering this argument, the trial court conceded that Buyer had raised a

claim of fraudulent concealment, which ordinarily tolls the time for filing a cause of action until the injured party discovers or should have discovered facts necessary to put the injured party on notice of the injury. Despite acknowledging that Buyer did not become aware of Sellers' wrongdoing until nearly three years after the sale, the trial court refused to toll the limitations period. Based on a decision that is factually distinguishable, the trial court held that tolling was not permitted because Buyer had inquiry notice of the alleged breach within the five-year limitations period. The trial court's legal conclusion misapplied the law of fraudulent concealment, rests on legal errors, and must be reversed.

## SUMMARY OF ARGUMENT

I. The trial court committed reversible error by holding that Buyer's fraudulent inducement claims were waived by a provision in the Letter Agreement barring claims of fraud relating to losses attributable to the Governmental Proceedings.[3] The Letter Agreement modified the Purchase Agreement by establishing certain "caps" on damages and narrowing the scope of claims for indemnification regarding "Losses attributable" to Governmental Proceedings. The very first sentence of Section 4(a), titled "Indemnification," defines the scope of the provision and makes clear that Section 4(a) is addressing situations where the Buyer seeks indemnification from the Sellers for "***Losses attributable to (y) one or more of the Governmental Proceedings***." Section 4(a), when read in context, was designed to clarify "for the avoidance of doubt" that any losses attributable to the Governmental Proceedings must be recovered through an indemnification claim "capped" at $6 million, rather than through a separate action for fraud, intentional misrepresentation, or willful misconduct of the Sellers. Nothing in this provision precluded fraud claims seeking damages for losses unrelated to the Governmental Proceedings, which are outside the scope of this provision.

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[3] The Letter Agreement defined "Governmental Proceedings" to include: a) the January 17, 2020 DOJ subpoena; b) the December 4, 2018 FDA Form 483; c) an Alabama Sister State action related to the FDA Form 483 findings; and d) any potential sister state actions related to the DOJ subpoena or the FDA Form 483 findings. A799.

II. Contrary to the language in Sections 4(a), (b) and (c) of the Letter Agreement, which explicitly reference "losses relating" to the Governmental Proceedings, the trial court adopted an expansive reading of the last clause of Section 4(a) of the Letter Agreement. The trial court opined that because the last clause of Section 4(a) did not repeat the "Losses attributable" language found earlier in the subsection, the parties must have intended to create a distinct waiver provision that barred any fraud claims related to the "Governmental Proceedings." The last clause, however, did not need to repeat the "Losses attributable" language, because it begins with "For the avoidance of doubt," which expressly ties back to the limited scope of indemnification claim set forth earlier in the section. Moreover, such a broad waiver clause was clearly contrary to the explicit terms of the Purchase Agreement, which allowed fraud claims.

III. At a minimum, the parties' competing interpretations of Section 4(a) created ambiguity, which precluded dismissal. Moreover, the trial court declined to construe the meaning of Section 4(a) in the light most favorable to Buyer, despite Buyer presenting a reasonable construction supported by the full text of Section 4.

IV. Even under the trial court's expansive reading of Section 4(a) of the Letter Agreement, Buyer should still be allowed to pursue its fraudulent inducement claims because they are unrelated to the Governmental Proceedings. The Governmental Proceedings have nothing to do with the false and misleading

statements that Sellers made to induce Buyer to purchase the Target Companies. Buyer's fraudulent inducement claims relate solely to Sellers' false statements to Buyer during the due diligence process before the sale, and in the representations and warranties contained in the Purchase Agreement regarding the Target Companies' compliance with applicable laws and import/export controls. Buyer's fraudulent inducement claims would exist even if the Governmental Proceedings never occurred.

V. The trial court committed reversible error by refusing to apply tolling from the time Buyer was first on inquiry notice of its indemnification claim based on fraudulent concealment by the Sellers. The trial court acknowledged that Buyer had raised "the tolling principles of fraudulent concealment and equitable estoppel" as a justification for not filing its lawsuit until September 2023. Consistent with Buyer's claim of fraudulent concealment, the trial court acknowledged that Buyer did not have "actual knowledge of the Governmental Proceedings" until the Letter Agreement, dated July 23, 2020—just over three years before Buyer filed suit. As the five-year contractual limitations period began to run on July 23, 2020, Buyer had until July 23, 2025 to file this action. Nevertheless, the trial court held that because Buyer was "indisputably on inquiry notice of the alleged breach well within the limitations period," the survival period could not be tolled by fraudulent concealment. This erroneous ruling constitutes reversible error.

## STATEMENT OF FACTS

### I. The Parties

Appellant LGM, is a Delaware limited liability company formed in June 2017 for purposes of the acquisition described below. Appellant LGM Subsidiary Holdings, LLC, is a Delaware limited liability company. Appellee Gideon is an individual residing in Israel. Appellee Mendy is an individual residing in Florida. Appellee Chitrik is an individual residing in Florida. Appellee IBS is a Delaware corporation.

### II. The Purchase Agreement

On September 19, 2017, Buyer and Sellers entered into the Purchase Agreement, which governed Buyer's acquisition of the Target Companies from Sellers. *See* A86-178. The Target Companies sourced and distributed active pharmaceutical ingredients ("API") from manufacturers and suppliers around the world.[4] A15 at ¶ 1.

Prior to entering into the Purchase Agreement, Buyer engaged in significant due diligence. *Id.* To induce Buyer to pay approximately $35 million for the businesses, Sellers represented that the businesses were in compliance with all health care laws and legal requirements wherever they operated. *Id.* As an additional inducement, Sellers agreed that Buyer could bring a claim against them at any time

[4] Buyer purchased 100% of Sellers' businesses subject to a rollover investment from Sellers of approximately 27.2% of the equity of the businesses.

if one or more Sellers committed fraud in connection with the operation of the business or the acquisition. *Id.* The transaction closed on November 15, 2017. *Id.* at ¶ 18.

The Purchase Agreement provided that Buyer generally had five years to bring indemnification claims but had the right to bring legal action without any time limitation "in the event that any breach of any representation or warranty by any of the Sellers constitutes actual or constructive fraud, willful misconduct, or intentional misrepresentation." A86 at Section 12.1(a)(viii). Similarly, the Purchase Agreement provided that there would not be a "cap" on indemnifiable losses for "any claims relating to fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." *Id.* at Section 12.2(a). Finally, the Purchase Agreement provided that while indemnification would be the "sole remedy" for breaches of representations and warranties, this "shall not, however, prevent or limit a cause of action hereunder [] with respect to fraud, bad faith or intentional misrepresentation[.]" *Id.* at Section 12.9.

After the acquisition, Gideon took on the role of Commercial Director at LGM. A15 at ¶ 35. Gideon's job responsibilities included: a) managing and overseeing the Quality Assurance function for LGM; b) managing the sourcing of all API from foreign manufacturers regardless of the end use by the customers; c) ensuring that all manufacturers are following cGMP and abiding by applicable FDA

rules and regulations; and d) managing procurement and approving shipments, including the documentation of API from foreign manufacturers to the U.S. *Id.* Meanwhile, Mendy took on the role of Chief Operating Officer. *Id.* Mendy's job responsibilities included: a) managing the movement of all foreign-sourced API from clearance through Customs and FDA to the LGM warehouse, and then shipping to customers; b) managing all sales and customer relations other than Drug Development; and c) managing the registration of foreign manufacturers of API with the FDA. *Id.*

## III. FDA Inspection

On September 17, 2018, less than one year after the acquisition, the FDA inspected LGM's facility in Erlanger, Kentucky. *Id.* at ¶ 36. During the course of this inspection, the FDA focused on two shipments of the antiviral medication, cidofovir, that arrived at LGM's warehouse falsely labeled under the name of "tranexamic acid" which were improperly relabeled by LGM. *Id.*

In response to questioning from the FDA, Gideon falsely advised FDA inspectors that he was not aware of the mislabeled shipments of cidofovir until the mislabeled API arrived at LGM's warehouse. *Id.* at ¶ 37. Gideon made this false statement despite numerous emails showing that he had authorized mislabeling the second shipment of cidofovir as tranexamic acid. *Id.* at ¶ 38. Gideon, however,

intentionally withheld these emails from the FDA in an effort to convince the FDA that LGM did not have prior knowledge of the mislabeling. *Id.*

Furthermore, in response to questions from the FDA about potentially contaminated products, Gideon supervised the creation of a phony product investigation log (the "CAR Log") to represent falsely that LGM had investigated certain potentially contaminated products when no such investigations had actually occurred. *Id.* at ¶ 39.

On December 4, 2018, at the inspection's conclusion, the FDA issued LGM an FDA Form 483. *Id.* at ¶ 40. FDA Form 483 is used to document and communicate concerns discovered during an inspection. *Id.* at ¶ 41. Concerns outlined in the Form 483 do not necessarily represent the FDA's final determination of a company's compliance. *Id.* at ¶ 42. Instead, the FDA allows the recipient of a Form 483 to respond to the concerns raised and implement a corrective action plan before the FDA takes further action. *Id.* at ¶ 43. The Form 483 issued to LGM on December 4, 2018 made eleven observations, five of which related to two shipments of cidofovir received by LGM on July 30, 2018, and September 5, 2018. *See Id.* at ¶ 44, A202-203, A206, A208. Specifically, the FDA observed that the two shipments of cidofovir arrived in LGM's warehouse falsely labeled under the name of tranexamic acid and then were improperly relabeled. A15 at ¶ 45.

To prepare a response to the Form 483, Buyer engaged the law firm of Reed Smith LLP ("Reed Smith") to investigate the most serious findings related to the relabeling of the cidofovir shipments from July and September of 2018. *Id.* at ¶ 47. Reed Smith interviewed LGM personnel, including Gideon, involved in ordering, receiving, and relabeling the shipments. *Id.* at ¶ 48. Reed Smith also collected and reviewed hundreds of emails from these employees. *Id.* at ¶ 49. Reed Smith found no evidence that anyone at LGM either authorized or was aware of the first mislabeled shipment of cidofovir prior to its receipt. *Id.* at ¶ 50. Emails related to the second shipment of cidofovir, however, revealed that Gideon improperly authorized the shipment of cidofovir under the false name tranexamic acid. *Id.* at ¶ 51.

During the FDA's inspection, Gideon produced to the FDA a series of emails and documents surrounding the mislabeled cidofovir shipments. *Id.* at ¶ 52. Reed Smith determined, however, that Gideon withheld and altered materially relevant documents and lied to FDA inspectors about the second mislabeled shipment. *Id.* Specifically, Gideon stated in an interview with Reed Smith attorneys that he withheld material documents from the FDA that showed that he had instructed the Chinese supplier of cidofovir to send the shipment under the false name of tranexamic acid. *Id.* at ¶ 53. Gideon further acknowledged that he had withheld these documents to deceive the FDA into believing that the second mislabeled

shipment of cidofovir was mistakenly sent to LGM without anyone at LGM's knowledge. *Id.* at ¶ 54.

In its January 11, 2019 response to the Form 483, LGM disclosed the results of Reed Smith's investigation to the FDA. *Id.* at ¶ 55. Namely, LGM disclosed that Gideon approved the September 5, 2018 shipment of cidofovir under the wrong label. *Id.* at ¶ 56. Additionally, LGM disclosed that Gideon withheld relevant documents related to the second mislabeled shipment of cidofovir from the FDA. *Id.* at ¶ 57. Thereafter, LGM turned over the withheld documents to the FDA. *Id.* at ¶ 58.

Armed with Reed Smith's findings, Buyer took immediate and comprehensive steps to address the eleven alleged observations in the Form 483. *Id.* at ¶ 59. Furthermore, in light of Gideon's admissions of fraud and false statements to the FDA during its investigation, Buyer entered into a separation agreement with Gideon, who was then serving as LGM's commercial director. *Id.* at ¶ 60. Mendy was retained in his position since there was no evidence that he had knowingly participated in Gideon's fraud or false statements to the FDA.

## IV. DOJ Subpoenas

As a result of the Form 483 and Gideon's obstruction of justice, the Department of Justice ("DOJ") Criminal Division contacted LGM seeking documents and information about the company's practices. *Id.* at ¶ 62. On or about

January 17, 2020, LGM received a grand jury subpoena from DOJ Criminal Division requesting information about the purchase and receipt of API from foreign suppliers and the distribution of that API to U.S. customers. *Id.* at ¶ 65. Buyer retained Reed Smith to review and produce tens of thousands of documents in response to the subpoenas at substantial cost. *Id.* at ¶ 67.

Through Reed Smith's review of documents and interviews with current and former LGM employees during the summer of 2020, Buyer discovered that Gideon and Mendy routinely violated health care laws, customs restrictions, and regulations in the U.S. and in other jurisdictions. *Id.* at ¶ 68. Moreover, Buyer learned that many of these violations took place prior to its acquisition of the Target Companies. *Id.* at ¶ 69. As a result of Reed Smith's investigation, Buyer discovered that many of Sellers' representations and warranties in the Purchase Agreement were false. *Id.* at ¶ 70.

Despite their representations to the contrary, Sellers were not in material compliance with laws in all jurisdictions where they operated because they (1) shipped mislabeled API to the U.S., Israel, and Switzerland, (2) returned API to manufacturers with an incorrect product name, (3) registered manufacturers with the FDA without their knowledge or consent, (4) registered intermediaries rather than the manufacturers, (5) failed to declare the full value of API shipments, and (6)

purchased API that the manufacturers specifically instructed suppliers should not be sold in the U.S. *Id.* at ¶ 71.

Sellers hid this information from Buyer leading up to and after the acquisition. *Id.* at ¶ 5. If Buyer knew about Sellers' illegal practices, then it never would have purchased the businesses for $35 million. *Id.* Moreover, as a result of Sellers' fraud, Buyer has incurred over $6 million in damages in the form of professional and legal fees and costs to investigate Sellers' misconduct, to bring the companies into compliance with FDA requirements, and to resolve the government's investigations. *Id.* at ¶ 4.

## V. The Letter Agreement

After learning the extent of Gideon and Mendy's misconduct in July 2020, Buyer terminated its relationship with Mendy, who was still serving as Chief Operating Officer for LGM. *Id.* at ¶ 131. As part of Mendy's departure, on July 23, 2020, LGM Holdings, LLC, IBS Pharma, Inc., LGM Pharma, LLC, Gideon, and Mendy entered into a Confidential Letter Agreement (the "Letter Agreement"). *Id.* at ¶ 132 *citing* A798. In the Letter Agreement, *inter alia*, the Parties agreed to certain caps on indemnification "**in respect of Losses attributable**" to one or more of the Governmental Proceedings. *Id.* at ¶ 133 (emphasis added***)*** *citing* A803 at Section

4(a).[5] Specifically, Section 4(a) of the Letter Agreement provided for a $6 million cap for "Losses attributable to [] one or more of the Governmental Proceedings." A803. The Letter Agreement further specified that the Buyer could seek these damages through indemnification in respect to "a breach of one or more Health Care Representations." *Id.* Finally, while allowing Buyer to seek indemnification for Losses attributable to one or more Governmental Proceedings, the Letter Agreement provided that "For the avoidance of doubt . . . no claim with respect to [one or more of the Governmental Proceedings] shall include a claim regarding fraud, intentional misrepresentation or willful misconduct of the Selling Parties[.]" A804. In other words, LGM was barred from bringing a fraud claim for Losses attributable to the Governmental Proceedings, which had three consequences for LGM. First, as regards claims for Losses attributable to the Governmental Proceedings, LGM was not able to use the fraud exception to the provision in the Purchase Agreement providing that indemnification would be the sole remedy for breaches of representations and warranties. Second, LGM was not entitled to the fraud exception to the five year contractual limitations period with respect to indemnification claims for Losses attributable to the Governmental Proceedings. Third, LGM was not entitled to assert a fraud claim to circumvent the agreed-upon $6 million

[5] Paragraph 133 of the Complaint (A15) mistakenly cites to Ex. 27 (A913) where it should cite to Ex. 26 (A798).

indemnification cap with respect to indemnification claims for Losses attributable to Governmental Proceedings.

## VI. FDA Consent Decree

On January 12, 2023, LGM and its senior executives entered into a Consent Decree of Permanent Injunction with the DOJ Civil Division and FDA. *Id.* at ¶ 137. The Consent Decree, among other things, requires LGM to retain an independent expert, at a significant expense to the Company, in order to monitor the Company and its compliance with the Consent Decree for the next four years. [6] *Id.*

## VII. Sellers Refuse to Indemnify Buyer

After discovering Seller's illegal business practices, Buyer gave timely notice of its indemnification claim to Sellers on November 8, 2022, consistent with the procedures set forth in the Purchase Agreement, Section 12.3 (the "Claim Notice"). *Id.* at ¶ 138, A913. The Claim Notice advised that Buyer incurred more than $6 million in fees as a result of government investigations stemming from the Sellers' illegal practices. A15 at ¶ 139. Moreover, Buyer stated that all of the legal and investigatory fees were attributable to Sellers' breach of representations and warranties set forth in the Purchase Agreement. *Id.* at ¶ 140. Buyer further complained that Sellers "hid[] and concealed" "numerous violations of applicable healthcare laws" "even after the FDA's inspections were completed." *Id.* at ¶ 140

[6] *See* Case 9:23-cv-80040-AMC (S.D. Fla.), Docket No. 4.

*see* A916. The Claim Notice also informed Sellers that in addition to its indemnification claim, Buyer believed that it had "a claim for fraud, intentional misrepresentation, and/or willful misconduct" against the Sellers. A917.

On December 1, 2022, in response to the Claim Notice, Sellers rejected Buyer's claims and reserved their rights under the Purchase Agreement, Letter Agreement, and Promissory Notes. A15 at ¶ 142.

## VIII. The Complaint

On September 1, 2023, Buyer filed its Complaint to recover damages against Sellers for fraudulently inducing Buyer to pay $35 million for the business, and for indemnity of expenses up to $6 million associated with the subsequent investigations by FDA and DOJ that Buyer has incurred because of Sellers' breaches of representations and warranties in the Purchase Agreement.

### Counts I, II & III – Fraudulent Inducement

Counts I, II and III of the Complaint allege that in connection with the acquisition, Sellers made a series of representations and warranties, which served "[a]s a material inducement to Buyer to enter into [the Purchase] Agreement and consummate the transactions contemplated" in the Purchase Agreement. *Id*. at ¶ 22. Sellers represented that the Target Companies were in material compliance with laws and that Sellers disclosed all material facts. *Id.* at ¶ 23 *citing* A86 at Article IV. Specifically, Sellers represented the following:

**Section 4.20 – Compliance with All Applicable Laws**

- The Target Companies and their facilities are in material compliance with and have not, in the past seven years, violated any law, including in countries in which the Target Companies conduct business. *See* A86 at Section 4.20.

**Section 4.21 – Compliance with Health Care Laws**

- The Target Companies are, and have been within five years prior to the Closing Date, in material compliance with all Health Care Laws in all jurisdictions where the Target Companies operate. *See id.* at Section 4.21(a).

**Section 4.30 – Disclosure of All Material Facts**

- There is no material fact which is specific to the Target Companies and which has not been disclosed to Buyer which has a Material Adverse Effect. *See id.* at Section 4.30.

The fraudulent inducement claims, Counts I, II, and III, allege that Sellers intentionally made false statements to Buyer during the due diligence relating to the transaction and in the representations and warranties contained in the Purchase Agreement to induce Buyer to purchase the Target Companies. A15 at ¶¶ 147- 148, 158-159, 167-168. Buyer ultimately relied on these false representations when it agreed to pay approximately $35 million for the Target Companies. *Id.* at ¶¶ 149, 151, 160, 162, 169, 171. However, if Buyer had known that the representations made in Sections 4.20, 4.21 and 4.30 were false, "Buyer would not have purchased the Target Companies." *Id.* at ¶¶ 152, 163, 172. The Complaint makes clear that Sellers "**willfully concealed from Buyer**" its false and misleading statements and unlawful business practices. *Id.* at ¶¶ 150, 161, 170.

**Count IV – Indemnification**

Count IV of the Complaint seeks indemnification from Sellers for their breach of the representations and warranties in Section 4.21 (Health Care) of the Purchase Agreement. As described above, in Section 4.21, Sellers represented and warranted that the Target Companies and their products were in "material compliance with all Health Care Laws in all jurisdictions where the Target Companies operate[.]" *See* A86 at Section 4.21(a) and (b). These representations and warranties were false because, among other things, Sellers (1) shipped mislabeled API to the U.S., Israel, and Switzerland, (2) returned API to manufacturers with an incorrect product name, (3) registered manufacturers with the FDA without their knowledge or consent, (4) registered intermediaries rather than the manufacturers, (5) failed to declare the full value of API shipments, and (6) purchased API that the manufacturers specifically instructed suppliers should not be sold in the U.S. A15 at ¶ 71.

Count V of the Complaint seeks a declaratory judgment against Sellers declaring, *inter alia*: 1) Sellers owe indemnification to Buyer; 2) Sellers' representations in the Purchase Agreement were fraudulent and false; 3) but for Sellers' representations, Buyer would not have entered into the Purchase Agreement; 4) Sellers breached their obligations under the Purchase Agreement by refusing to indemnify Buyer; and 5) amounts Buyer is entitled to recover under the Purchase Agreement. *Id.* at ¶¶ 178-189.

## IX. Motions to Dismiss

On November 17, 2023, Mendy, Chitrik and IBS filed a motion to dismiss. Gideon filed his own motion to dismiss on December 20, 2023. The two motions made similar claims. Specifically, Sellers argued that: 1) Buyer's fraud and indemnification claims were untimely; 2) Buyer waived its fraud and indemnification claims in the Letter Agreement because both claims related to the "Governmental Proceedings" and were grounded in fraud; 3) Buyer's request for a declaratory judgment was impermissibly redundant; and 4) Buyer failed to raise a reasonable inference that Chitrik or IBS knew that the alleged misrepresentations were false.

Buyer responded to Sellers' motions by agreeing to withdraw its claim for Declaratory Judgment. A947. Buyer, however, challenged the remainder of Sellers' arguments. Specifically, Buyer argued that its fraud claims were timely since both parties agreed to an indefinite limitations period under the express terms of the Purchase Agreement pursuant to 10 *Del. C.* § 8106(c). A941-43. As for its indemnification claim, Buyer argued that such claim did not accrue until after Sellers rejected the Notice of Claim. A972-75. Additionally, Buyer maintained that even if the trial court concluded that the indemnification claim accrued at the time of closing, the doctrines of equitable tolling and fraudulent concealment tolled the limitations period until Buyer learned of the breach – which did not occur until Buyer

completed its internal investigation in the summer of 2020. A974-975. Accordingly, based on the five-year contractual limitations period from the Purchase Agreement, Buyer had until the summer of 2025 to bring its indemnification claim. *Id.*

Similarly, Buyer rejected Sellers' assertion that it had waived its fraud claim under the Letter Agreement entered into at the time of Mendy's termination. While Buyer agreed that the Letter Agreement precluded fraud claims seeking "Losses attributable to one or more of the Governmental Proceedings," it insisted that the damages sought under the fraudulent inducement claims were directly tied to false and misleading statements made by Sellers during the due diligence period and closing, which predated the Governmental Proceedings. A965. Indeed, the Governmental Proceedings had nothing to do with the false and misleading statements made by Sellers to induce Buyer to purchase the Target Companies. *Id.* Rather, the "Governmental Proceedings" arose from LGM's disclosure of false statements made by Gideon in 2018 in response to the FDA's investigation. *Id.* Buyer argued that its fraudulent inducement claims would exist even if the Governmental Proceedings never occurred. A966.

As for Sellers' assertion that the indemnification claim was also waived, Buyer explained that its indemnification was not a "fraud claim" barred by the Letter Agreement. A975-76. Instead, Buyer pointed out that its indemnification claim was

premised on Sellers' breach of Health Care representations and warranties set forth in the Purchase Agreement, an indemnification claim expressly allowed by the Letter Agreement. A975. Additionally, Buyer maintained that the Complaint's allegations of fraud against "Sellers" – defined to include Chitrik and IBS Pharma – were more than sufficient to demonstrate that Chitrik and IBS knew that the alleged misrepresentations were false. A944-46.

## X. Trial Court Opinion

On April 1, 2024, the trial court held oral argument on Sellers' motions to dismiss. On July 10, 2024, the trial court issued its opinion granting Sellers' motions to dismiss. In its opinion, the trial court found two of the Sellers' arguments to be "dispositive." Ex. A at 10. Specifically, the trial court found that Counts I, II and III (the Fraudulent Inducement counts) should be dismissed because Buyer waived its fraud claims in the Letter Agreement. *Id.* The trial court also concluded that Count IV (the Indemnification count) should be dismissed because Buyer did not bring its indemnity claim within the applicable survival period. *Id.* Because Buyer elected to withdraw its declaratory judgment claim in Count V, the trial court did not address that count. *Id.*

Initially, the trial court addressed Sellers' assertion that Buyer waived its fraud claims under the Letter Agreement. *Id*. Focusing on the last clause within Section 4(a) of the Letter Agreement, the trial court concluded that Buyer agreed that "no

claim with respect to [one or more of the Governmental Proceedings] . . . shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." *Id.* at 10-11. The trial court opined that "because Buyer's fraudulent inducement claims relate to the Governmental Proceedings, those claims were waived in the Letter Agreement." *Id.* Citing to paragraphs relating to damages for the Buyer's **indemnification claim,**[7] the trial court rejected Buyer's contention that the fraud claims were unrelated to the Governmental Proceedings. *Id.* at 11-12. Instead, the trial court concluded that there was "no clean break between the actions that led to the Governmental Proceedings and the actions that allegedly made the Purchase Agreement fraudulent." *Id.* at 12.

The trial court disregarded Buyer's argument that its fraud claims related to fraud perpetrated by the Sellers against Buyer, while the Governmental Proceedings related to fraud perpetrated by the Sellers' against the FDA. The trial court conceded that "[t]here may not be perfect identity between the actions implicated in the Governmental Proceedings and the actions that allegedly made the challenged representations fraudulent," but it nevertheless held that there was "sufficient

[7] In contrast to Buyer's fraud claims, which focused on fraud committed by the Sellers against the Buyer, Buyer's indemnification claim focused on the damage to the Buyer from the Governmental Proceedings. The two claims are distinct and address two different types of damages. The court did not find that Buyer's indemnification claim was waived by the Letter Agreement.

overlap" such that the Buyer's fraud claims were still claims "with respect to" one or more of the Governmental Proceedings. *Id.*

Finally, in a footnote, the trial court rejected Buyer's reading of the waiver provision in Section 4(a) of the Letter Agreement. Buyer argued that the waiver provision, contained in the last sentence of Section 4(a) of the Letter Agreement, should be understood as barring only fraud claims related to "**Losses attributable**" to the Governmental Proceedings. *Id.* at 11 n.72. The trial court opined that the last sentence referencing waiver of fraud claims in Section 4(a) of the Letter Agreement should be read more broadly to include **all** claims that are in any way related to subjects included in the Governmental Proceedings – whether or not the losses being sought had a relationship to the Governmental Proceedings. *Id.*

The trial court then addressed the timeliness of Buyer's indemnification claim. *Id.* at 12. The trial court observed that Section 4(a) of the Letter Agreement provides that indemnity claims related to the Governmental Proceedings should be brought pursuant to Section 12(b) (ii)(A) of the Purchase Agreement with respect to a breach of one or more Health Care Representations. *Id.* at 12-13. Pursuant to Section 12.1(a)(iii) of the Purchase Agreement, the Health Care Representations contain a five-year survival period within which to bring indemnity claims. *Id.* at 12. Accordingly, the trial court concluded that Buyer had to bring any indemnity claims

for the Governmental Proceedings within five years of the closing date – or by November 15, 2022. *Id.*

Despite language in the Purchase Agreement requiring Buyer to provide timely notice to Sellers of the breach, the trial court held that an indemnity notice within the survival period was insufficient. *Id.* at 14. Instead, the trial court concluded that the Buyer must bring suit within the survival period, and that an indemnity notice was insufficient. *Id.* Moreover, the trial court held that Buyer must bring suit within five years of the closing of the Purchase Agreement, even if Buyer did not discover the breach until long after the closing of the Purchase Agreement. *Id.*

The trial court rejected Buyer's argument that indemnity claims in Delaware do not accrue until the indemnitor refuses a demand for indemnification – thus breaching the indemnification provision. Citing *Pilot Air Freight, LLC v. Manna Freight Sys., Inc.*, 2020 WL 5588671 (Del. Ch. Sept. 18, 2020), the trial court held that "accrual for purposes of 10 *Del. C.* § 8106 and the temporal limitations voluntarily created by contractual survival periods are distinct concepts." *Id.* at 14-15. The court discarded Buyer's legal argument by noting that it "conflicts with *Pilot Air* and the precedent cited therein." *Id.* at 15. Although the cases cited by Buyer clearly state that indemnity claims do not accrue until a demand for

indemnification is rejected, the trial court distinguished them by noting that they did not relate to "survival periods." *Id.*

Next, the trial court addressed Buyer's claim that the survival period was tolled under principles of fraudulent concealment and equitable estoppel. *Id.* Specifically, Buyer argued that because the Complaint unambiguously alleged that Sellers "**willfully concealed from Buyer**" its false and misleading statements and unlawful business practices, the survival period for the indemnification claim should be tolled based on fraudulent concealment. A15 at ¶¶ 150, 161, 170. While the trial court conceded that Buyer did not have "actual knowledge" of Sellers' misconduct until July 23, 2020, it nevertheless held that fraudulent concealment could not toll the survival period because Buyer was "indisputably on inquiry notice of the alleged breach well within the limitations period." Ex. A at 15. The trial court never explained why knowledge of the breach within the limitations period should preclude tolling for fraudulent concealment. In any event, the trial court concluded that Buyer's indemnification claim was untimely because it was not filed before November 15, 2022 – five years after the date of closing. *Id.*

On July 10, 2024, the trial court granted Sellers' motion to dismiss. *Id.* at 16.

## ARGUMENT

### I. Buyer's Fraudulent Inducement Claims Are Not Waived By Section 4(a) of the Parties' Letter Agreement

#### A. Question Presented

Was it error for the trial court to hold that Buyer's fraudulent inducement claims were waived by a provision in the Letter Agreement barring claims of fraud relating to losses attributable to the Governmental Proceedings? A964-68; A938-39.

#### B. Scope of Review

This Court reviews "questions of law, including contract interpretation, *de novo.*" *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 674 (Del. 2020) (citations omitted). Likewise, this Court reviews "rulings on motions to dismiss pursuant to Rule 12(b)(6) . . . *de novo.*" *Id.*

#### C. Merits of the Argument

In its Complaint, Buyer seeks damages for two distinct sets of claims. First, Buyer seeks indemnification for losses attributable to the Governmental Proceedings resulting from Sellers' breach of one or more Health Care Representations in the Purchase Agreement. These losses include at least $6 million in legal and investigatory fees resulting from the Governmental Proceedings. A15 at ¶ 177. Second, Buyer seeks damages for false and misleading statements made by Sellers during the due diligence relating to the transaction and in representations and

warranties contained in the Purchase Agreement. *Id*. These losses include the $35 million Buyer paid for the Target Companies, which Buyer would not have purchased had it known that the representations and warranties made by Sellers were false. *Id*. at ¶ 152. The damages sought by Buyer for these fraud claims are distinct and separate from losses attributable to the Governmental Proceedings sought in Buyer's indemnification claim.

The Purchase Agreement allowed for both indemnification and fraud claims. Pursuant to Section 12.1(b)(ii) of the Purchase Agreement, Sellers agreed to "indemnify, protect, defend and hold and save the Buyer Parties harmless, from and against the entirety of any Losses any of the Buyer Parties may suffer, sustain or become subject to . . . resulting from, arising from or out of, or caused by: (A) any breach or inaccuracy of any representation or warranty set forth in Article IV," which included the representations and warranties made in Section 4.21.

Similarly, the Purchase Agreement contemplated that Buyers would have the right to bring legal action against Sellers "in the event that any breach of any representation or warranty by any of the Sellers constitutes actual or constructive fraud, willful misconduct, or intentional misrepresentation." A15 at ¶ 31 *citing* A86 at Article XII, Section 12.1(a)(viii). Sellers also agreed that there would not be a cap on indemnifiable losses for "any claims relating to fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." *See* A15 at ¶ 33

*citing* A86 at Section 12.2(a). Finally, Sellers agreed that while indemnification would be the "sole remedy" for breaches of representations and warranties, this "shall not, however, prevent or limit a cause of action hereunder [] with respect to fraud, bad faith or intentional misrepresentation[.]" *Id.* at Section 12.9. Accordingly, the Purchase Agreement always anticipated and allowed for claims of fraud.

The Letter Agreement modified the Purchase Agreement by establishing certain caps on damages and narrowing the scope of claims for indemnification regarding "Losses attributable" to Governmental Proceedings. *See* A15 at ¶ 133 *citing* A798 at Section 4(a). Under Section 4(a) ("Indemnification") of the Letter Agreement, the parties agreed that:

> [I]n the event Parent, Subsidiary Holdings, LGM (or one of its Affiliates (other than the Sellers)) elects to seek indemnification from the Sellers pursuant to Article XII of the Purchase Agreement in respect of ***Losses attributable to (y) one or more of the Governmental Proceedings or (z) any matter set forth on Schedule 12.1(b) of the Purchase Agreement, L***GM agrees that it and any other Buyer Party that seeks indemnification thereunder shall be subject to an aggregate indemnification cap of Six Million Dollars ($6,000,000); *provided*, that, in the case of (y), LGM agrees and shall cause each Buyer Party to, seek indemnification therefor solely pursuant to Section 12.1(b)(ii)(A) of the Purchase Agreement in respect to a breach of one or more Health Care Representations (i.e., applying an aggregate cap of Six Million Dollars ($6,000,000) as set forth in Section 12.2(a)(iii))); provided; further, that, in respect of (y) and (z) above, the Basket shall not apply. For the avoidance of doubt, the above $6,000,000 cap will apply to any and all claims made by the aforementioned regarding (y) and/or (z) above, and no claim with respect to (y) or (z) above shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties;

(emphasis added).

The very first sentence of Section 4(a), titled "Indemnification," defines the scope of the provision and makes clear that Section 4(a) is addressing situations where the Buyer seeks indemnification from the Sellers for "***Losses attributable to (y) one or more of the Governmental Proceedings***." Section 4(a) goes on to limit indemnification for these losses to an aggregate cap of $6 million. The Section then concludes that, "for the avoidance of doubt," the $6 million cap will apply to any and all claims made by the Buyer regarding the Governmental Proceedings and that "no claim with respect to [the Governmental Proceedings] above shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." When read in context, this clause was designed to clarify "for the avoidance of doubt" that any losses attributable to the Governmental Proceedings must be recovered through an indemnification claim for breach of one or more of the Health Care Representations capped at $6 million, and that the Buyer would not be able to circumvent the agreed upon $6 million indemnification cap for losses attributable to the Governmental Proceedings by asserting a separate action for fraud, intentional misrepresentation, or willful misconduct of the Selling Parties. Nothing in this provision precluded fraud claims seeking damages for losses ***unrelated*** to the Governmental Proceedings, which are outside the scope of this provision.

Buyer's reading of the Letter Agreement is also supported by Section 4(b) of the Letter Agreement. This subsection once again refers to "Losses relating to one or more of the Governmental Proceedings." Specifically, Section 4(b) states:

> In the event a Buyer Party seeks and is entitled (in accordance with Article XII of the Purchase Agreement) to indemnification in respect to Losses relating to one or more Governmental Proceedings, the Parties agree and acknowledge that any Losses shall solely be borne, jointly and severally . . .

Section 4(c) also explicitly references "Losses relating to the Governmental Proceedings." In sum, every provision of Section 4 of the Letter Agreement explicitly references "Losses relating to one or more of the Governmental Proceedings."

Contrary to the language found in Sections 4(a), (b) and (c) of the Letter Agreement, which explicitly reference "losses relating" to the Governmental Proceedings, the trial court adopted an expansive reading of the last clause of Section 4(a) of the Letter Agreement. Specifically, the trial court held that this explanatory clause did not simply bar fraud claims for "losses relating" to the Governmental Proceedings, but barred ***all*** fraud claims that related in any way to the Governmental Proceedings. The trial court opined that since the last clause of Section 4(a) did not repeat the "Losses attributable" language found earlier in the subsection, the parties must have intended to create a distinct waiver provision that barred any fraud claims related to the "Governmental Proceedings." But, the last clause did not need to

repeat the "Losses attributable" language, because it begins with: "For the avoidance of doubt," which expressly ties back to the limited scope of indemnification claim set forth earlier in the section. *See White v. Curo Texas Holdings, LLC*, 2016 WL 6091692, at *21 (Del. Ch. Sept. 9, 2016) ("The second part of the parenthetical phrase seeks to clarify the first part by stating "'but for the avoidance of doubt'"). It would be illogical to read a clause meant to clarify earlier language as taking on a broader meaning.

Further, such a broad waiver clause was clearly contrary to the explicit terms of the Purchase Agreement – which allowed fraud claims. To establish such a broad waiver, the trial court must find that there was an unequivocal and clear representation by the Buyer to disclaim its rights under the Purchase Agreement. *See Terrell v. Kiromic Biopharma, Inc.*, 2024 WL 370040, at *4 (Del. Ch. Jan. 31, 2024) ("Delaware courts use contract principles of interpretation to determine whether a written [waiver] representation is 'unequivocal and clear.'") (citations omitted). The trial court never explained how it determined that such a broad waiver clause by the Buyer was "unequivocal and clear" based on the last clause of a section of the Letter Agreement devoted to "Indemnification." Nor did it explain why this one clause involving "Governmental Proceedings" should be read to expand the scope of Section 4(a) beyond its express terms and contrary to the language of

Sections 4 (b) and (c) which explicitly referenced ***losses*** relating to the Governmental Proceedings.

In *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*, 166 A.3d 912 (Del. 2017), then Chief Justice Strine explained, "[i]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract." *Id.* at 913–14; s*ee also Lorillard Tobacco v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006) ("A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed *ex ante*."). In the present case, the last clause of Section 4(a) should be read and understood in the context of: 1) a Purchase Agreement that expressly allowed claims of fraud involving the breach of any representation or warranty by any of the Sellers; and 2) Sections 4(a), (b) and (c) that expressly reference "Losses relating to one or more of the Governmental Proceedings." When read in this context, it is clear that Section 4(a) was designed to cap damages for losses relating to the Governmental Proceedings to $6 million, and limit the types of claims that could be brought to recover those losses. Accordingly, Section 4(a) does not bar every fraud claim that relates in any way to the Governmental Proceedings, but only fraud claims that seek damages for losses relating to the Governmental Proceedings.

At a minimum, the parties' competing interpretations of Section 4(a) created ambiguity, which precluded dismissal. It is well settled that, "[a]t the motion to dismiss stage, the Court 'cannot choose between two differing reasonable interpretations of ambiguous provisions.'" *Markow v. Synageva Biopharma Corp.*, 2016 WL 1613419, at *5 (Del. Super. Ct. Mar. 3, 2016) (citations omitted). "[F]or purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party." *VLIW Tech., LLC, v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). "Dismissal is proper only if the defendant['s] interpretation is the *only* reasonable construction as a matter of law." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613 (Del. 1996). Here, the parties presented two different readings of the last clause of Section 4(a) – one which barred fraud claims relating to losses attributable to the Governmental Proceedings and one which barred all fraud claims related to the Governmental Proceedings. The trial court, however, did not construe the meaning of Section 4(a) in the light most favorable to Buyer, despite Buyer presenting a reasonable construction supported by the full text of Section 4.

Even if this Court were to adopt the trial court's expansive reading of Section 4(a) of the Letter Agreement, Buyer should still be allowed to pursue its fraudulent inducement claims since they are unrelated to the Governmental Proceedings. The Governmental Proceedings simply have nothing to do with the false and misleading

statements that Sellers made to induce Buyer to purchase the Target Companies. The false statements underlying Buyer's fraudulent inducement claims were made during due diligence for the transaction and at the time of closing—November 15, 2017. A15 at ¶ 159. In contrast, the false statements at issue in the Governmental Proceedings were made by Gideon in 2018 in response to the FDA investigation. *Id.* at ¶ 52.

As set forth in the Complaint, the Governmental Proceedings began after a September 2018 inspection by the FDA of LGM's Kentucky facility uncovered misconduct by Gideon. *Id*. at ¶¶ 47-67. The FDA's investigation subsequently evolved into an investigation by the Department of Justice after LGM disclosed that Gideon had withheld and altered materially relevant documents, and lied to FDA inspectors about his misconduct. *Id.* at ¶¶ 52-58. Buyer's fraudulent inducement claims ***do not*** include the 2018 misconduct by Gideon and Mendy that led to the FDA investigation and the subsequent DOJ investigation. Rather, Buyer's fraudulent inducement claims relate solely to Sellers' false statements to Buyer during the diligence relating to the transaction and in the representations and warranties contained in the 2017 Purchase Agreement regarding the Target Companies' compliance with applicable laws and import/export controls. Buyer's fraudulent inducement claims would exist even if the Governmental Proceedings never occurred.

The trial court takes issue with this assertion, and cites to several examples from the Complaint where Buyer seeks indemnity for expenses of up to $6 million associated with investigations by the FDA and DOJ that Buyer incurred as a result of Sellers' fraud. The examples cited by the trial court, however, are taken from allegations involving Buyer's indemnity claim, not Buyer's fraud claims. Buyer's fraud claims seek damages related to false and misleading statements from due diligence that caused Buyer to pay $35 million for the Target Companies when the value of these companies was "far lower." *See, e.g., Id.* at ¶¶ 170-71.

The trial court next asserts that the Complaint and the attached exhibits "reveal that the Governmental Proceedings investigated pre-closing conduct." Ex. A at 12. While it is true that the DOJ subpoena requested documents dating back to before Buyer's acquisition of LGM, there is nothing in the Complaint or the record suggesting that the DOJ was investigating fraudulent statements and representations made by Sellers to the Buyer as alleged in Buyer's fraudulent inducement claims. A careful reading of the exhibits to the Complaint confirms that the FDA was not investigating any "fraud" by Gideon and Mendy – apart from the false statements and obstruction of justice by Gideon with respect to the FDA. For example, the findings in the FDA Form 483 do not mention a single allegation of fraud by anyone at LGM. A202-11. Similarly, LGM's response to the Form 483 (authored by Reed Smith) addresses Gideon's fraud, but does not address any other "fraud" at LGM.

*See* A257-78. The truth of the matter is that the FDA's investigation was a regulatory review, not a criminal investigation. But for LGM's discovery and reporting of Gideon's false representations and misconduct, these regulatory violations would never have caught the attention of the DOJ Criminal Division.

Finally, the trial court maintains, without citation, that the Governmental Proceedings "pertain to an alleged pattern of wrongdoing that began before the Purchase Agreement closed and continued thereafter." Ex. A at 12. Once again, the record simply does not support this conclusion. The Complaint alleges that Sellers (1) shipped mislabeled API to the U.S., Israel, and Switzerland, (2) returned API to manufacturers with an incorrect product name, (3) registered manufacturers with the FDA without their knowledge or consent, (4) registered intermediaries rather than the manufacturers, (5) failed to declare the full value of API shipments, and (6) purchased API that the manufacturers specifically instructed suppliers should not be sold in the U.S. A15 at ¶ 71. There are no allegations in the FDA Form 483 or LGM's response to the Form 483 that refer to any portion of this pattern of wrongdoing. As alleged in the Complaint, LGM itself did not know of this pattern of wrongdoing until it completed its own internal investigation in the summer of 2020. *See id*. at ¶¶ 68-69.

## II. Buyer's Indemnification Claim Is Tolled Under the Doctrine of Fraudulent Concealment

### A. Question Presented

Where Buyer properly alleged fraudulent concealment, was it error for the trial court not to apply tolling from the time Buyer was first on inquiry notice of its indemnification claim? A974-75.

### B. Scope of Review

This Court reviews "questions of law, including contract interpretation, *de novo.*" *Urdan*, 244 A.3d at 674 (citations omitted). Likewise, this Court reviews "rulings on motions to dismiss pursuant to Rule 12(b)(6) . . . *de novo.*" *Id.*

### C. Merits of the Argument

After considering the "impact" of Section 4(a) of the Letter Agreement and Sections 12.1(a)(iii) and 12.1(b)(ii) of the Purchase Agreement, the trial court concluded that "Buyer had to bring indemnity claims for the Governmental Proceedings within sixty months of the closing date." Ex. A at 13. Because the acquisition closed on November 15, 2017, the trial court concluded that Buyer had until November 15, 2022 to bring its indemnity claim. *Id.*

The trial court acknowledged that Buyer had raised "the tolling principles of fraudulent concealment and equitable estoppel" as a justification for not filing its lawsuit until September 2023. *Id.* at 15. Specifically, Buyer alleged in the Complaint, it was only "[t]hrough its review of documents and interviews with

current and former LGM employees, [that] Buyer discovered that Gideon and Mendy routinely violated health care laws, customs restrictions, and regulations in the U.S. and in other jurisdictions." A15 at ¶ 68. Buyer's Complaint also unambiguously alleged that Sellers "**willfully concealed from Buyer**" its false and misleading statements and unlawful business practices. *Id.* at ¶¶ 150, 161, 170. These revelations did not occur until many months after LGM received the January 17, 2020 grand jury subpoena from the DOJ Criminal Division.

Consistent with Buyer's claim of fraudulent concealment, the trial court acknowledged that Buyer did not have "actual knowledge of the Governmental Proceedings" until the Letter Agreement, dated July 23, 2020 – just over three years before Buyer filed suit. Ex. A at 15. As the five-year contractual limitations period began to run on that date (July 23, 2020), Buyer had until July 2025 to file this action. *See Snyder v. Butcher & Co.*, 1992 WL 240344, at *5 (Del. Super. Ct. Sept. 15, 1992) (where there is fraudulent concealment, "'the statute of limitations will begin to run from the time the right of action is discovered, or, by the exercise of ordinary diligence, might have been discovered'") (citing *Trainer v. Deemer,* 166 A. 657, 660 (Del. Super. Ct. 1933)). The trial court, nevertheless, ruled that because Buyer was "indisputably on inquiry notice of the alleged breach well within the limitations period," the survival period could not be tolled by fraudulent concealment. Ex. A at

15 (*citing Pilot Air*, 2020 WL 5588671, at *12-14). The trial court misread *Pilot Air* and misapplied the doctrine of fraudulent concealment.

*Pilot Air* involved a dispute relating to an Asset Purchase Agreement where Pilot purchased substantially all of the assets of Manna. *Pilot Air*, 2020 WL 5588671 at *1. Pilot alleged that Manna had engaged in fraud when it concealed the fact that three of its top customers were no longer customers at all. *Id.* Manna moved to dismiss Pilot's indemnification claim as untimely, arguing that the parties had agreed to a 15-month survival period and Pilot filed its lawsuit more than 15 months after closing. *Id.* at *12. In response, Pilot argued, *inter alia*, that the contractual limitation period should be tolled because Manna "acted affirmatively to conceal the wrong." *Id.* at *15 (internal quotations omitted). The Court of Chancery ultimately rejected Pilot's fraudulent concealment claim because "by the time Pilot took the helm at the Company, ship's alarms had been ringing for months," and Pilot was "indisputably on inquiry notice" of the customer issues. *Id.*

Despite the trial court's statement to the contrary, the *Pilot Air* court did not hold that "inquiry notice" during the limitations period doomed any potential claim of fraudulent concealment. In *Pilot Air,* the Purchase Agreement was signed on June 26, 2018 and Pilot's Complaint was not filed until December 11, 2019 – roughly five months after the expiration of the 15-month survival period. *Id.* at *9. Because the

*Pilot Air* court ruled that Pilot was on "inquiry notice" almost immediately after closing, there was no tolling available to extend the 15-month survival period.

"The doctrine of fraudulent concealment tolls the statute of limitations and extends the time for suit under the doctrine of laches 'when a defendant has fraudulently concealed from a plaintiff the facts necessary to put him on notice of the truth.'" *Lebanon Cnty. Employees' Ret. Fund v. Collis*, 287 A.3d 1160, 1214 (Del. Ch. 2022) (citing *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007)). So, "if a defendant fraudulently conceals the existence of a cause of action from the injured party, the limitation period will not begin to run until such time as the injured party discovers or should have discovered his rights against the defendant." *Hiznay v. Strange*, 415 A.2d 489, 492 (Del. Super. Ct. 1980) (citing *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973). Unlike the facts in *Pilot Air*, Buyer did not learn of Sellers' false and misleading representations almost immediately after "taking the helm" at LGM in November of 2017. In fact, there is no dispute that Buyer did not have inquiry notice of Sellers' misconduct until the summer of 2020 – after concluding a detailed internal investigation. This was over two-and-a-half years after the closing. Accordingly, under the doctrine of fraudulent concealment, the 5-

year limitation period did not begin to run until the summer of 2020 – less than 5 years before the filing of the Complaint in this matter.[8]

In light of allegations from the Complaint that Sellers "willfully concealed from Buyer" its false and misleading statements and unlawful business practices of fraudulent concealment, Buyer should be able to avail itself of tolling from fraudulent concealment. *See Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008) (citing *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007)) ("Fraudulent concealment requires an affirmative act of concealment or 'actual artifice' by a defendant that prevents a plaintiff from gaining knowledge of the facts."). *See also* Compl. ¶¶ 150, 161, 170. When the doctrine of fraudulent concealment is applied to the facts of this case, Buyer's indemnification claim was timely filed.

[8] The trial court noted that "Buyers do not explain why they should be permitted to predicate their indemnity claim on Sellers' fraud when they waived "'claim[s] regarding fraud'" in the Letter Agreement." Ex. A at 15. Buyer's indemnity claim, however, is not predicated on Sellers' fraud, it is predicated on a breach of the Health Care Representations pursuant to Section 12(b)(ii)(A) of the Purchase Agreement. The fact that Sellers' engaged in fraud when they breached these representations does not bar Buyer from bringing an indemnity claim consistent with Section 4(a) of the Letter Agreement. Even under an expansive view of Section 4(a), only fraud claims regarding these breaches would be barred.

## CONCLUSION

For these reasons, this Court should reverse the judgment of the trial court.

Dated: September 24, 2024

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