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 REPLY BRIEF

Thad J. Bracegirdle (No. 3691)
Justin C. Barrett (No. 6485)
BAYARD, P.A.
600 North King Street, Suite 400
Wilmington, DE 19801
(302) 655-5000

Attorneys for Plaintiffs Below-Appellants

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

INTRODUCTION

In their Answering Brief (cited as "AB"), Defendants ask the Court to excuse the underhanded conduct that deprived Plaintiffs of a material benefit under the Asset Purchase Agreement ("APA") because Plaintiffs are "sophisticated parties." Even the most sophisticated businesspeople, however, cannot foresee every possible way a contracting counterparty might try to evade its future obligations – and the law does not require them to protect themselves against every unknown contingency through a contract's explicit terms. Instead, contracting parties – sophisticated or otherwise – can reasonably expect that their counterparties will not engage in bad faith conduct intended to contravene the parties' agreement. This expectation can be preserved by an express prohibition against actions taken in "bad faith" or, if the contractual language does not specifically articulate all possible misconduct, through the implied covenant of good faith and fair dealing. In either case, Plaintiffs here – STX Business Solutions, LLC ("STX" or "Seller") and Jon Thompson ("Thompson") – have a legally cognizable interest in protecting the benefit of their bargain under the APA from deceitful actions by Financial-Information-Technologies, LLC ("Fintech" or "Buyer") and Fintech Holdco, LLC ("Holdco" or "Parent") intended to keep Plaintiffs from reaping those benefits. By dismissing Plaintiffs' claims, however, the Court of Chancery's holding below failed to uphold that interest.

Contrary to Defendants' arguments, Plaintiffs do not challenge or attempt to rewrite the language in the APA to which they agreed. Rather, Plaintiffs allege that Defendants: (i) breached the terms of the APA by acting in bad faith to deny Plaintiffs the maximum earn-out payment; or (ii) engaged in conduct sufficiently inequitable and wrongful to defraud Plaintiffs and breach the implied covenant of good faith and fair dealing inherent in the APA.

The facts alleged by Plaintiff – which must be taken as true at this stage of the proceeding – show that Defendants, after the APA was executed, took whatever actions they believed necessary to keep for themselves the earn-out money that rightfully should have been paid to Plaintiffs. This included: (i) intentionally scuttling a relationship with Walmart that was years in the making, and on the precipice of earning the STX Business significant revenues; (ii) intentionally concealing an "exclusive relationship" between Fintech and Information Resources, Inc. ("IRI") and thereby misleading Plaintiffs about the realistic achievability of revenue target triggers in the APA's earn-out provision; and (iii) intentionally structuring a transaction through which TA Associates Management ("TA") sold control over the business to General Atlantic, L.P. ("General Atlantic") for the purpose of evading a change of control trigger in the earn-out provision.

Each of these actions was taken to deprive Plaintiffs of the maximum earn-out payment to which they were entitled under the APA, and none of Defendants' arguments can alter the reality that Plaintiffs were denied rights for which they lawfully bargained. Instead, Defendants try to excuse their misconduct by claiming that Plaintiffs, as "sophisticated parties," should have seen it coming. This Court should not countenance Defendants' behavior but should hold Defendants accountable by reversing the Court of Chancery's dismissal.

ARGUMENT

I. PLAINTIFFS STATE AN ACTIONABLE CLAIM FOR BREACH OF CONTRACT.

A. The APA Expressly Prohibits Defendants' Alleged Conduct.

First, Defendants argue that the APA allowed the conduct of which Plaintiffs complain and, therefore, Plaintiffs' own allegations effectively negate their breach of contract claim. This is incorrect, as Plaintiffs have specifically alleged Defendants engaged in conduct that falls ***outside*** what the APA permits – *i.e.*, conduct that breaches the APA's prohibition against "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 (APA § 2.7(f)).

None of the case law Defendants cite is apposite. In *Malpiede v. Townson*, 780 A.2d 1075, 1085 (Del. 2001), the plaintiff alleged that directors feared personal liability from litigation while simultaneously (and inconsistently) alleging that the same directors were offered indemnification; thus, the Court found the allegation that directors reasonably feared personal liability was effectively negated by the contrary allegation that indemnification insulated directors from bearing personal liability. Similarly, in *Windsor I, LLC v. CWCapital Asset Management LLC*, 239 A.3d 863, 877 (Del. 2020), the plaintiff alleged contradictory facts, pleading that a board committee review would be both "substantive and analytical" and a "foregone conclusion." Plaintiffs' Amended Complaint suffers from no such inconsistency.

While Section 2.7(f) of the APA allows Fintech to "use the Purchased Assets and operate the Business in a manner that is in the best interests of Buyer or its Affiliates," the same section provides a carve-out that explicitly forbids Fintech from "tak[ing] 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. Fintech's conduct, as alleged in the Amended Complaint, did not merely use the STX Business in Defendants' best interests but was undertaken in bad faith to deprive Plaintiffs of their Earn-Out Consideration – the very thing that Section 2.7(f) prohibits.

Therefore, Plaintiffs explicitly plead that Defendants took actions that breached their contractual agreement to refrain from acting in bad faith. Contrary to Defendants' argument, this does distinguish *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010), from this action. In *Nemec*, this Court declined to reform a contract using the implied covenant of good faith and fair dealing when the defendant corporation was alleged to have exercised its rights under the contract in a manner that was inequitable. *See id.* at 1126-28. Noting that "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement," the *Nemec* Court recognized that "[a] party does not act in bad faith by relying upon contract provisions for which that party bargained where doing so simply limits advantages to another party." *Id.* (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)). Unlike the appellants in *Nemec*, Plaintiffs here do not attempt to rewrite the APA or shift the parties' post-contractual economic benefits (*see id.* at 1126) but seek to enforce Section 2.7(f) as written. Since Plaintiffs allege that Defendants acted with the express intent to deny Plaintiffs the earn-out payment, Defendants cannot escape liability by selectively relying on one clause of Section 2.7(f) while ignoring another.

This, however, is what the trial Court's ruling does. While Defendants argue that the Court of Chancery merely "held that Plaintiffs had affirmatively pleaded several motivations that the APA expressly authorizes" (AB at 19), that circular logic does, in reality, moot Section 2.7(f)'s prohibition of bad faith conduct. Under the interpretation offered by the trial Court and Defendants, no action permitted under the first portion of Section 2.7(f), which allows Defendants to manage the acquired business "regardless of any impact whatsoever that such actions or inactions have on the earn-out" (A0545), could ***ever*** constitute bad faith. The second portion of Section 2.7(f) imposes a limitation on the discretion given to Defendants by the preceding language, but the Court of Chancery's ruling effectively eliminates that contractual restriction.

B. The Amended Complaint Sufficiently Alleges Bad Faith.

Therefore, Section 2.7(f) of the APA, when read in its entirety, prohibits Fintech from managing the acquired business in "bad faith," which this Court has defined as "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006). Plaintiffs alleged facts – which must be accepted as true and from which all reasonable inferences must be drawn – showing that Defendants acted in bad faith to deprive Plaintiffs of their earn-out payment, rather than for legitimate business purposes. *See, e.g.*, Opening Brief (cited as "OB") at 18-19 (quoting A0510-A0511). This is sufficient to defeat Defendants' motion to dismiss and permit Plaintiff's claim to proceed.

Allen v. Encore Energy Partners, L.P., 72 A.3d 93 (Del. 2013), is unhelpful to Defendants. *Allen* does not hold, as Defendants suggest, that "a party does not act in bad faith simply because it disadvantaged another party." AB at 18. Rather, the *Allen* Court considered whether a limited partnership's general partner complied with the partnership agreement's requirement that it approve a merger "in good faith," which was contractually defined as a "belie[f] that the determination or other action is in the best interests of the Partnership." 72 A.3d at 101. Looking at the specific facts alleged in *Allen*, the Court concluded that the process employed by the general partner met this subjective good faith standard imposed by contract. *See id.* at 108-09. Therefore, the Court's holding in *Allen* offers no sweeping principles that can be applied here.

Both Defendants and the trial Court suggest that the "only reasonable inference from the structure of the transaction is that TA did not want to sell control." OB, Ex. A at 10. However, even if this were a reasonable inference to draw from the Amended Complaint, it is not the ***only*** reasonable inference. To survive Defendants' motion to dismiss, Plaintiffs need not prove that the inference they draw is the correct or only reasonable one; rather, Plaintiffs need only show that there are multiple, contradictory reasonable inferences flowing from the alleged facts. *See Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1167 (Del. Ch. 2024) ("A plaintiff need not 'plead facts that rule out any possibility other than bad faith.'") (quoting *Kahn v. Stern*, 2018 WL 134719, at *1 (Del. Mar. 15, 2018) (en banc), *reported at* 183 A.3d 715 (Del. 2018)).[1] Plaintiffs have done so here. Taking the Amended Complaint's alleged facts as a whole and drawing inferences from those facts in Plaintiffs' favor, it is reasonable to believe that, given the amount of money at stake, Defendants intentionally structured the transaction between TA and General Atlantic to transfer control away from TA without triggering a maximum earn-out payment under the APA.

Defendants' reliance on *Fortis Advisors LLC v. Medtronic Minimed, Inc.*, 2024 WL 3580827 (Del. Ch. July 29, 2024), also is misplaced. First and foremost,

[1] Tellingly, Defendants do not address, let alone attempt to rebut, this case law in their Answering Brief.

the contractual language at issue in *Fortis* only prohibited actions taken for the primary purpose of frustrating payment of a milestone payment. *See Fortis*, 2024 WL 3580827, at *6. *Fortis* did not address bad faith or the contractual prohibition that Defendants breached here. Furthermore, the complaint in *Fortis* lacked any allegations that Medtronic's purpose was to frustrate the milestone payment. *See id.* at *7. By contrast, Plaintiffs here have pleaded, at length, that Defendants acted with the intent of preventing the earn-out payment from being triggered. The *Fortis* Court also acknowledged that circumstances, such as the timing of certain actions, could in fact establish an improper purpose. *See id.* These are precisely the kinds of facts Plaintiffs allege here – for example, Plaintiffs allege that Defendants intentionally concealed the IRI relationship and waited until the last moment to scuttle the Walmart contract to frustrate the earn-out payment – and they support a reasonable inference of bad faith.

In a footnote, Defendants ask the Court to disregard some of these facts – namely, Plaintiffs' allegations concerning the dubious vesting schedule of Management Incentive Units given to Holdco insiders. *See* AB at 21 n.5. These factual allegations, however, were not "thrown in" during oral argument on the motion to dismiss, as Defendants contend – rather, they were pled in support of Plaintiffs' original derivative claims against the insiders, which Plaintiffs voluntarily withdrew on standing grounds after Defendants exercised rights to purchase

Thompson's ownership units. *See* A0011-A0022; A0299. Plaintiffs then referred to those facts in briefing on Defendants' motion to dismiss (*see* A1037) and discussed them in detail with the trial Court during oral argument on the motion (*see* A1140). They were thus "fairly presented" in the proceedings below and are properly before this Court on appeal. *See* Supr. Ct. R. 8; *see also Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *10 (Del. Ch. Aug. 27, 2004) ("[A] previous version of a complaint may, in appropriate circumstances, help to interpret a new version if the key factual allegations remain the same ….").

This Court's opinion in *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245 (Del. 2019), cited by Defendants, is inapplicable. In *Sheldon*, the Court simply declined to consider "new facts or facts expanding those contained in the complaint." *Id.* at 255 n.45. Here, Plaintiffs' allegations concerning the Holdco insiders' Management Incentive Units are neither new nor outside the pleadings; rather, they were pled in Plaintiffs' original Complaint and raised with the trial Court in both briefing and oral argument.

C. Defendants' "Negative Covenant" Argument Has No More Merit Now Than It Did In The Proceeding Below.

Defendants spill much ink arguing that Section 2.7(f) is a negative covenant that prohibits action, not inaction. In its Opinion, the Court of Chancery succinctly explained why Defendants' argument fails. In addition to the case law considered and distinguished by the trial Court, Defendants now cite for the first time the Superior Court's opinion in *Shakesby v. SNC International*, 2023 WL 8187301 (Del. Super. Ct. Nov. 27, 2023). In *Shakesby*, however, the Superior Court found the complaint alleged actions plaintiff believed defendant ***should have*** taken, but which defendant never did take. *See id.*, at *5. The Superior Court then declined to interpret a negative covenant to require a party to take any and all affirmative actions to achieve a certain goal. *See id.*, at *5 n.64. Here, Plaintiffs do not allege that the APA requires Defendants to take any and all affirmative actions needed to make the earn-out payment; rather, Plaintiffs contend, and the trial Court agreed, that Defendants cannot consciously decide ***not to act*** in bad faith to prevent Plaintiffs from receiving the maximum earn-out.

As the Court of Chancery explained, while Delaware law does distinguish between action and inaction, a "conscious inaction," as opposed to simply not taking certain actions, can "represent[] as much of a decision as conscious action." *Garfield v. Allen*, 277 A.3d 296, 336 (Del. Ch. 2022). The trial Court collected opinions supporting Plaintiffs' argument that a conscious decision not to act constitutes an action (*see* OB, Ex. A at 7-8), but Defendants do not meaningfully address this case law or its reasoning.

Instead, Defendants shift focus and argue that the preceding clause of Section 2.7(f) refers to "actions or inactions" and, thus, the later reference to "action" must have a different meaning, rather than encompassing both. *See* AB at 24. The full text of Section 2.7(f), however, disproves Defendants' argument. Just a few lines earlier, the relevant language of Section 2.7(f) states: "Buyer … 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, … Buyer shall not take any action in bad faith …." A0049 (emphasis added). Thus, Section 2.7(f) itself refers to "any and all actions," and then immediately explains that those actions include both "actions and inactions." As Defendants themselves acknowledge, the plain meaning of the APA's terms should be applied. *See* AB at 25 (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010)).

Moreover, Defendants' conduct amounts to more than simple inaction. Plaintiffs' allegations do not describe a scenario where Defendants merely opted not to take any number of potential actions without other context or reasoning. Instead, Defendants chose to scuttle a relationship years in the making, burning goodwill and potential revenues for their own self-interested purposes. It also is not the case that Defendants simply choose not to pursue a "Sale of the Company." Rather, when Defendants decided to sell TA's majority control of Holdco, they intentionally structured the transaction with General Atlantic to avoid triggering the maximum earn-out payment to Plaintiffs. This is affirmative "action," and there is no "Catch 22" as Defendants claim. Had Defendants not pursued a transaction of ***any*** type, then perhaps their argument would have weight; but when Defendants decided to sell TA's control over Holdco to General Atlantic, they made the conscious choice to structure the sale in a way that breached their obligations under the APA.

II. PLAINTIFFS STATE AN ACTIONABLE CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Like the Court of Chancery, Defendants offer two arguments for dismissing Plaintiffs' claim under the implied covenant of good faith and fair dealing: (i) there is no discretion to be implied for contractually permitted conduct; and (ii) there is no gap in the APA that must be addressed by the implied covenant of good faith and fair dealing. Neither argument withstands scrutiny.

On the first point, Defendants cite *Glaxo Group Limited v. DRIT LP*, 248 A.3d 911, 920-21 (Del. 2021), for the rule that Courts should not "imply discretion to restrict actions expressly permitted by the parties' agreement." AB at 29. However, the facts of *Glaxo Group* do not mirror those here. In that case, the contract at issue explicitly allowed a party to voluntarily disclaim patents without restriction. *See* 248 A.2d at 920. The party given that right exercised it by disclaiming a patent, which in turn affected royalty payments that otherwise would have been owed to the counterparty. *See id.* Since the parties' contract did not expressly place limits or restrictions on the disclaimer rights, the Court declined to use the implied covenant to require that disclaiming patents must be done in good faith. *See id.* Here, there is no language in the APA giving Defendants the right to reject the Walmart RFP under false pretenses or structure a transaction between TA and General Atlantic so that it does not qualify as a "Sale of the Company" and, therefore, does not trigger the maximum earn-out payment. Instead, Defendants (and the trial Court) interpret general language governing how Fintech may "use the Purchased Assets and operate the Business" so expansively that it would insulate even intentional, bad faith acts. The implied covenant of good faith and fair dealing is intended to prevent this very outcome.

Therefore, even assuming *arguendo* that the APA did not strictly prohibit Defendants' actions, their conduct nonetheless "ha[d] the effect of preventing [Plaintiffs] from receiving the fruits of the bargain." *Dunlap*, 878 A.2d at 442 (internal quotations omitted). When Plaintiffs agreed to accept future earn-out payments and partially defer receipt of consideration for selling the STX Business, they reasonably expected that Defendants would capitalize on the valuable Walmart relationship Plaintiffs had developed for years. Plaintiffs also reasonably expected that if there came a time when Defendants no longer had sole management control over the STX Business, they then would receive the full value of the earn-out payments they agreed to defer. Instead, Defendants concealed the IRI relationship from Plaintiffs, performed the charade of performing due diligence on the Walmart RFP, and then withdrew from the RFP at the last minute because of a purported conflict between Walmart and IRI. When Defendants decided to sell TA's equity control over Holdco, they artfully structured the transactional terms so they would not trigger Plaintiff's maximum earn-out payment. Defendants' actions were intended to – and did – deprive Plaintiffs of their reasonable expectations under the APA.

In summary, Plaintiffs are not attempting to rewrite the APA or to rebalance the bargained-for economics resulting from the contract. Rather, Plaintiffs are simply enforcing their right, protected under Delaware law, to ensure that Defendants do not act arbitrarily or in bad faith to keep Plaintiffs from realizing the benefits for which they bargained.

III. PLAINTIFFS STATE AN ACTIONABLE CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT.

The elements of a claim for tortious interference with contract under Delaware law are well-settled – there must be: (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. *E.g.*, *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 453 (Del. 2013). Defendants do not question whether Plaintiffs satisfied the first, second, and fifth elements, but ask this Court to affirm the holding below that, without an underlying breach of the APA or the implied covenant of good faith and fair dealing, "the claim for tortious interference fails." AB at 31. Of course, if the Court reverses the dismissal of either Count I or Count II of the Amended Complaint, then Plaintiffs will have established the predicate breach of contract required for this claim.

Alternatively, Defendants argue that Plaintiffs have not alleged facts establishing that Holdco acted "without justification" in causing Fintech to breach the APA. Preliminarily, Defendants fault Plaintiffs for not addressing six of seven factors under the Restatement (Second) of Torts § 767, as identified by the Court in *Cousins v. Goodier*, 283 A.3d 1140 (Del. 2022), to analyze whether "intentional interference with another's contract is improper or without justification." AB at 32. Defendants even go so far as to claim that Plaintiffs waived arguments concerning the other six factors. *See id.* at 33-34 n.8. As evidenced by briefing on Defendants' motion to dismiss, however, Defendants never cited or relied upon the Restatement factors in the proceeding below. *See* A0799-1023; A1062-93. Ironically, then, it is Defendants who waived their argument applying these factors, since "[u]nder Supreme Court Rule 8, a party may not raise new arguments on appeal." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).

Regardless, the allegations of Plaintiffs' Amended Complaint show that Holdco's actions were not justified. Defendants rely on this Court's opinion in *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012), to argue that Plaintiffs cannot prevail on their tortious interference claim because "they have not alleged that Holdco's ***sole*** motive was a bad faith one." AB at 33. This, however, misinterprets the law – in *Cousins*, the Court clarified that "under *WaveDivision*, a defendant need not have a singular motive to interfere in order to be liable for tortious interference." 283 A.3d at 1163-64. Therefore, even if Defendants scuttled the Walmart relationship to protect the "exclusive" relationship with IRI, or so that a Walmart deal would not "muddy the waters" with General Atlantic (*see* A0508-A0509), these objectives do not justify Defendants' conduct. Instead, Plaintiffs' allegations that Defendants acted with the intent to prevent Plaintiffs from receiving the maximum earn-out payment for which they negotiated (*see* A0513-14) are sufficient to satisfy this element of Plaintiffs' claim.

See Cousins, 283 A.3d at 1166-67 ("*WaveDivision* should not be understood as absolutely precluding a tortious interference claim when the alleged tortfeasor can identify one proper motive among many unseemly ones.").

Additionally, "[w]eighing the seven factors identified in the Restatement requires the court to engage in a fact-specific inquiry to determine whether the interference with contract is improper under the particular circumstances of the case." *In re P3 Health Grp. Holdings, LLC*, 2022 WL 16834483, at *2 (Del. Ch. Nov. 9, 2022). Thus, "[i]t is often difficult to assess the element of justification at the pleading stage. If it is not possible to determine at the pleading stage that the interference was justified as a matter of law, then the claim for tortious interference can proceed." *Id.* at *3. Indeed, the Court in *WaveDivision* heard an appeal from a summary judgment ruling, where the Superior Court had considered and weighed evidence of motivations underlying the alleged tortious interference. *See* 49 A.3d at 1174. In this action, the Court of Chancery did not have the benefit of any record evidence concerning Defendants' motivations; at a minimum, therefore, Plaintiffs' tortious interference claim should survive until discovery can be had into the motives for Defendants' conduct.

Nonetheless, the other six Restatement factors, applied to the facts alleged in the Amended Complaint, are either neutral or weigh in Plaintiffs' favor:

The nature of the actor's conduct. This factor "focuses on the ***means*** utilized by the actor in causing the interference." *Hursey Porter & Assocs. v. Bounds*, 1994 WL 762670, at *14 (Del. Super. Ct. Dec. 2, 1994). Plaintiffs allege that Holdco, through its agents, interfered with Plaintiffs' entitlement to earn-out payments under the APA through at least one fraudulent misrepresentation, which "is ordinarily an improper means of interference and precludes a defense of justification." *WaveDivision*, 49 A.3d at 1174.

The interests of the other with which the actor's conduct interferes. This factor "permits the Court to consider whether the underlying relationship with which the actor interfered was one which violates public policy such as to justify the actor's inducement of a breach." *Hursey Porter*, 1994 WL 762670, at *15. Here, the underlying relationship was Fintech's acquisition of the STX Business from Plaintiffs, as effectuated through the APA, which Defendants cannot argue violated any public policy.

The interests sought to be advanced by the actor. This factor "focuses upon the interest that the actor seeks to promote through interference with another's contractual … relationship." *Id.* As Plaintiffs allege, Holdco assisted its subsidiary, Fintech, in wrongfully withholding earn-out payments from Plaintiffs in breach of the APA.

The social interests in protecting the freedom of action of the actor and the contractual interests of the other. This "permits the Court to consider the social utility of the interests sought to be advanced by each of the litigants." *Id.* At worst, this factor is neutral if Plaintiffs' interest in earn-out payments under the APA is not greater than or less than Holdco's interest in the TA-General Atlantic transaction. *See id.*

The proximity or remoteness of the actor's conduct to the interference. Since the Holdco sale is the transaction which would have triggered the maximum earn-out payment to Plaintiffs but for Holdco's interference, this weighs in favor of finding Holdco's conduct was improper. *See id.* at *16.

The relations between the parties. As Plaintiffs explained in their Opening Brief, the parent-subsidiary relationship between Holdco and Fintech does not insulate Holdco from liability for tortious interference under an "affiliate privilege." *See* OB at 29-30. Defendants do not argue otherwise, and this factor thus tilts in Plaintiffs' favor.

IV. PLAINTIFFS STATE AN ACTIONABLE CLAIM FOR FRAUDULENT INDUCEMENT.

Defendants offer two arguments for dismissing Plaintiffs' claim for fraudulent inducement, contending that: (i) Plaintiffs failed to plead active concealment or a duty to speak; and (ii) Plaintiffs' claim is barred by integration and anti-reliance clauses in the APA. *See* AB at 35-39. Both arguments fail.

A. Plaintiffs Allege Facts Showing That Defendants Either Actively Concealed Material Information Or Did Not Disclose It Despite A Duty To Speak.

As Delaware law requires, the Amended Complaint's allegations are sufficient to apprise Defendants of the basis for Plaintiffs' fraud claim. *See, e.g., Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *9 (Del. Super. Ct. Aug. 7, 2019) ("When 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.'") (quoting *CSH Theatres LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *22 (Del. Ch. Apr. 21, 2015); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006)).

Defendants attempt to simply wave away the specific fact allegations cited in Plaintiffs' Opening Brief, arguing that the allegations do not identify any fraudulent ***statements***. *See* AB at 37. Plaintiffs, however, allege that Defendants' ***failure to speak*** constituted either active concealment or failure to disclose in the face of a duty to speak. So, in actuality, Defendants have done nothing to rebut the facts alleged by Plaintiffs in support of these claims.

Nor could they. Defendants attempt to distinguish *Surf's Up Legacy Partners, LLC v. Virgin Fest, LLC*, 2021 WL 117036 (Del. Super. Ct. Jan. 13, 2021), on the grounds that the fraud in that case arose from representations previously made and which required correction, leading to a duty to speak. *See* AB at 36-37. However, that is precisely what Plaintiffs allege Defendants did here. Before executing the APA, the parties engaged in due diligence and extensive negotiations. As alleged in the Amended Complaint, Defendants made numerous statements to Plaintiffs during negotiations regarding the economic prospects of the STX Business following the acquisition. A contracting party's "negotiation behavior and pre-closing initiatives" can defraud the counterparty when such behavior includes either an intentional failure to disclose material facts or misstatements that are "starving for correction." *Surf's Up*, 2021 WL 117036, at *14.

Such is the case here, where the Amended Complaint alleges that Defendants, during negotiations, either actively concealed facts or were obligated to disclose facts that would have a material impact on Plaintiffs' ability to realize the earn-out payments. An otherwise truthful but "incomplete statement can amount to fraud when a party 'purports to tell the whole truth' but fails to 'disclose the additional information necessary to prevent the statement from misleading the recipient.'"

Labyrinth, Inc. v. Urich, 2024 WL 295996, at *10 (Del. Ch. Jan. 26, 2024) (citation omitted). *See also Hartree Nat. Gas Storage, LLC v. PAA Nat. Gas Storage, L.P.*, 2025 WL 101638, at *10 (Del. Super. Ct. Jan. 15, 2025) (failure to disclose fact that made a representation inaccurate, or actively concealing the same, breached a duty of disclosure in negotiation context).

By choosing to make representations during negotiations about the economic prospects of the STX Business under Defendants' control, Defendants were obligated to disclose, rather than conceal, material facts that made their representations untrue. Nonetheless, Defendants failed to disclose the "exclusive" IRI relationship to Plaintiffs and, in fact, took steps to actively conceal it from Plaintiffs.

B. Defendants Cannot Rely Upon Language In The APA To Evade Liability For Fraudulent Inducement.

Defendants also offer APA Sections 5.7 and 9.7 as an "alternative ground" for dismissing Plaintiffs' fraud claim. AB at 38-39. As a threshold matter, however, this was not a "question[] fairly presented to the trial court" and, therefore, is not subject to appellate review. Supr. Ct. R. 8. Defendants never cited the "non-reliance" language in Section 5.7 to the Court of Chancery and only referenced Section 9.7's integration clause once, in a single footnote, during motion to dismiss briefing. *See* A0845. As a result, Defendants may not raise this argument now on appeal. *See In re Mindbody, Inc.*, --- A.3d ---, 2024 WL 4926910, at *49 (Del. Dec.

2, 2024) (recognizing that "[i]t seems unlikely that raising [an] issue in a last-minute, extraneous footnote can be considered 'squarely raising'" an issue with the trial court); *Clouser v. Doherty*, 2017 WL 3947404, at *5 (Del. Sept. 7, 2017), *reported at* 175 A.3d 86 (Del. 2017) (TABLE) (declining to consider on appeal arguments raised in a footnote in the action below); *Sabree Envtl. & Constr., Inc. v. Summit Dredging, LLC*, 2016 WL 5930270, at *1 (Del. Oct. 12, 2016), *reported at* 149 A.3d 517 (Del. 2016) (TABLE) ("[S]tandalone arguments in footnotes are usually not considered fairly raised in any court.").

In any event, the language of the APA does not bar Plaintiffs' fraudulent inducement claim. In Section 5.7, "Buyer" (*i.e.*, Fintech) agrees that it relied solely upon the representations and warranties of "Seller" (*i.e.*, STX) and the "Seller Parties" (including Thompson) set forth in the APA. *See* A0569. In other words, the anti-reliance language of Section 5.7 protects ***Plaintiffs*** against post-closing claims of fraud by ***Defendants***, not vice versa. The APA contains no similar language limiting the scope of statements upon which Plaintiffs relied and, therefore, it has no effect on Plaintiffs' claim.

The standard integration clause in Section 9.7 also is inapplicable. "[F]or a contract to bar a fraud in the inducement claim, the contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract." *Kronenburg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004). Section 9.7 contains no such language and, thus, it cannot insulate Defendants from liability for fraud. *See id.* ("The 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.").

CONCLUSION

For the foregoing reasons, as well as those set forth in their Opening Brief, Plaintiffs respectfully request that this Court reverse the Court of Chancery's judgment granting defendants' motion to dismiss.

Dated: March 13, 2025

<u>/s/ Thad J. Bracegirdle</u>
Thad J. Bracegirdle (No. 3691)
Justin C. Barrett (No. 6485)
BAYARD, P.A.
600 North King Street, Suite 400
Wilmington, DE 19801
(302) 655-5000

Attorneys for Plaintiffs Below-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2025, true and correct copies of the attached document were served upon the following counsel of record via File & ServeXpress:

Ryan D. Stottmann, Esquire
Taylor A. Christensen, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

/s/ Thad J. Bracegirdle
Thad J. Bracegirdle (No. 3691)