EFiled: Oct 21 2024 02:34PM EDT
Filing ID 74804831
Case Number 314,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LGM HOLDINGS, LLC and LGM SUBSIDIARY HOLDINGS, LLC, Plaintiffs Below/Appellants, v. GIDEON SCHURDER, MENDY SCHURDER, LEAH CHITRIK and IBS PHARMA, INC., Defendants Below/Appellees.	)	C.A. No. 314, 2024 Court Below – Superior Court of the State of Delaware C.A. No. N23C-09-011 EMD CCLD

THE IBS SELLERS' ANSWERING BRIEF

John M. Seaman (#3868)
Florentina D. Field (#7146)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Defendants Below/Appellees Mendy Schurder, Leah Chitrik and IBS Pharma, Inc.

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NATURE OF PROCEEDINGS

This is an appeal of a dismissal of a complaint that asserted claims for fraudulent inducement and indemnification relating to an equity purchase transaction that closed in November 2017. In a thorough and well-reasoned opinion (the "Opinion"), the Superior Court dismissed with prejudice three counts of fraudulent inducement under the waiver provision in the parties' 2020 letter agreement, and dismissed the sole indemnification count as time barred under the survival clause in the parties' 2017 purchase agreement. The trial court correctly applied the plain language of the relevant contract provisions to the allegations in the complaint to conclude that dismissal was appropriate. Appellants LGM Holdings, LLC and LGM Subsidiary Holdings, LLC ("Appellants" or "Buyers")[1] cannot achieve reversal by re-writing the underlying agreements and the complaint in their briefs. The judgment below should be affirmed.

In their complaint, Buyers alleged that appellees Gideon Schurder ("Gideon"), Mendy Schurder ("Mendy"), Leah Chitrik ("Leah"), and IBS Pharma Inc. ("IBS," and together with Mendy and Leah, the "IBS Sellers") fraudulently induced Buyers, affiliates of a sophisticated private equity firm, into purchasing shares in LGM Pharma, Yes Pharma Israel (2008) Ltd., and LGM Pharma (YES Pharma) Ltd. (the

[1] The IBS Sellers use the plural defined term "Buyers" to track the defined term in the Opinion.

"Target Companies") pursuant to an Equity Purchase Agreement dated September 19, 2017 (the "Purchase Agreement"). Buyers also sought indemnification for legal and investigatory fees for defending governmental investigations and conducting internal investigations purportedly "attributable to Sellers' breach of representations and warranties set forth in the Purchase Agreement" (defined below as the "Governmental Proceedings"). Sellers moved to dismiss, arguing that Buyers' claims were both waived and untimely.

The Superior Court properly dismissed the Complaint. It held that Buyers waived their fraudulent inducement claims over three years ago when, well after learning of the "extent of Gideon and Mendy's misconduct" (Opinion at 6), Buyers renegotiated their rights and obligations in relation to the ongoing Governmental Proceedings in a Confidential Letter Agreement dated July 30, 2020 (the "Letter Agreement"). In the Letter Agreement, the parties capped indemnification to Sellers and modified the Purchase Agreement to re-define Buyers' remedies in relation to the broadly defined Governmental Proceedings. The parties agreed that, going forward, the only remedy regarding the Governmental Proceedings was for indemnification under Article XII of the Purchase Agreement. The final sentence of Section 4(a) of the Letter Agreement carefully re-confirmed the $6 million cap for "any and all" claims regarding the Governmental Proceedings, i.e., Buyers' agreed that rescission or rescissory damages were off-limits. The final sentence further

clarified that Buyers' only remedy with respect to Governmental Proceedings was indemnification such that "no claim with respect to [the Governmental Proceedings] shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct" of the Sellers (the "Waiver Provision"). A804. The parties agreed to this modification in exchange for Sellers' significant cash contributions, concessions on indemnification caps, and other consideration.

The Superior Court read the allegations in Buyers' Complaint and properly rejected Buyers' argument that the fraud claims are unrelated to the Governmental Proceedings. The Court below further found that Buyers' allegations underlying the fraud claim asserted an alleged pattern of misconduct that also involved the actions at issue in the Governmental Proceedings. This overlap, the Superior Court held, was sufficient to support a finding that the alleged fraud claim was "with respect to" the Governmental Proceedings. The Superior Court thus flatly rejected Buyers' argument to modify the parties' agreement to fit Buyers' theory of the case, or to modify the Complaint to plead a different type of fraud claim.

The Superior Court also properly dismissed Buyers' indemnification claim as untimely. The Purchase Agreement required Buyers to bring any indemnification claims for breach of representations and warranties in Section 4.21 (that is Health Care Representations) within sixty months from the closing of the transaction ("Closing"). Closing was on November 15, 2017. Therefore, Buyers had until

November 15, 2022, to discover and file their indemnification claim. But Buyers waited until September 1, 2023, to file their Complaint.

Buyers tried to justify their lengthy delay in bringing their claims in several ways. The only argument advanced on appeal is that Sellers fraudulently concealed the facts that constituted the basis for Buyers' indemnification claim. The Superior Court appropriately rejected Buyers' arguments, holding that Buyers have at least been on inquiry notice "well within the limitation period." Opinion at 15. The Superior Court also correctly applied the settled Delaware default rule that to comply with a contractual survival period, the party claiming breach must *file suit* within the specified time period. Buyers did not.

Buyers then filed this appeal. But in their opening brief (the "Opening Brief," or "Op. Br."), Buyers expose their claims as meritless and advance arguments that contradict themselves. For the reasons below, the Court should affirm the Superior Court's dismissal of Buyers' Complaint with prejudice.

SUMMARY OF ARGUMENT

1. ***Denied***. The Superior Court correctly held that the "Buyers waived [their] fraudulent inducement claims in Section 4(a) of the Letter Agreement." Opinion at 12. In Section 4(a) of the Letter Agreement, titled "Indemnification," Buyers agreed that "no claim with respect to [the Governmental Proceedings] shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the [Sellers]." A804. The Superior Court held, and Buyers do not contest, that "with respect to," is interpreted broadly and that the pleading overlap between Buyers' fraud allegations and the Governmental Proceedings supports a finding that the fraud claims are with respect to the Governmental Proceedings. Buyers further admit that the Waiver Provision must preclude *certain* fraud claims and limited Buyers' remedies for Governmental Proceedings to contractual indemnification claims under the Purchase Agreement. Buyers' Opening Brief contends that Buyers preserved their right to assert fraud as a basis to recover for claims *other than* Governmental Proceedings. Buyers' problem is that the Complaint expressly asserts fraud claims based on Governmental Proceedings. *See* A16 ¶ 3 ("Buyer brings this action to recover … indemnity for expenses … associated with the below described investigations by FDA and DOJ *that Buyer has incurred as a result of Sellers' fraud.*"); *see also* A63 ¶ 175; A66 ¶ (b); A917 ¶ 16. Buyers' Complaint thus asserted exactly the type of fraud allegations that they waived in the Letter Agreement.

2. ***Denied.*** The Superior Court correctly construed the Waiver Provision in Section 4(a) in the context of the Letter Agreement as a whole. The phrase "Losses attributable to one or more of the Governmental Proceedings," is not a limiting phrase. It simply describes for what Buyers could be indemnified. The broad Waiver Provision appears in the final sentence of Section 4(a), which clarifies that "no claim *with respect to* [the Governmental Proceedings] shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." A804 (emphasis added). Buyers' fraudulent inducement claims were "with respect to" the Government Proceedings. Moreover, Buyers' Complaint sought indemnification "as a result of Sellers' fraud," A16 ¶ 3; *see also* A63 ¶ 175; A66 ¶ (b); A917 ¶ 16. Such fraud claims are waived by Section 4(a).

3. ***Denied.*** Buyers cannot argue ambiguity for the first time on appeal. The argument was not raised below and is waived. The trial court also was not required to construe the Letter Agreement in the light most favorable to Buyers. This argument was also raised for the first time on appeal and was waived. In any event, Section 7(g) of the Letter Agreement provides that "This Agreement shall be interpreted in accordance with the plain meaning of its terms *and not strictly for or against any Party.*" A806 (emphasis added).

4. ***Denied***. The Superior Court correctly held that "Buyers did not bring their indemnity claim within the applicable survival period," and were on "inquiry

notice of the alleged breach well within the limitations period." Opinion at 15. Therefore, the "indemnity claims are untimely," and were properly dismissed. *Id.* Buyers concede that the survival period in Section 12.1(a)(iii) governs the timeliness of their indemnification claim for breach of Health Care Representations. Therefore, Buyers were required to file their indemnification claim by November 15, 2022—sixty months after closing. Tolling cannot extend the contractual survival period under a fraudulent concealment theory and notice alone cannot preserve the claim.

5. ***Denied***. The Superior Court correctly dismissed Buyers' indemnification claim as time-barred and correctly rejected Buyers' tolling argument under well-accepted precedent. First, Buyers failed to allege the facts underlying a fraudulent concealment claim with any particularity. Second, Buyers mischaracterize the Superior Court's Opinion. Third, Buyers were on inquiry notice—if not actual notice—of potential claims in December 2018 when they received the FDA's Form 483, and again when Buyers negotiated the Letter Agreement in July 2020. Last, the sixty-month limitations period for Health Care Representations began at Closing, not July 2020, and expired in September 2022.

STATEMENT OF FACTS

A. The Target Companies

Appellees Gideon and Mendy Schurder founded the Target Companies, which source and distribute active pharmaceutical ingredients from various manufacturers and suppliers around the world. B79 at 3; Opinion at 2; A15 ¶ 1.

In the mid-2010s, Gideon and Mendy sought to further grow the Target Companies, including by improving the compliance and quality control functions in their U.S. operations and appointing a new leadership team. B79. To that end, Gideon and Mendy began marketing the Target Companies to private equity firms with experience and resources in the compliance sector. *Id.* Gideon and Mendy engaged in negotiations with New Harbor Capital, a Chicago-based private equity firm ("New Harbor"). New Harbor engaged in significant due diligence before moving forward with purchasing a majority interest in the Target Companies. A20 ¶ 17; Op. Br. at 8. Buyers identified no issues.

B. In September 2017, the Parties Enter into the Purchase Agreement

On September 19, 2017, Buyers and Sellers entered into the Purchase Agreement, by which Buyers acquired the Target Companies from Sellers. Opinion at 2; A19 ¶ 16. Specifically, Buyers purchased shares in the Target Companies from Sellers in exchange for $23.4 million in cash and a limited liability company interest in LGM Holdings, LLC valued at $6.6 million. A15 ¶ 1, A19 ¶ 16, A20 ¶ 20; A92-93; A108 § 2.1(a). Buyers also issued two unsecured $2.5 million promissory notes

to Gideon and IBS Pharma, Inc., which matured on November 15, 2023. A21 ¶ 21; A180-89; A191-200.[2] The relevant provisions of the Purchase Agreement are further summarized below.

On November 15, 2017, the transaction closed. Opinion at 3; A20 ¶ 18.

1. Sellers' Representations and Warranties

The Purchase Agreement included Sellers' representations and warranties in selling the Target Companies. Buyers' Complaint concerns Sellers' representations in Sections 4.20, 4.21, and 4.30 of the Purchase Agreement. Opinion at 3.

Specifically, Sellers represented in Section 4.20 that:

a) the "Target Companies and their facilities are in material compliance with and have not in the past seven (7) years violated in any manner any applicable Law" (A21 ¶ 23; A139 at § 4.20(a)); and

b) the "Target Companies conduct, and for the past seven (7) years have conducted, their export and re-export transactions in all material respects in accordance with all applicable import/export controls in countries in which the Target Companies conduct [] business" (A22 ¶ 25; A139 at § 4.20(b)).

[2] It was no coincidence that—although admitting to learning of the underlying facts more than three years prior—Buyers filed suit in September 2023, just before payment was due on two $2.5 million notes owed to Sellers, plus interest. Buyers have since improperly used this litigation as an excuse to refuse to pay the notes and other payment obligations to Sellers. *See, e.g.*, A66 (seeking offset).

Sellers represented in Section 4.21 that:

a) the "Target Companies are, and have been within five (5) years prior to the Closing Date, in material compliance with all Health Care Laws in all jurisdictions where the Target Companies operate, and none of the Target Companies engages in any activity that constitutes a knowing or material violation of the Health Care Laws" (A22 ¶ 26; A139 at § 4.21(a)); and

b) "[a]ll products now being purchased, distributed, or sold or services provided by the Target Companies and all products included in the inventory of the Target Companies comply, in all material respects, with all applicable legal requirements of all jurisdictions in which such products are now being acquired, distributed, sold, or such services are now being provided" (A23 ¶ 28; A139 at § 4.21(b)).

Finally, Sellers represented in Section 4.30 that:

a) "[t]here 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" (A24 ¶ 29; A139 at § 4.30).

To summarize: "Section 4.20 represents that the Target Companies were in material compliance with all applicable laws and had been for the last seven years; Section 4.21 is similar but specifically pertains to 'Health Care Laws' and

Section 4.30 represents that Sellers' representations and disclosures were complete and accurate." Opinion at 3 (footnotes omitted).

2. The Indemnification Provision

The Purchase Agreement also governs the parties' indemnification rights in the transaction. *Id.* Section 12.1(b)(ii) provides, in pertinent part, that Sellers shall

> 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, including in connection with any charges, complaints, actions, suits, proceedings, hearings, investigations, claims, demands, judgments, orders, decrees, stipulations, injunctions … resulting from, arising from or out of, or caused by … any breach or inaccuracy of any representation or warranty set forth in Article IV of this Agreement or in the Disclosure Schedule relating thereto delivered by them in connection herewith.

A25 ¶ 32; A165 at § 12.1(b)(ii).

To bring a claim for indemnification under the Purchase Agreement, the parties agreed to "give prompt written notice [] to the Indemnifying Person after the Indemnified Person first becomes aware of any event or other facts that has resulted or that might result in any Loss for which the Indemnified Person is entitled to any indemnification under [the Purchase] Agreement." A166 at § 12.3.

With respect to claims for indemnification, Section 12.1(a)(iii) provides in pertinent part:

> All of the representations and warranties that constitute Health Care Representations shall survive the Closing, and shall continue in full force and effect until … sixty (60) months thereafter, … after which period such

> representations and warranties shall terminate and have no further force or effect[.]

A164 at § 12.1(a)(iii).[3]

C. Governmental and Internal Investigations in 2018 through 2020

The Governmental Proceedings began in September 2018—less than one year after the acquisition closed—with the United States Food and Drug Administration's ("FDA") inspection of LGM's Kentucky facility in relation to "two shipments of the antiviral medication cidofovir received by LGM on July 30, 2018 and September 5, 2018." Opinion at 4; A27 ¶ 36; A28 ¶ 44. At the conclusion of its investigation, the FDA issued a Form 483 informing the Company of areas of concern found during the inspection. A28 ¶¶ 41, 44. The Form 483 listed eleven concerns, primarily relating to the improper labeling of APIs, quality control deficiencies, and inadequate internal controls. Opinion at 5; A28 ¶ 46; A202-11. Several Form 483 concerns related to alleged deficiencies concerning pre- and post-closing events and shipments. *See* B216; Opinion at 12 n.81 (Form 483 listing violation as far back as 2016) (citing A202-11 at 2, 4, 7-8). From this moment forward, Buyers were on actual notice of potential fraud and indemnity claims against Sellers relating to

[3] Section 12.1(a)(v) provides that "[a]ll other representations and warranties of the Selling Parties under Article III and Article IV [including Sections 4.20 and 4.30] of this Agreement shall survive the Closing, and shall continue in full force and effect for a period of fifteen (15) months thereafter, after which period such representations and warranties shall terminate and have no further force or effect." A164 at § 12.1(a)(v).

representations and warranties concerning compliance with laws. Buyers chose not to pursue those claims at that time.

Instead, in response to the FDA's Form 483, LGM conducted an internal investigation, which allegedly uncovered Gideon's role in the mislabeling of products from July – September 2018, A259, and his purported attempts to deceive the FDA. Opinion at 5; A29-30 ¶¶ 47-54. On January 11, 2019, LGM disclosed the results of the internal investigation to the FDA, and LGM terminated Gideon from his position as commercial director. A30 ¶ 55; A31 ¶ 60; A798.

The Form 483 also attracted the attention of other government agencies, including the Department of Justice ("DOJ"), which initiated a criminal investigation in 2019. A31-32 ¶¶ 62-65; Opinion at 5. The DOJ investigation included two grand jury subpoenas: one in July 2019 on New Harbor, and another in January 2020 on LGM. A31 ¶ 63; A32 ¶ 65; A915.

Beginning in January 2020, a year after LGM disclosed its internal investigation conclusions to the FDA and terminated Gideon, and as a result of further investigations in relation to the DOJ's subpoenas, Buyers "purportedly uncovered a variety of pre-closing misconduct by Gideon and Mendy." Opinion at 5; A32 ¶¶ 65-69. By no later than July 2020, Buyers discovered that Sellers allegedly unlawfully:

> (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.

A33 ¶ 71; Opinion at 5. Not surprisingly, these allegations track the same observations identified by the Form 483. *See, e.g.*, A203 ("Since June 2016 your firm has received two shipments of Cidofovir incorrectly labeled under the name Tranexamic Acid"). All or nearly all of this alleged misconduct spanned the period pre- and post-Closing period. *See id.* (observing transactions from 2015 through 2018). Thus, there was "no clean break" between the issues identified in Governmental Proceedings and the issues purportedly identified by Buyers' investigation. Buyers concluded that "Sellers' representations and warranties set forth in Section 4.20, 4.21, and 4.30 of the Purchase Agreement were false." A32 ¶ 70.

D. The July 2020 Letter Agreement

Buyers admit, as they must, that even after the Company's internal investigation, "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." Op. Br. at 13. Even after allegedly learning the extent of Gideon and Mendy's purported misconduct, the parties negotiated the terms of Mendy's departure from

his position as an officer, but LGM continued its relationship with Mendy and retained him as a consultant. A52 ¶ 131; Opinion at 6; B80.

In July 2020, LGM Holdings, LGM Pharma, LLC, IBS, Gideon, and Mendy entered into the Letter Agreement. Opinion at 6. Its purpose was "to set forth certain mutual understandings and agreements in relation to the relative rights and obligations of the parties in the Purchase Agreement and related transaction documents in respect of the Governmental Proceedings and ITA Proceeding."[4] *Id.* The Letter Agreement also confirmed that Gideon and Mendy's indemnification in connection with the expenses the incurred in the Governmental Proceedings was capped at $250,000 per indemnitee. A800 at § 2.

The Letter Agreement provided Buyers with substantial consideration, including cash payments, in exchange for, among other things, Buyers' promise not to pursue fraud claims against Sellers with respect to Governmental Proceedings. B53-54. For example, the Sellers agreed to "bear fifty percent (50%) of any settlement or compromise … up to an aggregate amount of One Million Two

[4] The Letter Agreement defined "Governmental Proceedings" to mean a subpoena from the US Department of Justice which LGM received on January 17, 2020, the FDA issued Form 483, the State Board of Pharmacy of the State of Alabama enforcement proceedings against LGM, and any related government actions. A799 at Recitals; Opinion at 6.

Hundred Fifty Thousand Dollars ($1,250,000)" regarding an audit by the Israeli Tax Authority. A803 at § 3(d); B54; B81.

Section 4(a) of the Letter Agreement expressly and significantly limited Buyers' ability to assert fraud claims and eliminated claims for fraud, intentional misrepresentation, or willful misconduct with respect to broadly defined Governmental Proceedings. It states:

> In 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, LGM 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 of 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[.]

A803-04 at § 4(a). Buyers thus agreed that indemnity claims related to the Governmental Proceedings shall be brought "solely pursuant to

Section 12.1(b)(ii)(A) of the Purchase Agreement in respect of a breach of one or more Health Care Representations." *Id*. The letter "(y)" is defined to mean, "one or more of the Governmental Proceedings." *Id.* The letter "(z)" is defined to mean, "any matter set forth on Schedule 12.1(b) of the Purchase Agreement." *Id.* The Waiver Provision itself reads, "no claim with respect to (y) or (z) shall include a claim regarding fraud." *Id.*[5]

E. Buyers Enter into a Consent Decree

The Governmental Proceedings moved towards a resolution starting May 10, 2021, when the Civil Division of the DOJ, on behalf of the FDA, requested an injunction against LGM, not Sellers. A55 ¶ 135. On January 11, 2023, the DOJ Civil Division and the FDA filed a complaint for a permanent injunction against LGM and its senior officers, not Sellers (the "PI Complaint"). *Id.* ¶ 136. The PI Complaint focused on post-closing (and post-Letter Agreement) violations observed during inspections in March and April 2022 at the LGM Pharma Kentucky and Headquarters Facilities, long after Sellers had departed. B55. The PI Complaint explained that the 2022 inspections uncovered continued violations and that Buyers and their executives "remain[ed] unable or unwilling to comply with the [Federal Food, Drug, and Cosmetic Act]." *United States v. LGM Pharma LLC, et al.*,

[5] The Waiver Provision can also be construed as a covenant not to sue using fraud claims. Buyers breached that covenant.

No. 9:23-cv-80040-AMC, Dkt. 1 ¶ 20 (S.D. Fla. 2023). The DOJ filed the PI Complaint based on its belief that "unless restrained by th[e] Court, [Buyers, not Sellers] will continue to violate the Act." *Id.*

On January 12, 2023, LGM Pharma and its senior executives entered into a Consent Decree of Permanent Injunction with the DOJ Civil Division and the FDA. A55 ¶ 137. Sellers were not subject to that Consent Decree. B117.

F. <u>In November 2022, Buyers Seek Indemnification</u>

More than four years after the initiation of the Governmental Proceedings, on November 8, 2022, Buyers sent Sellers an indemnity notice stating, in part, "that all of the legal and investigatory fees were attributable to Sellers' breach of representations and warranties set forth in the Purchase Agreement." A56 ¶ 140; Opinion at 7; *see also* A917 at ¶ 16 (indemnity notice to Sellers asserting "that Buyer believes … that it has a claim for fraud, intentional misrepresentation, and/or willful misconduct against the Selling Parties…"). On December 1, 2022, Gideon and Mendy responded rejecting Buyers' indemnity notice. *Id.* They explained that Buyers appear to be "attempting to circumvent their undertakings (and the parties' clear mutual understanding) under the Letter Agreement, by asserting claims and allegations they specifically waived and/or agreed not to assert pursuant to the terms of the Letter Agreement (and which was the basis of the undersigned's agreement to compromises detailed therein and their further capital investments in the Company

at the request of the Buyer Parties)." A920 at 1. Buyers were obviously frustrated with how the Governmental Proceedings resulted in sanctions against them for their continued wrongdoing, and sought to point the finger at Sellers.

G. This Litigation and the Motion to Dismiss Ruling

Even though Buyers were on notice of potential wrongdoing since at least when the FDA issued its Form 483 in December 2018, Buyers waited until September 1, 2023 to file their Complaint. A13 (Dkt. 1); Opinion at 7. Therein, Buyers asserted three claims of fraudulent inducement (Counts I, II, and III), one claim for indemnification (Count IV), and one claim for declaratory judgment (Count V). *See* A57-65 ¶¶ 143-89. Buyers' fraudulent inducement claims rest on the allegation that Sellers' representations in Sections 4.20, 4.21, and 4.30 of the Purchase Agreement were false and that "had [Buyers] known that the representations made in [those sections of the Purchase Agreement] were false, Buyers would not have purchased the Target Companies." A58 ¶ 152; A61 ¶ 163; A62 ¶ 172. In their indemnification claim, Buyers seek indemnification for losses incurred as a result of the "government investigations," and maintain that such "legal and investigatory fees" incurred in relation with the Governmental Proceedings were "attributable to Sellers' breach of representations and warranties set forth in the Purchase Agreement." A56 ¶¶ 138-40, A64 ¶ 177. Thus, Buyers' fraud and indemnity claims were inextricably intertwined with each other. Both relied upon

governmental investigations of pre- and post-Closing allegations of misconduct over time by Sellers (and Buyers) as the predicate for the fraudulent inducement and indemnity claims. Importantly, Buyers' Complaint never segregated any claims related to Governmental Proceedings from claims *unrelated* to Governmental Proceedings. There simply was no clear line between Buyers' fraudulent inducement claims and the Governmental Proceedings. Opinion at 12.

The IBS Sellers and Gideon separately moved to dismiss the Complaint (the "Motions"). The parties fully briefed the Motions, and the Superior Court heard argument on April 1, 2024. Opinion at 7-8; B208-70. In response to the Motions, Buyers withdrew their claim for declaratory judgment. Opinion at 10; A947. On July 10, 2024, the trial court issued its ruling and granted the Motions dismissing all the remaining claims with prejudice. Opinion at 2.

In granting the Motions, the trial court held that (1) Buyers waived their fraud claims in the Letter Agreement, and (2) Buyers' indemnity claim was untimely. *Id.* at 10, 12. This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT BUYERS WAIVED THEIR FRAUDULENT INDUCEMENT CLAIMS IN THE LETTER AGREEMENT

A. Question Presented

Did the Superior Court correctly hold that the Buyers' fraudulent inducement claims are waived by Section 4(a) of the Letter Agreement? The IBS Appellees raised this issue below (B59-61; B79-84; B219-22) and the trial court considered it (Opinion at 5-6).

B. Scope of Review

This Court reviews "questions of contract interpretation *de novo*." *GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The Court also "reviews *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6)." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–68 (Del. 2006).

C. Merits of Argument

The Superior Court correctly held that the Waiver Provision bars Buyers' fraudulent inducement claims. The analysis is simple. In Section 4(a) of the Letter Agreement, Buyers agreed that "[f]or the avoidance of doubt … no claim with respect to [the Governmental Proceedings] shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." A804. Despite this prohibition, Buyers filed the Complaint asserting fraudulent inducement claims that seek "indemnity for expenses of up to $6 million associated with the

below described investigations by FDA and DOJ that Buyer[s] ha[ve] incurred *as a result of Sellers' fraud*." A16 ¶ 3 (emphasis added). The Complaint further alleges that the conduct supporting the fraud claims is what led Buyers to incur "significant legal and investigatory fees." A64 ¶ 177. Indeed, the Complaint alleged a pattern of wrongdoing before and after Closing that Buyers incurred expenses as a result of Governmental Proceedings because of Sellers' alleged fraud. A16-17 ¶¶ 3-5; A42 ¶ 139; A915-17. Buyers' fraudulent inducement claims are, by definition, "with respect to" the Governmental Proceedings, and waived. Opinion at 10-12.[6]

Buyers' contrary arguments and attempts to disavow the plain language of the Waiver Provision and their own allegations fail. The Buyers (1) argue that the Superior Court's reading of the Waiver Provision is incorrect because the Purchase Agreement allowed fraud claims (Op. Br. at 29); (2) attempt to narrow the scope of the Waiver Provision by claiming that it bars claims only with respect to "Losses attributable" to the Governmental Proceedings (*id.* at 31); (3) claim they advanced a reasonable contrary construction of the Waiver Provision, thus giving rise to ambiguity (*id.* at 35); and (4) argue that, in any event, their fraud claims are

[6] In the Opinion, the Superior Court explained that the phrase "with respect to" should be construed broadly consistent with Delaware precedent. Opinion at 10. Buyers did not contest that conclusion in opposing the Motions, *id.*, and do not dispute that construction here.

completely unrelated to the Governmental Proceedings (*id.* at 36). None of Buyers' arguments have merit.

1. The Superior Court Correctly Rejected Buyers' Attempt to Change the Terms of the Letter Agreement

a. The Letter Agreement Explicitly Modified the Purchase Agreement

Buyers argue that the Court erred because the Purchase Agreement originally allowed, and did not cap, "any claims relating to fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." Op. Br. at 6, 29-30, 33 (quoting A86 at § 12.2(a)) (emphasis added). Buyers then argue that, in the Letter Agreement, the parties' agreement that "no claim with respect to [the Governmental Proceedings] shall include a claim for fraud, intentional misrepresentation, or willful misconduct of the Selling Parties," was not a waiver of Buyers' right to bring fraud claims. Buyers' argument is unavailing.

The Letter Agreement modified the Purchase Agreement by narrowing the scope of fraud claims Buyers could bring. Section 4(a) limited Buyers' remedies for Governmental Proceedings to indemnification claims and Buyers agreed not to bring fraud claims with respect to Governmental Proceedings. Indeed, Section 4 of the Letter Agreement starts with the phrase "[n]otwithstanding anything to the contrary set forth in the Purchase Agreement (including, without limitation, Article XII of the Purchase Agreement)." A803 at § 4. This confirms that Section 4 modifies the

Purchase Agreement to preclude Buyers from including any fraud claim with respect to any Governmental Proceeding.[7] *See In re Est. of Crist*, 863 A.2d 255, 258 (Del. Ch. 2004) ("The use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."), *aff'd*, 879 A.2d 602 (Del. 2005). Buyers' reading of the Waiver Provision would render meaningless the parties' deliberate waiver and prohibition on fraud claims. *See Young v. Zurich Am. Ins. Co.*, 2015 WL 3508105, at *1 n.7 (Del. Super. Ct. June 3, 2015) (Delaware law disfavors interpretations that would "render any provision of the contract illusory or meaningless").

Buyers' proposed construction would re-write the Waiver Provision as follows (underscored language added): "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, no claim <u>in respect of Losses attributable</u> to (y) or (z) above shall include an <u>indemnification</u> claim regarding fraud, intentional misrepresentation or willful misconduct of the Selling Parties, <u>but Buyers otherwise preserve the right to bring fraudulent inducement claims unrelated to (y) or (z)</u>

[7] Presumably, under Section 4(a), Buyers could assert fraud claims relating to, for example, Fundamental Representations, as they do not relate to Governmental Proceedings.

above." That is not what the Waiver Provision states and Buyers' construction is improper.

b. The Parties Deliberately Excluded the Phrase "Losses Attributable to" From the Waiver Provision

Buyers ask the Court to ignore the parties' deliberate choice of words and add the phrase "Losses attributable to [the Governmental Proceedings]" to the last sentence of Section 4(a). Op. Br. at 31. By this construction, Buyers purport to narrow the Waiver Provision to limit the waiver to only indemnifiable losses suffered from the Governmental Proceedings, presumably as distinct from losses attributable to fraud, intentional misrepresentation, or willful misconduct. The Superior Court rejected Buyers' attempt to read additional terms into the Waiver Provision. Opinion at 11 n.72. The trial court correctly called out Buyers' argument that the phrase "Losses attributable to" should be read into the Waiver Provision as "miscontru[ing] Section 4(a)." *Id.*

Buyers claim that contract interpretation principles support their position because other parts of Section 4(a) include this phrase and the phrase "For the avoidance of doubt" at the beginning of the last sentence of Section (4)(a) indicates that they intended to include the "Losses attributable to" language in that sentence as well. *Id*. at 6, 31-33. As an initial matter, Buyers did not make this argument about "For the avoidance of doubt" to the Superior Court, the court did not have the chance to consider it, and the argument is waived. *See Cahall v. Thomas*, 906 A.2d

24, 27 n.12 (Del. 2006) ("[B]ecause this alternative argument was not fairly presented to the trial court, it has been waived.").

More significantly, however, "[c]ontract interpretation that adds a limitation not found in the plain language of the contract is untenable." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997). The fact that the parties used the phrase "Losses attributable to" elsewhere in Section 4 of the Letter Agreement, if anything, is strong evidence that the parties knew how to include it where it was intended, but *purposefully excluded* it from the Waiver Provision. Adding this language to the Waiver Provision despite not appearing in the plain language of the contract goes against basic principles of contract interpretation.

Buyers attempt to support their argument by pointing out that the Waiver Provision appears under a heading titled "Indemnification." Op. Br. at 31. The heading, however, makes sense. It limits indemnification remedies under the Purchase Agreement and excludes fraud claims relating to Governmental Proceedings. Indeed, in the Purchase Agreement, the same provisions Buyers point to showing that fraud claims were allowed along with indemnification claims appeared under the title "Indemnification." *See* A164-66 at § 12.1.

c. Buyers Fail to Set Forth a Reasonable Construction of the Waiver Provision

Most importantly, Buyers' proposed reading of the Waiver Provision is internally inconsistent and would render the provision meaningless. On one hand,

Buyers argue that Section 4(a) should be construed as barring only Buyers' recovery of "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" and that Buyers could only recover such losses through an indemnification claim. Op. Br. at 2. But a claim for making false statements to the government is not a fraud claim that Buyers could have brought—or for that matter—waived. Any such claims belong to the government, or are post-Closing claims. Buyers even admit this. Op. Br. at 2. It would be impossible for allegedly false statements to the government made in 2018 or later to be the basis for fraudulently inducing Buyers to close a transaction in 2017.

On the other hand, Buyers argue that the Waiver Provision is meant 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 not through a "separate action for fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." *Id.* at 31. Of course, this is not what the Waiver Provision says and such construction fails to explain what the parties would gain from barring recovery of indemnifiable losses through fraud claims (if such thing is possible), but allowing the recovery of fraud-related damages through the same. Buyers insert this

language because they believe that they incurred "losses *unrelated* to the Governmental Proceedings" that are outside the scope of the Waiver Provision. *Id.* But, as explained below, there are no such allegations in the Complaint about any losses that are unrelated to the Governmental Proceedings. Buyers' Complaint never alleges this version of a fraud claim and Buyers cannot amend their Complaint on appeal. *See* A15-67; *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 812 n.13 (Del. 2016) (noting "an appellant cannot present an argument for the first time on appeal" while affirming denial of a motion to amend where plaintiffs' "claims and their basis have been a bit of a moving target"); 35A C.J.S. Fed. Civ. Proc. § 397 *Motion to Amend, Generally* ("Parties cannot amend their complaints through briefing or oral advocacy. Thus, a complaint may not be amended by the briefs in opposition to a motion to dismiss, and it cannot be amended by the briefs on appeal.") (footnote omitted) (citing *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 347 (7th Cir. 2012)).

Finally, Buyers already have a contract remedy for a breach of health care representations or warranty in Purchase Agreement Sections 4.20, 4.21, and 4.30. Those include representations that all pre-closing statements to government regulators were accurate. If Sellers breach those representations, Buyers have a remedy under the Purchase Agreement (if timely the claim is timely, it was not, see *infra* at § II). But the point of the Letter Agreement was to limit the remedy to

indemnification with a $6 million cap—not to allow fraud claims for the same alleged misconduct. To put it simply, Buyers' interpretation renders the Wavier Provision meaningless. Delaware law strongly disfavors such interpretation. *Young*, 2015 WL 3508105, at *1 n.7. Buyers have failed to set forth a consistent—let alone reasonable—interpretation of the Waiver Provision and, as explained below, also undermine the basis for their indemnification claim in the process. *See infra* § II.

d. Buyers' Ambiguity Arguments Are Waived

Buyers also argue that the parties' competing interpretations of Section 4(a) create ambiguity precluding dismissal. Op. Br. at 35. This argument regarding ambiguity was never raised below and is waived. *See Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668, 676 n.18 (Del. 2020); *see also* Del. Supr. Ct. R. 8. In any event, as explained above, Buyers do not set forth a reasonable alternative interpretation of the Waiver Provision that would render the contractual provision ambiguous. *See Markow v. Synageva Biopharma Corp.*, 2016 WL 1613419, at *5 (Del. Super. Ct. Mar. 3, 2016).

Nor was the trial court required to construe *the Letter Agreement* in the light most favorable to Buyers. *See* Op. Br. at 35. This argument was also raised for the first time on appeal and was waived. *See Cahall*, 906 A.2d at 27 n.12. Although Delaware courts review *a complaint* on a motion to dismiss in the light most favorable to the non-moving party, *see Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156,

1160 (Del. 2010), the *Letter Agreement* is not construed in favor of either party. Section 7(g) of the Letter Agreement provides: "This Agreement shall be interpreted in accordance with the plain meaning of its terms *and not strictly for or against any Party.*" A806.

2. Buyers' Fraud Claims Are Closely Related to the Governmental Proceedings

The Superior Court squarely rejected Buyers' argument that their fraud claims are "'unrelated' to the Governmental Proceedings." Opinion at 12. The trial court recognized the Governmental Proceedings were part of the "alleged pattern of wrongdoing" that also included the "misdeeds" underlying Buyers' fraud allegations. *Id.* Buyers find themselves in a conundrum factually and legally.

Factually, the FDA and DOJ started getting involved with LGM beginning in September 2018 when they identified a series of alleged misconduct occurring pre- and post-Closing. A203-210. Buyers cannot point to any alleged misconduct identified in the Form 483, or the DOJ subpoena, and claim that the alleged misconduct is "unrelated to the Governmental Proceedings." Opinion at 11; Op. Br. at 31, 35. Stated differently, to seek relief for fraud "unrelated to the Governmental Proceedings," Buyers would have to allege fraud relating to conduct *that appears nowhere in the Form 483 or the DOJ subpoena*. But there are no such separate allegations.

Buyers focus intently on mislabeled shipments of cidofovir as the primary alleged misconduct. Op. Br. at 10-13. That alleged misconduct appears throughout the Form 483. A201-212. And it was "[a]s a result of the Form 483" that "the Department of Justice [] Criminal Division contacted LGM seeking documents and information about the company's practices." Op. Br. at 13. Buyers thus cannot that mislabeled cidofovir that is "unrelated to the Governmental Proceedings." In fact, the core of the three fraudulent inducement counts (A57 ¶ 146; A59 ¶ 156; A61 ¶ 166) is that mislabeled cidofovir shipments resulted in fraudulent breaches of Sections 4.20, 4,21 and 4.30 regarding compliance with applicable law, compliance with Health Care Laws, and no undisclosed material facts. A57-63. Those fraudulent inducement counts therefore expressly plead conduct that relates to the Governmental Proceedings, and is waived.

The following chart summarizes the allegations in the Complaint and matches the corresponding underlying facts from the Governmental Proceedings:

No.	**Complaint Allegation**	**Governmental Proceeding Factual Basis**
1.	Sellers "shipped mislabeled API" and "relabeled" products. ¶¶ 71, 78-79.	API "shipments were incorrectly labeled" and "were relabeled." A202.
		LGM received "two shipments of Cidofovir incorrectly labeled under the name Tranexamic Acid" since June 2016. A203; A208.
		LGM gave "instructions to proceed further (e.g. relabeling of Tranexamic acid to Cidofovir)." A204.

No.	Complaint Allegation	Governmental Proceeding Factual Basis
		LGM's "quality unit was not informed of the relabeling operation." A205.
		LGM "changed the product label of the API from Tranexamic Acid to Cidofovir, and then further distributed the product." A206.
		FDA inspection, yielded a "series of emails and documents surrounding the mislabeled Cidofovir shipments in July and September of 2018." A915 ¶ 5.
		Review of documents (which was a direct result of the LGM subpoena which was a direct result of Form 483), included documents regarding "shipping API to the United States with the wrong product name or manufacturer listed." A916 ¶ 9.
2.	Sellers "returned API to manufacturers with an incorrect product name" and "falsely labeled" packages. ¶¶ 71, 87.	LGM "gave instructions … to relabel the returned product … with the original label, to remove all quarantine stickers and tags, and to redistribute the returned shipment." A205.
		The review of documents included documents regarding shipping products "under false names." A916 ¶ 11.
3.	Sellers "registered manufacturers with the FDA without their knowledge or consent." ¶ 71. This was because "[f]oreign pharmaceutical manufacturers that send API into the U.S. must register with the FDA." ¶ 91.	As a "direct result" of the Form 483, the DOJ issued LGM a subpoena requesting "information about all purchases and receipt of API from any foreign supplier, and sale of distribution of that API to any U.S. customer." A915 ¶ 7.
		The review of documents included documents regarding "registering manufacturers with the FDA without their consent." A916 ¶ 9.

No.	Complaint Allegation	Governmental Proceeding Factual Basis
4.	Sellers "registered intermediaries rather than the manufacturers." ¶ 71.	The review of documents included documents regarding "registering companies with the FDA as manufacturers when they were not." A916 ¶ 9.
5.	Sellers "failed to declare the full value of API shipments." ¶ 71. This includes "shipping invoice falsely declar[ing] the value of the shipment." ¶ 118.	The review of documents included documents regarding the shipping "of products without properly declaring their contents and/or value." A916 ¶ 11.
6.	Sellers "purchased API that the manufacturers specifically instructed suppliers should not be sold in the U.S." ¶ 71. This includes "falsely represent[ing]" where the products were to be shipped. ¶ 127.	"API suppliers are not adequately qualified." A202.
		Out of 388 companies on your firm's AVL (Approved Vendor List) only 144 are in 'approved' status, 93 are in 'initial approval' status and 151 have no designated status." A202-03.
		LGM "received two shipments of the API Cidofovir from a manufacturer that has been on FDA Import Alert number 66-40 since November 2015." A203.
		LGM "received an imported shipment" from a "manufacturer of the Thyroid Powder API has been on FDA Import Alert number 66-40 … through a trading company that is not listed as an approved vendor… nor have they ever been evaluated." A203.
		The review of documents included documents regarding shipping products "to various intermediary designations to avoid detection by authorities." A916 ¶ 11.

Because the fraud allegations in the Complaint track the pattern of alleged wrongdoing in the Governmental Proceedings, the Superior Court correctly found

"no clean break between the actions that led to the Governmental Proceedings and the actions that allegedly made the Purchase Agreement fraudulent." Opinion at 12. The Superior Court even noted that Buyers describe their indemnity and fraud claims as arising from the same conduct, i.e., "seek[ing] indemnity for expenses … associated with the below described investigations … that Buyer[s] ha[ve] incurred *as a result of Sellers' fraud*." *Id.* at 11; A16. The Complaint "reiterates that the conduct that supports the fraud claims is also what led to Buyers' 'significant legal and investigatory fees.'" *Id.* at 11-12. Buyers are stuck with their Complaint as written.

Much of Buyers' Opening Brief focuses on post-Closing alleged wrongdoing, such as Gideon's responses to the FDA in 2018. Op. Br. at 22. Buyers thus try to argue that "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.* Of course, post-Closing statements by Sellers could not be the basis for pre-Closing fraud.

Buyers conveniently forget that all their fraud counts are predicated on representations in the Purchase Agreement that were supposed to be "correct and complete as of the date of this Agreement and as of the Closing Date[.]" A118. Sections 4.20, 4.21 and 4.30 simply cannot provide a basis for an alleged *post*-Closing fraud claim (if such a thing exists). And there are no allegations in Buyers'

Complaint that there was any pre-Closing alleged wrongdoing that was distinct from the Governmental Proceedings. Rather, Buyers allege that they were damaged by incurring expenses "associated with the below described investigations by FDA and DOJ that Buyer has incurred as a result of Sellers' fraud." A16 ¶ 3.

Buyers wish they could re-write their Complaint to plead a separate "alleged pattern of wrongdoing." Op. Br. at 38. But it is too late. Parties cannot amend their Complaint through their brief, whether on a motion to dismiss or on appeal. *See Parseghian ex rel. Gregory J. Parseghian Revocable Tr. v. Frequency Therapeutics, Inc.*, 2022 WL 2208899, at *9 (Del. Ch. June 21, 2022) ("A Court must examine what has been alleged in the pleadings, not what a plaintiff believes has been alleged." (quoting *Gabelli & Co., Inc. v. Liggett Grp., Inc.*, 1983 WL 18015, at *3 (Del. Ch. Mar. 2, 1983), *aff'd*, 479 A.2d 276 (Del. 1984))); *id.* at *8 n.75 ("Plaintiffs cannot amend their Complaint through their brief." (citing *Cal. Pub. Emps.' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *12 (Del. Ch. Dec. 18, 2002))). *See also Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 347 (7th Cir. 2012); *Stinson v. Maye*, 824 Fed. Appx. 849, 856 (11th Cir. 2020) (same); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1022 (8th Cir. 2012) (same).

The Superior Court correctly held that there is "no clean break" between the Governmental Proceedings and the alleged conduct underlying Buyers' fraud

claims, and this overlap is sufficient to find that the fraud claims are "with respect to" the Governmental Proceedings. Opinion at 12.

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT BUYERS' INDEMNIFICATION CLAIM IS NOT TOLLED UNDER THE DOCTRINE OF FRAUDULENT CONCEALMENT

A. Question Presented

Did the trial court correctly hold that Buyers' indemnification claim is time-barred and not tolled under the fraudulent concealment doctrine? The IBS Appellees raised these issues below (B64-65; B89-92; B166-71; B233-36), and the trial court considered them (Opinion at 12-15).

B. Scope of Review

"Whether [a] complaint is barred by the … statute of limitations is a question of law and is reviewed *de novo*." *Parker v. Gadow*, 893 A.2d 964, 966 (Del. 2006).

C. Merits of Argument

The Superior Court correctly held that Buyers' indemnification claim is time-barred by the survival clause for Health Care Representations and that the Buyers were at least on inquiry notice of their indemnification claims against Sellers since entering the Letter Agreement, well "within the limitations period." Buyers argue that the trial court's decision should be reversed because their Complaint adequately pled facts to support tolling under a fraudulent concealment theory. Buyers' arguments fail to provide a basis for reversal.

Buyers' indemnification claim seeks to recover losses with respect to an alleged breach of one or more Health Care Representations. A64 ¶ 177; Op. Br. at 28. Under the contractual survival clause in the Purchase Agreement for breaches

of Health Care Representations, such claims must be brought within "sixty (60) months" from Closing. A164 at § 12.1(a)(iii)).[8] This gave Buyers five years after closing to uncover such claims. After those sixty months, the "representations and warranties" shall terminate and have no further effect." *Id.*; *see also id.* at § 12.1(b)(ii) (requiring that indemnity claims against the Sellers be made "before the end of [the applicable] survival period"); *see also* 10 *Del. C.* § 8106(c) (in an "action based on a written contract" the action "may be brought within a period specified in such written contract" not after). The transaction closed on November 15, 2017. Opinion at 13. Therefore, the Health Care Representations expired on November 15, 2022. Buyers failed to bring their lawsuit until September 1, 2023, almost a year later. *Id.*

At the motion to dismiss stage, the Superior Court rejected several theories Buyers advanced to that argue their indemnification claim was timely,[9] including a fraudulent concealment theory. In rejecting Buyers' argument, the Superior Court held that Buyers were at least on inquiry notice well within the limitations period.

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[8] To the extent Buyers seek indemnification for breaches of Sections 4.20 and 4.30, which are not defined as Health Care Representations, those are subject to a fifteen-month survival period. *See* note 3, *supra*. Indemnification for those claims has been time barred since February 2019.

[9] *See* Opinion at 12-14; *see also* B166-68. Buyers concede that the survival period governs the calculation of their time to bring an indemnification claim and that they were required to bring suit, and not just give notice, during the survival period. Any argument to the contrary is now waived.

Opinion at 15. Specifically, the trial court stated that the Letter Agreement, "which reveals Buyers' *actual knowledge* of the Governmental Proceedings," is dated "more than three years before Buyers filed this suit." *Id.* (emphasis added). Indeed, Buyers knew of potential indemnity claims as early as January 11, 2019, when they responded to the FDA Form 483 (A257-375) and terminated Gideon for alleged misconduct (A798). Buyers offer no legitimate excuse for their delay.

Citing no authority for the proposition that the tolling exceptions even apply to bargained-for survival periods fixed at Closing (rather than as of discovery),[10] Buyers disagree with the trial court's reliance on *Pilot Air Freight, LLC v. Manna Freight System, Inc.*, 2020 WL 5588671 (Del. Ch. Sept. 18, 2020) ("*Pilot Air*"). Op. Br. at 40-42; Opinion at 14-15. The only difference Buyers identify between this case and *Pilot Air* is that plaintiffs in *Pilot Air* were on inquiry notice "almost immediately after closing." Op. Br. at 41-42. Here, Buyers were on actual notice within eleven months after Closing in December 2018 based on the Form 483. Buyers' argument is unavailing.

As an initial matter, Buyers seem to confuse actual and inquiry knowledge. In *Pilot Air*, the court rejected plaintiff's fraudulent concealment argument on factual grounds when, "even after affording it all reasonable inferences, … [plaintiff] was

[10] *See* Opinion at 15 n.99 (noting the lack of legal support and rejecting Buyers' argument on a factual, not legal, basis).

indisputably on inquiry notice of the alleged breach well within the limitations period." 2020 WL 5588671, at *15. Just as the plaintiff in *Pilot Air*, Buyers do not allege any of the particularity required by Rule 9(b) that "Sellers stashed away unflattering documents in a forgotten filing cabinet." *Id.* *15 n.158. Buyers' Opening Brief does not even try to argue that "[u]nder any reasonably conceivable set of circumstances susceptible of proof, if [Buyers] had exercised 'reasonable diligence,' it would have discovered its injury from these lost customers immediately after the Closing." *Id.* Indeed, there are no allegations in the Complaint that suggest that Sellers (and the IBS Appellees in particular) took any active steps to obstruct Buyers' internal investigation, or that the Buyers were in any way differently situated in 2020 so that discovery of the facts underlying their indemnification claim was impossible before 2020. *See id.* ("[I]nquiry notice does not require actual discovery of the reason for injury,' but instead 'exists when plaintiff becomes aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of injury."); *see also Snyder v. Butcher & Co.*, 1992 WL 240344, at *4 (Del. Super. Ct. Sept. 15, 1992) (noting that fraudulent concealment tolls limitations period only "until such time as the plaintiff, using reasonable diligence, could have discovered the existence of the cause of action").

Even if actual knowledge was required (it is not), Buyers had it. The FDA commenced Governmental Proceedings in September 2018, less than a year following Closing, which involved allegations of mislabeling pharmaceutical ingredients similar to Buyers' indemnification claim. A16 ¶ 4. The FDA's December 2018 Form 483 identified multiple pre-and post-Closing issues, including allegations regarding mislabeling of cidofovir as tranexamic acid. Buyers conducted an internal investigation and responded in a January 11, 2019 letter. A257. The same day, LGM terminated Gideon for alleged wrongdoing. A798. Buyers were on actual notice of potential indemnification claims for Heath Care Representations by January 2019 at the latest.

Then, in July 2020, the parties entered into the Letter Agreement, capping the indemnification recovery for Governmental Proceedings at $6 million. A798. Buyers admit that they had actual notice of potential indemnification claims by July 2020.

Thus, like *Pilot Air*, Buyers had actual knowledge with alarm bells ringing for more than four-and-a-half years before Buyers sued Sellers, but Buyers chose not to inquire further, or file suit. *See Pilot Air*, 2020 WL 5588671 at *15. Buyers waited until September 2023, seventy (70) months after Closing, to file the Complaint.[11]

[11] Given the clear holding in *Pilot Air*, Buyers appropriately abandoned their argument that mere notice within the survival period was sufficient to toll the limitations period. "In Delaware, by default: when parties have [changed] the statute

Buyers' laches argument is also new, and improper. In any event, laches applies in equity, *see Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160, 1194 (Del. Ch. 2022), and Buyers do not seek equitable relief—they seek fraud damages. Even if laches applies here (it does not), it should bar Buyers' untimely claim, not excuse it. Buyers waited more than four years after responding to the Form 483 to file their complaint.

Buyers also misrepresent the Superior Court's holding, claiming that it somehow "*conceded* that Buyer had raised a claim of fraudulent concealment." Op. Br. at 3-4 (emphasis added). The Superior Court conceded nothing. Nor did the trial court "acknowledg[e] that Buyer did not become aware of Sellers' wrongdoing until nearly three years after the sale." Op. Br. at 4. The Superior Court merely "note[d] that the Letter agreement, which reveals Buyers' actual knowledge, is dated July 23, 2020—more than three years before Buyers filed this suit." Opinion at 15. This is hardly the equivalent of a finding that Buyers raised a valid fraudulent concealment claim.

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of limitations by providing that representations and warranties survive only through a specified date, the party claiming breach must file suit within the specified time period. Providing notice within the specified time period is not enough." *Pilot Air*, 2020 WL 5588671, at *14 (citation omitted). Here, "nothing in the [Purchase Agreement] says that an indemnification *demand* (rather than filing suit) will toll the survival period." *Id.* at *13.

Rather, Buyers' Complaint and Opening Brief are devoid of any actual allegations of "affirmative act[s] of 'actual artifice' by the [Sellers] that either prevented the [Buyers] from gaining knowledge of material facts or led [them] away from the truth," which are required in order to support tolling on the basis of fraudulent concealment. *See Pilot Air*, 2020 WL 5588671 at *15. Further, Buyers' allegations of "willful concealment," Op. Br. at 43,[12] are only conclusory statements that cannot toll the survival period. *See Eni Hldgs., LLC v. KBR Grp. Hldgs., LLC*, 2013 WL 6186326, at *12 (Del. Ch. Nov. 27, 2013) (conclusory allegation that defendant's "concealment" caused plaintiff not to "discover all the facts giving rise to its claims … falls short of pleading specific facts needed to plead an act of fraudulent concealment that can toll the contractual limitations period") (citation omitted). There is no basis for tolling and Buyers' indemnity claim is untimely.

Lastly, the trial court recognized 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." Opinion at 15. The Superior Court is correct. Buyers agreed that "no claim regarding [Governmental Proceedings] shall include a claim regarding fraud." A804. Yet, Buyers' indemnity

[12] The Complaint merely alleges that "Sellers' false and misleading statements and business practices [were] willfully concealed from Buyer." A58 ¶ 150; A60 ¶ 161; A62 ¶ 170.

claim for losses related to the Governmental Proceedings "include[s] a claim regarding fraud," including to the extent they are attempting to rely on allegations that Sellers fraudulently concealed their business practices in order to toll the survival period. Further, Buyers admit that they are seeking "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*." Op. Br. at 37.

Thus, the trial court correctly concluded that Buyers also waived their fraudulent concealment arguments in the Letter Agreement.

CONCLUSION

For all the foregoing reasons, the Court should affirm the trial court's well-considered judgment dismissing the Complaint in its entirety with prejudice.

/s/ John M. Seaman
John M. Seaman (#3868)
Florentina D. Field (#7146)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000
seaman@abramsbayliss.com
field@abramsbayliss.com

Attorneys for Defendants Below/Appellees Mendy Schurder, Leah Chitrik and IBS Pharma, Inc.

Dated: October 21, 2024