IN THE SUPREME COURT OF THE STATE OF DELAWARE

YATRA ONLINE, INC.,

Plaintiff-Below, Appellant,

v.

EBIX, INC., EBIXCASH TRAVELS, INC., REGIONS BANK, BMO HARRIS BANK, N.A., BBVA USA, FIFTH THIRD BANK, NATIONAL ASSOCIATION, KEYBANK NATIONAL ASSOCIATION, SILICON VALLEY BANK, CADENCE BANK, N.A., and TRUSTMARK NATIONAL BANK,

Defendants-Below, Appellees.

No. 294, 2021

Court below: Court of Chancery of the State of Delaware
C.A. No. 2020-0444-JRS

APPELLANT'S OPENING BRIEF

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Dated: November 2, 2021

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NATURE OF PROCEEDINGS[1]

This appeal concerns the grant of a motion to dismiss by the Court of Chancery.[2]

This action arises in connection with a remorseful buyer undermining the closing of a merger in the wake of the COVID-19 pandemic. On July 16, 2019, Ebix agreed to acquire Yatra in an all-stock transaction. A key deal term for Yatra was a Put Right, valued at $257 million, that would enable former Yatra stockholders to have their stock redeemed for cash during the 25th month after the Merger closed. When Ebix and Yatra agreed to the Merger, the Put Right equaled approximately 17.50% of Ebix's market capitalization.

After the pandemic struck and Ebix's stock price fell, the value of the Put Right ballooned in comparison to Ebix's market capitalization, as demonstrated by the graph below:[3]

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[1] Unless indicated, emphasis and alterations are added, and internal quotations and citations are omitted. References to "¶_" are to the Amended Complaint. Trans. ID. 65909222. A164-A244. Capitalized terms not defined herein have the same meaning as in the Amended Complaint.

[2] Memorandum Opinion, dated August 30, 2021 ("Op.") (attached hereto as Exhibit A).

[3] A814.

In response, Ebix failed to fulfill its most basic contractual obligations, including taking steps to file and allow the SEC to declare effective the Form S-4 necessary to issue the Merger consideration. At the same time, Ebix wrongfully feigned a willingness to renegotiate the deal with Yatra, so that Yatra would not exercise its contractual remedies while, unbeknownst to Yatra, Ebix agreed with its lenders to an amendment to its credit agreement that ***prohibited*** the issuance of the Put Right, *i.e.*, practically foreclosing the remedy of specific performance.

Despite the clear misconduct of Ebix and the Lender Defendants alleged in the Amended Complaint, the Court of Chancery dismissed this action in its entirety. In doing so, the court below misinterpreted the Merger Agreement in holding that contractual damages are unavailable to Yatra and reaching a conclusion that would lead to an absurd result. According to the lower court's ruling, Yatra had to hold open the Merger Agreement for the entire pendency of this litigation in order to be able to recovery money damages – a result at war with the language of the Merger Agreement and which could not have been the intent of these well represented and sophisticated parties.

Additionally, the lower court erred in (a) taking an unduly narrow view of the implied covenant of good faith and fair dealing, (b) ignoring that Ebix's fraud on Yatra alone caused Yatra to lose the remedy of specific performance, thereby suffering a loss directly related to fraud, and (c) applying the incorrect standard to Yatra's tortious interference claims against the Lender Defendants. For these reasons, and those explained more fully below, the Court of Chancery should not have granted Defendants' motions to dismiss and all of the Amended Complaint's claims – both contractual and equitable – should have survived.

SUMMARY OF ARGUMENT

Issue 1: The court below erred in holding that Yatra's termination of the Merger Agreement following the filing of the Original Complaint "extinguishe[d] liability then and there, regardless of whether a claim is pending before termination."[4]

Although this issue appears to be one of first impression, the trial court's holding misinterprets the contract, because the "liability" extinguished by the contract is limited to "obligations" and does not include an action for breach filed prior to the effective time of termination of the contract. Moreover, the lower court's holding misconstrues additional provisions of the Merger Agreement as barring money damages, is contrary to analogous Delaware law, and ignores economic realities, leading to an absurd result; *i.e.*, to recover damages, an aggrieved party would have to hold open a contract during the pendency of a multi-year litigation, continuing to be bound by all its operating covenant restrictions.

Issue 2: The court below erred in holding that (a) the Extension Agreement is not a standalone agreement apart from the Merger Agreement and (b) "Yatra's decision to terminate the Merger Agreement insulated Ebix from liability for alleged breaches of the Extension Agreement."[5]

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[4] Op. 24 n.93.

[5] Op. 33.

The Extension Agreement created new and independent obligations for the parties separate from the Merger Agreement itself. It did not incorporate, and is not subject to, any limitations on liability set forth in the Merger Agreement. Moreover, for the reasons set forth in **Issue 1**, *supra*, because Yatra initiated this litigation before the effective termination of the Merger Agreement, the subsequent termination of the contract did not extinguish Ebix's liability for prior breaches of the Extension Agreement.

Issue 3: The court below erred in holding that "the Merger Agreement leaves no gap to fill with the implied covenant."[6]

Indeed, there are at least two gaps in the Merger Agreement that the implied covenant of good faith and fair dealing bridges. Both those areas involve Ebix's actions to actively undermine the Merger Agreement, denying Yatra the fruits of the benefit of its bargain.

Issue 4: The court below erred in holding that Yatra's fraud claim failed for a lack of loss causation, because Yatra was purportedly unable to sue for specific performance under the Merger Agreement.

The lower court took an unduly narrow view of the specific performance remedy. Yatra affirmatively pled that the SEC had advised it that effectiveness of

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[6] Op. 37.

the Form S-4, which the SEC indicated it would not review, required Ebix to clear the SEC's outstanding Comment Letters. ¶98; A197. Thus, Yatra could have sought to require Ebix to take all steps necessary to clear the Comment Letters, the sole obstacle to the SEC's approval of the Form S-4. Nothing Yatra pled foreclosed this remedy. Yatra did not eliminate loss causation in its pleading. Uncoincidentally, and after dragging its feet for months, Ebix cleared the Comment Letters mere weeks after the institution of this litigation.

Issue 5: The court below erred in holding that "Yatra has failed to allege that the Lender Defendants' entry into the Tenth Amendment was a 'significant factor' in causing the breach of the Merger Agreement,"[7] because specific performance was a remedy purportedly unavailable to Yatra.

The Court of Chancery incorrectly conflated "loss causation" (an element of pleading fraud) with conduct that was a "significant factor in causing the breach," the actual element of tortious interference for lender liability claim. While loss causation in fraud demands pleading that ties the alleged misrepresentation to the loss suffered, tortious interference requires merely that Yatra allege (as it amply did here) that Lender Defendants' conduct was a "significant factor in causing" the breach, not the "sole" factor. Additionally, for the reasons set forth in **Issue 4**, *supra*,

[7] Op. 44.

specific performance ***was*** a remedy available to Yatra and thus even if held to a loss causation standard, dismissal was improper.

STATEMENT OF FACTS

I. YATRA AND EBIX ENTER INTO THE MERGER AGREEMENT

On July 16, 2019 (the "Signing Date"), Yatra and Ebix agreed to the Merger. A179 ¶39. The Merger Agreement provided that, upon the closing (the "Closing"), each Yatra share would convert into Ebix convertible preferred stock (the "Convertible Preferred Stock"). A179 ¶40. The parties also agreed on a Put Right as part of the consideration, enabling former Yatra stockholders who did not exercise the conversion right to have their stock redeemed for $5.31 per share in cash during the 25th month after the Closing. *Id*. The Put Right implied a Yatra equity value of $257 million and, as of the Signing Date, equaled approximately 17.50% of Ebix's market capitalization. *Id*.

As relevant to this action, the Merger Agreement includes the following provisions that Ebix breached:

- <u>Section 4.8</u>: Ebix represented and warranted that all public disclosures complied or would comply with all SEC rules and regulations and federal securities laws. A180 ¶44.

- <u>Section 4.10</u>: Ebix represented that all financial statements complied or would comply with applicable accounting requirements. A181 ¶46.

- <u>Section 6.1(a)</u>: Ebix covenanted to file, no later than 45 days after the Signing Date, the Form S-4 with the SEC, and thereafter use "reasonable best efforts" to have the SEC declare the Form S-4 effective "as promptly as practicable after such filing" (the "Form S-4 Provisions"). A182-A183 ¶48.

- Section 6.5(a): Yatra and Ebix covenanted to use "reasonable best efforts" to ensure that all closing conditions would be satisfied, including Ebix having the SEC declare the Form S-4 effective. A183 ¶50.

The Merger Agreement did not have an automatic termination provision; rather, the parties had a discretionary termination right (the "Outside Date Termination Right"). A223 ¶177. Either party could terminate the Merger Agreement after April 12, 2020 (the "Outside Date"), provided that such party had not breached the Merger Agreement resulting in the failure of the Closing. A184 ¶54.

II. EBIX DRAGS ITS FEET PREPARING AND FILING THE FORM S-4

To issue the Convertible Preferred Stock (*i.e.*, the Merger consideration to buy Yatra), Ebix had to file and the SEC had to declare effective the Form S-4. Ebix covenanted to file the Form S-4 with the SEC no later than August 30, 2019, and thereafter to "use its reasonable best efforts" to have the SEC declare the Form S-4 effective "as promptly as practicable after such filing." A185 ¶56; A070 §6.1(a). Ebix breached these Form S-4 Provisions, delaying the closing.

A key consideration for the preparation of the Form S-4 was whether Ebix would have to include pro forma financials for the post-Merger company. A185-A186 ¶57. Ebix prepares its financials in accordance with U.S. GAAP. A186 ¶58. Yatra, however, had historically prepared its financials in accordance with International Financial Reporting Standards ("IFRS"). *Id*. Converting Yatra's financials from IFRS to GAAP would be a time-intensive process. A186 ¶59.

Despite Yatra pressing Ebix on the issue, Ebix ignored the matter altogether and dragged its feet, which ultimately delayed the decision whether to convert and thus the preparation of the pro forma financials. A186-A189 ¶¶59-60, 64-69.

On September 4, 2019, Ebix confirmed Yatra's prior conclusion that pro forma financials ***would*** be needed for the Form S-4 and requested Yatra to prepare GAAP financials for the prior two years. A189 ¶71. On October 17, 2019, Yatra provided Ebix with the requested financials, which enabled Ebix to quickly compile pro forma financials. A190 ¶76. Thereafter, Ebix's stock price fell sharply, from a closing high of $43.05 on November 5, 2019 to a closing low of $31.06 on November 22, 2019. A191 ¶79. As a result, the relative value of the Put Right increased to nearly 26% of Ebix's market capitalization.

Perhaps preoccupied with its declining share price and consistent with its delay tactics, not until December 12, 2019, ***nearly five months after execution of the Merger Agreement and two months after Yatra had supplied its GAAP financials***, did Ebix finally send Yatra a draft Form S-4, with pro forma financials included. A192 ¶81. Eventually, Ebix filed the Form S-4 on January 17, 2020, ***185 days*** after the signing of the Merger Agreement. *Id*.

III. EBIX HIDES ITS ACCOUNTING PROBLEMS FROM YATRA AND FAILS TO TAKE ACTION TO SECURE SEC APPROVAL OF THE FORM S-4

Unbeknownst to Yatra until it reached out to the SEC to inquire as to the timing of the effectiveness of the Form S-4, Ebix received a series of Comment Letters from the SEC starting in September 2019 regarding its periodic reports that questioned Ebix's accounting policies and procedures. A193 ¶85.

Between September 12, 2019 and the date of Yatra's eventual termination of the Merger Agreement, Ebix received ***five Comment Letters***. A194-A195 ¶90. Market practice is to work quickly and collaboratively with the SEC to resolve any comments on accounting policies and practices. A195 ¶91. Yet, in the ***nine*** months of exchanging letters with the SEC, Ebix habitually requested extensions and failed to resolve the SEC's comments, which resulted in the SEC being unwilling to deem effective the Form S-4, in turn preventing the Merger from closing. A195, A204 ¶¶91, 122.

Yatra only learned about the existence of the Comment Letters through its direct communications with the SEC on January 24, 2020. A197 ¶98. During Yatra's conversation with the SEC, the Commission advised Yatra's counsel that it did not anticipate performing a substantive review of the Form S-4 and that the effectiveness of the document hinged on Ebix's clearing its unresolved Comment Letters. *Id*. When Yatra later inquired of Ebix "how significant" the comments were, as well as Ebix's "timing for responding to the comments and resolving with the SEC," Ebix advised that it was "***expecting prompt resolution and clearance***." A197 ¶100.

Ebix, however, remained evasive about the Comment Letters. For instance, when Yatra requested a copy of the February Comment Letter, Ebix refused to produce it. A199 ¶105. This stubbornness coincided with a drastic drop in Ebix's stock price. As of March 23, 2020, the Put Right equaled approximately 60.67% of Ebix's market capitalization. A202 ¶113.

On March 27, 2020, after learning about a new Comment Letter and in the face of Ebix's refusal to turn over its correspondence with the SEC, Yatra made a formal demand for such information from Ebix under the Merger Agreement. A201, A202 ¶¶111, 114. On March 30, 2020, Ebix's counsel provided Yatra's counsel with the September, December, February, and March Comment Letters, along with Ebix's four requests for extensions and three responses to the SEC. A202 ¶115.

IV. EBIX FAKES RENEGOTIATION TO LULL YATRA INTO NOT PROTECTING ITS RIGHTS

On Saturday, April 4, 2020, with the April 12 Outside Date looming, Raina told the Yatra Board that the deal reflected in the Merger Agreement, including the Put Right, could not happen. A208 ¶133. As of the prior trading day, April 3, 2020, the Put Right equaled approximately 68.39% of Ebix's market capitalization. *Id*.

On April 8, 2020, Yatra sent Ebix a notice under the Merger Agreement informing it that: (a) Ebix was in breach of the Merger Agreement based upon its repeated and inexcusable delays in the preparation and filing of the Form S-4 and its failure to clear the SEC's comments; and (b) due to these breaches, the Outside Date Termination Right was unavailable to Ebix. A209 ¶138.

The notice expressed a willingness to push out the Outside Date and explore renegotiating the Merger, but it also made clear that any conversations were "on the condition that such extension ***does not constitute a waiver of or otherwise impair Yatra's rights to enforce the Merger Agreement***." A209-A210 ¶139. On April 12, 2020, the parties agreed to extend the Outside Date until April 27, 2020, and thereafter agreed to two more extensions—until April 30, 2020 and May 4, 2020. A210-A211 ¶¶140, 142.

A. Ebix Dangles Revised Terms In Front Of Yatra

On May 3, 2020—a day before the extended Outside Date—Ebix provided a term sheet (the "Heads of Terms") for a renegotiated deal. A211 ¶143.

Ebix's proposed Heads of Terms kept the Merger in play and caused Yatra not to immediately sue for specific performance, terminate the deal, or seek other relief after the lapse of the Outside Date. A211 ¶143. The Heads of Terms included, among other things, that:

- Ebix would grant Yatra a stock dividend in exchange for the Put Right;
- convertible preferred stock would be issued that could be converted into common stock in certain specified circumstances;
- Yatra could raise $10 million in incremental capital, subject to Ebix's review and approval; and
- the expense reimbursement for Ebix would be reduced should Yatra stockholders reject the transaction.

A211 ¶144.

Although the Heads of Terms contemplated a stock dividend, it soon became clear the offer would require Ebix to issue more than 20% of its stock, necessitating an Ebix stockholder vote under NASDAQ rules. A212 ¶145. Not wanting to hold that vote, on or about May 3 or May 4, 2020, the CEOs of each company, Shringi and Raina, had telephonic discussions in which Ebix CEO Raina agreed to modify and enhance certain provisions of the Heads of Terms, including:

- a reduction in the total number of shares issued in the stock dividend to be offset with equivalent economic consideration;
- Ebix would assume the risk associated with the SEC's investigation by agreeing to pay Yatra a $10 million break-up fee if Ebix could not clear the Comment Letters by November 30, 2020; and

- Ebix would provide a loan in the amount of $10 million to Yatra on commercially reasonable terms.

A212 ¶146. The parties never formally executed the Heads of Terms. A213 ¶148.

B. Ebix Renegotiates The Credit Agreement With The Lender Defendants To Foreclose The Issuance Of The Put Right

At this same time, and unbeknownst to Yatra, the Lender Defendants and Ebix negotiated the Tenth Amendment to the Credit Agreement, whereby Ebix sought increased liquidity and relief from debt covenants in the face of the COVID-19 pandemic. A208 ¶134. As part of these negotiations, the parties also agreed to prohibit Ebix from issuing the Put Right ***despite all knowing the Merger Agreement still was in full force and effect.*** A208-A209 ¶135.

In particular, in the Ninth Amendment to the Credit Agreement, dated as of September 27, 2019 – *i.e.*, after Yatra and Ebix had entered into the Merger Agreement – Ebix and the Lender Defendants amended the Credit Agreement to expressly provide for the Put Right, demonstrating they all understood the impact of that provision in the Merger Agreement. A208-A209, A215-A216 ¶¶135, 154-55.

Ebix and the Lender Defendants reversed course in the Tenth Amendment, and foreclosed Ebix's ability to issue the Put Right to Yatra, or issue any other equivalent non-equity consideration. A217-A221 ¶¶162-69. Indeed, since issuance of the Put Right would immediately cause an event of default under the Tenth Amendment and an acceleration of all amounts Ebix owed to the Lender Defendants, the Tenth Amendment effectively precluded any meaningful specific performance remedy for Yatra.

Through the Tenth Amendment, Ebix and the Lender Defendants prevented Ebix from issuing the Put Right to Yatra, which it was contractually required to do under the Merger Agreement. On May 7, 2020, when Ebix and the Lender Defendants executed the Tenth Amendment, the Put Right equaled approximately 40.37% of Ebix's market capitalization. A216 ¶157. But Ebix never told Yatra about the amendment and pushed on with pretend re-negotiation.

C. Ebix Continues To String Yatra Along

In a May 8, 2020 email, Yatra expressed a willingness to renegotiate the Merger within certain parameters. A222-A223 ¶176. The email also attached a draft press release that Yatra would disseminate should Ebix purport to terminate impermissibly the Merger Agreement, which included discussion of the Comment Letters. A223 ¶177. With Ebix set to announce its first quarter financial results three days later, it wanted to avoid the stockholder scrutiny sure to follow upon its accounting issues coming to light. A223 ¶179.

On May 14, 2020, Yatra and Ebix agreed to a fourth extension of the Outside Date (the "Extension Agreement"),[8] which not only pushed out the Outside Date to

[8] *See* A1393-A1397.

June 4, 2020, but also imposed certain affirmative obligations on Ebix that mirrored the parameters set forth in the May 8, 2020 email, including to:

- make its officers and legal counsel available for diligence sessions "necessary to satisfactorily assess the diligence issues" (the "Diligence Covenant");
- provide Yatra a proposed draft of the revised certificate of designations of the Convertible Preferred Stock (the "COD Covenant");
- provide Yatra a proposed draft Merger Agreement amendment, which "shall include provisions for an interim $10,000,000 financing from Ebix to Yatra" (the "Financing Covenant"); and
- "promptly provide revised drafts of transaction documents . . . and negotiate in good faith with Yatra." (the "Good Faith Covenant.")

A223-A224 ¶180. Ebix failed to live up to these contractual obligations.

On May 18, 2020, in accordance with the Diligence Covenant, Yatra, Ebix, and their advisors met for a diligence session. A224-A225 ¶182. Yatra asked questions about Ebix's accounting policies and procedures, as well as the status of clearing the Comment Letters. *Id*. Despite Yatra having the right to ask questions "necessary to satisfactorily assess the diligence issues" (and such accounting issues being core to the ability to clear the Comment Letters, gain approval of the Form S-4, issue the Convertible Preferred Stock, and close the Merger), Ebix refused to provide any detail. *Id*. Instead, Ebix merely pointed Yatra to its public filings, and Raina stated, "this is not a technical accounting call for me to give you detailed answers on our disclosures." A225 ¶183. Ebix also refused to share draft responses to Comment Letters, pretextually saying that it was not at liberty to share such responses until its auditors had reviewed them. *Id*.

Additionally, Ebix did not provide Yatra a proposed draft of the revised certificate of designations as required by the COD Covenant. A225 ¶184. And, Ebix did not fulfil its obligations under the Good Faith Covenant either.

Ebix had agreed to send Yatra a proposed draft Merger Agreement amendment (the "Draft Amendment") by May 18, 2020. A225 ¶185. Ebix met this deadline, but the Draft Amendment materially modified, or all together deleted, certain key terms that had been agreed upon between the parties pursuant to the Heads of Terms and the subsequent discussion between Shringi and Raina:

- In exchange for eliminating the Put Right, Ebix had offered to issue a stock dividend for the Convertible Preferred Stock payable 25 months after Closing. Raina thereafter promised to reduce the number of shares issued the dividend to avoid an Ebix stockholder vote but offset that reduction with equivalent consideration. The Draft Amendment did not include ***any*** stock dividend ***or*** corresponding equivalent consideration.

- Ebix agreed that Yatra could raise up to $10 million prior to the Closing. Instead of allowing Yatra to access capital on market terms, Ebix proposed a predatory structure that could allow Ebix to seize one of Yatra's crown jewel assets for pennies on the dollar. Specifically, Ebix proposed that it would lend the $10 million to Yatra and take the equity of one of Yatra's subsidiaries as collateral. Such subsidiary is worth substantially more than $10 million. Ebix's offer required that, if the revised merger agreement were terminated ***for any reason***, Yatra would have to repay the loan ***within ten days or Ebix could foreclose on all of the equity of the subsidiary***.

- Ebix had proposed assuming the risk of the SEC not clearing its comments and the Form S-4 not being deemed effective. Specifically, Ebix had agreed to pay a $10 million break fee to Yatra should it not get the required SEC approvals, in addition to any other remedies that Yatra could seek under the Merger Agreement and the Extension Agreement. This break fee concept is entirely absent from the Draft Amendment.

A226 ¶186. When Yatra's counsel questioned Ebix's counsel about this "bait and switch," Ebix's counsel simply advised such terms were "off the table." A227 ¶187.

The extended Outside Date of June 4, 2020 thereafter elapsed. A228-A229 ¶193. Accordingly, Yatra declared material breaches of the Merger Agreement and the Extension Agreement and filed its Original Complaint against Ebix. *Id*. Thereafter, Yatra's notice of termination of the Merger Agreement (the "Termination Notice") became effective. *Id*.

On June 19, 2020, or less than two weeks after Yatra terminated the Merger Agreement, Ebix secured clearance of all of its Comment Letters from the SEC. A229 ¶194. On August 9, 2020, Ebix filed a Form 10-Q that made public the Tenth Amendment. A222 ¶174. Yatra filed the Amended Complaint on September 25, 2020, adding additional claims and the Lender Defendants as parties.

On August 30, 2021, the Court of Chancery dismissed the Amended Complaint in its entirety.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT TERMINATION OF THE MERGER AGREEMENT FOLLOWING INITIATION OF THIS LITIGATION EXTINGUISHED EBIX'S LIABILITY

A. Question Presented

Did the trial court err in holding that Yatra's termination of the Merger Agreement following the filing of the Original Complaint "extinguishe[d] liability then and there, regardless of whether a claim is pending before termination"?[9]

B. Scope of Review

The Court's review of the decision on a motion to dismiss under Ch. Ct. R. 12(b)(6) is *de novo*.[10] Plaintiff is entitled to have the Court accept all well-pleaded factual allegations as true and draw all reasonable inferences in its favor, and this Court should only affirm the grant a motion to dismiss if plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[11]

C. Merits of Argument

The court below erred in holding that Yatra's termination of the Merger Agreement ***after*** initiating this litigation extinguished all of Ebix's liability (except

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[9] Op. 24 n.93. Although the Court below noted that the parties disputed whether a claim had been commenced prior to the effective time of the termination, it did not decide the issue and effectively accepted that the claim had been filed prior to termination. *Id*.

[10] *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 717 (Del. 2020).

[11] *Id*.

for fraud). Although this issue appears to be one of first impression, the trial court's holding misinterprets the contract, is contrary to analogous Delaware law, ignores economic realities, and would lead to an absurd result.

1. ***The Court of Chancery Misapplied Section 8.2***

Section 8.2 of the Merger Agreement provides that, in the event of termination, "the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto . . ." (with certain exceptions).[12] The court below incorrectly concluded that this language released the parties from ***any and all liability***, rather than only liability in respect to ongoing "obligations" which the contract says "shall terminate."

Yet, as the lower court itself expressly held, the terminated "obligations" are those arising under the Merger Agreement itself[13] (*e.g.*, operate the business in the ordinary course between signing and closing;[14] provide access to certain information;[15] indemnify and maintain insurance for officers and directors[16]). And, to make this point even more clearly, the lower court relied on the language immediately following "with respect thereto" as "except[ing] certain obligations

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[12] A087 §8.2.

[13] Op. 23-24.

[14] A065 §5.1.

[15] A076 §6.4.

[16] A079-A081 §6.8.

under the Merger Agreement, as specifically enumerated, from the effects of the contractual limitation of liability."[17] Such logic effectively reaffirmed that the contract itself points to a definition of "obligations," which is consistent with the reading that the "obligations" referred to are those that arise under the Merger Agreement.[18]

Here, however, the lower court applied the contractual language terminating liability for "obligations" to a chose in action. Yatra seeks damages to redress Ebix's prior breaches of its contract, not to compel performance of those "obligations." In short, the plain meaning of the word "obligations," both broadly and in the context in which it arises, is insufficient to express a clear and shared intention of the drafters to extinguish a pre-existing lawsuit seeking a remedy for past breaches of contract.[19] In other words, the term "obligation" contextually is not broad enough to encompass an unquantified "chose in action," *i.e.*, this lawsuit.

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[17] Op. 24.

[18] Indeed, *Black's Law Dictionary* defines "obligation" as "[a] formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., ***a duty arising by contract***." OBLIGATION, Black's Law Dictionary (11th ed. 2019).

[19] *See, e.g.*, *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *6 (Del. Ch. June 13, 2008) ("When interpreting a contact, the court strives to determine the parties' shared intent.").

For a similar reason, the lower court's reliance on *AB Stable VIII LLC v. Maps Hotels & Resorts LLC*[20] is misplaced. Under the common law described by the *AB Stable* court, the general rule is that when termination results in an agreement becoming void, that action alone does not eliminate liability for a prior breach.[21] Where a contractual provision states that "there shall be no liability on the part of either party" upon termination, such language alters the common law and waives all liability and all contractual remedies.[22] But here, Section 8.2 does ***not*** say that there shall be "no liability" on either party; it says that there will be "no liability . . . with respect" to the "obligations of the parties."[23] In short, by tying liability to "the obligations of the parties," Section 8.2's language is more limiting than what the Court of Chancery described as the language of *AB Stable.*

The balance of the lower court's analysis fares no better. Despite facing an issue of first impression – the effect of the termination of a merger agreement on prior-filed deal litigation – the court below rested its ruling on an "impl[ication]" and a "*See*" citation to Section 709 of *American Jurisprudence*, Second Edition.[24]

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[20] 2020 WL 7024929 (Del. Ch. Nov. 30, 2020).

[21] Op. 26; *AB Stable*, 2020 WL 7024929, at *103.

[22] Op. 26.

[23] A087 §8.2

[24] Op. 24 n.93.

As for the "implication," what the lower court actually held is that Section 8.2's carve-out for liability arising from "fraud occurring prior to such termination" "impl[ied] that liability for all other claims (including contract-based claims) for acts 'occurring prior' to termination do not survive post termination."[25] With respect, dismissal of a party's claim at the pleading stage should never depend on a negative "implication" but instead only on clear contract language.[26]

The lower court's "implication" misses the mark. The contract saves a remedy for fraud ***whether or not a lawsuit exists*** at the time of termination. Here, however, the breach claim was filed prior to the effective date of the termination, and thus a holding that the fraud savings language necessarily implies that other causes of action (whether or not commenced prior to termination) are meant to be released relies too heavily on the carve-out language.

As for Section 709 of *American Jurisprudence*, that authority is both inapposite and actually cuts against the point the lower court sought to support. The treatise provides that "a ***remedy*** is generally exclusive if the contract so declares or

[25] Op. 24.

[26] *See CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2021 WL 2588905, at *12 (Del. Ch. June 14, 2021) ("If the language is clear and unambiguous, the ordinary meaning will establish the parties' intent. But language is ambiguous if it's reasonably susceptible to different interpretations. And on a motion to dismiss, the Court can't just choose between two differing reasonable interpretations of such ambiguous language.").

clearly shows the parties' intention to make it so."[27] Yet, the Merger Agreement does not address the effect of a party commencing litigation ***prior*** to the effective termination of the Merger Agreement.

A close analogy to the present facts is a contractual limitations period, which is akin to a statute of limitations and requires parties to file suit prior to a certain end date in order to preserve their rights.[28] Here, the relevant time period was arguably when the Merger Agreement was still in full force and effect. Filing suit ***before*** termination served as Yatra "putting its stake in the ground" and preserved Yatra's rights to seek damages. A subsequent termination, ***after*** filing suit, therefore should ***not*** function as a liability waiver.[29]

It is black-letter Delaware law that courts avoid "[a]n unreasonable interpretation [of a contract that] produces an absurd result or one that no reasonable person would have accepted when entering the contract."[30] Adopting the lower court's holding would require that Yatra, the aggrieved party, hold open the Merger

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[27] 17A Am. Jur. 2d Contracts §709 (2004).

[28] *See, e.g.*, *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *10 (Del. Ch. Nov. 27, 2013).

[29] *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *15 (Del. Ch. July 11, 2011) (noting that the presence of "express" termination language "strengthens the argument of those commentators who equate the termination date for representations and warranties with the last date to sue on those representations and warranties.").

[30] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

Agreement throughout the pendency of this litigation to recover damages. And, notably, when justifying its holding that "there is nothing absurd about a contract that, in essence, requires parties to sue for breach without terminating the agreement,"[31] the court below cited a section of *American Jurisprudence* regarding a "[n]onbreaching party's choice of remedies ***after repudiation or anticipatory breach***."[32] Yatra, of course never alleged that Ebix repudiated the Merger Agreement or anticipatorily breached the contract.

In sum, under the Court of Chancery's erroneous holding, Yatra arguably would be bound by its obligations under the Merger Agreement for years in the interim between the filing of the complaint and final judgment, requiring it to navigate the contract's restrictive financial and operating covenants (such as a bar on incurring financing without Ebix's approval[33]) that would effectively leave it unable to operate its business.[34] A reasonable person would not have accepted those

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[31] Op. 30 & n.108.

[32] 17A Am. Jur. 2d Contracts, §711 (Aug. 2021 Update).

[33] A065-A068 §5.2.

[34] The Court of Chancery said that Yatra admitted that "its obligations under the Merger Agreement 'ceased, because Ebix materially breached the Merger Agreement.'" Op. 30. With respect to the lower court, Yatra made a legal argument (which it contends is correct) that its obligations under the Merger Agreement ceased upon Ebix's serial, material breaches of the contract. Whether that argument is correct is dependent on judicial resolution. Admissions, on the other hand, are "[v]oluntary and knowing concessions of ***fact***." *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201 (Del. 2008).

conditions when entering into the Merger Agreement, as it renders a money damages remedy (contemplated by the Merger Agreement itself) completely unworkable.

2. ***The Lower Court's Other Contract Holdings Are At Odds With The Plain Language of The Merger Agreement***

The court below also erred in its interpretation of at least two additional provisions of the Merger Agreement – Sections 9.1 and 9.9(c) – both of which permit recovery of money damages following termination of the contract.

a. **Section 9.9(c)**

A bedrock tenant of contract interpretation is that agreements "are to be read as a whole," with each provision "interpreted in harmony with the other provisions." *W. Ctr. City Neighborhood Ass'n v. W. Ctr. City Neighborhood Planning Advisory Comm., Inc.*, 2003 WL 241356, at *7 (Del. Ch. Jan. 24, 2003). However, the lower court read Section 8.2 in a way that directly conflicts with Section 9.9(c), which expressly contemplates that monetary damages are available to Yatra. Thus, construing Section 8.2 as a bar on the right to seek damages for any past violation of covenants, representations, or warranties eviscerates Section 9.9(c) and cannot be squared with fundamental interpretation principles.

Section 9.9(c), in relevant part, reads:

> (ii) nothing set forth in this Section 9.9 shall require any party to institute any Proceeding (or limit any party's right to institute any Proceeding) for specific performance . . . prior or as a condition to exercising any termination right under Section 8.1, nor shall the commencement of any Proceeding . . . restrict or limit any party's ***right***

> ***to terminate*** the Agreement in accordance with the terms of Section 8.1 ***or pursue any other remedies (including monetary damages)*** in respect of this Agreement or the transactions contemplated thereby…[35]

The lower court mistakenly held that "[t]he disjunctive between a reference to termination and pursuit of other remedies '(including monetary damages)' reveals an intent that a party may *either* terminate the Merger Agreement (on contractual remedy for breach) *or* 'pursue any other remedies.'"[36] But, the word "either" appears nowhere in the relevant language, and, "[a]bsent the use of the word 'either,'" "[a] disjunctive 'or' can come in both *exclusive* and *inclusive* forms."[37] "When used in the exclusive disjunctive sense, 'or' indicates that one or the other of the listed things can be true, but not both. When used in the inclusive disjunctive sense, 'or' indicates that one or more of the listed things can be true."[38]

Here, the more natural reading of the relevant language in Section 9.9(c) is the ***inclusive*** form of the disjunctive. The provision plainly provides that the "commencement of any Proceeding" does not restrict or limit Yatra's potential remedies, whether those remedies may be termination, money damages, specific

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[35] A094.

[36] Op. 27-28.

[37] *Gonzalez v. State*, 207 A.3d 147, 155 & n.41 (Del. 2019).

[38] *Id*. at 155 n.41; *see also id.* ("To say that 'or' is 'disjunctive' is true enough. But authorities agree that a disjunctive connector can have either an 'inclusive' or an 'exclusive' sense. Thus, 'A or B' can mean one or the other, but not both. But it can also mean one or the other, or both.").

performance, or any other equitable remedy. Indeed, it would be nonsensical to read the language to say that the "commencement of any Proceeding" means that Yatra had to make a choice between ***either*** the termination of the Merger Agreement (which, according to the court below, would eliminate all other remedies, rendering the commencement of a Proceeding superfluous) ***or*** the pursuit of any other remedies.[39]

Yatra's reading, thus harmonizes Sections 8.2 and 9.9(c) and preserves the right to seek damages after termination of the Merger Agreement. Importantly, Section 8.2 provides that Article IX (including Section 9.9(c)) survives termination, and the plain language of Section 8.2 ***preserves*** the parties' abilities to pursue remedies, including money damages, by litigating any "Proceeding" after the termination of the Merger Agreement.

b. Section 9.1

According to the lower court, Section 9.1 functions to extinguish remedies for breaches of representations, warranties, covenants, and agreements because the underlying obligations terminate upon consummation of the Merger or termination

[39] *See AB Stable*, 2020 WL 7024929, at *102 ("Absent a provision limiting remedies, 'all remedies, whether at common law, under statute, or under equitable principles, are cumulative.'").

of the Merger Agreement.[40] Yet, Section 9.1 includes no language whatsoever restricting or eliminating ***remedies***.[41] In relevant part, Section 9.1 provides:

> [R]epresentations, warranties, covenants and agreements in this Agreement and in any certificate or other writing delivered pursuant hereto shall not survive the consummation of the Merger or the termination of this Agreement, subject to Sections 8.2 and 8.3.[42]

Thus, the plain language cuts off the parties' continuing obligations to comply with certain provisions of the Merger Agreement; Section 9.1 does nothing to affect the parties' rights to sue for prior breaches of the contract. And, importantly, Section 9.1 provides that Article IX (including Section 9.9(c)) and Section 8.2 "shall survive the termination of this Agreement." This cross-reference lends additional support for Yatra's harmonious reading of the Merger Agreement, since Section 9.1 states that certain provisions will survive, post-termination, that entitle Yatra to seek money damages (as discussed above).

To support its contrary interpretation, the lower court relied on *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011).[43] In *GRT*, the court held that, following the ***closing*** of a transaction, the survival clause

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[40] Op. 28-29.

[41] *See Dolan v. Altice USA, Inc.*, 2019 WL 2711280, at *5 (Del. Ch. June 27, 2019) (describing survival clauses as providing "that only certain covenants, representations, warranties and agreements would survive the consummation or termination of the Merger.").

[42] A089.

[43] Op. 28-29.

functioned to cut off a party's ability to sue for breaches of representations and warranties.[44]

There are pivotal differences, however, between an aggrieved party seeking money damages from its contractual counterparty following termination versus closing of a merger. In the post-closing context and analogizing to real estate transactions, Delaware courts have recognized that "[a]bsent contract language providing to the contrary, pre-closing representations about the acquired property interest become ineffective post-closing under the same rationale that causes representations about real property to merge with a warranty deed."[45] In effectuating a closing, M&A counterparties have decided to scramble the proverbial eggs after the opportunity to diligence each other during the post-signing, pre-closing period. *See GRT*, 2011 WL 2682898, at *13 ("It is therefore common in cases where the representations and warranties expire at closing for the parties to conduct robust due diligence *pre-closing*, with it being understood that the contractual representations and warranties will be true as of the closing date and can provide a basis to avoid closing to the extent that their truth is made a condition to closing, ***but will not provide a basis for a post-closing lawsuit***.").

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[44] *GRT*, 2011 WL 2682898, at *13.

[45] *Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg. LLC*, 2015 WL 139731, at *14 (Del. Ch. Jan. 12, 2015).

Different considerations are at play here. Nothing analogous to representations merging into a warranty deed have occurred; to the contrary, Yatra seeks to hold Ebix accountable for its litany of breaches ***prior*** to closing. Yet, under the lower court's decision, it makes no difference how grossly Ebix misbehaved and misled. It was free to game and ruse and disregard its obligations—provided only that Ebix did not commit fraud[46] there can be no monetary liability for its breach of contract, unless Yatra was willing to keep the Merger Agreement, with all of its restrictions on operations, in place for the life of this litigation. That is neither what the plain language of the Merger Agreement provides nor a sensible holding from the perspective of policy.

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[46] Which it did. *See* Section III, *infra*.

II. THE TRIAL COURT ERRED BY HOLDING THAT BREACHES OF THE EXTENSION AGREEMENT CANNOT GIVE RISE TO LIABILITY

A. Question Presented

Did the trial court err in holding that (a) the Extension Agreement is not a standalone agreement apart from the Merger Agreement and (b) "Yatra's decision to terminate the Merger Agreement insulated Ebix from liability for alleged breaches of the Extension Agreement"?[47]

B. Scope of Review

See Section I.B.

C. Merits of The Argument

The court below erred in dismissing Yatra's breach of the Extension Agreement claim for two reasons.

First, the trial court erred in holding that the Extension Agreement is subject to any limitations on liability set forth in the Merger Agreement.[48] Relying on Section 9.1 of the Merger Agreement, the lower court held that the Extension Agreement was a writing delivered "pursuant to" the Merger Agreement because, *inter alia*, it incorporated capitalized terms from that agreement.[49] Section 9.1 of the

[47] Op. 33.

[48] Op. 31.

[49] Op. 31.

Merger Agreement, after listing specific Articles and Sections of the Merger Agreement that survived termination, continues:

> All other representations, warranties, covenants and agreements in this [Merger] Agreement and in any certificate or ***other writing delivered pursuant hereto*** shall not survive consummation of the Merger or the termination of this [Merger] Agreement.

Contrary to the lower court's conclusion, the Extension Agreement was ***not*** a writing delivered ***pursuant*** to the Merger Agreement.[50] It did not merely, as the trial court held, "modify the Merger Agreement by extending the agreed upon Outside Date."[51] Rather, the Extension Agreement created new and ***independent*** obligations for the parties divorced from the Merger Agreement itself. For instance, the Extension Agreement required Ebix to propose "an interim $10,000,000 financing from Ebix to Yatra,"[52] a concept entirely absent from the Merger Agreement and focused on the day-to-day operations of Yatra. The lower court simply ignored this new obligation, which necessarily makes the Extension Agreement something more than a mere technical amendment to the Merger Agreement.[53]

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[50] *Compare* A085, A086 §§7.2(d), 7.3(d) (requiring delivery of an officer's certificate as a closing condition of the Merger).

[51] Op. 31.

[52] A160.

[53] *See* Op. 32 ("Indeed, there is nothing in the Extension Agreement that provides or even suggests it stands apart from the terms and structure of the Merger Agreement."). With respect, this conclusion cannot be squared with the plain language of the Extension Agreement.

Moreover, nothing in the subsequently executed Extension Agreement indicates an intent to be bound by the Merger Agreement's limitations on liability. *See, e.g.*, *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 819 n.40 (Del. 2018) (citing *Pauley Petroleum, Inc. v. Cont. Oil Co.*, 231 A.2d 450 (Del. Ch. 1967)) ("[A]n agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference."). Although the Extension Agreement adopts the Merger Agreement's defined terms and generally provides that the Merger Agreement remains in full force and effect, it does not reference Section 9.1 of the Merger Agreement or even address any limitations on liability.

"Absent a provision limiting remedies, 'all remedies, whether at common law, under statute, or under equitable principles, are cumulative.'" *AB Stable*, 2020 WL 7024929, at *102. Accordingly, dismissal of Count II of the Amended Complaint was improper.

Second, even if the Extension Agreement is a "certificate or other writing delivered pursuant hereto"[54] (which Appellant submits it is not), the trial court erred in holding that Ebix cannot be held liable for its breaches of the Extension Agreement because "the termination of the Merger Agreement eliminates claims for

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[54] A089 §9.1.

prior breaches of contract."[55] As discussed in Section I.C, *supra*, because Appellant initiated this litigation ***before*** the effectiveness of the Termination Notice, the subsequent termination of the Merger Agreement did not extinguish Ebix's liability for pre-termination breaches of the Extension Agreement.

[55] Op. 33.

III. THE TRIAL COURT ERRED BY HOLDING THERE IS NO ROOM FOR THE IMPLIED COVENANT TO FUNCTION

A. Question Presented

Did the trial court err in holding that "the Merger Agreement leaves no gap to fill with the implied covenant"?[56]

B. Scope of Review

See Section I.B.

C. Merits of The Argument

The court below erred in holding that the Merger Agreement "occupies the space Yatra seeks to fill with the implied covenant."[57] In fact, there are at least two gaps in the Merger Agreement for the implied covenant to fill, both of which Ebix breached. First, Ebix breached by purporting to renegotiate the terms of the Merger Agreement—without any intent to close on the renegotiated terms—to induce Yatra to forbear from exercising remedies until Ebix could accomplish ulterior objectives (*i.e.*, amending its Credit Agreement and announcing its financial results) (the "Renegotiation Breach"). Second, Ebix breached the implied covenant by entering into the Tenth Amendment, without ever disclosing it to Yatra, effectively prohibiting Ebix from closing the Merger with its Put Right intact (the "Amendment Breach").

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[56] Op. 37.

[57] Op. 35.

As this Court explained in *Dieckman v. Regency GP LP*:

> The implied covenant is ***inherent in all contracts*** and is used to infer contract terms to handle developments or contractual gaps that the asserting party pleads ***neither party anticipated***. It applies when the party asserting the implied covenant proves that the other party has ***acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected***.[58]

"While this test requires resort to a counterfactual world—what if—it is nevertheless appropriately restrictive and ***commonsensical***." *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*, 685 A.2d 365, 376 (Del. Ch. 1996).

With respect to the Renegotiation Breach, the trial court held that the Merger Agreement "is not silent as to Ebix's obligations" because it contains a "reasonable best efforts" provision.[59] This holding, however, improperly conflates an explicit requirement to use reasonable best efforts to close the Merger with an implicit prohibition on actively misleading the other party in order to prevent it from enforcing its contractual rights. In other words, the Court of Chancery "erred by focusing too narrowly" on the reasonable best efforts provision.[60]

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[58] 155 A.3d 358, 367 (Del. 2017).

[59] Op. 34-35; A076 §6.5(a).

[60] *Dieckman*, 155 A.3d at 367.

A Delaware court, applying Delaware contract law, has not confronted this specific issue.[61] However, the United States District Court for the Southern District of New York, applying New York law,[62] and the Court of Chancery, applying D.C. law[63] both agreed that a defendant that actively undermines a contract can be held liable ***both*** for violating a "reasonable best efforts" provision ***and*** the implied covenant.[64]

Rus, Inc. v. Bay Industries, Inc.[65] is instructive. In early January 2001, the plaintiff Recticel agreed to sell the stock of its wholly-owned subsidiary, Soundcoat, to defendant Bay. *Rus*, 322 F.Supp.2d at 305. Both Soundcoat's and Bay's profits fell in February 2001, and Recticel alleged that the transaction was no longer

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[61] Thus, Appellant respectfully disagrees with the trial court that there is "no point" in considering foreign law, especially when those authorities come out the opposite way. Op. 35 n.125.

[62] The requirements of the implied covenant are the same under New York and Delaware law. *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *23 (Del. Ch. Dec. 19, 2017).

[63] In applying D.C. implied covenant law, then-Vice Chancellor Strine cited New York law approvingly when deciding the issue. *See Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, 2008 WL 1746974, at *13 n.60 (Del. Ch. Apr. 7, 2008) (citing *Rus Inc. v. Bay Indus., Inc.*, 322 F.Supp.2d 302, 315 (S.D.N.Y. 2003)) ("[G]iving pretextual reasons ***may breach implied covenant when there is an explicit contractual duty to use reasonable best efforts*** to meet explicit conditions.").

[64] *See Council of Unit Owners of Sea Colony East, Phases III, IV, VI, & VIII v. Carl M. Freeman Assocs., Inc.*, 1989 WL 48568, at *2 (Del. Super. Ct. Apr. 28, 1989) ("This is an area of first impression in Delaware. Since the law is not well established we must look to see how other states resolve this problem.").

[65] 322 F.Supp.2d 302 (S.D.N.Y. 2003).

advantageous to defendants, which then "proffered a variety of pretextual issues as grounds on which they could avoid their duty to close." *Id*. at 315. Defendants even refused to close after a renegotiation of Soundcoat's purchase price. *Id*. Applying New York law, the court denied summary judgment and held that, under ***both*** the agreement's reasonable best efforts provision and the implied covenant, the defendant "would be liable for acting in bad faith if it did not intend for its negotiations to result in the closing, or if it purposely acted in a manner that prevented the closing from occurring." *Id*.

Similarly, there is room for the implied covenant to operate with respect to the Amendment Breach. The trial court held (mistakenly) that Ebix could enter into the Tenth Amendment with the Lender Defendants, effectively foreclosing the issuance of the Put Right under the Merger Agreement (which was in full force and effect), because Section 4.4 of the Merger Agreement provides that "[t]he execution, delivery and performance of this Agreement" and "the consummation . . . of the Merger" by Ebix will not trigger a default under the Credit Agreement.[66]

Again, the Court of Chancery "erred by focusing too narrowly."[67] The explicit representation and warranty not to have defaults under contracts (as of the Signing Date and Closing of the Merger) is ***not*** equivalent to an implicit prohibition on

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[66] Op. 36-37.

[67] *Dieckman*, 155 A.3d at 367.

actively interfering with the ability to issue Merger consideration. Ebix knowingly and purposefully entered into the Tenth Amendment, which contractually precluded it from issuing the Put Right—if it did so, Ebix would have caused an immediate event of default under the Credit Agreement, allowing its lenders to accelerate the debt and foreclose on Ebix's assets—including those acquired from Yatra. And, after the execution of the Tenth Amendment, the deal under the Merger Agreement (an all-stock transaction accompanied by the Put Right exercisable after 25 months) was no longer practically available to Yatra, because its stockholders would hold shares in a potentially insolvent company.

Finally, the court below seemed to suggest that termination of the Merger Agreement also resulted in the extinguishment of liability for breaches of the implied covenant.[68] It is black-letter law, however, that the implied covenant cannot be waived. *See Pierce v. Int'l Ins. Co. of Illinois*, 671 A.2d 1361, 1366 (Del. 1996) ("So that the reasonable expectations of parties to a contract will not be defeated, we have held that a duty of good faith and fair dealing attaches to every contract, and this duty cannot be disclaimed."). And, as discussed in Sections II.C and III.C, *supra*, Appellant filed this action prior to the effectiveness of the Termination Notice.

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[68] Op. 35.

IV. THE TRIAL COURT ERRED IN DISMISSING THE FRAUD CLAIM

A. Question Presented

Did the trial court err in holding that Yatra's fraud claim failed for a lack of loss causation because of Yatra's purported inability to sue for specific performance under the Merger Agreement?[69]

B. Scope of Review

See Section I.B.

C. Merits of The Argument

The lower court erred in dismissing Yatra's fraud claim and holding that loss causation was not reasonably conceivable based on Yatra's pleading. Specifically, the lower court reasoned that because Yatra affirmatively pled that Ebix breached its covenant to cause its Form S-4 filing to become effective, any action for specific performance (*i.e.*, what Yatra claimed it lost as a result of Ebix's fraud) could not succeed because the closing of the Merger required SEC approval of the Form S-4. Therefore, the lower court held the loss causation element of Yatra's fraud claim was defeated by Yatra's own pleading.[70]

This holding is in error because the right to seek specific performance that Yatra lost was not limited to a suit seeking a decree to force the closing of the

[69] Op. 39-42.

[70] Op. 39-42.

Merger. Instead, Yatra could well have pled an action in specific performance seeking a decree to cause Ebix to take all steps necessary and within its power to effectuate the prompt closing of the Merger. *See Engelhardt v. Fessia*, 31 Misc. 2d 127, 219 N.Y.S.2d 631 (N.Y. Sup. Ct. 1961) (holding that where a contract for the sale of stock was made contingent upon an approval of the state Public Service Commission and the Interstate Commerce Commission prior to a certain date, the seller could be required to withdraw a previous regulatory filing that intentionally precipitated the approval's delay).

Indeed, the Amended Complaint affirmatively pleads that the SEC had advised Yatra that it did not intend to review the Form S-4 and that the reason the document had not become effective was Ebix's own failure to clear the Comment Letters.[71] Yet, within a matter of just a few weeks after the filing of the Original Complaint, Ebix ***voluntarily did*** precisely what it had previously ***failed*** to do – it cleared such Comment Letters.[72] Such facts, at a minimum, demonstrate that it was reasonably conceivable that Ebix had the power to clear the Comment Letter, thus causing the S-4 to become effective, but simply chose not to do so until Yatra terminated the Merger Agreement. *See Meisels v. 1295 Union Equities Corp.*, 306 A.D.2d 144, 145, 761 N.Y.S.2d 48 (N.Y. Sup. Ct. 1st Dep't 2003) (granting

[71] A197 ¶98.

[72] Op. 18.

purchaser's motion for summary judgment for specific performance and noting "volitional unwillingness, as distinguished from good faith inability, to meet contractual obligations furnishes neither a ground for cancellation of the contract nor a defense against its specific performance").

At bottom, Yatra adequately pled that, ***but for*** Ebix's fraud through the extension periods and its failure to clear the Comment Letters, the SEC would have declared Form S-4 effective, clearing the path for the Merger to close.[73] Thus, it is reasonably conceivable that Yatra could have prosecuted a suit for specific performance that was both within the power of the lower court to order, and, if ordered, likely to cause the Merger itself to close. There was no failure of loss causation here.

[73] A197 ¶98.

V. THE TRIAL COURT ERRED IN DISMISSING THE TORTIOUS INTERFERENCE CLAIM

A. Question Presented

Did the trial court err in holding that "Yatra has failed to allege that the Lender Defendants' entry into the Tenth Amendment was a 'significant factor' in causing the breach of the Merger Agreement,"[74] because specific performance was a remedy purportedly unavailable to Yatra?

B. Scope of Review

See Section I.B.

C. Merits of The Argument

The lower court held that Yatra failed to plead tortious interference against the Lender Defendants because it failed to allege that the Lender Defendants' conduct was a "significant factor in causing the breach."[75] In so concluding, the trial court reasoned that the "Lender Defendants' [conduct] . . . *did not stand alone* as an impediment to Yatra's ability to pursue specific performance of the Merger Agreement," because "specific performance would not have been a remedy available to Yatra."[76] Put simply, the court below built on its erroneous finding of a lack of "loss causation," and imported the "loss causation" pleading requirement for fraud

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[74] Op. 44.

[75] Op. 43.

[76] Op. 43-44.

into the "significant factor" analysis for tortious interference for lender liability. The lower court erred in reaching these conclusions for several reasons.

First, the appropriate standard of review on this motion to dismiss was "reasonable conceivability." Thus, the lower court should have only dismissed if Yatra could not recover against the Lender Defendants under any reasonably conceivable set of circumstances susceptible to proof. *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863 (Del. 2020). It is entirely conceivable that but for Lender Defendants' interference, their intentional sabotaging of the agreed-upon terms of the Merger Agreement, the temporal impasse and the delayed closing could have unfolded much differently. Moreover, Yatra would have had the remedial alternatives to pursue to address Ebix's breaches that the Tenth Amendment simply extinguished.

Second, the lower court conflated "loss causation" (an element of pleading fraud) with conduct which was a "significant factor in causing the breach," the actual element of tortious interference for lender liability claim. *WaveDivision Holdings, LLC v. Highland Cap. Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012). Loss causation in fraud demands pleading that ties the alleged misrepresentation to the loss suffered. *See Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 971 (Del. Ch. 2004). Tortious interference, on the other hand, merely requires that Yatra allege (as it amply did here) that Lender Defendants' conduct was a "significant factor in causing" the breach, ***not*** the "sole" factor. *See Patterson-Woods & Assoc., LLC v. Realty Enters., LLC*, 2008 WL 2231511, at *15 (Del. Super. Ct. May 21, 2008) (holding that intentional interference claim remains viable even when other factors may have contributed to the breach and the alleged interference was not the "*sole*" factor). The lower court's holding that the Lender Defendants' conduct "did not *stand alone*" in the way of Yatra's remedy applies an unduly harsh standard in measuring Yatra's tortious interference pleading on this motion. The lower court erred in injecting this causal exclusivity to dismiss the tortious interference claim against the Lender Defendants.

Third, as demonstrated in Section IV.C, *supra*, even if held to a "loss causation" standard, which was improper, the lower court nonetheless erred because Yatra's pleadings did not foreclose a showing of loss causation. Yatra could have sued to compel Ebix to take all reasonable and required steps under the Merger Agreement, including responding to and settling the various outstanding Comment Letters (which Ebix conveniently did promptly after the filing of this lawsuit), which would have been a complete remedy for Yatra and led to the effectiveness of the Form S-4. *See Engelhardt*, 31 Misc. 2d 127, 219 N.Y.S.2d 631.

Importantly, Yatra pled that the SEC had directly communicated with Yatra that the matter holding up the SEC's decision to declare the Form S-4 "effective" was Ebix's failure to clear the various Comment Letters.[77] Thus, it was reasonably conceivable that Yatra suffered a loss when it lost the opportunity to sue for specific performance to cause Ebix to clear the SEC's Comment Letters.

The court below also ignored that it was Ebix's breach ***coupled*** with the Lender Defendants' interference that ***caused*** the perceived remedial impossibility of forcing Ebix to close the Merger in accordance with the Merger Agreement terms. *See Meisels*, 306 A.D.2d at 145. It was the Lender Defendants' knowing and volitional interference with Ebix's practical ability to issue the Put Right, through entry into the Tenth Amendment, that was a significant factor in foreclosing the consummation of the Merger. Put differently, Yatra sufficiently pled that Lender Defendants' interference and pressure on Ebix to mitigate their credit exposure at Yatra's expense in renegotiating and executing the Tenth Amendment was a significant factor in causing Yatra's loss.[78]

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[77] A196-A197 ¶¶97-98.

[78] A213-A222 ¶¶150-174.

CONCLUSION

The motion to dismiss opinion should be reversed.

Dated: November 2, 2021

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Exhibit A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

YATRA ONLINE, INC.,

Plaintiff,

v.

EBIX, INC., EBIXCASH TRAVELS, INC., REGIONS BANK, BMO HARRIS BANK N.A., BBVA USA, FIFTH THIRD BANK, NATIONAL ASSOCIATION, KEYBANK NATIONAL ASSOCIATION, SILICON VALLEY BANK, CADENCE BANK, N.A., and TRUSTMARK NATIONAL BANK,

Defendants.

C.A. No. 2020-0444-JRS

MEMORANDUM OPINION

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SLIGHTS, Vice Chancellor

This case concerns an abandoned merger (the "Merger") that Plaintiff, Yatra Online Inc. ("Yatra"), asserts was sabotaged post-signing by Defendants, Ebix, Inc. ("Parent") and EbixCash Travels, Inc. ("Merger Sub" and, together with Parent, "Ebix"), after Parent determined the deal was no longer attractive. In early 2019, Parent and Yatra engaged in extensive negotiations regarding Parent's potential acquisition of Yatra. The parties ultimately agreed to structure the transaction as a stock-for-stock reverse triangular merger with Parent forming an acquisition subsidiary, Merger Sub, to merge with and into Yatra, leaving Yatra as both the surviving entity and a direct, wholly owned subsidiary of Parent. The merger agreement (the "Merger Agreement") was duly executed by Ebix and Yatra on July 16, 2019 (the "Signing Date"), but the closing never occurred.

According to the Merger Agreement, at closing (the "Closing"), each share of Yatra stock would be converted into the right to receive shares of Parent's convertible preferred stock (the "Convertible Preferred Stock") per a fixed exchange ratio. The rights associated with the Convertible Preferred Stock included a put right (the "Put Right"), which could be exercised during the 25th month after the Closing. The Put Right gave former Yatra stockholders the option to force Parent to redeem any unconverted shares of Convertible Preferred Stock for $5.31 per share. This was a key feature of the deal, in part, because it gave Yatra stockholders a floor under which the price for their shares could not fall.

The Convertible Preferred Stock was to be issued for the first time in connection with the Merger and, thus, had not been registered with the Securities Exchange Commission ("SEC") as of the Signing Date. To register the security, Parent needed to file, and the SEC needed to accept and approve, a Form S-4 registration statement. As a right attached to the Convertible Preferred Stock, the Put Right could not be exercised until the Convertible Preferred Stock was registered.

Parent's S-4 filing was delayed for months after the Signing Date notwithstanding Parent's contractual promise to move forward on that front as promptly as practicable. Making matters worse, the COVID-19 pandemic depressed Parent's stock price, ballooning the value of the Put Right relative to Parent's market capitalization. According to Yatra's amended complaint (the "Complaint"), it was then that Parent's view of the deal soured, and it wanted out.[1]

To buy time as it planned its exit, Parent sought to renegotiate several deal points post-signing and repeatedly extended the outside date contemplated in the Merger Agreement. Relevant here, one of those extensions came in the form of a letter agreement (the "Extension Agreement"), where Ebix explicitly promised, among other things, that it would negotiate with Yatra in good faith. Having anchored Yatra at bay in the dark, Parent and its lenders (the "Lender Defendants"—

[1] Pl.'s Verified Am. Compl. (D.I. 27) ("Compl.").

further defined below) secretly negotiated an amendment (the "Tenth Amendment") to Yatra's credit agreement (together with the amendments, the "Credit Agreement") that effectively eliminated Parent's ability to issue the Put Right without causing Parent to default under the Credit Agreement.

Fed up with Parent's behavior during the extended renegotiations, and after the final outside closing date lapsed, Yatra terminated the Merger Agreement and filed a lawsuit against Ebix in this court on June 5, 2020. Yatra's original complaint (the "Original Complaint") asserted two counts against Ebix: Count I claimed a breach of the Merger Agreement, while Count II claimed a breach of the Extension Agreement.[2] In its initial motion to dismiss, Ebix argued that Yatra's termination triggered the Merger Agreement's Effect of Termination provision (the "Effect of Termination Provision"), which eliminated Ebix's liability for all claims post-termination except fraud. In response, Yatra amended its Original Complaint to assert fraud and breach of the implied covenant of good faith and fair dealing against Ebix—in addition to the two breaches of contract claims alleged in the Original Complaint. Yatra also added a claim against the Lender Defendants for tortious

[2] *See generally* Pl.'s Verified Compl. for Breach of Contract (D.I. 1).

interference with Yatra's Put Right.[3] All Defendants have moved to dismiss the Complaint under Chancery Rule 12(b)(6).

For reasons explained below, Defendants' motions must be granted in full. Under the Merger Agreement's plain terms, Yatra extinguished its breach of contract claims when it elected to terminate the Merger Agreement. The implied covenant claim fails because there is no gap in the Merger Agreement for the implied covenant to fill. And the fraud and tortious interference claims fail because each relies on the false premise that the Tenth Amendment frustrated Yatra's remedy for specific performance. As Yatra affirmatively pleads, it could not have sued for specific performance until the S-4 filing was approved, and it elected to terminate the Merger Agreement before that condition to closing occurred. Consequently, Yatra has failed to plead reasonably conceivable loss causation for either fraud or tortious interference. My reasoning follows.

[3] (D.I. 27).

I. BACKGROUND

The facts are drawn from the pleadings, documents incorporated into the pleadings by reference and matters of which the Court may take judicial notice.[4]

A. The Parties

Plaintiff, Yatra, is a Cayman Islands exempted company with operations primarily in India.[5] It operates in the online travel space servicing both leisure and business travelers.[6] Yatra's common stock (or "ordinary shares") are listed on the NASDAQ exchange under the symbol "YTRA," and certain warrants to purchase its ordinary shares are listed on the OTCQX Best Market under the symbol "YTROF."[7]

Defendant, Parent, is a Delaware corporation with headquarters in Johns Creek, Georgia.[8] It operates as an international supplier of on-demand

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[4] *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612–13 (Del. 1996).

[5] Compl. ¶ 22.

[6] *Id.*

[7] *Id.*

[8] Compl. ¶ 23.

infrastructure exchanges to the insurance, financial and healthcare industries.[9] Parent's common stock is listed on NASDAQ under the symbol "EBIX."[10]

Defendant, Merger Sub, is a Cayman Islands exempted company and a direct, wholly owned subsidiary of Parent.[11] Merger Sub was formed solely to engage in the transactions contemplated by the Merger Agreement.[12]

Defendant, Regions Bank ("RB"), is an Alabama state-chartered commercial bank.[13] RB serves as administrative agent and collateral agent under the Credit Agreement and has served in such capacities since August 5, 2014.[14] RB is also a lender under the Credit Agreement and executed the Tenth Amendment.[15]

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[9] *Id.*

[10] *Id.*

[11] Compl. ¶ 24.

[12] Ebix Defs.' Opening Br. in Supp. of their Mot. to Dismiss the Verified Am. Compl. (D.I. 53) ("DOB"), Ex. A (Merger Agreement, dated July 16, 2019, by and among Ebix and Yatra) ("MA"); MA § 4.9.

[13] Compl. ¶¶ 25, 119.

[14] Compl. at 2.

[15] Compl. ¶ 25.

Defendant, BMO Harris Bank N.A. ("BMO"), is a bank based in Chicago, Illinois.[16] BMO is a lender under the Credit Agreement and executed the Tenth Amendment.[17]

Defendant, BBVA USA, is an Alabama banking corporation headquartered in Birmingham, Alabama.[18] BBVA USA is a lender under the Credit Agreement and executed the Tenth Amendment.[19]

Defendant, Fifth Third Bank, National Association ("FTBNA"), is a national bank based in Cincinnati, Ohio.[20] FTBNA is a lender under the Credit Agreement and executed the Tenth Amendment.[21]

Defendant, KeyBank National Association ("KNA"), is a regional bank headquartered in Cleveland, Ohio.[22] KNA is a lender under the Credit Agreement and executed the Tenth Amendment.[23]

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[16] Compl. ¶ 26.

[17] *Id.*

[18] Compl. ¶ 27.

[19] *Id.*

[20] Compl. ¶ 28.

[21] *Id.*

[22] Compl. ¶ 29.

[23] *Id.*

Defendant, Silicon Valley Bank ("SVB"), is a California state-charted bank.[24] SVB is a lender under the Credit Agreement and executed the Tenth Amendment.[25]

Defendant, Cadence Bank, N.A. ("CB"), is a national banking association. It is a lender under the Credit Agreement and executed the Tenth Amendment.[26]

Defendant, Trustmark National Bank ("TNB" and, together with CB, SVB, KNA, FTBNA, BBVA USA, BMO and RB, the "Lender Defendants"), is a Mississippi state-chartered bank headquartered in Jackson, Mississippi.[27] TNB is a lender under the Credit Agreement and executed the Tenth Amendment.[28]

B. Yatra and Ebix Negotiate and Execute the Merger Agreement

On February 13, 2019, the CEO of Parent, Robin Raina, advised the CEO of Yatra, Dhruv Shringi, that Parent was interested in exploring a strategic transaction with Yatra.[29] Over the next two weeks, Shringi and Raina discussed potential

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[24] Compl. ¶ 30.

[25] *Id.*

[26] Compl. ¶ 31.

[27] Compl. ¶ 32.

[28] *Id.*

[29] Compl. ¶ 33.

transaction structures, the details of which Shringi brought back to Yatra's senior management and Yatra's board of directors.[30]

On February 24, 2019, Parent sent a written proposal to Yatra's board of directors to acquire 100% of Yatra via a merger (the "Initial Proposal").[31] The Initial Proposal contemplated that the merger consideration would be payable either in cash or freely-tradeable Parent stock (with a price floor). All outstanding Yatra warrants would be surrendered (or repurchased) and retired by Yatra before closing.[32] If the merger consideration was stock, the Initial Proposal also provided for a put right that would be exercisable 25 months after closing and would allow former Yatra stockholders to sell the Parent stock they received as merger consideration back to Parent at 90% of the price at which it was issued.[33] Yatra's board of directors engaged sophisticated legal and financial advisors to assist in its evaluation of the proposed transaction.[34]

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[30] Compl. ¶¶ 33–34.

[31] Compl. ¶ 34.

[32] *Id.*

[33] *Id.*

[34] Compl. ¶ 35.

On March 11, 2019, without consent from Yatra, Parent publicly disclosed the terms of the Initial Proposal in a press release and Form 8-K filed with the SEC.[35] Later that day, Yatra publicly confirmed that it was exploring a transaction with Parent, and the parties subsequently entered into a confidentiality agreement to protect against future unauthorized disclosures.[36]

Over the next several months, Yatra and Parent negotiated the Merger Agreement's terms and conducted mutual due diligence aided by legal and financial advisors.[37] Though Yatra engaged in preliminary discussions with two other potential strategic acquirors, Yatra and Ebix ultimately finalized and executed the Merger Agreement on July 16, 2019, announcing the Merger the next day.[38]

C. The Merger Agreement

The Merger Agreement contemplated a stock-for-stock transaction where, upon Closing, each share of Yatra Stock would be cancelled and converted into a right to receive shares of Convertible Preferred Stock, in accordance with a fixed exchange ratio (with a different exchange ratio assigned to each class of

[35] Compl. ¶ 36.

[36] *Id.*

[37] Compl. ¶ 38.

[38] Compl. ¶ 39.

Yatra stock).[39] The rights associated with the Convertible Preferred Stock included the Put Right, which could be exercised during the 25th month after the Closing. The Put Right gave former Yatra stockholders the option to force Parent to redeem any unconverted shares of Convertible Preferred Stock for $5.31 per share.[40] On the Signing Date, the Put Right implied a Yatra equity value of $257 million, equaling approximately 17.5% of the Parent's market capitalization.[41] The Merger Agreement also contemplated that Parent would also assume certain outstanding Yatra warrants, which would be convertible into the same Convertible Preferred Stock per a specified exchange ratio and tempered by the same Put Right.[42]

Beyond the economic terms, the Merger Agreement included a number of representations and warranties offered by both Yatra and Ebix, as well as post-

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[39] Compl. ¶ 40.

[40] *Id.*

[41] Compl. ¶ 41. The relative value of the Put Right to Parent's market capitalization would fluctuate, however, according to Parent's stock price. For example, on November 14, 2019, as Parent's stock price fell in the wake of a disappointing earnings announcement, the value of the Put Right equaled approximately 25.67% of Parent's market capitalization. *Id.* As of May 1, 2020, the last trading day before Parent proposed the "Heads of Terms" (described *infra*), the Put Right equaled approximately 44.17% of Parent's market capitalization. *Id.*

[42] Compl. ¶ 42.

signing, pre-Closing covenants, which were tied to closing conditions for the Merger.[43] Several of these provisions are relevant here.

First, Parent represented and warranted in Section 4.8 that all prior and future public disclosures complied or would comply with all SEC rules and regulations and federal securities laws (collectively, the "Accuracy Rep").[44]

Second, and relatedly, Parent represented and warranted in Section 4.10 that: (a) all prior and future financial statements complied or would comply with applicable accounting requirements, and (b) it had not received regulatory inquiries into its accounting practices or policies between December 31, 2018, and the date of the Merger Agreement (collectively, the "Accounting Reps").[45]

Third, Parent agreed to file the S-4 with the SEC as "promptly as practicable" and in no event later than 45 days after the Signing Date (i.e., August 30, 2019).[46] Parent also agreed to use "reasonable best efforts" to have the SEC declare the S-4 effective "as promptly as practicable after such filing with the SEC" (the "S-4

[43] Compl. ¶ 43.

[44] Compl. ¶ 44; MA §§ 4.8(b)–(c).

[45] Compl. ¶ 46; MA §§ 4.10(a)–(b).

[46] Compl. ¶ 56; MA § 6.1(a).

Covenants").[47] An effective S-4 was a closing condition to the Merger and a prerequisite for Yatra to hold its stockholder meeting for approval of the Merger.[48]

Fourth, Parent and Yatra agreed to use "reasonable best efforts" to ensure that all closing conditions would be satisfied (the "Best Efforts Covenant").[49]

Fifth, the Merger Agreement did not require that the Closing occur on a specific calendar date. Rather, it provided that the Closing would take place on the third business day following the date on which each of the closing conditions set forth in Article VII is satisfied or waived by the party entitled to waive such condition, *provided* that the Closing must occur before the outside closing date of April 12, 2020 (the "Outside Date").[50]

Finally, if the Closing did not occur before the Outside Date, then either party could terminate the Merger Agreement.[51] This termination right did not apply if the terminating party had breached or violated any of its obligations under the Merger Agreement and "such breach [was] the principal cause of or directly resulted in

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[47] Compl. ¶ 48; MA § 6.1(a).

[48] Compl. ¶ 49; MA §§ 6.1(a), 6.5.

[49] Compl. ¶ 50. The Best Efforts Covenant, includes, but is not limited to, Parent's covenant to use reasonable best efforts to have the SEC declare the S-4 effective as promptly as practicable. *See* MA §§ 6.1(a), 6.5.

[50] Compl. ¶ 54; MA § 8.1(b)(i).

[51] *Id*.

(A) the failure to satisfy the conditions to the obligations of the terminating party to consummate the Merger set forth in Article VII prior to the Outside Date or (B) the failure of the Closing to occur by the Outside Date."[52] In the Effect of Termination Provision, the parties agreed that, "[i]n the event of any termination of this Agreement . . . , the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto," with limited exceptions not relevant here.[53] The parties agreed, however, that termination shall not "relieve any party from liability for damages arising out of any fraud occurring prior to such termination."[54]

D. Parent Delays in Preparing and Filing the S-4

As noted, the S-4 filing was essential to the Closing, mainly because the Merger consideration would consist of newly issued Convertible Preferred Stock that needed to be registered.[55] Key to the timing of Parent's preparation of the S-4 was whether Parent would have to include *pro forma* financials for the post-Merger

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[52] *Id.*

[53] MA § 8.2; Compl. ¶ 56.

[54] *Id.*

[55] *Id.*

company.[56] And that determination would depend upon the results of a "significance test."[57]

While Parent historically prepared its financials in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"), as a company operating primarily out of India, Yatra historically prepared its financials under the International Financial Reporting Standards ("IFRS").[58] Aware that converting Yatra's financials from IFRS to GAAP would be time-intensive, immediately after signing the Merger Agreement, Yatra began pushing Parent to determine whether *pro forma* financials would be necessary.[59] Despite Yatra's requests, Parent delayed conducting its significance test analysis; when it finally was completed, that analysis revealed that *pro forma* financials would be required.[60] That, in turn, further delayed preparation of the S-4 and ultimately the Closing.[61]

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[56] Compl. ¶ 57. The details of the of the "significance test[ing]" are not provided in the Complaint.

[57] *Id.*

[58] Compl. ¶ 58.

[59] Compl. ¶¶ 59–60.

[60] *Id.*

[61] *Id.*

E. Parent Conducts a Pretextual Renegotiation

Shortly before the initial Outside Date, in late March 2020, Parent was severely impacted by the COVID-19 pandemic and approached Yatra about renegotiating specific terms of the Merger Agreement.[62] While reserving all of its rights under the Merger Agreement, Yatra reluctantly agreed to renegotiate in hopes of closing the Merger and avoiding the cost of litigation.[63] With Yatra committed to renegotiating, Parent sought repeated extensions of the Outside Date and proposed revisions to a number of material deal terms, including an attempt to eliminate the Put Right.[64]

Meanwhile—unbeknownst to Yatra—Parent and the Lender Defendants were negotiating the Tenth Amendment, which essentially would prohibit Parent from issuing the Put Right.[65] Parent and the Lender Defendants executed the Tenth Amendment on May 7, 2020, despite Parent's knowledge that the Put Right was a crucial component of the Merger consideration payable to Yatra and that entering into the Tenth Amendment would make payment of the Put Right impossible.[66]

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[62] Compl. ¶ 127.

[63] Compl. ¶ 130.

[64] Compl. ¶¶ 131, 133.

[65] Compl. ¶¶ 134–35.

[66] Compl. ¶¶ 153–57; 172.

F. Parent Continues to Delay Closing

After Parent finalized the Tenth Amendment, it continued to string Yatra along via renegotiations and Outside Date extensions.[67] On May 14, 2020, Yatra and Ebix agreed to a fourth extension of the Outside Date (the "Extension Agreement").[68] The Extension Agreement requires that Ebix: make its officers and legal counsel available for diligence sessions as "necessary to satisfactorily assess the diligence issues" (the "Diligence Covenant"); provide Yatra a proposed draft of the revised certificate of designation of the Convertible Preferred Stock, which must clearly set forth Ebix's proposed modified terms (the "COD Covenant"); provide Yatra with a proposed draft Merger Agreement amendment, which "shall clearly articulate and set forth Ebix's proposed modified terms and shall include provisions for an interim financing"; and "promptly provide revised drafts of transaction documents . . . and negotiate in good faith with Yatra." (the "Good Faith Covenant.")

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[67] Compl. ¶ 175.

[68] Compl. ¶ 180; Pl.'s Omnibus Answering Br. in Opp'n to Defs.' Mots. to Dismiss (D.I. 62) ("PAB") Ex. 6 ("EA") at 1.

Ebix is alleged to have breached the Extension Agreement by: refusing to provide diligence details and the proposed draft of the certificate of designation of the Convertible Preferred Stock; modifying the agreed terms to the amendment; and failing to respond to Yatra's term sheet proposing revisions to the deal.[69] The final Outside Date of June 4, 2020, came and went without any hint that Parent was prepared to close.[70]

G. Procedural History

On June 5, 020, the day after the final Outside Date, Yatra terminated the Merger Agreement and filed this action for breach of contract against Ebix.[71] On June 19, 2020, Parent secured clearance of all of its SEC comment letters.[72] On August 9, 2020, Parent filed a form 10-Q that included a disclosure related to the

[69] Compl. ¶¶ 180, 182, 184, 185–86, 191–92. I note that the draft amendment to the Merger Agreement that Ebix delivered to Yatra included several new terms that are not specifically addressed in this opinion, which are referred to by the parties as "Heads of Terms." Included among these new terms was a loan from Parent to Yatra for $10 million. Yatra alleges the structure of this loan was "predatory." I need not address the terms added to the draft amendment to the Merger Agreement because the parties never entered into the proposed amendment, and therefore are not bound by its terms. Compl. ¶¶ 144, 234.

[70] Compl. ¶ 193.

[71] D.I. 1; Compl. ¶ 193.

[72] Compl. ¶ 194.

Tenth Amendment.[73] Yatra filed the now-operative Complaint on September 25, 2020.[74]

Yatra's Complaint comprises five counts. Count I alleges that Ebix breached several of the Merger Agreement's provisions, including the Accuracy Rep, the Accounting Reps, the S-4 Covenants and the Best Efforts Covenant.[75] Count II alleges that Ebix breached several of the Extension Agreement's provisions, including the Diligence Covenant, the COD Covenant, and the Good Faith Covenant.[76] In Count III, Yatra alleges that Ebix breached the covenant of good faith and fair dealing implied within the Merger Agreement and the Extension Agreement.[77] In Count IV, Yatra alleges that Ebix committed fraud when Ebix intentionally delayed the consummation of the Merger Agreement, to Yatra's detriment, through misrepresentations and acts of deceit.[78] And, in Count V, Yatra alleges the Lender Defendants tortiously interfered with the Merger Agreement by entering into the Tenth Amendment and thereby destroying the economic value of

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[73] Compl. ¶ 174.

[74] D.I. 27.

[75] Compl. ¶¶ 195–99.

[76] Compl. ¶¶ 200–04.

[77] Compl. ¶¶ 205–15.

[78] Compl. ¶¶ 216–39.

the Put Right.[79] After the parties briefed Defendants' motions to dismiss, the Court heard oral argument on June 17, 2021, and the matter was deemed submitted for decision that day.[80]

II. ANALYSIS

Chancery Rule 12(b)(6) requires dismissal of a complaint if the plaintiff could not recover under "any reasonably conceivable set of circumstances susceptible of proof" based on the complaint's well-pled facts.[81] While the court need not accept conclusory allegations or "every strained interpretation of the allegations proposed by plaintiff,"[82] it "must accept as true all well-pled allegations in the complaint and draw all reasonable inferences from those facts in plaintiff's favor."[83]

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[79] Compl. ¶¶ 240–45.

[80] D.I. 51 (Lender Defs.' Opening Br. in Supp. of Mot. to Dismiss Count V of Pl.'s Verified Am. Compl.) ("LDOB"); D.I. 53 (DOB); D.I. 62 (PAB); D.I. 76 (Lender Defs.' Reply Br. in Supp. of Mot. to Dismiss Count V of Pl.'s Verified Am. Compl.) ("LDRB"); D.I. 79 (Ebix Defs.' Reply Br. in Further Supp. of Their Mot. to Dismiss the Verified Am. Compl.) ("DRB"); D.I. 87 (Tr. of 5.17.21 Oral Arg. on Defs.' Mots. to Dismiss) ("Oral Arg. Tr.").

[81] *See Gen. Motors*, 897 A.2d at 168; *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002).

[82] *Id.*

[83] *In re Rouse Props., Inc.*, 2018 WL 1226015, at *10 (Del. Ch. Mar. 9, 2018) (citations omitted).

A. Count I – Breach of the Merger Agreement

In Count I, Yatra claims Ebix breached the Merger Agreement. "Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiff."[84] "[Because] [t]he construction of a contract is a question of law,"[85] it is well understood that "a motion to dismiss is a proper framework for determining the meaning of contract language."[86]

Ebix's showcase argument is that Yatra's decision to terminate the Merger Agreement bars its claims for breach of contract under the unambiguous terms of the Effect of Termination provision. That provision reads in full:

> **Section 8.2 Effect of Termination**. In the event of **any termination** of this Agreement as provided in Section 8.1, **the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto**, **except for** the confidentiality provisions of Section 6.4 (Access to Information) and the provisions of Section 3.26 (No Other Representations and Warranties; Disclaimers), Section 4.17 (No Expenses), this Section 8.2, Section 8.3 (Termination Fees) and Article IX (General Provisions), each of which shall survive the termination of this Agreement and remain in full force and effect; provided, however, that, subject to Section 8.3(a)(iii), **nothing contained herein shall relieve any party from liability for damages arising out of any fraud occurring prior to such termination**, in which case the aggrieved party shall be entitled to all rights and

[84] *77 Charters, Inc. v. Gould*, 2020 WL 2520272, at *19 (Del. Ch. May 18, 2020) (internal quotations omitted).

[85] *Id.*

[86] *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006).

> remedies available at law or equity. The parties acknowledge and agree that nothing in this Section 8.2 shall be deemed to affect their right to specific performance under Section 9.9 prior to the valid termination of this Agreement. In addition, the parties agree that the terms of the Confidentiality Agreement shall survive any termination of this Agreement pursuant to Section 8.1 in accordance with its terms.[87]

Ebix asserts that, under this provision, Yatra's decision to terminate the Merger Agreement eliminated any potential "liability . . . with respect" to the "obligations" arising from the Merger Agreement, including in particular Yatra's claim that Ebix breached the Merger Agreement. Yatra responds that the phrase "with respect thereto" can reasonably be read to modify "any termination of this Agreement" (as opposed to "obligations"). Under this construction, the Effect of Termination provision cannot be understood to eliminate damages owed for prior breaches of "obligations," but only damages caused by the act of terminating the Merger Agreement. Thus, according to Yatra, the Effect of Termination provision does not by its terms extinguish all claims for breach of the Merger Agreement; instead, it serves only to make clear which contractual obligations carry forward post-termination and which do not. At best, Yatra says, the Merger Agreement is ambiguous as to the effect of termination on a party's post-termination remedies.

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[87] MA § 8.2 (emphasis added).

Of course, "[a]n agreement is not ambiguous [simply] because the parties disagree about its interpretation."[88] Rather, "a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[89] "By contrast, a contract is unambiguous when the agreement's ordinary meaning leaves no room for uncertainty, and the plain, common, and ordinary meaning of the words . . . lends itself to only one reasonable interpretation."[90]

Yatra's reading of the Effect of Termination provision stretches the words beyond their tolerance. The comma following "Section 8.1" breaks the sentence, reading naturally to indicate the Merger Agreement's drafters intended the phrase "with respect thereto" to modify "the obligations of the parties" as opposed to "any termination of this agreement."[91] Further, Yatra's position—that the provision only extinguishes liability arising from "any termination of this Agreement"—is

[88] *Sage Software, Inc. v. CA, Inc.*, 2010 WL 5121961, at *6 (Del. Ch. Dec. 14, 2010), *aff'd*, 27 A.3d 552 (Del. 2011) (TABLE).

[89] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorist Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[90] *Pearl City Elevator, Inc. v. Gieseke*, 2021 WL 1099230, at *9 (Del. Ch. Mar. 23, 2021).

[91] To the extent Yatra is seeking to invoke the so-called "last antecedent rule," that rule actually supports Ebix's construction. *See Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *4 (Del. Ch. Dec. 7, 1999) ("[O]ridinarily, qualifying words or phrases, where no contrary intention appears, usually relate to the last antecedent.") (citation omitted). The only "antecedents" at work in the clause at issue are "obligations" and "liability," both of which "terminate" upon termination of the Merger Agreement.

inconsistent with the language immediately following "with respect thereto," which "except[s]" certain *obligations* under the Merger Agreement, as specifically enumerated, from the effects of the contractual limitation of liability. That clause would be superfluous if the effect of the provision was to limit liability only arising from the act of terminating the Merger Agreement.[92] Moreover, contrary to Yatra's contention that termination leaves claims for breach of contract based on prior acts unaffected, Section 8.2 expressly carves out only liability for "fraud occurring prior to such termination," implying that liability for all other claims (including contract-based claims) for acts "occurring prior" to termination do no survive post-termination.[93]

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[92] *See Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage."), *see also* Restatement (Second) of Contracts § 203 ("In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable: (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); *id.* cmt. b ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.").

[93] Though Yatra places great weight on its (disputed) contention that it filed the Original Complaint before effectively terminating the Merger Agreement, Section 8.2 expressly states that following "any termination," "the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto," except "for damages arising out of any fraud occurring prior to such termination." MA § 8.2. By expressly terminating all liability of the parties (except "fraud occurring prior to such termination") following termination, the Effect of Termination provision makes clear that the act of termination extinguishes liability then and there, regardless of whether a claim is pending before termination. *See* 17A Am. Jur. 2d Contracts § 709 (2004) ("Where a contract

Indeed, Section 8.2's language is not *terra incognita*; Vice Chancellor Laster considered a substantively similar effect of termination provision containing a broad waiver of contractual liability, modified by two exceptions, in *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*.[94] There, the court observed that the provision and its exceptions were "pretty standard" and cited extensive secondary sources, including leading treatises, explaining that the consequences of termination are "usually [ ] that all of the provisions, with a few possible exceptions, will terminate and no longer be of any force and effect."[95] In other words, the court endorsed Ebix's construction of the Effect of Termination Provision here.

At oral argument, Yatra attempted to distinguish *AB Stable* by pointing out that the effect of termination provision at issue there included the phrase "this

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prescribes a remedy for a breach, that remedy is generally exclusive if the contract so declares or clearly shows the parties' intention to make it so." (internal citations omitted)).

[94] 2020 WL 7024929, at *104 (Del. Ch. Nov. 30, 2020). It is telling that Yatra did not address *AB Stable* on brief even after Ebix prominently featured that case in its opening submission. *See* DOB at 25–26.

[95] *AB Stable*, 2020 WL 7024929, at *104 n.311 (citing Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions*, § 15A.02 at 15A-4.3 (2020 ed.) (noting the effect of a provision broad that eliminates liability upon termination suggesting that "[it] is important . . . to continue and carve out a proviso to the effect that the foregoing will not relieve any party for liability for its breach of any provision prior to termination. Failure to do this could leave the aggrieved party without a remedy, particularly if the breaching party was the one to terminate."); ABA Mergers & Acqs. Comm., *Model Tender Offer Agreement* 240 (2020) (discussing exceptions to a provision contemplating no liability upon termination and stating that, "[w]ithout this proviso, the language in Section 8.02 would provide that neither party would be liable for breach to the other after termination regardless of pre-closing breaches")).

Agreement shall forthwith become void" upon termination, whereas that phrase is not included in the Effect of Termination provision at issue here.[96] But, as Yatra admitted at oral argument,[97] the court in *AB Stable* expressly observed that "[u]nder the common law, termination results in an agreement becoming void, but that fact alone does not eliminate liability for a prior breach."[98] The court went on to explain that when parties include a provision stating that "there shall be no liability on the part of either party" upon termination, they "alter[] the common law rule" and "broadly waive[] contractual liability and all contractual remedies."[99] The Merger Agreement's Effect of Termination Provision contains language nearly identical to *AB Stable*'s hypothetical, providing that there "shall be no liability on the part of *any* party" in the event of termination, rendering the basis for Yatra's proffered distinction illusory.[100]

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[96] Oral Arg. Tr. 101:8–11.

[97] *Id.* at 101:16–21.

[98] *AB Stable*, 2020 WL 7024929, at *103.

[99] *Id.*

[100] MA § 8.2 (emphasis added). Yatra also observed at oral argument that the effect of termination provision at issue in *AB Stable* did not have the "with respect thereto" language which, according to Yatra, is what inserts ambiguity into the Merger Agreement's Effect of Termination Provision. Oral Arg. Tr. 101:24–102:3. But the point to draw from *AB Stable* is how an effect of termination provision with the "no liability" language operates. As the court there observed, that language makes clear the parties' intent that termination of the agreement will eliminate liability of both parties except to the extent

Yatra next contends that a reading of the broader Merger Agreement conflicts with Ebix's construction of the Effect of Termination provision. Specifically, according to Yatra, Ebix's reading of Section 8.2 conflicts with Section 9.9(c) and Section 9.1.

Section 9.9(c) reads:

> (ii) nothing set forth in this Section 9.9 shall require any party to institute any Proceeding (or limit any party's right to institute any Proceeding) for ***specific performance . . . prior or as a condition to exercising any termination right*** under Section 8.1, nor shall the commencement of any Proceeding . . . restrict or limit any party's right to **terminate the Agreement** in accordance with the terms of Section 8.1 **or** pursue any other remedies (***including monetary damages***) in respect of this Agreement or the transactions contemplated thereby . . .[101]

There is no discernible conflict between Ebix's construction of Section 8.2 and Section 9.9(c). Section 9.9(c) plainly provides only that a party need not sue for specific performance before terminating the Merger Agreement.[102] The disjunctive

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expressly carved-out in the provision. That is precisely what the parties agreed to in the Merger Agreement.

[101] MA § 9.9(c) (emphasis added).

[102] Yatra proposes that Section 9.9(c) allows for a party to terminate the contract and then sue for specific performance. PAB at 32. But Section 9.9(c) does not say that. It states simply that a party is not prevented from suing for specific performance before exercising its termination right. It would make no sense for a party to terminate the agreement, only to turn around and sue for specific performance, and Section 9.9(c) does not provide for that scenario. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, (Del. 2010) (holding that a party seeking specific performance must demonstrate, *inter alia*, that she "is ready, willing and able to perform").

between a reference to termination and the pursuit of other remedies "(including monetary damages)" reveals an intent that a party may *either* terminate the Merger Agreement (one contractual remedy for breach) *or* "pursue any other remedies." Thus, the parties contemplated termination as a remedy distinct from others, which makes perfect sense in view of Section 8.2's unambiguous provision that when a party elects to terminate the Merger Agreement, that termination eliminates any party's liability for damages arising from a breach occurring prior to termination.

Yatra's argument under Section 9.1 fares no better. That provision provides in relevant part:

> [R]epresentations, warranties, covenants and agreements in this Agreement and in any certificate or other writing delivered pursuant hereto shall not survive the consummation of the Merger or the termination of this Agreement, subject to Sections 8.2 and 8.3.[103]

Yatra argues that the survival clause functions to cut off the parties' continuing obligations to comply with the Merger Agreement's provisions *after* the consummation of the Merger or the termination of the Merger Agreement, but does not affect the parties' rights to sue for *prior* breaches.

Contrary to Yatra's argument that the survival clause makes clear that only the obligations set forth in the Merger Agreement (and not the remedy for prior breaches of those obligations) are extinguished post-termination, this court has

[103] MA § 9.1.

explained that "where the contract expressly provides that the representations and warranties terminate upon closing, so do any remedies for breach of those representations and warranties."[104] According to Yatra, the holding in *GRT* is inapt because Yatra has brought its claims for breach post-termination, not post-closing.[105] But this argument ignores that Section 9.2 treats termination as equivalent to closing, stating that "representations, warranties, covenants and agreements . . . shall not survive the consummation of the Merger *or the termination of this Agreement, subject to Sections 8.2* and 8.3."[106] As noted, Yatra's reading simply cannot be squared with Section 8.2's broad elimination of liability following termination. The only way to square Section 8.2 with Section 9.1 is to understand the survival clause to provide that termination operates as if the parties consummated the Merger Agreement—eliminating both sides' liability for any claim arising out of the contract.

In a last gasp, Yatra protests that Ebix's construction results in absurdity, as it would require Yatra to have sued for breach of contract without terminating the

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[104] *GRT*, 2011 WL 2682898, at *13, *see also id.* ("[A]ll major commentaries agree that by expressly terminating representations and warranties at closing, the parties have made clear their intent that they can provide no basis for a post-closing suit seeking a remedy for an alleged misrepresentation"); *id.* at *12 (explaining that Delaware law does not require survival clauses to contain express language limiting remedies).

[105] PAB at 36.

[106] MA § 9.2 (emphasis added).

Merger Agreement.[107] But there is nothing absurd about a contract that, in essence, requires parties to sue for breach without terminating the agreement.[108] Indeed, by Yatra's own admission, its obligations under the Merger Agreement "ceased, because Ebix materially breached the Merger Agreement."[109] Thus, the Merger Agreement provided a choice to a party faced with a breach by the counterparty: either (a) sue for damages (or specific performance) or (b) terminate the Merger Agreement and extinguish liability for all claims arising from the contract (except those specifically carved-out, including claims for fraud). The latter option would be preferable where, for example, the terminating party believed it had some liability exposure of its own and would prefer to terminate the Merger Agreement to eliminate that risk. This is a perfectly logical way for parties contractually to manage risk, and it is not for this Court to redline the parties' bargained-for limitations of liability because one party now regrets the deal it struck.[110]

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[107] PAB at 32.

[108] *See* 17A Am. Jur. 2d Contracts, § 711 (Aug. 2021 Update) (observing that a party to a contract may elect "to keep the contract alive" by "remaining at all times ready, willing, and able to perform their part of the contract" while still maintaining a claim for breach of contract against the counterparty).

[109] *Id.* at 32 n.21.

[110] *See GRT*, 2011 WL 2682898, at *6; *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (explaining the Court will "not rewrite the contract to appease a party who later wishes to rewrite a contract").

Yatra agreed that termination of the Merger Agreement would terminate liability for breach of that contract. Accordingly, its post-termination claim for breach of the Merger Agreement, as stated in Count I, must be dismissed.

B. Count II – Breach of the Extension Agreement

In Count II, Yatra asserts that Ebix breached the Extension Agreement. According to Yatra, even if the Court finds that Count I fails under the Merger Agreement's Effect of Termination Provision, the Extension Agreement is a standalone agreement unaffected by any limitations the parties may have agreed to in other contracts.[111]

Yatra's argument cannot be squared with the plain text of either the Merger Agreement or the Extension Agreement. The Extension Agreement is intended, as its name suggests, to modify the Merger Agreement by extending the agreed upon Outside Date.[112] Not surprisingly, the Extension Agreement refers to the Merger Agreement in its very first sentence, incorporates the capitalized terms in the Merger Agreement and is replete with references to the Merger Agreement.[113]

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[111] Oral Arg. Tr. 116:3–5.

[112] PAB, Ex. 6 ("EA") at 1.

[113] *Id.* at 1 ("Reference is hereby made to the Merger Agreement . . . . All capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Merger Agreement. By signing . . . below, and subject to the following agreements, the Parties hereby agree that the Outside Date in the Merger Agreement shall be further extended to . . . June 4, 2020 . . ."); *id.* at 2 ("In the event that Ebix fails to comply with the provisions in clauses (i)–(iv) above, Yatra shall have the right to immediately terminate

Conspicuously absent from the Extension Agreement, however, is an integration clause.[114] Indeed, there is nothing in the Extension Agreement that provides or even suggests it stands apart from the terms and structure of the Merger Agreement, including the Effect of Termination provision. On the contrary, the parties agreed in the Extension Agreement:

> With the sole exception of the amendment to the Outside Date set forth in this letter agreement, the Merger Agreement remains unchanged and continues in full force and effect. By entering into this letter agreement, neither Party shall be deemed to waive or otherwise impair any of its rights under the Merger Agreement or preclude any other or further exercise of such rights or any other rights under the Merger Agreement. Both Parties expressly reserve their rights under the Merger Agreement and in law and equity.[115]

That language clearly indicates the Extension Agreement was intended narrowly to modify the Merger Agreement's provisions, with all rights and obligations therein otherwise expressly reserved.

The Merger Agreement, for its part, explicitly contemplates "other writings delivered pursuant" thereto, like the Extension Agreement, stating that any representations in "other writings" "shall not survive the consummation of the

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this letter agreement by written notice in accordance with the provisions of Section 9.2 of the Merger Agreement . . . .").

[114] *See generally id.*

[115] EA at 2.

Merger or the termination of this Agreement."[116] For reasons already explained, the termination of the Merger Agreement eliminates claims for prior breaches of contract. Thus, like Count I, Yatra's decision to terminate the Merger Agreement insulated Ebix from liability for alleged breaches of the Extension Agreement. Defendants' motion to dismiss Count II is granted.

C. Count III – Breach of the Implied Covenant of Good Faith and Fair Dealing

In Count III, Yatra asserts that Ebix breached the implied covenant of good faith and fair dealing under the Merger Agreement and the Extension Agreement in two ways. First, Yatra claims Ebix breached the implied covenant by purporting to renegotiate the terms of the Merger Agreement, without any intention of closing those renegotiated terms, to induce Yatra to forbear from exercising remedies before Parent could amend its Credit Agreement, finalize its audit and announce its financial results.[117] Second, Yatra claims that Parent breached the implied covenant by entering into the Tenth Amendment, effectively foreclosing the issuance of the Put Right or the payment of any consideration other than stock.[118]

[116] MA § 9.1.

[117] PAB at 38.

[118] *Id.* at 42.

Under Delaware law, the implied covenant of good faith and fair dealing is "a limited and extraordinary legal remedy."[119] "As such, the implied covenant does not apply when the contract addresses the conduct at issue, but only when the contract is truly silent concerning the matter at hand."[120] Even if the contract is silent, "[a]n interpreting court cannot use an implied covenant to re-write the agreement between the parties, and 'should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.'"[121]

With respect to Yatra's first implied covenant theory, the contract is not silent as to Ebix's obligations. Section 6.5 of the Merger Agreement requires the parties to "use their reasonable best efforts to take, or cause to be taken, as promptly as practicable, all actions necessary, proper or advisable to consummate the Merger as promptly as practicable . . . ."[122] Romanette iv of the Extension Agreement obligates Ebix to "negotiate in good faith with Yatra and its advisors . . . ."[123] These provisions

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[119] *Nemec*, 991 A.2d at 1128.

[120] *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 507 (Del. 2019) (internal quotations and citations omitted).

[121] *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 897 (Del. 2015) (quoting *Allied Cap. Corp. v. GC–Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) (Strine, V.C.)).

[122] MA § 6.5.

[123] EA at 1.

would provide Yatra a contractual hook to hold Ebix to account for its alleged bad faith foot-dragging and Parent's subsequent entry into the Tenth Amendment; indeed, Yatra has attempted to do precisely that in Counts I and II of its Complaint.[124] Instead, Yatra elected to terminate the Merger Agreement and, in doing so, terminated its right to pursue a claim for breach of contract as well.[125] As our Supreme Court has explained, "[t]he implied covenant of good faith and fair dealing involves inferring contractual terms to handle developments or contractual gaps that neither party anticipated. It does not apply when the contract addresses the conduct at issue."[126]

Yatra's second theory fails for the same reasons as its first—the contract occupies the space Yatra seeks to fill with the implied covenant. According to Yatra,

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[124] *See* Compl. ¶¶ 195–204; *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272–73 (Del. 2017) (holding a provision requiring "commercially reasonable efforts" imposed "an affirmative obligation on the parties" and reversing the lower court for focusing only "on the absence of any evidence" when finding that the provision was not breached).

[125] To support its contention that a breach of the implied covenant is not foreclosed by a reasonable best efforts provision, Yatra cites cases applying foreign law. PAB at 40 (citing *Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, 2008 WL 1746974, at *13 n.60 (Del. Ch. Apr. 7, 2008) (applying D.C. law) and *Rus, Inc. v. Bay Indus., Inc.*, 322 F. Supp. 2d 302 (S.D.N.Y. 2003) (applying New York law)). There is no point in addressing these authorities as Delaware law on the subject is clear. There is no basis to imply a covenant of good faith and fair dealing where the express terms of the contract address the matter in question, including a parties' obligation to use best efforts to complete a designated task. *Oxbow Carbon*, 202 A.3d at 507.

[126] *Nationwide Emerging Managers*, 112 A.3d at 896 (cleaned up).

Parent breached the implied covenant when it entered into the Tenth Amendment without ever disclosing the amendment to Yatra, thereby effectively prohibiting Ebix from closing the Merger with its Put Right intact or suing for specific performance.[127] But the Merger Agreement specifically addresses Ebix's obligation to consummate the transaction without trigging an event of default under an agreement to which Parent or Merger Sub is bound. In Section 4.4 of the Merger Agreement, Ebix represents to Yatra that Ebix's execution, delivery, and performance of the Merger Agreement and its consummation of the Merger do not and will not "violate, conflict with, result in the loss of any benefit under, constitute a default (or an event which, with or without notice or lapse of time, or both, would constitute a default) under . . . any Contract to which Parent or Merger Sub is a party, or by which they or any of their respective properties or assets are bound or affected . . ."[128] One of Yatra's closing conditions was that Ebix's representations and warranties, as set forth in Section 4.4, are "true and correct" as of the Signing Date and as of the Closing.[129]

Yatra alleges the Tenth Amendment prohibits Ebix from closing the Merger with Yatra's Put Right intact because doing so would cause Parent to default on the

[127] Compl. ¶¶ 213–15.

[128] MA § 4.4.

[129] MA § 7.3(a).

Credit Agreement.[130] Section 7.3 of the Merger Agreement explicitly provides that Ebix must be able to consummate the Merger without defaulting on the Credit Agreement, and so the "[e]xisting contract terms control . . . such that implied good faith cannot be used to circumvent the parties' bargain."[131]

Because the Merger Agreement leaves no gap to fill with the implied covenant, the motion to dismiss Count III must be granted.[132]

D. Count IV – Fraud

In Count IV, Yatra asserts it was defrauded by Ebix. To be clear, Yatra's claim is not premised on a fraudulent inducement theory, nor is it premised upon a contractual fraud theory, i.e., that Ebix made knowingly false representations in the Merger Agreement itself. Instead, Yatra's fraud claim—asserted only in its Amended Complaint after Ebix briefed in its original motion to dismiss the

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[130] Compl. ¶¶ 213–15.

[131] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005); see also *Shenandoah Life Ins. Co. v. Valero Energy Corp.*, 1988 WL 63491, at *8 (Del. Ch. June 21, 1988) ("Where . . . a specific, negotiated provision directly treats the subject of the alleged wrong and has been found to have not been violated, it is quite unlikely that a court will find by implication a contractual obligation of a different kind that has been breached.").

[132] I note separately that, in my view, where an implied covenant relates to contractual commitments that cease to operate upon termination, the covenant itself would likely also be extinguished. I need not rest dismissal on that ground, however, because Yatra's implied covenant claim fails for other reasons. Moreover, Yatra's implied covenant claims, both of which implicate the same conduct that animates its fraud claim, appear to be attempts to dress down a fraud claim in order to avoid the more stringent pleading burdens imposed by Chancery Rule 9(b). That, too, is likely improper. But again, I need not decide the motion to dismiss Count III on that ground.

consequences of the Merger Agreement's Effect of Termination provision—is premised on a theory of promissory fraud, i.e., that Parent made knowingly false "promises or predictive statements of future intent rather than past or present facts."[133] Specifically, Yatra alleges that Ebix made extra-contractual promises that it was willing to renegotiate the Merger Agreement's terms when, in fact, it had no intent to close on the renegotiated terms (or any commercially reasonable terms for that matter). According to Yatra, Ebix strung Yatra along to induce it to forbear from exercising remedies until Parent could get its house in order by amending its Credit Agreement, finalizing its audit and announcing its financial results.[134]

> To state a claim for fraud under Delaware law, a plaintiff must allege:
>
> (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance.[135]

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[133] *MicroStategy, Inc. v. Acacia Rsch. Corp.*, 2010 WL 5550455, at *15 (Del. Ch. Dec. 30, 2010).

[134] Compl. ¶¶ 217, 225, 236.

[135] *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005). The fifth element—that 'the plaintiff was injured by its reliance'—injects a causation inquiry into the fraud cause of action. *See In re Wayport, Inc. Litig.*, 76 A.3d 296, 325 (Del. Ch. 2013) (holding that, to be actionable, "the fraudulent misrepresentation must actually cause harm") (citations omitted).

Fraud claims are subject to Chancery Rule 9(b), which requires the plaintiff to allege the "circumstances constituting fraud . . . with particularity."[136] The relevant circumstances are "the time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation."[137] "The core test is whether the claim has been pled with detail sufficient to apprise the defendant of the basis for the claim."[138]

Even assuming *arguendo* that Yatra's premise for its fraud claim is sound—i.e., that Yatra was somehow frustrated in its ability to hold Ebix to the bargain it struck by Ebix's inexcusable delay[139]—the claim nonetheless fails for lack of loss

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[136] Ct. Ch. R. 9(b).

[137] *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207–08 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (TABLE).

[138] *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 142 (Del. Ch. 2009) (internal quotations and citations omitted).

[139] There is serious reason to doubt this premise. *See Shah v. Shah*, 1988 WL 67403, at *3 (Del. Ch. June 28, 1988) ("Mere inconvenience or substantial increase in the cost of compliance with a contract though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Courts cannot alter contracts merely because they work a hardship. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform." (quoting *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. Aug. 3, 1988)); *Estate of Necastro*, 1993 WL 315464, at *3 (Del. Ch. Aug. 3, 1993) (finding that "[m]ere inconvenience or substantial increase in the cost of compliance" did not excuse obligations under terms of settlement agreement).

causation. Yatra alleges that, but for Ebix's false promises that it would engage in meaningful negotiations while Parent secretly bargained for and then consummated the Tenth Amendment, Yatra would have sued for specific performance of the Merger Agreement.[140] According to Yatra, once Parent entered into the Tenth Amendment, any lawsuit for specific performance was pointless because the claim would have triggered an event of default under the Tenth Amendment, rendering Yatra's Put Right worthless.

[140] Compl. ¶¶ 188, ("Ebix . . . effectively gutted Yatra's valuable Put Right consideration, making specific performance of the contract impossible."), 223 ("For its part, Yatra preferred the original Merger Agreement with its ever more valuable Put Right, but also was willing to consider a renegotiation on valuable economic terms . . ."), 237 ("Yatra reasonably relied on Ebix's promises and did not act to enforce the terms of its existing Merger Agreement at a time when it had leverage to insist on its favorable Put Right and other rights."). On brief, Yatra argues exclusively that the damage suffered as a result of the fraud was the loss of its ability to sue for specific performance. PAB at 52 ("By its fraud, Parent lulled Yatra into granting multiple extensions of the Outside Date and not filing the Original Complaint until June 4, 2020. By this point in time, the specific performance remedy was both unlikely legally ('a party seeking specific performance must act with alacrity or lose its rights') and infeasible practically (there was too much bad blood between the parties for a harmonious business combination). Thus, and as described in more detail below, because of Ebix's fraud, specific performance was off the table by the time of filing of the Original Complaint."); *id.* at 53 ("By this point in time, specific performance was effectively foreclosed as a remedy, since it would have caused an ***immediate*** event of default under the Credit Agreement. Yatra clearly had a contractual right to seek specific performance under the Merger Agreement, and like all contractual rights the right to seek specific performance has value. Parent, with the help of its lenders ***gutted*** that right by surreptitiously contracting away its ability to issue the Put Right under the Tenth Amendment." (emphasis in original)). To the extent Yatra could have contended it suffered other harm as a result of the alleged fraud (unlikely), it has waived that argument now. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

The problem with Yatra's theory is that specific performance of the Merger Agreement was never an option in any event because, as Yatra affirmatively pleads, the SEC never declared the S-4 effective.[141] And, as the Complaint acknowledges, "[i]n order for [Parent] to be able to issue [the Put Right] . . . to Yatra as Merger consideration, the SEC had to declare effective the S-4."[142] Yatra was aware of Parent's troubles with the SEC well before Parent engaged Yatra in the allegedly fraudulent renegotiations that purportedly frustrated Yatra's right to specific performance.[143] Indeed, this frustration animates Yatra's claim for breach of contract in Count I, where Yatra alleges Parent failed to use its "reasonable best efforts" to have the SEC declare the S-4 effective "as promptly as practicable."[144] Thus, Yatra's own pleading belies its effort to pin its inability to sue for specific performance on Parent's separate renegotiation of the Tenth Amendment and, for

[141] Compl. ¶¶ 49, 84, 91.

[142] Compl. ¶ 49. *See also* Compl. ¶¶ 43, 48–49 (acknowledging that "an effective S–4 was a condition to closing").

[143] Compl. ¶¶ 98–122, 133.

[144] MA § 6.1; Compl. ¶ 198. I note that the Complaint alleges that Ebix failed to use its "reasonable best efforts" to have the SEC declare the S-4 effective, but the Merger Agreement provides that this obligation applies only to Parent and not Parent and Merger Sub.

that reason, its fraud claim fails.[145] Accordingly, Defendants' motion to dismiss Count IV must be granted.

E. Count V – Tortious Interference with Contract

In Count V, Yatra asserts the Lender Defendants tortiously interfered with the Merger Agreement by entering into the Tenth Amendment. Specifically, Yatra alleges the Tenth Amendment made the issuance of the Put Right impractical and thereby "sabotaged the Merger all together by contractually prohibiting Ebix from issuing crucial Merger consideration."[146]

At the threshold, the parties dispute choice of law. The Lender Defendants argue the law of India should apply to Yatra's tortious interference claim, while Yatra argues Delaware law applies. For reasons explained below, there is no need for a choice of law analysis here because Yatra's tortious interference claim fails even if the Court assumes the law of Yatra's preference (Delaware) applies.

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[145] *See Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int'l Fund, L.P.*, 829 A.2d 143, 159 (Del. Ch. 2003) (finding that the fourth and fifth elements of fraud are ". . . inadequately pled to meet the requirements of Court of Chancery Rule 9(b)"), *see also Brevet Cap. Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *8 (Del. Super. Ct. Aug. 5, 2011) (dismissing claim for fraud because plaintiff merely alleged that it "suffered damages" without identifying "in any meaningful way" what those damages were); *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch. Dec. 19, 2002) (dismissing fraud claim for failure to well plead harm flowing from the alleged fraud), *aff'd*, 825 A.2d 239 (Del. 2003) (TABLE).

[146] PAB at 66.

To state a claim for tortious interference under Delaware law, a party must plead "(1) a contract, (2) about which [the] defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[147] Again, Yatra's contention that the Lender Defendants caused its injury (the loss of the Put Right) runs headlong into its allegations that Parent could not have issued the Put Right in any event due to the SEC having never declared the S-4 effective.[148] The Lender Defendants are not alleged to have had any role in Parent's troubles with the SEC, which were ongoing long before the Tenth Amendment was even contemplated.[149] Thus, the Lender Defendants' entry into the Tenth Amendment did not stand alone as an impediment to Yatra's ability to pursue specific performance of the Merger Agreement (or its bargained-for Put Right); even if the Tenth Amendment was never executed, specific

[147] *Aspen Advisors LLC v. UA Theater Co.*, 861 A.2d 1251, 1265–66 (Del. 2004) (quoting *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987)).

[148] Compl. ¶¶ 49, 84, 91, *see also Stone & Paper Invs., LLC v. Blanch*, 2020 WL 3496694, at *6 (Del. Ch. June 29, 2020) ("[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law").

[149] *See* Compl. ¶¶ 56 (alleging the SEC declaration was due "no later than 45 days after execution of the Merger Agreement (*i.e.*, August 30, 2019)" and that "Ebix breached these obligations, along with the Best Efforts Provision, by dragging its feet with the preparation and filing of the S-4"), 87 ("[R]ather than expeditiously working to clear the SEC's comments, Ebix sought extensions to respond to each and every one of the Comment Letters, and its replies were entirely inadequate.").

performance would not have been a remedy available to Yatra. For that reason, Yatra has failed to allege that the Lender Defendants' entry into the Tenth Amendment was a "significant factor" in causing the breach of the Merger Agreement.[150] The motion to dismiss Count V, therefore, must be granted.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are GRANTED in full.

IT IS SO ORDERED.

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[150] *See Himawan v. Cephalon, Inc.*, 2018 WL 6822708, at *11 (Del. Ch. Dec. 28, 2018) (dismissing plaintiffs' tortious interference with contract claim because "the allegations that [p]laintiffs cite, even with all reasonable inferences drawn in their favor, do not support the allegation" that [the defendants actually] interfered with the Merger Agreement . . ."); *NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *25 (Del. Ch. Nov. 17, 2014) (stating a tortious interference claim requires an act "that is a significant factor in causing the breach of such contract").