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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORNICE VENTURES I LLC and CORNICE VENTURES II LLC, Plaintiffs-Below/Appellants, v. JOSHUA SILBERSTEIN, Defendant-Below/Appellee.	C.A. No. 29, 2026 Appeal from the Superior Court of the State of Delaware C.A. No. N25C-04-184 MAA CCLD

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NATURE OF PROCEEDINGS[1]

On August 13, 2024, Cornice commenced an action in New Jersey Superior Court by filing a complaint essentially identical to the instant Complaint. *Cornice Ventures I LLC, et al. v. Silberstein*, No. ESX-L-5564-24. (N.J. Super. Essex Co.) After Silberstein moved to dismiss that complaint, Cornice voluntarily agreed to re-file its claims in Delaware state court. (A0013; A0049-52.)

Cornice filed the Complaint in Delaware Superior Court on April 21, 2025, alleging it was among "scores—if not hundreds—of" Thrasio investors who purportedly were fraudulently induced to invest in Thrasio between 2018 and 2021 based on overly optimistic financial data. (A0046 ¶ 129.) Cornice attempted to state against Silberstein, in his personal capacity, racketeering, fraud, negligent misrepresentation and unjust enrichment claims, all of which allegedly arose out of Cornice's investments in Thrasio. (A0009 ¶ 1.)

On December 1, 2025, following full briefing and oral argument on Silberstein's motion to dismiss, the Superior Court issued a bench ruling: (1) dismissing Cornice's racketeering claim on choice-of-law grounds; and

[1] Unless otherwise noted, all emphasis is added and citations and quotation marks are omitted. References to "A##" refer to the pages of the Appendix to Appellants' Opening Brief ("Appellants' Br."). References to "B##" refer to the pages of the Appendix to Appellee's Opening Brief, submitted herewith. Capitalized terms not otherwise defined herein have the same meanings as set forth in Silberstein's Opening Brief in Support of Defendant's Motion to Dismiss the Complaint (B1-44.)

(2) dismissing Cornice's common-law claims as untimely under Delaware's three-year statute of limitations, which, under the facts alleged in the Complaint, was not subject to tolling. (Appellants' Br Ex. A 37:5-59:2.) The Superior Court memorialized its bench ruling in a final order issued on December 18, 2025. (*Id.* Ex B.)

Cornice appeals from the Superior Court's final order with respect to a single issue: whether the limitations period applicable to its common-law claims should be tolled. Cornice does not appeal either the Court's dismissal of the statutory racketeering claim or the Court's choice-of-law analysis resulting in the application of Delaware's three-year statute of limitations to Cornice's common-law claims.

SUMMARY OF ARGUMENT

1. **Denied.** Cornice's Complaint does not plead sufficient grounds to toll Delaware's three-year statute of limitations under the doctrine of fraudulent concealment and, in any case, contains allegations demonstrating that Cornice was on inquiry notice of its claims prior to August 13, 2021, precluding tolling of the statute of limitations beyond that date.

2. **Denied.** Cornice's Complaint does not plead sufficient grounds to toll Delaware's three-year statute of limitations under the doctrine of inherently unknowable injury and, in any case, contains allegations demonstrating that Cornice was on inquiry notice of its claims prior to August 13, 2021, precluding tolling of the statute of limitations beyond that date.

3. **Denied.** On the facts alleged in the Complaint, a reasonable person in Cornice's position would have suspected or known of an injury and have reason to investigate its claims prior to August 13, 2021.

4. **Denied.** On the facts alleged in the Complaint, a reasonable person in Cornice's position would have been in a position to discover sufficient facts to state a claim for fraudulent concealment prior to August 13, 2021.

5. **Denied.** Because the limitations period began running prior to August 13, 2021, and the Complaint does not plead sufficient grounds to toll under any theory beyond August 12, 2021, Cornice's claims are untimely as a matter of law.

6. In the alternative, Cornice's claims should be dismissed because Cornice improperly seeks to bring derivative claims in its individual capacity and, in doing so, attempts to secure recovery at the expense of similarly situated shareholders.

COUNTERSTATEMENT OF FACTS

A. Thrasio Thrives Under Silberstein's Co-Leadership

Silberstein and Carlos Cashman co-founded Thrasio in April 2018. (A0015 ¶ 20.) Thrasio is known as an "aggregator"; its business was—and still is—to acquire businesses that sell consumer products through amazon.com or other e-commerce outlets and consolidate these businesses into Thrasio's platform, thereby expanding sales through economies of scale and other synergies. (A0009-10 ¶ 2.) Thrasio was among the first, and (initially, at least) most successful, companies to pursue this business model. (*Id.*)

Silberstein and Cashman served as co-CEOs and sat on Thrasio's board of directors from the company's founding.[2] (A0009-10 ¶ 2; A0015-16 ¶ 21.) Thrasio's business grew rapidly during its first three years under Silberstein and Cashman's leadership. According to its audited annual financial statements, Thrasio had sales revenue of about $4 million in its first nine months, from inception through December 31, 2018; about $53 million in 2019; and about $345 million in 2020. Sales revenue for 2021 grew to about $891 million and reached $1.26 billion in 2022. (B11.)

[2] Despite Cashman's role as Thrasio's co-founder and co-CEO, with responsibility equal to Silberstein's, Cornice elected not to sue him and instead seeks to assign all blame to Silberstein. Remarkably, Cashman is not mentioned once in Cornice's opening brief.

B. Relying on Peabody, Cornice Invests in Thrasio

In order to finance its growth, Thrasio engaged in several rounds of financing by issuing preferred shares to outside investors. (A0011-12 ¶¶ 6-7.) Each of these rounds was led by highly sophisticated private equity firms that engaged in rigorous due diligence.

In or around November 2020, Cornice decided to explore investing in Thrasio's "C-2" financing round. Bo Peabody, a managing member of both Cornice entities as well as a Thrasio advisor, acted "on behalf of Cornice's prospective members." (A0023 ¶ 48.) At no time does Cornice allege that any of its investors spoke directly to Silberstein; instead, Peabody relayed Silberstein's purported communications to Cornice. (A0025 ¶ 57.)

Allegedly, on "numerous occasions," Peabody insisted he required from Thrasio "more detailed financial information on behalf of Cornice's prospective members." (A0022-23 ¶¶ 46, 48, 51.) And, time and again, he was unable to obtain this information. (*E.g.*, A0020 ¶ 37; A0023-24 ¶¶ 52, 53, 55; A0028 ¶ 68.) Accoridng to Cornice, Silberstein repeatedly advised that if Cornice "require[d] more information, then it should just back out" of the deal (A0027-28 ¶¶ 65-68); yet Cornice and its members nonetheless decided to participate in the C-2 financing "*quickly* and *without additional financial data*" (A0024 ¶ 55 (emphasis in original)).

In the end, Cornice concedes it invested "[d]espite the expedited timeline and lack of supplemental data." (A0025 ¶ 58.)

C. The Stock Purchase Agreements

Cornice invested approximately $8 million in the C-2 financing in February 2021, and approximately $7 million in the subsequent C-3 financing the following month. (A0028-30 ¶¶ 70, 72.)

Each of Cornice's investments was memorialized in a written agreement. Cornice I entered into a stock purchase agreement with Thrasio dated February 3, 2021 ("C-2 SPA") by which it agreed to purchase 981,976 shares of Series C-2 Preferred Stock for approximately $7 million. (A0028-29 ¶¶ 70-71; A0089-169.) Cornice II entered into a virtually identical agreement with Thrasio dated March 17, 2021 ("C-3 SPA," together with the C-2 SPA, "Series C SPAs"), by which it agreed to purchase 572,819 shares of Series C-3 Preferred Stock for approximately $7 million. (A0029-31 ¶¶ 72-73; A0171-221.) In partial consideration for the Thrasio preferred stock, Cornice agreed to Delaware choice-of-law and forum-selection provisions. (A0110-12 §§ 6.3, 6.14; A0191-93 §§ 6.3, 6.14.)

Importantly, Cornice was not the only signatory to the Series C SPAs. All 52 participants in the C-2 financing round executed the C-2 SPA, investing a total of approximately $250 million. (A0114-58; A0160-64.) And 23 investors signed the

C-3 SPA, from whom Thrasio raised approximately $100 million. (A0195-212; A0214-16.)

D. Cornice Alleges It Discovered Multiple Red Flags of Wrongdoing

As described above, Cornice participated in the Series C financings despite knowing it lacked the detailed financial data it repeatedly demanded. According to the Complaint, throughout the months that followed, additional red flags arose concerning Cornice's investment.

First, both Series C SPAs represent that Thrasio made available to each purchaser its "audited financial statements for the fiscal year ended December 31, 2019." (A0028-31 ¶¶ 71, 73.) And the C-3 SPA further represented that "[t]he company has made available to each Purchaser its unaudited financial statements as of December 31, 2020." (A0030 ¶ 73; A0181 § 2.14.) Yet, Cornice alleges it only received unaudited financial statements—and even those were provided only through the period ending November 2020. A0023 ¶ 49; A0033 ¶ 83 ("Neither Silberstein nor the Company ever provided . . . updated financial statements.").

Second, Cornice alleges the C-3 SPA required Thrasio to provide Cornice and other investors the 2020 audited financial statements by no later than April 20, 2021. (A0032-33 ¶¶ 80-81.) According to Cornice, Thrasio ignored Cornice's continued demands for these statements, which Cornice did not receive until June 2022—fourteen months after the contractually agreed deadline. (A0033 ¶¶ 82-83.)

Third, Cornice alleges it understood these updated financials in fact existed, and that Silberstein was purportedly using them to solicit large purchases of his own stock on the secondary market. (A0033 ¶¶ 83.) Cornice further alleges it was aware that Silberstein sold large quantities of his Thrasio stock in July and August 2021. (A0034 ¶ 87.)

Fourth, Cornice alleges it became aware that Thrasio hired a new CFO, Bill Wafford, in April 2021 due to questions about Thrasio's financials and to "ensure there was an 'adult in the room' with Silberstein to manage Thrasio's finances." (A0033-34 ¶ 85.) And by early July 2021, Cornice discovered that Wafford suddenly resigned. (A0035 ¶ 86.) Throughout this period, Cornice's managing member Bo Peabody remained an advisor at Thrasio in connection with various transactions. (A0015 ¶ 18.)

E. Silberstein's Separation and the Series D Financing

Silberstein separated from Thrasio on September 25, 2021 and ceased to play any role in the company's decision-making. (A0034 ¶ 88.) Cashman remained as CEO for another year, until September 2022, and as a director through at least May 2024. (B14.)

Thrasio and its board of directors issued an eighth round of financing in October and December 2021 ("Series D Financing"). (A0033 ¶ 84.) A later investigation by independent directors (discussed further in the following section)

determined that Thrasio maintained "significant equity value" at the time of the Series D Financing—shortly *after* Silberstein's departure. (A0081 ¶ 45.)

F. Thrasio Files for Bankruptcy

Following Silberstein's departure, Thrasio's board of directors installed a new management team and hired consultants to help "lead an operational transformation." (A0077-78 ¶ 35.) Unfortunately, the decisions made by the new management team failed to maintain Thrasio's "significant equity value" from the time following Silberstein's departure, and the company faced a tumultuous transition period while incurring substantial losses. (A0081 ¶ 45.)

Finally, on February 28, 2024—two years and five months after Silberstein left the company—Thrasio filed a chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. *In re Thrasio Holdings, Inc.*, *et al.*, Case No. 24-11840 (CMG) (Bankr. N.J.) ("Bankruptcy Case"). During the Bankruptcy Case, two Thrasio independent directors investigated and filed a report ("Disinterested Directors' Report" or "DDR") regarding "potential estate causes of action against the Debtors' current or former directors, managers, officers, equity holders, subsidiaries, affiliates, and other related parties." (A0061.) Cornice argues that its claims in this action mirror the causes of action set forth in the DDR, which were ultimately reserved for the Thrasio estate. (A0037-40 ¶¶ 96-104.)

On June 13, 2024, the Bankruptcy Court approved a Plan of Reorganization ("Plan"). Among other things, the Plan: (1) cancelled the outstanding shares held by all of Thrasio's shareholders, including Cornice and Silberstein (who held a substantial amount of Thrasio stock); and (2) included a broad injunction barring any person from suing Thrasio and certain of its officers and directors. (A0036 ¶ 93.)

The Plan also created the Thrasio Legacy Trust ("Trust") as successor-in-interest to Thrasio's claims. On December 3, 2024, META Advisors, LLC ("Trustee"), in its capacity as trustee of the Trust, filed an adversary proceeding against Silberstein, certain other former Thrasio directors and officers, and certain transferees of Thrasio's property. *Meta Advisors, LLC v. Silberstein, et al.*, Case No. 24-11850 (CMG) (D.N.J. Bankr. Dec. 12, 2024) ("Adversary Proceeding"). In the Adversary Proceeding, the Trust sought to compensate Thrasio's creditors under the same theories that Cornice now raises individually. Adversary Proceeding, Compl. ¶ 15 (dkt no. 1).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT CORNICE FAILED TO ESTABLISH A BASIS FOR TOLLING ITS TORT CLAIMS.

A. Question Presented

Whether the Superior Court correctly held that Cornice failed to establish a tolling exception under the doctrines of fraudulent concealment and "inherently unknowable" injuries where the Complaint shows that Cornice was on actual or inquiry notice when it entered into the Series C SPAs more than three years before filing suit. (Preserved B22-23; Appellants' Br, Ex. A at 16:9-18:18, 52:13-59:2.)

B. Scope of Review

"[This Court] review[s] the Superior Court's grant of a motion to dismiss under Superior Court Rule 12(b)(6) *de novo*." *McMahon v. McMahon*, 340 A.3d 543 (Del. 2025). Under that standard, this Court "view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). It does not, however, "simply accept conclusory allegations unsupported by specific facts" or "draw unreasonable inferences in the plaintiff's favor." *Id.*

C. Merits of the Argument

Despite Cornice's reiterated argument to the contrary,[3] it is "well settled that where the complaint itself alleges facts that show that the complaint is filed too late, the matter may be raised by defendants' motion to dismiss." *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993) (collecting cases). In deciding such a motion, "well-pled allegations in the complaint [are] accepted as true" and "reasonable inferences [are] drawn in favor of the plaintiff." *Id.* "[H]owever, when a plaintiff seeks to . . . invok[e] a tolling exception to the statute of limitations, the plaintiff bears the burden to plead facts demonstrating the applicability of the exception." *Id.* "To invoke any [tolling exception], 'the facts underlying a claim must be so hidden that a reasonable plaintiff could not timely discover them.'" *Trott v. Delaware Div. of Child Support Servs.*, 2025 WL 816768, at *4 (Del. Super. Ct. Mar. 13, 2025), *aff'd*, 2025 WL 3281187 (Del. Nov. 24, 2025).

"When that burden is not met [by plaintiff], the court must dismiss the complaint if filed after expiration of the limitations period." *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Strine, V.C.) (Del. Ch. Jan. 24, 2005). If, however, plaintiff meets that burden, the limitations period will be tolled only until plaintiff has inquiry notice. *Id.* at *7. "Inquiry notice does not require actual discovery of the reason for injury. Rather, it exists when the plaintiff becomes aware

[3] Appellants' Br. 37-38 n.5; *id.* 40-41.

of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery of injury." *Id.* In other words, a plaintiff "may not simply wait until the details of the harm are provided to [it] before the statute of limitations begins to run." *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *12 (Del. Ch. Jan. 24, 2005).

The Superior Court adhered to this standard. (Appellants' Br, Ex. A at 40:21-41:18, 53:4-8.) First, Cornice's claims accrued when the claim elements were met. (*Id.* at 57:23-58:2.) *See Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 186 (Del. 2021) (claims for fraud or negligence accrued at closing of purchase transaction because that is when plaintiff relied on allegedly false information). The Superior Court thus found—and Cornice does not dispute—that Cornice's claims accrued by March 2021, *i.e.*, when the C-3 SPA was executed. (Appellants' Br, Ex. A at 58:13-23.) Second, because Cornice failed to allege the requirements for invoking the fraudulent concealment exception or grounds for tolling under the discovery rule for "inherently unknowable" injuries, the Superior Court dismissed the Complaint as time-barred. (*Id.* at 54:6-59:2.)

There was no error in that decision. Cornice's arguments to the contrary ignore its own allegations and instead rely on unreasonable inferences and inapposite cases.

1. Cornice Failed to Allege Grounds for Invoking the Doctrine of Fraudulent Concealment.

"Fraudulent concealment requires an affirmative act of concealment by a defendant—an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry." *Trott*, 2025 WL 816768, at *5. "Under Superior Court Civil Rule 9(b), a plaintiff who relies upon this doctrine is required to plead with particularity the factual circumstances constituting fraud." *Hiznay v. Strange*, 415 A.2d 489, 492 (Del. Super. Ct. 1980).

Cornice characterizes the Superior Court's assessment of Silberstein's alleged pre- and post-closing conduct as contrary to "the overwhelming weight of authority" on fraudulent concealment. (Appellants' Br, at 22-23.) As an initial matter, Cornice did *not* raise Silberstein's *pre*-closing conduct as a basis for invoking this exception before the Superior Court, and thus it should be deemed waived on appeal. *Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 676 n.18 (Del. 2020) (argument on contract ambiguity "was not raised below and is therefore waived"). Even so, Cornice's arguments lack merit and fail to show any error by the Superior Court.

a. The Superior Court Correctly Held That Cornice Did Not Allege the Fraudulent Concealment Exception Based on Post-Closing Conduct.

As the Superior Court noted, Cornice—both in briefing and at oral argument—cited paragraphs 80 to 83 of the Complaint to support its contention that

Silberstein took "affirmative steps to hide [Thrasio's] true condition." (Appellants' Br, Ex. A at 56:1-9.)[4] Those paragraphs merely allege that, ***in the months after the Series C SPAs were executed***, Thrasio and Silberstein did not provide additional and updated financial information that was either required by the SPAs or requested by Cornice. (A0032-33 ¶¶ 80-83.) The Complaint does not allege that Silberstein made any representations to Peabody (or Cornice) after the Series C SPAs closed. Indeed, Silberstein's last alleged representation was to Peabody in late January 2021, roughly one week before execution of the C-2 SPA and nearly two months before execution of the C-3 SPA. (*See* A0028-34 ¶¶ 67-88.)[5]

Consistent with the pleading standard for this exception, the Superior Court correctly found that such allegations are "far from an affirmative act of concealment or actual artifice" required under the doctrine. (Appellants' Br, Ex. A at 56:9-12.) *See*, *e.g.*, *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 436 (Del. Super. Ct. 1998). ("[M]ere silence or failure to disclose does not constitute such fraudulent concealment as will suspend operation of a statute of limitations."); *Trott*, 2025 WL

[4] *See also* Cornice Answering Brief, at 34 (B86) ("[F]ollowing its investment, Cornice alleges that Silberstein continued to take affirmative steps to hide Thrasio's true financial condition and Cornice was not able to obtain accurate financial information showing Silberstein's fraud until June 2022. (Compl. ¶¶ 80-83.)"); Appellants' Br. Ex. A at 20:8-21:5.

[5] Cornice doesn't allege the purported representations Silberstein made on or about January 26, 2021 were false. *See* A0040 ¶ 106 (setting forth alleged misrepresentations for Cornice's fraud claim).

816768, at *5 ("Since an affirmative act is required, Petitioner cannot claim that Respondent was obligated to notify him that his payments were not distributed and that failure to do so constituted concealment.").

b. Cornice's Additional Arguments Do Not Establish Grounds for Fraudulent Concealment Exception.

Cornice cites several cases for the general proposition that tolling based on fraudulent concealment can arise from conduct that occurred before and after execution of a contract. (Appellants' Br, at 20-27.) But those cases are factually inapposite: among other things, the plaintiffs in those cases did not enter into a contract knowing it contained false representations and warranties at the time of execution.[6] *See Ocimum Biosolutions (India) Ltd. v. AstraZeneca UK Ltd.*, 2019 WL 6726836, at *13 (Del. Super. Ct. Dec. 4, 2019) (noting the "cases on which [plaintiff] relies [for its tolling argument] are inapposite because none of [them] involved a

[6] *E.g.*, *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1137-39, 1149 (Del. 2025) (buyer could not know representations and warranties were false until at least one year after executing purchase agreement); *AssuredPartners of Virginia, LLC v. Sheehan*, 2020 WL 2789706 (Del. Super. May 29, 2020) (buyer could not know representations and warranties were false until at least four years after executing purchase agreement); *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co.*, 2020 WL 5054791, at **1, 4, 9-11 (Del. Super. Ct. Aug. 17, 2020) (buyer could not know representations and warranties were false until one year after executing purchase agreement); *Agspring Holdco, LLC v. NGP X US Holdings, L.P.*, 2020 WL 4355555, at **6-9 (Del. Ch. July 30, 2020) (buyer reasonably relied on corporate fiduciaries in purchase transaction and had no reason to suspect they committed fraud until eight months after transaction closed).

plaintiff with sufficient facts to plead a cause of action"), *aff'd*, 247 A.3d 674 (Del. 2021).

Relying on arguments that it did not raise before the Superior Court and were therefore waived, *see supra* § 1(a), Cornice contends "the Superior Court's determination contravenes this Court's recent decision" in *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134 (Del. 2025). (Appellants' Br, at 23.) That is wrong. In *LGM*, the buyers of pharmaceutical companies brought fraudulent inducement and indemnification claims against the selling company and its individual owners in connection with representations and warranties that the acquired companies were in "material compliance with applicable laws," and had been for a certain number of years. 340 A.3d at 1137-38. When the transaction closed, two individual defendants became executives at the plaintiff-buyer's company. *Id.* at 1139. Roughly one year later, an FDA inspection revealed mislabeled shipments of active pharmaceutical ingredients ("API") at one of the acquired facilities. *Id.* During the FDA's investigation, an individual defendant—who was then an executive of plaintiff—"actively concealed his role in the mislabeling of API by withholding emails from the FDA and producing a false product-investigation log." *Id.* An internal investigation and DOJ subpoena soon revealed the individual defendants "routinely violated health care laws, customs restrictions, and regulations," many of which "took place prior to [the] acquisition." *Id.* at 1139-40. The Superior Court dismissed

the indemnification claim after finding plaintiffs had actual notice within the five-year contractual survival period. *Id.* at 1147-48. On appeal, this Court found that the Superior Court's analysis of contractual survival periods was flawed and that the complaint adequately alleged fraudulent concealment through the sellers' intentional false statements during due diligence and affirmative acts of concealment during the FDA's investigation. *Id.* at 1148-49. The parties, however, were "free to litigate the question of inquiry notice," *id.* at 1149, an issue that the Superior Court did not address, *id.* at 1148.

Unlike the *LGM* plaintiffs, Cornice does not allege fraudulent concealment by its fiduciaries and executives. Nor does it allege that Silberstein engaged in any such affirmative acts of concealment before or after the Series C SPAs closed. Moreover, Cornice knew the representations and warranties in the Series C SPAs were not "true and complete" at the time of execution. Section 2.14 "represents and warrants" that Thrasio "made available to each Purchaser . . . its audited financial statements for the fiscal year ended December 31, 2019," which was the Company's first full year in business. (A0028-29 ¶ 71; A0030 ¶ 73.) The C-3 SPA further "represents and warrants" the same with respect to Thrasio's "unaudited financial statements as of December 31, 2020." (A0030 ¶ 73.) Yet, Cornice executed the Series C SPAs knowing it did not receive these financial statements. A0023-31 ¶¶ 49-73 (showing Cornice received one unaudited financial statement by the time it executed the Series

C SPAs that "purportedly reflect[ed] Thrasio's revenues, profits, and losses through November 2020," which Silberstein allegedly sent nearly two months before the C-2 SPA was executed). In other words, as the Superior Court noted, Cornice "entered into the SPAs despite the existence of observable and objective factors that put it on notice." (Appellants' Br, Ex. A at 58:13-15.)

Because Cornice was "objectively aware, or should have been objectively aware, of facts giving rise to the wrong" at or before the time it executed the C-3 SPA on March 17, 2021, the claims cannot be tolled beyond that date. *See LGM Holdings, LLC*, 340 A.3d at 1147. And the alleged pre-closing misrepresentations—which Cornice did not raise as grounds for tolling before the Superior Court—fail to show to otherwise.

First, despite Cornice's attempt to attribute the alleged misrepresentations to Silberstein for purposes of a fraud claim (A0040 ¶ 106), its allegations show that these representations were made by Thrasio, not Silberstein. For example, Cornice alleges that—on some unknown date—Silberstein falsely represented that "Thrasio had been profitable since inception." (A0022 ¶ 44; A0040 ¶ 106.) But the Complaint makes clear that this statement was taken from a Thrasio press release from April 2020. (A0017 ¶ 27.) To the extent Silberstein later repeated the statement to Cornice, the Complaint fails to allege when he did so or how it amounted to an affirmative act of concealment. The other alleged misrepresentations are not statements made

by Silberstein but representations and warranties that Thrasio made in the Series C SPAs regarding its (i) unaudited financial statements as of November 30, 2020 and (ii) lack of knowledge of "any significant deficiency or material weakness in [its] internal accounting" or fraud in the preparation of its financial statements or internal accounting controls. (A0100 and A0181, at § 2.14.)

Second, assuming for the sake of argument that the alleged misrepresentations were made by Silberstein rather than Thrasio, Cornice failed to sufficiently allege that Silberstein "intended to put [Cornice] off the trail of inquiry" and "knowingly took affirmative steps to prevent [Cornice] from learning [the] facts," as the doctrine requires. *Certainteed Corp.*, 2005 WL 217032, at *8. In fact, when Silberstein informed Cornice of Thrasio's increased valuation and share price in the weeks before the C-2 SPA closed—without "provid[ing] [Cornice with] any new financial information to justify the increase[s]"—Silberstein allegedly repeated "his refrain that, if Cornice was going to require more information, then it should just back out [of the deal]." (A0027-28 ¶¶ 65-68.) That is a far cry from an affirmative act of concealment. And while Cornice's decision to nevertheless to go forward with the transactions may have been "dissonant with commercial good sense" on Cornice's part, it doesn't transform the alleged conduct into affirmative acts of concealment. *See Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *8 (Strine, V.C.) (Del. Ch. July 9, 2002) (rejecting argument that defendant's

"strict confidentiality" precluded plaintiff from performing due diligence as it "misconstrues the scope of meaningful choice available to [plaintiff]," including the choice to "walk[] away from any proposed deal").

Third, the Series C SPAs bar Cornice from asserting fraud claims based on extra-contractual statements. Under section 3.7, Cornice represented that it is an "accredited and sophisticated investor . . . capable of evaluating the merits and risks of the investment" and "has not relied on the Company, or any director, officer, employee, agent, representative or professional advisor of the Company for any legal, tax, or financial advice[.]" (A0107 and A0187, at § 3.7.) The section concludes by clarifying that it doesn't limit Cornice's rights "with respect to fraud or intentional misrepresentation based on any statement set forth in this Agreement or any other agreement, instrument or document delivered in connection with the [contemplated] transactions." (*Id.*) In addition, section 6.12 contains a merger clause stating that each Series C SPA "constitute[s] the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled." (A0111 and A0192, at § 6.12.) The Court should find that these provisions, taken together, preclude Cornice from asserting the fraudulent concealment exception based on alleged pre-closing, extra-contractual representations. *See Pilot Air Freight, LLC v. Manna Freight Sys., Inc.*, 2020 WL

5588671, at **21-24 (Del. Ch. Sept. 18, 2020) (non-reliance provision precluded reliance on extra-contractual statements, thus plaintiff's fraud claims, including for omission and concealment, were limited to representations and warranties within the contract).

Finally, even if Cornice sufficiently alleged that Silberstein engaged in affirmative acts of concealment to prevent Cornice from discovering its rights, it would not negate the fact that Cornice was on actual or inquiry notice on or before the date it executed the C-3 SPA in March 2021. *See*, *e.g.*, *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 531-32 (Strine, V.C.) (Del. Ch. 2005) (claims for developer's misrepresentations regarding availability of clubhouse for condominium residents were not tolled where clubhouse's closure five years earlier "was so blatantly obvious that no affirmative act of concealment could have prevented a reasonably diligent [condo] resident from discovering his rights at that time"); *Hydrogen Master Rts., Ltd. v. Weston*, 228 F. Supp. 3d 320, 331 n.9 (D. Del. 2017) ("'[E]ven where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory plaintiff who was not or should not have been fooled.'") (quoting *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007)).

2. The Superior Court Correctly Held That Cornice Failed to Allege Grounds for Invoking the Doctrine of "Inherently Unknowable" Injury.

"Under the doctrine of inherently unknowable injuries, the running of the statute of limitations is tolled while the discovery of the existence of a cause of action is a practical impossibility." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999). For the doctrine to apply, "there must have been no observable or objective factors to put a party on notice of an injury, and plaintiffs must show that they were blamelessly ignorant of the act or omission and the injury." *Id.* It thus makes sense that the doctrine arose from "situations where surgeons left items within the bodies of their patients," *Certainteed Corp.*, 2005 WL 217032, at *8, and that it has largely been limited to "certain medical and other professional malpractice cases." *Saunders v. Lightwave Logic, Inc.*, 2024 WL 4512227, at **7-8 (Del. Super. Ct. Oct. 17, 2024), *aff'd*, 342 A.3d 401 (Del. 2025). Even if this Court's precedent set a "low threshold" for the doctrine's use (Appellants' Br, at 28), it remains "a narrowly confined exception to the statute of limitations." *E.g.*, *Edwards v. GigAcquisitions2, LLC*, 2025 WL 2092832, at *18 (Del. Ch. July 25, 2025), *aff'd*, 2026 WL 370125 (Del. Feb. 10, 2026).[7]

[7] As best as counsel can tell, this Court has never stated it set a "low threshold" for invoking the doctrine. That description appears to originate from a 2005 decision by

The Superior Court correctly found that the inherently unknowable injury doctrine has no application where, as here, a plaintiff enters into arms-length transactions knowing it had not received financial information it specifically requested before closing and other financial information expressly required under the agreements. (Appellants' Br, Ex. A at 57:16-58:23.) Cornice's arguments to the contrary have no merit.

First, the Superior Court did not "rule against Cornice at the pleading stage on the apparent basis that Cornice is a 'sophisticated' party." (Appellants' Br, at 41.) There is no indication that the Superior Court's comment that the Series C SPAs were "arms-length transactions between sophisticated parties" formed any basis of its holding. (Appellants' Br. Ex. A 58:16-18.) In any event, "the commercial context does, to [the court's] mind, matter" in a tolling analysis, *Certainteed Corp.*, 2005 WL 217032, at *10, and Delaware courts regularly take a plaintiff's business acumen into account in evaluating inquiry notice. *E.g.*, *Van de Walle v. Salomon Bros.*, 733 A.2d 312, 315 (Del. Ch. 1998) (company's "rosy forecasts" insufficient to lull into

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the Court of Chancery following this Court's then-recent ruling in *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004). *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *9 (Del. Ch. Jan. 24, 2005) ("[The] ruling [in *Wal-Mart*] sets a low threshold for the use of the doctrine[.]"). But that same court found the doctrine inapplicable to a commercial transaction where plaintiff had reason to suspect the purchase agreement contained false representations and warranties more than three years before filing suit, and thus dismissed the related contract and tort claims as time-barred. *Id.* at **9-10, 16.

complacency a "reasonable person with [plaintiff's] sophistication"); *Gen. Video Corp. v. Kertesz*, 2008 WL 509816, at *5 (Del. Ch. Feb. 25, 2008) (distinguishing cited cases and rejecting tolling because "[t]he plaintiffs here are sophisticated parties").

Second, while Cornice argues that the Complaint "easily surmounts [the] low bar" for this exception (Appellants' Br, at 29), it altogether ignores the fact that, at the time of execution, Cornice knew it had not received the financial information it requested multiple times before closing or the financial statements expressly required by the Series C SPAs. Moreover, Cornice doesn't even contend it was "blamelessly ignorant," let alone assert facts to support such a claim. These distinctions render the cases on which Cornice relies inapposite.[8]

[8] *See Jacam Chem. Co. 2013, LLC v. Jacam Chem. Co., Inc.*, 2024 WL 960180, at **3, 8-10 (Del. Ch. Mar. 1, 2024) (misrepresentations and conduct of plaintiff's fiduciary with respect to purported trade secrets of acquired company precluded plaintiff from learning trade secret representations were false until after fiduciary's departure); *Wilmington Housing Auth. v. Design Contracting, Inc.*, 2023 WL 3625995, at **2-3 (Del. Super. Ct. May 18, 2023) (claims relating to general contractor's failure to remove concrete foundations that were buried up to 10 feet below the surface); *Serviz, Inc. v. ServiceMaster Co., LLC*, 2022 WL 1164859, at **5-6 (Del. Super. Ct. Apr. 19, 2022) (counterclaim defendant seeking to acquire plaintiff "had no reason to suspect that [plaintiff] might not have been complying with its express [exclusivity] obligations" until obtaining plaintiff's private communications through discovery in the lawsuit); *BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at **2, 6 (Del. Super. Ct. Jan. 3, 2020) (it would be "unreasonable" to find that plaintiff should have known defendant tortiously interfered with stock purchase transaction "simply by the fact that the transaction was never consummated," particularly when "many transactions are contemplated

Third, Cornice cannot claim blameless ignorance or excuse its lack of diligence by assuming other "larger, well-resourced [Thrasio] investors . . . had 'kicked the tires' and decided to invest after conducting more extensive diligence." (Appellants' Br, at 29.) Accepting the premise of that wholly unsupported argument would eviscerate basic concepts of notice and due diligence in commercial transactions. Despite any alleged misrepresentations, "[o]nce [Cornice] had reason to suspect," or, in this case know, the Series C SPAs contained false or inaccurate representations and warranties regarding Thrasio's financials, "[it] was not entitled to lean back in the recliner" and do nothing. *Certainteed Corp.*, 2005 WL 217032, at *10 (rejecting application of inherently unknowable injury doctrine); *see also Pomeranz*, 2005 WL 217039, at *12 ("[Plaintiffs] may not simply wait until the details of the harm are provided to them before the statute begins to run. Knowing of a wrong is sufficient to require action to preserve one's rights.").

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but never consummated"); *Otto Candies, LLC v. KPMG LLP*, 2019 WL 994050, at **1, 29 (Del. Ch. Feb. 28, 2019) (plaintiff creditors and bondholders of company that perpetrated fraud "were not aware of any discrepancies in [its] financial statements," which were audited by defendant accounting firms and relied on by plaintiffs, and defendants "do not explain how plaintiffs could have been aware of the allegedly fraudulent scheme . . . until February 2014"); *Yencer Builders, Inc. v. Fabi*, 2010 WL 8250829 (Del. Super. Ct. Oct. 1, 2010) (plaintiff alleged it "had no reason to know that the lots [it] purchased were not suitable for a full depth [low pressure pipe] [septic] system" until more than a year after transaction where seller misrepresented "the suitability of [purchased] land for a full depth LPP septic system" and provided plaintiff "with documentation from the Department of Natural Resources and Environmental Control indicating [the same]").

In short, Cornice's arguments are rooted in unreasonable inferences and excuses untethered to reality and the law. Crediting them would "subvert the concept of inquiry notice by providing a ready excuse for untimely filing whenever a plaintiff was not aware of all material facts relating to its claims, not only as to their possible existence, but as to the extent of the harm they caused." *Pomeranz*, 2005 WL 217039, at *14. Because Cornice shows neither an inherently unknowable injury nor blameless ignorance on its part, this Court should find that the Superior Court did not err in rejecting the doctrine's application in this case.

II. THE SUPERIOR COURT CORRECTLY HELD THAT CORNICE WAS ON NOTICE OF ITS CLAIMS PRIOR TO AUGUST 13, 2021.

A. Question Presented

Did the Superior Court correctly hold that "observable and objective factors" put Cornice on inquiry notice of its claims prior to August 13, 2021, such that the limitations period expired prior to Cornice filing its Complaint? (Preserved B22-23; Appellants' Br Ex. A 16:9-18:18, 58:13-15.)

B. Scope of Review

This question is reviewed *de novo* for the reasons set forth above. *See supra* § I.B.

C. Merits of the Argument

1. Cornice Was on Inquiry Notice of Its Claims Prior to August 13, 2021.

Even if there existed grounds for tolling the statute of limitations at the moment Cornice executed the SPA Series C SPAs on February 3, 2021 and March 17, 2021, the Complaint alleges multiple events in the ensuing five months that raised red flags more than sufficient to have placed Cornice on inquiry notice of its claims as a matter of law prior to August 13, 2021. The three-year limitations period therefore expired before Cornice filed the Complaint on August 13, 2024.

a. Legal Standard

As the Superior Court correctly held: "The statute of limitations begins when a plaintiff is on inquiry notice, regardless of later revelations." (Appellants' Br. Ex.

A 58:3-5.) Thus, even if a tolling doctrine applies, the limitations period will be tolled only "until the plaintiff discovers the 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." *Lehman Bros. Holdings, Inc.*, 268 A.3d at 194 (emphasis in original). This rule applies regardless of the plaintiff's theory for tolling. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 & n.42.

Importantly, Cornice "may not simply wait until the details of the harm are provided to [it] before the statute of limitations begins to run," *Pomeranz*, 2005 WL 217039, at *12, nor does inquiry notice "require *actual* discovery of the reason for the injury" or "plaintiffs' awareness of all of the aspects of the alleged wrongful conduct," *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (emphasis in original). "Rather, the statute of limitations begins to run when plaintiffs should have discovered the general fraudulent scheme"—that is, "once a plaintiff is in possession of facts sufficient to make him suspicious, or that ought to make him suspicious." *Id.* *7, n.49. And "once a plaintiff's suspicions are triggered, he is expected to act with alacrity to explore those suspicions." *Ocimum Biosolutions*, 2019 WL 6726836, at *11.

b. Analysis

In its Opening Brief, Cornice attempts to thread an impossible needle, making sprawling allegations of blatant misconduct by Thrasio and Silberstein while zealously shielding itself from any awareness of such misconduct. But Cornice can only do so by ignoring the allegations of its own Complaint. In the end, Cornice pleads its way out of court by alleging numerous red flags, any one of which would be sufficient to put Cornice on inquiry notice of its injury well before August 13, 2021.

According to the Complaint:

- **Cornice alleges Thrasio made key misrepresentations in the Series C SPAs**. Thrasio represented in both the C-2 and C-3 SPAs that it had made available to Thrasio its "audited financial statements for the fiscal year ended December 31, 2019," and further represented in the C-3 SPA that "[t]he company has made available to each Purchaser its unaudited financial statements as of December 31, 2020." (A0028-31 ¶¶ 71, 73; A0181 § 2.14; A100 § 2.14.) Cornice alleges that both these representations were lies. According to Cornice: "Neither Silberstein nor the Company ever provided such updated financial statements [indeed, the latest unaudited financial statements Cornice alleges it received were as of November 2020 (A0023 ¶ 49)], nor did they provide the audited financial information required by the C-3 SPA." (A0033 ¶ 83.)

- **Cornice alleges it was aware that Thrasio was openly in breach of the C-3 SPA by April 2021**. Cornice alleges the C-3 SPA further required Thrasio to provide Cornice and other investors the 2020 audited financial statements by no later than April 20, 2021. (A0032-33 ¶¶ 80-81.) Cornice accordingly demanded the promised audited statements, but claims that Thrasio refused to provide them, in violation of its written agreement. (A0033 ¶¶ 82-83.) That the audited 2020 financials were delayed for more than a year, until June 2022, was a further indication that the unaudited financials Cornice had received pre-closing were problematic.

- **Silberstein allegedly used the withheld financial statements to sell his own stock.** According to the Complaint, not only did Cornice know the updated financial statements existed, but it also understood that Silberstein was allegedly using them to solicit purchases of his stock on the secondary market. (A0033 ¶¶ 83.) Cornice further alleges it was aware that Silberstein sold large quantities of his Thrasio stock in July and August 2021. (A0034 ¶ 87.)

- **Thrasio allegedly made sudden key personnel moves in response to purportedly improper financial statements.** Cornice admits it became aware that Thrasio hired a new CFO, Bill Wafford, in April 2021 due to questions about Thrasio's financials and to "ensure there was an 'adult in the room' with Silberstein

to manage Thrasio's finances." (A0033-34 ¶ 85.) And by early July 2021, Cornice discovered that Wafford suddenly resigned. (A0035 ¶ 86.)

- **Cornice's representative remained at Thrasio.** Throughout this tumultuous period, one of Cornice's managing members, Bo Peabody, remained an advisor at Thrasio, and would have been aware of its activities and personnel moves. (A0015 ¶ 18.)

Given these red flags, Cornice cannot viably argue that it remained blamelessly ignorant of the alleged wrong until June 2022. Cornice admits it knew of alleged serial misrepresentations about the scope of financial statements being provided, Thrasio's alleged breach of the C-2 and C-3 SPAs at the time of execution, Thrasio's alleged failure to provide contractually required audited financial statements, Silberstein's purported rush to sell his stock, and management's frantic efforts to address an erupting financial crisis. The cases cited by Cornice that lack any comparable red flags are therefore inapt. (Appellants' Br. 35-39.)[9]

[9] *See* Appellants' Br. 35. For example, in *Carsanaro v. Bloodhound Techs., Inc.*, the court held that plaintiffs were not obligated to "monitor the Secretary of State's filing system, pay to obtain each new filing, and scour it for evidence of potential injury" that, in the end, was not there—a far cry from knowing of alleged misstatements relating to a hotly contested financial disclosure issue contained in contracts Cornice itself executed. 65 A.3d 618, 646 (Del. Ch. 2013), *abrogated on other grounds by El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016); *see also Agspring Holdco, LLC v. NGP X US Holdings, L.P.*, 2020 WL 4355555, at *9 (Del. Ch. July 30, 2020) ("Plaintiffs had no ostensible reason to suspect [defendants] of wrongdoing"); *Marks v. CDW Computer Centers, Inc.*, 122 F.3d

In the face of its own admissions, Cornice downplays its knowledge, claiming that Thrasio's mere "generalized demurrals," "strong bargaining position," and "reluctance to fulfill . . . diligence requests" were insufficient to put it on inquiry notice of wrongdoing. (Appellants' Br. 33, 36, 39.) Yet even in that argument, Cornice admits that—following a monthslong dispute over the extent of Thrasio's disclosure—Cornice finally "settled on" receiving only the audited and unaudited financial statements identified in the Series C SPAs. (*Id.* at 34.) Cornice illogically argues that Thrasio's failure to provide *even those limited materials*—in blatant breach of the very contractual provisions Cornice long fought for and now relies on for its claims—would not have put any reasonable investor on notice that something was amiss.

Cornice is wrong, and in any case, its argument ignores the other red flags set forth above. Numerous Delaware courts have held that similar warning signs put plaintiffs in Cornice's position on inquiry notice of a potential cause of action;

363, 368-69 & n.3 (7th Cir. 1997) (applying federal securities law; plaintiff not on inquiry notice where defendant's attempt to increase his compensation, refusal to disclose information to plaintiff and termination of plaintiff were not "particularly notable" and could not have supported a cause of action); *Jeter v. RevolutionWear, Inc.*, 2016 WL 3947951, at *10 (Del. Ch. July 19, 2016) (defendant's mere refusal to disclose confidential contract insufficient to place plaintiff on inquiry notice of fraud); *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 843 (Del. 2004) (single email suggestive of questionable accounting practices did not constitute a "'red flag' that clearly and unmistakably" put plaintiffs on inquiry notice where plaintiffs were told that auditors had blessed approach).

specifically, tolling does not apply where plaintiff "had reason to know of the breach of [an] Agreement." *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 503 (Del. 1996); *see also ECB USA, Inc. v. Savencia, S.A.*, 2025 WL 417738, at *23 (D. Del. Feb. 6, 2025) (breach of one provision of a contract was a "red flag" that "should have put the plaintiffs on notice that other provisions in the [contract]—particularly those related to [company's] financials—may have been breached"); *Pomeranz*, 2005 WL 217039, at *12-13 (defendant's withdrawal of capital and company's breach of partnership agreement placed plaintiffs on inquiry notice of claims, even though plaintiffs alleged they were "lulled into believing that [defendant] was thriving"); *Dean Witter*, 1998 WL 442456, at *7-8 (rejecting investors' claim that they had no reason to "go behind" company's reassurances where red flags "should have prompted an inquiry by plaintiffs into the health of their investments").[10]

Finally, Cornice improperly attempts to expand Delaware's limited statute-of-limitations tolling exception beyond any reasonable scope. Cornice argues that, even if there were red flags that Thrasio had engaged in misrepresentation and breach of

[10] Cornice's reliance on cases involving a mere lack of disclosure are therefore inapplicable. (Appellants' Br. 35.) In fact, in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, the court emphasized that plaintiffs were not on inquiry notice because—unlike here—defendant "made all the disclosures the [relevant agreement] obligated it to make." 2007 WL 2982247, at *15 (Del. Ch. Oct. 9, 2007).

contract with respect to its financials, that was a different injury than the fraud alleged. Appellants' Br. 33-34 (arguing that "[n]otice of one type of injury does not impute notice of another"). Unsurprisingly, that is not the rule in Delaware, which requires only that the plaintiff be aware of facts "that ought to make him suspicious." *Dean Witter*, 1998 WL 442456, at *7 n.49; *see also U.S. Cellular*, 677 A.2d at 504 ("[W]hatever is notice calling for inquiry is notice of everything to which such inquiry might have led."); *Van de Walle*, 733 A.2d at 315 ("[T]he information necessary to put a plaintiff on inquiry notice is not necessarily the exact same information necessary to state a claim."), *aff'd*, 734 A.2d 160 (Del. 1999).

The Superior Court correctly held that Cornice was on inquiry notice of its claims well before August 13, 2021.

2. Once on Inquiry Notice, Cornice Was Not Entitled to Wait Until June 2022 to Commence a Three-Year Investigation.

The statute of limitations began to run upon the accrual of Cornice's claims in February and March 2021, or—at the latest—once Cornice was placed on inquiry notice of a series of red flags that would have made a reasonable investor aware of its claims. Contrary to Cornice's argument, Delaware law does not countenance the continued tolling of the statute of limitations for another full year "until Cornice was capable of discovering *all* the facts necessary to plead its fraud claims with sufficient particularity." (Appellants' Br. 40 (emphasis in original).)

Instead, plaintiffs like Cornice "only receive the benefit of tolling until they had reason to know that a wrong has been committed." *Pomeranz*, 2005 WL 217039, at *12. In *Pomeranz*, the Chancery Court expressly rejected the plaintiff's argument that the limitations period is tolled "whenever a plaintiff was not aware of all material facts relating to its claims . . . [and] the extent of the harm they caused." *Id.* at *14; *see also Dean Witter*, 1998 WL 442456, at *7 (inquiry notice does not require "plaintiffs' awareness of all aspects of the alleged wrongful conduct."). The plaintiff need not be provided all the facts underlying a specific cause of action. *Van de Walle*, 733 A.2d at 315 ("The information necessary to put a plaintiff on inquiry notice is not necessarily the exact same information necessary to state a claim.").

As set forth in the previous section, by August 13, 2021, Cornice was aware that—after months of negotiating the precise amount of disclosure Thrasio would provide—Thrasio breached the Series C SPAs by refusing to supply even that limited disclosure. *See supra* § II.C.1. Through this and other red flags set forth above, *id.*, Cornice was placed on inquiry notice that its rights had been violated, including, at a minimum, that the Series C SPAs contained multiple false representations and warranties. Accordingly, the cases cited by Cornice where the plaintiff was not on inquiry notice it had a claim are distinguishable.[11]

[11] For example, in *In re Primedia, Inc. Shareholders Litig.*, the court held that a plaintiff is "obliged to diligently investigate" once she is "on notice of facts that

In any case, Cornice clearly had alternate routes of pursuing its investigation over the three years following inquiry notice. Its managing member, Peabody, remained at Thrasio and could inquire (and, at the very least, would have been aware of Thrasio's frenetic personnel moves). (A0015 ¶ 18.) Moreover, Cornice does not allege that it sought information from Thrasio's new CFO, who was specifically retained to "ascertain and manage Thrasio's true financial condition" and to be "an 'adult in the room.'" (A0033-34 ¶¶ 85-86.)

In fact, Cornice concedes that it failed to act with the promptness the law requires even after it received the 2020 audited financials in June 2022, which allegedly "revealed the truth—*i.e.*, that Thrasio was not profitable and instead was deeply distressed—and that Silberstein's prior representations had been false all

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ought to make her suspect wrongdoing." 2013 WL 6797114, at *13 (Del. Ch. Dec. 20, 2013). Since the shareholder could have discovered the existence of a cause of action, albeit through pursuing a series of actions, the claims were held time-barred on the pleadings. *Id.*, at *14-*15; *see also Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 294 A.3d 65, 98 (Del. Ch. 2023) (tolling limitations period where the complaint's allegation "do not contain anything that would have put stockholders on the trail" of defendant's misconduct). And in *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *7-*8 (Del. Ch. May 31, 2000), the plaintiff diligently pursued its claims for years—and actually filed an earlier, timely lawsuit—while defendants engaged in years of "highly disturbing" conduct, including "fabrication of evidence," that prevented plaintiffs from "detect[ing]" wrongdoing. Cornice here failed to act with comparable diligence, and Silberstein is not alleged to have engaged in any concealment at all after he left Thrasio in September 2021.

along." (A0012 ¶ 9.) June 2022 was approximately only one year into the three-year limitations period that commenced once Cornice was on inquiry notice, and Cornice offers no reason for waiting more than two additional years to file its claims. As the Court of Chancery has held, Delaware "courts should be careful to apply the concept of inquiry notice [according to precedent] and expect plaintiffs to act with reasonable alacrity once they have reason to suspect that their rights were injured." *Pomeranz*, 2005 WL 217039, at *15 (dismissing claims as time-barred where plaintiffs "had a full three years to file suit" after their "antenna should have been raised"; "[b]y acting too slowly, the plaintiffs, by tactical choice, forfeited their right to seek relief.").

In sum, the limitations period on Cornice's claims began to run well before August 13, 2021. Cornice's claims are accordingly time-barred.

III. THIS COURT MAY AFFIRM THE DISMISSAL ON THE ALTERNATIVE GROUND THAT CORNICE'S INDIVIDUAL CLAIMS ARE PURELY DERIVATIVE

A. Question Presented

Could the Superior Court have dismissed based on Silberstein's alternative argument that Cornice's claims are purely derivative and cannot be brought individually? (Preserved at B19-22; Appellants' Br Ex. A 5:13-9:7.)

B. Scope of Review

The Superior Court did not rule on this fully briefed and argued issue. On appeal, however, this Court "can affirm on the basis of an argument not addressed by the trial court if the argument was raised below and argued as an alternative ground for affirmance on appeal." *Ginsberg v. Harleysville Worcester Ins. Co*., 329 A.3d 504 (Del. 2024).

C. Merits of the Argument

The Superior Court alternatively could have dismissed the Complaint because Cornice improperly attempts to bring a derivative claim in its individual capacity. In doing so, it is violating black-letter Delaware statutory and common law, as well as attempting to secure recovery at the expense of similarly situated shareholders.

Generally, when "all of a corporation's stockholders are harmed and would recover pro rata in proportion to their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v.*

Cutaia, 951 A.2d 727, 733 (Del. 2008). Conversely, if a corporation's stockholders demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing injury to the corporation, then the claims are direct. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).

Resolving the issue of whether a claim is direct or derivative requires the application of the two-part test established in *Tooley*: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation, or the stockholders, individually)?" *Tooley*, 845 A.2d at 1033; *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he test may be stated as follows: Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?"). Under *Tooley*, the "[p]laintiffs' classification of the suit is not binding." *Id.* at 1035. Instead, the court must "look to all the facts of the complaint and determine for itself" whether a claim is direct or derivative. *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004).

Cornice's claims are derivative. Cornice alleges that Silberstein, as a Thrasio officer, misrepresented the Company's financial condition "to scores—if not hundreds—of victims whom he induced to invest in Thrasio on false pretenses from 2018 to 2021" (A0046 ¶ 129.) These alleged misrepresentations were contained in

general investor communications,[12] widely circulated financial statements,[13] and stock purchase agreements executed by all Thrasio investors.[14]

According to Cornice, all of Thrasio's investors suffered damages proportional to their stock ownership when the Thrasio stock price "dropped dramatically following the revelation of Thrasio's true financial condition upon disclosure of the Audited Financial Statements," after which the stock "price never recovered and, following confirmation of the Plan [of Reorganization] in the Bankruptcy Case, the stock is worthless." (A0041 ¶ 110.) Such allegations of "misconduct . . . [and] mismanagement which depress the value of stock" are "prototypical examples of corporate harm that can be pursued only derivatively." *In re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484, 503 (Del. Ch. 2017) (quoting *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988)). That the "mismanagement is alleged to have involved unlawful activity makes no difference." *Id.*

[12] A0046 ¶¶ 129 (alleging Silberstein caused "scores—if not hundreds—of victims" to invest in Thrasio on false pretenses from 2018 to 2021); A0011 ¶ 6 (alleging Silberstein induced "prior rounds of investors into purchasing Thrasio stock at inflated valuations" before Cornice invested); A0031-32 ¶ 77 (alleging Silberstein misrepresented Thrasio's 2020 EBITDA in "an email to prospective investors").

[13] A0037 ¶ 97 (alleging "material discrepancies [in] Thrasio's unaudited financial statements, which were provided to investors").

[14] A0028-30 ¶¶ 71, 73 (alleging misrepresentations in the SPAs).

Delaware courts reject the argument that shareholders can avoid proceeding derivatively simply by pointing to their own stock purchases. "The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*." *Feldman,* 951 A.2d at 733 (Del. 2008). What matters is whether the plaintiff "suffered some individualized harm not suffered by all of the stockholders at large." *Id.*; *In re J.P. Morgan Chase & Co. S'holder Litig*., 906 A.2d 766, 772 (Del. 2006) ("To the extent the plaintiffs' claim is that the[ir] compensatory damages worth $7 billion flow from [a] disclosure violation, that damages claim is derivative, not direct.").

Cornice undeniably did not take the steps necessary to bring a derivative action, such as to make a written demand on Thrasio. *See* Ct. Ch. R. 23.1. In the bankruptcy context, "a derivative action becomes a part of the corporation's estate," *Agostino*, 845 A.2d at 1117 n.15, and a shareholder must obtain authority from the bankruptcy court to pursue a derivative claim. *Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 566 (3d Cir. 2003). Cornice has satisfied none of these requirements.

Indeed, the Thrasio bankruptcy trustee already pursued substantially identical claims against Silberstein (among others). The Disinterested Directors' Report—which alleges the ***identical*** "pump-and-dump" scheme alleged in the Complaint—concluded that any related claims belong to Thrasio's estate. (A0078-79 ¶¶ 37-41.)

And the Bankruptcy Court, in reliance on the DDR, vested all estate claims exclusively in the Thrasio Legacy Trust and authorized it to pursue such claims against Silberstein as "successor-in-interest to the claims of Thrasio." Compl., *Meta Advisors, LLC v. Silberstein, et al.*, Case No. 24-11850 (CMG) (D.N.J. Bankr. Dec. 3, 2024). By filing the instant claim eight months after the Trustee filed the Adversary Action, Cornice sought to disrupt this orderly recovery process, misappropriate these estate claims for itself, and leapfrog other creditors. *See* 11 U.S.C. § 510(b) (claims involving "damages arising from the purchase or sale of [debtor's] security" are "subordinated to all claims or interest that are senior to or equal to the claim or interest represented by such security.").

Because Cornice brought derivative claims in its own name without demand, without authorization, and without standing, the Superior Court could have dismissed the Complaint on this alternative ground. *Tooley*, 845 A.2d at 1033 (case is "correctly dismissed" where individual plaintiff seeks to bring derivative claim).

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment of the Superior Court.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2026, copies of the foregoing Appellee's Answering Brief were served via File & ServeXpress on the following counsel:

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