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NATURE OF PROCEEDINGS

Cornice brought four causes of action against Defendant-Appellee Joshua Silberstein arising from his fraudulent scheme to induce Cornice’s investment in Silberstein’s business, Thrasio, by providing Cornice with false financial data and representations regarding Thrasio’s financial condition: three common law claims (fraud, negligent misrepresentation, and unjust enrichment) and one statutory claim under a New Jersey anti-racketeering statute.¹ Cornice originally filed its claims in New Jersey state court on August 13, 2024—which the parties stipulated is the relevant date for statute of limitations purposes—and the claims were subsequently re-filed in the Complex Commercial Litigation Division of Delaware Superior Court, New Castle County (the “Superior Court”), at Silberstein’s insistence. Silberstein then moved to dismiss Cornice’s complaint. On December 1, 2025, at oral argument on Silberstein’s motion to dismiss, the Superior Court issued a bench ruling (1) dismissing Cornice’s statutory claim on choice-of-law grounds and (2) dismissing Cornice’s common law claims on statute of limitations grounds (without reaching the merits of those claims). In doing so, the Superior Court ruled that, because Cornice’s common law claims otherwise accrued in March 2021 and no doctrine of tolling applied, Cornice’s claims filed in August 2024 are untimely under

¹ For ease of reading, “Cornice” in the singular refers to both Appellants (Plaintiffs below). Capitalized terms not otherwise defined herein retain their definitions set forth in Cornice’s Complaint. (A0009-48.)

Delaware's applicable three-year statute of limitations. The Superior Court issued a final order implementing its bench ruling on December 18, 2025.²

Cornice appeals the Superior Court's order with respect to the timeliness of Cornice's common law claims. The Superior Court erred by conclusively resolving the issue of tolling in Silberstein's favor at the pleading stage, where Cornice's complaint contains sufficient allegations to support tolling of the statute of limitations. Accordingly, Cornice respectfully requests reversal of the Superior Court's ruling and remand so the Superior Court may address the merits of Cornice's common law claims on a more complete record.

² Pursuant to Supreme Court Rule 14(b)(vii), the Superior Court's bench ruling and implementing final order are appended hereto as Exhibit A and Exhibit B.

SUMMARY OF ARGUMENT

1. Cornice's complaint states facts sufficient to toll the applicable statute of limitations until at least August 13, 2021, under the doctrine of fraudulent concealment.

2. Cornice's complaint states facts sufficient to toll the applicable statute of limitations until at least August 13, 2021, under the doctrine of inherently unknowable injury.

3. On the facts set forth in the complaint, a reasonable person in Cornice's position would not, until at least August 13, 2021, have reason to investigate Silberstein's scheme or otherwise believe that he was injured by investing in Silberstein's company.

4. On the facts set forth in the complaint, a reasonable person in Cornice's position would not, until at least August 13, 2021, have been in a position to discover sufficient facts to state a claim for fraudulent inducement.

5. Because the applicable statute of limitations was otherwise tolled under either or both of the doctrines fraudulent concealment and inherently unknowable injury, and such tolled statute of limitations did not begin to run prior to August 13, 2021, because Cornice was neither on notice of nor able to investigate its claims, Cornice pleads facts on which it is reasonably conceivable that its claims are timely.

STATEMENT OF FACTS

A. Silberstein's Fraudulent Scheme

In 2018, Silberstein founded an e-commerce business, Thrasio, where he served as CEO until his termination in September 2021. (A0015-16 ¶¶ 20-21.) However, Silberstein did not operate the business for the long-term benefit of its shareholders. Instead, Silberstein operated Thrasio as pump-and-dump scheme, manufacturing the illusion of profits and growth to drive up valuations and induce investment, hiding the business's actual financial condition through false statements and misrepresentations, and then selling his own shares before the truth came out. (A0016 ¶ 23.) Prior to Cornice's investment, Silberstein induced hundreds of millions of dollars of investment by overstating Thrasio's growth and profitability. (A0016-18 ¶¶ 24-30.) Silberstein then made a series of false representations about Thrasio's financial condition and fraud controls directly to Cornice to induce Cornice's investments in February and March 2021. (A0014 ¶¶ 15-16.) Just a few months later, Silberstein cashed out of his scheme by selling his own Thrasio shares at sky high valuations for hundreds of millions of dollars. (A0031-32 ¶¶ 77-79.) Those sales prompted the Thrasio Board to commence an investigation into Silberstein's representations to investors about Thrasio's financial information. (A0034 ¶ 87.) Silberstein quickly left Thrasio in September 2021 via negotiated termination. (A0034 ¶ 88.) Subsequently released audited financial statements in

June 2022—and the results of the Thrasio Board’s investigation released in May 2024—confirm that the representations Silberstein made to Cornice to induce its investment were false.

B. Silberstein’s Initial Fraudulent Representations that Included the Unaudited Financial Statements

Cornice’s investment in Thrasio was led by Bo Peabody and Ari Horowitz, who are well-known in the technology-sector investment community. (A0021 ¶ 40.) Prior to Cornice’s investment, Silberstein had recruited Messrs. Peabody and Horowitz to work with Thrasio to leverage their connections with potential investors. (A0021 ¶ 41-42.) At the time Silberstein began soliciting Cornice’s members to invest, Mr. Peabody was engaged as an advisor to Silberstein and Thrasio, and Mr. Horowitz worked for a separate e-commerce lending business backed by Thrasio. (A0015 ¶¶ 18-19.) Upon such solicitation of Cornice’s members, Silberstein provided false financial information and, when asked for supplemental diligence materials, Silberstein consistently refused, assured Cornice in multiple e-mails and phone calls that the information he had already provided was accurate, and asserted his strong bargaining position by stating that Cornice’s insistence on additional diligence would preclude any deal for Cornice to purchase shares of Thrasio Stock.

Silberstein’s misrepresentations began in or about November 2020, when Silberstein solicited Mr. Peabody to arrange for Cornice’s members’ investment in Thrasio in an upcoming round of equity financing. (A0021 ¶ 43.) Among other

false representations, Silberstein stated that Thrasio was profitable and had been faster in reaching profitably than certain other notable start-ups. (A0021-22 ¶¶ 44-45.) Silberstein stated repeatedly that Thrasio had been “profitable since inception.” (A0022 ¶ 44.)

Silberstein initially rebuffed requests for detailed financial information, asserting that Cornice would be getting a favorable price for Thrasio stock because Silberstein was prioritizing closing the upcoming financing as quickly as possible over conducting a more protracted diligence and negotiation process. (A0022 ¶¶ 46-47.) Silberstein further asserted that Cornice’s participation allocation would be reallocated to other eager would-be investors if Cornice insisted on taking more time to consider the deal. (A0022 ¶ 46.)

Nevertheless, Mr. Peabody continued to press Silberstein for, at minimum, current financial statements reflecting Thrasio’s revenues, profits, and losses, which Silberstein eventually e-mailed to Mr. Peabody on December 23, 2020 (the “Unaudited Financial Statements”). (A0023 ¶¶ 48-49.) Among other data purporting to corroborate Silberstein’s representations about Thrasio’s financial condition and profitability, the Unaudited Financial Statements (falsely) represented that Thrasio had been profitable throughout 2019 and 2020, including approximately \$74 million EBITDA for 2020. (A0023 ¶ 50.)

On December 28, 2020, in response to a request for additional, updated information, Silberstein told Mr. Peabody by e-mail that he could “[n]ot quickly” provide updated financial information, which was unavailable because he had “prioritized closing the [previous financing] round . . . over [preparing] closing financials” for the upcoming financing round in which Cornice would participate. (A0023-24 ¶ 52.) However, Silberstein reassured Mr. Peabody that “October, November, and December [2020] were all record setting months,” and so updated financial data would not “tell a different story” with respect to Thrasio’s profitability and financial condition. (A0024 ¶ 53.) As Cornice would later discover, however, accurate updated data would likely have told a much different story than the one Silberstein was telling. In that same e-mail on December 28, 2020, Silberstein reasserted that Cornice’s participation in the deal was contingent on a truncated diligence period and “pulling the trigger . . . pretty quick.” (A0024 ¶ 55.)

Notwithstanding the expedited diligence process, Cornice had no reason to believe that either the Unaudited Financial Statements or Silberstein’s other statements about Thrasio’s profitability were false. (A0025 ¶ 58.) Indeed, although they were not privy to Thrasio’s granular financial information that would be required to directly corroborate the Unaudited Financial Statements and Silberstein’s claims of profitability, Messrs. Peabody and Horowitz observed that Thrasio appeared to be operating consistent with Silberstein’s representations. (A0025-26

¶¶ 59-61.) Moreover, Silberstein reassured them that Thrasio’s financial condition had been recently vetted by reputable financial and accounting professionals in connection with prior investment rounds. (A0026 ¶ 62.) Indeed, Silberstein touted that one of Thrasio’s largest investors in prior rounds, Advent International (“Advent”)—a highly sophisticated investment firm with representation on Thrasio’s Board—would be investing even more as the largest participant in the upcoming equity financing alongside Cornice. (A0026 ¶ 62; A0073; A0161; A0214.) Silberstein repeatedly pointed to Advent and other top-tier investment firms’ investments in Thrasio as reassurance to Cornice that Thrasio’s finances were in order. (A0026-27 ¶ 62.)

Ultimately, induced by Silberstein’s representations regarding Thrasio’s profitable financial condition, Cornice agreed to invest \$15 million in Thrasio by purchasing stock in the upcoming equity financing. (A0027 ¶ 64.) Silberstein subsequently advised that the upcoming equity financing would be split into two successive financings that would close about one month apart: the C-2 financing and the C-3 financing. (A0027-28 ¶¶ 65-66.) In continued reliance on Silberstein’s representations, Cornice agreed to maintain its \$15 million investment, split into \$8 million in the C-2 financing and \$7 million in the C-3 financing. (A0028 ¶ 69.)

C. Silberstein's Further Fraudulent Representations Made in the SPAs

To further induce Cornice's investment, Silberstein made additional false representations at closing. In particular, Silberstein made identical representations in the two share purchase agreements (the C-2 SPA and C-3 SPA) that: (1) the previously-provided Unaudited Financial Statements had been prepared in accordance with GAAP (A0100 § 2.14 ("The Financial Statements have been prepared in accordance with generally accepted accounting principles ('GAAP')."); A0181 § 2.14 (same)); (2) confirmed the accuracy of those financial statements (A0100 § 2.14 ("The [Unaudited] Financial Statements fairly present in all material respects the financial condition and operating results of the Company."); A0181 § 2.14 (same)); and (3) represented that the company had robust fraud and accounting controls and was devoid of fraud by management (A0100 § 2.14 (disclaiming knowledge of "(A) any significant deficiency or material weakness in the internal accounting controls utilized by the Company, or (B) any fraud, whether or not material, that involves the Company's management"); A0181 § 2.14 (same)). (A0025; A0028-31.) These representations were false: (1) the financial statements provided to Cornice were not prepared in accordance with GAAP; (2) they did not fairly present Thrasio's financial condition; (3) and there were significant deficiencies in Thrasio's internal accounting controls and fraud by management (namely, the very fraud that Silberstein was perpetrating by soliciting investments

based on false financial data that he was able to employ thanks to such deficient accounting controls). (A0031 ¶ 76.)

The C-2 financing closed on February 3, 2021, and the C-3 financing closed on March 17, 2021. (A0028-30.)

D. Silberstein's Further Concealment of the Fraud

In the months following its investment, Cornice learned that Silberstein was using updated financial statements to solicit purchases of his Thrasio stock on the secondary market, and Cornice made multiple requests for such statements and other updated and audited financial information, which Cornice was entitled to receive pursuant to information rights granted per the C-3 SPA. (A0032-33 ¶¶ 80-83.³) Each of Cornice's requests for further information was denied; until June 2022, neither Silberstein nor Thrasio ever provided updated financial statements or any other updated or audited financial information, including such information required by the C-3 SPA. Other investors were also unable to access additional financial information following the C-2 and C-3 financings. (A0033 ¶ 84.)

E. The Audited Financial Statements and Revelation of the Truth

Only after Silberstein made large sales of Thrasio stock in July and August 2021 did the Thrasio Board become concerned with Silberstein's conduct. But those

³ Said information rights pleaded in the complaint are fully set forth in the Investors' Rights Agreement accompanying the C-3 SPA. (A0189.)

concerns were not publicized at the time. Only long after did investors learn that—in or about September 2021—the *Board* (not investors) was concerned that Silberstein may have been providing inaccurate or misleading financial information to investors in order to *personally* benefit by artificially inflating Thrasio’s financial condition, and only then did Thrasio engage outside counsel to investigate Silberstein. (A0034 ¶ 87.) Silberstein quickly left Thrasio through a negotiated termination on or about September 25, 2021. (A0034 ¶ 88.) Until that point, investors like Cornice had no indication that Silberstein was under suspicion of wrongdoing of any kind—and certainly no indication that he had made misstatements as to Thrasio’s financial condition.

In June 2022, Thrasio finally delivered to Cornice audited financial statements covering the same time periods as the Unaudited Financial Statements that Silberstein had previously provided. (A0035 ¶ 89.) The newly-disclosed audited financial statements (the “Audited Financial Statements”) revealed that—in addition to not being prepared in accordance with GAAP—the Unaudited Financial Statements did not accurately reflect Thrasio’s financial condition or profitability, including material discrepancies with respect to Thrasio’s 2020 profits and losses. (*Id.*) Indeed, far from the \$74 million positive EBITDA in 2020 that was stated in the Unaudited Financial Statements, the Audited Financial Statements revealed that

Thrasio incurred massive losses that year. (*Id.*) Hence, it was in June 2022 when Cornice first learned it had been lied to and, as a result, overpaid for Thrasio stock.

Thrasio commenced bankruptcy proceedings in February 2024. As part of the bankruptcy proceedings, certain of Thrasio's directors (the "Disinterested Directors") conducted an investigation into Silberstein, among other persons, and issued a report on May 23, 2024 (the "Disinterested Directors' Report"). (A0036-37 ¶ 94.) The Disinterested Directors' Report confirmed that the representations Silberstein made to induce Cornice's investment were false, including revealing the truths that: Thrasio was not profitable (and never had been) at the time Silberstein said it was; the Unaudited Financial Statements were not prepared in accordance with GAAP; the Unaudited Financial Statements did not accurately reflect Thrasio's financial condition; and Thrasio had substantial deficiencies in its accounting and fraud controls. (A0037-40.)

For example, the Disinterested Directors' Report stated that, "[f]rom its inception in 2018 through January 2022, Thrasio had persistent issues with its internal accounting and the preparation of financial statements," which "resulted in material discrepancies between Thrasio's unaudited financial statements, which were provided to investors, and subsequently-prepared audited financial statements." (A0037 ¶ 97.) The Disinterested Directors' Report further stated that "contemporaneous written documents" show that Silberstein was "aware of financial

and accounting issues since 2019,” and that such “evidence demonstrates that Silberstein . . . made a conscious decision to invest resources to grow the business rather than focusing on adequate controls and accuracy in financial reporting.” (A0038 ¶ 99.)

The Disinterested Directors’ Report also confirmed that Silberstein successfully concealed his scheme from investors by, among other things, “fail[ing] to address or disclose these [accounting] issues, either to investors or the Board.” (A0038 ¶ 100.) Indeed, the Disinterested Directors’ Report states that Silberstein was likely successful in hiding his scheme until at least his departure, such that “Thrasio’s non-management directors likely did not become aware of the extent of the financial and inventory control issues until approximately September 2021.” (A0038-39 ¶ 101.) “Notably,” the Disinterested Directors’ Report disclosed that “certain of the non-management directors’ investment firms made substantial investments in Thrasio’s equity in October 2021,” indicating that sophisticated inside investors still “believed Thrasio had significant equity value at the time.” (A0067 ¶ 15.) The Disinterested Directors’ Report did not address when or how investors might have become aware of the fraud prior to the release of the audited financial statements in June 2022.

ARGUMENT

QUESTION PRESENTED

Did the Superior Court err by holding at the pleading stage that the applicable three-year statute of limitations should not be tolled until at least August 13, 2021, which would otherwise render Cornice’s claims timely? (Preserved at D.I. 16 (Pls. Ans. Br.) pp. 33-34; Ex. A 19:3-22:14)

SCOPE OF REVIEW

All aspects of this question are reviewed *de novo*. *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1143 (Del. 2025) (“Whether a claim is time-barred is . . . a question of law that we review *de novo*. Likewise, we review the Superior Court’s grant of a motion to dismiss under Rule 12(b)(6) *de novo*.” (citations omitted)). The scope of review includes all findings, inferences, applications of law, and any other express or implied determinations of the Superior Court necessary to the Superior Court’s holding that Cornice’s claims are untimely.

MERITS OF ARGUMENT

This case presents allegations quintessentially calling for pleading-stage tolling. Cornice pleads that Silberstein perpetrated a surreptitious fraud, concealing Thrasio's true financial condition from Cornice (and the rest of the world) while employing further falsehoods and misleading reassurances to induce Cornice to pay \$15 million for worthless Thrasio stock. Moreover, Cornice pleads sufficient facts to infer that Cornice was unable to ascertain its injury until Silberstein's scheme came to light many months later. Yet, despite these textbook allegations calling for tolling, the Superior Court held that—*on the face of the complaint and as matter of law*—Cornice should have been put off by the hurried diligence process and unfulfilled requests for additional diligence. And not just put off as a matter of business sense, but actually so perturbed as to suspect actual *fraud*—and be charged with inquiry notice thereof. Such a ruling is contrary to well-settled Delaware law providing that one transactional party's aggressive negotiating tactics do not put its counterparty on inquiry notice of fraud. Indeed, the Superior Court's holding sets forth an unprecedented rule: unfulfilled diligence requests constitute inquiry notice of fraud in diligence materials received. That is not (and cannot be) the law. Such a rule, if upheld here, would mark a sea-change in Delaware courts' review of business dealings and cast a shadow of fraud over nearly all transactional negotiations, where buyers rarely get all diligence materials they seek. To the

contrary, well-settled principles of Delaware law make clear that the statute of limitations should be tolled here, rendering Cornice’s claims timely.

First, the tolling doctrine of “fraudulent concealment” applies given the surreptitious nature of the scheme alleged, through which Silberstein took numerous steps to conceal his misconduct—and successfully did so from even his own Board until at least September 2021. Delaware courts recognize that the fraudulent concealment doctrine maps neatly onto fraud claims like Cornice’s because the same affirmative acts taken to cause the injury have the effect of concealing the injury. Here, Silberstein’s misrepresentations that caused Cornice to overpay for Thrasio stock also concealed from Cornice that it was so overpaying. Moreover, here, Silberstein also took post-closing steps to further hinder discovery of his fraud, such as refusing to deliver post-closing updated financial statements required by the C-3 SPA.

Second, even putting aside Silberstein’s affirmative acts of concealment, the doctrine of “inherently unknowable injury” applies to toll Cornice’s claims because all information that would alert Cornice to the fact that it overpaid for Thrasio stock (*e.g.*, true financial statements showing Thrasio’s actual financial condition) were not available to Cornice and were instead closely held and closely guarded by Silberstein alone.

Third, once tolled, the statute of limitations did not restart until Cornice became reasonably aware of some indication that it had overpaid as a result of Silberstein's misstatements. On the face of the complaint, the first such indication was the Audited Financial Statements provided in June 2022. Yet, the Superior Court held that Silberstein's refusal to provide additional financial information at closing—which he had no duty to do and is normal course for private transactions of this nature—was a sufficient indicator of falsity to charge Cornice with inquiry notice *of fraud*. But that holding misconstrues the pertinent injury. It is irrelevant whether Cornice may have been able to ascertain an informational injury—*i.e.*, whether Silberstein was breaching a duty to provide further information—the pertinent question here is whether Cornice had reason to believe that the information Silberstein was providing was false. Cornice observed no such indication.

Fourth, even were Cornice somehow on notice of possible fraud, the statute of limitations does not begin to run unless Cornice was actually capable of getting to the truth through a reasonable investigation. But Cornice plainly pleads that such investigation was impossible. After first misleading Cornice through his initial fraudulent misrepresentations of Thrasio's profitability, Silberstein made further misrepresentations in the share purchase agreements to augment and conceal those false claims, as well as provided other misleading reassurances. Then, he refused Cornice's post-closing requests for updated financial information that might have

divulged Cornice's injury. Indeed, the Disinterested Directors' Report confirms that Silberstein's successfully kept even his own Board in the dark until September 2021. Yet, the Superior Court says Cornice could have somehow gotten wise six months sooner. How?

To answer that question and otherwise circumvent the foregoing principles of law, the Superior Court improperly drew numerous inferences in Silberstein's favor about how Cornice might have played Sherlock Holmes and uncovered Silberstein's scheme in a counterfactual world. But Delaware law does not require an investor to be the world's greatest detective. And at the pleading stage, all inferences are required to be drawn in Cornice's favor, and factual findings are reserved for later stages of the proceedings after discovery. Accordingly, the Superior Court's ruling was error.

I. THE DOCTRINES OF “FRAUDULENT CONCEALMENT” AND “INHERENTLY UNKNOWABLE INJURY” APPLY TO TOLL CORNICE’S CLAIMS AND RENDER THEM TIMELY

Delaware law tolls statutes of limitations where plaintiffs are unable to ascertain their injuries. Two related (but distinct) doctrines compel this result. First, the doctrine of “fraudulent concealment” tolls statutes of limitations where the defendant takes affirmative steps to hide his injurious conduct. Naturally, the doctrine finds home in fraud cases, like this one, where the alleged financial misrepresentations have the simultaneous effect of injuring the plaintiffs (by inducing their purchase of shares) and hiding the resulting injury (by concealing the shares’ true value). Fraud cases are also a natural fit for the second doctrine: “inherently unknowable injury” (also known as the “time of discovery rule” or “discovery rule”), which applies where the information that would apprise a plaintiff of his injuries is unavailable to him—regardless of whether such unavailability is the defendant’s fault. Both doctrines apply here. Indeed, simply put, “[i]t is clear . . . that the discovery rule and fraudulent concealment doctrine are applicable in this case” because “[Cornice] alleges that [Silberstein] actively defrauded [Cornice] and hid [his] behavior from [Cornice].” *Huntsman Int’l, LLC v. Dow Benelux N.V.*, 2021 WL 509668, at *8 (Del. Super. Ct. Feb. 2, 2021); *see also BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *6 (Del. Super. Ct. Jan. 3, 2020) (holding that

allegations “support a ‘time of discovery’ tolling argument and a fraudulent concealment tolling argument” given “the surreptitious nature of the scheme pled”).

A. The Doctrine of “Fraudulent Concealment” Applies

“Under the doctrine of fraudulent concealment, a statute of limitations . . . can be disregarded when a defendant has fraudulently concealed from a plaintiff the facts necessary to put the plaintiff on notice of the truth.” *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1146 (Del. 2025) (internal quotation marks and brackets omitted). The doctrine applies where “something affirmative [is] done by a defendant” constituting an “actual artifice which prevents a plaintiff from gaining knowledge of the facts,” *Lebanon Cnty. Employees’ Ret. Fund v. Collis*, 287 A.3d 1160, 1215 (Del. Ch. 2022) (internal quotation marks omitted), including where “the defendant knowingly acted to prevent the plaintiff from learning facts or otherwise made misrepresentations intended to put the plaintiff off the trail of inquiry,” *AssuredPartners of Virginia, LLC v. Sheehan*, 2020 WL 2789706, at *17 (Del. Super. Ct. May 29, 2020) (internal quotation marks and brackets omitted). “The rationale for this doctrine is to disallow a defendant from taking advantage of his own wrong in preventing a plaintiff from filing a timely suit in the courts.” *LGM*, 340 A.3d at 1147 (internal quotation marks and brackets omitted).

Delaware courts recognize that a well-pleaded claim of fraudulent inducement will sufficiently invoke tolling because the same allegations of fraudulent conduct

(here, making misrepresentations about Thrasio’s financial condition) comprise affirmative acts taken to conceal the plaintiff’s injuries (here, that Cornice overpaid for Thrasio stock). *Techview Invs. Ltd. v. Amstar Poland Prop. Fund I, L.P.*, 2021 WL 3891573, at *9 (Del. Super. Ct. Aug. 31, 2021) (applying fraudulent concealment doctrine to toll fraudulent inducement claims where allegations supported inference “that Defendants knew they had made a materially false representation that induced Plaintiffs to enter the Subscription Agreements”). “This is unsurprising” because fraudulent schemes “are inherently self-concealing,” and their perpetrators take affirmative steps to keep them secret. *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 797 (Del. Ch. 2014) (internal quotation marks omitted); *see also CFTC v. Worldwide Markets, Ltd.*, 675 F. Supp. 3d 496, 504-05 (D.N.J. 2023) (numerous steps taken to further and conceal scheme “constitute[] active conduct” and “had [the] intended effect of preventing [others] from uncovering the fraud”); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 186-89 (D. Del. 2000) (applying Delaware doctrine of fraudulent concealment to toll claims arising from accounting manipulation and false financial statements).

Here, Silberstein’s fraudulent inducement scheme included two layers of affirmative acts designed to both cause and conceal Cornice’s injuries. First, pre-closing, Silberstein made a series of connected misrepresentations that overstated Thrasio’s financial condition—including in the Unaudited Financial Statements—

and, after providing the false financials, he then switched to hiding additional materials that might have put Cornice on the scent of the Unaudited Financial Statements' falsity. (A0021-24.) Second, at closing, Silberstein employed another layer of reassuring misrepresentations in the SPAs regarding the Unaudited Financial Statements' accuracy and Thrasio's internal controls. (A0028-31.) Together, these acts both induced Cornice to enter the SPAs and concealed the resulting injury that Cornice vastly overpaid for Thrasio stock. Additionally, post-closing, Silberstein further took affirmative action to hide that injury from Cornice by hiding updated and audited financial information, including by taking the additional affirmative step of breaching the obligation that required such information to be shared with Cornice when it became available. *See MKE Holdings Ltd. v. Schwartz*, 2020 WL 467937, at *13 (Del. Ch. Jan. 29, 2020) ("*MKE I*") (applying tolling where breach of obligation to provide post-closing updated financial statements supported inference that "the financial statements were withheld in order to further conceal [the company]'s actual performance"). Accordingly, because Cornice "was the victim of an ongoing campaign of fraud," and "[t]he fraudulent statements that [Silberstein] made to [Cornice] in connection with the [investments] were sufficient to lead [Cornice] away from the truth" of Cornice's overpayment injury, Cornice's allegations "provid[e] a basis for tolling." *Clark v. Davenport*, 2019 WL 3230928, at *16 (Del. Ch. July 18, 2019). The Superior Court's contrary

determination that neither Silberstein's pre-closing or post-closing conduct constitutes "an affirmative act of concealment or actual artifice" (Ex. A at 56:9-11) cannot withstand the overwhelming weight of authority to the contrary.

Indeed, the Superior Court's determination contravenes this Court's recent decision in *LGM*. There, certain "Buyers" entered a "Purchase Agreement" with "Sellers" to purchase shares in "Target Companies" that distributed pharmaceutical ingredients. *LGM*, 340 A.3d at 1137. As here, the Sellers made both affirmative representations about the Target Companies' condition (namely, their "material compliance" with applicable regulations) and confirmatory representations "that their representations and disclosures were complete and accurate." *Id.* at 1138. After closing, investigations spurred by regulatory inquiries revealed that Sellers engaged in numerous pre-closing regulatory violations, indicating that their representations of compliance were false. *Id.* at 1139-40. Applying tolling and holding that the "Buyers' complaint adequately alleges that the Sellers affirmatively acted to conceal their wrongdoing from the Buyers," the Court found two layers of such affirmative acts: initially "during the due diligence process before the acquisition" and "again during [subsequent] investigation after the acquisition." *Id.* at 1148-49. First, "the Sellers intentionally made false statements to the Buyers during due diligence relating to [the Target Companies'] compliance with the law and [otherwise] actively concealed their illegal activity from the Buyers." *Id.* at

1149. Then, after closing, the Sellers hindered the investigations that ultimately revealed the truth. *Id.* Here, likewise, Silberstein both made pre-closing misrepresentations about Thrasio’s condition and took post-closing actions to hinder Cornice’s follow-up inquiries. Accordingly, under this Court’s precedents, the doctrine of fraudulent concealment applies to toll the statute of limitations here.

Consistent with *LGM*, other Delaware courts routinely apply the doctrine of fraudulent concealment in similar circumstances, including where sellers misrepresent their companies’ financial condition to induce a transaction. In *AssuredPartners*, for example, the Superior Court applied the doctrine where “the sellers fraudulently concealed material facts with the goal of making [the target company] look more attractive and valuable than it was, resulting in an inflated purchase price,” including by misrepresenting that the financial statements provided in connection with the transaction “were true and accurate.” 2020 WL 2789706, at *1. Among other concealing acts warranting tolling, the court observed that the sellers “represented that the financial statements of [the company] provided to [the buyer] accurately reflected the financial status of [the company]” and that the sellers otherwise “provided false or misleading financial information to [the buyer], causing [the buyer] to believe that the company’s EBITDA was higher than it was, in fact, and thus misrepresented the value of the business at the time of purchase.” *Id.* at *18. That is precisely what happened here, so the same result should follow.

Likewise, in *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co., LLC*, the Superior Court applied the doctrine where sellers engaged in “accounting fraud which falsely inflated [the target company]’s EBITDA in order to make [the buyer] believe that it was paying the correct amount for the company.” 2020 WL 5054791, at *3 (Del. Super. Ct. Aug. 17, 2020). The false financial figures were furnished as unaudited, interim financial statements in response to the buyer’s requests for information during the due diligence period leading up to the transaction. *Id.* at *4. Among other allegations warranting tolling, the court noted that the sellers “presented the [i]nterim [f]inancial [s]tatements for [the buyer]’s reasonable reliance which misrepresented the assets and income of [the target company]” and that, through certain accounting processes, members of the sellers’ “finance team concealed and perpetuated [the sellers]’ fraud in connection with the [accounting errors] that had overstated EBITDA and overstated inventory within the [i]nterim [f]inancial [s]tatements.” *Id.* at *9-10. Cornice’s allegations here are functionally identical.

Similarly, in *Agspring Holdco, LLC v. NGP X US Holdings, L.P.*, the Court of Chancery applied the doctrine where the seller represented to the buyer that the target company “was projecting it would earn \$33 million of EBITDA for its [current] fiscal year,” but, after closing, it was revealed that the seller had “concealed from the buyer that [the company] reduced its EBTIDA forecast for the [current]

fiscal year internally *before* the closing to just \$20 million.” 2020 WL 4355555, at *1 (Del. Ch. July 30, 2020). Additionally, as here, the sellers—who continued to manage the post-closing company—continued to indicate that the company “remained ‘on target’” to meet the misleading projections and refused to provide updated post-closing financials when asked. *Id.* at *7-8. In “totality,” the court held that such facts establish that the sellers “made affirmative efforts to conceal the fraud they allegedly committed in connection with the sale of the [c]ompany during,” including by ma[king] statements to perpetuate the myth that the artificially inflated forecast they provided to [the buyers] shortly before the closing remained achievable when they knew otherwise.” *Id.* at *8. On similar facts, the same result should follow here.

These cases and others establish that Silberstein’s artifice to conceal Thrasio’s true value from Cornice—first by furnishing the false Unaudited Financial Statements, then by further misrepresenting their accuracy in the SPAs, and finally by refusing to provide contractually-required post-closing financial information—warrant tolling under the doctrine of fraudulent concealment. *Lebanon*, 287 A.3d at 1217 (misrepresentation that company’s internal controls were sound constituted “an actual artifice that would be sufficient to invoke fraudulent concealment for the purpose of extending the actionable period”); *Technicorp Int’l II, Inc. v. Johnston*, 2000 WL 713750, at *7 (Del. Ch. May 31, 2000) (applying tolling where controlling

manager concealed the true finances of the company from investor); *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman*, 2018 WL 3084975, at *9 (Del. Super. Ct. June 21, 2018) (applying tolling to fraud claim where seller misrepresented environmental condition of property and failed to disclose documents that would have alerted the buyer to environmental issues); *Matter of Est. of du Pont Dean*, 2017 WL 3189552, at *9 (Del. Ch. July 13, 2017) (applying tolling where party “affirmatively obscured” his misconduct “through his recordkeeping practices” and “affirmatively misled or stonewalled [the claimant] when [the claimant] asked questions and sought records . . . necessitating legal action to obtain [a] forensic accounting”).

B. The Doctrine of “Inherently Unknowable Injury” Applies

Even setting aside Silberstein’s affirmative efforts to conceal Cornice’s injuries, Cornice’s claims are nonetheless tolled by the doctrine of “inherently unknowable injury” because no information was available to Cornice that indicated that Cornice had been defrauded into overpaying for Thrasio stock via false statements. Like the fraudulent concealment doctrine, tolling is warranted under the inherently unknowable injury doctrine where “it would be practically impossible for the plaintiff to discover the existence of a cause of action.” *Jacam Chem. Co. 2013, LLC v. Jacam Chem. Co. Inc.*, 2024 WL 960180, at *8 (Del. Ch. Mar. 1, 2024) (internal quotation marks and brackets omitted). That is, “[i]f an injury is inherently

unknowable, the statute of limitations is tolled until the harmful effects of the injury become ascertainable.” *Id.* Unlike the fraudulent concealment doctrine, however, the inherently unknowable injury doctrine applies regardless of whether the plaintiff’s inability to ascertain his injuries is due to the defendant’s affirmative conduct. *Lebanon*, 287 A.3d at 1215. Where the doctrine applies, “the statute will begin to run only ‘upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.’” *Serviz, Inc. v. ServiceMaster Co., LLC*, 2022 WL 1164859, at *5 (Del. Super. Ct. Apr. 19, 2022) (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)).

Importantly, this Court “has set a low threshold for the use of the doctrine of inherently unknowable injury.” *Id.* (internal quotation marks omitted); *see also BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *5 (Del. Super. Ct. Jan. 3, 2020). Thus, to invoke tolling under this doctrine, Cornice need not plead that the overpayment injury was *utterly* unknowable to even the most skeptical investor or dogged investigator; rather, Cornice need plead only that “there were no observable or objective factors to alert [Cornice] to the injury.” *Wilmington Hous. Auth. v. Design Contracting, Inc.*, 2023 WL 3625995, at *3 (Del. Super. Ct. May 18, 2023).

Cornice’s complaint easily surmounts this low bar, and the Superior Court applied a burden inconsistent with this Court’s precedents. The complaint makes clear that Mr. Peabody and Mr. Horowitz—the Thrasio insiders leading Cornice’s investment—did not observe any red flags or other indications that Silberstein’s representations were false. (A0025-27.) To the contrary, Thrasio appeared to be operating and growing consistent with Silberstein’s representations, and continuing to attract new, sophisticated investors, including investors with even greater access to information than Cornice. Advent, for one, had representation on Thrasio’s Board and was the largest investor in the C-2 and C-3 financings (A0026 ¶ 62; A0073; A0161; A0214), making clear to Cornice that larger, well-resourced investors aided by reputable financial and accounting professionals had “kicked the tires” and decided to invest after conducting more extensive diligence with the aid of reputable professionals. (A0026 ¶ 62.) To smaller investors like Cornice, such diligence and investment by larger players is the opposite of a red-flag and confirms that there were no observable or objective factors to alert investors to Silberstein’s scheme. Indeed, both Advent and Silver Lake, another sophisticated investor, went on to invest “more than \$1 billion in Thrasio’s equity after engaging in due diligence” in *October 2021*, further signaling to Cornice that nothing was amiss and confirming that Silberstein’s scheme was undetectable until at least that time—even by the most well-resourced investors. (A0081 ¶ 45.)

Moreover, the unobservability of Silberstein's scheme is confirmed by Cornice's allegations that he took great pains to maintain sole control over Thrasio's finances and evade supervision by Thrasio's other officers and directors. (A0020-21; A0033-34.) For example, Silberstein installed a deferential CFO whom Silberstein sidelined from financial matters, while otherwise "closely guarding Thrasio's detailed financial data." (A0020.)

Delaware courts routinely apply the discovery rule in such circumstances, as the law in Delaware is clear. In *Otto Candies, LLC v. KPMG LLP*, for example, the Court of Chancery held that the plaintiffs sufficiently invoked "toll[ing] under the discovery rule as an inherently unknowable injury" by "plead[ing] that they were not aware of any discrepancies in the financial statements" on which they relied. 2019 WL 994050, at *29 (Del. Ch. Feb. 28, 2019) (internal quotation marks and brackets omitted). Likewise, in *BTIG*, the Superior Court applied the inherently unknowable injury doctrine where the defendant "had control over the documents that gave rise to its [the plaintiff's] claim" and engaged in a "surreptitious" scheme to undermine the plaintiff's benefit of the bargain of the stock purchase agreements at issue. 2020 WL 95660, at *5; *see also Yencer Builders, Inc. v. Fabi*, 2010 WL 8250829, at *2 (Del. Super. Ct. Oct. 1, 2010) (applying discovery rule where seller furnished buyer with documents that buyer had no reason "to second guess or reconfirm").

Jacam is also instructive. There, sellers of a chemical company's assets allegedly misrepresented that the sold assets included certain proprietary, trade-secret chemical formulas that were actually in the public domain. 2024 WL 960180, at *7. However, because the buyers were not given a schedule of the formulas designated as trade secrets during due diligence (which may have allowed them to corroborate whether such formulas were actually secret or public), the court held that the buyers "could not discover their claims during the [pre-closing] due diligence period." *Id.* at *9. Here, likewise, Cornice has no access to information that could have disproven Silberstein's false representations.

Accordingly, whether or not fraudulently concealed, Cornice's injuries were otherwise unknowable, tolling the statute of limitations until Cornice was able to ascertain that the Thrasio stock purchased was not as valuable as Silberstein had represented.

II. THE SUPERIOR COURT ERRED BY MISCONSTRUING THE INJURY AT ISSUE AND DRAWING INFERENCES IN SILBERSTEIN'S FAVOR TO CONCLUDE THAT CORNICE WAS ON INQUIRY NOTICE IN MARCH 2021

The Superior Court did not meaningfully grapple with application of the fraudulent concealment or inherently unknowable injury doctrines. Instead, the Superior Court's ruling hinged on the finding that "Plaintiffs had inquiry notice when they executed the SPAs, having not received the information it requested and allegedly knew it was lacking." (Ex. A at 58:9-12.) Hence, under such holding, Cornice's claims would be untimely *regardless* of whether either doctrine otherwise applied because the statute of limitations clock re-started "by March 2021." (Ex. A at 58:19.)

Although tolling under either doctrine generally lasts only until a plaintiff is on inquiry notice of his injuries, at which point the statute of limitations begins to run, the Superior Court's determination that Cornice was on inquiry notice at the time of closing is erroneous in multiple respects. First, the Superior Court misconstrued the relevant injury. It is irrelevant whether Cornice was aware that it had not received *some* "information it requested" and was "lacking" *supplemental* diligence materials because Cornice is not asserting an informational injury: *e.g.*, that Silberstein breached some duty to respond to each and every diligence request. Rather, Cornice alleges that the diligence *it did receive* was *false*, which injured Cornice by inducing it to overpay for Thrasio stock. That other diligence requests

went unfulfilled—as is ordinary course in private company investments—did not somehow alert Cornice to the fact that the financial information and corroborating representations *it did receive* were *false*. Second, even if Cornice’s suspicions were otherwise aroused, there are no facts alleged to suggest that investigation and discovery of Silberstein’s fraud was practicable. To reach both of those erroneous conclusions the Superior Court piled inference upon inference in Silberstein’s favor to conclude that, by March 2021, Cornice (1) *should have* investigated and (2) *could have* discovered the facts giving rise to its claims. Those conclusions are both error because all inferences must be drawn in Cornice’s favor at this stage. Indeed, as set forth below, courts routinely hold that such questions of inquiry notice are intensely factual ones rarely resolvable on a motion to dismiss—and certainly are not resolvable here.

A. Cornice Was Not on Inquiry Notice of the Injury Alleged

The Superior Court’s ruling ignored the “important preliminary issue [of] determining what the ‘injury’ is that was sustained by [Cornice].” *BTIG*, 2020 WL 95660, at *4. Notice of one type of injury does not impute notice of another. Nor does a general sense of discontent with a counterparty’s negotiating leverage constitute inquiry notice of actual fraud. Yet, the Superior Court determined that Silberstein’s reluctance to fulfill *other* diligence requests somehow put Cornice on notice that the diligence he did provide—*i.e.*, the Unaudited Financial Statements

and corroborating representations—were fraudulent. That determination was error. Indeed, as set forth below, the Superior Court’s determination of inquiry notice rests on inferences and assumptions drawn in Silberstein’s favor that this Court instructs may not be drawn *even at summary judgment*, much less at the pleading stage.

As a threshold matter, Cornice does not plead an informational injury with respect to pre-closing diligence. There is no assertion that Silberstein was under a legal duty to provide a certain amount or granularity of Thrasio’s financial information. Were there such a duty, perhaps Cornice would be charged with notice of *that* injury, but that is not the injury at issue. *See Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 294 A.3d 65, 97 (Del. Ch. 2023) (“Inquiry notice about [one violation] need not result in inquiry notice about [another violation].”).

Instead, as in most transactions, the parties were free to negotiate what diligence materials and corroborating representations would be required to close the transaction. Among others, they settled on (1) the Unaudited Financial Statements (2) representations that the Unaudited Financial Statements were accurate and prepared in accordance with GAAP, and (3) representations regarding the robustness of Thrasio’s accounting and fraud controls. That Silberstein successfully negotiated for Cornice to close the transaction without further diligence does not raise the specter of *fraud* in the information he *did* provide. Simply put, “[t]he issue is not

whether [Silberstein] improperly failed to make some disclosure. . . . Rather, the question is when were the plaintiffs on notice that th[ey] w[ere] making [a] worthless and improper investment[.]” *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *15 (Del. Ch. Oct. 9, 2007). The pertinent injury here is that Cornice overpaid for its investment in Thrasio, and nothing Silberstein did or said during the diligence process indicated that “the real value of the investment[.]” was anything different than as set forth in the Unaudited Financial Statements or otherwise alerted Cornice that it “had overpaid for improper or worthless investments.” *Id.* Indeed, regardless of whether Cornice desired further information as a matter of business insight, “it would be unreasonable to expect” Cornice to act as Sherlock Holmes and “scour” the world for evidence that Silberstein was lying *in the information he did provide* because “[m]ost of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded.” *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 646 (Del. Ch. 2013) (quoting *Gabelli v. S.E.C.*, 568 U.S. 442, 450-51 (2013)); *see also Agspring*, 2020 WL 4355555, at *9 (rejecting notion that investors “immediately should have begun investigating the CEO and President of the Company it had just acquired even though [the investors] had no ostensible reason to suspect them of wrongdoing at that time”).

Focusing on the relevant injury, Silberstein’s mere “refusal to reveal information” or “coercive” hurrying of Cornice through a truncated diligence process are not “sufficient to place someone on inquiry notice” of *fraud*. *Marks v. CDW Computer Centers, Inc.*, 122 F.3d 363, 368 (7th Cir. 1997). As the Seventh Circuit put it:

[I]t is abundantly clear that such a question [of inquiry notice] would be one for the trier of fact . . . keeping in mind that the relationship between a buyer and seller of a security is an inherently adversarial one. Rational acting parties to a commercial transaction always use their bargaining strength to secure the best deal possible for themselves; that action, alone, does not put a reasonable person on inquiry notice of the existence of fraud.

Id. at 368-69 (citations omitted). Shrewd sellers are, of course, motivated to minimize cumbersome diligence processes and not provide prospective buyers with informational ammunition to haggle on price or other deal terms. Cornice was aware that Silberstein enjoyed a strong bargaining position given high investor demand to participate in the Series C-2 and Series C-3 financings, but that does impute notice that he was a fraudster. *See id.* at 368-69 & n.3 (“[Seller]’s decision not to share the information does not strike this Court as something [the plaintiff] should have found particularly notable, let alone evidence of fraud.”).⁴

⁴ Indeed, Cornice believed the expedited diligence and closing timeline was driven at least in part by larger investors’ desire to close quickly. *Infra*, n.6.

Jeter v. RevolutionWear, Inc. underscores that one party's mere reluctance to provide corroborating information does not charge a counterparty with inquiry notice of fraud. 2016 WL 3947951, at *10 (Del. Ch. July 19, 2016). There, one party (RWI) claimed that the other (Jeter) had fraudulently induced a contractual relationship by misrepresenting restrictions on Jeter's activities in a separate agreement with a third party (Nike). *Id.* Resisting tolling at the pleading stage, Jeter argued that:

Jeter's agents' repeated refusal to provide the Nike contract . . . should have deterred RWI from moving forward with Jeter and should have provoked further investigation into the contents of the Nike contract. Therefore, it would follow, RWI failed to perform reasonable diligence to investigate the contents of the Nike contract and should thus not benefit from equitable tolling.

Id. The court, however, rejected that argument because it "assumes" that "it was unreasonable for RWI to trust Jeter's agents' repeated representations" about the restrictions in the Nike contract and the court "cannot make that fact-based assumption at this stage of the litigation." *Id.* Likewise, here, the Superior Court's finding of inquiry notice rests on an improper assumption that Cornice had reason to distrust the Unaudited Financial Statements and Silberstein's other representations about Thrasio's financial condition.⁵

⁵ Like the improper argument advanced in *Jeter*, the Superior Court's ruling that Cornice should have known better than to invest with Silberstein boils down to a premature determination on the element of Cornice's reasonable reliance. But determining that an investor acted so completely unreasonably as to preclude a fraud

Besides Silberstein’s general demurral to supplemental diligence requests—which alone are insufficient to establish inquiry notice as a matter of law—the Superior Court did not identify any “red flags” to charge Cornice with inquiry notice of Silberstein’s fraud.⁶ There are none on the face of the complaint, and any inferences that Cornice might have otherwise been suspicious must be tested by evidence at trial. The Superior Court’s determination to the contrary is therefore at odds with the principles of inquiry notice set forth in *Coleman v. Pricewaterhousecoopers, LLC*, where this Court reversed the trial court’s grant of *summary judgment* (no less at the pleadings) predicated on a finding of inquiry notice. 854 A.2d 838, 842-43 (Del. 2004). There, it was undisputed that the plaintiffs received an e-mail indicating that the defendant was taking an “aggressive

claim is a fact-intensive inquiry into the totality of the circumstances that “is not generally suitable for resolution on a motion to dismiss.” *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *7 (Del. Super. Ct. Sept. 25, 2015); *see also Trifecta Multimedia Holdings Inc. v. WCG Clinical Servs. LLC*, 318 A.3d 450, 465 (Del. Ch. 2024). It also speaks volumes to how the Superior Court may view Silberstein’s credibility going forward, but that is not an appropriate issue at the pleading stage.

⁶ With respect to Silberstein’s breach of the obligation to provide updated post-closing financial information, such breach does not trigger inquiry notice for two reasons. First, as set forth above, such a breach of informational rights is, as a matter of law, an act of concealment that *hides* notice, not presents it. Second, here, Silberstein’s apparent motive for such breach is open to competing inferences. Indeed, evidence at trial will show that Cornice believed Silberstein was refusing to provide updated post-closing financials because Thrasio was *growing even more valuable* and Silberstein was hoarding that *good news* for himself in order to front-run the market with his sales of shares in July and August 2021. Cornice had no reason to suspect Silberstein’s breach was part of a cover-up for his fraud.

accounting approach.” *Id.* at 840. But this Court held even that explicit indication of accounting manipulation was not sufficient, as a matter of law, to “impose upon the plaintiffs a duty to conduct a further investigation” because “[a] person of ordinary intelligence and prudence could draw competing inferences from the statements made”—*e.g.*, that “aggressive” indicated impropriety versus mere creativity. *Id.* at 843. Hence, “there was no ‘red flag’ that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire” whether the accounting practices were actually improper. *Id.* Likewise, here, Silberstein’s hurried and minimal diligence process is open to competing inferences of whether he was acting as a shrewd negotiator versus snake oil peddler.⁷ If the actual and particular “red flag” document in *Coleman* was insufficient to charge plaintiffs with inquiry notice of fraud at the summary judgment stage, surely, Silberstein’s generalized demurrals are insufficient to charge Cornice with inquiry notice of fraud *at the pleading stage*. Further factual development is required to adjudicate whether Cornice acted reasonably under the circumstances in trusting Silberstein.

B. Cornice Was Not Able to Discover Its Claims Until June 2022

Even if Cornice *should have* reasonably suspected wrongdoing, charging Cornice with inquiry notice also requires a finding that Cornice *could have*, as a

⁷ Another competing inference is that the diligence window and closing timeline were driven by Advent and other larger investors’ preferences.

practical matter, discovered Silberstein's fraud upon further investigation. Importantly, a marginal ability to discover *some* additional facts does not constitute inquiry notice; the statute of limitations does not begin to run until Cornice was capable of discovering *all* the facts necessary to plead its fraud claims with sufficient particularity to survive a motion to dismiss. *In re Primedia, Inc. Shareholders Litig.*, 2013 WL 6797114, at *12 (Del. Ch. Dec. 20, 2013) (“[T]he reasonable [plaintiff] must be able to commence an investigation and discover the facts necessary to plead the claim and survive the motion to dismiss.”); *see also Ontario*, 294 A.3d at 978; *Technicorp*, 2000 WL 713750, at *7 (applying tolling until the plaintiff “obtain[ed] sufficient evidence to plead his claims with particularity”).

Contrary to the Superior Court's ruling, however, the complaint contains no facts to suggest (much less conclusively establish) that further investigation could have fully uncovered Silberstein's scheme. Indeed, complaints rarely do, as retrospective examination of whether a plaintiff was actually capable of getting to the truth is a fact-intensive endeavor ill-suited for the pleading stage. Accordingly, courts consistently reserve such inquiry for later stages. *See, e.g., LGM*, 340 A.3d at 1149 (holding that “it is reasonably conceivable [on the face of the pleadings] that during the due diligence process before the acquisition and again . . . after the acquisition, the [s]ellers fraudulently concealed facts that would have put the [b]uyers on inquiry notice” and reserving adjudication of the issue “for another day”

following “discovery and fact-finding”); *Weiss v. Swanson*, 948 A.2d 433, 452 (Del. Ch. 2008) (“In later proceedings, the defendants will have the opportunity to present evidence to show that [the plaintiff] was, in fact, on inquiry notice.”); *Ontario*, 294 A.3d at 98; *TL of Fla., Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 329 (D. Del. 2014) (applying Delaware law to toll statute of limitations because “whether [the plaintiff] exercised reasonable diligence in relying on [the defendant]’s alleged representations” cannot be resolved on a motion to dismiss); *see also Coleman*, 854 A.2d at 843 (holding that whether “a more diligent inquiry by plaintiffs would have enabled them to uncover the irregularities” was too fact-intensive to resolve *even at summary judgment*); *MKE Holdings, Ltd. v. Schwartz*, 2024 WL 3964332, at *3 (Del. Ch. Aug. 28, 2024) (“*MKE IP*”) (similar). The Superior Court’s decision to nevertheless rule against Cornice at the pleading stage on the apparent basis that Cornice is a “sophisticated” party (Ex. A at 58:17) was error because the tolling doctrines apply no differently to “sophisticated” parties. *Serviz*, 2022 WL 1164859, at *6; *see also Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at *19 (Del. Ch. Oct. 31, 2013).

Yet, following its erroneous finding that Silberstein’s refusal to provide additional diligence materials *should have* roused Cornice’s suspicions of fraud (already a massive and inappropriate inferential leap in Silberstein’s favor), the Superior Court further made a series of implicit inferences that Cornice *could have*

uncovered Silberstein's scheme. Setting aside that Cornice and its members are technology sector investors, not ace detectives, there are no facts alleged to suggest that any investigation by Cornice could have uncovered the fraud. To the contrary, the complaint is replete with allegations that Cornice and others (including Thrasio's Board and other members of management, a rather notable fact) were unable to get to the truth while Silberstein zealously guarded Thrasio's true financial condition and stonewalled all attempts to access information that would have revealed his scheme.

In particular, the complaint sets forth how Silberstein impeded Cornice's efforts to obtain information that might have otherwise put them on the trail to discovering his fraud:

- Pre-closing, Silberstein hid additional financial data and instead provided false reassurances that such data would not “tell a different story” than the false information he provided (A0023-24), *see Coleman*, 854 A.2d 838, 843 (Del. 2004) (no inquiry notice where the defendant “gave the plaintiffs false reassurances” in response to follow-up inquiries); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 541 F. Supp. 2d 986, 1006 (S.D. Ohio 2007) (holding plaintiffs “could not have reasonably discovered the wrongful conduct” where the defendants “issued false assurances about the health of the [investment]”);
- Post-closing, Silberstein breached the obligation to provide Cornice with updated and audited financial information and refused Cornice's multiple requests for him to do so (A0032-33 ¶¶ 80-83), *see MKE I*, 2020 WL 467937, at *13 (no inquiry notice where the defendants “allegedly breached an obligation in the [contract] to provide yearly audited and monthly unaudited financial statements” after closing); *see also Serviz*, 2022 WL 1164859, at *5 (contractual obligations to later provide information “implicitly recognized that [investors] were not in any reasonable position to discover such [information] themselves”); *Ontario*, 294 A.3d at 978 (no inquiry notice

where defendants likely to “resist” legal obligation to provide information); *N. Texas Opportunity Fund L.P. v. Hammerman & Gainer Int’l, Inc.*, 107 F. Supp. 3d 620, 636 (N.D. Tex. 2015) (tolling claims where managers misappropriated company funds for personal benefit and impeded shareholders from discovering their misconduct by “prevent[ing] [the company] from providing audited financial statements”).

Moreover, Cornice further alleges that Silberstein blocked other parties—including other investors and Thrasio’s own CFO and Board—from accessing the financial data that would have exposed his fraud. Indeed, the Thrasio Board—far better positioned than Cornice—did not become concerned and begin to investigate Silberstein until *after* he made troublesome stock sales in August 2021. (A0034 ¶ 87.) And the subsequent Disinterested Directors’ Report confirms that “Thrasio’s non-management directors likely did not become aware of the extent of the financial and inventory control issues until approximately *September 2021*.” (A0077 ¶ 35 (emphasis added).) Moreover, Advent invested alongside Cornice in March 2021, and both Advent and Silver Lake made massive investments in *October 2021* following extensive diligence. (A0081 ¶ 45.) Yet, contrary to these allegations, the Superior Court nevertheless concluded that Cornice should have caught a whiff of Silberstein’s scheme and begun to investigate even before Silberstein’s own Board—whose very job is to detect such wrongdoing—and largest stakeholders. *See Orloff v. Shulman*, 2005 WL 3272355, at *10 (Del. Ch. Nov. 23, 2005) (no inquiry notice where even directors who “would normally be considered to have had access to crucial information” were “unable[] [to] exercise[] normal diligence”); *see also*

Ryan v. Gifford, 918 A.2d 341, 360 & n. 60 (Del. Ch. 2007) (tolling “supported by the fact that no one [else] noticed” the misconduct). And, even if Cornice had begun investigating around the time of closing (despite no reason to do so), the Superior Court’s decision improperly infers that Cornice would have gotten to the truth by August 2021—ignoring the allegations in the complaint that Cornice actually tried but was unable to access the revelatory true financial information until June 2022.

Against Silberstein’s stonewalling Cornice and everyone else, what was Cornice supposed to do? Barge into Silberstein’s office and rifle through his papers? *Cf. Serviz*, 2022 WL 1164859, at *5 (“The only way [investors] could have discovered [the truth] . . . would have been to read the private emails and text messages of [the company]’s executives . . . [but] [n]othing in the pleadings suggest that [investors] had that level of access to [the executives]’ private communications.”). Perhaps, in some speculative way, acting as an ace detective or catching a lucky break, Cornice *might* have found a way to sooner root out Silberstein’s fraud, but numerous cases instruct that speculative inference cannot be drawn against Cornice at this stage. *See, e.g., BTIG*, 2020 WL 95660, at *7 (holding “it is premature to dismiss the complaint on statute of limitations grounds” where “it is alleged that [the defendant] took efforts to keep the [truth] from becoming public” and “the very nature of a conspiracy implies that the uncovering of facts is unlikely.”); *AssuredPartners*, 2020 WL 2789706, at *18-19 (holding “dismissal on

the basis of the statute of limitations would be premature at th[e] [pleading] stage” where it was alleged that the defendants “retained full control” over the company’s accounts post-closing); *see also* *Serviz*, 2022 WL 1164859, at *6; *MKE II*, 2024 WL 3964332, at *3 (“This Court . . . does not lightly infer that a plaintiff is on inquiry notice of his claims simply because he could have pieced together the alleged wrong.” (internal quotation marks and brackets omitted)). Accordingly, further factual development is required to adjudicate whether, as a practical matter, Cornice reasonably could have uncovered Silberstein’s fraud even through further investigative efforts.

CONCLUSION

For the reasons set forth above, the Superior Court's ruling that Cornice's claims are untimely should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF SERVICE

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