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Case Number 356,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IRV EDWARDS, M.D., MARK BELL, M.D., BRUCE HENSEL, M.D., and STEVE MARON, M.D.,

Plaintiffs Below,
Appellants,

v.

GIGACQUISITIONS2, LLC, GIGCAPITAL2, INC., UPHEALTH, INC., AVI KATZ, RALUCA DINU, CHIRINJEEV KATHURIA, THE NEEDHAM GROUP, INC., and, NEEDHAM & COMPANY, LLC,

Defendants Below,
Appellees.

No. 356, 2025

Court Below: Court of Chancery of the State of Delaware,
C.A. No. 2024-0591-LWW

PUBLIC VERSION FILED - DECEMBER 1, 2025

(CORRECTED) APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

This appeal turns on the straightforward proposition that, under Delaware law, a tort-based claim accrues when a plaintiff is actually injured—when detrimental reliance becomes real, not theoretical. Applying that principle here, Plaintiffs' claims accrued when the SPAC transaction closed on June 9, 2021 or, at the earliest, when Cloudbreak's members approved and adopted the BCA on June 2, 2021. Under either accrual date, Plaintiffs' claims are timely.

Defendants resist this outcome by mischaracterizing Plaintiffs' arguments and distorting Delaware law. Plaintiffs do not contend that accrual awaits damages. Nor do they dispute Delaware's occurrence rule. Rather, Delaware law makes clear that in multi-step transactions that end in a closing, like this one, injury occurs when the deal becomes final and the plaintiff's reliance is irrevocable—*i.e.*, at closing. And in other contractual contexts, like those addressed in cases Defendants themselves cite, injury occurs when the contract becomes fully binding and effective (which means after any conditions subsequent have been satisfied).

In any event, even if Plaintiffs' claims accrued in November 2020, they would still be timely under applicable tolling doctrines. Defendants all but ignore the inherently unknowable falsities baked into the diligence materials, and Needham cannot explain how Plaintiffs could have uncovered its concealed, behind-the-scenes role in fabricating financials—discovered only through unrelated litigation in 2023.

For the reasons below, the Chancery Court erred by starting the limitations clock before Plaintiffs were even injured. Delaware law does not permit that result. This Court should thus reverse the Chancery Court's dismissal of Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' CLAIMS ACCRUED IN JUNE 2021, RENDERING THEM TIMELY

Much of Defendants' answering brief talks past Plaintiffs' opening brief; misconstruing Plaintiffs' arguments and focusing on strawmen.

To start, Defendants apparently concede that the Chancery Court erred when it held that Plaintiffs' claims accrued at the time of misrepresentation. *See generally* Op. Br. at 17–25.[1] Rather than attempt to defend this aspect of the Chancery Court's decision, Defendants simply deny that the Chancery Court ever made such a holding. *See, e.g.*, Ans. Br. at 20 ("The Court of Chancery did not hold that Plaintiffs' claims accrued when the alleged misrepresentations and omissions were made in June and October 2020."); *see also, e.g.*, *id.* at 16. Of course, Defendants' position ignores the multiple times the Chancery Court expressly held exactly that. *See, e.g.*, Op. at 30 (holding that a fraudulent inducement claim "accrues when the alleged misrepresentations were made"), 31 (holding that a negligent misrepresentation claim "similarly accrues when the challenged statements are made"), 31 n.138 (observing that "a negligent misrepresentation claim accrues . . . *on the date of the*

[1] Throughout this brief, "Op. Br." refers to Plaintiffs' opening brief, and "Ans. Br." refers to Defendants' answering brief.

alleged misrepresentation"), 32 (making timeliness determination in relation to the timing of the fraudulent and misleading statements).[2]

Unable to endorse the Chancery Court's repeated holdings, Defendants attack an argument Plaintiffs never made: that, under Delaware law, a cause of action only accrues upon damages. *See, e.g.*, Ans. Br. at 15–19. It is not clear why Defendants spill any ink on this argument—let alone five pages of their brief—especially given that the term "damages" never even appears in Plaintiffs brief. Indeed, it is an uncontroversial statement of Delaware law that "[t]he statute of limitations can start to run before any 'actual or substantial damages' occur." *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 196 n.156 (Del. 2021) (quoting *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 735 (Del. 2020)).

Accordingly, and as Defendants ultimately recognize, the actual questions are: What is the relevant injury, and when does that injury occur? *See* Ans. Br. at 15. With regards to the first question, Defendants cite no relevant Delaware law, instead

[2] Confusingly, despite abandoning any defense of these holdings, Defendants cite (and even quote) several decisions that appear to endorse the rule that accrual begins at the time of misrepresentation. *See* Ans. Br. at 17 (quoting *Jeter v. Revolutionwear, Inc.*, 2016 WL 3947951, at *9 (Del. Ch. July 19, 2016); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.*, 2019 WL 328429, at *6 (Del. Super. Jan. 23, 2019); *Winkelvoss Cap. Fund, Ltd. Liab. Co. v. Shaw*, 2019 WL 994534, at *5 (Del. Ch. Mar. 1, 2019). To the extent these cases stand for the proposition that accrual can begin before injury has occurred, they do not accord with current authoritative Delaware law. *See generally* Op. Br. at 17–25.

citing a (more than thirty-year-old) federal Pennsylvania decision and a Delaware decision addressing an inapposite breach of fiduciary duty claim. *Id.* at 16 (citing *Margarite v. HRN Corp.*, 1993 WL 283980 (E.D. Pa. July 21, 1993), and *Reilly v. Horn*, 2025 WL 2781735 (Del. Ch. Sept. 30, 2025)).

Rather than relying on out-of-jurisdiction and incomparable cases, Plaintiffs have identified two potential moments at which injury for tort claims involving false representations occurs and those claims begin to accrue. These options are supported by Delaware law (including this Court's cases and cases Defendants themselves rely on) and common sense. The first date of injury, which applies in the context of a multi-step transaction that ends in a closing, is at the transaction's closing. The second date of injury, which applies in other contractual contexts, is when the contract becomes fully binding on the parties (*i.e.*, upon satisfaction of any conditions necessary to the contract's being finalized).

In this case, either date of injury renders Plaintiffs' claims timely, requiring reversal of the Chancery Court's dismissal of those claims.

A. Under analogous Delaware law, Plaintiffs' claims accrued when the SPAC transaction closed on June 9, 2021.

Delaware courts, including this Court, consistently recognize that claims like Plaintiffs' that arise out of a multi-step transaction that culminates in a closing accrue at closing. This rule is simple, easy to apply, and makes sense—the date of closing is when the transaction's objectives are satisfied and any injury is sustained.

Defendants' attempt to distinguish *Lehman Bros.* is misplaced. *See* Ans. Br. at 19. *Lehman Bros.* supports Plaintiffs' position that the SPAC transaction's closing is the appropriate accrual date. There, this Court held that misrepresentation[3] and false information claims accrued at closing, when the lender "relied on the false information" and the buyer "finalized the transaction that transferred the purchase money to the Sellers." *Lehman Bros.*, 268 A.3d at 190–91, 197. The Court did not tie accrual to a pre-closing date (for example, when the lender agreed to loan the buyer money), but to the moment the lender's and buyer's detrimental reliance became irrevocable through consummation of the deal. The same logic applies here: Plaintiffs' injury did not occur when Defendants distributed doctored diligence materials in 2020, or when Plaintiffs finalized the BCA. Rather, Plaintiffs were injured when the SPAC transaction closed and they sold Cloudbreak.

Next, Defendants attack *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552 (Del. Super. Ct. Oct. 1, 2008), a case that this Court cited approvingly in *Lehman*. *See Lehman*, 268 A.3d at 190 n.94. Defendants' claim that *Lee* is cabined to cases involving breach of contracts is undermined by even a cursory review of the court's decision. *See* Ans. Br. at 25–26. *Lee* very clearly held: "Generally, where a plaintiff

[3] While the buyer brought a rescission claim, this Court recognized that the Court of Chancery assessed the claim under an analysis that would apply to tort-based misrepresentation claims. *Lehman Bros*., 268 A.3d at 184 n.40.

alleges claims of breach of contract, *fraudulent misrepresentation, and negligenc*e related to the purchase of a home, the statute of limitations begins to run on the date of the settlement or closing." *Lee*, 2008 WL 4444552, at *3 (emphasis added). This language is notably absent from Defendants' answering brief.

Finally, Defendants try to distinguish *Kilcullen v. Spectro Scientific, Inc.*, 2019 WL 3074569 (Del. Ch. July 15, 2019), by claiming that the fraudulent misrepresentations were made "on the date of closing," as opposed to pre-closing. Ans. Br. at 24. That is wrong. The misrepresentations in *Kilcullen* took the form of false representations and warranties contained in a stock purchase agreement that was entered into nine days *before* the transaction closed. 2019 WL 3074569, at *1 (finding the stock purchase agreement was entered into on November 19, 2014 and the transaction closed on November 28, 2014). That the misrepresentations were made within a pre-closing contract as opposed to extra-contractually is irrelevant—what matters is that the injury caused by those misrepresentations was felt upon closing. *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005) (finding a party was injured by pre-closing misrepresentations upon closing, at which point the party received property whose value and nature were worse than had been represented).[4]

[4] Notably, Defendants do not respond to *Certainteed*, which Plaintiffs also cited in their opening brief. *See* Op. Br. at 28.

Each of these cases support the conclusion that the SPAC transaction is the appropriate and legally cognizable date of injury. Everything leading up to that point was a step towards each of the parties' ultimate objective, which was to close the deal. And at that moment, Defendants succeeded in their fraudulent scheme to induce Plaintiffs to facilitate and consummate the SPAC transaction.[5]

B. At minimum, Defendants' own cases confirm that Plaintiffs' claims accrued no earlier than the June 2, 2021 member vote.

Defendants assert that "[d]ecades of [Delaware] precedent affirms that the injury for extra-contractual fraudulent inducement occurs by no later than the execution of the relevant contract." Ans. Br. at 16–17 (collecting cases). But none of those cases involved a contract, like the one here, that required a subsequent

[5] Defendants again contend that Plaintiffs "conflat[e] *injury* with *damages*." Ans. Br. at 26. Not so. Even if the UpHealth's stock price soared after de-SPACing, Plaintiffs' injury would still have occurred at the time of closing. Plaintiffs' position is not that a closing only serves as an accrual date when the closing itself causes damages—such a rule would be unpredictably variable and unworkable.

approval vote to become binding.[6] At most, Defendants' cases can only be read to support the principle that tort claims based on extra-contractual misrepresentations typically (but not always, *see supra* 5–8) accrue when the contract becomes binding.[7]

Applying this principle, Plaintiffs' claims are timely because the BCA became binding upon the June 2, 2021 member vote. Indeed, under the BCA's plain terms, Cloudbreak's members were required to approve and adopt the BCA by subsequent vote—a step that all parties understood was necessary. *See* A329, ¶115; *see also, e.g.*, A73–74 (providing, in Section 4.21, that the subsequent member vote was

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[6] *See, e.g.*, *Sunrise Ventures, LLC v. Rehoboth Canal Ventures*, LLC, 2010 WL 363845, at *4 (Del. Ch. Jan. 27, 2010) (finding that a contract was executed and a related acquisition consummated on the same day, without reference to any subsequent determinative vote); *Puig v. Seminole Night Club, LLC*, 2011 WL 3275948, at *1 (Del. Ch. July 29, 2011) (finding that three agreements were signed on the same day, without reference to any subsequent determinative vote); *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *4 (Del. Super. Ct. Dec. 29, 2015) (finding that the parties entered into an agreement on a specific date, without reference to any subsequent determinative vote). As noted, the remainder of Defendants' cases restate the erroneous statement of law that a tort claim based on a misrepresentation accrues at the time of the misrepresentation. *See supra* n.2 (discussing *Jeter*, *Optical Air*, and *Winkelvoss*).

[7] As one of Defendants' cases provides, "[f]raudulent statements made after the execution of an agreement relate to the performance of the contract, not the inducement of the contractual relationship." *Optical Air Data Sys.*, 2019 WL 328429, at *6 (internal quotation marks omitted). Where, as here, a contract is not binding until a condition subsequent has been satisfied (*e.g.*, a second determinative vote), any previous interim steps do not bind the parties or require their performance—and thus do not trigger the statute of limitations.

necessary), 79 (providing, in Section 5.10, that additional subsequent votes were necessary); *see also* Op. Br. at 29–30 (identifying relevant BCA provisions making clear that the November 20, 2020 vote was an interim step and the June 2, 2021 member vote was determinative). Against this factual backdrop, it is clear Plaintiffs' claims are timely even under the cases Defendants cite.

Defendants proffer three arguments for why June 2, 2021 is not an adequate accrual date. Each is unpersuasive.

First, Defendants contend that Plaintiffs' claims did not accrue on the date of the member vote because Plaintiffs "have not pleaded that they relied on post-November 2020 statements in casting their votes." Ans. Br. at 27 (quoting Op. at 35–36). But because the BCA was effective only on the June 2021 member vote, Defendants' reliance on November 2020 is irrelevant. Put simply, Plaintiffs did not need to "plead a separate 'wrongful act' after November 2020 that would have restarted the limitations clock," *id.* at 27 (emphasis omitted), because the limitations period did not start until June 2021.[8] A clock cannot "restart" if it never began at all.

Second, Defendants assert that Plaintiffs' allegations undermine the argument that Plaintiffs did not detrimentally rely on Defendants' misrepresentations until the

[8] Defendants offer no response to Plaintiffs argument that even assuming Plaintiffs suffered injuries in November 2020, pre-November 2020 misrepresentations could cause multiple, distinct resulting injuries. *See* Op. Br. at 33 n.17.

June 2, 2021 member vote. *See* Ans. Br. at 27–28. Not so. Plaintiffs' allegations repeatedly state that Defendants "intended to induce Plaintiffs to *approve the merger and adopt the BCA*." A340, ¶159 (emphasis added); *see also, e.g.*, A344, ¶182 (alleging that Defendants "meant to induce Plaintiffs' *approval of the merger and adoption of the BCA*" (emphasis added)). Those allegations are clear references to the member vote, as the member vote was held *precisely* to approve the merger and adopt the BCA. *See, e.g.*, A73–74, 79. And Defendants' insinuation that Plaintiffs represented that Edwards "detrimentally relied on the alleged misrepresentations" during the November 2020 vote is disingenuous. Ans. Br. at 28. Plaintiffs never claimed Edwards *detrimentally* relied on Defendants' misrepresentations in November 2020—nor could they have, as the only vote that could conceivably have detrimentally bound Edwards was the June 2021 member vote.

Third, Defendants fall back on the argument that the Member Support Agreements contractually bound certain members to vote in favor of the BCA and SPAC transaction, rendering both pre-determined as of the November 2020 vote. *See* Ans. Br. at 28–29. But Defendants *fail to respond* to Plaintiffs' arguments that the Member Support Agreements were non-binding because the alternative interpretation would render multiple provisions of the BCA meaningless and would violate Cloudbreak's LLC agreement. *See* Op. Br. at 32–33.

This Court has long recognized that "[i]ssues not briefed are deemed waived." *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349, 408 (Del. 2024) (quoting *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999)); *see also Pinnacle IV, L.P. v. CyberLabs AI Holdings Ltd.*, 2024 WL 3252672, at *8 n.68 (Del. Super. Ct. July 1, 2024) (holding the defendants waived an argument by failing to address the plaintiff's argument in their answering brief); *Larkin v. Shah*, 2016 WL 4485447, at *2 (Del. Ch. Aug. 25, 2016) (holding that parties "waived [an] argument by omitting it entirely" from their answering brief). Accordingly, Defendants have waived any argument that the Member Support Agreements were valid and binding.[9]

Finally, though mooted by their failure to fully defend the Member Support Agreements against Plaintiffs' arguments, Defendants claim Plaintiffs waived their argument that the Member Support Agreements cannot be considered on a motion to dismiss. *See* Ans. Br. at 29. But the Chancery Court's decision was not based on the applicability of the Member Support Agreements. To the extent Defendants now rely upon the Member Support Agreements to support affirmance, Plaintiffs are entitled to respond to that argument on appeal. And, in any event, Defendants are wrong on the merits. Defendants do not dispute that the Member Support

[9] By the same token, Defendants have waived any argument regarding the "drag-along" right appearing in Cloudbreak's LLC agreement, which they do not mention a single time in their brief. *Compare* Op. Br. at 31–32 (asserting the inapplicability of the drag-along right) *with* Ans. Br. at 28–29 (offering no response).

Agreements were never incorporated by reference in the pleadings—instead, they point to Exhibit A to the BCA, which was so incorporated. *See id.* But Exhibit A is an incomplete and unsigned form document, not the actual executed Member Support Agreements. *See, e.g.*, A107–13 (Exhibit A to the BCA); *see also* A42. Thus, even if the Chancery Court had reached the issue, it would have been inappropriate for it to have consider the Member Support Agreements on this procedural posture.

Thus, no matter which way this Court looks at it, Plaintiffs claims accrued in June 2021, rendering them timely and requiring reversal of the Chancery Court's dismissal of those claims.

II. ALTERNATIVELY, PLAINTIFFS' CLAIMS ARE TIMELY BECAUSE THEIR LIMITATIONS PERIODS TOLLED

Defendants' answering brief obscures the fact that Plaintiffs raise two primary arguments for why their claims should be tolled. First, the falsity of certain misrepresentations—which Defendants do not even address, let alone dispute—were inherently unknowable to Plaintiffs. Second, Needham's central involvement in the fraudulent scheme was both inherently unknowable and fraudulently concealed.

The first tolling ground applies to all Defendants. The second ground applies only to Needham. Both are fact-intensive inquiries that, at the very least, should not have been resolved at the motion to dismiss stage. *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 321 (Del. 2004) (reversing and remanding a decision that the statute of limitations was not tolled as a matter of law, noting that a motion to dismiss was "not a proper procedural vehicle" where there were conflicting factual inferences"); *Sykes v. Touchstream Techs., Inc.*, 2024 WL 1299928, at *10 n.162 (Del. Ch. Mar. 27, 2024) ("[A]t the motion to dismiss stage with plaintiff-friendly inferences is not an appropriate point in litigation to determine a fact-intensive question such as the application of a tolling doctrine.").

Accordingly, even if this Court determines Plaintiffs were not injured in June 2021—rendering Plaintiffs' claims timely on their own—it should nonetheless hold the limitations period for Plaintiffs' claims tolled and reverse the Chancery Court's dismissal of those claims as untimely.

A. Defendants do not contest that the falsity of certain representations in diligence materials was inherently unknowable to Plaintiffs.

In their opening brief, Plaintiffs highlighted their allegations that the falsity of multiple material representations could only be proved when compared against representations made in presentations that were never shared with Cloudbreak. *See* Op. Br. at 36; *see also* A322, ¶100 (alleging the October 2020 presentation stated that one of the Portfolio Companies saw 2,000 patients a day, whereas a presentation not shared with Cloudbreak claimed the same company saw only 1,000 patients a day); A326–27, ¶¶108–07 (alleging the June 2020 presentation stated one of the Portfolio Companies had a 5-year $138 million contract with Mali, whereas a presentation not shared with Cloudbreak represented the Mali contract was worth, at most, $60 million).

Remarkably, Defendants effectively ignore these allegations. Instead, they deflect by focusing on separate representations that Plaintiffs never claimed caused their claims to toll. *See* Ans. Br. at 34 (including a comparison table of irrelevant misrepresentations). The only response Defendants muster, in a footnote, is that "while Plaintiffs assert 'certain' of other alleged misrepresentations may not have been apparent from a comparison of the presentations," a "plaintiff need not be aware of all the aspects of the allegedly wrongful conduct to be on inquiry notice." Ans. Br. at 33 n.17 (internal quotation marks omitted) (quoting *Gallagher Indus., LLC v. Addy*, 2020 WL 2789702, at *13 (Del. Ch. May 29, 2020)). But the sole

authority Defendants cite, *Gallagher*, clarifies that "[o]nce a plaintiff is put on inquiry notice, she is deemed to be on notice of everything *to which such inquiry might have led*." 2020 WL 2789702, at *13 (emphasis added) (internal quotation marks omitted); *see also U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 504 (Del. 1996) (same).

Thus, the issue is not simply whether Plaintiffs were aware, or could have been aware, of other inconsistencies in diligence materials provided by Defendants, but whether Plaintiffs could have even discovered the falsity of other representations at all.[10] Plaintiffs have alleged that the falsity of these representations was not confirmed until Plaintiffs discovered alternative presentations that contained contradicting representations. *See* A322, ¶100; A326–27, ¶¶108–07. Drawing all inferences in Plaintiffs' favor, as must be done on a motion to dismiss, the Chancery Court should have concluded that Plaintiffs *could not* have discovered such falsity, even with reasonable inquiry (an inference that is particularly strong given the Portfolio Companies were private and did not engage in meaningful public reporting,

[10] To put a finer point on it, Defendants appear to claim that because Plaintiffs should have seen that diligence materials contained false representations regarding the revenues of various Portfolio Companies, for example, Plaintiffs were on notice that other financial information (*e.g.*, statistics and government contract values) was also false. *See* Ans. Br. at 33–34. That makes no sense. The inquiry into one type of falsity would not have necessarily uncovered the instances of another type of falsity.

A294).[11] The import and effect of those misrepresentations, how much Plaintiffs relied on them, and whether (if at all) they could have been verified by Plaintiffs are the exact types of factual questions that should be resolved in Plaintiffs' favor, must be resolved during discovery, and cannot serve as a basis to reject tolling as a matter of law. *See Wal-Mart Stores*, 860 A.2d at 321; *Sykes*, 2024 WL 1299928, at *10 n.162.

Defendants proffer individual bases for why tolling should not apply to them. *See* Ans. Br. at 35–37 (the Gig2 Defendants' arguments[12]); 37–39 (Kathuria's arguments), 39–44 (Needham's arguments). Plaintiffs address the Gig2 Defendants' and Kathuria's arguments in this subsection, and address Needham's below in II.B.

The Gig2 Defendants primary argument is that tolling should not apply to the claims against them because they were not involved with Needham, apparently under the misplaced belief that Plaintiffs' tolling argument "relies entirely on Needham documents." Ans. Br. at 35. As explained in Plaintiffs' opening brief, *see* Op. Br. at 35–37, and above, tolling applies to the Gig2 Defendants' claims because

[11] This is thus not a case like *In re Dean Witter Partnership Litigation*, where being on inquiry would have led investors to the discovery of their injury. 1998 WL 442456, at *8 (Del. Ch. July 17, 1998). The inference that Plaintiffs could not have discovered such falsity also negates any impact of the disclosures in the June and October presentations, as Plaintiffs' "own analysis" would not have uncovered the falsity of Defendants' representations. Ans. Br. at 35.

[12] Following Defendants' convention, GigAcquisitions2, LLC, GigCapital2, Inc., UpHealth, Inc., Avi Katz, and Raluca Dinu are referred to as the "Gig2 Defendants."

they made representations that were inherently unknowably false. Indeed, Plaintiffs alleged that "Katz, Kathuria, and the other UpHealth Defendants provided Plaintiffs with presentations and analyses that falsely showed [that the Portfolio Companies] were in strong financial condition and were positioned for significant future success." A312, ¶84. That included the October 2020 presentation, which Plaintiffs received from Katz, among others. A312, ¶85. And it was that presentation that contained the material and false representations discussed above. *See* A322, ¶100; A326–27, ¶¶108–07. The Gig2 Defendants cannot hide behind Needham's conduct to insulate themselves from misrepresentations they are alleged to have made.

Kathuria's defenses are even flimsier. Like the Gig2 Defendants, Kathuria unpersuasively argues the claims against him cannot be tolled based on Plaintiffs' discovery of Needham's involvement, *see* Ans. Br. at 37–38, ignoring that tolling independently applies to his claims by virtue of the misrepresentations he made that Plaintiffs inherently could not know were false, *see, e.g.*, A322, ¶100 (alleging that Kathuria falsely overinflated the number of patients that one Portfolio Company saw in a day, and that "Kathuria's willingness to pull numbers out of thin air and present them—even when contradictory with other presentations—was supported by the other Defendants who included those figures in their presentations and oral pitches and verified their accuracy")

Facing this reality, Kathuria takes the imaginative approach of asserting that Plaintiffs' distrust in Kathuria means that Plaintiffs were on notice that everything he said could be fraudulent. *See* Ans. Br. at 38–39. Of course, Plaintiffs have never argued that the reputation of the defendant is dispositive for purposes of tolling misrepresentation claims, nor are they aware of any authority that would permit such an argument. And Kathuria misses the crux of Plaintiffs' argument, which is that inquiry notice is inapplicable to the inherently unknowable misrepresentations because inquiry notice only puts a plaintiff on notice of facts "to which such inquiry might have led." *Gallagher*, 2020 WL 2789702, at *13. Where, as here, Plaintiffs' allegations and the inferences drawn from them support a finding that Plaintiffs could not know that Kathuria's representations were false, notice inquiry has no relevance.

B. Needham's tortious conduct was inherently unknowable until 2023, in part because of Needham's fraudulent concealment.

Regardless of whether this Court agrees that the limitations period should be tolled as to claims against the Gig2 Defendants and Kathuria, it should recognize that the claims against Needham are differently situated by virtue of Needham's secret involvement in the fraudulent scheme that was not revealed until 2023. Put differently, *even assuming falsity*, Needham's claims should be tolled because its *involvement* was unknowable and concealed from Plaintiffs until 2023.

As Plaintiffs' opening brief explained, *see* Op. Br. at 37–39, internal Needham documents (first revealed through unrelated litigation in 2023) exposed that Needham was not a passive investment banker relying on client-provided financials, but rather a knowing architect and amplifier of falsified projections, who internally acknowledged the Portfolio Companies' abysmal condition yet helped manufacture doctored financials for distribution to potential investors—including Cloudbreak. Those internal communications showed, among other damning admissions, Needham employees:

- engaging in manipulation of the Portfolio Companies' financials by attributing the revenues of seven companies to only four companies (in what one Needham employee called a "terrible look for us");
- discussing fabricating revenue numbers, with one employee remarking "this doesn't feel right haha"; and
- acknowledging Kathuria "lied through his teeth," yet accepting Kathuria's edits inserting false revenue data into investor presentations.

See, e.g., A295–304; *see also* Op. Br. at 7–8 (detailing Needham's involvement).

None of this was knowable to Plaintiffs in 2020 or 2021. Plaintiffs were not insiders at Needham and had no right or ability to obtain its private communications. What is more, the diligence materials delivered to Plaintiffs were drafted to conceal, not reveal, Needham's financial manipulation happening behind the scenes, stating that Needham was not responsible for the veracity of the diligence materials, and

that other Defendants had prepared the information Needham used in those materials. *See* Op. at 41.

Against this backdrop, Needham's defenses miss the mark. First, Needham argues the claims against it should not toll because Plaintiffs were on inquiry notice of the misrepresentations contained in the diligence materials before the BCA was finalized. *See* Ans. Br. at 39–40. Again, even assuming that were true, it would have no bearing on the fact that *Needham's involvement* was unknowable and concealed until 2023.

Second, Needham points to diligence materials outside of the record, which it argues "provided Cloudbreak with detailed financial information in connection with the October presentation." Ans. Br. at 40–41. Even if these materials could be considered on a motion to dismiss, they are similarly irrelevant as they do nothing to demonstrate that Needham was involved in the manipulation and fabrication of the Portfolio Companies' financials. A financial model apparently created by Needham (but that was not even sent to Plaintiffs) does not show that Needham was doctoring financials. *See* B00171.[13] And the allegations Needham cites from Plaintiffs' initial complaint make no mention of Needham at all. *See* B00024, ¶81; B00043, ¶¶140–41.

[13] References to "B__" refer to the Defendants' answering brief's appendix.

Third, while Needham downplays the import of the disclosed communications and claims they "refute the argument that they revealed an 'inherently unknowable' scheme to defraud Plaintiffs," Ans. Br. at 42–43, Needham conveniently omits reference to the communications that actually show Needham's direct involvement in the scheme, *see, e.g.*, A297–98, ¶48 (discussing a communication where one Needham employee explained that Needham was "showing 7 companies but claiming it's 4" and another asked, "like what are we doin here[?]"); *see also* A298–99, ¶50 (discussing another communication where one Needham employee said "why are we literally hiding 3 companies in the financials" and characterized the maneuver as "a terrible look for [Needham]").

Finally, Needham asserts its claims should not be tolled based on fraudulent concealment because Plaintiffs were on inquiry notice of the false representations. *See* Ans. Br. at 43–44. This argument, yet again, fails because it has no bearing on Needham's involvement in the scheme. Even if Plaintiffs knew they were being defrauded by the other Defendants, they had no way of knowing that Needham was directly involved in that tortious conduct. In fact, as Needham itself readily observes, the June and October presentations disclaimed Needham's role in the scheme by stating that Needham had not verified the information. *See* Ans. Br. at 41. The inclusion of such disclaimers are the exact types of "affirmative act[s]" that led

Plaintiffs away from detecting Needham's involvement in the fraud. *See LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1146–47 (Del. 2025).[14]

In sum, even if this Court holds that Plaintiffs' claims accrued in November 2020, it should nevertheless reverse the Chancery Court's holding that the claims against all Defendants (and, at minimum, against Needham) were tolled, rendering Plaintiffs' claims timely.

[14] While Defendants attack *LGM* on its facts (because it "did not involve such a disclaimer," Ans. Br. at 44), they do not—and cannot—dispute that the inclusion of a false disclaimer used to hide an investment bank's involvement in manipulating and fabricating financials disclosed to investors is an "affirmative act" that satisfies tolling under a fraudulent concealment theory.

CONCLUSION

For these reasons, and for the reasons contained in Plaintiffs' opening brief, this Court should reverse the Chancery Court's dismissal of Counts I, III, and V as untimely, and remand for further proceedings.

Date: November 20, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2025, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record via File & Serve*Xpress*:

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