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Case Number 29,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORNICE VENTURES I LLC and CORNICE VENTURES II LLC	:	
Appellants,	:	No. 29, 2026
	:	Court Below: Superior Court of the State of Delaware
v.	:	C.A. No.: N25C-04-184-MAA (CCLD)
JOSHUA SILBERSTEIN,	:	
Appellee.	:	

APPELLANTS' REPLY BRIEF

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Silberstein's fraudulent scheme evaded detection by numerous overseers for years, including Thrasio's Board and investors who poured more than $1 billion into Thrasio while Silberstein was concealing the company's poor financial condition.[1] Yet, in his answering brief, Silberstein suggests that Cornice was somehow uniquely situated to sleuth out his fraud. But there are no facts pleaded in the complaint to support that implausible assertion, so Cornice cannot be charged with inquiry notice of its fraud claims at the pleading stage. Instead, Delaware law requires that Silberstein test his dubious theory of inquiry notice through discovery. Nor do any of Silberstein's other arguments support affirming the Superior Court's premature factual determination that Cornice should be charged with inquiry notice at the pleading stage.

First, while Silberstein insists that Cornice *should have* sooner investigated his fraud, his answering brief does explain how such an investigation, if pursued, *could have* actually uncovered the facts necessary to plead a claim—as necessary to charge Cornice with inquiry notice. To the contrary, the complaint makes clear that Silberstein zealously guarded the financial data that would have revealed Thrasio's true financial condition, and he successfully concealed his scheme from numerous

[1] Capitalized terms not otherwise defined herein retain their definitions set forth in Appellants' opening brief ("OB") or Silberstein's answering brief ("AB"), as appliable.

other parties with massive incentives to uncover it. There is no indication Cornice could have fared any better, and Silberstein's suggestion that Cornice could easily have placed a phone call or conducted a review of public records to learn the truth is pure conjecture.

Second, Silberstein cannot avoid that his pre-closing conduct supports application of the fraudulent concealment doctrine here. Such conduct is well-pleaded in the complaint and was raised below. Silberstein wrongly insists that he has legal defenses against personal liability for such conduct—*e.g.*, that the SPAs limit Cornice's remedies and causes of action against him. But even if that were true (it is not), Silberstein cites no authority for the proposition that a contractual limitation on remedies vitiates real world acts and facts that otherwise support application of the fraudulent concealment doctrine. The pertinent question here is whether Silberstein undertook any affirmative acts to conceal Cornice's discovery of its injury (he did), not whether Silberstein may be independently liable for those acts on any particular cause of action. Regardless, Silberstein concedes post-closing affirmative acts of concealment.

Third, Silberstein attempts to highlight two "red flags" that, in his view, should have alerted Cornice that it was being defrauded with respect to Thrasio's true financial condition: (1) a breach of a disclosure obligation at the time the SPAs were executed and (2) "sudden" personnel moves—*to wit*, the quick hiring-then-

resignation of a new CFO at Thrasio—in the months after Cornice invested. But neither of these are indicia of *fraud*. Indeed, tumult at rapidly growing startups is a calling card of an industry that prides itself on a "move fast and break things" approach to innovation. In any event, the complaint makes clear that any connection between those contemporaneous events and Silberstein's scheme was apparent only in hindsight. Silberstein does not explain how or why Cornice should have connected the dots in real time.

The Court should also reject Silberstein's invitation to affirm on the alternative basis that Cornice's claims are derivative. They are not. Cornice's claims are quintessential stock *purchaser* claims. The injury is overpayment upon the inducement to *become* a stockholder. Cornice does not bring claims for mismanagement causing diminution of Thrasio's value that would have flowed through to all Thrasio stock*holders* who already owned shares at the time of the mismanagement. Furnishing false information (or failing to furnish accurate information) to induce a person to purchase, sell, hold, or redeem shares is a direct harm to that person. Regardless, Silberstein argues that the direct-versus-derivative analysis should be informed by the litigation (and recent settlement) of mismanagement claims in Thrasio's bankruptcy case, which are recently-developed facts that were not addressed by the Superior Court in the first instance.

Accordingly, the Superior Court's ruling that Cornice's claims are untimely should be reversed and the case remanded for further proceedings.

I. SILBERSTEIN FAILS TO SHOW HOW A REASONABLY DILIGENT INVESTIGATION BY CORNICE COULD HAVE UNCOVERED HIS FRAUD

Silberstein's brief focuses entirely on why Cornice *should have* sooner investigated Silberstein's fraud. While he is wrong about that (*see infra* § III), his utter failure to show—on the face of the complaint—that Cornice *could have* sooner discovered the fraud through additional investigation is dispositive. (*See* OB at 39-45.) As this Court recently observed, a statute of limitations begins to run only when the plaintiffs are *actually capable* of "gaining knowledge of facts giving rise to their claim." *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1148 (Del. 2025). Hence, the question is not merely whether Cornice should have done more to investigate, the question is also whether such investigation, "if pursued, *would lead to the discovery*" of Silberstein's scheme. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (internal quotation marks omitted) (emphasis added). The complaint answers that question in the negative. Silberstein's brief does not answer it at all.

Whether "a more diligent inquiry by plaintiffs *would have enabled them* to uncover the [truth]" is necessarily a fact-intensive inquiry that is not susceptible for resolution *even at summary judgment*—much less the pleading stage. *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 843 (Del. 2004). Indeed, at this stage, where all inferences must be drawn in Cornice's favor, Silberstein must establish

that *no inference at all* could be drawn to the conclusion that Cornice was effectively stonewalled from getting to the truth. Silberstein makes little attempt to do so and instead merely invites speculation as to how Cornice might have been capable of getting to the truth of Thrasio's financial condition. Such speculation is improper and, in any event, runs headlong into well-pleaded facts supporting inferences that no investigative avenue to the truth was reasonably available to Cornice.

First, the inference that Cornice was incapable of getting to the truth is readily drawn from the fact that *no one else in the world was able to*, including Thrasio's own Board and Thrasio's largest stakeholders with more resources and more at stake than Cornice. (*See* OB at 43-44.) This strongly suggests that Cornice had no realistic ability to discover Silberstein's scheme until at least after those other parties ousted Silberstein (in September 2021) and, eventually, facilitated revelation of Thrasio's true financial condition (in June 2022).

Second, the inference that Cornice was incapable of getting to the truth is also readily drawn from the nature of the alleged scheme. This is a fraud case. Cornice alleges affirmative deceit, not merely latent injury. The "inherently self-concealing," nature of the alleged scheme yields an inference that Cornice was not reasonably able to penetrate Silberstein's obfuscations and misrepresentations. *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 797 (Del. Ch. 2014) (internal quotation marks omitted). Indeed, Silberstein blocked Cornice from seeing

Thrasio's true financial condition once (when he sent the false Unaudited Financial Statements), twice (when he provided reassurances about those financial statements and Thrasio's fraud controls in the SPAs, *see Coleman*, 854 A.2d at 843; *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 541 F. Supp. 2d 986, 1006 (S.D. Ohio 2007)), and thrice (when he refused to provide the contractually required updated and audited financial information post-closing, *see MKE Holdings Ltd. v. Schwartz*, 2020 WL 467937, at *13 (Del. Ch. Jan. 29, 2020); *Serviz, Inc. v. ServiceMaster Co., LLC*, 2022 WL 1164859, at *5 (Del. Super. Ct. Apr. 19, 2022); *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 294 A.3d 65, 98 (Del. Ch. 2023)). There is nothing in the complaint to suggest a fourth inquest would be Cornice's charm. To the contrary, the pleaded facts all point to a reasonable inference that Silberstein would continue to prevent Cornice from "gaining knowledge of facts giving rise to their claim"—as he had time and time again. *LGM*, 340 A.3d at 1148; *see also infra* § II.

These facts are plainly distinguishable from *Trott v. Delaware Division of Child Support Services*, which Silberstein cites throughout his brief. *See* 2025 WL 816768 (Del. Super. Ct. Mar. 13, 2025). There, the petitioner's mother's receipt of state payments was the critical fact, and the Superior Court observed that "a simple call to Petitioner's mother to inquire whether she had received the payments would have sufficed to discover it." *Id.* at *4. And, "[e]ven if Petitioner could not locate

his mother, . . . [a]n inquiry to the Delaware Division of Child Support Enforcement would likely have allowed him to check the status of the funds." *Id.* Here, in stark contrast, the critical facts about Thrasio's true financial condition were not readily available from the state, close relatives, or other friendly sources. *They were closely guarded by the perpetrator himself.* No "simple call" call to Silberstein would have revealed the truth, and whether any more efficacious investigative mechanisms were available to Cornice is a question that must be reserved for later stages.[2] *See*, *e.g.*, *BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *6 (Del. Super. Ct. Jan. 3, 2020).

Accordingly, because Silberstein fails to show that Cornice *could have* discovered the truth—as required to charge Cornice with inquiry notice—Cornice's appeal should be granted for that reason alone.

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[2] *In re Dean Witter Partnership Litigation* is inapposite for similar reasons. 1998 WL 442456 (Del. Ch. July 17, 1998). There, information that contradicted the defendants' allegedly misleading statements was "readily available" to the plaintiffs. *Id.* at *8. Indeed, such information was ascertainable "with a quick glance" in an annual report delivered to plaintiffs, and "they would have been alarmed" had they "bothered . . . to read past the first page." *Id.* It was not so easy to spot Silberstein's scheme that evaded detection from numerous sophisticated overseers for years. Likewise, the court in *Van de Walle v. Salomon Brothers*, charged the plaintiff with inquiry notice (only at the summary judgment stage) because "public information including media statements, S.E.C. filings, and the [allegedly misleading] Prospectus itself . . . would put [the plaintiff] on inquiry notice not only of the [allegedly concealed] activity itself, but the potential risk and financial impact involved." 733 A.2d 312, 315 (Del. Ch. 1998). Here, Silberstein's fraudulent activities were not disclosed in public filings.

II. SILBERSTEIN CANNOT ESCAPE THAT HIS AFFIRMATIVE CONDUCT WARRANTS TOLLING UNDER THE DOCTRINE OF FRAUDULENT CONCEALMENT

A. Cornice Alleges Numerous Affirmative Acts Taken by Silberstein to Conceal His Fraud

Silberstein asserts that Cornice does not "allege that [he] engaged in any [] affirmative acts of concealment before or after the Series C SPAs closed." (AB at 19.) That assertion is simply untrue; the complaint is replete with such allegations. Among others, Cornice alleges that Silberstein:

- Falsely stated that Thrasio had been profitable since inception to mislead Cornice regarding Thrasio's true financial condition (A0021-22 ¶ 44);[3]
- Furnished Cornice with the false Unaudited Financial Statements to mislead Cornice regarding Thrasio's true financial condition (A0023 ¶¶ 48-50);
- Falsely reassured Cornice that the additional information it requested would not "tell a different story" with respect to Thrasio's financial condition than the (false) information he provided (A0024 ¶ 53);
- Reassured Cornice that Thrasio's financial condition had been recently vetted by reputable financial and accounting professionals (A0026-27 ¶ 62);

[3] Silberstein attempts to sidestep this allegation by suggesting this "statement was taken from a Thrasio press release" (AB at 20), despite Cornice clearly alleging that Silberstein repeated it directly to Cornice on multiple occasions, in or about November 2020, on phone calls, by text message, and by e-mail. (A0021-22 ¶ 44.)

- Made false and misleading representations in the SPAs (including that (1) the Unaudited Financial Statements had been prepared in accordance with GAAP (A0100 § 2.14), (2) those financial statements were accurate (*id.*), and (3) Thrasio had robust fraud and accounting controls and was devoid of fraud by management (*id.*)) to mislead Cornice regarding Thrasio's true financial condition and internal controls;

- Refused to provide post-closing updated and audited financial information that Cornice was entitled to receive (A0032-33 ¶¶ 80-83).

Each of these are *affirmative acts* taken to conceal his wrongdoing—not "mere silence." (*Cf.* AB at 16 (internal quotation marks omitted); *see also* OB at 19-26.)

In response, Silberstein posits that some of these affirmative acts may have "made by Thrasio, not Silberstein." (AB at 20.) But any such distinction is immaterial (and would be a question of fact, in any event). All of the aforementioned false and misleading statements were uttered aloud (or put in writing) by Silberstein, the man. Whether any of those statements may also be deemed to be statements of Thrasio, the corporation, for any other purpose (*e.g.*, such as the enforceability of the SPAs against Thrasio as a matter of contract law), Delaware law is clear that Silberstein is nonetheless charged with the fraudulent effects of his flesh-and-blood conduct. *See Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59 (Del. Ch. 2015) ("Flesh and blood humans also can be held accountable for

statements that they cause an artificial person, like a corporation, to make."); *see also Online HealthNow, Inc. v. CIP OCL Invs., LLC*, 2021 WL 3557857, at *13 (Del. Ch. Aug. 14 12, 2021) (a human being acts fraudulently where he has knowledge of his corporation's misrepresentations). Here, for purposes of the fraudulent concealment doctrine, Silberstein was "the human[] through which the Company made its representations," regardless of whether the misrepresentations may be charged to Thrasio for any other purpose. *Prairie Cap.*, 132 A.3d at 61. Silberstein cites no law for the outlandish contention that he can evade the fraudulent concealment doctrine—for acts he literally did in the real world—on the theory that those acts might be legally ascribed to a non-human corporate entity for other purposes. *His* affirmative acts of concealment toll the claims against *him*.

Silberstein also attempts to evade application of the fraudulent concealment doctrine by suggesting it is foreclosed by the SPAs' boilerplate merger clauses. (AB at 22.) It is not. First, as a threshold matter, Silberstein's merger clause argument was "buried in a footnote" below (B70) and should "not be considered by the Court on appeal." *Johnson & Johnson Fortis Advisors LLC*, 2026 WL 89452, at *21 (Del. Jan. 12, 2026). Second, regardless, Silberstein's argument below was that the SPAs' merger clauses foreclose Cornice's tort *causes of action*; he cites no law for the proposition that contracts vitiate real-world acts for purposes of the fraudulent concealment doctrine simply because the contracts may narrow the parties' available

causes of action. The substantive validity of Cornice's fraud claim vis-à-vis the merger clauses is not presented here on appeal; the only question is whether Silberstein's conduct warrants tolling. Third, in any event, even if Silberstein's attack on the substantive validity of Cornice's fraud claim based on the merger clauses were properly preserved and presented on appeal (it is not), that attack fails.[4] Only an express and specific anti-reliance clause "foreclose[es] reasonable reliance on statements outside the contract"; a boilerplate integration clause does not. *Rheault v. Halma Holdings Inc.*, 2023 WL 8005318, at *10 (D. Del. Nov. 7, 2023); *see also Adviser Invs., LLC v. Powell*, 2023 WL 6383242, at *6 (Del. Ch. Sept. 29, 2023). Regardless, Silberstein acknowledges that the merger clauses include carveouts for cases precisely like this one by clarifying that they do not "limit Cornice's rights 'with respect to fraud or intentional misrepresentation based on any statement set forth in [the SPAs] or any other agreement, instrument or document delivered in connection [therewith]'"—*e.g.*, the Unaudited Financial Statements. (AB at 22.) Regardless, as set forth above, Silberstein cites no authority for the proposition that an individual person's affirmative acts should be ignored under the doctrine of fraudulent concealment for statute of limitations purposes merely

[4] As a threshold matter, Silberstein lacks standing to raise such a challenge because he is not a party to those contracts and cannot invoke them to cleanse his prior misconduct. *See Yangaroo Inc. v. Digital Media Servs., Inc.*, 2024 WL 2791100, at *8 (Del. Super. Ct. May 30, 2024).

because those acts may not incur direct liability against that individual under a separate statute or claim. Whatever Silberstein's *legal* defenses to Cornice's underlying tort claims, they do not supplant his *factual* conduct that concealed Cornice's injury—which is the lynchpin of the fraudulent concealment doctrine.

B. Cornice Alleges and Raised Below Both Pre- and Post-Closing Acts of Concealment

Silberstein credits Cornice's argument for application of the fraudulent concealment doctrine based on Silberstein's post-closing conduct (*e.g.*, failure to provide updated and audited financial information), but he asserts that Cornice waived argument for application of the doctrine based on his pre-closing conduct by not raising such pre-closing conduct below. (AB at 15-16.) There was no such waiver. As on appeal, Cornice argued below 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; hence, the allegations underpinning Cornice's fraud claim—*to wit*, that Silberstein "'actively defrauded'" Cornice through his pre-closing conduct to induce the transaction—also support application of the fraudulent concealment doctrine. (*See* B86 (quoting *Huntsman Int'l, LLC v. Dow Benelux N.V.*, 2021 WL 509668, at *8 (Del. Super. Ct. Feb. 2, 2021)).[5]) Cornice was not required to re-state in complete detail under a

[5] Cornice cited *LGM* below for a similar proposition. (B86.) This belies Silberstein's bizarre assertion that Cornice "waived" its arguments that *LGM* is

"statute of limitations" header its arguments regarding Silberstein's pre-closing fraudulent conduct (*see, e.g.*, B59 ("Silberstein's . . . pre-SPA representations (*to wit*, that Thrasio was profitable and its financial information was reviewed by reputable professionals) were also false.")) in order to preserve that overlapping issue for appeal. Regardless, counsel underscored this point at oral argument, making clear that tolling was warranted on account of Silberstein's *pre-closing* act of providing (false) assurances of accuracy in lieu of truthful information to induce the transaction:

> [T]he largest effort to conceal that the financial statements provided were inaccurate was the additional representation in the contracts that they were accurate. . . . [E]very investor wants more and more information and it's always a dance to see how much you get, and I think the fact that they requested more, but instead of getting more, they secured the representation of what they had was accurate, is quintessential concealment.

(OB, Ex. A at 20:16-21:5.) Accordingly, Cornice did not "waive" application of the doctrine of fraudulent concealment with respect to Silberstein's pre-closing conduct.

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instructive here. (AB at 18.) Plainly, Cornice describes the applicability of *LGM* in greater detail on this appeal (which focuses narrowly on the statute of limitations issue) than below, where Cornice's answering brief addressed numerous issues raised in Silberstein's motion to dismiss within the page limits prescribed by the Superior Court. But Cornice nonetheless "raised" *LGM*—a case addressing both pre- and post-closing concealment—for purposes of waiver. *Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("[T]he mere raising of the issue is sufficient to preserve it for appeal."); *see also Wit Cap. Grp., Inc. v. Benning*, 897 A.2d 172, 184 n.48 (Del. 2006) (further articulations of arguments on appeal permissible where "sufficiently related" to arguments advanced below).

III. SILBERSTEIN OTHERWISE FAILS TO SHOW THAT CORNICE SHOULD BE CHARGED WITH INQUIRY NOTICE AT THE PLEADING STAGE

A. Silberstein's Ongoing Breach of Disclosure Obligations Does Not Constitute Notice of *Fraud*

Silberstein emphasizes that he was immediately in breach of the SPAs upon closing because he had not provided additional financial statements required thereby. (AB at 19-20, 26, 31.) But Silberstein does not explain why notice of a contractual *disclosure* violation would reasonably put Cornice on suspicion of *fraud*, nor does he cite any authority for such proposition.[6] He simply suggests that *any*

[6] The plaintiffs in *ECB USA, Inc. v. Savencia, S.A* were charged with inquiry notice (only at the summary judgment stage) of misrepresentations of certain aspects of the company's financial condition in a share purchase agreement (*to wit*, inflated accounting statements) upon discovery that *other aspects of the company's financial condition* (*to wit*, the discharge of a certain debt) had also been misrepresented in the share purchase agreement. Here, Silberstein's failure to provide audited financial statements at closing in contravention of the SPAs did not reveal to Cornice that another aspect of Thrasio's financial condition had also been misrepresented; it suggested only he was delinquent on his disclosure duties. 2025 WL 417738, at *23 (D. Del. Feb. 6, 2025). *Pomeranz v. Museum Partners, L.P.*, is distinguishable for similar reasons; namely, the plaintiffs were provided information that the defendants *had engaged in a significant transaction* in breach of the relevant contract's covenants, and *that transaction* jeopardized the relevant partnership's financial condition. 2005 WL 217039, at *10 (Del. Ch. Jan. 24, 2005). In other words, the fact constituting inquiry notice (the transaction) *revealed something about the partnership's financial condition*, while also happening to be a breach of contract, but the mere existence of a contractual breach was not the pertinent fact constituting inquiry notice. *U.S. Cellular Investment Company of Allentown v. Bell Atlantic Mobile System, Inc.* is inapposite because that case concerned only inquiry notice of a contractual breach for purposes of tolling that very contract claim, not whether inquiry notice of that contract claim should also serve as inquiry notice of a separate fraud claim. 677 A.2d 497, 503 (Del. 1996).

wrongdoing with respect to a transaction constitutes inquiry notice of *all* wrongdoing. Not only is that all-encompassing view untethered from any conception of reasonable suspicion—which lies at the heart of the inquiry notice doctrine—but it also approaches the issue from the wrong side. That is because the question inquiry notice question focuses on the observability of the *plaintiff's injury*, not the mere fact that the defendant is an observable wrongdoer who may have caused *other injuries*. *See Ontario*, 294 A.3d at 97. Here, in particular, that Silberstein fell short of his disclosure obligations did nothing to tip Cornice off to the fact that he was running Thrasio as a self-enrichment scheme and had sold Cornice worthless stock. This is especially true because Cornice (1) already had substantially the same financial data in hand (or so it thought) in the form of the Unaudited Financial Statements and (2) expected to receive additional updated and audited financial information post-closing. There was no reason to raise the alarm bells over what could reasonably be viewed as superfluous financial data that would soon be overtaken in any event.[7] That reasonable inference must be drawn in Cornice's favor at this stage.

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[7] Silberstein's observation that Cornice knew that "Silberstein was allegedly using [updated financial statements] to solicit purchases of his stock on the secondary market" (AB at 32) only underscores why Cornice had no reason to be suspicious of Thrasio's financial condition. Cornice sought those updated financial statements precisely because they reasonably believed they would further show a *strong* financial condition, which is why Silberstein was sharing them with prospective purchasers to market his shares. Regardless, Cornice did not become

B. Tumult at Thrasio Does Not Constitute Notice of *Fraud*

Silberstein suggests that his fraudulent scheme "was so blatantly obvious" that Cornice must have pieced it together (AB at 23), but the only "red flags" he identified beyond the aforementioned failure to furnish additional information are (1) that "Thrasio made sudden key personnel moves" in April and July 2021 (AB at 32) and (2) that "Cornice's representative remained at Thrasio" throughout "this tumultuous period" (AB at 33). But Silberstein fails to explain how such generalized tumult would put Cornice on inquiry notice of his fraudulent scheme. Nor could he. Even putting aside the absurd implications of a rule that would put every investor in tumultuous startups on inquiry notice of fraud (where tumult is an industry calling card, if not a badge of honor), Silberstein's argument is not supported by the allegations in Cornice's complaint. First, there is nothing in the complaint to suggest that Cornice knew *contemporaneously* what motivated the Board's personnel decisions—all of that was learned *post hoc* through the Disinterested Directors Report and other reporting and disclosures made in connection with Thrasio's unraveling and eventual bankruptcy. Second, indeed, Cornice expressly pleads that its representatives' contemporaneous assessment was that Thrasio was operating consistent with Silberstein's representations. (A0025-26.) And that Cornice's

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aware of these updated financial statements until *after closing*, so they are irrelevant to Silberstein's argument that Cornice should have been tipped off *at closing* by Silberstein's failure to furnish additional financial statements for prior time periods.

insider representatives were "sophisticated" does not make them superhuman; Silberstein offers no explanation for why they might have suspected a fraud that others much deeper in Thrasio's inner circle (*to wit*, the Board and the company's largest stakeholders) did not until at least September 2021. (*Cf.* AB at 25-26.) The reasonable inference is that there was no basis for them to do so.

IV. THE COURT SHOULD DECLINE TO AFFIRM ON ALTERNATIVE GROUNDS

The Court need not entertain alternative arguments for affirmance, *Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022) ("We . . . decline to do so."), and the Court should decline Silberstein's invitation to resolve this appeal in his favor on the alternative grounds of his challenge to Cornice's standing. (AB at 40-44.) As a threshold matter, the arguments advanced were not fully presented to the trial court below. Silberstein invokes the trustee's claims in Thrasio's bankruptcy case as evidence that Cornice's claims are derivative therefrom, but *after* the Superior Court issued its ruling (which did not address the standing issue in the first instance), the trustee settled those claims and carved out claims (like Cornice's) that were not expressly vested in the bankruptcy trust. *See Meta Advisors, LLC v. Silberstein, et al.*, No. 24-11850 (CMG), ECF No. 150-1 at 6-7 (D.N.J. Bankr.). While Cornice contends the existence of bankruptcy proceedings is irrelevant to the issue of Cornice's standing (*see* B64; OB, Ex. A at 26:13-28:14), Silberstein's emphasis on developments in the bankruptcy proceedings (*see* B22) introduces facts that (if they are relevant) must be sorted out by the Superior Court in the first instance.

Regardless, Cornice's claims are not derivative. Silberstein asserts derivativeness under the *Tooley* test, but Cornice's purchaser claims are inherently direct claims not subject to *Tooley*. *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1140 (Del. 2016) ("("[S]eller and purchaser claims . . . are direct claims that

are personal to the holder."). Undoubtedly, Cornice's claims arise from Silberstein's fraudulent misrepresentations to induce purchase of Thrasio shares at prices above their actual value, which are direct personal claims that infringe on Cornice's right to purchase, hold or sell shares—not derivative harm flowing from a drop in share value. *Id.*; *see also Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *5 (Del. Ch. Aug. 21, 2009) (holding that a fraud claim was direct where the defendant allegedly induced the plaintiff to pay more than the company's assets were worth by misrepresenting the financial condition of the company); *Sehoy Energy LP v. Haven Real Est. Grp., LLC*, 2017 WL 1380619, at *9 & n.104 (Del. Ch. Apr. 17, 2017) (finding plaintiff's claims were direct where false and misleading statements concerning financial performance and status of investment impeded plaintiff's exercise of withdraw rights). Moreover, the *Tooley* test—to distinguish direct from derivative *stockholder* claims—cannot logically apply to the claim that Cornice was fraudulently induced to become a stockholder and, thereby, became a stockholder only *after* suffering the wrongdoing at issue.

Even if *Tooley* applies, Cornice's claims are nevertheless direct because Delaware courts recognize non-disclosure claims as direct claims, not as derivative ones because the right to receive and rely upon accurate information is a personal right. *Freedman v. Adams*, 2012 WL 1345638, at *16 n. 154 (D. Del. Mar. 30, 2012) ("Indeed, disclosure claims are generally direct claims of corporation's

shareholders."); *see also, e.g.*, *Dieterich v. Harrer*, 857 A.2d 1017, 1029-30 (Del. Ch. 2004) (holding that disclosure allegations in proxy materials were direct claims); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005) (holding that non-disclosure claim was a direct claim under *Tooley*); *Alden*, 2009 WL 2581873, at *5; *In re MultiPlan Corp. Stockholders Litig.*, 268 A.3d 784, 803-05 (Del. Ch. Jan. 3, 2022) (inducing stockholders to forgo redemption rights by misrepresenting value thereof is a direct harm under *Tooley*).

Silberstein attempts to mischaracterize Cornice's claims as derivative by asserting that Cornice's allegations are based on diminution of value of Cornice's shares *after purchase* due to Silberstein's mismanagement of Thrasio. (AB 42.) But Cornice's injury occurred *upon purchase*, when it overpaid for those shares. Any claim for subsequent diminution in value is a separate claim not presented here. And that Cornice pleaded facts about the adverse effects of Silberstein's scheme on Thrasio does not automatically convert this into a mismanagement claim; rather, these facts provide context that illuminates Cornice's direct claims. *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *18 (Del. Ch. March 13, 2017) ("The fact that Plaintiff highlights mismanagement to enrich his breach of fiduciary duty narrative does not convert the claim from direct to derivative."). Nor does the fact that a number of purchasers may have similar direct claims based on

the same or similar misrepresentations made to them to induce their purchase of Thrasio shares.

Moreover, Silberstein's assertion that the "[Cornice's] misrepresentations were contained in . . . stock purchase agreements executed by all Thrasio investors" is patently false. (AB 41-42.) Various purchasers relied on *different* misrepresentations made to each of them at *different* times in connection with *different* classes of Thrasio stock and *different* share purchase agreements (and for some, like Cornice, in connection with additional direct dealings with Silberstein). Thus, Silberstein's reliance on *Feldman v. Cutaia* for the assertion that all of Thrasio's fraudulently-induced stock purchasers would recover "pro rata in proportion to their ownership of the stock" is misguided. 951 A.2d 727, 733 (Del. 2008); *cf. Lee v. Pincus*, 2014 WL 6066108, at *5-6 (Del. Ch. Nov. 14, 2014) (distinguishing *Feldman* where plaintiff alleged direct harm to a limited subgroup of stockholders). Instead, they would recover commensurate with their particular overpayment injury based on the particular circumstances of how (and at what price) Silberstein induced them to "invest" in his scheme.

CONCLUSION

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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