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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.	Case No. 494, 2024 Court Below: Court of Chancery; C.A. No. 2024-0038-JTL

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Plaintiffs STX Business Solutions, LLC and its manager, Jon Thompson, are sophisticated parties who sold their software and consulting business in 2021 to Financial-Information-Technologies, LLC ("Fintech") for approximately $7 million in cash and equity. In the carefully negotiated Asset Purchase Agreement ("APA"), the parties also specified the precise conditions that would obligate Fintech to make earn-out payments: Those payments would be due *if* (1) the acquired business hit certain revenue targets between calendar years 2021 to 2023, or (2) Fintech's parent company, Fintech Holdco, LLC ("Holdco"), effected a "Sale of the Company" as defined in the parent company's operating agreement.

It is undisputed that the revenue targets were never reached and that no "Sale of the Company" occurred. Yet Plaintiffs filed this action demanding the earn-out payments anyway. The gist of their complaint is that they *assumed* that Fintech would take certain steps that (in Plaintiffs' view) would have guaranteed them the earn-out payments. Plaintiffs complain that Fintech decided not to pursue a "potentially lucrative" contract with Walmart that STX had been working toward, and that another investor purchased a large portion of Holdco—but not enough to effect a "Sale of the Company" as defined in the contract.

In essence, Plaintiffs wish that they had bargained for different earn-out protections than what they negotiated in the APA. That contract does not require

Fintech to pursue an opportunity with Walmart or do anything else to help STX satisfy the earn-out targets. In fact, the agreement expressly authorizes Fintech to act in its own best interests "regardless of any impact whatsoever that such actions or inactions have on the earn-out," so long as Fintech does "not take any action in bad faith with respect to [STX's] ability to earn the Earn-Out Consideration." A0545. If Plaintiffs wanted to guarantee that Fintech pursue the Walmart contract or that the Holdco transaction would trigger the earn-out payments, they should have bargained for those guarantees.

Plaintiffs attempt to plead around the APA's Fintech-friendly provisions by asserting that Fintech acted in "bad faith"—a claim that Plaintiffs styled as breach of contract and, in the alternative, breach of the implied covenant of good faith and fair dealing. Plaintiffs also brought claims for tortious interference with contract and fraudulent inducement. After briefing and oral argument, however, the Court of Chancery correctly dismissed all claims. That court explained that the Amended Complaint fails to plead facts supporting a reasonable inference of bad faith and, because the conduct of which Plaintiff complains is specifically addressed by the APA, there is no "gap" for the implied covenant to fill. The Court of Chancery also dismissed the tortious interference claim given the lack of an underlying breach. Finally, it dismissed the fraudulent inducement claim because Plaintiffs did not plead any duty to speak.

This Court should affirm. The trial court's thoughtful opinion rightly dismissed all claims, and nothing in Plaintiffs' arguments on appeal suggests that the court below erred. Moreover, as further discussed below, this Court may also affirm on several alternative grounds that were fairly presented below.

SUMMARY OF THE ARGUMENT

1. Denied. The trial court correctly held that, beyond conclusory allegations of wrongdoing, the Amended Complaint fails to plead facts supporting a reasonable inference of wrongdoing. Indeed, the facts that are alleged in the complaint support the opposite inference—that Defendants made good faith decisions in their own best interests, as expressly authorized by the APA. Alternatively, the Court may affirm on the ground that, by its plain terms, the relevant APA provision establishes a "negative covenant" that prohibits only "actions," not inactions. And Plaintiffs' breach-of-contract allegations plead only inactions.

2. Denied. The Court of Chancery correctly concluded that the APA's earn-out provision and "Sale of the Company" definition leave no gap that can be filled with an implied covenant. In fact, those provisions squarely and unambiguously address the exact issues underpinning Plaintiffs' complaint. Plaintiffs impermissibly seek to rewrite the APA through the implied covenant.

3. Denied. The Court of Chancery correctly dismissed the tortious interference claim for lack of a breach. Plaintiffs mistakenly assert that, if this Court holds that one theory of breach is adequately pled, then their "tortious interference claim also must survive." Even if this Court were to reverse the dismissal of one of the breach-of-contract claims, the Court may affirm dismissal of the tortious interference claim on alternative grounds. Here, this Court may affirm on the

alternative ground that the Amended Complaint does not plead that any interference by Holdco was "without justification," because it cannot reasonably be inferred that an improper motive was Holdco's sole motive.

4. Denied. The trial court correctly dismissed the fraudulent inducement claim because Plaintiffs failed to plead active concealment or a duty to speak. In this Court, Plaintiffs proclaim that "defendants made affirmative representations about how Fintech would manage the STX business"—but that is attorney argument that is absent from the Amended Complaint. The Amended Complaint does not contain any allegations of such representations, and it certainly does not plead such representations with the requisite particularly under Court of Chancery Rule 9(b). This Court may affirm on that ground. It may also affirm on the alternative ground that, under well-established Delaware law, Plaintiffs' fraud claim is barred by the APA's express integration and non-reliance clauses.

COUNTERSTATEMENT OF FACTS

I. Factual Background.

A. The Agreement's Earn-Out Provisions.

Fintech is a leading business solutions and data services provider focused on simplifying beverage alcohol management for retailers, distributors, and suppliers, serving over 4,600 distributors and over 225,000 retail locations in all 50 states. A0814.[1] Holdco is Fintech's parent corporation. A0505-A0506 (¶¶4, 11).

In July 2021, Fintech executed an Asset Purchase Agreement ("APA") with STX and Thompson, through which Fintech agreed to purchase STX's software business in the consumer-packaged goods and retail industries. A0506 (¶10). In exchange, Fintech agreed to pay $5.3 million and deliver $1.7 million worth of common units of Holdco. *Id.* (¶11).

Fintech also agreed to make earn-out payments up to a maximum of $5.5 million if specified conditions were satisfied. *Id.* (¶12). The APA provides that earn-out payments would be made if either of two conditions were satisfied: (a) the acquired business reached certain revenue targets between calendar years 2021 to

[1] *See also Financial Information Technologies Announces Strategic Investment from General Atlantic*, Business Wire (Aug. 1, 2023, 9:00 AM), https://www.businesswire.com/news/home/20230801913888/en/FinancialInformation-Technologies-Announces-Strategic-Investment-from-GeneralAtlantic. This document is incorporated by reference into the Amended Complaint. A0510 (¶26.).

2023, or (b) immediately "upon the closing of a Sale of the Company." A0544-A0545 (APA § 2.7(b)-(c)). Under the APA, "Sale of the Company" has the meaning set forth in Holdco's Operating Agreement (*see* A0524), which provides:

> "Sale of the Company" means any 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.[2]

Because the earn-out necessarily depended on how Fintech would operate the business, the parties carefully delineated what Fintech could and could not do with respect to any potential impact on the earn-out:

> [Fintech] is entitled, after the Closing, to use the Purchased Assets and operate the Business in a manner that is in the best interests of [Fintech] 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 contemplated by this Section 2.7; provided, that … [Fintech] shall not take any action in bad faith with

[2] Unless otherwise specified, this brief cites the Amended and Restated Operating Agreement dated August 15, 2018. A0711. The Holdco Operating Agreement was subsequently amended on February 21, 2023 and June 30, 2023. *See* A0816 n.4; A0849. The "Sale of the Company" definition remains the same throughout.

> respect to [STX]'s ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof.

A0545 (APA § 2.7(f)).

The APA also contains explicit and comprehensive non-reliance (Section 5.7) and integration (Section 9.7) provisions. *See* A0569; A0580.

B. The Walmart Request for Proposal.

The Amended Complaint alleges that, on April 5, 2023, Walmart issued a request for proposal ("RFP") "seeking a 5-year contract for data management services provided by the STX Business purchased by Fintech." A0507-A0508 (¶18). The deadline for this RFP was May 1, 2023—which was just seven months before the final earn-out measurement date of December 31, 2023. A0508 (¶20); A0544 (APA § 2.7(b)(iii)). The Amended Complaint does not contain any further details about when Walmart would make a decision on the RFP, how many other parties were invited to participate, the total amount of money at stake, or how much revenue from this contract would have been generated in calendar year 2023. It simply alleges that "[h]ad Fintech successfully secured a contract with Walmart, Fintech easily would have exceeded the revenue targets triggering STX's earn-out payments under the APA." A0507-A0508 (¶18).

On May 1, 2023, according to the Amended Complaint, Fintech emailed Walmart explaining that Fintech would not be submitting a proposal because of

"'constraints' imposed by an 'exclusive relationship' with a third party, Information Resources, Inc. ('IRI')." A0508 (¶¶20-21). The Amended Complaint labels this explanation "pretextual…, since the 'exclusive relationship' with IRI existed before Walmart issued the RFP and Fintech requested the information needed to respond to the RFP." *Id.* (¶21). But even that allegation admits that the "exclusive relationship" with IRI existed. Indeed, elsewhere Plaintiffs allege that "Defendants concealed the existence of Fintech's 'exclusive relationship' with IRI from Plaintiffs and never disclosed … Fintech would forgo opportunities within the STX Business that competed with IRI." A0509 (¶23). The Amended Complaint contains no allegations that the parties ever discussed IRI or Walmart prior to the APA, and neither is mentioned in the APA.

The Amended Complaint alleges that after Fintech declined to pursue the Walmart RFP, Holdco's Chief Executive Officer informed Thompson (STX's manager) that "at the time Walmart issued its RFP, Holdco already had begun marketing itself for a potential sale" and "Holdco did not want a new contract with Walmart to possibly 'muddy the waters' and threaten a sale of Holdco." A0509 (¶25).

C. The General Atlantic Investment.

Until May 2023, Holdco was majority owned by non-party TA Associates Management ("TA"), and Holdco's Operating Agreement entitled TA to appoint

four of seven seats on Holdco's Board of Managers ("Board"). A0507 (¶17). In May 2023, General Atlantic, L.P. ("General Atlantic") and Holdco agreed that General Atlantic acquire a 48.1% membership stake in Holdco, and TA would likewise hold an equal 48.1% membership state in Holdco. A0509 (¶24). In connection with this agreement, Holdco's Operating Agreement was amended to provide that, in lieu of TA appointing four of the seven Board seats, TA and General Atlantic would each appoint two. *Id.*

The Amended Complaint acknowledges that, because General Atlantic acquired only two of seven seats on the Board, the General Atlantic transaction did "not strictly meet the definition of a 'Sale of the Company' in the Operating Agreement." A0510 (¶27); *see also* A0512 (¶39).[3] The Amended Complaint does not allege that General Atlantic had ever proposed, or that TA would have accepted, a different transaction that would have satisfied the definition of a "Sale of the

[3] In this Court, Plaintiffs suggest for the first time that "[w]ithout discovery … there is no way to determine whether … a Sale of the Company occurred." Opening Br. 27 n.4. But that has the pleading burden backwards; Plaintiffs do not get discovery in search of a claim. In any event, Plaintiffs plead themselves out of a claim, as the Amended Complaint pleads that "General Atlantic did not acquire a majority of Holdco's units through its investment or obtain the right to appoint a majority of Managers on the Board." A0512 (¶39). Those allegations are "judicial admissions [that] are 'conclusive and binding both upon the party against whom they operate, and upon the court.'" *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 766 (Del. 2022) (citation omitted).

Company." In fact, Section 3.6(a)(iii)(H) of the Holdco Operating Agreement prohibited Holdco and Fintech from "effect[ing] any Sale of the Company" "without the prior written consent of TA." A0734-A0735. Upon the APA's closing, the Seller Parties (including Thompson) executed joinders to the Holdco Operating Agreement, as required under Section 2.10(a)(xii) of the APA. *See* A0546; A0694. Thus, in entering into the APA, Plaintiffs expressly agreed that no Sale of the Company would occur absent TA's written consent.

Nonetheless, the Amended Complaint asserts that Holdco and Fintech "intentionally structured General Atlantic's investment so that it would not strictly meet the definition of a 'Sale of the Company' in the Operating Agreement and, therefore, it would not trigger" the earn-out payment. *Id.*

II. Procedural History.

Plaintiffs initiated this action in the Court of Chancery in January 2024, initially naming as defendants Fintech, Holdco, and several of Holdco's directors. *See* A0011. The initial complaint did not assert a claim for breach any express provision of the APA. *See* A0017-A0022. In April 2024, following a motion to dismiss, Plaintiffs amended the complaint—leaving only Fintech and Holdco as named defendants. *See* A0504.

The Amended Complaint asserts four counts: (1) breach of contract (against Fintech), (2) breach of the implied covenant of good faith and fair dealing (against

Fintech), (3) tortious interference with contract (against Holdco), and fraudulent inducement (against Fintech and Holdco). A0510-A0515 (¶¶28-51). Fintech and Holdco moved to dismiss all counts under Court of Chancery Rules 9(b) and 12(b)(6). A0799. The motion was fully briefed and the Court of Chancery heard argument. A1111. On October 31, 2024, the court issued a memorandum opinion dismissing the Amended Complaint for failure to state a claim. *See* Ex. A at 14.

Plaintiffs' first claim asserts a breach of Section 2.7(f) of the APA, which provides that Fintech "shall not take any action in bad faith with respect to [STX's] ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof." A0510 (¶30). In moving to dismiss, Fintech and Holdco argued that the plain language of this provision establishes a "negative covenant" that prohibits only *actions*, not inactions. A0825-0826. Indeed, Plaintiffs conceded in their opposition brief and at oral argument that Section 2.7(f) established a "negative covenant." A1043; A1149. Yet the trial court *sua sponte* rejected the parties' shared understanding of a negative covenant, reasoning instead that "[t]he reference to 'action' in the earnout provision encompasses both" "action and inaction." Ex. A at 7-8.

Nevertheless, the Court of Chancery concluded that the breach-of-contract claim fails because Plaintiffs' allegations do not "support an inference of bad faith." Ex. A at 8. First, the court explained that the Amended Complaint itself alleges that

Fintech "did not want to pursue the Walmart contract because that could cause complications for the [General Atlantic] transaction," and that was "a business judgment that the [Fintech] was empowered to make" under the APA. *Id.* at 9. "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." *Id.* (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010)).

Second, the Court of Chancery explained that the "joint-control regime" established through the General Atlantic transaction did not support a reasonable inference of bad faith "[g]iven the obvious business purpose for insisting on shared control"—*i.e.*, "[i]f TA had sold control to [General Atlantic], then TA would have been in the vulnerable position of a minority investor." *Id.* at 10.

The Court of Chancery next dismissed Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. The court rejected Plaintiffs' first theory of breach, which turned on Fintech's decision not to pursue the Walmart contract, because Section 2.7(f) of the APA contains an express provision regarding Fintech's obligations with respect to the earn-out. Therefore, "there is no gap to fill" with an implied covenant. Ex. A at 11-12. For similar reasons, the court rejected Plaintiffs' other theory of breach arising from the General Atlantic transaction. Because the APA "clearly states that the Maximum Earnout will become due and payable upon a Sale of the Company," "[t]he necessary implication is that other

types of transactions do not trigger the Maximum Earnout." *Id.* at 12. Thus, "there is no gap for the implied covenant to fill." *Id.*

The Court of Chancery also dismissed the remaining claims. Because there was no "underlying breach of contract," the claim of tortious interference with contract lacks a necessary predicate. Ex. A at 13. And the court reasoned that the claim of fraudulent inducement fails because "a plaintiff who asserts an omission-based fraud claim still must allege facts giving rise to a duty to speak or that support an inference of intentional concealment." *Id.* at 14. But Plaintiffs "have done neither." *Id.*

ARGUMENT

The Court of Chancery Correctly Dismissed the Action.

I. Questions Presented

Whether the Court of Chancery correctly concluded that the Amended Complaint failed to state a claim for breach of contract (*see* A0821-A0830), breach of the implied covenant of good faith and fair dealing (*see* A0830-A0834), tortious interference with contact (*see* A0835-A0839), or fraudulent inducement (*see* A0840-A0845).

II. Scope of Review

This Court reviews *de novo* the trial court's decision to grant a motion to dismiss under Rule 12(b)(6). *In re General Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 167-68 (Del. 2006). "A motion to dismiss may be granted where 'the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.'" *Geico General Ins. Co. v. Green*, 308 A.3d 132, 140 (Del. 2022) (citation omitted). The Court accepts as true the complaint's well-pled allegations and draws "all reasonable inferences that logically flow from those allegations" in favor of the non-moving party. *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). The Court does "not, however, simply accept conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor." *Id.*

III. Merits of Argument

The Court of Chancery correctly dismissed this action. This Court should affirm for the reasons given in the Court of Chancery's cogent opinion. Additionally, this Court may affirm on several alternative grounds.

A. The trial court correctly concluded that the Amended Complaint does not state a claim for breach of contract.

As the trial court held, the facts alleged do not support a reasonable inference that Defendants acted in bad faith with respect to the earn-out. That decision should be affirmed. This Court may also affirm on the alternative ground that the plain terms of Section 2.7(f) of the APA establish a negative covenant prohibiting certain actions, not inactions—and the Amended Complaint pleads *inaction* by Fintech. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("[T]his Court may affirm on the basis of a different rationale than that which was articulated by the trial court.").

1. The Amended Complaint does not support a reasonable inference of bad faith conduct.

In this Court, Plaintiffs first argue that bad faith can be inferred from Amended Complaint's "alleg[ations] 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." Opening

Br. 21. The trial court correctly concluded that such an inference is not reasonable in light of the APA's express authorization that Fintech may "'operate the Business in a manner that is in the best interests of [Fintech] 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' as long as [Fintech] did not act in bad faith to defeat the earnout." Ex. A at 9 (quoting APA § 2.7(f)). The APA thus authorized Fintech pursue its own interests and take any action or inaction "for the purposes of favoring the 'relationship' with IRI and avoiding a situation that might 'muddy the waters' with General Atlantic," Opening Br. 21, without regard to any hard work or good will STX had previously cultivated with Walmart.[4]

By affirmatively pleading these contractually permissible business motivations for Fintech's decision not to submit a proposal to Walmart, Plaintiffs have *undermined* any possible inference of bad faith. As this Court has explained, "a claim may be dismissed if allegations in the complaint … effectively negate the

[4] Contrary to Plaintiffs' suggestion (Opening Br. 21), it is not "notabl[]e" that "defendants have never disputed that the Walmart opportunity was 'potentially lucrative' and would have satisfied the revenue targets for triggering earn-out payments." Because this case was dismissed for failure to state a claim under Rule 12(b)(6), Defendants did not file an answer. Regardless, that responding to Walmart's proposal on May 1, 2023 would have, as a matter of fact, yielded a contract that satisfied the revenue targets by December 31, 2023 is an inherently unknowable outcome, to which no response would have been required.

claim as a matter of law," including when a complaint affirmatively pleads an "allegation [that] undermines the plaintiffs' inference" of wrongdoing. *Malpiede v. Townson*, 780 A.2d 1075, 1083-85 (Del. 2001); *see also Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 877 (Del. 2020) (affirming dismissal when complaint "also pleaded" fact that "undermines" inference in plaintiffs' favor); *Lone Pine Resources, LP v. Dickey*, 2021 WL 2311954, at *6 n.35 (Del. Ch. June 7, 2021) (court may disregard "conclusory allegation" of wrongdoing when "the facts pled in the complaint undermined such a conclusion"). That is the case here.

This Court has held 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." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). Plaintiffs suggest that *Nemec* is distinguishable because that case concerned the implied covenant of good faith rather than a contractual "bad faith" provision. Opening Br. 19. But Plaintiffs nowhere explain why "bad faith" would entail different obligations when it is an express rather than implied provision. Moreover, in construing an *express* "bad faith" contractual provision, this Court has similarly reasoned that a party does not act in bad faith simply because it disadvantaged another party. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 109 (Del. 2013) (plaintiff who "entered into a limited partnership agreement that created a duty of subjective good faith … has no contractual basis to argue that the LPA required

the [defendants] to bargain to his satisfaction or to achieve a better result"). As in *Allen*, Plaintiffs have failed to "allege in a nonconclusory way" that Fintech acted in bad faith. *Id.*

Plaintiffs mistakenly believe that the Court of Chancery's reading of the APA "effectively eliminates" the bad faith clause in Section 2.7(f). Opening Br. 20. That assertions is baseless. Rather, the trial court correctly held that Plaintiffs had affirmatively pleaded several motivations that the APA expressly authorizes and failed to plead any factual support for an inference of a bad faith purpose. Because "conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable," *Pfeffer v. Redstone*, 965 A.2d 676, 685 (Del. 2009) (citation omitted), the Amended Complaint does not state a claim for breach.

Plaintiffs' other theory—that Fintech breached APA § 2.7(f) by not structuring the General Atlantic transaction to produce a "Sale of the Company"—fails for similar reasons. As the Court of Chancery explained, the Amended Complaint does not plead any nonconclusory factual allegations supporting the inference that General Atlantic obtaining control of two Board seats instead of four had anything to do with the STX earn-out. Rather, "[t]he only reasonable inference from the structure of the transaction is that TA did not want to sell control" and be placed "in the vulnerable position of a minority investor." Ex. A at 10. Indeed, the Amended Complaint contains *no* allegations that General Atlantic was willing or

able to make an offer sufficient to entice TA to transfer four Board seats to General Atlantic, much less that Fintech could or should have taken any specific action to persuade non-party TA to accept such a hypothetical offer.

The deficiency in the Amended Complaint is illustrated by the analogous decision of the Court of Chancery in *Fortis Advisors LLC v. Medtronic Minimed, Inc.*, 2024 WL 3580827 (Del. Ch. July 29, 2024). That case concerned an earn-out milestone if the acquired business met sales targets of "smart insulin pens." *Id.* at *2. As here, the buyer was contractually authorized operate the business "in accordance with its … own business judgment," but covenanted to "not take any action intended for the primary purpose of frustrating the [earn-out] payment." *Id.* at *2-3 (emphasis deleted). The plaintiff alleged a breach of this provision because, *e.g.*, the buyer "refused to pursue" sales of one type of insulin pen "under the guise of" the belief those pens would be insufficiently covered by insurance. *Id.* at *4 (brackets omitted). The Court of Chancery concluded that the plaintiff failed to "raise[] a reasonable inference" that the buyer acted with the primary purpose of defeating the earn-out, because the complaint did not allege any "circumstantial evidence of [the] action's purpose aside from conjecture based only upon the action itself." *Id.* at *6-7. Disregarding the plaintiff's "conclusory allegations of purpose," the Court of Chancery dismissed the claims. *Id.* at *8.

As in *Fortis*, the parties here carefully negotiated an agreement giving Fintech full license to pursue its own business interests even to the detriment of the earn-out payments, provided that Fintech did not act in bad faith with respect to the earn-out. The Amended Complaint does not plead any facts that support an inference of such bad faith. Instead, Plaintiffs identify ordinary business decision and simply tack on conclusory allegations of bad faith intent. In fact, Plaintiffs affirmatively plead several *permissible* motivations that further undermine those conclusory allegations. *See* pp. 8-10, 17-18, *supra*. In these circumstances, the Court of Chancery correctly held that Plaintiffs have not stated a claim for breach of contract.[5]

2. Section 2.7(f) is a negative covenant that prohibits actions, not inactions.

Section 2.7(f) of the APA provides that Fintech "shall not take any action" in bad faith with respect to the earn-out or with the specific intention of reducing the

[5] In this Court, Plaintiffs also assert that bad faith may be inferable from their purported "alleg[ations]" regarding the vesting schedule of Holdco's "Management Incentive Units." Opening Br. 20-21. But those allegations appear only in the *original* complaint and "were not pled in the operative complaint," so they are not relevant to this motion to dismiss. *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 255 n.45 (Del. 2019) ("In reviewing a motion to dismiss, a court is limited to the facts pled in or appropriately incorporated into the operative complaint…."). Nor was any argument based on those allegations "fairly presented" to the trial court under Supreme Court Rule 8 because it was first "throw[n] in" at oral argument, and only in passing. A1140, A1163-64; *see Klauder v. Echo/RT Holdings, LLC*, 152 A.3d 581, at *2 (Del. 2016) (Table) ("[A] short reference to an issue in an oral argument, where prior briefing has taken place, is not sufficient to fairly present an issue to a trial court.").

earn-out. A0545. In their motion to dismiss, Defendants argued that this provision is a "negative covenant" that forbids certain actions but not inaction, *i.e.*, it imposes no affirmative obligation on Fintech to take any particular action. *See* A0825-A0826. Plaintiffs *agreed* that Section 2.7(f) embodies a "negative covenant," arguing only that "[t]he Amended Complaint alleges affirmative acts that breached Defendants' negative covenant." A1043. Despite the parties' shared understanding of the contract, the Court of Chancery rejected "the distinction between action and inaction" as "dubious." Ex. A at 7-8. That conclusion conflicts with the plain language of the APA and this Court's precedents.

As then-Vice Chancellor Strine explained in *Alliance Data Systems Corp. v. Blackstone Cap. Partners V L.P.*, there is "a generally acknowledged distinction in merger agreements between affirmative and negative covenants: affirmative covenants require that a bound party take action while negative covenants forbid action." 963 A.2d 746, 766 (Del. Ch. 2009). The provision in *Alliance Data* used language identical to APA § 2.7(f): the defendant covenanted not to "take … any action" that would thwart closing of the merger. *Id.* at 765. Then-Vice Chancellor Strine concluded that this established a "negative covenant" under which liability "can only arise from an action," and the defendant's alleged "refusal to consent to the OCC Proposal is not a violation of a negative covenant." *Id.* at 766. He therefore dismissed the claim, *id.* at 770, and this Court "affirmed on the basis of and for the

reasons set forth in [the Court of Chancery's] well-reasoned … Opinion." 976 A.2d 170 (Del. 2009).

Other decisions have followed this reasoning in the specific context of earnout provisions almost exactly like the one here. In *Shakesby v. SNC International*, the Superior Court confronted an earn-out covenant requiring that the defendants "not take any action … with the purpose of materially frustrating" the earn-out payments. 2023 WL 8187301, at *5 (Del. Super. Nov. 27, 2023). Looking to then-Vice Chancellor Strine's decision, the Superior Court held that this provision created a "negative covenant" and, "under established Delaware law," the defendants' failure to take affirmative actions "cannot be a breach" of such a covenant. *Id.* Likewise, in *Quarum v. Mitchell International, Inc.*, the Superior Court held that contractual language that the buyer must "avoid taking actions that would reasonably be expected to materially reduce" the earn-out payments established, "by its plain meaning, … a negative covenant." 2020 WL 351291, at *4 (Del. Super. Jan. 21, 2020). The court therefore held that no claim for breach could arise from allegations of "the lack of any action taken by [the buyer], or decisions and strategies [it] could have pursued but did not." *Id.* Here, the language of APA § 2.7(f) ("not take any action") is indistinguishable from the negative covenants discussed in *Alliance Data*, *Shakesby*, and *Quarum*.

That Section 2.7(f) establishes a negative covenant is confirmed by the immediately preceding clause, providing that Fintech may act in its own best interest "regardless of any impact whatsoever that such *actions or inactions* have on the earn-out." A0545 (emphasis added). That adjacent clause dispels the trial court's assertion that "[t]he reference to 'action' in the earnout provision encompasses both" "action and inaction." Ex. A at 7-8. Under the trial court's reading, the words "or inactions" in the previous clause have no meaning. But a "contract must also be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'" *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (citation omitted). Moreover, that Section 2.7(f) carefully spells out "actions or inactions" in the first clause but not in the second clause shows that the APA's "drafters knew how to impose an affirmative obligation when they so intended." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 364 (Del. 2013); *see In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 578 & n.77 (Del. 2019) (applying this canon and collecting cases). In Section 2.7(f), then, the plain meaning of "shall not take any action" is a negative covenant.[6]

[6] The "actions or inactions" clause thus further supports Defendants' argument in the trial court that Section 2.7(f) establishes a negative covenant. This Court may consider an "argument [that] is merely an additional reason in support of a proposition urged below." *Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) (citation and quotation marks omitted)); *see also N. River Ins. Co. v. Mine Safety Appliances*
(Continued . . .)

The trial court asserted that "there is no difference between the concepts [of action and inaction] when a conscious decision is involved," because "'conscious inaction represents as much of a decision as conscious action.'" Ex. A at 7 (quoting *Garfield v. Allen*, 277 A.3d 296, 336 (Del. Ch. 2022)). But that reasoning overlooks that while conscious inaction may be a "decision," it is not an "action"—which is the operative term in Section 2.7(f). It makes no difference that, as the trial court observed, "[a] *scienter* based standard like bad faith means that any breach will involve a conscious decision." *Id.* at 8. Under the APA, a breach of Section 2.7(f) requires *both* "bad faith" *and* "action," so a conscious decision is insufficient unless some "action" has been taken. The trial court thus failed to "give effect to the plain-meaning of the contract's terms." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010). Moreover, such a reading would overturn the "generally acknowledged distinction in merger agreements between affirmative and negative covenants." *Alliance Data*, 963 A.2d at 766. This Court should adhere to the contract's plain meaning, the parties' shared understanding, and the commonly recognized distinction in agreements of this type.

Co., 105 A.3d 369, 383 (Del. 2014) ("We are satisfied that the broader issue … was sufficiently raised in the Court of Chancery….").

Because Section 2.7(f) establishes only a negative covenant, Plaintiffs' claim of breach necessarily fails. This claim is based on the Amended Complaint's allegations of what Fintech did not do, rather than anything it did—*i.e.*, that Fintech did *not* pursue the Walmart proposal and did *not* effect a "Sale of the Company." *See* A0510-A0511 (¶31). Thus, Plaintiffs accuse Fintech of "forgoing a lucrative opportunity with Walmart," *id.*, which is classic inaction. *See Quarum*, 2020 WL 351291, at *5 (no breach of negative covenant based on alleged "strategies [the buyer] could have pursued but did not"); *Alliance Data*, 963 A.2d at 765-76 & n.72 (same for "alleged failure to respond to … requests for information").

Similarly, the allegation that Fintech decided *not* to effect a "Sale of the Company" pleads a non-action. While the Amended Complaint couches this allegation as Fintech's "structuring" of the General Atlantic transaction, A0510-A0511 (¶31), Delaware courts have rebuffed such "creative rephrasing" that "attempts to convert [the] inaction into an affirmative … act by phrasing [Fintech's] inaction in affirmative terms." *Alliance Data*, 963 A.2d at 765-76; *see also Fortis*, 2024 WL 3580827, at *7 (noting that alleged "actions" taken to defeat earn-out "are, in fact, artfully worded omissions"). The complaint contains no allegations of any affirmative acts of "structuring" the transaction in a manner designed to avoid the earn-out, nor does it allege any alternative deal structure was ever on the table. At bottom, Plaintiffs' allegation is merely that they expected the General Atlantic

transaction to be a "Sale of the Company" but it was not. That is inaction, and it cannot support a breach of Section 2.7(f)'s negative covenant.

Indeed, Plaintiffs' argument proves too much because it creates a Catch 22: If Fintech effected a Sale of the Company, then Plaintiffs get the earn-out; if Fintech did not effect a Sale of the Company, then Plaintiffs can leverage the absence of such a sale into a claim for breach of contract simply by tacking on a conclusory allegation of bad faith. That is not the law under either the plain terms of the APA or Rule 12(b)(6), and it is hardly a "sensible" construction of the earn-out provision. *See Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017) ("The basic business relationship between parties must be understood to give sensible life to any contract.").

B. The trial court correctly dismissed the claim for breach of the implied covenant and fair dealing.

"Under Delaware law, sophisticated parties are bound by the terms of their agreement. Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written." *Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021). In "limited and extraordinary" circumstances, "[s]ubject to the express terms of the agreement, when gaps in an agreement lead to controversy, the court has in its toolbox the implied covenant of good faith and fair dealing to fill in the spaces between the written words." *Id.* at 919-20 (citations

omitted). But the implied covenant is "not an equitable remedy for rebalancing economic interests that could have been anticipated" and "cannot be invoked 'when the contract addresses the conduct at issue.'" *Id.* at 920 (citations omitted).

Thus, the implied covenant applies "only 'when the contract is truly silent' concerning the matter at hand." *Oxbow Carbon & Minerals Hldgs., Inc. v. Crestview-Oxbow Acquisition LLC*, 202 A.3d 482, 507 (Del. 2019) (citation omitted). "Even where the contract is silent, 'an interpreting court cannot use an implied covenant to re-write the agreement between the parties,' and 'should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.'" *Id.* (brackets and citation omitted).

Applying these well-established principles, the Court of Chancery correctly concluded that both of Plaintiffs' theories of breach of the implied covenant—not pursuing the Walmart contract and not effecting a Sale of the Company—fail to state a claim for breach of the implied covenant. Ex. A at 10-11. As the trial court explained, neither of these theories "identifies a gap to be filled" and "[b]oth conflict with the Agreement." *Id.* at 11.

The APA was negotiated at arms' length between sophisticated parties and it speaks directly to when the earn-out payments would, and would not, be triggered. In Section 2.7, the parties carefully delineated the precise revenue targets (down to the dollar) and acceleration events that would trigger an earn-out payment. A0544-

A0545. And Section 2.7(f) expressly contemplates that Fintech "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," provided that Fintech does not take action in bad faith with respect to the earn-out or with the specific intention of reducing its amount. A0545. Indeed, Plaintiffs brought a claim for breach of this express contractual provision based on the *same alleged conduct*, *see* pp. 16-17, *supra*, asserting their implied-covenant claim "in the alternative." Opening Br. 22; *see* A0511-A0512 (¶¶36-37). There is simply "no gap to fill in the Agreement" with respect to the earn-out payments, so the implied-covenant claim was rightly dismissed. *Glaxo Group*, 248 A.3d at 920.

Plaintiffs' contrary arguments are meritless. They first argue that Section 2.7(f) confers "discretion" on Fintech to operate the business reasonably, and that Fintech "abused [its] discretion to manage the STX Business by rejecting the Walmart RFP." Opening Br. 23-24. But this Court has rejected similar "characterization[s]" of a party's contractually authorized conduct "as a discretionary act that [the party] had to exercise in good faith." *Glaxo Group*, 248 A.3d at 920. Courts may not "imply discretion to restrict actions expressly permitted by the parties' agreement," because the implied covenant "should not be used to imply terms that modify or negate an unrestricted contractual right authorized by an agreement." *Id.* at 920-21. Section 2.7(f) expressly authorizes Fintech to act (or not

act) in its own best interests even at the earn-out's expense, with the sole exception of bad faith actions regarding the earn-out. A0545. Because there is no gap between Section 2.7(f)'s authorization to operate the business and the express "bad faith" carveout, there is nothing for the implied covenant to fill.

Plaintiffs next argue that a "gap exists in the 'Sale of the Company' definition adopted by the APA" because Plaintiffs "reasonably expected that their earn-out payments would be accelerated if TA was no longer 'in charge,'" notwithstanding that "the General Atlantic transactions did not meet the strict definition of a 'Sale of the Company' as used in the APA." Opening Br. 24-27. The problem with this argument is, as the Court of Chancery noted, that the APA "addresses that exact point" and "contemplates paying out the Maximum Earnout if there is a change in control that results in a new controller" but not "if there is a transition to shared control." Ex. A at 12. Indeed, "[t]he parties could have drafted a trigger based on TA's loss of sole control, but they did not do that." *Id.* The contractual definition of "Sale of the Company" is crystal clear.

This Court has repeatedly held that the implied covenant is not an opportunity to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec*, 991 A.2d at 1126; *see Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 897 (Del. 2015) ("An interpreting court cannot use an implied covenant to re-write the

agreement between the parties….”). Yet Plaintiffs’ argument is an undisguised plea to do just that. If Plaintiffs wanted the earn-out to “be accelerated if TA was no longer ‘in charge,’” Opening Br. 27, they should have bargained for that contractual arrangement. Instead, they agreed to an unambiguous definition of “Sale of the Company” that excludes shared control. “The implied covenant of good faith and fair dealing cannot properly be applied to give the plaintiffs contractual protections that ‘they failed to secure for themselves at the bargaining table.’” *Winshall v. Viacom Int’l Inc.*, 76 A.3d 808, 816 (Del. 2013) (citation omitted).

C. The trial court correctly dismissed the claim for tortious interference.

“Under Delaware law, the elements of a claim for tortious interference with a contract are: ‘(1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury.’” *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013) (citation omitted). Plaintiffs allege that Holdco tortiously interfered with the APA by causing Fintech to breach it. *See* A0513-A0514 (¶¶43-46). The Court of Chancery correctly concluded that, “[b]ecause [Fintech’s] actions did not breach the Agreement, the claim for tortious interference fails.” Ex. A at 13. This Court should affirm for the same reason. *See* pp. 16-31, *supra*.

Alternatively, this Court may affirm because the Amended Complaint does not plead that any interference by Holdco was "without justification." *See* A0835-A0839 (Defendants raising this argument below).[7] The Restatement (Second) of Torts § 767 "establishes seven 'factors to consider in determining if intentional interference with another's contract is improper or without justification.'" *Cousins v. Goodier*, 283 A.3d 1140, 1166 (Del. 2022) (citation omitted). Those factors are:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Id.

Plaintiffs ignore six of those factors entirely. They rely only on Holdco's motive, arguing that they "have sufficiently pled bad faith conduct motivating the tortious interference." Opening Br. 29. That argument fails. To start, the Amended

[7] Plaintiffs mistakenly assert that, because the trial court dismissed the tortious interference claim "based solely" on the lack of an underlying breach, then if either of their claims for breach survives the "tortious interference claim also must survive." Opening Br. 7. But their tortious interference claim also fails for other reasons, and "this Court may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

Complaint does not adequately plead any "bad faith" motivation by Holdco for the same reason that it does not sufficiently bad faith by Fintech. *See* pp. 16-21, *supra*.

Moreover, even assuming that Plaintiffs plead non-conclusory allegations of an improper motive by Holdco, they have not alleged that Holdco's *sole* motive was a bad faith one. "The defense of justification does not require that the defendant's proper motive be its sole or even its predominate motive for interfering with the contract. Only if the defendant's *sole* motive was to interfere with the contract will this factor support a finding of improper interference." *WaveDivision Holdings, LLC v. Highland Cap. Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) (emphasis in original). The Amended Complaint nowhere alleges that Holdco's *sole* motive was improper, nor can such a single-minded focus be reasonably inferred from the well-pleaded allegations. The lack of "justification" is an element that Plaintiffs must "plead[] and prove[]," *Bhole*, 67 A.3d at 453 (citation omitted), and Plaintiffs have not done so. Accordingly, dismissal of the tortious interference claim should be affirmed.[8]

[8] It is true that "[m]otive … is simply one of seven factors to be considered when determining whether interference was improper," and so the ability to "identify one proper motive among many unseemly ones" does not "absolutely preclude[] a tortious interference claim." *Cousins*, 283 A.3d at 1166-67. Here, though, Plaintiffs have put all their eggs in the "motive" basket, making no argument below (A1050-A1052) or in their Opening Brief as to any of the other six factors. Any such (Continued . . .)

With respect to allegedly not pursuing the Walmart contract, the Amended Complaint affirmatively pleads multiple legitimate motivations: to protect the exclusive relationship with IRI and not to "muddy the waters" with the looming General Atlantic transaction. *See* pp. 8-9, *supra*. Because the Amended Complaint acknowledges that Holdco's alleged decision not to pursue the Walmart contract was "motivated at least in part by" these proper motives, that decision cannot support a claim for tortious interference. *WaveDivision*, 49 A.3d at 1174. Similarly, the Amended Complaint does not allege that Holdco's decision not to effect a "Sale of the Company" was *solely* motivated by bad faith with respect to Plaintiffs' earn-out. And it would be unreasonable to infer that the desire to avoid placing TA "in the vulnerable position of a minority investor," Ex. A at 10, was not at least *part* of the motivation for the joint-control regime with General Atlantic. Thus, Plaintiffs have failed to "allege facts to rebut the presumption that the non-party was pursuing legitimate profit seeking goals in good faith—*i.e.*, by showing that the non-party's *sole* motive in interfering was bad faith to injure plaintiff." *Buck v. Viking Holding Mgmt. Co. LLC*, 2021 WL 673459, at *6 (Del. Super. Feb. 22, 2021) (dismissing

argument is waived. *See* Sup. Ct. Rules 8, 14(b)(vi)(A)(3). The failure of their "motive" argument is thus fatal to the tortious interference claim.

claim for tortious interference when plaintiff failed (quotation marks, citation, ellipses, and footnote omitted)).

D. The trial court correctly dismissed the fraudulent inducement claim.

Plaintiffs' final claim is for fraudulent inducement arising from the nondisclosure "of Fintech's 'exclusive relationship' with IRI" prior to entering into the APA. A0514 (¶49). According to Plaintiffs, the Amended Complaint states a claim for fraudulent inducement because it pleads either "deliberate concealment or silence in the face of a duty to speak." Opening Br. 34. The Court of Chancery dismissed this claim because "a plaintiff who asserts an omission-based fraud claim still must allege facts giving rise to a duty to speak or that support an inference of intentional concealment," and Plaintiffs "have done neither." Ex. A at 14. This Court should affirm.

1. Plaintiffs failed to allege active concealment or a duty to speak.

"Under Delaware law, the elements of fraudulent inducement and fraud are the same." *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829, at *31 (Del. Ch. Dec. 3, 2018). "In order to state a claim for common law fraud, the Plaintiffs must allege with the particularity required by Rule 9(b) that the [Defendants] either '(1) represented false statements as true, (2) actively concealed facts which prevented [the Plaintiffs] from discovering them, or (3)

remained silent in the face of a duty to speak.'" *MKE Holdings Ltd. v. Schwartz*, 2020 WL 467937, at *10 (Del. Ch. Jan. 29, 2020) (citation omitted). Plaintiffs do not argue that Defendants said anything untrue, but rather that they "did not disclose the IRI relationship to plaintiffs." Opening Br. 34.

As the trial court correctly concluded, this argument falters because Plaintiffs "have not alleged any act of intentional concealment" and "have not identified any reason why [Defendants] would have had a duty to speak." Ex. A at 14. Plaintiffs do not even try to point any factual allegation supporting an "active concealment" theory. That is because the Amended Complaint says nothing to indicate that Defendants deployed some "'affirmative … artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.'" Opening Br. 34 (quoting *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, at *7 (Del. Ch. Apr. 10, 2008)).

Nor does the Amended Complaint contain any allegations suggesting that Defendants did anything to trigger a duty to speak about IRI or Walmart before entering into the APA. Neither IRI nor Walmart is mentioned in the APA. And the Amended Complaint nowhere alleges that either of those topics were ever discussed before the APA's closing. This case is nothing like *Surf's Up Legacy Partners, LLC v. Virgin Fest, LLC*, upon which Plaintiffs rely (Opening Br. 33), where the defendants had made representations about the company's "present liabilities," and

those prior representations "were starving for correction (breach of the duty to speak) at closing." 2021 WL 117036, at *14 (Del. Super. Ct. Jan. 13, 2021). Because there were no earlier representations about IRI or Walmart, there was nothing to correct.

In this Court, Plaintiffs resort to mischaracterizing their own pleading. They contend that they have alleged that Defendants made "representations regarding the future performance of the STX Business" and "made numerous representations to plaintiffs about Fintech's prospects managing the STX Business." Opening Br. 34; *see also id.* at 7 (asserting, without citation, that "[w]hile negotiating the APA, defendants made affirmative representations about how Fintech would manage the STX business"). But the Amended Complaint is devoid of such allegations. Plaintiffs point to seven bullet points of allegations, *see* Opening Brief 31-32, but none of those bullets alleges that Defendants said *anything* to Plaintiffs (let alone what was said and by whom).

To the extent Plaintiffs believe that such representations are lurking somewhere between the lines of the Amended Complaint, that cannot satisfy the particularity requirement under Court of Chancery Rule 9(b). The Amended Complaint says *nothing* about these supposed representations, and it certainly does not specify "the time, place, and contents of the false representations; the facts misrepresented; [and] the identity of the person(s) making the misrepresentation." *Valley Joist BD Hldgs., LLC v. EBSCO Indus., Inc.*, 269 A.3d 984, 988 (Del. 2021);

see MHS Capital LLC v. Goggin, 2018 WL 2149718, at *9 (Del. Ch. May 10, 2018) ("Rule 9(b) is not satisfied by the allegation that, at some unspecified time …, [the defendant] made false representations and omitted material facts.").

Because Fintech and Holdco "never spoke" to Plaintiffs about IRI or Walmart in the run-up to the APA and the Amended Complaint does not plead *any* representations with the requisite particularity, they "had no duty to update an earlier statement." *In re Wayport, Inc. Litigation*, 76 A.3d 296, 324 (Del. Ch. 2013) (dismissing fraudulent omission claim against defendant who "never made any representation that subsequently became untrue" and therefore had no "duty to speak").

2. Plaintiffs' fraud claim is barred by the APA's integration and non-reliance provisions.

The Court may also affirm the dismissal of the fraudulent inducement claim on the alternative ground that Plaintiffs cannot justifiably rely on any extracontractual representations in light of the APA's explicit integration and non-reliance provisions. *See* A0845 n.10 (raising this argument below); *Unitrin*, 651 A.2d at 1390; *see also* p. 24 n.6, *supra*.

Delaware courts "enforc[e] contractually binding written disclaimers of reliance on representations outside of a final agreement of sale or merger." *RAA*

Mgmt., LLC v. Savage Sports Hldgs., Inc., 45 A.3d 107, 118-19 (Del. 2012). Here, the APA expressly provides:

> Buyer acknowledges and agrees that: (i) in making its decision to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer *has relied solely* upon the representations and warranties of Seller and the Seller Parties set forth in … this Agreement … and in the other Transaction Documents.

A0569 (APA § 5.7; emphases added). The APA further contains an integration clause providing that "[t]his 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." A0580 (APA § 9.7).

Where, as here, "a party represents that it only relied on particular information, then that statement establishes the universe of information on which that party relied." *Prairie Capital III, L.P. v. Double E. Hldg. Corp.*, 132 A.3d 35, 51-52 (Del. Ch. 2015) (holding that "the Exclusive Representations Clause and the Integration Clause combine to mean that the Buyer did not rely on other information" and "add up to a clear anti-reliance clause"). Accordingly, Plaintiffs' claim of fraudulent inducement based on purported "representations made *outside* of a merger agreement" "must be barred." *RAA Management*, 45 A.3d at 117.

CONCLUSION

For the reasons given above, the decision of the Court of Chancery should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2025, a copy of the *Appellee's Answering Brief* was served, by File & Serve*Xpress*, on the following attorneys of record:

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