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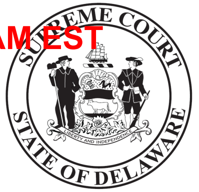

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STX BUSINESS SOLUTIONS, LLC and JON THOMPSON, Plaintiffs Below-Appellants, v. FINANCIAL-INFORMATION-TECHNOLOGIES, LLC and FINTECH HOLDCO, Defendants Below-Appellees.	No. 494, 2024 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 2024-0038-JTL

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

In July 2021, Financial-Information-Technologies, LLC ("Fintech" or "Buyer") acquired the operating assets of STX Business Solutions, LLC ("STX" or "Seller"), a firm that provided consulting, software, and data solution services to alcoholic beverage producers. In exchange for these assets and certain liabilities, STX's members received $5.3 million in cash (subject to certain adjustments and payment of funds into escrow) and common units in Fintech's parent entity, Fintech Holdco, LLC ("Holdco" or "Parent") with an agreed value of $1.7 million. Following the transaction, Fintech employed Jon Thompson ("Thompson"), the Manager and a member of STX, as its Vice President of Business Development.

The terms on which STX agreed to sell its business operations to Fintech were memorialized in an Asset Purchase Agreement, dated as of July 1, 2021 (the "APA"). In the APA, Fintech agreed to make additional earn-out payments to STX, up to a maximum of $5.5 million, if the acquired assets met specific revenue goals post-closing. STX and its members negotiated for and secured protections for this future consideration in the APA; for example, Fintech agreed, clearly and unambiguously, that it would "not take any action in bad faith with respect to Seller's ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof." To protect against the possibility that an unknown third party might later acquire control over the business STX sold to

Fintech – and, therefore, influence whether the business met the revenue targets on which STX's earn-out payments relied – Fintech also agreed that "upon the closing of a Sale of [Holdco]," it would pay STX the maximum $5.5 million earn-out immediately.

Fintech, however, did not give STX what it bargained for. After acquiring the business, Fintech killed a valuable opportunity with Walmart that STX (which also calls Bentonville, Arkansas home) had been grooming for years. When Walmart invited Fintech to respond to an RFP for data management services that STX's business was uniquely qualified to provide, Fintech entered into a non-disclosure agreement with Walmart and obtained the information needed to submit a proposal for a lucrative five-year contract that, if awarded, would satisfy the earn-out targets. This, however, proved to be a charade; on the last night proposals were due, Fintech abruptly notified Walmart that it was passing up the opportunity, citing "constraints" imposed by an "exclusive relationship" between Fintech and Information Resources, Inc. ("IRI"), a data management company that ***competed*** with STX.

Before this, Fintech had never disclosed its "exclusive relationship" with IRI to STX or the effect the relationship would have on STX's prospects for receiving earn-out payments. Indeed, if had STX known that Fintech had an "exclusive relationship" with a competitor that would prevent the acquired business from pursuing its most promising prospect, this would have materially impacted the terms

of the APA. Instead, however, Fintech fraudulently withheld this information from STX and breached its covenant not to act in bad faith to deprive STX of the earn-out payments to which it was entitled.

Even without the Walmart contract, the APA still required Fintech to pay STX the full $5.5 million earnout if Holdco were sold. In May 2023, General Atlantic, L.P. ("General Atlantic") reached an agreement with TA Associates Management ("TA"), Holdco's controlling equity holder, to purchase a 48.1% membership interest in Holdco. TA sold majority control over Holdco through this transaction, after which TA and General Atlantic both held equal 48.1% shares and equal rights to elect managers to Holdco's Board.

Fintech, however, refused to pay STX the maximum earn-out because the APA (by reference to Holdco's Operating Agreement) defined a "Sale" as a transaction in which sufficient equity to elect a majority of Holdco's Board was transferred. In fact, Holdco intentionally structured the transaction with General Atlantic so that TA would sell control over Holdco ***without*** triggering Fintech's obligation to pay the entire earnout to STX – while at the same time, Holdco's Board amended the terms of equity incentive units held by certain insiders at Holdco to accelerate the vesting of those units at closing of the General Atlantic transaction and ensure that those insiders would receive benefits not shared with STX,

Thompson, or other unitholders. In doing so, Holdco and Fintech unfairly denied STX and Thompson the rights for which they lawfully bargained in the APA.

To enforce those rights, STX and Thompson filed a Verified Complaint in the Court of Chancery on January 17, 2024. *See* A0011-A0022. In addition to claims alleged against Fintech and Holdco, plaintiffs originally alleged a derivative claim for breach of fiduciary duty against the Holdco insiders whose accelerated incentive units vested upon closing of the General Atlantic sale. *See id.* Shortly after plaintiffs commenced the action, however, Holdco exercised a contractual right to redeem Thompson's Holdco units for the purpose of eliminating Thompson's standing to seek derivative relief. *See* A0299. On April 12, 2024, plaintiffs then filed a Verified Amended Complaint against Fintech and Holdco alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and fraudulent inducement, and seeking an award of damages no less than the maximum earn-out payment that plaintiffs should have received under the APA. *See* A0504-A0516.

On May 10, 2024, defendants moved to dismiss the Amended Complaint. *See* A0799-A0847. After briefing and oral argument, the Court of Chancery issued a Memorandum Opinion on October 31, 2024, granting defendants' motion and dismissing all counts of plaintiffs' Amended Complaint. *See* Ex. A hereto. In its ruling, the Court of Chancery held that: (i) plaintiffs failed to allege a breach of the

APA because they did not plead facts supporting an inference that defendants acted in bad faith to deny plaintiffs the earn-out payment; (ii) plaintiffs' claim under the implied covenant of good faith and fair dealing conflicts with the express terms of the APA; (iii) plaintiffs did not allege an underlying breach of the APA to support a tortious interference claim against Holdco; and (iv) plaintiffs failed to plead fraud through silence because they offered no reason to infer that the defendants had a duty to speak or engaged in an affirmative act of fraudulent concealment. *See id.*

Plaintiffs appealed the Court of Chancery's ruling on December 2, 2024 and respectfully submit this Opening Brief in support of their appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly held that plaintiffs failed to state a breach of contract claim. The well-pled facts alleged in the Amended Complaint, taken as true and considered in the light most favorable to plaintiffs, support a reasonable inference that defendants' conduct – *e.g.*, intentionally passing over the Walmart RFP and structuring the transactions between Holdco and General Atlantic to divest TA of exclusive control of Holdco without transferring a majority of Holdco's equity – was taken in bad faith or to cause a reduction in the earn-out payments. This is precisely the conduct prohibited by the APA.

2. The Court of Chancery incorrectly rejected the theories on which plaintiffs alleged claims for breach of the implied covenant of good faith and fair dealing. First, plaintiffs identified a gap in the APA to be filled by the implied covenant. When negotiating the APA and agreeing to sell its business assets to Fintech, STX reasonably expected that it would be paid the entire maximum earn-out if TA gave up control of Holdco. STX agreed to defer a portion of its consideration in earn-out payments in reliance upon Holdco's continued management of Fintech and the STX business, while at the same time protecting its right to receive that consideration in the event that Holdco lost its control over Fintech (and, therefore, Fintech's ability to meet the earn-out targets). Applied strictly, the definition of "Sale of the Company" adopted in the APA does not

account for circumstances where TA divests its controlling stake in Holdco, and surrenders control of Holdco's board of managers, but no one single person or group of persons acquires a majority of Holdco's units. This is a gap in the APA that, if not addressed through the implied covenant, will allow defendants to evade liability for conduct that intentionally deprived plaintiffs of their reasonable expectations under the contract. Second, plaintiffs did not need to identify a gap in the APA to defeat defendants' motion to dismiss; the implied covenant of good faith and fair dealing applies to a contractual party's exercise of discretion, such as Fintech's decision relating to the Walmart RFP. The Court of Chancery, however, did not consider this argument in its ruling.

3. The Court of Chancery dismissed plaintiffs' claim for tortious interference with the APA based solely on its holdings that plaintiffs did not sufficiently allege an underlying cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing. If either of those claims survives, plaintiffs' tortious interference claim also must survive.

4. The Court of Chancery's dismissal of plaintiffs' fraud claim, based on its holdings that plaintiffs failed to identify a duty for Fintech to disclose the exclusive relationship with IRI or allege facts supporting an inference of intentional concealment, was incorrect. While negotiating the APA, defendants made affirmative representations about how Fintech would manage the STX business and

plaintiffs reasonably relied upon those representations when they agreed to accept earn-out payments as partial consideration. Defendants thus owed plaintiffs a duty to disclose additional information if defendants knew or believed that their initial representations would be materially misleading to plaintiffs without that additional or qualifying information. Since the IRI relationship would have materially impacted defendants' representations to plaintiffs concerning their future management of the STX business, defendants breached their duty of disclosure – and committed fraud – by concealing that relationship. Plaintiffs' fraud claim also is supported by allegations that defendants knew of STX's Walmart relationship and made numerous representations to plaintiffs about Fintech's prospects for running the STX Business and achieving the earn-out targets but actively concealed the IRI relationship from plaintiffs until after the parties executed the APA.

STATEMENT OF FACTS

A. Relevant Parties.

STX is an Arkansas limited liability company with a principal place of business in Bentonville, Arkansas. A0504. Thompson is the Manager and a Member of STX. A0506.

Fintech is a Florida limited liability company with a principal place of business in Tampa, Florida, and a subsidiary of Holdco, a Delaware limited liability company. A0505. Frederic (Tad) Phelps ("Phelps") is the Chief Executive Officer for Fintech and Holdco. A0508-A0509.

B. Fintech Purchases STX's Business.

STX, Thompson, and Fintech are parties to the APA, pursuant to which Fintech acquired from STX the assets relating to STX's "Business," defined in the APA as "providing consulting, software, and data solutions to the consumer packaged goods and retail industries." A0524. As consideration for the purchased assets, Fintech agreed to pay $5.3 million (subject to certain adjustments and payment of funds into escrow), assume certain liabilities from STX, and issue to STX common units in Holdco with an agreed value of $1.7 million. A0506 Following Fintech's acquisition of STX's assets, the Holdco common units delivered to STX were transferred to Thompson and the other selling Members of

STX. *Id.* In the APA, Fintech also agreed to employ Thompson as Vice President of Business Development. *See* A0653-A0660.

The APA entitled STX to receive additional consideration in the form of earn-out payments if the purchased assets met specified revenue goals. A0506. Under Section 2.7(a) of the APA, the "Maximum Earn-Out Consideration Amount" to be paid was $5.5 million. A0544. Each of three earn-out payment installments would become due and payable on December 31, 2021, December 31, 2022, and December 31, 2023, in amounts calculated under Section 2.7(b) according to certain goals for revenue generated by the acquired Business. *Id.* In Section 2.7(f) of the APA, Fintech agreed, clearly and unambiguously, that it "shall not take any action in bad faith with respect to Seller's ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof." A0545.

Alternatively, Section 2.7(c) of the APA entitled STX to payment of the Maximum Earn-Out Consideration Amount of $5.5 million (less any earn-out payments already paid to STX) "upon the closing of a Sale of the Company." A0545. The APA does not independently define a "Sale of the Company" (*see* A0534), but adopts the definition of that term used in Holdco's Amended and Restated Limited Liability Company Agreement (the "Operating Agreement"):

> [A]ny transaction or series of transactions pursuant to which any Person or group of related Persons … in the aggregate acquire(s) (i) equity securities of [Holdco] possessing the voting power (other than voting rights

> accruing only in the event of a default or breach) to elect Board members which, in the aggregate, control a majority of the votes on the Board (whether by merger, consolidation, reorganization, combination, sale or transfer of [Holdco]'s equity securities, securityholder or voting agreement, proxy, power of attorney or otherwise), or (ii) all or substantially all of [Holdco]'s assets determined on a consolidated basis.

A0722.

At the time the APA was executed, Holdco was managed by a Board of seven Managers, four of whom were appointed by TA, which held a controlling interest in Holdco through its affiliates. *See* A0507; A0744. Therefore, Section 2.7(c) of the APA, by incorporating the "Sale of the Company" language from Holdco's Operating Agreement, reflects STX's agreement and reasonable expectation that the full earn-out would be paid in the event TA ever sold control over Holdco (and, in turn, control over Fintech and the STX Business).

C. The Walmart RFP.

Before selling its business assets to Fintech, STX had pursued a potentially lucrative contract with Walmart to provide data management services for approximately 2-3 years. A0507. On April 5, 2023, after the APA closed, Walmart issued a request for proposals for a five-year contract for data management services provided by the STX Business purchased by Fintech. A0507-A0508. Walmart explicitly invited Fintech to submit a proposal, telling Fintech that its products appeared to be the only viable solution for Walmart's needs. A0508. Had Fintech

secured a contract with Walmart, the earnings to Fintech would have easily exceeded the APA's revenue targets triggering the maximum earn-out payment to STX. *Id.*

Fintech requested and obtained from Walmart, under the terms of a non-disclosure agreement, the necessary information to prepare and submit a proposal to the RFP. A0508. However, at 9:35 p.m. on May 1, 2023, the last day to submit proposals, Fintech abruptly notified Walmart by e-mail that Fintech would ***not*** submit a proposal. *Id.* This came as a surprise to Thompson, who had cultivated STX's relationship with Walmart before the transaction with Fintech. *Id.* In declining to respond to Walmart's RFP, Fintech cited "constraints" imposed by an "exclusive relationship" with IRI, a third party. *Id.* The "exclusive relationship" with IRI existed before Walmart issued the RFP, yet Fintech still requested the information needed to respond from Walmart – and received this information after entering into a non-disclosure agreement. *Id.*[1]

Before receiving the e-mail on May 1, 2023, plaintiffs knew nothing of the purported "exclusive relationship" between Fintech and IRI. A0508. Fintech had never indicated to STX that it had any relationships that would cause Fintech not to respond to an RFP. *Id.* Indeed, defendants never told plaintiffs, either before or after executing the APA, that there was any relationship or other business reason

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[1] Fintech has not explained why it requested and accepted confidential information from Walmart notwithstanding the purported conflict of interest it faced from the exclusive relationship with IRI.

that could affect the prospective contract with Walmart that STX had been cultivating for years. *Id.* Before May 1, 2023, defendants never disclosed to plaintiffs any conflicts of interest created by Fintech's relationship with IRI or that Fintech would forgo opportunities within the STX Business that competed with IRI. A0509. This information would have been material to plaintiffs when entering into the APA, since it directly impacted Fintech's ability to achieve the revenue targets triggering earn-out payments under the APA. *Id.*

After learning that Fintech failed to respond to the Walmart request for proposals, Thompson asked Phelps for additional information. A0508-A0509. Phelps did not respond. *Id.* Upon information and belief, defendants intentionally passed on the opportunity with Walmart for the purpose of denying STX the earn-out consideration to which it was entitled under the APA. A0510-A0511.

D. The General Atlantic Sale.

On May 13, 2023, Thompson learned that Holdco had reached agreement on a series of transactions with affiliates of General Atlantic. A0509. On May 17, 2023 – about two weeks after Thompson had asked Phelps for information concerning Fintech's decision not to pursue the Walmart opportunity – Phelps told Thompson that Holdco had begun marketing itself for sale at the time Walmart issued the RFP. *Id.* Phelps also told Thompson that Fintech passed on the Walmart RFP because

Holdco feared that a contract with Walmart would "muddy the waters" and threaten a prospective sale to General Atlantic. *Id.*

On or about August 1, 2023, Holdco announced that it had closed its transactions with General Atlantic. A0510. Under the terms of those transactions, as memorialized in an agreement dated May 16, 2023, affiliates of General Atlantic acquired a 48.1% membership interest in Holdco. A0509. While TA owned virtually 100% of Holdco's equity before the transactions, General Atlantic and TA each owned an equal 48.1% membership stake in Holdco after the transactions. *Id.* Prior to the transactions, TA controlled four of the seven Managers on Holdco's Board. *Id.* Following the transactions, however, each of General Atlantic and TA held a right to appoint two Managers to Holdco's board of managers. *Id.* Of the three remaining seats on Holdco's Board of Managers, Phelps held one, and the remaining were filled by the joint agreement of TA and General Atlantic. A0512. As a result of the transactions between Holdco and General Atlantic, TA did not hold a majority controlling interest of Holdco units and no longer had the right to appoint a majority of the Board. A0510.[2] Upon information and belief, defendants

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[2] Holdco's Operating Agreement was amended to provide that two "Independent Managers" who are not affiliated with either TA or General Atlantic may be designated and removed "by agreement" between TA and General Atlantic. A0951-A0952. The amended Operating Agreement does not explain how disputes between TA and General Atlantic are resolved if they do not agree on Independent Managers, but regardless the number of Holdco Managers TA is entitled to appoint on its own was reduced from four to two (out of seven) through the transactions.

intentionally structured the transactions with General Atlantic so that they would not strictly meet the definition of a "Sale of the Company" under the Operating Agreement and, therefore, would not trigger Fintech's obligation under Section 2.7(c) of the APA to immediately pay the Maximum Earn-Out Consideration Amount to STX. *Id.*

At the same time defendants were depriving plaintiffs of the full earn-out consideration to which they were entitled, Phelps and other individuals serving as Holdco's managers and officers lined their own pockets when selling control to General Atlantic by voting to accelerate the vesting of Management Incentive Units and other time-vested units, a self-interested benefit that was not shared with Thompson or other Holdco unitholders. *See* A0021. Plaintiffs originally brought a derivative claim challenging this as corporate waste and a breach of fiduciary duty, but they withdrew that cause of action after Holdco repurchased Thompson's units on March 15, 2024, the same day defendants moved to dismiss the Original Complaint. *See* A0299. In short, these insiders made sure to secure personal benefits for themselves when TA sold control over Holdco while simultaneously approving transactions with General Atlantic with terms that were designed intentionally to avoid triggering the same benefits for plaintiffs. The implications and timing of defendants' conduct are no coincidence; defendants never intended to pay plaintiffs the full consideration they were owed under the APA.

ARGUMENT

I. THIS ACTION SHOULD NOT HAVE BEEN DISMISSED.

A. Questions Presented.

Did plaintiffs allege sufficient, well-pled facts to support an actionable claim for breach of contract? *See* A1038-A1045.

Did plaintiffs sufficiently identify a gap in the APA or otherwise allege well-pled facts supporting an actionable claim for breach of the implied covenant of good faith and fair dealing? *See* A1045-A1049.

Did plaintiffs state an actionable claim for tortious interference with contract? *See* A1050-A1052.

Did plaintiffs state an actionable claim for fraudulent inducement, including by alleging sufficient, well-pled facts supporting a duty to disclose or intentional concealment? *See* A1052-A1059.

B. Scope Of Review.

This Court's "standard of review of a decision granting a motion to dismiss is *de novo*. At the motion to dismiss stage, [the Court] must 'accept as true all of the plaintiff's well-pleaded facts,' and 'draw all reasonable inferences' in plaintiff's favor. Further, a motion to dismiss should be denied if the facts pled support a reasonable inference that the plaintiff can succeed on his claims." *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019) (quoting *Allen v. Encore Energy Partners,*

L.P., 72 A.3d 93, 100 (Del. 2013)). Conversely, dismissal under Rule 12(b)(6) is warranted "only if the 'plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.'" *City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011)).

C. Merits Of Argument.

1. *Accepting all well-pled facts as true and applying the appropriate standard, plaintiffs state an actionable claim for breach of contract.*

"In order to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). When defendants acquired the STX Business, they agreed in Section 2.7(f) of the APA, clearly and unambiguously, that they would "not take any action in bad faith with respect to Seller's ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof." A0545. Therefore, as the Court below succinctly stated, "[t]o state a claim for breach, the complaint must allege facts supporting a reasonable inference that the Buyer acted in bad faith." Ex. A at 7. Plaintiffs' Amended Complaint did precisely that.

As a preliminary matter, and as the Court below noted, defendants cannot evade liability by claiming that their decision to not respond to the Walmart RFP constitutes permissible "inaction," rather than an "action" that is prohibited under the APA. This is a distinction without a difference, since "Delaware law recognizes that conscious inaction represents as much of a decision as conscious action." *Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 336 (Del. Ch. 2022).

Thus, the analysis turns on whether the well-pled allegations of the Amended Complaint sufficiently support an inference of bad faith – and they do. Bad faith occurs when one "intentionally acts with a purpose other than that of advancing the best interests of the corporation." *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 299 A.3d 393, 455 (Del. Ch. 2023) (quoting *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006)) (internal quotations omitted). In this action, plaintiffs allege that "Fintech breached the APA by ***intentionally, and in bad faith***, (i) forgoing a lucrative opportunity with Walmart for the ***express purposes of depriving STX of the earn-out consideration*** … ***and*** (ii) structuring General Atlantic's investment ***so that it would not … trigger Fintech's obligation*** under Section 2.7(c) of the APA ***to immediately pay the Maximum Earn-Out Consideration Amount to STX***." A0510-A0511 (emphasis added). Defendants' bad faith can be reasonably inferred from factual allegations that: (i) the STX Business was on the precipice of undertaking a lucrative contract with Walmart when defendants passed on that opportunity to

deprive plaintiffs of earn-out payments; (ii) defendants structured the General Atlantic transactions in such a way as to prevent plaintiffs from receiving earn-out payments; and (iii) defendants used the General Atlantic transactions as justification for passing on the Walmart RFP.

The Court below relied upon the first clause of APA Section 2.7(f) to hold that "[d]eciding whether to pursue the Walmart contract required a business judgment that the Buyer was empowered to make." Ex. A at 9. That language states:

> Buyer is entitled, after the Closing, to use the Purchased Assets and operate the Business in a manner that is in the best interests of Buyer or its Affiliates and shall have the right to take any and all actions regardless of any impact whatsoever that such actions or inactions have on the earn-out ….

A0545. Quoting *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010), the Court of Chancery observed that "[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party." Ex. A at 9. In *Nemec*, however, this Court affirmed the dismissal of a claim for breach of the ***implied covenant of good faith and fair dealing*** and did not consider what constitutes "bad faith" sufficient to breach a contractual term expressly ***prohibiting*** "bad faith." *See* 991 A.2d at 1128.[3] Here, the discretion given

[3] Specifically, the *Nemec* Court held that the implied covenant, which "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain," did not apply because the plaintiffs "got the benefit of their

to Fintech under the first clause of Section 2.7(f), is expressly limited by the second clause: "provided, that … Buyer ***shall not take any action in bad faith*** with respect to Seller's ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof." A0545 (emphasis added). The trial Court's reasoning, under which Fintech cannot act in bad faith when it acts within the scope of conduct permitted by the first clause of Section 2.7(f), effectively eliminates the limitation imposed by the second clause of the same paragraph. Delaware law does not allow such an interpretation. *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.") (internal quotations omitted).

The Court below also suggested that declining the Walmart RFP "because that could cause complications" for the General Atlantic transactions was a reasonable business justification permitted by the APA, rather than an act of bad faith. Ex. A at 9. This, however, fails to consider plaintiffs' allegations that the General Atlantic transactions themselves were intentionally structured in bad faith to avoid triggering payment of the maximum earn-out to plaintiffs and were used by Fintech as an excuse for not responding to the RFP. Additionally, plaintiffs alleged that Holdco's

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actual bargain." 991 A.2d at 1128. By contrast, Fintech breached the APA by engaging in conduct that the contract prohibits by its plain language.

insider Managers and officers accelerated their own insiders' unvested units upon closing the General Atlantic sale, a self-interested benefit that was not shared with Thompson or other Holdco unitholders and shows the General Atlantic transactions were not merely an independent act of business judgment. *See* A0021-A0022.

Notably, defendants have never disputed that the Walmart opportunity was "potentially lucrative" and would have satisfied the revenue targets for triggering earn-out payments to STX, as plaintiffs allege. *See* A0507. Regardless, plaintiffs also allege that defendants' decision not to pursue the Walmart opportunity wasted years of STX's hard work and burned good will with a substantial customer, all for the purposes of favoring the "relationship" with IRI and avoiding a situation that might "muddy the waters" with General Atlantic – and, in turn, keep the Holdco insiders from accelerating their Management Incentive Units. Bad faith can be inferred from alleged facts such as these showing that a transaction was "effected … for a reason unrelated to a pursuit of the corporation's best interests." *In re Columbia Pipeline Grp., Inc.*, 299 A.3d at 455.

The Court of Chancery also found it unreasonable to infer that the General Atlantic transactions were structured to avoid triggering the maximum earn-out, holding instead that "[t]he only reasonable inference from the structure of the transaction is that TA did not want to sell control" and "was only willing to accept shared control." Ex. A at 10. While the Court below acknowledged that "TA might

have bargained for contractual protections" to maintain control while still selling sufficient equity to General Atlantic to trigger a "Sale of the Company," it nonetheless rejected plaintiffs' allegations that defendants structured the transactions specifically to avoid paying the maximum earn-out to STX.

In short, the Court below declined to infer bad faith from plaintiffs' factual allegations because there were conceivable reasons for defendants' conduct that fell within the business judgment permitted by the APA. However, "[a] plaintiff need not 'plead facts that rule out any possibility other than bad faith.'" *Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1167 (Del. Ch. 2024) (quoting *Kahn v. Stern*, 2018 WL 1341719, at *1 (Del. Mar. 15, 2018) (en banc), *reported at* 183 A.3d 715 (Del. 2018)). Where, as here, plaintiffs have alleged facts raising a reasonable inference of bad faith, notwithstanding other potential justifications for the conduct, that reasonable inference must be accepted at the motion to dismiss stage. A contrary holding turns the applicable pleading standard on its head.

2. *Plaintiffs identify gaps in the APA and state an actionable claim for breach of the implied covenant of good faith and fair dealing.*

Even if one interprets the APA's terms in a manner that relieves defendants from liability for breaching them, plaintiffs allege in the alternative that defendants' actions nonetheless breached the implied covenant of good faith and fair dealing,

which "inheres in every contract governed by Delaware law and 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.'" *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145-46 (Del. Ch. 2009) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)). "[C]ourts will invoke the implied covenant to imply terms when necessary to protect the reasonable expectations of the parties." *Baldwin v. New Wood Resources LLC*, 283 A.3d 1099, 1116 (Del. 2022). Here, plaintiffs had a reasonable expectation when they agreed to accept future earn-out payments in partial consideration for selling the STX Business that Fintech would not act arbitrarily to deprive plaintiffs of those earn-out payments, even if the language of the APA did not strictly prohibit Fintech's conduct. As alleged in the Amended Complaint, defendants' actions to forgo the Walmart RFP and structure the General Atlantic sale to avoid triggering the maximum earn-out payment frustrated plaintiffs' reasonable expectations under the APA.

With respect to the Walmart RFP, the Court below found that Section 2.7(f) of the APA described an express standard of conduct governing Fintech's business decisions that left no contractual "gap" to be filled by the implied covenant. *See* Ex. A at 11. However, while the APA gave Fintech discretion "to use the Purchased Assets and operate the business in a manner that is in the best interests of Buyer or

its Affiliates" (A0545), this language does not excuse Fintech from honoring the implied covenant of good faith and fair dealing. Instead, the implied covenant requires that "[w]hen exercising a discretionary right, a party to the contract must exercise its discretion reasonably." *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 419 (Del. 2013). Plaintiffs allege that defendants abused their discretion to manage the STX Business by rejecting the Walmart RFP and thereby denying plaintiffs the earn-out payments to which they were entitled under the APA. Defendants thereby frustrated plaintiffs' reasonable expectations as contracting parties and, if defendants' conduct was not strictly prohibited by the APA's precise language, this creates a gap in the APA that can only be rectified through plaintiffs' claim for breach of the implied covenant.

Another gap exists in the "Sale of the Company" definition adopted by the APA for triggering payment of the Maximum Earn-Out Consideration to plaintiffs. As plaintiffs alleged, they agreed to defer receipt of a portion of the consideration paid for the STX Business – *i.e.*, the Earn-Out Consideration – trusting in defendants' management of the STX Business to achieve the milestones that would trigger the deferred payments. Section 2.7(c) of the APA reflects plaintiffs' reasonable understanding and expectation that, if a third party later assumed control over the STX Business, then plaintiffs would not have to rely upon the outsider's management of Fintech and their Earn-Out Consideration would become

immediately due and payable. This is a logical conclusion, since plaintiffs would have no control over when or to whom TA might sell Holdco or who could manage the STX Business should TA decide to sell its controlling stake. Thus, plaintiffs rationally negotiated for the right to receive their full earn-out payments upon a change of control to protect against an unfamiliar third party managing the STX Business and thereby influencing whether the earn-outs are triggered.

This is not an unusual or unreasonable expectation for sellers in plaintiffs' position. *See Fortis Advisors LLC v. Johnson & Johnson*, 2024 WL 4048060, at *1 (Del. Ch. Sept. 4, 2024) (noting that earnout provisions "are common risk allocation tools" where "[t]he seller … risks losing the earnout payment along with operational control after closing" and "may be loath to agree to an earnout structure without contractual assurances from the buyer and a strong belief in the value of its business"). This Court's longstanding doctrine under *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), also explains plaintiffs' reasonable bargained-for expectation that a change in control at Fintech would constitute a "Sale of the Company" and trigger the Maximum Earn-Out Consideration. Indeed, the definition of "Sale of the Company" as adopted by the APA identifies the two circumstances underlying a *Revlon* analysis – a sale of Holdco's assets and a change in majority control over the Board. The enhanced scrutiny of *Revlon* applies in the context of either a "sale of the company" or a "change in control" because both

represent a "sale of control" of the company, triggering the enhanced judicial review. *See McGowan v. Ferro*, 859 A.2d 1012, 1032 (Del. Ch. 2004). Delaware Courts have a history of using the terms "sale of control" and "change of control" interchangeably, given the lack of doctrinal distinction between the two for purposes of examining this type of transaction. *See, e.g.*, *Paramount Comms. Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 n.10 (Del. 1994).

The Court of Chancery, however, drew a distinction in this action between "a shift to shared control" and "a change in control that results in a new controller," finding that plaintiffs should have had no expectation that their earn-out payments would be accelerated upon the first event. *See* Ex. A at 12. This distinction focuses only on the effects upon TA from the two possible transactions – *i.e.*, a shift from majority controller to split controller, rather than a minority holder – rather than analyzing how plaintiffs' interests would be affected. For plaintiffs, the change to shared control is salient; while plaintiffs negotiated the APA expecting that TA would control Holdco and thus make business decisions impacting the earn-out payments, adding General Atlantic as an equal controller with TA introduces an unfamiliar third party into managing Fintech and takes full control out of TA's hands. Therefore, TA's supposed right to "block changes in the Company's

direction" as co-controller does not mean, as the Court of Chancery inferred, that "shared control did not increase the plaintiffs' risk." Ex. A at 12.[4]

In similar circumstances, the Court of Chancery recognized that a "change of control" could occur when the person who "is basically in charge" of a business changed, even if a 35% equity ownership threshold was not met by one single purchaser on its own. *Wilmington Sav. Fund Soc'y, FSB v. Foresight Energy LLC*, 2015 WL 7889552, at *8 (Del. Ch. Dec. 4, 2015). Here, plaintiffs agreed to partially defer consideration while TA was "in charge" of Holdco and Fintech and reasonably expected that their earn-out payments would be accelerated if TA was no longer "in charge." Even if the General Atlantic transactions did not meet the strict definition of a "Sale of the Company" as used in the APA, plaintiffs' reasonable expectations

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[4] There also is nothing in the Amended Complaint or the relevant contracts supporting an inference that TA has the ability to "block changes in the Company's direction." Following their transactions, TA and General Atlantic are entitled to appoint two Managers to the Holdco Board, with an additional two Managers to be jointly appointed by TA and General Atlantic. Given General Atlantic's ability to veto choices to which it does not agree, and its role in appointing 4 of the 7 Managers to the Board, the transaction may nonetheless constitute a "Sale of the Company" that triggered the Maximum Earn-Out Consideration. Without discovery, however, there is no way to determine whether and to what extent TA and General Atlantic collaborate on the "Independent Manager" choices, or whether General Atlantic has *carte blanche* to simply appoint who it pleases. If the latter, a Sale of the Company occurred, and Plaintiffs are owed the Maximum Earn-Out Consideration under Section 2.7(c) of the APA. Absent such circumstances, a contractual gap remains to be filled.

under the APA must be protected by the implied covenant of good faith and fair dealing.

3. *If plaintiffs state an actionable claim for breach of contract or breach of the implied covenant of good faith and fair dealing, their claim for tortious interference also survives.*

Under Delaware law, the elements of a claim for tortious interference with contract are: (i) a contract, (ii) about which defendant knew, and (iii) an intentional act that is a significant factor in causing the breach of such contract, (iv) without justification, (v) which causes injury. *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 453 (Del. 2013). To be actionable, a claim for tortious interference requires an underlying breach of contract or the implied covenant of good faith and fair dealing. *See NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *26-27 (Del. Ch. Nov. 17, 2014).

In this action, the Court of Chancery dismissed plaintiffs' tortious interference claim solely on the ground that Counts I and II did not sufficiently plead predicate claims for breach of the APA or breach of the implied covenant. *See* Ex. A at 13. Therefore, if this Court reverses the trial Court's dismissal of Count I or II, then plaintiffs have alleged an underlying cause of action to support their claim for tortious interference with the APA.

Plaintiffs also have alleged facts satisfying the other elements for tortious interference with contract. Plaintiffs sufficiently pled a lack of justification for

defendants' conduct, which can be established by alleging that the party in question acted for some "bad faith purpose." *See Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053, at *27 (Del. Ch. Oct. 7, 2019). Plaintiffs allege explicitly that defendants intentionally structured the General Atlantic transaction for the purpose of unfairly depriving plaintiffs of the earn-out payments to which they were entitled under the APA. Thus, as alleged in the Amended Complaint, Holdco acted with the express purpose of interfering with the APA, and not for some lawful purpose. Defendants cannot rely upon a "justification defense" to plaintiffs' claim for tortious interference with contract, which "turn[s] on good faith, or more precisely, the absence of bad faith." *Skye Mineral Investors, LLC v. DXS Capital (U.S.) Limited*, 2020 WL 881544, at *33 (Del. Ch. Feb. 24, 2020). Where, as here, plaintiffs have sufficiently pled bad faith conduct motivating the tortious interference, the claim should not be dismissed. *See id.* at *33-34.

Defendants also are not entitled to any "affiliate privilege" protecting their tortious interference. As with a justification defense, the affiliate privilege turns on a lack of bad faith. *See id.* at *33. Plaintiffs alleged in detail in the Amended Complaint that Holdco "use[d] its control of a subsidiary, not to enrich the subsidiary, but to divert value from the subsidiary … in a bad faith manner …." *See PPL Corp. v. Riverstone Holdings LLC*, 2019 WL 5423306, at *13 (Del. Ch. Oct. 23, 2019) (internal quotations and citations omitted). Plaintiffs further allege that

Holdco intentionally prevented Fintech from realizing a lucrative opportunity with Walmart and then sold control in a manner intentionally designed not to trigger a "Sale of the Company," with the bad faith objective of preventing plaintiffs from being paid $5.5 million of earn-out consideration to which they were entitled under the APA. When considering the allegations of the Amended Complaint in their entirety, plaintiffs have sufficiently pled a claim for tortious interference with contract.

4. ***Plaintiffs' fraud claim sufficiently alleges that defendants owed a duty to disclose the relationship with IRI and that defendants actively concealed such relationship.***

Court of Chancery Rule 9(b) states that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." Ct. Ch. R. 9(b). "Cases interpreting the Rule 9(b) requirement have held that a complaint must allege '(1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations.'" *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *22 (Del. Ch. Apr. 21, 2015) (quoting *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006)). Where, as here, "the necessary facts are typically within the opposing party's control, less particularity is required and the claim can prevail so long as the

claimant describes the circumstances of fraud with 'detail sufficient to apprise the defendant of the basis for the claim.'" *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *9 (Del. Super. Ct. Aug. 7, 2019) (quoting *CSH Theatres*, 2015 WL 1839684, at *22)).

Plaintiffs have done so here. Among other things, the Amended Complaint alleges:

- "Before agreeing to sell its assets to Fintech, STX had pursued a potentially lucrative contract with Walmart for approximately 2-3 years." A0507.

- "Fintech … requested and obtained from Walmart the information required to prepare and submit a response to Walmart's RFP." A0508.

- "[T]he 'exclusive relationship' with IRI existed before Walmart issued the RFP and Fintech requested the information needed to respond to the RFP." *Id.*

- "Defendants never informed Plaintiffs, either before or after executing the APA, that Fintech's 'exclusive relationship' with IRI affected the prospective contract with Walmart that STX had been cultivating for years." *Id.*

- "[B]efore May 1, 2023, Defendants concealed the existence of Fintech's 'exclusive relationship' with IRI from Plaintiffs and never disclosed to Plaintiffs the conflict of interest created by this relationship …." A0509.

- "This information [concerning Fintech's relationship with IRI] would have been material to Plaintiffs when entering into the APA with Defendants, since it directly impacted Fintech's ability to achieve the revenue targets triggering earn-out payments under the APA." *Id.*

- "While Defendants knew that STX was pursuing a major opportunity with Walmart when Fintech purchased the STX Business, they

> concealed Fintech's relationship with IRI from Plaintiffs to induce Plaintiffs to enter into the APA under the false expectation that they would be paid the Maximum Earn-Out Consideration." A0514.

Common law fraud can arise from, among other things, "active concealment of facts that prevents their discovery [and] remaining silent in the face of a duty to speak." *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, at *6 (Del. Ch. Apr. 10, 2008). In dismissing plaintiffs' claim for fraudulent inducement, the Court below found that plaintiffs neither "identified any reason why the Buyer would have had a duty to speak" nor "alleged any act of intentional concealment." Ex. A at 14.

Defendants, however, had an obligation when negotiating the APA to disclose information having a material impact on whether plaintiffs would receive the earn-out payments. "[O]nce a party chooses to speak, he can be held liable if he makes '[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter.'" *Corporate Prop. Assocs. 14 Inc.*, 2008 WL 963048, at *6 (citing Restatement (Second) of Torts § 529 (1977)). This duty "can arise before the consummation of a business transaction" when a party makes certain representations that are materially impacted by known, but intentionally unidentified, material information. *NetApp, Inc. v. Cinelli*, 2023 WL 4925910, at *13 (Del. Ch. Aug. 2, 2023). "[I]f a party in an arms' length negotiation chooses to speak, then it cannot

lie." *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015). "[O]nce the party speaks, it also cannot do so partially or obliquely such that what the party conveys becomes misleading." *Id.*

When negotiating a business transaction, it is reasonably conceivable that a party commits fraud when it induces the counterparty to enter into the transaction but fails to disclose information that materially affects the value of the assets bought or sold. *See Surf's Up Legacy Partners, LLC v. Virgin Fest, LLC*, 2021 WL 117036, at *14 (Del. Super. Ct. Jan. 13, 2021). In *Surf's Up*, the plaintiff alleged that the sellers made representations regarding the current liabilities and losses of the business, misrepresented the anticipated profits and cash flows by utilizing economically invalid assumptions, and prevented discovery of debts and litigation that comprised hidden liabilities and losses, among other things. *Id.* Accepting those well-pled allegations as true, the Superior Court found that the undisclosed material liabilities "either were intentionally not disclosed (deliberate concealment) or were starving for correction (breach of the duty to speak) at closing." *Id.* In essence, the plaintiffs in *Surf's Up* alleged that they were duped into accepting the value of the business based on forward-looking statements that masked present financial ruin. *See id.* at *15.

Here, plaintiffs similarly allege that defendants presented a false picture about the economic prospects of the STX Business under defendants' control. The parties

negotiated revenue triggers for earn-out payments based on defendants' representations regarding the future performance of the STX Business; however, defendants did not disclose the IRI relationship to plaintiffs, even though it would materially impact the ability of the STX Business to reach the negotiated revenue milestones. Had plaintiffs known of the IRI relationship, it is reasonable to infer that they would have negotiated for lower triggers for the earn-out payments, to account for the possibility that the IRI relationship diminished the then-understood value of the STX Business on a going-forward basis.

But defendants did not disclose the IRI relationship, and plaintiffs were unaware of it until Fintech rejected the Walmart RFP. "To plead active concealment, a plaintiff must allege facts supporting an inference that the 'defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.'" *Corporate Prop. Assocs. 14 Inc.*, 2008 WL 963048, at *7. Plaintiffs allege in detail that defendants knew of the Walmart relationship, made numerous representations to plaintiffs about Fintech's prospects managing the STX Business in support of the earn-out provisions negotiated by the parties, and concealed the IRI relationship from plaintiffs. Whether deliberate concealment or silence in the face of a duty to speak, it is reasonably conceivable from the facts

alleged in plaintiffs' Amended Complaint that defendants are liable for fraudulent concealment.

Defendants also advanced several arguments in the proceeding below that, while not addressed by the Court of Chancery, are nonetheless unavailing. First, plaintiffs' fraudulent inducement claim is not duplicative of their breach of contract claim because plaintiffs seek rescissory damages, a distinct remedy, as relief for defendants' fraud. *See Partners & Simons, Inc. v. Sandbox Acquisitions, LLC*, 2021 WL 3159883, at *6 (Del. Ch. July 26, 2021). Nor have plaintiffs "bootstrapped" their breach of contract claim into a claim for fraudulent inducement. Impermissible "bootstrapping" occurs when a plaintiff simply "add[s] the term 'fraudulently induced' to a complaint … by alleging that the defendant never intended to abide by the agreement at issue." *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *16 (Del. Ch. Nov. 19, 2013). By contrast, plaintiffs allege that defendants concealed information that would have been material to their negotiations and decision to enter into the APA. "Allegations that are focused on ***inducement*** to contract are separate and distinct conduct" and allow "[a] fraud claim [to] be based on representations found in a contract" and coexist with breach of contract claims. *Novipax Holdings LLC v. Sealed Air Corp.*, 2017 WL 5713307, at *12 (Del. Super. Ct. Nov. 19, 2013) (emphasis in original). This is precisely what plaintiffs allege here.

Finally, plaintiffs have sufficiently pled justifiable reliance. The Amended Complaint alleges that "Plaintiffs justifiably relied upon Defendants' intentional omission of … material information when they entered into the APA." A0515. Additionally, defendants cannot rely upon the integration language contained in Section 9.7 of the APA to defeat plaintiffs' reliance claim.[5] Under Delaware law, "[t]he presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims." *Kronenburg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004). Section 9.7 of the APA is a standard integration clause, not an anti-reliance clause, and cannot insulate defendants from liability.

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[5] *See* A0580 ("This Agreement and the other Transaction Documents constitute the sole and entire agreement of the Parties with respect to the subject matter contained herein and therein, and supersede all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter.").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reverse the Court of Chancery's judgment granting defendants' Motion to Dismiss.

Dated: January 29, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 29, 2025, true and correct copies of the attached document were served upon the following counsel of record via File & ServeXpress:

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