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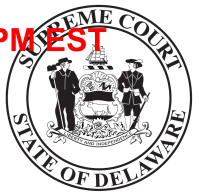

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N23C-09-011 EMD CCLD

APPELLANTS' REPLY BRIEF

Dated: November 4, 2024

BARNES & THORNBURG LLP
Thomas E. Hanson, Jr. (No. 4102)
222 Delaware Ave, Suite 1200
Wilmington, Delaware 19801
Tel: 302-300-3447

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PRELIMINARY STATEMENT

Sellers continue to defend the trial court's tortured reading of Section 4(a) of the Letter Agreement. Focusing exclusively on the last clause of Section 4(a), Sellers insist that the parties intended to waive all fraud claims "related" in any way to the Governmental Proceedings rather than simply waiving fraud claims regarding "Losses attributable" to the Governmental Proceedings. Sellers, however, remain unable to explain why every other provision of Section 4 of the Letter Agreement explicitly applies to "Losses attributable" to the Governmental Proceedings **except** the one clause identified by Sellers. Moreover, Sellers have no explanation for why the first sentence of Section 4(a) references "Losses attributable" to the Governmental Proceedings and the next sentence begins: "For the avoidance of doubt"—clearly referencing the prior sentence and the "Losses attributable" language.

Citing the "plan language" of Section 4(a), Sellers argue that the parties "deliberately" chose to exclude the phrase "Losses attributable" in the last clause in an effort to expand the waiver provision. Sellers, however, cite no evidence to support their claim. More importantly, Sellers' adherence to the "plain language" of Section 4(a) puts them in the impossible position of explaining why the parties also included "For the avoidance of doubt" language before the last clause of Section

4(a). Sellers have no explanation for this language and have chosen to simply ignore it.

Sellers also refuse to characterize Buyer's interpretation of the waiver provision as a "reasonable alternative interpretation," because they realize that if there is more than one "reasonable construction" of the contractual language of Section 4(a), then the contract is ambiguous, and Sellers' motions to dismiss cannot be granted. Even the trial court conceded that it must draw all reasonable inferences in favor of Buyer. Nevertheless, both Sellers and the trial court have failed to acknowledge the obvious ambiguity of the parties' readings of the disputed clause of Section 4(a).

Even if Sellers' interpretation of Section 4(a) were correct, Buyer has clearly differentiated its fraud claims from the Governmental Proceedings. For example, Sellers concede that the Governmental Proceedings were about LGM's failure to correct the violations identified in the FDA Form 483. Moreover, Sellers acknowledge that there were no "false statements" at issue in the Form 483 or the DOJ Complaint. Buyer's fraudulent concealment claims, however, are premised entirely on false representations and warranties made to the Buyer in the Purchase Agreement almost one year **before** the FDA inspection and Form 483. Additionally, the Complaint details numerous examples of pre-closing misconduct supporting Buyer's fraudulent inducement claims that have nothing to do with the

Governmental Proceedings. Unlike the Governmental Proceedings, Buyer's fraud claims seek to hold Sellers accountable for the **pre-closing** lies they told Buyer in an effort to conceal rampant misconduct at the Target Companies.

Finally, Sellers disregard the well-pleaded allegations in Buyer's Complaint (as well as the trial court's findings) and assert that Buyer had notice of the misconduct underlying its indemnification claim no later than September 2018, when the FDA first conducted its investigation at LGM's Kentucky facility. This claim flies in the face of the Complaint, which alleges that Buyer only learned of Sellers misconduct in the summer of 2020, after its law firm began reviewing documents and interviewing employees in response to DOJ's January 17, 2020 grand jury subpoena. Sellers' claim that Buyer did not "exercise reasonable diligence" in uncovering misconduct is simply not borne out by the allegations of the Complaint.

Similarly, Sellers assert that Buyer failed to properly plead sufficient facts to establish fraudulent concealment. Yet again, Sellers fail to accept the well-pleaded allegations of Buyer's Complaint. In its Complaint, Buyer alleges, in three separate paragraphs, 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." The Complaint further alleges that Sellers "hid [] information leading up to and after the acquisition" describing how they had violated the law for years before the acquisition. These allegations clearly

demonstrate that Sellers had actual knowledge of the wrong done and acted affirmatively in concealing those facts from Buyer. When the doctrine of fraudulent concealment is applied to the facts of this case, Buyer's indemnification claim was timely filed.

ARGUMENT

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

A. The Letter Agreement Was Designed to Modify Indemnification Claims

Consistent with the language of Section 4(a), Buyer maintains that the Letter Agreement modified the Purchase Agreement by establishing certain caps on damages and narrowing the scope of claims for indemnification regarding "Losses attributable" to Governmental Proceedings. Buyer Opening Br. at 30. In essence, Buyer's position is that the entirety of Section 4 was designed to outline how indemnification claims relating to "Losses attributable" to Governmental Proceedings should be handled. Hence, Sections 4(a), (b) and (c) explicitly reference "losses relating" to the Governmental Proceedings. Sellers, on the other hand, have chosen to cherry-pick the last clause of Section 4(a), ignore prior references to "Losses attributable" to the Governmental Proceedings, and seek to bar **all** fraud claims that relate in any way to the Governmental Proceedings.

The first sentence of Section 4(a) discusses a situation where Buyer "elects to seek indemnification from the Sellers pursuant to Article XII of the Purchase Agreement in respect to **Losses attributable** to one or more of the Governmental Proceedings." (emphasis added). The next sentence begins: "For the avoidance of doubt," a phrase that expressly seeks to clarify the preceding sentence discussing

indemnification claims "in respect to Losses attributable to one or more of the Governmental Proceedings."[1]

Sellers ignore this clarifying language and insist that the last clause of Section 4(a) is referring to a much broader set of fraud claims that relate in any way to the Governmental Proceedings. Under Sellers' reading, Section 4(a) was intended to address **two** distinct sets of claims: (i) those involving "Losses attributable" to one or more of the Governmental Proceedings; and (ii) those "with respect to" the Governmental Proceedings. Sellers have no explanation for why Section 4(a) refers to two distinct sets of claims while Sections 4(b) and (c) only address "Losses relating" to one or more of the Governmental Proceedings.

Sellers' only argument, which was never raised below, is that the parties "deliberately" chose to exclude the phrase "Losses attributable" from the waiver provision. IBS Br. at 25-26; Gideon Answering Br. at 23 ("Gideon Br."). In support

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[1] Sellers claim that Buyer's argument regarding the use of the phrase "For the avoidance of doubt" should be waived since the Superior Court did not have a chance to consider it. IBS Answering Br. at 25 ("IBS Br."). Yet, Buyer has consistently argued that Section 4(a) only covered "Losses attributable" to Governmental Proceedings. A967-68. It was the trial court that first raised a textual argument regarding the waiver provision of Section 4(a). Ex. A at 11 n.72. Buyer is permitted to explain why the trial court erred in its interpretation of Section 4(a). In *Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 659 (Del. 1952), this Court explained, "[w]e will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered." *Id.* at 659.

of their claim, Sellers argue that the fact that the parties used the phrase "Losses attributable to" elsewhere in Section 4 demonstrates that the parties "knew how to include it where it was intended," but chose not to in the last clause of Section 4(a). IBS Br. at 26. This circular argument does not provide "strong evidence" of the parties' intention to expand the waiver provision and only begs the question as to why the parties included the "For the avoidance of doubt" language, which clearly references the prior sentence of Section 4(a) discussing "Losses attributable." The only way Sellers' argument makes sense is if they ignore the "For the avoidance of doubt" language.

Sellers next insist that Buyer's interpretation of Section 4(a) would render the provision "meaningless." *Id*. Sellers argue that the parties would have nothing to gain by barring fraud claims for Losses attributable to the Governmental Proceedings, while still allowing indemnification claims for breaches of the Health Care Representations. *Id.* at 27. Of course, the primary advantage for Sellers of limiting available fraud claims for Losses attributable to the Governmental Proceedings is the shorter survival period and a cap on damages. The Purchase Agreement provided that Buyer had only five years to bring indemnification claims based on breaches of the Health Care Representations, but had the right to bring legal action without any time limitation "in the event that any breach of any representation or warranty by any of the Sellers constitutes actual or constructive fraud, willful

misconduct, or intentional misrepresentation." A86 at Section 12.1(a)(viii). Similarly, the Purchase Agreement provided that there would not be a "cap" on indemnifiable losses for "any claims relating to fraud, intentional misrepresentation, or willful misconduct of the Selling Parties." *Id.* at Section 12.2(a). By barring fraud claims for Losses attributable to the Governmental Proceedings, the parties ensured that there would not be any ambiguity as to the $6 million cap for those losses.

Sellers insist that there is no ambiguity in Section 4(a) of the Letter Agreement because Buyer cannot set forth a "reasonable alternative interpretation" of the Waiver Provision that would render the contractual provision ambiguous. IBS Br. at 29. Buyer, however, did set forth a "reasonable alternative interpretation" to the trial court, which improperly rejected that interpretation. *See* Ex. A at 11, n.72. Buyer also argued in both of its briefs to the trial court that "if there is more than one 'reasonable construction' of contractual language, then the contract is ambiguous, and a defendant's motion to dismiss cannot be granted." A936-37; A963-64. While acknowledging that it must "draw all reasonable inferences in favor of the non-moving party," the trial refused to do so when considering the parties' competing interpretations of Section 4(a). *See* Ex. A at 10. The notion that Buyer raised this issue for the first time on appeal or that the trial court did not have an opportunity to fairly consider the issue is false. The trial court was fully aware that it could not grant Sellers' motion to dismiss based on an ambiguous contractual provision.

Nevertheless, the trial court ignored the obvious ambiguity of the parties' competing readings of the disputed provision and ruled in favor of Sellers.

B. Buyer's Fraud Claims for Pre-Closing Conduct Are Distinct from the Governmental Proceedings

Strangely, Sellers assert that Buyer is "amending" its Complaint to include a new "version of a fraud claim" because there are no "allegations in the Complaint about any losses that are unrelated to the Governmental Proceedings." IBS Br. at 28. This claim is patently false. The Complaint is replete with allegations that Buyers suffered losses after the closing of the transaction that were unrelated to the Losses attributable to the Governmental Proceedings. For example, in Paragraph 3 of the Complaint, Buyer specifically alleges that it "brings this action to recover damages against Sellers for fraudulently inducing Buyer to pay $35 million for the business." The Complaint goes on to allege that:

> Prior to entering into the Purchase Agreement, Buyers engaged in significant due diligence and relied on representations made by the Sellers in Sections 4.20, 4.21 and 4.30 of the Purchase Agreement. Buyers also relied on representations made by Sellers in Sections 4.20, 4.21 and 4.30 of the Purchase Agreement in determining its valuation of the businesses and setting the purchase price. Had Buyers known that the representations in Sections 4.20, 4.21 and 4.30 of the Purchase Agreement were false, Buyers would not have purchased the businesses.

A15 at ¶ 17; *see also id.* at ¶¶ 150-51, 161-62, 170-71 (due to Sellers' actions in making false statements to the Buyer, the value of the Target Companies is far lower than the $35 million paid by Buyer). Simply put, Sellers made false statements to

the Buyer which caused damages that were unrelated to the damages caused by the Governmental Proceedings. One set of damages was the $35 million paid by the Buyer for the Target Companies based on false statements made in due diligence while the other set of damages includes the $6 million in legal and remediation costs associated with the Governmental Proceedings.

Sellers continue to argue that Buyer's fraudulent inducement claims are closely related to the Governmental Proceedings and present a series of red herrings designed to obscure Buyer's fraud claims. For instance, contrary to Sellers' assertion, Buyer does not "focus" on mislabeled shipments of cidofovir or other post-closing conduct to support its fraudulent inducement claims. *See* IBS Br. at 30-31. Buyer never even mentions the mislabeling of cidofovir in its allegations of pre-closing misconduct by Sellers. Instead, Buyer focuses exclusively on false statements made to the Buyer **before** closing concerning the Target Companies' compliance with applicable laws and import/export controls. *See e.g.,* A15 at ¶¶ 145-46; 155-56; 165-66. Moreover, Buyer's Complaint lays out six detailed categories of legal violations and examples of each violation that occurred **pre-closing**. *See id.* at ¶¶ 72-130.

For instance, Buyer's Complaint cites a shipment of "cisplatin" from May 2017, where Sellers agreed to have the API delivered to its Kentucky facility falsely

labeled as a "document."[2] *Id.* at ¶¶ 76-77. Or an incident in September 2017, where the U.S. Customs and Border Protection seized a package from Sellers at the border because "an attempt was made to smuggle or clandestinely import prescription medication into the commerce of the United States by falsely declaring the description and/or value on the shipper's manifest." *Id.* at ¶¶ 119-121. Each of these examples involved a violation of applicable laws that occurred pre-closing and had nothing to do with issues identified in the Form 483. *See* A202-11. Moreover, either of these incidents, standing alone, is sufficient to support Buyer's theory that Sellers made false representations about the legality of their conduct in order to fraudulently induce Buyer to purchase the Target Companies.

In an effort to demonstrate a connection between the Governmental Proceedings and Buyer's Complaint, IBS Sellers have included a chart in their Answering Brief that purportedly shows similarities between the two. The chart, however, fails to match up any of the specific allegations of pre-closing misconduct identified by Buyer in paragraphs 72-130 of the Complaint. *See* IBS Br. at 31-33. A careful reading of the Form 483 and the IBS chart demonstrates that **none** of the allegations in the Form 483 match up with Sellers' pre-closing misconduct. Indeed, almost half of the citations contained in the IBS chart refer to Buyer's Claim Notice

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[2] By falsely labeling an API shipment as "documents," Sellers avoided paying duties and taxes on APIs. Sellers also avoided a more detailed inspection of the products by the FDA.

sent to the Sellers on November 8, 2022, not to the Governmental Proceedings. Additionally, Sellers continue to falsely claim that Buyer is seeking fraud damages for its significant legal and investigatory fees, when Sellers know full well that Buyer is only seeking those damages for its indemnification claim. *See id.* at 34.

Significantly, Sellers concede that "[t]he Governmental Proceedings were about LGM's failure to correct identified violations [from the FDA Form 483]." Gideon Br. at 30. According to Sellers, "[t]he DOJ, *acting on behalf of the FDA*, alleged that LGM remained unwilling or unable to adequately address the violations identified in the Form 483." *Id.* Sellers also concede that "[t]here were no false statements at issue in the Form 483 or the DOJ Complaint." *Id.* at 31. As described above, Buyer's fraud claims have nothing to do with LGM's alleged failure to correct violations from the September 2018 FDA inspection or the resulting Form 483. Buyer's fraud claims are premised entirely on false representations and warranties made to Buyer almost one year **before** the FDA inspection and Form 483. By Sellers' own descriptions of the Form 483 and the DOJ Complaint, Buyer's fraud claims do not overlap with the Governmental Proceedings.[3]

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[3] Citing to the Form 483, Gideon argues that the Governmental Proceedings are unrelated to his false statements to the FDA. Gideon Br. at 31. Of course, the FDA was not aware of Gideon's false statements until LGM disclosed them in its response to the Form 483. *See* A257-78. As for the DOJ **criminal** investigation, that only began after Gideon's false statements were disclosed to the FDA. Gideon's reliance on the DOJ **civil** Complaint for injunction is misplaced, since the DOJ Complaint was limited to the allegations raised, and allegedly not addressed, in the FDA Form

II. Buyer's Indemnification Claim Should be Tolled Under the Doctrine of Fraudulent Concealment

In an effort to preserve the trial court's flawed tolling decision, Sellers attempt to push back the date that Buyer was on notice of Sellers' misconduct from July 2020 to September 2018. Although the trial court explicitly concluded that Buyer was on actual notice of Sellers' misconduct on July 23, 2020 (*see* Op. at 15), Sellers assert, for the first time, that Buyer was on "actual notice" of Sellers' misconduct two years earlier, in September 2018, when the FDA first conducted its investigation at LGM's Kentucky facility. *See* IBS Br. at 41; Gideon Br. at 34. Sellers' newfound claim not only ignores the trial court's finding, but it also flies in the face of the allegations contained in Buyer's Complaint.

As alleged in the Complaint, it was only "[t]hrough its review of documents and interviews with current and former LGM employees, [that] Buyer discovered that Gideon and Mendy routinely violated health care laws, customs restrictions, and regulations in the U.S. and in other jurisdictions." A15 at ¶ 68. "Moreover, Buyer learned that many of these violations took place prior to its acquisition of the Target Companies." *Id.* at ¶ 69. These revelations did not occur until many months **after**

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483. The DOJ Complaint did not reference Gideon or Mendy since they were no longer employed by LGM on January 12, 2023 when the Consent Decree of Permanent Injunction was entered. *See* A15 at ¶ 137. This fact, however, did not deter the DOJ Criminal Division from continuing its investigation into Gideon and Mendy's prior misconduct.

LGM received the January 17, 2020 grand jury subpoena from the DOJ Criminal Division. "After learning the extent of Gideon and Mendy's misconduct, Buyer terminated its relationship with Mendy, who was still serving as Chief Operating Officer for LGM." *Id.* at ¶ 131. Accordingly, based on the facts alleged in the Complaint, Buyer was not on notice of Sellers' misconduct until the summer of 2020. Despite the requirements of Delaware Superior Court Rule of Civil Procedure Rule 12(b)(6), Sellers still refuse to accept Buyer's well-pleaded factual allegations as true.

Next, Sellers argue that even if Buyer did not have "actual knowledge" of Sellers misconduct until July 23, 2020, Buyer still had "inquiry knowledge" by the date of the FDA inspection in September 2018. IBS Br. at 39-40. Citing *Pilot Air Freight, LLC v. Manna Freight System, Inc.*, 2020 WL 5588671 (Del. Ch. Sept. 18, 2020), Sellers assert that if Buyer had exercised "reasonable diligence," it would have discovered Gideon and Mendy's misconduct. IBS. Br. at 40. Sellers' "inquiry notice" claim again ignores the allegations in the Complaint. The Complaint explains that Buyer initially hired Reed Smith, LLP ("Reed Smith") to conduct a limited internal investigation into "the relabeling of the cidofovir shipments" identified in the Form 483. A15 at ¶ 47. The internal investigation ultimately concluded that Gideon had lied and withheld relevant documents related to his knowledge of the cidofovir shipments from the FDA. *Id.* at ¶ 53. Given the limited

nature and scope of the initial investigation, Reed Smith did not uncover any evidence suggesting that Gideon and Mendy had also engaged in extensive misconduct prior to entering into the Purchase Agreement in 2017. *See id.* at ¶ 48 ("Reed Smith interviewed LGM personnel, including Gideon, involved in ordering, receiving, and relabeling the shipments [of cidofovir]."). It was not until Reed Smith began reviewing documents and interviewing employees in response to DOJ's January 23, 2020 grand jury subpoena, that "Buyer discovered that Gideon and Mendy routinely violated health care laws, customs restrictions, and regulations in the U.S. and other jurisdictions." *Id.* ¶¶ 64-69. Sellers' claim that Buyer did not "exercise reasonable diligence" and had "alarm bells ringing" is simply not supported by the allegations of the Complaint.

Sellers also assert that Buyer's Complaint is "factually deficient" because it fails to allege sufficient facts to establish fraudulent concealment.[4] Gideon Br. at 36. However, the Complaint alleges, in three separate paragraphs, that "Sellers

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[4] Without authority, Sellers question whether fraudulent concealment applies to a contractual survival period. Gideon Br. at 36-37. Under Delaware law, however, survival clauses do not inherently bar application of the fraudulent concealment tolling doctrine. *See e.g., AssuredPartners of Virginia, LLC v. Sheehan*, 2020 WL 2789706, at *13 (Del. Super. Ct. May, 29, 2020) (the two-year contractual limitations period "may be tolled by Defendant's alleged fraudulent concealment"); *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co., LLC*, 2020 WL 5054791, at *8 (Del. Super. Ct. Aug. 17, 2020) (finding that "the Survival Clause does not foreclose a tolling analysis"); *Pilot Air*, 2020 WL 55886714, at *15 (conducted fraudulent concealment tolling analysis for contractual survival period).

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." *See* A15 at ¶¶ 150, 161, 170. The Complaint further alleges that Sellers "hid [] information leading up to and after the acquisition" describing how they had violated the law for years before the acquisition. *Id.* at ¶ 5.

Citing to *In re Tyson Foods, Inc.*, 919 A.2d 563,585 (Del. Ch. 2007), Sellers argue that Buyer failed to allege an affirmative act of "actual artifice" which prevented Buyer from gaining knowledge of material facts. *See* Gideon Br. at 36. Needless to say, hiding and willfully concealing material facts during due diligence, and then making false representations and warranties to Buyer certainly rises to the level of an "actual artifice." Moreover, *In re Tyson* cites to the Delaware Supreme Court case of *Ewing v. Beck*, 520 A.2d 653, 667 (Del. 1987). In *Ewing*, the Supreme Court explained that "[w]hen a plaintiff wishes to rely on the doctrine of fraudulent concealment, a prerequisite is for the Complaint to allege that the [defendant] had actual knowledge of the wrong done and acted affirmatively in concealing the facts from the [plaintiff]." *Id.* Here, the Complaint properly alleges that "Sellers intentionally made false statements to Buyer during the due diligence relating to the transaction and in the representations and warranties contained in the Purchase Agreement." *See e.g.,* A15 at ¶ 148. The Complaint further alleges that Sellers

actively "hid" and "concealed" the information underlying those false statements from Sellers. *See* A15 ¶¶ 5, 150, 161, 170.

Finally, Sellers latch onto allegations in the Complaint relating to Buyer's fraudulent inducement claims, and assert that these allegations transform Buyer's indemnification claim into a fraud claim that is barred by Section 4(a) of the Letter Agreement. IBS Br. at 43-44. Sellers even argue that Buyer's "allegations that Sellers fraudulently concealed their business practices in order to toll the survival period" should be barred under Section 4(a). *Id.* at 44. Under Sellers' theory, Buyer cannot allege even the basics of a fraudulent concealment claim without transforming its indemnification claim into a fraud claim. This is absurd. Buyer's Complaint plainly relies on Sellers' breach of representations and warranties contained in Section 4.21 of the Purchase Agreement. A15 at ¶¶ 174-75. This breach and the corresponding right of indemnification exist under the Purchase Agreement regardless of whether the breach involved false statements by Sellers. Sellers also assert that Buyer "admit[ted]" it was seeking indemnification for expenses "incurred as a result of Sellers' fraud." IBS Br. at 44. This so-called "admission" has been taken out of context. Buyer was merely referencing the fact that the FDA and DOJ investigations were both premised on Sellers' fraud – *e.g.*, lying to the FDA, concealing documents from the FDA and intentionally relabeling cidofovir. *See* Opening Br. at 37. Buyer was not "admitting" that its indemnification

claim was based on Sellers' fraud. Accordingly, even if this Court were to conclude that Sellers' waiver claim forecloses fraud claims, this conclusion should not waive Buyer's indemnification claim.

CONCLUSION

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

Dated: November 4, 2024

BARNES & THORNBURG LLP

/s/ *Thomas E. Hanson, Jr.*
Thomas E. Hanson, Jr. (No. 4102)
222 Delaware Ave, Suite 1200
Wilmington, Delaware 19801
Tel: 302-300-3447
Email: thanson@btlaw.com

Attorneys for Plaintiffs-Below / Appellants LGM Holdings, LLC and LGM Subsidiary Holdings, LLC