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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FAIZ KHAN and RALPH FINGER, on behalf of themselves and all others similarly situated, Plaintiffs below, Appellants v. WARBURG PINCUS, LLC, WARBURG PINCUS PRIVATE EQUITY XII, L.P., WARBURG PINCUS PRIVATE EQUITY XII-B, L.P., WARBURG PINCUS PRIVATE EQUITY XII-D, L.P., WARBURG PINCUS PRIVATE EQUITY XII-E, L.P., WP XII PARTNERS L.P., WARBURG PINCUS XII PARTNERS, L.P., WP CITYMD TOPCO LLC, WALGREENS BOOTS ALLIANCE, INC., and VILLAGE PRACTICE MANAGEMENT COMPANY LLC, Defendants below, Appellees	No. 236, 2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2024-0523-LWW PUBLIC VERSION FILED - AUGUST 29, 2025

APPELLEES WP CITYMD TOPCO LLC AND VILLAGE PRACTICE MANAGEMENT COMPANY LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This case arises out of a transaction (the "Merger") by which Village Practice Management Company LLC ("VillageMD") acquired WP CityMD Topco LLC (the "Company"). In connection with the Merger, the Company's unitholders overwhelmingly approved an amendment to the Company's LLC Agreement that allowed certain controlling investors in the Company—which were affiliated with Warburg Pincus LLC ("Warburg")—to receive different forms of consideration in the Merger than the Company's non-Warburg unitholders. For over a year after the Merger closed, the non-Warburg unitholders had no regrets about their decision. But after the Company's prospects soured, two of these non-Warburg unitholders suddenly decided that Warburg had coerced them into agreeing to amend the Company's LLC Agreement, and filed suit asserting various claims against Warburg and, even more curiously, against the Company and VillageMD. The Court of Chancery readily dismissed Plaintiffs' claims. Respectfully, this Court should affirm.

Prior to the Merger, the Company's LLC Agreement provided that, in certain transactions, the Company's Class B, E, and I unitholders (the "Partial Rollover Holders") would receive the same amount and form of consideration as the units held by the controlling Class A unitholders. The Class A unitholders consisted of

investors affiliated with Warburg (the "WP Investors"). The LLC Agreement also provided that these provisions could be amended by a majority vote of the affected class(es) of the Company's unitholders. On November 7, 2022, the Company and VillageMD entered into the Merger Agreement, which provided that the Company's Class A unitholders, including the WP Investors, would receive a greater percentage of cash from the Merger consideration than the percentage received by the Partial Rollover Holders. As a consequence, the Merger was conditioned on the approval by the Partial Rollover Holders of an amendment to the LLC Agreement that would permit such differential consideration (the "Amendment"). This gave the Partial Rollover Holders a choice: if they liked the terms of the Merger and wanted it to close, they could vote to approve the Amendment; but, if they did not like the Merger, they could reject the Amendment, and the Merger would not close.

The Partial Rollover Holders voted to amend the LLC Agreement, and by a wide margin. The two named Plaintiffs were among those who voted in favor of the Amendment. As a result, the Merger closed without controversy in January 2023. But more than a year later, VillageMD's majority owner, Walgreens, announced that it was reducing the goodwill value of VillageMD. Plaintiffs suddenly had a change of heart and brought this lawsuit.

The crux of Plaintiffs' claim—and its subsequent appeal—is that Warburg, through the WP Investors, "negotiate[d] away" the Partial Rollover Holders' right to receive the same consideration as the WP Investors and "coerced" the Partial Rollover Holders into approving the Amendment. Plaintiffs claimed that this was a breach of the implied covenant of good faith and fair dealing by the WP Investors and constituted tortious interference of the LLC Agreement and unjust enrichment by Warburg. Seemingly as an afterthought, Plaintiffs also asserted a claim against the Company itself for breach of the implied covenant as well as a claim against VillageMD—the counterparty to the Merger—for alleged tortious interference.

After briefing and argument, the Court of Chancery dismissed all claims asserted by Plaintiffs, holding that Plaintiffs attempted to "improperly inject common law fiduciary duties into a contractual relationship that eliminated them" and that the LLC agreement "leaves no room for a quasi-fiduciary theory disguised as an implied covenant claim[.]" Dkt. 56, *Khan v. Warburg Pincus, LLC*, C.A. No. 2024-0523, at 1-2 (Del. Ch. Apr. 30, 2025) ("Op."). Plaintiffs now appeal that ruling, but they fail to identify any error whatsoever in the Court of Chancey's cogent analysis of the myriad flaws with Plaintiffs' theory.

First, the Court of Chancery correctly dismissed Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing. As explained in the

Answering Brief of Warburg and the WP Investors (collectively, the "Warburg Defendants"), Plaintiffs failed to state an implied covenant claim against the WP Investors, and their attempt to do so against the Company was weaker still. According to Plaintiffs, the breach of the implied covenant occurred when they were unlawfully coerced to enter into the Amendment to the LLC Agreement. The Complaint, however, did not allege that the Company itself engaged in any act of coercion, and Plaintiffs' appeal does not (and cannot) do anything to address that fatal flaw. Nor did the Complaint allege any facts supporting an inference that the Company acted in bad faith, and Plaintiffs' appeal does not even mention this requirement. Plaintiffs' silence on this element is not surprising. The Company had absolutely no incentive to coerce Plaintiffs into agreeing to the Amendment for the simple reason that the Company had no interest in how the merger proceeds were allocated among unitholders.

Second, the Court of Chancery correctly dismissed Plaintiffs' claim that VillageMD tortiously interfered with the LLC Agreement. Indeed, Plaintiffs barely attempt to defend this claim in their appeal. Plaintiffs do not dispute that if their claim for breach of the implied covenant was properly dismissed, their claim for tortious interference must likewise fail. But even if Plaintiffs had pleaded a claim for breach of the implied covenant, their tortious interference claim against

VillageMD was still properly dismissed. In their Complaint, Plaintiffs alleged nothing more than that VillageMD entered into the Merger Agreement, which conditioned closing of the Merger on the approval of an amendment to the LLC Agreement. Plaintiffs did not, and plausibly could not, allege that VillageMD's signing of the Merger Agreement somehow caused a breach of the LLC Agreement Plaintiffs likewise do not, and cannot, point to any allegation that VillageMD somehow intended to cause a breach of the LLC Agreement. Plaintiffs' allegations showed the opposite: VillageMD sought to ensure that the Merger Agreement would not breach the LLC Agreement by conditioning the closing on a valid amendment to the LLC Agreement. To suggest that VillageMD tortiously interfered with the LLC Agreement by negotiating a Merger that was expressly conditioned on not breaching the LLC Agreement was and is nonsensical.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Plaintiffs failed to state a claim for breach of the implied covenant of good faith and fair dealing. More specifically, the court correctly held that Plaintiffs failed to allege any actual coercion and, instead, "improperly inject[ed] common law fiduciary duties into a contractual relationship that eliminated them." Op. at 1. The Court of Chancery further correctly held that the implied covenant was not implicated because the "LLC Agreement has no gap preventing the WP Investors from negotiating for disparate consideration—or undertaking an Amendment to permit it." *Id.* at 19. Plaintiffs' arguments on appeal fall especially short with regard to its claim against the Company. On appeal, as in the Court of Chancery, Plaintiffs focus entirely on alleged actions of the Warburg Defendants and do not even attempt to allege any facts that could support a claim that the Company breached the implied covenant.

2. Denied. The Court of Chancery correctly held that Plaintiffs failed to state a claim for tortious interference with contract against VillageMD because they had failed to plead an underlying breach of the implied covenant in the LLC Agreement. But even if Plaintiffs had pleaded a breach of the implied covenant, the Court should still affirm the dismissal of the tortious interference claim because Plaintiffs identify no allegations from the Complaint that could support a claim that

VillageMD engaged in any "intentional act that was a significant factor in causing a breach" or that VillageMD did so "without justification." Instead, Plaintiffs' Complaint compels the opposite conclusion: that VillageMD ensured that the Merger Agreement ***would not*** breach the LLC Agreement by conditioning the Merger closing on a valid amendment to the LLC Agreement.

COUNTERSTATEMENT OF FACTS

A. Factual Allegations and Background

Defendants VillageMD and the Company refer to the Warburg Defendants' Answering Brief for a complete recitation of the factual background. This section focuses on Plaintiffs' factual allegations relating specifically to conduct by the Company and VillageMD, which are few and far between.

In the leadup to the Merger, the Company was governed by the Fourth Amended and Restated Limited Liability Company Operating Agreement (the "LLC Agreement"). A0026 (Compl.); A0036 (Compl.) ¶ 35; A0132 (LLC Agreement).

Pursuant to the LLC Agreement, the Company had various classes of ownership units. Most relevant to Plaintiffs' claims were (1) Class A units that were the most senior class of units and were generally owned by the WP Investors, and (2) Class B units that were generally owned by non-Warburg investors who had previously invested in either CityMD or Summit Medical Group. A0034 (Compl.) ¶ 28. In addition, the Company also issued Class E and I units. A0040 (Compl.) ¶ 42. The parties and the Court of Chancery have referred to the Class B, E, and I unitholders as the Partial Rollover Holders.

The LLC Agreement contained provisions that governed how distributions to unitholders would be made, including in the event of a sale of the Company. A0184-

88 (LLC Agreement) § 4.01. The LLC Agreement provided drag-along rights that allowed the Class A unitholders to compel the Partial Rollover Holders to sell their units under certain circumstances. A0205-08 (LLC Agreement) § 7.04. The LLC Agreement also provided tag-along rights that allowed the Partial Rollover Holders to participate in certain transfers of units by the Class A unitholders. A0202-05 (LLC Agreement) § 7.03. Plaintiffs alleged that the upshot of these provisions was that, in any sale of the Company's units, the Partial Rollover Holders would have the opportunity to "sell their interests in such transaction on the same terms and conditions" as the WP Investors. A0040-41 (Compl.) ¶ 43.

Section 14.04 of the LLC Agreement specifically addressed the manner in which the LLC Agreement could be amended, including amendments that disproportionately impacted certain classes of unitholders. A0237-38 (LLC Agreement) § 14.04. In most circumstances, the LLC's Board of Managers could approve an amendment to the LLC Agreement, but in certain circumstances, Section 14.04 required additional approvals. *Id.* Relevant here, Section 14.04(c) provided that if a proposed amendment "[redacted]" the proposed amendment would require "[redacted]

[redacted]

[redacted]" A0237 (LLC Agreement) § 14.04(c). In the event that "[redacted]," the proposed amendment could be approved by "[redacted]." *Id.*

Section 14.04(d) specifically addressed Section 4.01(a)—the provision governing distributions to the Company's members. Amending that section required "[redacted]." *Id.* § 14.04(d).

In 2021, the Company and VillageMD began negotiating a transaction through which VillageMD would acquire the Company. Ultimately, the Company and VillageMD entered into a non-binding LOI in September 2022. A0044 (Compl.) ¶ 50. The LOI provided that VillageMD would pay a mix of $4,500,000,000 in cash and $2,500,000,000 in VillageMD equity, with Class A unitholders receiving 100% cash. *Id.* ¶ 51. The Company's Board approved the LOI on September 2, 2022. *Id.*

Over the next two months, the Company and VillageMD, along with counsel for the non-Warburg unitholders (including Plaintiffs), worked to memorialize the deal in a final, binding merger agreement. On November 7, 2022, the parties

finalized and signed the Merger Agreement. The Merger Agreement provided that VillageMD would pay aggregate consideration worth $[redacted], with up to $[redacted] in cash and at least $[redacted] in equity. A0045 (Compl.) ¶ 54. The WP Investors received primarily cash consideration, plus $[redacted] in VillageMD equity. *Id.* ¶ 55. The Partial Rollover Holders, in the aggregate, received at least $[redacted] of their consideration in VillageMD equity and the rest in cash. *Id.* ¶ 56.

The Merger Agreement provided that, as a condition to closing, Amendment No. 1 to the LLC Agreement—which was attached as Exhibit C to the Merger Agreement—had to be approved by the Company's unitholders. A0257 (Amendment); A0047 (Compl.) ¶ 61. Among other things, the Amendment changed the LLC Agreement's distribution provisions to specifically permit Class A unitholders to receive a different cash versus equity split than the Partial Rollover Holders. A0258-59 (Amendment). In particular, the Amendment amended Section 4.01(b) of the LLC Agreement to provide:

[redacted]

A0258 (Amendment) § 1(b) (emphasis added).

On or about November 22, 2022, which was after the signing but before the closing, the Partial Rollover Holders received a Confidential Information Statement. That Confidential Information Statement provided significant detail and information about the Merger as well as the proposed Amendment. *See, e.g.*, A0277-84 (Information Statement). In addition, Plaintiffs alleged that "Warburg" conducted information sessions with the minority unitholders "purportedly intended to 'educate' the minority unitholders about the impending deal." A0049-50 (Compl.) ¶ 69.

Plaintiffs concede that the Amendment was validly approved by the Partial Rollover Holders in accordance with the requirements of Section 14.04 of the LLC Agreement. A0050-51 (Compl.) ¶ 71. With that condition to closing satisfied, the Merger closed on January 3, 2023. *Id*.

There is no allegation that any Partial Rollover Holder raised a concern about the Merger, the cash/equity distribution of the Merger proceeds, or any alleged coercion either prior to the Merger or during the year following the Merger. *See generally id.* But on March 28, 2024, Walgreens (Village MD's majority shareholder) announced in a Form 10-Q that it was taking a $5.8 billion impairment

charge to the goodwill value of VillageMD. A0051 (Compl.) ¶ 73.[1] Less than two months later, Plaintiffs filed their Complaint.

In their Complaint, Plaintiffs—two doctors who purport to represent a class of the Partial Rollover Holders—claimed that they were "coerced" into "agreeing to amend the LLC Agreement" so that Warburg could receive a different cash/equity split from the Company's other unitholders. A0047 (Compl.) ¶ 61. The crux of Plaintiffs' claim in the Complaint was that the WP Investors, as the controlling equity holders of the Company, "negotiate[d] away" Plaintiffs' tag-along right and then "coerced" the non-Warburg unitholders into approving the Amendment. In particular, the WP Investors allegedly failed to provide the minority unitholders with various procedural protections leading up to the vote, none of which was required under the LLC Agreement. Op. at 13; A0047-50 (Compl.) ¶¶ 61-70. Plaintiffs asserted that, through this alleged coercion, the WP Investors breached the implied covenant of good faith and fair dealing in the LLC Agreement and that Warburg tortiously interfered with the LLC Agreement. A0054-58 (Compl.) ¶¶ 82-101. As an apparent fallback, Plaintiffs also asserted that the Company breached the implied

[1] *See also* Leroy Leo and Puyaan Singh, *Walgreens takes $5.8 bln hit on VillageMD bet amid CEO focus on profit*, Reuters (Mar. 28, 2024), https://www.reuters.com/business/retail-consumer/walgreens-narrows-full-year-profit-forecast-takes-58-billion-impairment-2024-03-28/.

covenant, while VillageMD allegedly tortiously interfered with the LLC Agreement. A0058-59 (Compl.) ¶¶ 102-06.

B. The Court of Chancery's Dismissal

Defendants moved to dismiss the Complaint for failure to state a claim under Court of Chancery Rule 12(b)(6). The Court of Chancery held oral argument on Defendants' motions to dismiss on January 23, 2025. On April 30, 2025, the Court of Chancery issued a Memorandum Opinion dismissing Plaintiffs' claims with prejudice. Dkt. 56.

In doing so, the Court noted that, overall, Plaintiffs' "arguments . . . improperly inject common law fiduciary duties into a contractual relationship that eliminated them." Op. at 1. The Court further explained that "the LLC Agreement explicitly addressed the matters at issue[,]" including the "requirements to amend . . . the tag-along right[,]" which left "no gap for the implied covenant to fill." *Id.* at 15. The Court further made clear that Plaintiffs failed to plead any facts suggesting the circumstances surrounding the approval of the Amendment were coercive because "the LLC Agreement contemplates amendments adversely affecting the rights of a particular class of units and outlines the steps required for approval of such amendments[,]" and the parties complied with those steps. *Id.* at 16. As the Court of Chancery recognized, "[i]f the parties wanted to include additional

protections against amending the tag-along provision—or to bar changes to it—they could have done so." *Id.* at 17. The parties, however, did not include these additional protections, and thus the Court of Chancery held that Plaintiffs failed to plead that the implied covenant was even implicated by the Amendment, let alone breached by it. *Id.* The Court of Chancery further held that because "[t]he plaintiffs have not . . . sufficiently alleged a breach of any express or implied term [in] the LLC Agreement" Plaintiffs' "tortious interference claims [were] therefore dismissed." *Id.* at 25. The Court of Chancery subsequently entered an order implementing the Opinion and dismissing the Complaint with prejudice.

On May 29, 2025, Plaintiffs filed a notice of appeal. Dkt. 1.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFFS' CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Question Presented

Whether the Court of Chancery correctly held that Plaintiffs failed to plead a claim for breach of the implied covenant of good faith and fair dealing against the Company where the LLC Agreement directly addressed the conduct at issue and Plaintiffs failed to plead any coercive acts or bad faith on behalf of the Company. Op. at 15, 24.

B. Scope Of Review

This Court reviews *de novo* a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6). *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019). Rule 12(b)(6) requires dismissal where the plaintiff cannot recover under any "reasonably conceivable set of circumstances susceptible of proof" based on the complaint's well-pleaded facts. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002). The Court must not "accept conclusory allegations unsupported by specific facts [nor] draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). "[F]ailure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim." *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1036

(Del. Ch. 2014). Further, "this Court may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits Of Argument

On appeal, Plaintiffs challenge the Court of Chancery's dismissal of their implied covenant claim against all Defendants, but do not even attempt to argue that the Complaint states such a claim against the Company. Instead, Plaintiffs focus exclusively on their allegations against the WP Investors. For all of the reasons set forth in the Warburg Defendants' Answering Brief, Plaintiffs' arguments fail. The Court of Chancery correctly held that Plaintiffs failed to identify the existence of any implied obligation implicated by this case because the LLC Agreement (1) expressly permitted the amendment of the Partial Rollover Holders' tag-along rights in the LLC Agreement and (2) provided the specific steps required to effect such Amendment. Because those steps were undisputedly followed, the Court of Chancery's dismissal of the implied covenant claims against the Company was proper for the same reasons it was proper to dismiss the same claims against the WP Investors.

In fact, the Court of Chancery's dismissal of the implied covenant claim was all the more appropriate as against the Company because, simply put, the Complaint

attributed no wrongful, bad-faith conduct whatsoever to the Company, much less conduct that could constitute a breach of the implied covenant.

First, neither the Complaint nor Plaintiffs' Opening Brief identifies any actual coercive acts by the Company. In the Complaint, Plaintiffs repeatedly alleged that "Warburg coerced the Company's minority investors into amending the LLC Agreement." A0027 (Compl.) ¶ 4; A0026 (Compl.) ¶ 1 ("This action challenges a controlling equity holder's coercion of minority investors."); A0047 (Compl.) C. ("Warburg Coerces Equity holders [sic] to Amend the LLC Agreement to Divert Proceeds to Itself."). The only allegations suggesting any coercive acts by the Company consist of entirely conclusory allegations that broadly lumped the Company in with the other defendants. A0047 (Compl.) ¶ 61 ("Therefore, Defendants coerced the Partial Rollover Holders into agreeing to amend the LLC Agreement as a condition to being able to receive the Merger consideration."); A0055-56 (Compl.) ¶ 90 ("The Company and WP Investors did so by coercing the Class into amending the LLC Agreement as a condition of the consummation of the Merger."). The same is true of Plaintiffs' Opening Brief, which still focuses entirely on the purported coercive acts by Warburg. Appellants' Opening Br. ("AOB") at 1 ("This appeal involves claims that private equity firm Warburg coerced the plaintiffs . . . into waiving contractual rights in order to secure differential, advantageous

treatment for Warburg's affiliates."); *see also id.* at 2 ("Warburg lied to unitholders . . . ."); *id.* at 36 ("In the information sessions, Warburg, acting as the WP Investors' agents, falsely threatened that no cash would be paid to those Class B members who failed to deliver the Transmittal Letter by December 4.").

Thus, even if Plaintiffs had stated a claim for breach of implied covenant on their "coercion" theory against the WP Investors—and they clearly did not—Plaintiffs certainly did not do so against the Company, as the Complaint still does not contain a single particularized factual allegation of coercion by the Company. *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 40 (Del. 1996) (holding that "conclusory allegation[s] that coercion was present . . . fall[] well short of the minimum" pleading requirements); *Gelfman v. Weeden Invs., L.P.*, 792 A.2d 977, 992 n.24 (Del. Ch. 2001) (finding as deficient the claim that investors "were coerced in the voting process by the defendants" because it was supported "only by conclusory and, indeed, incoherent accusations"); *Higher Educ. Mgmt. Grp., Inc. v. Mathews*, 2014 WL 5573325, at *9 (Del. Ch. Nov. 3, 2014) (rejecting "only generalized and conclusory allegations" that Board attempted to coerce CEO into signing loan agreements).

Second, Plaintiffs' Opening Brief fails to point to any allegations that the Company acted in bad faith, an essential element for a breach of implied covenant

of good faith and fair dealing. *See New Wood Res. LLC v. Baldwin*, 2023 WL 4883924, at *8 (Del. Super. Ct. July 31, 2023) ("So to prove a breach of the implied covenant of good faith and fair dealing, [the plaintiff] must demonstrate that [the defendant] acted in bad faith."), *aff'd*, 315 A.3d 445 (Del. 2024); *see also eCommerce Indus., Inc. v. MWA Intel., Inc.*, 2013 WL 5621678, at *33 (Del. Ch. Sept. 30, 2013) ("[I]t is critical that the standard [for the implied covenant of good faith and fair dealing] be rigorous, that the obligation breached be clearly implied, and that the party act with an improper state of mind, that is, bad faith."). Instead, as in the Court below, Plaintiffs once again ignore this element altogether. For this reason alone, the Court can affirm the dismissal of the claim against the Company. Del. Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 715 (Del. 2019) (finding that a party waived its claim where the claim was only mentioned in a "cursory" manner in the conclusion and a footnote).

In any event, for the avoidance of doubt, Plaintiffs could never point to allegations supporting a claim that the Company acted in bad faith. The Complaint does not contain any particularized allegation that the Company acted in bad faith. It also did not allege that the Company had any motive to act in bad faith. While

Plaintiffs argue that Warburg purportedly acted in bad faith because it "need[ed] liquidity for its fund investors" and wanted to obtain "different and more attractive consideration [for itself]", AOB at 16; A0027 (Compl.) ¶ 4, Plaintiffs cannot ascribe any such motive on the part of the Company. Simply put, the Company was indifferent as to its unitholders' need for liquidity or the cash/equity splits among the Company's various unitholders. The Company's sole interest was that the Merger consideration be distributed in accordance with the specific requirements of the LLC Agreement. And there is no allegation that the distribution of the Merger consideration breached the requirements of the LLC Agreement, as amended by the Amendment. As such, for these reasons and the reasons set forth in the Warburg Defendants' Answering Brief, the Court should affirm the Court of Chancery's dismissal of Plaintiffs' claim for breach of the implied covenant against the Company.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS FAILED TO PLEAD A CLAIM OF TORTIOUS INTERFERENCE AGAINST VILLAGEMD

A. Question Presented

Whether the Court of Chancery correctly held that Plaintiffs failed to plead a claim for tortious interference against VillageMD where Plaintiffs failed to plead an underlying breach of the implied covenant or any allegation that VillageMD intentionally caused such a breach without justification. Op. at 24-25.

B. Scope Of Review

This Court reviews *de novo* the dismissal below of Plaintiffs' Complaint under Court of Chancery Rule 12(b)(6). *See* Section I.B, *supra*. In addition to affirming the dismissal for the reasons articulated by the Court of Chancery, "this Court may [also] affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin*, 651 A.2d at 1390.

C. Merits Of Argument

The Court of Chancery correctly dismissed Plaintiffs' claim against VillageMD for tortious interference with contractual relations on the basis that Plaintiffs failed to plead an underlying breach of the implied covenant (or any other breach of the LLC Agreement). Op. at 25. In their Opening Brief, Plaintiffs do not dispute that, in order to state a claim for tortious interference, Plaintiffs needed to plead an underlying breach of the implied covenant. AOB at 45 ("To plead viable

claims for tortious interference, 'a plaintiff must plead . . . the breach of such contract . . . .").[2] Because the Court of Chancery correctly held that Plaintiffs failed to plead a breach of the implied covenant, as discussed above and in Warburg Defendants' Answering Brief, the Court should likewise affirm the dismissal of Plaintiffs' tortious interference claim.

Moreover, even if Plaintiffs could have asserted a claim for breach of the implied covenant, this Court should still affirm the dismissal of the tortious interference claim against VillageMD because the Complaint failed to allege two other requisite elements of a tortious interference claim: namely, that VillageMD undertook any "intentional act" that caused the alleged breach of contract or that VillageMD did so "without justification." *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013) (describing a claim for tortious interference as having the following elements: "(1) a contract, (2) about which 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"). Indeed, Plaintiffs' Opening Brief barely mentions the basis for its tortious interference claim against VillageMD and

[2] *See Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1266 (Del. 2004) ("The Court of Chancery concluded that the plaintiffs' Amended Complaint failed to state a claim for breach of the Warrant contract. Accordingly, the Court of Chancery properly held that there could be no viable claim for tortious interference with the Warrant contract.").

never once cites to any Complaint allegations that purportedly state such a claim. As such, even though the Court could affirm the dismissal on the grounds articulated by the Court of Chancery, the Court could and should also affirm on these additional grounds. *See Unitrin*, 651 A.2d at 1390.

1. Plaintiffs failed to allege any intentional act by VillageMD that was a significant factor in causing the alleged breach.

To state a tortious interference claim, Plaintiffs needed to allege that VillageMD engaged in "an intentional act that [was] a significant factor in causing the breach." *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987); *see also Cousins v. Goodier*, 283 A.3d 1140, 1160 (Del. 2022). There are two prongs to this element. Plaintiffs must first plead facts showing that VillageMD acted in a way that was a "significant factor in causing [the] breach[]," *Cousins*, 283 A.3d at 1160, and, importantly, must also plead facts showing that VillageMD did so with the "intent to interfere" with the LLC Agreement. *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579, 593 (Del. Ch. 1997); *see also Cousins*, 283 A.3d at 1160 (same); *Anesthesia Servs., P.A. v. Anesthesia Advantage, P.C.*, 2013 WL 3352672, at *5-6 (Del. Super. Ct. June 27, 2013) (same).

On appeal, Plaintiffs offer only one sentence to explain how "the Complaint clearly alleges facts establishing [this prong]:" *i.e.* arguing that "Plaintiffs allege facts showing that Walgreens and VillageMD knew of the LLC Agreement and

negotiated the LOI and Merger agreement with Warburg to avoid and coercively eliminate the tag-along right." AOB at 45. The cursory statement does not even cite to the Complaint, much less identify any specific intentional act by VillageMD that was a significant factor in causing any alleged coercion. It certainly does not support any claim that VillageMD had any "intent to interfere" with the LLC Agreement.

Instead, as Plaintiffs tacitly acknowledge, VillageMD did nothing more than negotiate and enter into a Merger Agreement that conditioned the closing on an amendment to the LLC Agreement allowing the Class A unitholders to receive a different ratio of cash versus equity than the other unitholders. A0042-45 (Compl.) ¶¶ 46-53; AOB at 45. The entire purpose of conditioning the closing on the Amendment was to ensure that consummation of the Merger ***would not breach*** the LLC Agreement. Such acts, without more, cannot establish that VillageMD caused the alleged breach of the LLC Agreement. Such a claim requires allegations showing that the defendant's conduct causes the plaintiff to breach a contract "by persuasion or by intimidation" or by "leav[ing] [the plaintiff] no choice" but to breach the contract. Restatement (Second) of Torts § 766 cmt. h (1979); *see WaveDivision Hldgs., LLC v. Highland Cap. Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) ("Delaware courts follow Section 766 of the Restatement (Second) of Torts in assessing a tortious interference claim."). The mere fact that VillageMD entered

into a Merger Agreement conditioned upon a proper amendment to the LLC Agreement could not plausibly have induced anyone to breach the LLC Agreement "by persuasion or by intimidation" or somehow have left Warburg "no choice" but to engage in coercion to obtain the Amendment. *See* Restatement (Second) of Torts § 766 cmt. h.

Plaintiffs' Opening Brief likewise fails to point to any allegations in the Complaint supporting an inference that VillageMD intended to interfere with the LLC Agreement. Restatement (Second) of Torts Section 766 makes clear that intent is a required element of tortious interference: "[i]f the actor does not have th[e] intent [to interfere], his conduct does not subject him to liability." Restatement (Second) of Torts § 766 cmt. h; *Anesthesia Servs.*, 2013 WL 3352672, at *5 (The Restatement "requires both 'knowledge of the contract' and knowledge 'of the fact that [defendant] is interfering with the performance of the contract.'") (emphasis omitted). At the very least, this requirement means that Plaintiffs had to allege facts sufficient to show that VillageMD believed that the breach was "***substantially certain to result from [its actions]***." *NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *28 (Del. Ch. Nov. 17, 2014) (citing the Restatement (Second) of Torts § 8A) (emphasis added); *UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697, at *6 (Del. Ch. Dec. 14, 2005) (same). Plaintiffs' Opening Brief points to no such

facts because no such allegations exist in the Complaint. There is no allegation that VillageMD knew about any alleged coercion or participated in or encouraged any alleged coercion. In fact, none of the allegations related to the purported coercion even mentions VillageMD. *See* A0047-50 (Compl.) ¶¶ 61-70. That makes sense: VillageMD had no interest in how the merger proceeds were allocated among the Company's unitholders. Plaintiffs themselves conceded as much in the Complaint, noting that "VillageMD and Walgreens should not have cared whether the Company's equity holders split the consideration fully *pro rata*." A0043-44 (Compl.) ¶ 49.

Rather than intending to interfere with the LLC Agreement, Plaintiffs' allegations make clear that VillageMD's sole intent was that the Merger ***would not*** breach the LLC Agreement. That is why the Merger Agreement specifically provided that, as a condition of closing, the LLC Agreement needed to be amended to permit the Class A unitholders to receive a different form of consideration than the other unitholders. In this way, VillageMD ensured compliance with the LLC Agreement. If, on the one hand, the Amendment passed, there could be no breach of the LLC Agreement because the relevant stakeholders would have authorized the Class A unitholders' receipt of different compensation. If, on the other hand, the Amendment did not pass, there again could be no breach of the LLC Agreement

because the Merger would not go forward. Thus, it is not just that the facts here failed to support an inference that VillageMD intended to induce a breach of the LLC Agreement; they affirmatively showed that VillageMD did not harbor such intent.

2. Plaintiffs fail to allege VillageMD's alleged conduct was "without justification."

To support a claim for tortious interference, Plaintiffs also had to allege facts showing that VillageMD's supposed interference was "without justification." Plaintiffs argue on appeal that they "plead facts showing that . . . VillageMD . . . acted 'without justification," but, again, do so without any citation to the actual factual allegations from the Complaint. AOB at 46. There is a good reason for Plaintiffs' omission: the Complaint did not even mention the "without justification" element of a tortious interference claim, much less allege facts sufficient to satisfy it. That failure alone warrants affirming the Court of Chancery's dismissal. *Pontone*, 100 A.3d at 1036 ("[F]ailure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.").

Plaintiffs' Opening Brief now tries to supplement its deficient Complaint by offering a series of speculative and entirely unsupported statements that VillageMD agreed to the payment of differential consideration among the Company's unitholders in order to "get favorable deal terms" and "avoid spending more than

$4.95 billion cash toward Merger consideration." AOB at 47. Plaintiffs then conclude that "[t]here is no justification for Walgreens/VillageMD's efforts to extinguish the tag-along right just so Walgreens could get deal terms it preferred and induce Warburg to agree." *Id.* at 47-48. As a threshold matter, Plaintiffs' newfound conclusory assertions are not supported by single factual allegation. But putting that aside, these assertions do not even address the factors relevant to the analysis of whether an alleged interference was "without justification," let alone support a claim in that regard.

In determining whether defendant's act in inducing a breach is improper—*i.e.* "without justification"—the Court looks to the following factors: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." *WaveDivision Hldgs.*, 49 A.3d at 1174 (quoting Restatement (Second) of Torts § 767); *Cousins*, 283 A.3d at 1166 (same). Here, each of these factors points to only one conclusion: the alleged acts by VillageMD—*i.e*. proposing and negotiating terms that were favorable to VillageMD and conditioning the transaction on an Amendment of the

LLC Agreement to avoid any breach—were legitimate and justifiable commercial conduct that cannot sustain a claim of tortious interference.

Nature of the actor's conduct. This factor considers whether VillageMD's alleged conduct was itself "independently tortious." *NAMA Hldgs.*, 2014 WL 6436647, at *29. Where the conduct alleged was itself "not wrongful," this factor "does not support a claim for tortious interference." *Id.* Here, VillageMD's only alleged conduct consisted of negotiating and executing a Merger Agreement. Such conduct is most assuredly not independently tortious.

VillageMD's motive. This factor requires Plaintiffs to come forward with factual allegations suggesting that VillageMD was motivated solely by a desire to interfere with the Plaintiffs' contractual relations. *See WaveDivision Hldgs.*, 49 A.3d at 1174. "Only if the defendant's *sole* motive was to interfere with the contract will this factor support a finding of improper interference." *Id*. (emphasis in original). Here, Plaintiffs do not allege that VillageMD had ***any*** motive to interfere with the LLC Agreement, let alone that it was VillageMD's sole motive. Quite the opposite, Plaintiffs admit that VillageMD, as the buyer, had no reason to care how the consideration it paid for the Company was split between its unitholders. A0043-44 (Compl.) ¶ 49.

The interests of Plaintiffs. This factor looks at the contractual interest that Plaintiffs seek to protect, namely, "whether the obligation was an existing contract, whether it was oral or in writing, and the degree of specificity of the obligation." *NAMA Hldgs.*, 2014 WL 6436647, at *31–32; *see also* Restatement (Second) of Torts § 767 cmt. e (stating that depending on other factors, an "interference would be improper if [there was a] breach of an existing contract" as opposed to a "prospective" contract). Here, Plaintiffs seek to protect their purported interest in preventing Warburg from breaching the implied duty of good faith and fair dealing in connection with obtaining an amendment to the LLC Agreement. The need to protect such an interest, if any, is certainly low. As case law has noted, "[j]ust as a business expectancy is less worthy of protection than an actual contract, an implied obligation would seem less entitled to protection than an express obligation." *NAMA Hldgs.*, 2014 WL 6436647 at *32; *see also* Restatement (Second) of Torts § 767 cmt. e ("greater definiteness" of a contractual interest favors a finding of improper interference). That should be especially true here, where the Plaintiffs sought to create new obligations, such as the amendment of Plaintiffs' tag-along rights, which are already addressed by the express terms of the LLC Agreement.

VillageMD's interests. In contrast with Plaintiffs' weak interest, VillageMD has an "important" interest in being able to pursue a legitimate merger, especially

when it did so in a manner that ensured compliance with the LLC Agreement. *See* Restatement (Second) of Torts § 767 cmt. f ("Usually the actor's interest will be economic, seeking to acquire business for himself. An interest of this type is important and will normally prevail over a similar interest of the other if the actor does not use wrongful means.").

The social interests. The Restatement has explained that this factor balances the social interest in "competitive enterprise" against the social interest in avoiding the use of "predatory means like violence and fraud" in pursuit of enterprise. Restatement (Second) of Torts § 767 cmt. g. Here, Plaintiffs did not allege that VillageMD did anything other than pursue its legitimate commercial interest by negotiating the Merger Agreement. Plaintiffs did not and could not allege that VillageMD engaged in any "predatory means like violence or fraud" in doing so, or otherwise used improper means. As such, the social interest here could only favor VillageMD's interest in fostering a "competitive enterprise." *See id.*

The remoteness of VillageMD's alleged conduct to the interference. This factor considers whether the defendant's conduct directly "induce[d] a third person not to perform his contract," such that "interference is an immediate consequence of the [defendant's] conduct" or whether the alleged failure to perform is a "more indirect and remote consequence" of the defendant's conduct. Restatement (Second)

of Torts § 767 cmt. h. As noted above, Plaintiffs did not allege that VillageMD did anything to "induce" Warburg to purportedly coerce the non-Warburg unitholders into voting in favor of the Amendment, much less that such coercion was an "immediate consequence" of VillageMD's alleged conduct. As such, this factor again cannot support Plaintiffs' tortious interference claim.

Relations between the parties. This final factor considers whether any aspect of the relationship between the parties warrants a finding that VillageMD's conduct was "improper." *See* Restatement (Second) of Torts § 767 cmt. i. Here, Plaintiffs do not allege that VillageMD had any relationship with the other parties, other than as an independent counterparty seeking to negotiate the Merger Agreement. Delaware promotes the freedom of parties to enter into such contracts. *NAMA Hldgs.*, 2014 WL 6436647, at *34–35 ("The right of competent persons to make contracts and thus privately to acquire rights and obligations is a basic part of our general liberty. This ability to enter and enforce contracts is universally thought not only to reflect and promote liberty, but as well to promote the production of wealth."). As such, nothing about VillageMD's relationship with the other parties supports a claim that its actions were "without justification."

In short, none of the relevant factors supports an inference that VillageMD's alleged interference with the LLC Agreement was "without justification." If

anything, the factors show just the opposite, as the allegations pertaining to VillageMD bespeak only legitimate and justifiable commercial conduct. On this ground alone, the Court can affirm the dismissal of Plaintiffs' tortious interference claim against VillageMD.

CONCLUSION

For all of the foregoing reasons, the Court should affirm.

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CERTIFICATE OF SERVICE

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