EFiled: Oct 21 2024 04:32PM EDT
Filing ID 74807639
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.	)	No. 314, 2024 Court Below: Superior Court of the State of Delaware, C.A. No. N23C-09-011 EMD CCLD

APPELLEE GIDEON SCHURDER'S ANSWERING BRIEF

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Dated: October 21, 2024

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NATURE OF THE PROCEEDINGS[1]

This case comes before the Court on the dismissal of the Appellants' claims for fraudulent inducement and indemnification. Upon its review of the Complaint and attached exhibits, the Superior Court correctly determined that the Appellants had waived the fraudulent inducement claims, and the indemnification claim was time barred. The Court's Opinion is well supported under Delaware law.

Appellants LGM Holdings, LLC and LGM Subsidiary Holdings, LLC ("LGM") filed the instant action against various defendants including Gideon Schurder ("Gideon"). LGM asserted claims against Gideon and the other defendants for fraudulent inducement and indemnification. In its lawsuit, LGM sought to recoup the costs it incurred in responding to the Food and Drug Administration ("FDA") and the violations documented during the FDA's inspections of LGM's facilities. LGM also sought reimbursement for its costs incurred in dealing with the Department of Justice's ("DOJ") investigation (the "DOJ action") and resulting Complaint for Permanent Injunction (the "DOJ Complaint"). Contrary to LGM's characterization, the DOJ action did not result from Gideon's alleged

[1] Unless noted; the Superior Court's Opinion ("Opinion") defines capitalized terms; emphasis is added; and internal citations, footnotes, and quotations are omitted. Appellant's Opening Brief is cited as "OB [page]. Gideon's Answering Brief is cited as "AB [page]", and his Reply Brief is cited as "RB [page]."

misrepresentations related to the same actions which were flagged in the FDA investigation. A review of the DOJ Complaint instead establishes that LGM placed itself in the DOJ's crosshairs solely through its own mismanagement and inability and/or refusal to address and correct the continuing violations identified by the FDA in 2018 and again in 2022.

As relevant to this appeal, LGM acquired the profitable pharmaceutical businesses owned by the Schurders in November 2017. Those businesses, referred to as the Target Companies, sourced and distributed active pharmaceutical ingredients ("API") from manufacturers and suppliers around the world. In 2018 the FDA initiated an investigation which continued into April 2022. LGM's recalcitrance in addressing the FDA's concerns resulted in the DOJ's involvement to motivate LGM to get serious about dealing with its violations.

Faced with the ever-increasing costs of defending itself and the Schurders, LGM chose not to sue the Schurders for fraud or to demand indemnification as allowed under the parties' Purchase Agreement, but to instead negotiate a settlement with Gideon and the other defendants. As part of the settlement terms, as set out in the Confidential Letter Agreement (the "Letter Agreement"), Gideon agreed to take on the costs of his defense in the DOJ action and make a significant contribution to the settlement of a separate tax-related action involving business assets in Israel. In exchange, the parties agreed that LGM's

indemnification rights would be restricted, restrictions which included a $6,000,000 cap on LGM's indemnification for losses attributable to the Governmental Proceedings, including both the FDA inspections and the DOJ action. Most importantly to Gideon and the other defendants, the parties agreed that no claim with respect to the Governmental Proceedings "shall include" a claim regarding fraud, intentional misrepresentation, or willful misconduct on the part of the Schurders. The primary goal of the Letter Agreement was to preclude further litigation between these parties.

Despite the unambiguous terms of the Letter Agreement, LGM filed the instant action which included claims against Gideon for fraud, intentional misrepresentation, and willful misconduct. In response, Gideon filed a Motion to Dismiss based on the arguments that (1) LGM had waived its right to a fraud claim against the Schurders, and (2) LGM's indemnification claim was untimely and therefore barred under Delaware law.

In its Opinion dated July 10, 2024, the Superior Court granted Gideon's and the other Defendants' Motions to Dismiss (the "Motions") based on its finding that (1) LGM waived its right to bring a claim for fraud related to the Governmental Proceedings, and LGM's fraudulent inducement claims were related to the Governmental Proceedings; and (2) LGM's indemnification claim was not timely filed within the sixty-month survival period established in the parties' Purchase

Agreement. The Court also rejected LGM's theory that its fraudulent concealment theory tolled the survival limitations date such that the survival period did not begin to run until the July 23, 2020 signing of the Letter Agreement.

On appeal, LGM asserts first that the Superior Court erred in its reading and interpretation of the waiver clause of the Letter Agreement. For the first time on appeal, LGM argues that the waiver clause is ambiguous and should therefore be read in LGM's favor. LGM also contends that the trial court should have, but failed to, read the waiver clause in the context of the surrounding provisions. LGM further disputes the Superior Court's holding that, based on the allegations of the Complaint and the exhibits attached thereto, the fraudulent inducement claims relate to the Governmental Proceedings so as to trigger the waiver provision and require dismissal of those claims.

With regard to the indemnification claim, LGM does not contest the trial court's finding that the 60-month survival limitation applies to that claim. Instead, LGM contends that it sufficiently pled a claim for application of the fraudulent concealment doctrine to allow for the tolling of the survival limitation. And LGM argues that, as a result, the Superior Court erred in refusing to apply the fraudulent concealment doctrine to toll the survival limitation period to begin running on July 23, 2020, when the parties executed the Letter Agreement.

But well-established Delaware law supports the Superior Court's dismissal of the fraudulent inducement and the indemnification claims. For the reasons examined herein, the Superior Court's Opinion should therefore be affirmed.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court correctly determined, based on the pleadings and the attached exhibits, that LGM's fraudulent inducement claims were related to the Governmental Proceedings. Under the unambiguous terms of the parties' Letter Agreement, LGM agreed that no claim with respect to the Governmental Proceedings shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct.

Interpreting the contract as written, the Superior Court correctly held that LGM had waived its right to bring a fraud claim related to the Governmental Proceedings. The Superior Court did not make a finding with regard to LGM's contention that the waiver provision is ambiguous because LGM did not raise that argument below.

LGM's argument that reading the waiver provision "in context" would yield a different interpretation is meritless. The Letter Agreement and its waiver provision supersede the relevant provisions of the Purchase Agreement. And neither the provisions of the Letter Agreement nor Delaware law support LGM's contention that the Superior Court should read language into the waiver provision to yield the result desired by LGM.

II. Denied. Because the Letter Agreement supersedes the Purchase Agreement, the Superior Court was not required to determine whether the waiver

clause was contrary to the Purchase Agreement. Contrary to LGM's assertion, the Superior Court interpreted the unambiguous terms of the waiver clause as written. LGM failed to support its contention that, contrary to established Delaware precedent, the Superior Court was required to read the "Losses attributable" language into the waiver clause. The fact that said language was included in the other relevant Sections only confirms the conclusion that the drafters chose not to incorporate that same language in the waiver provision. The Superior Court did not err in rejecting LGM's unsupported contention that the "For the avoidance of doubt" language did not "expressly" tie back to the limited scope of indemnification which appears earlier in that Section.

III. Denied. LGM failed to raise the ambiguity argument below thereby waiving appellate review.

IV. Denied. The Superior Court correctly determined, based on the allegations of the Complaint and the attached exhibits, that LGM's fraudulent inducement claims are related to the Governmental Proceedings. As the Superior Court found, the undisputed "with respect to" phrase supports a broad reading of the waiver provision. The Superior Court further found that there was no clean break between the actions which led to the Governmental Proceedings and the actions which allegedly made the Purchase Agreement fraudulent. The alleged pattern of wrongdoing began before the closing and continued thereafter. Accordingly, the

Superior Court held that there was sufficient overlap that LGM's fraud claims remain claims "with respect to" the Governmental Proceedings.

V. Denied. LGM does not contest the Superior Court's finding that the sixty-month survival limitation applies to the indemnification claim. But LGM contends the survival limitation should have been tolled to begin running on the date the Letter Agreement was signed. First, LGM failed to plead the facts required to support the application of the fraudulent concealment doctrine. Assuming, however, that LGM could so plead, the Superior Court correctly found that LGM was on inquiry notice of the alleged breach well before the expiration of the survival limitation. There is no dispute that LGM was on notice of the alleged misrepresentations as early as 2018 when the FDA issued a Form 483 identifying many of the same violations which LGM relies on to support its fraudulent inducement claims. Based on well-established precedent, the Superior Court correctly determined that fraudulent concealment did not apply to toll the applicable survival limitation.

STATEMENT OF FACTS

A. In the beginning

Appellees Gideon Schurder,[2] Mendy Schurder ("Mendy"), Leah Chitrik, and IBS Pharma, Inc. (collectively "the Schurders") owned several pharmaceutical businesses; namely, LGM Pharma, LLC, Yes Pharma Israel (2008) Ltd., and LGM Pharma Ltd. (collectively "Target Companies"). A 20 at ¶ 16. The Target Companies were in the business of sourcing and distributing active pharmaceutical ingredients from various manufacturers and suppliers around the world. A15 at ¶ 1; Opinion at 2.

In order to grow their operation, Gideon and Mendy decided to offer their businesses to private equity firms for acquisition. B79. Eventually a Chicago-based private equity firm, New Harbor Capital Management LLC ("New Harbor") became involved. B279. New Harbor engaged in a thorough due diligence process before going forward with the acquisition. A20 at ¶ 17.

B. Initiating the business relationship

On September 19, 2017, New Harbor—acting through LGM Holdings, LLC and LGM Subsidiary Holdings, LLC—entered into an agreement with the Schurders for the acquisition of the Target Companies; i.e., the Equity Purchase Agreement ("Purchase Agreement"). Opinion at 2; A19 at ¶ 16.

[2] In order to avoid confusion, Gideon Schurder and Mendy Schurder are referred to as individuals by their first names.

Under the terms of the Purchase Agreement, LGM acquired shares in the Target Companies in exchange for $23.4 million in cash and a limited liability interest in LGM Holdings, LLC which was then valued at $6.6 million. A15 at ¶ 1; A19 at ¶ 16; A20 at ¶ 20; A92-93 at Recitals and A108 at § 2.1(a). LGM also agreed to issue two unsecured $2.5 million promissory notes (the "Promissory Notes"), one each to Gideon and to IBS Pharma, Inc. (IBS). A21 at ¶ 21. The Promissory Notes matured for payment on November 15, 2023. A21 at ¶ 21; A180-89; A191-200. LGM's acquisition of the Target Companies closed on November 15, 2017. Opinion at 3; A20 at ¶ 18.

The Purchase Agreement contained certain representations and warranties given by the Schurders, certain of which are at issue in this case:

- The Target Companies were in material compliance with and had not in the past seven (7) years violated any applicable law; (Section 4.20)
- For the past seven (7) years, the Target Companies had conducted export and re-export transactions in all material respects in accordance with all applicable controls in countries where LGM does business; (Section 4.20(b))
- The Target Companies were and had been in material compliance with all Health Care Laws within five (5) years prior to the closing date; (Section 4.21(a));

- All products purchased and, in the inventory, complied in all material respects with all applicable legal requirements of all jurisdictions where products were sold; (Section 4.21(b))
- There is no material fact specific to the Target Companies which has not been disclosed to LGM which has a Material Adverse Effect. (Section 4.30) B282.

The Purchase Agreement also provided for the parties' indemnification rights. A25 at ¶ 32; A165 at §12.1(b)(ii).

With regard to claims for indemnification for the Health Care Representations, the Purchase Agreement included a contractual statute of limitations in the form of a survival period in which LGM could bring an indemnification action. A164 at §2.1(a)(iii).

Gideon was retained as Commercial Director, and Mendy accepted the position of Chief Operating Officer. A 21 at ¶ 35.

C. The break-up

Approximately a year after LGM acquired the Target Companies, beginning in September and continuing through December of 2018, the Food and Drug Administration inspected LGM's Kentucky facility. Opinion at 4; A27 at ¶ 36; A 28 at ¶ 44. At the conclusion of the inspection process, the FDA issued a Form 483 listing 11 inspectional observations. A 28 at ¶¶ 41, 44. The observations were related

primarily to improper labeling of APIs, inadequate internal controls, medication shipments, and quality control deficiencies. Opinion at 5; A28 at ¶¶ 41, 44, 46; A202-11. The alleged violations identified both pre- and post-closing activities. Opinion at 12 n. 81; A202-11 at ¶¶ 2, 4, 7-8.

In response to the Form 483, LGM engaged outside counsel to conduct an internal investigation. A29 at ¶ 47. LGM's internal investigation, the results of which were provided to the FDA, focused primarily on Gideon's alleged misrepresentations. Opinion at 5; A29-30 at ¶¶ 47-54; A30 at ¶55. Shortly thereafter, LGM terminated Gideon. A30 at ¶ 55; A31 at ¶ 70; A798. LGM did not seek indemnification from Gideon or otherwise pursue a fraud claim against him. B285.

D. Litigation looms

In 2019, the Department of Justice initiated an investigation resulting primarily from LGM's ongoing failure to address or correct the violations identified in the 2018 Form 483 and repeated in the 2022 Forms 483. Opinion at 5; A31-32 at ¶¶ 62-63. In 2019 the DOJ issued a grand jury subpoena to New Harbor, majority investor in the Target Companies. A31 at ¶ 63; A32 at ¶ 65. And in July 2020, the DOJ issued a grand jury subpoena to LGM. *Id.* LGM acknowledges that by 2020 it was well aware of the extent of Gideon's and Mendy's alleged misconduct. Opinion at 5; A 53 at ¶ 131. And in 2020, LGM terminated Mendy as Chief Operating Officer. Opinion at 6; A 53 at ¶131.

E. The choice to settle—not litigate

Rather than seek indemnification or file suit against the Schurders, LGM opted to negotiate a settlement agreement; i.e., the Confidential Letter Agreement (Letter Agreement). Opinion at 6. The purpose of the Letter Agreement 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 Proceedings." *Id.* The Letter Agreement defined the "Governmental Proceedings" to include the January 17, 2020 DOJ subpoena to LGM, the FDA-issued Form 483, the State Boad of Pharmacy of the State of Alabama enforcement proceedings against LGM, and any related future government proceedings. A799 at Recitals; Opinion at 6.

The Letter Agreement provided that Gideon and Mendy were entitled to indemnification with respect to the Governmental Proceedings, capped at $250,000 each. A800 at § 2 And Gideon and Mendy agreed to make significant cash payments and waived other monetary entitlements in exchange for LGM's commitment not to pursue fraud, intentional misconduct, or willful misconduct claims against the Schurders. A802-804.

The parties also expressly agreed to limit LGM's rights to indemnification and to pursue fraud and intentional misconduct claims against the Schurders. A803-804. Specifically, LGM agreed to seek indemnification solely as a breach of the

Health Care Representations with the applicable aggregate cap of Six Million Dollars ($6,000,000) as allowed in Section 12.2(a)(iii) of the Purchase Agreement:

> 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 Section12.1(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));[sic] 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) or (z) above shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Selling Parties[.]
>
> A803-04 at § 4(a)

Under the terms of the Letter Agreement, LGM agreed that (1) the $6 million cap would apply to any and all claims regarding the Governmental Proceedings or any claim under Schedule 12.1(b) and (2) no claim with respect to the Governmental Proceedings or Schedule 12.1(b) shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Schurders. *Id*. Further, "(y)" is defined to mean "one or more of the Governmental Proceedings." *Id*. And the letter "(z)" is defined as "any matter set forth on Schedule 12.1(b) of the Purchase

Agreement. *Id*. The waiver provision provides that, "no claim with respect to (y) or (z) shall include a claim regarding fraud." *Id*.

F. The aftermath

On May 10, 2021, the DOJ, acting on behalf of the FDA, requested an injunction against LGM. A55 ¶ 135. Subsequently, on January 11, 2023, the DOJ filed a complaint for permanent injunction against LGM and its senior officers (the "PI Complaint"). *Id*. ¶ 136. The PI Complaint did not name Gideon or Mendy, or allege any claims against either. B6-17. Instead, the DOJ alleged that the 2022 inspections uncovered continued violations, and that LGM and its officers remained "unable or unwilling to comply with the [Federal Food, Drug, and Cosmetic] Act." *United States v. LGM Pharma, LLC, et al.*, No. 9:23-cv-80040-AMC, Dkt. 1 at ¶ 20 (S.D. Fla. 2023); B14. The DOJ further expressed its belief that, "unless restrained by the Court, [Buyers, not Sellers] will continue to violate the Act." *Id*. On January 12, 2023, LGM and its senior officers entered into a Consent Decree of Permanent Injunction (Consent Decree) with the DOJ Civil Division and the FDA. A55 ¶ 137; B18. The Schurders were not parties to the Consent Decree. B18.

G. An eye on litigation

Over four years after the FDA initiated the inspection of LGM, on November 8, 2022, LGM first gave notice to the Schurders in accordance with the terms of Section 12.3 of the Purchase Agreement (the "Claim Notice"). A56 at ¶ 138. In the

Claim Notice, LGM informed the Schurders that it intended to offset the amount it submitted for indemnification against the Promissory Notes. A56 at ¶ 141. In the Claim Notice, LGM further asserted that, "all of the legal and investigatory fees were attributable to the [Schurders'] breach of the representations and warranties set forth in the Purchase Agreement." A56 ¶ 140; Opinion at 7. And "Buyer [LGM] believes…that it has a claim for fraud, intentional misrepresentation, and/or willful misconduct against the Selling Parties [the Schurders]." A917 at ¶ 16.

On December 1, 2022, Gideon and Mendy responded to the Claim Notice. A56-57 at ¶ 142. The Schurders rejected and denied LGM's claims based on both the merits of the claims detailed in the Claim Notice and on the basis of the form of the Claim Notice. A920 at 1. The Schurders further noted that it appeared LGM was attempting to circumvent the parties' "clear mutual understandings" under the Letter Agreement by asserting claims they had specifically waived or had agreed not to assert in accordance with the terms of the Letter Agreement. A920 at 1. Gideon and Mendy observed that, but for LGM's agreement to waive those claims, they would not have agreed to the costly concessions they accepted in the Letter Agreement. *Id*.

H. Legal battle engaged

LGM took the next step and filed suit on September 1, 2023. A13 (Dkt. 1); Opinion at 7. LGM alleged claims for fraudulent inducement based on three Sections of the Purchase Agreement (Counts I, II, and III), a claim for

indemnification (Count IV), and a claim for declaratory judgment (Count V). A56-65 ¶¶ 143-89.

For the fraudulent inducement claims, LGM alleges that the representations set out in Sections 4.20, 4.21, and 4.30 of the Purchase Agreement were false. *Id*. And if LGM had known that those representations were false, LGM would not have purchased the Target Companies. A58 ¶152; A61 ¶163; A62 ¶ 172. For their indemnification claim, LGM seeks indemnification for the losses it incurred as a result of the government investigations and asserts that its losses were accrued in relation to the Governmental Proceedings and were "attributable to Sellers' breach of the warranties and representations "set forth in the Purchase Agreement." A56 ¶¶ 138-40; A64 ¶ 177.

Gideon moved to dismiss the Complaint as did the other defendants (the "Motions"). B272-308; B 40. The Motions were fully briefed, and a hearing was held on April 1, 2024. Opinion at 7-8; B 208. LGM withdrew its claim for declaratory judgment. A947. On July 10, 2024, the Superior Court granted the Motions and dismissed LGM's claims. Opinion at 2. The Superior Court held that (1) LGM waived its fraud claims in accordance with the terms of the Letter Agreement, and (2) LGM's indemnity claim was untimely. *Id*. at 10, 12.

LGM timely filed its Notice of Appeal. A 1 Dkt. 35.

ARGUMENT

I. Under the unambiguous terms of the Confidential Letter Agreement, LGM waived the right to bring claims based on fraud and/or intentional misrepresentation.

A. Question Presented

Did the trial court correctly determine that, under the unambiguous terms of the Confidential Letter Agreement, LGM waived its fraudulent inducement claims? Opinion at 10-11.

B. Scope of Review

The proper construction of any contract is a question of law, and this Court reviews questions of law *de novo*. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A. 3d 1262, 1266-67 (Del. 2017).

C. Merits of the Argument

This case involves an equity investment firm's attempt to recoup the losses it suffered as a result of its own arrogance and initial mismanagement after acquiring the prize pharmaceutical business owned in part by Gideon Schurder.[3] The Superior Court found that LGM waived any claims for fraud and intentional misrepresentation.

[3] The defendants/appellees in this case include both Gideon and Mendy Schurder. In order to avoid confusion, the Schurders will be referred to individually herein by their first names.

In challenging the Superior Court's finding, LGM maintains that it was seeking damages for two "distinct set of claims," one for fraudulent inducement and the other for indemnification as allowed under the Purchase Agreement. LGM's argument provides the quintessential example of a distinction without a difference. Notably, *all* of LGM's allegations are incorporated in each of the fraudulent inducement claims. *See* paragraphs 143, 153, and 164 incorporating all of the preceding allegations. A57-61 at ¶ 143, 153, 164. And those same allegations, along with the specific allegations set forth in the fraudulent inducement counts, are incorporated in the indemnification count. *See* paragraph 173 of the Complaint. A62 at ¶ 173. So even on the face of the Complaint, LGM's "distinct-claims" theory fails.

More importantly, LGM acknowledges that the Letter Agreement modified the Purchase Agreement. AB at 30. LGM's reliance on the Purchase Agreement also fails because the Letter Agreement modified the Purchase Agreement to create certain caps on damages and to narrow the scope of claims for indemnification. Under Delaware law, where a new, later contract between the parties covers the same subject matter as an earlier contract, the new contract supersedes and controls that issue if the agreements conflict. *VMware, Inc. v. Wood*, No. 2022-0820-PAF, 2023 Del. Ch. LEXIS 118 at *21 (Del. Ch. May 16, 2023). *See also Cabela's Ltd. Liab. Co. v. Wellman*, No. 2018-0607-TMR, 2018 Del. Ch.

LEXIS 511 at *10 (Del. Ch. Oct. 26, 2018) (Delaware recognizes that where a new, later contract covers the same subject matter as an earlier contract, the new contract supersedes and controls the issue).

Nevertheless, LGM contends that the "broad waiver clause"—LGM's description—of the Letter Agreement was clearly contrary to the terms of the earlier contract; i.e., the Purchase Agreement. LGM argues that for this reason, the Superior Court was required to find that there was an unequivocal and clear representation by LGM to disclaim its rights under the Purchase Agreement. This is not correct.

First, under Delaware law the Letter Agreement supersedes and controls the waiver issue. So LGM's argument that the purportedly broad waiver clause was contrary to the Purchase Agreement is irrelevant. This is because the provisions of the new, later Letter Agreement, including the waiver clause, supersede and control over any contrary provision of the Purchase Agreement. And the unambiguous clause of the Letter Agreement clearly provides that no claim with respect to (y), the Governmental Proceedings, shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct of the Schurders. A804.

Faced with this unambiguous provision, LGM first argues that the clause must be read "in context" to allow for a different interpretation over the language which appears on the page. For the required "context," LGM focuses first on the provision's title, "Indemnification." But LGM ignores the following sentence:

"Notwithstanding anything to the contrary set forth in the Purchase Agreement (including, without limitation, Article XII of the Purchase Agreement." In the case cited by LGM, *Terrell v. Kiromic Biopharma, Inc.*, the court reaffirmed that the term "notwithstanding" indicates the parties' intention to "supersede all other [agreements]." 2024 WL 370040, at *9 (Del. Ch. Jan. 31, 2024). Under Delaware law, LGM thereby agreed that the Section 4 provisions were intended to supercede all other agreements including, most relevantly, the Purchase Agreement.

Despite the "notwithstanding" clause, LGM maintains that the waiver provision must be read in the context of the Purchase Agreement. Contrary to LGM's argument, however, neither *Chicago Bridge* nor *Lorillard Tobacco* require that the Court espouse an interpretation which goes beyond the clear language of the waiver clause as LGM would have it. In *Chicago Bridge & Iron. N.V. v. Westinghouse Elec. Co. LLC*, the trial court reaffirmed the well-established principle that contract provisions must be read in light of the entire contract. 166 A.3d 912, 913-14 (Del. 2017). The Letter Agreement, read in its entirety, reveals an agreement on terms which limit each side's losses and bars future litigation with the exception of a restricted indemnification claim. In *Lorillard Tobacco Co. v. Am. Legacy Found.*, unlike in this case, the trial court addressed a dispute over the meaning of a particular undefined term in the contract. 903 A. 2d 728, 740 (Del. 2006).

For its next contextual argument, LGM contends that the phrase, "For the avoidance of doubt" was designed to clarify that losses attributed to Governmental Proceedings must be recovered through the indemnification clause such that LGM could not get around the cap by asserting a separate action for fraud against the Schurders—which, of course, is what LGM is attempting to accomplish here.

LGM also asserts that nothing in the waiver clause precluded claims for losses unrelated to the Governmental Proceedings which are outside the scope of the waiver provision. First, if LGM desired this particular clarification, it could simply have worded the clause to accomplish its goal. Second, the context relied upon by LGM reinforces the proposition that LGM could have drafted the waiver clause to include this language.

In Sections 4(b) and 4(c), the drafters incorporated the limitation language, the same language which does *not* appear in Section 4(a). In Section 4(b), the parties agreed that if LGM sought indemnification "in respect of Losses relating to one or more Governmental Proceedings," the losses would be borne jointly and severally.

In Section 4(c), the parties agreed that if LGM was entitled to indemnification for Losses relating to the Governmental Proceedings, the Schurders could not seek interest payments on the subordinated promissory notes. Sections 4(b) and 4(c) therefore reveal that the parties incorporated this language where they intended to limit the claim—and that they could have incorporated the same language in Section

4(a) to limit the waiver provision as they did in Sections 4(b) and 4(c). But they did not choose to do so.

Despite this drafting reality, LGM contends that it was the job of the Superior Court to read the proposed language into the relevant provision of Section 4(a). But under Delaware law, the trial court's role is to interpret, not to make, contracts. *Jefferson Chemical Co. v. Mobay Chemical Co.*, 267 A.2d 635, 636-37 (Del. Ch. 1970). The court's function is not to re-write or re-state what the parties have said. *Id*. at 636. For this reason, the court does not re-write a contract after the fact because the contract becomes a bad deal for one of the parties. *Torrent Pharma, Inc. v. Priority Healthcare Distribution.*, No. N18C-05-094 CEB, 2022 Del. Super. LEXIS 333, at *19 (Super. Ct. Aug. 11, 2022). Under Delaware law, the Superior Court was not required, nor permitted, to read language into the waiver provision to effect a limit on the waiver clause which LGM could have, but did not, incorporate into the contract.

Continuing with its contextual theory of interpretation, LGM argues that the "Losses attributable" language *expressly* ties back to the limited scope for indemnification. It is not clear, however, how LGM supports this conclusion other than to assert, without supporting authority, that it would be illogical to read a clarifying clause as taking on a broader meaning. LGM's reliance on *White v. Curo Texas Holdings, LLC*, 2016 WL 6091692 at *32 (Del. Ch. Sept. 9, 2016) is

misplaced in that the waiver provision at issue here is distinct from the language and circumstances in *White*. In this case, the first and second part of the parenthetical phrase are separated by an additional provision.

The clause at issue begins with the agreement that indemnification for losses attributable to one or more of the Governmental Proceedings is capped at $6,000,000. In the next sentence, the waiver clause provides that the Basket will not apply "in respect of one or more of the Governmental Proceedings" rather than to "losses attributable to the Governmental Proceedings." The Basket provision is then followed by the provision at issue; i.e., that the $6,000,000 cap applies to *any and all claims* "regarding" the Governmental Proceedings—not, as LGM would have it, to any and all losses attributable to the Governmental Proceedings. The clause further provides that no *claim*—not a loss, but a claim— "with respect to" the Governmental Proceedings, shall include a fraud claim. Contrary to LGM's position, the "For the avoidance of doubt" clause does not expressly tie the waiver of claims with respect to the Governmental Proceedings to the indemnification cap for losses attributable to the Governmental Proceedings.

Similarly unavailing is the argument that the waiver clause, which LGM characterizes as "broad," was contrary to the terms of the Purchase Agreement which allowed fraud claims. As noted above, the Letter Agreement and its waiver provisions supersede the Purchase Agreement. Despite this legal reality, LGM

argues that the Superior Court was required to find and explain that the waiver clause was an unequivocal and clear statement that LGM was disclaiming its rights under the Purchase Agreement. LGM's reliance on *Terrell v. Kiromic Biopharma Inc.*, 2024 WL 370040, at *4 is misplaced, however, because it does not appear that the *Terrell* court specifically held that a trial court is required to both make and explain a finding that a waiver clause is "unequivocal and clear." To the contrary, the court noted that a waiver of a contract provision may be made by an express declaration, *or* it may be implied by representations which fall short of an express declaration of waiver. *Id*. at *8. Contrary to LGM's position, *Terrell* does not require that the trial court find and explain how the language in Section 4(a) was a clear and unequivocal waiver of its rights under the Purchase Agreement.

LGM next contends that when read in context it is "clear" that Section 4(a) was designed to limit the types of claims that could be brought to recover losses relating to the Governmental Proceedings. But neither the authority, the allegations of the Complaint, nor the attached exhibits support LGM's argument that the Superior Court should not have read the waiver clause as written but should instead have read the "losses attributable" language into the clause. Contrary to LGM's assertion, it is not "clear" that Section 4(a) only bars fraud claims where the losses—rather than the claims—are related to the Governmental Proceedings.

Despite arguing on the one hand that the waiver clause is clear in barring fraud claims only where the losses are related to the Governmental Proceedings, LGM asserts on the other that the waiver clause is ambiguous, and the Superior Court should have resolved the ambiguity in the LGM's favor. LGM failed, however, to preserve that argument below. A922, A948; B138, 164; B275-308; B309-330. And under Delaware law, a court exercising its appellate authority will generally decline to review contentions not raised below and not fairly presented to the trial court for decision." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Indeed, "[i]t is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by the trial court. Parties are not free to advance arguments for the first time on appeal." *Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997). Parties may not attack a judgment on legal theories they failed to advance before the trial judge. *Scion Breckenridge Managing member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013). Moreover, when contract interpretation is at issue, a party may not for the first time on appeal raise a new theory as to how a contract is interpreted. *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-252 (Del. 2008).

But even assuming the question of ambiguity had been decided by the trial court—which is not the case—under Delaware law contractual language is not "rendered ambiguous simply because the parties in litigation differ concerning its

meaning." *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1198 (Del. 1993); *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 820 (Del. 2018). Instead, when the language of a contract provision is clear and unequivocal, as in this case, the parties are bound by the plain meaning because if the court creates an ambiguity where none exists, it could, in effect, "create a new contract with rights, liabilities and duties to which the parties had not assented." *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982). Certainly, the ambiguity espoused by LGM would create a new contract with the risk of liabilities that the Schurders clearly sought and believed had been eliminated.

LGM argues in the alternative that it should be allowed to proceed with its fraudulent inducement claims because those claims are unrelated to the Governmental Proceedings. The Superior Court rejected this theory, and found that, while there may not be "perfect identity between the actions implicated in Governmental Proceedings and the actions that allegedly made the challenged representations fraudulent," there is still "sufficient overlap that [LGM's] fraud claims" are, essentially, claims "with respect to [one or more of the Governmental Proceedings]." Opinion at 12. The Superior Court's conclusion is well supported.

LGM does not dispute that the phrase "with respect to" is typically construed broadly. Opinion at 11, n. 73. Nor, as the Superior Court noted, does LGM

argue that the phrase should be read narrowly. Opinion at 11. Based on the undisputed reading of "with respect to," the Superior Court found that LGM's allegations do not support its argument that its fraud claims are "unrelated to the Governmental Proceedings." Opinion at 11.

In support of its finding, the Superior Court cited various allegations from the Complaint. For example, the Court highlighted LGM's allegation that it is entitled to indemnification for the $6 million in expenses incurred in relation to the FDA and DOJ investigations "*as a result of* [the Schurders'] *fraud*." Opinion at 11. And the conduct supporting the fraud claims also resulted in LGM incurring "significant legal and investigatory fees" for which it is entitled to indemnification. Opinion at 11. The Superior Court also noted that the conduct which constitutes false representations under the EPA is essentially the same conduct which resulted in the costs for which LGM is seeking indemnification. Opinion at 12, n. 80.

For example, LGM alleges that it was fraudulently induced into acquiring the Target Companies based on Gideon's false representation that LGM was in compliance with Section 4.20 of the Letter Agreement. A57-58 at ¶¶ 144, 146. To support that claim, LGM alleges that the Schurders registered manufacturers with the FDA without their knowledge or consent. A57-58 at ¶ 146. Essentially the same conduct appears in paragraph 19(D) of the "Defendants' History of Violative Conduct" section of the DOJ's complaint; i.e., one of the Governmental

Proceedings. B6. The DOJ, on behalf of the FDA, alleged that LGM "continued its practice of inaccurate and unauthorized registration of suppliers after the 2018 Inspection." B14 at ¶ 19. And the same conduct likewise appears in the FDA's Form 483: "Prior to August 2018, the regulatory status of vendors was not evaluated; and "[Y]our firm failed to qualify the manufacturer of the injectable cancer-treatment API." A201-211.

The Superior Court further refuted LGM's assertion that the fraud claims are unrelated to the Governmental Proceedings by finding that the Governmental Proceedings pertain to an "alleged pattern of wrongdoing that began before the Purchase Agreement closed and continued thereafter." Opinion at 12. The Superior Court found that the pattern of conduct includes the same misdeeds supporting LGM's fraud allegations. *Id.* Since the fraudulent inducement claims overlap the claims "with respect to" the Governmental Proceedings, the trial court held that LGM waived those claims under the unambiguous terms of the Letter Agreement. *Id.*

In response, LGM argues semantics; i.e., the FDA was not investigating "fraud" by Gideon and Mendy.[4] LGM asserts that the FDA was not investigating fraud by the Schurders "apart from the false statements and obstruction of justice by

[4] AB at 37

Gideon with respect to the FDA."[5] LGM also argues that neither the Form 483 nor the DOJ Complaint includes a "single allegation of fraud by anyone at LGM."[6] It must first be noted that neither the Forms 483 nor the DOJ Complaint address the concept of fraud.[7] Despite LGM's best efforts to convince the FDA that the violations noted were solely the result of Gideon's fraud, the FDA and the DOJ remained focused on the actual violations and the failure of LGM's leadership to address and correct those violations. The Governmental Proceedings were about LGM's failure to correct the identified violations. As the Superior Court found, the conduct addressed in the Governmental Proceedings was essentially the same as the conduct on which LGM's fraudulent inducement claims are based.

LGM also takes issue with the trial court's finding that the Complaint and the attached exhibits revealed that "the Governmental Proceedings investigated pre-closing conduct." Opinion at 12. LGM contends in response that there is nothing in the Complaint or the record "suggesting" that the DOJ was investigating the false representations as alleged in the fraudulent inducement claims. Again, a distinction without a difference. The DOJ, *acting on behalf of the FDA*, alleged that LGM remained unwilling or unable to adequately address the violations identified in the Form 483. B108-110 at ¶¶ 18-20. As the Superior Court found, the Form 483

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[5] AB at 37

[6] *Id.*

[7] *Id.* at 37-38

violations sufficiently overlap the claims "with respect" to one or more of the Governmental Proceedings so as to trigger the waiver provision of the Letter Agreement. Opinion at 12. LGM failed in the Superior Court, as it fails here, to establish that the conduct identified in the Governmental Proceedings is separate, distinct, and unrelated to the actions which "allegedly made the Purchase Agreement fraudulent." Opinion at 12.

Despite this failure, LGM maintains that that it should be allowed to pursue its fraudulent inducement claims as they are unrelated to the Governmental Proceedings. To support this argument, LGM poses a narrative at odds with the Complaint and attached exhibits. For example, LGM claims that the false statements at issue in the fraudulent inducement claims were made prior to closing while the false statements at issue in the Governmental Proceedings were made by Gideon in response to the FDA investigation. This statement belies even a cursory review of the attached exhibits. There were no false statements at issue in the Form 483 or the DOJ Complaint. There was also no reference to Gideon in the Form 483 or the DOJ complaint. And contrary to LGM's representation, the FDA investigation did not evolve into the DOJ action as a result of LGM's disclosure that Gideon allegedly withheld and altered relevant documents. Instead, the DOJ alleged that a permanent injunction was required because the LGM defendants remained unable or unwilling to comply with the Act and that unless restrained by the court, they would continue

to violate the Act. B110 at ¶ 20. In the section of the DOJ complaint setting forth LGM's "History of Violative Conduct," there is no reference to Gideon or Mendy. Instead, the complaint focuses on the LGM defendants' continued failure to remedy the violations. As the Superior Court found based on the Complaint and attached exhibits, the Governmental Proceedings addressed conduct both prior to and after the closing.

In the same vein, LGM argues that its fraudulent inducement claims do not include the 2018 misconduct which led to the FDA investigation and subsequent DOJ action. And LGM asserts, contrary to the allegations of its Complaint, that its fraudulent inducement claims relate solely to the false statements allegedly made to LGM prior to the closing.

But the Superior Court rejected LGM's argument and, based upon its review of the Complaint and the attached exhibits, found that LGM's fraudulent inducement claims related to the Governmental Proceedings and were therefore waived. The Superior Court's Opinion should therefore be affirmed.

II. LGM's indemnification claim is not tolled under the doctrine of fraudulent concealment.

A. Question Presented

Did the trial court correctly determine that the doctrine of fraudulent concealment did not extend the survival period for LGM's indemnification claim? Opinion at 15.

B. Scope of Review

The determination as to whether a claim is barred by the applicable statute of limitations is a question of law that the Court reviews *de novo*. *Lehman Bros. Holdings, Inc.*, 268 A.3d 178, 185 (Del. 2021).

C. Merits of the Argument

The Superior Court held that, in accordance with the terms of Section 4(a) of the Letter Agreement and Sections 12.1(a)(iii) and 12.1(b)(ii) of the Purchase Agreement, LGM had to initiate its indemnity claims related to the Governmental Proceedings within sixty months of the closing date. Opinion at 13. With a closing date of November 15, 2017, the Superior Court found that LGM had to file suit no later than November 15, 2022. *Id.* Since LGM did not file the instant action until September 1, 2023, its indemnity claims are untimely and must be dismissed. *Id*. at 15.

LGM does not challenge the Superior Court's interpretation of the applicable survival period for its indemnification claim. Instead, LGM argues only that it

properly alleged fraudulent concealment such that the start date for the survival period should have been tolled until the Letter Agreement was signed on July 23, 2020. With that start date, LGM contends it had until July 2025 to file the instant action. LGM's reliance on *Snyder v. Butcher & Co.* to support this point is misplaced as the issue in *Snyder* was whether the action was barred by the applicable statute of limitations as opposed to a contractual survival period as in this case.

LGM also asserts that the Superior Court misread and misapplied *Pilot Air* in finding that LGM was on inquiry notice of the alleged breach well within the survival limitations period. *Pilot Air Freight, LLC v. Manna Freight Sys.*, 2020 WL 5588671 (Del. Ch. Sept. 18, 2020). Contrary to LGM's categorization, the trial court did not cite *Pilot Air* for the proposition that inquiry notice during the limitations period "doomed" a potential claim of fraudulent concealment. The Superior Court instead correctly found that in *Pilot Air*, the court rejected an attempt to toll the survival period based on fraudulent concealment because the plaintiff was on inquiry notice of the alleged breach well within the limitations period. Opinion at 15. As in *Pilot Air*, in this case LGM was on inquiry notice well within the limitations period. Although the trial court referenced the Letter Agreement dated July 23, 2020, the Complaint alleges that the first Form 483 was issued on December 4, 2018. A28 at ¶ 44. And prior to January 11, 2019, LGM had notice of the results of its internal investigation which led to its termination of Gideon shortly thereafter. At a

minimum, LGM had inquiry notice over four years before it filed the instant action. As in *Pilot Air*, LGM was indisputably on inquiry notice of Gideon's alleged misrepresentations well within the limitations period.

In response, LGM argues for the first time on appeal that the trial court should have extended the survival period under the doctrine of laches. But *Collis* fails to support the application of laches in this case. In *Lebanon Cnty. Employees' Ret. Fund v. Collis*, unlike in this case, the court was addressing equitable claims for breach of fiduciary duty. 287 A.3d 1160, 1177 (Del. Ch. 2022). For those claims, the court held that timeliness could not be assessed by applying the statute of limitations, but instead applied the doctrine of laches based on two factors; i.e., whether the plaintiff had sued within a reasonable time and whether there had been any prejudice to the defendants from the amount of time that had passed. *Id*. at 1177-78. First, the tolling of a survival period was not at issue in *Collis* as in *Pilot Air* and as in this case.

Furthermore, even assuming the doctrine of laches would apply here, LGM makes no attempt to establish that it sued within a reasonable time—an obviously futile endeavor—or that the Schurders were not prejudiced by the fact that LGM waited four years, at a minimum, to file the instant action. For these reasons, the *Collis* case does not direct the outcome in this case.

LGM's reliance on *Hiznay v. Strange*, 415 A.2d 489 (Del. Super. Ct. 1980) is similarly unavailing. In *Hiznay*, the court addressed the question of whether the plaintiff's medical malpractice claim was barred by the applicable statute of limitations. *Id.* at 490. Unlike in this case, the dispute in *Hiznay* involved the application of the statute of limitations rather than the application of a contractual survival period.

Finally, LGM argues that its conclusory allegation that the Schurders "willfully concealed from Buyer" its false and misleading statements entitles LGM to a tolling of the 60-month survival period. In support of this theory, LGM cites to the factually-deficient allegation that, "Sellers caused significant damage to the Target Companies and Buyers by Sellers' false and misleading statements and business practices all of which it willfully concealed from Buyer." A58-62 at ¶¶ 150, 161, 170. This allegation is clearly insufficient. Under the doctrine of fraudulent concealment, the plaintiff must allege an affirmative act of "actual artifice" by the defendant which either prevented the plaintiff from gaining knowledge of material facts or which led the plaintiff away from the truth. *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007). The conclusory allegation that Gideon "willfully concealed" false and misleading statements simply does not constitute an "actual artifice" which prevented LGM from gaining the unspecified material facts or which

led LGM away from the truth. Its unsupported assertion notwithstanding, LGM's pleading fails to warrant the application of the fraudulent concealment doctrine.

LGM's reliance on *Weiss v. Swanson*, 948 A.2d 433 (Del. Ch. 2008) fails to require a different result. *Weiss* was a derivative action wherein the court addressed the question as to whether the statute of limitations under 10 Del. C. § 8106 barred plaintiff's claims based on option grants which occurred more than three years before the complaint was filed. *Id*. at 450. The *Weiss* court was not called upon to apply the fraudulent concealment theory within the context of a contractual survival limitation as is the context in this case.

For these reasons, LGM fails to establish that the Superior Court erred in finding that the survival period was not tolled based on its finding that LGM was on inquiry notice of the Schurders' alleged breach well within the limitations period.

CONCLUSION

For the reasons set forth herein, the Court should affirm the Superior Court's Opinion.

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Dated: October 21, 2024