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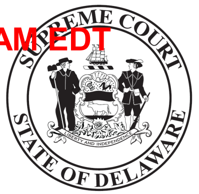

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER A. WINSHALL, in his capacity as the Stockholders' Representative, Plaintiff Below, Appellant, Cross Appellee, v. VIACOM INTERNATIONAL INC. and HARMONIX MUSIC SYSTEMS, INC., Defendants Below, Appellees, Cross Appellants.	No. 39, 2013 On appeal from the Court of Chancery of the State of Delaware C.A. No. 6074-CS

DEFENDANTS VIACOM INTERNATIONAL INC. AND HARMONIX MUSIC SYSTEMS, INC.'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS APPEAL

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Dated: April 17, 2013

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CASES

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OTHER AUTHORITIES

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Nature of the Proceedings

Defendants submit this brief in response to Plaintiff's appeal of the grant by the Court of Chancery (Strine, C.) of Defendants' Motion to Dismiss Count I of Plaintiff's Amended Complaint. Count I alleges a breach of the implied covenant of good faith and fair dealing. As the Court of Chancery correctly held, no such breach is adequately pled.

Defendants also submit this brief in support of their cross appeal of the Court of Chancery's grant of summary judgment in favor of Plaintiff on Counts II and III of the Amended Complaint. In Count II, Plaintiff seeks declaratory judgment that Defendants were not entitled to indemnification for claims by third-parties that Defendants infringed their intellectual property rights. In Count III, Plaintiff asserts that Defendants breached the Merger Agreement by failing to release to Plaintiff's constituents certain escrowed funds that had been set aside to indemnify Defendants. As explained below, the Court of Chancery erred in ruling that the Merger Agreement did not obligate Plaintiff to pay the costs of defending against those third-party claims, and that no triable fact existed with respect to whether Defendants were entitled to indemnification for those claims.

Summary of Argument

1. DENIED. The lower court correctly ruled that Plaintiff did not adequately plead an implied contractual obligation or a breach of such obligation. The Amended Complaint alleges that Defendants had an implied obligation to increase the Selling Shareholders' earn-out payments, which is contrary to both well-established precedent and the language of the Merger Agreement. Further, Defendants did not breach any such duty, as the Amended EA Agreement had no effect on those payments.

2. DENIED. The lower court correctly ruled that the Selling Shareholders were not denied the "benefit of their bargain" under the Merger Agreement, because under the Original EA Agreement, EA had a vested right to distribute Harmonix products throughout the earn-out period. The lower court correctly relied on the Original EA Agreement in so holding, as it was repeatedly referenced in the Amended Complaint.

3. The lower court erred in ruling that the Merger Agreement did not obligate the Selling Shareholders to pay the costs of defending against third-party claims for which Defendants request indemnification. The obligation to pay defense costs is separate from the obligation to indemnify, and arose when Defendants provided Plaintiff with notice of a claim as to which they "may request indemnification." The claims at issue clearly fall within the ambit of the agreement to pay defense costs.

4. The lower court erred in ruling that there is no triable issue of fact as to whether Defendants' losses stemming from third-party intellectual property claims arose out of a breach of the representations and warranties in the Merger Agreement. The record clearly demonstrates that potentially infringing development work on the *Rock Band* video game was well underway by the time of the merger.

Counter-Statement of Facts

Viacom is a global entertainment company whose portfolio of television, motion picture, and digital media brands includes Viacom Media Networks (formerly known as MTV Networks), BET Networks, and Paramount Pictures. *See* A66 ¶ 5. Harmonix (together with Viacom, the "Defendants") is a developer of music-oriented video games, including *Guitar Hero* and *Rock Band*. A65 ¶ 1, A67 ¶ 10. This litigation arises out of Viacom's acquisition of Harmonix, pursuant to a Merger Agreement dated September 20, 2006, *see* A94-A225, and an Escrow Agreement dated October 27, 2006, *see* B21-B52. As a result of that arms-length transaction, Harmonix became a wholly owned subsidiary of Viacom. A68 ¶ 15. Plaintiff Walter Winshall represents the former holders of Harmonix stock, options, and warrants, who relinquished their holdings (the "Selling Shareholders"). A65 ¶ 2, A68 ¶ 14.

A. The Merger Agreement

Viacom acquired Harmonix pursuant to the Merger Agreement. It agreed to pay the Selling Shareholders two forms of consideration: a $175 million cash payment paid at closing, A67 ¶ 11, and conditional incremental earn-out payments tied to Harmonix's financial performance in 2007 and 2008, A68 ¶ 12. These contingent earn-out payments were equal to 3.5 times the amount by which Gross Profit (as defined by the Merger Agreement) exceeded, if at all, $32 million in 2007 and $45 million in 2008. A68 ¶ 12. The agreement does not require Defendants to conduct business so as to ensure or maximize the earn-out payments. *See generally* A101-A111 Art. II.

The Merger Agreement and Escrow Agreement provide that the Selling Shareholders shall indemnify Defendants, and reimburse them for the costs of defense, with

respect to certain claims that third parties might assert against Harmonix or Viacom based on the games created and marketed by Harmonix. The agreements provided for $12 million of the initial $175 million payment to be placed in escrow as a sum available to satisfy these indemnification obligations. [redacted] The relevant substantive indemnification provisions are as follows:

First, Section 8.2(a) sets forth the Selling Shareholders' obligations to indemnify Defendants against any losses "based upon, arising out of or by reason of" certain events, including "the breach of any representation or warranty of the Company contained in this Agreement." A153 § 8.2(a)(i).

Second, Section 4.15 sets forth a series of representations and warranties made by the Selling Shareholders regarding intellectual property issues. These include representations that, except as disclosed in schedules to the Merger Agreement:

> [W]ith respect to the (i) Company Developed Software . . . the Company (A) has adequate rights therein as is necessary for the current use (if any) of such Company Developed Software. . . .
>
> . . . .
>
> . . . [N]either the operation of the Business, nor any activity of the Company, nor any manufacture, use, importation, offer for sale and/or sale of any Current Game . . . infringes on, constitutes a misappropriation of (or in the past constituted a misappropriation of), or violates (or in the past infringed on or violated) any intellectual property rights of a third party except for . . . any Patent . . . .

A128-A129 §§ 4.15(k), 4.15(o)(i).

Third, Section 8.2(d) of the Merger Agreement provides that Viacom "shall give [Plaintiff] written notice of any claim . . . by or in respect of a third party as to which [Viacom] may request indemnification pursuant to Section 8.2(a)," A156

§ 8.2(d)(i), no later than 18 months following the October 27, 2006 closing date, *see* A152 § 8.1. Section 8.2(d)(i) provides that Viacom "shall have the right to direct, through counsel of its own choosing . . . the defense or settlement of any such claim *at the expense of the applicable indemnifying parties*." A156 § 8.2(d)(i) (emphasis added). Section 8.2(d)(ii) permits Plaintiff, subject to certain conditions, "to assume the defense of any such claim." A156 § 8.2(d)(ii). In certain cases, however—including those involving claims for non-monetary relief—Plaintiff "shall not have the right to assume control of the defense of any such claim, *and shall pay the reasonable fees and expenses of counsel retained by*" Viacom. *Id.* (emphasis added).

B. The Distribution Agreements with EA

By the time the merger closed in October 2006, the development of *Rock Band* was well underway. *See* B380, B386, B396-B397. In March 2007, before development was complete, Harmonix entered into an agreement with Electronic Arts, Inc. ("EA") to distribute *Rock Band* (the "Original EA Agreement"). The distribution fee that Harmonix paid to EA was one of the largest single expenses that Harmonix incurred. A72 ¶ 34. According to Plaintiff, the "huge and immediate success of *Rock Band*" enabled Defendants to renegotiate that distribution agreement, *id.*, and also supposedly threatened to cause a surge in the 2008 earn-out payment, A71-A72 ¶ 33.

In October 2008, Defendants entered into a new agreement with EA (the "Amended EA Agreement"). A75 ¶ 47. The Amended EA Agreement extended the term of the Original EA Agreement, and governed the distribution of additional games that were not subject to the Original EA Agreement, such as *The Beatles: Rock Band* (referred to in the Amended EA Agreement as "Project 9"). A262. The Amended EA

Agreement also provided for reduced distribution fees starting in 2009, as well as commitments by EA to purchase advertising from MTV Networks and other Viacom media outlets, A75 ¶ 47. Those commitments could prevent EA from threatening to reduce its advertising spending in order to obtain benefits under the new agreement. The Amended Complaint, however, contains no allegation that these commitments were any more than what EA had historically spent, or would continue to spend in any event, to advertise on Viacom outlets. The Amended EA Agreement also accelerated into 2008 certain payments due to Harmonix from EA, which otherwise would have been paid in January and February 2009. None of these provisions had any effect on the 2008 earn-out payment; the amount of that payment remained exactly what it would have been under the Original EA Agreement. *Id.*; A265.

C. Third-Party Claims Against Defendants Based on *Rock Band*

From late-2007 to mid-2008, four separate third parties filed complaints against Defendants, asserting that *Rock Band* infringed their intellectual property rights.

1. **1st Media:** On November 29, 2007, 1st Media LLC ("1st Media") commenced a patent infringement lawsuit against Defendants and others in the U.S. District Court for the District of Nevada, alleging, *inter alia*, that *Rock Band* infringed U.S. Patent No. 5,464,946, and seeking injunctive relief and damages. *See* B83-B89.

2. **Gibson:** On March 20, 2008, Gibson Guitar Corp. ("Gibson") filed a lawsuit against Harmonix, Viacom subsidiary MTV Networks, and EA in the U.S. District Court for the Middle District of Tennessee. On April 4, 2008, Gibson filed a separate lawsuit, also in the Middle District of Tennessee, against those same parties and others. Both lawsuits alleged that the *Guitar Hero* and *Rock Band* games infringed U.S.

Patent No. 5,990,405, and sought injunctive relief and damages. *See* B102-B109, B113-B126. The Gibson cases were eventually dismissed.

3. **Activision:**

4. **Konami:** On July 9, 2008, Konami Digital Entertainment Co., Ltd. ("Konami") filed a lawsuit in the U.S. District Court for the Eastern District of Texas against Defendants and MTV Networks, alleging that *Rock Band* infringed U.S. Patent Nos. 6,390,923, 6,425,822, and 6,645,067. Konami alleged that Harmonix's infringement was knowing, willful, and deliberate, and sought declaratory and injunctive relief, as well as monetary damages. *See* B190-B197. After more than two years of litigation, Konami agreed to dismiss the action, and the court entered an order dismissing the action on September 17, 2010. *Konami Digital Entm't Co.* v. *Harmonix Music Sys.*, 08-CV-286 (E.D. Tex.), Docket Entry No. 337.

* * *

Defendants advised Plaintiff, by a Notice of Claim dated April 24, 2008, that

the Selling Shareholders had breached the representations and warranties made in the Merger Agreement. *See* B294-B296. The Notice of Claim specifically advised Plaintiff of, and sought indemnification for, the 1st Media, Gibson, and Activision claims. The notice also specifically reserved the right to seek indemnification for additional claims that might be made by third parties. Defendants advised Plaintiff of the Konami claim by letter dated July 21, 2008, twelve days after Konami filed suit. *See* B376-B377. The July 21, 2008 letter specifically noted that the Konami claim was an additional claim based on the breaches that were the subject of the April 24, 2008 Notice of Claim. [redacted]

Plaintiff has denied any obligation to pay these expenses, and accordingly, Viacom has refused to instruct the Escrow Agent to release the $12 million in escrowed proceeds to Plaintiff and the Selling Shareholders. A83 ¶ 89; A90 ¶ 117.

D. Plaintiff's Amended Complaint

Plaintiff commenced this action on December 15, 2010, and filed the Verified Amended Complaint on March 28, 2011, asserting three counts against Defendants. In Count I, Plaintiff alleges that Defendants breached the implied covenant of good faith and fair dealing under Delaware law by negotiating for the terms contained within the Amended EA Agreement, instead of "negotiat[ing] for a reduction of the distribution fees in 2008." A72 ¶ 34. Plaintiff does not allege that any provision of the

Merger Agreement required Defendants to negotiate for a lower distribution fee in 2008. Nor does Plaintiff allege that Defendants entered into the Amended EA Agreement for the purpose of reducing the 2008 earn-out payment. In fact, if Defendants had left the Original EA Agreement intact and not entered into the Amended EA Agreement, the 2008 earn-out payment would have been *exactly the same*. In sum, Plaintiff's theory on Count I is that Defendants were required to capitalize on an "opportunity" created by the success of *Rock Band* to secure from EA a decrease in distribution fees that would yield an *increase* in the baseline for the 2008 earn-out payment—to the *detriment* of Defendants. Plaintiff claims that Defendants have an implied duty to *maximize* the earn-out payments despite the lack of a fiduciary relationship between the parties or any express contractual provision so providing.

In Counts II and III, Plaintiff sought declaratory judgment that Defendants are not entitled to indemnification for the third-party infringement claims described above, *see* A76-A88 ¶¶ 51-105, and claimed that Defendants breached the Merger Agreement by refusing to instruct the Escrow Agent to release the $12 million in escrowed proceeds to Plaintiff and the Selling Shareholders, *see* A88-A90 ¶¶ 106-118.

E. The Court of Chancery's Decisions

On April 14, 2011, Defendants moved to dismiss Count I. The lower court held oral argument on the motion on August 18, 2011. At oral argument, Plaintiff argued for the very first time—without having briefed the argument previously, *see* A450-A451 (Tr. 46:23-47:11); A467 (Tr. 63:17-63:20)—that EA sought to renegotiate the Original EA Agreement to shore up distribution rights pertaining to *Rock Band* in 2008 because certain provisions in the Original EA Agreement permitted Harmonix to

terminate it prior to the expiration of the earn-out period. Specifically, Plaintiff argued that higher royalty fees for the forthcoming *Rock Band 2*, and the parties' failure to agree upon a "minimum royalty base" and "minimum sales deduction" in the Original EA Agreement put EA's distribution rights in jeopardy. The lower court rejected Plaintiff's arguments and by opinion dated November 10, 2011, granted Defendants' motion. The court ruled that Plaintiff's allegations that Defendants breached the implied covenant of good faith and fair dealing by failing to increase the 2008 earn-out payment were not reasonably conceivable. It stated that Plaintiff's

> tenuous argument buckles in light of two factors: (i) although Viacom and Harmonix did not accept a reduction in 2008 distribution fees, neither did they take action to *increase* the 2008 fees beyond what was expected under the Original EA Agreement; and (ii) it is not conceivable that the benefits conferred on Viacom and Harmonix by the renegotiation were offered in exchange for product sales in which the Selling Stockholders had a valid expectancy interest—*i.e.*, sales during 2008.

See Pl.'s Br., Ex. A, at 14.

On December 28, 2011, Plaintiff moved for summary judgment on Counts II and III. After the motion was briefed, but before the scheduled oral argument was held, the lower court granted Plaintiff's motion by opinion dated December 12, 2012. The court ruled that Defendants were not entitled to the costs of defending against third-party claims unless there had been a breach of the representations and warranties in the Merger Agreement, and that Defendants did not create a triable issue of fact as to whether there had been any breach. It also ruled, alternatively, that Defendants' notice to Plaintiff regarding one of the four third-party claims, the Konami lawsuit, was untimely. The court entered a final order in the case on January 3, 2013. The instant appeal and cross appeal followed.

Argument

I. The Lower Court Correctly Ruled that Plaintiff Neither Adequately Pled an Implied Contractual Obligation, nor Adequately Pled that Defendants Breached Such an Obligation.

A. **Question Presented:** Did Plaintiff adequately plead that Defendants owed a specific implied contractual obligation toward the Selling Shareholders and that Defendants breached such an obligation?

B. **Standard of Review:** The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed *de novo*. *Feldman* v. *Cutaia*, 951 A.2d 727, 730 (Del. 2008). The test is "whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Id.* at 730-31 (internal quotation marks omitted).

C. **Merits:** The implied covenant of good faith and fair dealing, which inheres in every contract governed by Delaware law, *see Dunlap* v. *State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005), is "a limited and extraordinary legal remedy," *Nemec* v. *Shrader*, 991 A.2d 1120, 1128 (Del. 2010). Implying such an obligation is a "cautious enterprise" reserved to "narrow context[s]." *Cincinnati SMSA Ltd. P'ship* v. *Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). Specifically, the implied obligation applies "only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer. In the Venn diagram of contract cases, the area of overlap is quite small." *Airborne Health, Inc.* v. *Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009). As a result, the implied covenant "is only rarely invoked successfully." *Kuroda* v. *SPJS Holdings*, 971 A.2d 872, 888 (Del. Ch. 2009).

To state a cognizable claim for breach of the implied covenant of good faith and fair dealing, Plaintiff was required to "allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract." *Id.* As the lower court correctly held, Plaintiff failed adequately to plead either of these elements.

1. Plaintiff did not adequately plead a specific implied contractual obligation.

The lower court correctly ruled that Plaintiff did not adequately plead that Defendants had a specific implied contractual obligation. Plaintiff's allegations are conclusory and internally inconsistent, and they contradict the terms of the Merger Agreement itself.

Plaintiff argues in his opening brief that the Amended Complaint "repeatedly describes the specific covenant that was implied in the parties' agreement." Pl.'s Br. at 13. Those "repeated" descriptions, however, consist of nothing more than conclusory, unsupported allegations, *see, e.g.*, A70 ¶¶ 26-28 (agreement included implied covenant not to "engage in arbitrary or unreasonable conduct," not to "use oppressive or underhanded tactics," and to use "discretion reasonably and in good faith"), that merely parrot the common buzzwords underlying Plaintiff's claim, *see, e.g.*, *Dunlap*, 878 A.2d at 442 (implied covenant "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct" (internal quotation marks omitted)); *PAMI–LEMB I, Inc.* v. *EMB–HNC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004) (implied covenant applies where "one side uses oppressive or underhanded tactics"). Such conclusory allegations are plainly insufficient under Delaware's pleading requirements. *See Feldman*, 951 A.2d at 731 ("conclusory allegations need not be treat-

ed as true, nor should inferences be drawn unless they truly are reasonable").

Plaintiff's primary argument appears to be that the Selling Shareholders reasonably expected that Defendants would not "manipulate Harmonix's cost structure in order to *reduce the earn-out payment*." Pl.'s Br. at 11 (emphasis added). Plaintiff's own allegations, however, betray this argument. Indeed, Plaintiff alleged that EA offered Defendants a reduction in 2008 distribution fees for Harmonix products, *see* A72 ¶ 37, and that Defendants instead opted "for other consideration designed *not to increase* the 2008 Earn-Out Payment Amount," *see* A74 ¶ 46 (emphasis added). Thus, Plaintiff alleges not that Defendants did anything to reduce the earn-out payment, but rather that Defendants did not act to increase it. Plaintiff's core theory is that the Merger Agreement implied an obligation for Defendants to *maximize the earn-out payments* by exploiting all opportunities for the Selling Shareholders' benefit—regardless of whether doing so would work to Defendants' own detriment. Plaintiff seeks to usurp benefits that were not even subject to the Original EA Agreement, such as the distribution rights to future products such as *The Beatles: Rock Band*, to benefit his constituents. As the lower court ruled, even construing the facts in Plaintiff's favor, "the Selling Stockholders could not conceivably have had a reasonable expectation that Viacom and Harmonix had a duty to renegotiate the Original EA Agreement to increase the amount of earn-out payments." Pl.'s Br., Ex. A, at 13.

No court in this state has recognized a blanket obligation for one party to an arms-length business transaction to exploit opportunities to maximize the benefit received by the counterparty to the transaction. Even fiduciaries are not required to engage in the kind of self-sacrifice that Plaintiff urges here. *See Jedwab* v. *MGM Grand*

Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986) (directors and controlling shareholders not required to "sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders"); *accord In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1041 (Del. Ch. 2012) (controlling shareholder need not act "altruistically" toward minority stockholders). A fiduciary has no obligation to transfer an opportunity unless it "fairly belongs" to the corporation. *See Broz* v. *Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996). Here, by contrast, Plaintiff seeks to have Defendants transfer post-2008 opportunities into 2008 not because such opportunities "fairly belong" to Plaintiff, but simply because it would benefit Plaintiff's constituents.[2] The lower court correctly prevented Plaintiff from doing so.

Because courts "can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue," Plaintiff here was required to "advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." *Fitzgerald* v. *Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998). Plaintiff here did not advance any such contractual provision in his Amended Complaint. Nor could he have, as there is none in the Merger Agreement. Had the parties to the merger sought to impose an explicit restriction on Defendants' ability to renegotiate a distribution agreement during the earn-out period, they easily could have added language to that effect in the Merger Agreement.

[2] Defendants, of course, do not stand as fiduciaries with respect to Plaintiff—nor does Plaintiff allege that they do—and the fiduciary duty analysis does not apply here. *See Wood* v. *Baum*, 953 A.2d 136, 143 (Del. 2008) ("The implied covenant of good faith and fair dealing is a creature of contract, distinct from the fiduciary duties that the plaintiff asserts here."); *see also Quadrangle Offshore (Cayman) LLC* v. *Kenetech Corp.*, 1999 WL 893575, at *13 (Del. Ch. Oct. 13, 1999) (usurpation of economic opportunity could not "sustain a breach of the Certificate's implied covenant").

see also Airborne Health, 984 A.2d at 147 (implied covenant claim "undercut" where plaintiff failed to secure provisions "familiar to any transactional lawyer, and [it] was a sophisticated party represented by able counsel").

Despite Plaintiff's effort to distinguish *Airborne Health*, the case is on point and highly instructive. In that case, Squid Soap sold its business to Airborne Health pursuant to a merger agreement that provided for contingent earn-out payments. When Airborne failed to expend resources on the business that it acquired, causing it to collapse and foreclosing the earn-out payments, Squid Soap sued Airborne for breach of the implied covenant of good faith and fair dealing. The Court of Chancery dismissed the claim on the basis that Squid Soap failed to insist on "specific contractual commitments from Airborne regarding . . . some form of 'efforts' obligation." *Airborne Health*, 984 A.2d at 147. The court held that "[t]he price of the greater consideration that Squid Soap hoped to achieve through the earn-out was the risk that Airborne would fail. Unfortunately for Squid Soap, Airborne did not succeed, but that does not allow Squid Soap to rewrite the deal it cut in more optimistic days." *Id.* at 147-48. Similarly here, it was foreseeable that there might be events or opportunities for Defendants to take steps that would increase the earn-out payments. But the parties here did not bargain for, and the Merger Agreement does not contain, any specific commitment from Defendants—express or implied—to maximize those payments.

The Merger Agreement's silence on this issue is fatal to Plaintiff's implied covenant claim. Indeed, as the lower court correctly observed, the implied covenant

> should not be applied to give plaintiffs contractual protections that they failed to secure for themselves at the bargaining table. In other words, the implied

> covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal.

Pl.'s Br., Ex. A, at 12 (internal quotation marks omitted); *see Nemec*, 991 A.2d at 1128 (implied duty not an "equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract"); *Alliance Data Sys. Corp.* v. *Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch. 2009) ("courts will not alter the terms of a bargain sophisticated parties entered into willingly because a party now regrets the deal").

In fact, not only does the Merger Agreement lack any provision from which a relevant covenant may be implied, but it contains at least three provisions that foreclose Plaintiff's argument that Defendants had an implied obligation to maximize the earn-out payments. [REDACTED]

Second, the Merger Agreement makes clear that the earn-out payments

were not guaranteed. Article II defines the earn-out payments as "the positive amount, *if any*," to be paid to the Selling Shareholders, *see* A102-A103 § 2.1(c)(ii) (A)-(B) (emphasis added), and describes them as "Contingent Consideration," *see* A109 § 2.4. The Merger Agreement cannot imply an obligation to increase payments that may never exist in the first place. *Third*, to the extent that Harmonix's Gross Profit exceeds the thresholds that trigger the earn-out payments, the Merger Agreement provides for no cap on those payments. As the lower court correctly observed,

> imply[ing] an obligation to maximize those already uncapped payments is simply not in line with the reasonable expectations of the parties. . . . [N]o reasonable commercial actor in Viacom's position at the time of the acquisition would agree not only to pay earn-outs subject to no cap or ceiling, but also to be duty-bound to accept any opportunities that would have the effect of increasing those earn-out payments during the relevant period.

Pl.'s Br., Ex. A, at 16. This is particularly true where the earn-out is a 3.5 times *multiple* of any value transferred to the earn-out period.[3]

Plaintiff, therefore, did not and could not give the lower court any basis to rewrite the Merger Agreement. To the contrary, Plaintiff's claim is yet "another in a long line of cases in which a plaintiff has tried, unsuccessfully, to argue that the implied covenant grants it a substantive right that it did not extract during negotiation." *Allied Capital Corp.* v. *GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006). To hold that Defendants had any duty regarding the 2008 earn-out payment beyond paying it in accordance with the terms of the Merger Agreement would transform the implied covenant into "a judicial mandate for the other side to engage in charity."

[3] In addition, the benefit the Selling Shareholders realized from the merger did not lie solely with the earn-out payments because Viacom paid them $175 million upfront. That substantial sum also counsels against finding an implied duty to maximize the 2008 earn-out payment. *See WirelessMD, Inc.* v. *Healthcare.com Corp.*, 610 S.E.2d 352, 356 (Ga. Ct. App. 2005).

Liberty Prop. Ltd. P'ship v. *25 Mass. Ave. Prop. LLC*, 2008 WL 1746974, at *13 n.59 (Del. Ch. Apr. 7, 2008) ("To hold that [defendant] was duty-bound to refinance its debt solely to allow [plaintiff] a longer option exercise period would be to require of it an act of commercial generosity nowhere mentioned in the detailed Option Agreement and nowhere implied by any of its terms."). The lower court correctly ruled that Plaintiff failed to adequately plead a specific implied contractual obligation.

2. Plaintiff did not adequately plead that Defendants breached a specific implied obligation.

Even if Plaintiff had adequately alleged a specific implied contractual obligation, his claim would fail because he has not adequately alleged a breach of that obligation. A party breaches the implied covenant when its conduct "has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap*, 878 A.2d at 442 (internal quotation marks omitted); *accord Lola Cars Int'l Ltd.* v. *Krohn Racing, LLC*, 2009 WL 4052681, at *8 (Del. Ch. Nov. 12, 2009). For a plaintiff to adequately plead breach, it must allege that the defendant acted with "bad faith." *See Wood*, 953 A.2d at 143; *Merrill* v. *Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992). "General allegations of bad faith," however, do not suffice. *Kelly* v. *Blum*, 2010 WL 629850, at *13 (Del Ch. Feb. 24, 2010). Instead, the plaintiff must "demonstrate that the conduct at issue involved fraud, deceit, or misrepresentation." *Cont'l Ins. Co.* v. *Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000).

Plaintiff here has failed to allege a conceivable breach because the facts pleaded in the Amended Complaint and the documents incorporated therein by reference simply do not support the conclusion that Defendants' choice not to negotiate for lower distribution fees in 2008 had the result of depriving the Selling Shareholders of the

fruits of their bargain under the Merger Agreement. In his opening brief, Plaintiff repeatedly argues that Defendants breached the implied covenant of good faith and fair dealing by "manipulating" the cost structure of Harmonix products so as to "reduce" the 2008 earn-out payment. *See, e.g.*, Pl.'s Br. at 4, 9, 11, 13, 15, 20. Plaintiff's rhetoric, however, ignores one simple, and crucial, undisputed fact: Defendants' actions had *no effect whatever*—neither positive, nor negative—on the 2008 earn-out payment. As noted above, Plaintiff alleged that as a result of negotiating the Amended EA Agreement, Defendants secured from EA lower distribution fees for Harmonix in 2009, advertising commitments for MTV Networks and other Viacom media outlets, and cash advances to be paid to Viacom prior to December 21, 2008. *See* A75 ¶ 47(A)-(B).[4] What Plaintiff leaves unsaid is that the Amended EA Agreement in no way altered distribution fees for 2008 and, therefore, in no way altered the earn-out payment for that year. Indeed, even if Defendants had left the Original EA Agreement exactly as it was—and negotiated for none of the above-mentioned benefits—the effect on the 2008 earn-out payment would have been *exactly the same*.

Plaintiff takes issue with the lower court's evaluation of the Selling Shareholders' reasonable expectations at the time that the Original EA Agreement was negotiated, in March 2007, as opposed to the time at which the Merger Agreement was signed, in September 2006. *See* Pl.'s Br. at 21. Plaintiff does not, however, demonstrate how the analysis would be any different. Irrespective of what the Original EA Agreement

[4] Because Plaintiff discusses and relies upon the Amended EA Agreement in his Amended Complaint, the document is incorporated by reference therein, and the Court of Chancery correctly considered it in dismissing Plaintiff's implied covenant claim. *See In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995); *see also* Pl.'s Br., Ex. A, at 7-9, 20-21 (lower court opinion discussing Amended EA Agreement).

provided for, Plaintiff has offered no basis for concluding that the legitimate "fruits" of the parties' bargain in September 2006 included the right for the Selling Shareholders to receive a 2008 earn-out payment based on an enhancement in Gross Profit through more favorable distribution terms. *See Dunlap*, 878 A.2d at 442.

Plaintiff likewise fails to offer more than generalized, unsupported allegations that Defendants undertook any acts with respect to the distribution fees in bad faith. Instead, the Amended Complaint cobbles together snippets rooted in "information and belief" to suggest that Viacom's instruction to two of its executives for renegotiating the Original EA Agreement was motivated by a desire to avoid increasing the Gross Profit on which the 2008 earn-out payment would be based. *See* A72-A74 ¶¶ 36-37, 43-46. As Plaintiff alleges, any such increase would have been very costly to Viacom. *See* A72-A73 ¶ 38. Without a fiduciary duty or an express contractual obligation to the contrary, however, it cannot be bad faith for a party to an arms-length contract to put its own interests ahead of those of a counterparty. *See supra* at 13-14. Viacom, lacking any fiduciary duty to the Selling Shareholders, or any express contractual obligation to maximize the 2008 earn-out payment, was within its rights to consider the effect on its own business of enhancing Gross Profit for the benefit of Plaintiff and those he represents. Pursuit of such a legitimate business purpose is fatal to a claim for breach of the implied covenant of good faith and fair dealing. *See Commonwealth Assocs.* v. *Providence Health Care, Inc.*, 1993 WL 432779, at *7 (Del. Ch. Oct. 22, 1993) (no breach where "decision is made for a legitimate business purpose"); *accord Glinert* v. *Wickes Cos., Inc.*, 1990 WL 34703, at *8 (Del. Ch. Mar. 27, 1990) (no breach where action had "independent significance to the corporation").

Plaintiff's attempts to analogize the instant case to previous cases sustaining claims for breach of the implied covenant of good faith and fair dealing are unavailing. Plaintiff relies heavily on *Keating* v. *Applus+ Technologies, Inc.*, 2009 WL 261091 (E.D. Pa. Feb. 4, 2009), a Pennsylvania federal court case applying Delaware law; but, as the lower court correctly held, that case is readily distinguishable. In *Keating*, the plaintiffs sold Keating Technologies to Applus in exchange for earn-out payments based on revenues earned by Keating under any new contracts signed during the six-year period following the sale. *See id.* at *1. Applus, however, waited until after the expiration of the earn-out period to enter into a major contract, *see id.*, and the court held that the complaint stated a claim for breach of the implied covenant because "Applus cannot avoid its contractual obligations by creating, in bad faith, an outcome that technically satisfies the express terms of the [stock purchase agreement], but deprives plaintiffs of their legitimate expectations," *id.* at *4. *Keating* offers no support for Plaintiff's argument, because the agreement there expressly contemplated that new contracts would increase the earn-out payments.

By contrast, here, the Merger Agreement clearly did not contemplate increased earn-out payments based upon lower distribution fees. As the lower court observed, "*Keating* would be analogous to the present case if Viacom and Harmonix had, for example, deliberately delayed the release of *Rock Band* or *Rock Band 2* until after the earn-out period expired." Pl.'s Br., Ex. A, at 18. Plaintiff, however, does not allege that Defendants intentionally, and in bad faith, shifted revenue contemplated by the Merger Agreement outside the earn-out period (or that Defendants shifted new costs not contemplated by the Merger Agreement into the earn-out period). Rather, what

Plaintiff seeks is to compel Defendants to undertake an act of "commercial generosity . . . nowhere implied by any of [the Merger Agreement's] terms," *see Liberty Prop.*, 2008 WL 1746974, at *13 n.59, by shifting revenue from outside the earn-out period into the earn-out period, merely because such a transfer would benefit the Selling Shareholders. *Keating*, therefore, is inapposite.[5]

The other (non-Delaware) cases Plaintiff cites, *see* Pl.'s Br. at 15-16, are similarly distinguishable on their facts. *See, e.g.*, *O'Tool* v. *Genmar Holdings, Inc.*, 387 F.3d 1188, 1195 (10th Cir. 2004) (plaintiffs alleged that defendants' "entire course of conduct frustrated and impaired [plaintiffs'] realization of the Earn-Out," including by undertaking a series of at least eight injurious actions post-acquisition that destroyed the boat line that plaintiffs sold to defendants); *MWI Veterinary Supply Co.* v. *Wotton*, 2012 WL 2576205, at *7 (D. Idaho July 3, 2012) (plaintiffs alleged that defendant acquirer sought to undermine plaintiffs' business entirely, including by "[a]ctively selling and marketing products that competed directly with, and siphoned business from, the [acquired] products" (first alteration in original)); *Kuchera* v. *Parexel Int'l Corp.*, 719 F. Supp. 2d 121, 124, 126 (D. Mass. 2010) (plaintiffs alleged that defendant "never intended to pay the earn-out payments" and engaged in "a multitude of actions" designed to avoid the earn-out triggers); *Hodges* v. *MedAssets Net Revenue Sys., LLC*, 2008 WL 476140, at *7 (N.D. Ga. Feb. 19, 2008) (plaintiffs alleged that defendants signed an asset purchase agreement "with the full intention of 'sun-setting' Plaintiffs'

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[5] In any event, *Keating* has never been cited by any other court (other than the lower court here, which distinguished the case), and contains little analysis of the Delaware cases it purports to follow. One of those precedents, *Wal-Mart Stores, Inc.* v. *AIG Life Insurance Co.*, 901 A.2d 106, 116 (Del. 2006), actually *rejected* a claim for breach of the implied covenant because the complaint there, like the Amended Complaint here, did "not identif[y] any express contract provision that was breached."

former products in order to supplant them with Defendants' comparable products, as well as converting Plaintiffs' contracts and intellectual property to products not subject to the earn-out"); *Interwave Tech., Inc.* v. *Rockwell Automation, Inc.*, 2005 WL 3605272, at *3-*4 (E.D. Pa. Dec. 30, 2005) (plaintiff alleged that despite defendant's explicit assurances that it would develop certain software and enter into certain partnerships with third-party vendors, defendant failed both "to devote any meaningful resources or effort toward development of a . . . software product" and "to approve fully negotiated partnerships with existing comprehensive third party vendors," thereby preventing plaintiff from "attain[ing] the negotiated revenue targets for the Year One Earn-Out"); *T.R. McClure & Co. Liquidating Trust* v. *TMG Acquisition Co.*, 1999 WL 692683, at *7 (E.D. Pa. Sept. 7, 1999) (defendant acted to impair plaintiff's earn-out capacity "by setting unreasonable prices and unacceptable schedules" for plaintiff's brokerage work and by "undercapitalizing" plaintiff). The plaintiffs in these other cases alleged that the defendants set out to undermine the plaintiffs' businesses altogether, or violated explicit promises made at the time of the parties' agreements. Plaintiff here makes no such allegations.[6] Indeed, the facts alleged in the Amended Complaint show that Defendants did nothing to diminish the 2008 earn-out payment.

Given that Plaintiff failed to allege a specific implied contractual obligation and failed to allege how—assuming such an obligation existed—the violation of that obligation denied Plaintiff the fruits of the contract, the lower court's dismissal of the implied covenant of good faith and fair dealing claim should be affirmed.

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[6] Moreover, Plaintiff's reliance on *Kuchera* and *T.R. McClure & Co.* is misplaced for the additional reasons that those cases apply Massachusetts and New York law, respectively, and consider implied covenant claims at the summary judgment stage, rather than on a motion to dismiss. *See Kuchera*, 719 F. Supp. 2d at 125, 127; *T.R. McClure & Co.*, 1999 WL 692683, at *6, *8.

II. The Lower Court Correctly Looked to the Original EA Agreement in Holding that Plaintiff Did Not Adequately Plead that the Selling Shareholders Were Denied the "Benefit of their Bargain" Under the Merger Agreement.

A. **Question Presented:** Did the lower court correctly look to the Original EA Agreement in ruling that Plaintiff did not adequately plead that the Selling Shareholders were denied the "benefit of their bargain" under the Merger Agreement?

B. **Standard of Review:** The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed *de novo*. *Feldman*, 951 A.2d at 730. The test is "whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Id.* at 730-31 (internal quotation marks omitted).

C. **Merits:** The lower court's dismissal of Plaintiff's implied covenant claim should be affirmed irrespective of the Original EA Agreement—indeed, it can and should be affirmed based on a review of the Amended Complaint, the Merger Agreement, and the Amended EA Agreement. As detailed above, the Merger Agreement clearly did not imply a specific contractual obligation to increase or maximize the 2008 earn-out payment; and the Amended Complaint and Amended EA Agreement demonstrate that Defendants could not possibly have breached an obligation with respect to the earn-out payments because their actions had no effect upon those payments. The Original EA Agreement, however, provides additional support for the dismissal of Plaintiff's claim: because the agreement gave EA the right to distribute Harmonix products during—and indeed after—2008, the agreement renders Plaintiff's allegation that the Selling Shareholders had an expectancy interest in lower distribution fees during 2008 inconceivable.

1. The lower court properly considered the Original EA Agreement.

In deciding a motion to dismiss under Rule 12(b)(6), the Court of Chancery may "'consider, for certain purposes, the content of documents that are integral to or are incorporated by reference into the complaint.'" *In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *4-6 (Del. Ch. Jan. 11, 2001) (quoting *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999)); *see also Freedman* v. *Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint; this is true even where the documents are not expressly incorporated into or attached to the complaint." (footnotes omitted)).

The Original EA Agreement is essential to Plaintiff's implied covenant claim. Indeed, had Defendants not entered into the Original EA Agreement, Plaintiff would not be able to claim that Defendants breached an implied obligation under the Merger Agreement. As this Court has held, it is especially proper for the Court of Chancery to consider the documents on whose terms or language the operative facts of the plaintiff's claim relies, as was the case here. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 69 ("It was certainly proper to consult the Joint Proxy to analyze the disclosure claim because the operative facts relating to such a claim *perforce* depend upon the language of the Joint Proxy."); *see also In re New Valley Corp.*, 2001 WL 50212, at *6 (noting that contracts are especially proper to consider on a motion to dismiss because they are "operative documents that are central to the cause of action," as opposed to documents like minutes of a meeting, which are "more evidentiary in

nature”). It therefore is not significant that Defendants first provided the lower court with a copy of the Original EA Agreement with their reply brief, because by that point Plaintiff had already extensively relied upon the document in formulating his pleadings and asserting a cause of action against Defendants. *See Freedman*, 2012 WL 1345638, at *5.

Indeed, Plaintiff referred to the Original EA Agreement extensively in the Amended Complaint. Plaintiff argues that the agreement is only “briefly referred to,” *see* Pl.’s Br. at 25, but the Amended Complaint contains at least 9 explicit references to the Original EA Agreement and/or its terms, in at least 7 separate paragraphs within the pleading. *See, e.g.*, A72 ¶ 34 (“When Defendants entered into *the original distribution contract with EA*, *Rock Band* had not yet been developed and its market potential was unproven. The terms of *the original distribution contract with EA* reflected this uncertainty.” (emphasis added)); A72 ¶ 35 (“[T]he renegotiation of the terms of *the EA contract* in 2008 . . . .” (emphasis added)); A72 ¶ 36 (“the financial benefits of renegotiating *the EA contract*” (emphasis added)); A74 ¶ 43 (“Mr. Yapp . . . did not renegotiate *the EA contract* for an extended period of several months” (emphasis added)); A74 ¶ 44 (“Dissatisfied that Mr. Yapp was not implementing their directives regarding the renegotiation of *the EA contract*, Viacom Senior Management relieved Mr. Yapp of his responsibility to renegotiate *the EA contract* . . . .” (emphasis added)); A74 ¶ 45 (“Mr. Davis complied with the directives of Viacom’s Senior Management in renegotiating *the EA contract*” (emphasis added)); A75 ¶ 47 (“Harmonix amended its *distribution contract with EA*” (emphasis added)). Plaintiff also refers to the specific rights established by the terms of the Original EA Agreement. *See, e.g.*, A72

¶ 34 ("[T]he huge and immediate success of *Rock Band* following its November 2007 launch gave Defendants an opportunity to negotiate for a reduction of the distribution fees in 2008 if EA wanted to *retain the distribution rights to Rock Band and its sequels*." (emphasis added)), A72 ¶ 37 ("EA offered Harmonix a reduction in 2008 distribution fees in order to *retain the worldwide distribution rights to Rock Band and its sequels*." (emphasis added)). Courts in this state have considered external documents on a motion to dismiss with far fewer references in the operative pleading. *See, e.g.*, *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *9 n.79 (Del. Ch. Jan. 31, 2013) (considering email referenced in 2 paragraphs in the complaint, and letter referenced in only 1 paragraph); *Fletcher Int'l, Ltd.* v. *ION Geophysical Corp.*, 2011 WL 1167088, at *3 n.17 (Del. Ch. Mar. 29, 2011) (considering agreement "characterize[d]," but "not refer[red] to [by its] express terms," in 3 paragraphs of the complaint).

In sum, Plaintiff cannot have it both ways: he cannot discuss and rely upon the Original EA Agreement in his Amended Complaint, and then cry foul when the Court of Chancery looks to the document to determine what it actually says. *See Fletcher Int'l*, 2011 WL 1167088, at *3 n.17 ("[A] plaintiff may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms."); *see also Midland Food Servs., LLC* v. *Castle Hill Holdings V, LLC*, 792 A.2d 920, 925 n.5 (Del. Ch. 1999) ("The fact that [plaintiffs] chose to describe the Resolution Agreement in their complaint but not to attach it should not preclude consideration of its clear terms. To hold otherwise would be to encourage the filing of misleading complaints that strategically omit crucial infor-

mation and to subject defendants to the substantial burdens of pre-trial discovery in cases that, if pled straightforwardly, can be resolved on a motion to dismiss." (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 69)). The lower court correctly considered the document in dismissing the implied covenant claim.

2. The Original EA Agreement demonstrates that the Selling Shareholders could not have been denied the benefit of their bargain under the Merger Agreement.

The lower court correctly concluded from the Original EA Agreement that the Selling Shareholders could not have been denied the benefit of their bargain under the Merger Agreement because the Original EA Agreement already provided EA with the right to distribute Harmonix products for certain agreed-upon fees for the duration of the earn-out period—indeed, through March 2010. *See* A373 § 37(a) (providing that the term of the Original EA Agreement "shall commence on [March 6, 2007] and shall continue for three years thereafter"). Therefore, Plaintiff's allegation (made "[o]n information and belief," *see* A72 ¶ 37) that EA had offered Harmonix lower distribution fees for the period through 2008 was not reasonably conceivable, as those fees were already secure. EA must have been—and was—seeking an extension of distribution rights after March 2010, and was offering consideration for the extension. Plaintiff's argument that the lower court should not have looked to the terms of the Original EA Agreement in so concluding ignores the fact that the Court of Chancery typically looks to contractual language in determining whether a plaintiff's allegations are reasonably conceivable. *See, e.g.*, *Central Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *25 (Del. Ch. Aug. 7, 2012) (holding that plaintiff did not adequately plead estoppel because it was "not reasonably con-

ceivable" that plaintiff relied on an oral promise by a representative of defendant when the promise directly contradicted the terms of the agreement).

Plaintiff also argues that the Original EA Agreement did not guarantee EA the right to distribute Harmonix products through the end of the earn-out period because Harmonix had the right to terminate the Original EA Agreement based upon (1) substantial changes in "variable costs," namely higher royalty fees for *Rock Band 2*, *see* Pl.'s Br. at 28-30; and (2) the parties' failure to agree upon a "minimum royalty base" and "minimum sales deduction" in Exhibit L to the Original EA Agreement, *see id.* at 30-32. Plaintiff, however, did not include allegations to this effect in his Amended Complaint and never raised these arguments in the briefing before the lower court. Plaintiff's counsel admitted as much at oral argument on Defendants' motion to dismiss. *See* A450-A451 (Tr. 46:23-47:11) (admitting that Exhibit L issue not pled and not briefed); A467 (Tr. 63:17-63:20) (admitting that allegation "that there was a substantial change in variable costs related to Rock Band 2" was "[n]ot in the complaint").[7] As such, Plaintiff waived those arguments before the lower court. *See, e.g.*, *Thor Merritt Square, LLC* v. *Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010) (defendants waived argument because they "did not raise [the] defense until oral argument"); *Criden* v. *Steinberg*, 2000 WL 354390, at *4 (Del. Ch. Mar. 23, 2000) (declining to consider issue "raised for the first time at oral argument").

Because Plaintiff failed to raise these arguments in a fair or timely manner before the lower court, they are not now properly before this Court. Delaware Supreme

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[7] Plaintiff implicitly acknowledges this waiver in its opening brief, referring to arguments that "counsel explained" or made "[d]uring oral argument," rather than referring to paragraphs in the Amended Complaint or portions of its lower court brief. *See* Pl.'s Br. at 26, 27, 30.

Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Supr. Ct. R. 8; *see Smith* v. *Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012). Thus, the Court may excuse a waiver only if the lower court committed an error "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity" of the proceedings. *Smith*, 47 A.3d at 479 (internal quotation marks omitted). This is an "extremely limited" exception, *see Russell* v. *State*, 5 A.3d 622, 627 (Del. 2010), and typically is not applied with respect to arguments regarding document interpretation, as is the case here, *see, e.g.*, *Genger* v. *TR Investors, LLC*, 26 A.3d 180, 197 (Del. 2011) (declining to consider argument regarding revocability of proxy "because it was never fully and fairly presented to the trial court"); *AT&T Corp.* v. *Lillis*, 953 A.2d 241, 252 (Del. 2008) (failing to consider choice-of-law argument with respect to stock option plan because "plaintiffs-appellees never raised this argument before the Vice Chancellor").

Even if Plaintiff had not waived these arguments, however, they have no merit. The Original EA Agreement expressly limited the parties' ability to terminate the agreement: [redacted]

[redacted] The two provisions to which Plaintiff points contain no language that expressly provides for termination. Section 15(e)(i), which Plaintiff argues permits termination in the event of higher royalty fees, says only that the parties "*may revisit and*

[redacted]

renegotiate terms that may be affected by substantial changes in variable costs, such as licensed content costs." *See* A353 § 15(e)(i). The suggestion that such a provision permits outright termination is simply untenable—especially in light of the requirement, which appears later in that same section, that the parties "shall negotiate in good faith." *See id.* Similarly, Schedule L, which indicates that the "minimum royalty base" and "minimum sales deduction" were "[t]o be determined by the Parties in writing," nowhere expressly provides for termination of the Merger Agreement. *See* A403 [redacted]

[redacted] Plaintiff's argument, therefore, defies the basic tenet of contract interpretation that any agreement must be construed "as a whole, giving effect to all provisions therein" *E.I. du Pont de Nemours & Co.* v. *Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *accord State* v. *Dabson*, 217 A.2d 497, 500 (Del. 1966); *Stockman* v. *Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *6 (Del. Ch. July 14, 2009).

For the foregoing reasons, the lower court's dismissal of Plaintiff's implied covenant of good faith and fair dealing claim should be affirmed.

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[9] Moreover, as the lower court ruled, because "[i]t is undisputed that EA began and continued to distribute *Rock Band* (which was launched well after May 31, 2007) under the Original EA Agreement without interruption and with great success for Viacom and Harmonix," it is not plausible that "the failure to have a locked-in Exhibit L to the Original EA Agreement gave Viacom a clear right to terminate the contract without having any obligation to negotiate the amounts of the Minimum Royalty Base and Minimum Sales Deduction in good faith." Pl.'s Br., Ex. A, at 23.

III. The Lower Court Erred in Holding that the Merger Agreement Did Not Impose an Independent Duty to Pay Defense Costs.

A. **Question Presented:** Did the lower court err in holding that the Merger Agreement did not obligate Plaintiff to pay Defendants' cost of defending against third-party claims arising out of the Merger Agreement? This question was preserved for appeal. *See* B429-B430.

B. **Standard of Review:** The decision of the Court of Chancery granting a motion for summary judgment is reviewed *de novo*. *Riverbend Cmty., LLC* v. *Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012). The test is "whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted).

C. **Merits:** The lower court erred in holding that Plaintiff was not obligated under the Merger Agreement to pay Defendants' defense costs. The Merger Agreement specifically obligates the Selling Shareholders to do two things with respect to third-party intellectual property claims. First, it obligates the Selling Shareholders to indemnify Defendants for any losses related to such claims "based upon, arising out of or by reason of" Harmonix's breach of the representations or warranties contained in the Merger Agreement. *See* A153 § 8.2(a)(i). Second, it separately obligates the Selling Shareholders to reimburse Defendants for the costs of defending against third-party claims as to which Defendants "may request indemnification." *See* A156 § 8.2(d)(i), (ii). The obligation to pay the costs of defense necessarily arises before there has been a determination whether the Selling Shareholders breached a representation or warranty. By using the words "may request indemnification," the parties ac-

counted for this fact, and set forth their agreement that the Selling Shareholders were obligated to pay defense costs for any claims that, if proven, would fall within the scope of the representations and warranties in the Merger Agreement. The lower court's contrary and strained interpretation of these provisions ignores the language that sets forth this independent obligation.

As noted above, Section 8.2(a) sets forth the Selling Shareholders' obligation to indemnify Defendants against losses stemming from any breach of the representations and warranties in the Merger Agreement. *See* A153 § 8.2(a)(i).

Section 8.2(d) addresses third-party claims, including the independent obligation for Plaintiff to pay the cost of defending against such claims. Section 8.2(d)(i) provides that "[Viacom] shall give [Pla intiff] written notice of any claim . . . by or in respect of a third party as to which [Viacom] *may request indemnification* pursuant to Section 8.2(a)." *See* A156 § 8.2(d)(i) (emphasis added). This section also provides that "[Viacom] shall have the right to direct, through counsel of its own choosing . . . the defense or settlement of any such claim *at the expense of the applicable indemnifying parties*." *Id.* (emphasis added). The term "any such claim" clearly refers back to "any claim . . . as to which [Viacom] *may request indemnification* pursuant to Section 8.2(a)." Therefore, by its express terms, this section creates a reimbursement obligation that is triggered by Viacom's written notice of a third-party claim as to which it "may request indemnification"—*i.e.*, a claim that alleges wrongdoing covered by the Merger Agreement's representations and warranties.

Section 8.2(d)(ii) also sets forth a duty to pay defense costs, this time with respect to certain kinds of third-party claims. Specifically, it provides that "[Plaintiff]

shall be entitled to assume the defense of any such claim"—*i.e.*, claims for which Viacom "may request indemnification" under Section 8.2(a). *See* A156 § 8.2(d)(ii). It also contains a crucial exception to this provision: "[Plaintiff] shall *not* have the right to assume control of the defense of any such claim, and *shall pay the reasonable fees and expenses of counsel retained by* [*Viacom*], if the claim which [Plaintiff] seeks to assume control (A) seeks non-monetary relief." *See* A156 § 8.2(d)(ii) (emphasis added). As with Section 8.2(d)(i), this section sets forth an obligation to pay defense costs that is triggered solely by Viacom's written notice of a qualifying third-party claim—namely one as to which it "may request indemnification."

Whether under Section 8.2(d)(i) or 8.2(d)(ii), the obligation to pay defense costs is not contingent on a court's later determination that the Selling Shareholders have actually breached a representation or warranty within the Merger Agreement.

The lower court's interpretation of Section 8.2(d) ignored these express terms. The court observed that "because Viacom's only ground for seeking indemnification is under § 8.2(a)(i), . . . which makes the obligation to indemnify dependent on the existence of a 'breach' of a representation or warranty, Viacom must show that there has been such a breach." *See* Ex. A, at 11. Section 8.2(d), however, contains no explicit

or implicit requirement that a court first determine that there has in fact been a breach of a representation or warranty under Section 8.2(a)(i) before the duty to pay defense costs is triggered. If it did, it might have referred to claims as to which Viacom "demonstrates that it is *entitled to indemnification*," instead of claims for which it "*may request indemnification*." The lower court improperly imported terms from Section 8.2(a)(i)'s duty to indemnify in construing Section 8.2(d)'s independent duty to pay defense costs. *See, e.g.*, *Ivize of Milwaukee, LLC* v. *Compex Litig. Support, LLC*, 2009 WL 1111179, at *9-*10 (Del. Ch. Apr. 27, 2009) (declining to import a "knowledge qualifier" from one section of the agreement into another, and instead "examin[ing] only the words actually written in each of the sections").

The lower court seemed to suggest that Defendants' interpretation of Section 8.2(d) was not viable because if that section actually set forth an independent duty to pay defense costs, it would have been worded more clearly to do so. *See* Ex. A, at 11-12. But the language does clearly set forth such an obligation, using language such as "*shall pay the reasonable fees and expenses of counsel*." It is hard to imagine how the parties could have been clearer. And in any case, the court must ascertain the parties' objectively manifested intent not by reference to hypothetical alternative language, but by looking to the plain language of the agreement. *See Citadel Holding Corp.* v. *Roven*, 603 A.2d 818, 822 (Del. 1992); *see also Seaford Golf & Country Club* v. *E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1260 (Del. 2007).

The lower court also suggested that Defendants' interpretation of Section 8.2(d) was not viable because it could lead to the Selling Shareholders being responsible for paying for the defense of claims that they never could have predicted, including frivo-

lous ones. *See* Ex. A, at 12. Section 8.2(d), however, does not set forth an *unlimited* duty to defend; instead, it circumscribes the Selling Shareholders' duty to defend to claims which allege wrongdoing covered by the Merger Agreement's representations and warranties. In any event, to the extent that Section 8.2(d) sets forth a duty to defend against potentially unforeseeable or frivolous claims, this is a natural—and foreseeable—result of the duty to defend. The duty to defend is "broader" than the duty to indemnify, *United Westlabs, Inc.* v. *Greenwich Ins. Co.*, 2011 WL 2623932, at *8 (Del. Super. June 13, 2011), and "includes claims that are *potentially* covered," *DynCorp* v. *Certain Underwriters at Lloyd's, London*, 2009 WL 3764971, at *3 (Del. Super. Nov. 9, 2009). This interpretation is in line with the rule in Delaware that "whether a duty to defend exists can be resolved before the underlying litigation is resolved." *LaPoint* v. *AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009); *accord Pac. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254 (Del. 2008) ("In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend. The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy." (internal quotation marks omitted)). By contrast, the duty to indemnify arises "only when the facts in [the underlying claim] are actually established." *United Westlabs*, 2011 WL 2623932, at *8.

For example, the contract in *United Westlabs*, similar to the Merger Agreement in this case, set forth a duty to defend that was separate from and broader than the duty to indemnify. In that case, the plaintiff insureds entered into an insurance contract

with the defendant insurers and sought defense costs arising out of a third-party claim that they alleged fell within the terms of the insurance contract. *See id.* at *1. The contract specifically provided for coverage to the plaintiffs both "when a Wrongful Act occurs, *and* when the Claim arising from that Wrongful Act is first made." *Id.* at *9. The contract defined a "Claim" as "a demand or assertion of a legal right made against any Insured," and a "Wrongful Act" as "conduct or alleged conduct . . . by the Insured or any person or organization for whom the Insured is legally liable." *Id.* at *3 (alteration in original). Therefore, the contract set forth a duty to defend that was triggered by the third party's filing of a "Claim" alleging a wrongful act—not by a determination that the wrongful act actually occurred, which triggered a duty to indemnify. *Id.* at *4, *9-*11. Similarly, the Merger Agreement here sets forth a duty to defend triggered by Defendants' request for indemnification on a third-party claim making allegations covered by the representations and warranties in the Merger Agreement, and a separate duty to indemnify triggered by a determination as to the wrongful conduct alleged in that claim.[10]

Although, as the lower court pointed out, the pre-indemnification duty to pay defense costs arises most frequently in the context of insurance cases, *see* Ex. A, at 12 & n.47, it is by no means limited to that context. Indeed, in *LaPoint*, this Court applied the concept of an independent and broader duty to pay defense costs in the context of a merger agreement. In that case, the plaintiff stockholder representatives sued

[10] The lower court distinguished *United Westlabs* because the contract in that case provided for the payment of defense costs where the claims asserted were "groundless, false, or fraudulent," *see* Ex. A, at 12 n.46. This argument misses the mark, because the court in *United Westlabs* did not rely upon this language specifically, but instead relied upon the fact that the contract provided for separate coverage for both "Claims" and "Wrongful Acts." *See* 2011 WL 2623932, at *10-*11.

the defendant corporation for breach of a merger agreement, alleging that the defendant failed to adequately promote the acquired business and to properly calculate earn-out payments. *See LaPoint*, 970 A.2d at 188-89. The plaintiffs likewise demanded payment of attorney's fees from the defendant, claiming that "[i]f [the defendant] had not breached the Merger Agreement, Plaintiffs would not have incurred these fees and expenses." *Id.* at 189. In considering the plaintiffs' claim, this Court stated that "the question of whether a duty to defend exists can be resolved before the underlying litigation is resolved. Further, a '[d]efense may be required even if there never turns out to be any liability to indemnify.'" *Id.* at 197 (alteration in original) (quoting *Molex Inc.* v. *Wyler*, 334 F. Supp. 2d 1083, 1086 (N.D. Ill. 2004)).

The lower court held that *LaPoint* was inapplicable because the Court in that case quoted the above language from *Molex* v. *Wyler*. *See* Ex. A, at 12 n.47. But this Court's use of the language from *Molex* makes clear that it was adopting the rule from *Molex* more broadly. *See LaPoint*, 970 A.2d at 197. And other courts that have considered *LaPoint* have found that it stands for the proposition that, where the appropriate contractual language such as that in the Merger Agreement is present, Delaware law recognizes a duty to defend that is independent of and broader than the duty to indemnify, even outside the context of insurance contracts. For example, in *Convergent Wealth Advisors LLC* v. *Lydian Holding Co.*, 2012 WL 2148221 (S.D.N.Y. June 13, 2012), a federal district court in New York considered a plaintiff's right to defense costs pursuant to a purchase agreement containing a Delaware choice-of-law provision. *See id.* at *1. The court looked to Delaware law—and to *LaPoint* in particular—in considering whether the claim was ripe for adjudication, and held that the

"plaintiff's injury is not speculative; the plaintiff has expended significant sums in its defense." *Id.* at *6. Notably, the court observed that "[u]nder Delaware law, the right to defend claim can be resolved before the underlying litigation—in this case, arbitration—is concluded, as defendant's own case law reveals." *Id.* (citing *LaPoint*, 970 A.2d at 197); *see also Lear Corp.* v. *Johnson Electric Holdings Ltd.*, 353 F.3d 580, 583 (7th Cir. 2003) (interpreting purchase agreement involving acquisition of automotive operations corporation under Delaware law, and observing that "[d]efense may be required even if there never turns out to be any liability to indemnify").

Molex itself also supports the conclusion that even outside the insurance context, the contractual duty to defend is independent of and broader than the duty to indemnify. In *Molex*, the court considered a stock purchase agreement in which the defendant seller agreed both to indemnify and to defend the plaintiff buyer against losses relating to claims made by persons not disclosed in the purchase agreement. *See Molex*, 334 F. Supp. 2d at 1085. When a third-party sued the plaintiff, claiming a right to the acquired shares, the plaintiff sought defense costs and indemnification from the defendant. *See id.* The court held,

> We see no difference between an insured's claim that his insurer has a duty to defend him in on-going litigation and [the plaintiff's] claim here that [the defendant] is bound contractually to defend him in the [third-party] litigation. Whether [the defendant] has a duty to defend [the plaintiff] is a question of contractual interpretation that does not require the resolution of any facts or issues in the underlying action.

Id. at 1086. The same is true here: the Selling Shareholders' duty to defend Defendants against the third-party infringement claims is determined by the Merger Agree-

ment, which provides for defense costs upon a request for indemnification.[11]

Even if the Merger Agreement does not clearly set forth a separate duty to pay defense costs—and Defendants submit that it does—the agreement is at the very least ambiguous as to whether there exists such a duty. This too would preclude the entry of summary judgment in Plaintiff's favor. This Court has held that "where reasonable minds could differ as to the contract's meaning, a factual dispute results and . . . . summary judgment is improper." *GMG Capital Investments, LLC* v. *Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012) (footnotes omitted); *see Bean* v. *Fursa Capital Partners, LP*, 2013 WL 755792, at *8 (Del. Ch. Feb. 28, 2013) (movant must "show that its construction of the contract is the *only* reasonable interpretation" for it to be entitled to summary judgment (internal quotation marks omitted)).

As discussed above, the Merger Agreement provides that the Selling Shareholders shall pay the costs of defending any claim as to which Viacom "*may request indemnification*." *See* A156 § 8.2(d)(i), (ii) (emphasis added). The most plausible reading of this contractual language is that Viacom "may request indemnification" when a third-party makes an allegation which, if true, would support a finding of a breach of a representation or warranty. If, however, the Court disagrees that this is the most plausible reading of the Merger Agreement, then it should at the very least conclude that this language is ambiguous.

Courts in Delaware have frequently held that where an indemnification provision is open to more than one reasonable interpretation, summary judgment is not war-

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[11] The lower court distinguished *Molex* on the basis that "the language in the *Molex* purchase agreement is different from that in the Merger Agreement in this case." *See* Ex. A, at 12 n.47. This assertion, however, finds no support in the *Molex* case, as the court there did not once quote the terms of the underlying purchase agreement.

ranted. For example, in *Eagle Industries, Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228 (Del. 1997), this Court overturned a lower court's grant of summary judgment on the basis of ambiguities in a stock purchase agreement's indemnification provision regarding coverage for product defect claims. The Court held that language in the agreement limiting indemnification to "Damages arising from . . . suits, actions, arbitrations or other proceedings the alleged basis for which arose or occurred on or prior to the Closing Date" was ambiguous. *Id.* at 1230. The Court held that the provision could be read as requiring indemnification against claims where the allegedly defective product was *manufactured or purchased* before closing—or, alternatively, against claims based on *injury* that occurred prior to closing. *See id.* at 1231-32; *see also Moses* v. *State Farm Fire & Cas. Ins. Co.*, 1991 WL 269886 (Del. Super. Nov. 20, 1991) (holding insurance contract's exclusion clause was ambiguous where it could be read as either including or exempting coverage for dishonest acts of independent contractors, and denying summary judgment).

More broadly, courts have recognized that the use of the word "may" can give rise to ambiguity. For example, the U.S. Court of Appeals for the First Circuit considered the impact of the word "may" in deciding whether the Fair Labor Standards Act permitted the removal of claims to federal court. The relevant portion of the statute provided that an FLSA action "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." *Cosme Nieves* v. *Deshler*, 786 F.2d 445, 449 (1st Cir. 1986). As the court observed:

> The words "may be maintained" are ambiguous . . . . They are not an express provision barring the exercise of the right to removal. If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here.

Id. at 451 (footnote omitted); *accord Loutfy* v. *R.R. Donnelley & Sons Co.*, 1992 WL 97761, at *1 (N.D. Ill. May 4, 1992). In these cases, Congress's use of the phrase "may be maintained" left open the question as to whether actions *had to* remain in state court, or whether the parties *could elect to* keep the action there.

* * *

In sum, the language of Sections 8.2(d)(i) and 8.2(d)(ii) creates an independent obligation for the Selling Shareholders to reimburse Defendants for the costs of defending against third-party claims when the third party makes an allegation which, if true, would support a finding of a breach of a representation or warranty. Thus, Defendants' April 24, 2008 and July 21, 2008 notices of third-party claims triggered a duty, on the part of the Selling Shareholders, to pay the costs of defense under Section 8.2(d)(i). Further, [redacted]

[redacted]

the Selling Shareholders also had a duty to pay the costs of defense under Section 8.2(d)(ii).

At a minimum, if Sections 8.2(d)(i) and 8.2(d)(ii) did not clearly create a separate obligation for the Selling Shareholders to pay Defendants' defense costs, then the Merger Agreement is ambiguous on this point. As such, summary judgment was not warranted.

IV. The Lower Court Erred in Holding that There Was No Breach of the Representations and Warranties in the Merger Agreement.

A. **Question Presented:** Did the lower court err in holding, as a matter of law, that there was no breach of the representations and warranties in the Merger Agreement? This question was preserved for appeal. *See* B423-B429, B430-B432.

B. **Standard of Review:** The decision of the Court of Chancery granting a motion for summary judgment is reviewed *de novo*. *Riverbend Cmty.*, 55 A.3d at 334. The test is "whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted).

C. **Merits:** Separate and apart from Plaintiff's duty to pay Defendants' defense costs with respect to the third-party claims at issue, Plaintiff also owed Defendants a duty to indemnify them against any losses arising out of a breach of the representations and warranties in the Merger Agreement. *See* A153 § 8.2(a)(i). The lower court erred in ruling as a matter of law that Defendants' losses with respect to the third-party claims filed by Activision, 1st Media, Gibson, and Konami did not arise out of a breach of those representations and warranties. The record demonstrates a breach of the representations and warranties concerning Harmonix's business contained in Sections 4.15(k) and 4.15(o)(i).

1. The representations and warranties regarding Harmonix's business in Sections 4.15(k) and 4.15(o)(i) were breached.

Section 4.15(k) provides that with respect to "Company Developed Software . . . used in Games in development or in Current Games . . . the Company (A) has adequate rights therein as is necessary for the current use (if any) of such Company De-

veloped Software." This provision applies to all four third-party claims at issue because those claims allege that Harmonix did not, in fact, have adequate rights for the "current use" of "Company Developed Software" in a "Game[] in development"—namely, the software used in *Rock Band*.

As an initial matter, *Rock Band* constitutes "Company Developed Software" under Section 4.15(k) of the Merger Agreement, defined as "all Software developed by the Company and, if delivered to a third party, in the form so delivered by the Company." *See* A130 § 4.15(w)(iii). The lower court ruled that *Rock Band* was not "Company Developed Software" because the video game was not yet fully developed at the time of the merger. *See* Ex. A, at 15 n.50. To support this conclusion, the lower court reasoned that Section 4.15(w)(iii) implies that software that is "developed" must be in a state that can be "delivered to a third party." *See id.* Section 4.15(w)(iii), however, sets forth no such requirement. It merely specifies that "Company Developed Software" includes delivered software in its then-current state "*if* delivered to a third party"—a condition that bears no relevance to the instant case. *See* A130 § 4.15(w)(iii). Ultimately, the Merger Agreement does not define "developed," and, therefore, the Court must accept its plain meaning. *See Sanders* v. *Wang*, 1999 WL 1044880, at *6 (Del. Ch. Nov. 8, 1999) ("Under the plain meaning rule of contract construction, if a contract is clear on its face, the Court should rely solely on the clear literal meaning of the words." (internal quotation marks omitted)). In this context, "Company Developed" plainly means "created or produced" by the company. *See* "Develop," Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/develop (defining "develop" as "to create or produce"). This

interpretation is also supported by the reference, in section 4.15(k), to the use of "Company Developed Software" in "games in development."

Furthermore, the third-party claims at issue here each alleged a violation of the "current use" of *Rock Band* as defined under Section 4.15(k). The lower court ruled that "current use" does not encompass the third-party claims because "current use" must "refer to the use of the intellectual property in October 2006, when Viacom purchased Harmonix," and "[t]he claims for which Viacom seeks indemnification all relate to the final *Rock Band* video game that was produced in November 2007." *See* Ex. A, at 14. Thus, according to the lower court, the third parties "do not allege that any prototype of *Rock Band* before the [merger] infringed" their intellectual property rights. *See id.* at 15. This interpretation takes a far too narrow view of the work that was ongoing at Harmonix in October 2006. Indeed, by describing Harmonix's work at the time of the merger as work on a "prototype," the lower court arbitrarily divided the ongoing development work on *Rock Band* at the time of the merger in October 2006 from the final product release in November 2007. That the third-party claims made allegations regarding the "final, published version of *Rock Band*" is of no moment, *see id.*, since the third parties could not have discovered any potential infringement until *Rock Band* was released to the public. To the extent that Harmonix was allegedly infringing upon third-party intellectual property rights, that infringement started at the moment it began employing the intellectual property at issue in its development of *Rock Band*—in other words, at or before the time of the merger. Indeed, had the third parties known of the alleged infringement mid-development, pre-sale, they likely would have filed suit earlier.

Harmonix's development of the "note highway" [redacted]

[redacted] illustrates this point. At the time of the merger, *Rock Band* was already utilizing a form of the "note highway." *See* B388-B389, B408; *see also* B380. As Alex Rigopulos, Harmonix's CEO explained, "the concept of the note highway was in place at that point in time, I believe." *See* B408. The "note highway" is the central interface between the game player and the game, on which the song's notes are displayed and the player is prompted to "play along." *See* B389, B404-B405. Rigopulos testified that "[i]t is functionally an important part of how you play the game," *see* B405, while Eran Egozy, Harmonix's Chief Technical Officer, testified that "the notion of having a track in a music game is fairly fundamental . . . we had the notion that you would use a track to display the information that the person needs to know about to play the game pretty early on," *see* B389. [redacted]

Finally, because the development of *Rock Band* was well underway at the time of the merger, it clearly constituted a "Game in development." Therefore, Harmonix's work on *Rock Band* software—particularly the "note highway" feature of the game—was a "current use" of "Company Developed Software" in a "Game[] in development," under Section 4.15(k) of the Merger Agreement.

Activision's claims also arise out of a breach of the representations and warranties in Section 4.15(o)(i) of the Merger Agreement. As noted above, this section provides that "neither the operation of the Business, nor any activity of the Company, nor any manufacture, use, importation, offer for sale and/or sale of any Current Game . . .

infringes on . . . any intellectual property rights of a third party."[12] *See* A128-A129 § 4.15(o)(i). The agreement defines "business" as Harmonix's business "as currently conducted." *See* A130 § 4.15(w)(i). Both Harmonix's "business" and "activities" at the time of the Merger Agreement included the company's development of *Rock Band*, including work done at the time on the purportedly infringing "note highway" feature. Even accepting the lower court's novel theory that the October 2006 version of *Rock Band* is a separate and distinct video game from that which was offered for sale in November 2007, Section 4.15(o)(i) covers the work underway in October 2006 on *Rock Band*. Because Section 4.15(o)(i) makes a separate representation as to "manufacture, use, importation, offer for sale and/or sale of any *Current Game*," the representations with respect to the "operation of the Business" and the "activity of the Company" must refer to other activities, such as work on a game in development or a future game not yet in development. Any other interpretation would render the representation as to "any Current Game" mere surplusage, and therefore violate the basic tenet of contract interpretation that "a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless." *Sonitrol Holding Co*. v. *Marceau Invetissements*, 607 A.2d 1177, 1183 (Del. 1992) (citation omitted).

Although the lower court indicated that Defendants' interpretation of Section 4.15(o)(i) would render the phrase "Current Game" redundant, *see* Ex. A, at 17, this simply is not the case. The term "Current Game" would indeed be made redundant if the representations and warranties covered both "Current Games," which are scheduled in the Merger Agreement, as well as future games. But Defendants make

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[12] This section expressly excludes patent claims, *see* A129, § 4.15(o)(i)

no such argument. *Rock Band* is not a "*future* game[]," as the lower court characterized it, but rather a "Game in development." The lower court seems to include within the category of "future games"—a category, notably, that does not exist in the Merger Agreement—anything that is not a "Current Game." But this ignores the fact that the representations and warranties also apply to "Games in development"—which *Rock Band* indisputably was. Indeed, Section 4.15(k), which lists "Current Games" and "Games in development" separately, makes clear that these are to be treated as distinct categories under the Merger Agreement. And, as described above, *Rock Band* was well into the development stage at the time of the merger. If, at the time of the merger, *Rock Band* had not yet existed in any form—if it were a future game *not yet in development*—the lower court's rationale might hold water. But because *Rock Band* was indisputably a "Game in development," the lower court's ruling should be overturned.

2. Defendants provided timely notice of the Konami lawsuit.

Finally, the lower court erred in ruling that Defendants' July 21, 2008 notice to Plaintiff regarding the Konami lawsuit was untimely. As noted above, Defendants provided Plaintiff with an indisputably timely Notice of Claim on April 24, 2008. That Notice of Claim advised Plaintiff of a breach of the representations and warranties under Section 4.15 of the Merger Agreement,

See B294. The Notice of Claim then also provided notice that Defendants had received various notices of claims from third parties, and specifically identi-

fied the Activision, Gibson, and 1st Media claims. Further, it "reserve[d] the right to seek indemnification for any other claims . . . by other third parties that may result due to the Company's breach of its representations and warranties." *See* B295.

As the lower court noted, the Merger Agreement provides that the Selling Shareholders have "no liability with respect to any claim for any breach . . . of any representation or warranty" in the Merger Agreement unless Defendants submit written notice to Plaintiff "of *such a claim* on or before the date which is eighteen (18) months following the Closing Date." *See* A152-A153 § 8.1 (emphasis added); *see also* Ex. A, at 20. This provision does not, however, render Defendants' notice of the Konami lawsuit untimely. By its terms, the April 24, 2008 Notice of Claim provided Plaintiff with notice of "such a claim" by advising Plaintiff that Defendants were asserting a claim that the Selling Shareholders had breached their representations and warranties, and that Defendants would be seeking reimbursement and indemnification for existing and forthcoming claims by third parties.

After Konami sued Defendants, Defendants provided Plaintiff with notice of the Konami lawsuit, [redacted] *See* B376. The April 24, 2008 Notice of Claim notified Plaintiff that Defendants were asserting that there had been breaches of the representations and warranties, and the subsequent July 21, 2008 letter referred back to the April 24 notice, and advised Plaintiff that the Konami lawsuit was yet another result of those breaches. Taken together, these notices were sufficient to satisfy Defendants' notice obligations, and were timely.

Conclusion

For the foregoing reasons, the judgment of the Court of Chancery dismissing Count I of the Amended Complaint should be affirmed, and the judgment of the Court of Chancery granting summary judgment in favor of Plaintiff on Counts II and III should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2013, a copy of the foregoing was electronically served via File & Serve*Xpress* on the following counsel of record:

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