UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FINTECH CONSULTING LLC, d/b/a APTASK, Plaintiff, vs. TSR, INC.; QAR INDUSTRIES, INC.; ROBERT E. FITZGERALD; and BRADLEY TIRPAK, Defendants.	Civil Action No. 2:21-cv-20181-KSH-AME

REPLY BRIEF IN SUPPORT OF DEFENDANTS TSR, INC, QAR INDUSTRIES, INC, ROBERT E. FITZGERALD AND BRADLEY TIRPAK'S MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(2), FED. R. CIV. P. 12(B)(6) AND FED. R. CIV. P. 9(B)

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PRELIMINARY STATEMENT

Defendants[1] submit this reply brief in further support of their motion to dismiss Plaintiff's Amended Complaint. Plaintiff's opposition to Defendants motion asks this Court to disregard black letter law requiring courts to enforce the terms of a contract as written and seeks to unlawfully replace the SPA with "a different or better contract", which overrides the parties' chosen forum of Delaware's state and federal courts and ignores Plaintiff's express agreement that Defendants had no obligation to disclose any non-public company information as part of the transaction at issue in the Amended Complaint. The terms of the SPA are clear, unequivocal, and enforceable under controlling United States Supreme Court and Third Circuit precedents (which Plaintiff largely ignores), all of which require this Court to find that Defendants had no affirmative duty to disclose non-public information to Plaintiff.[2] For these reasons, and as further detailed herein, the terms of the SPA barring Plaintiff's Amended Complaint in its entirety must be enforced, and the Amended Complaint dismissed.

As set forth in Defendants' moving brief, this case arises from the SPA between Plaintiff, as Seller of shares of TSRI's common stock, and Defendants QAR and Tirpak, as Buyers of such shares. The parties were all existing holders of TSRI stock and were "accredited investors" within the meaning of the Securities Exchange Act. The essence of Plaintiff's Amended Complaint is that Defendants perpetrated an alleged fraud by not disclosing an impending award of restricted stock to TSRI's directors and executives, which Plaintiff speculates caused an increase in individual share value after the transaction contemplated by the SPA was completed. While there are many

[1] Capitalized and abbreviated terms have the same meaning as set forth in Defendants' Motion Brief filed April 19, 2022.

[2] *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011); *Chiarella v. United States*, 445 U.S. 222 (1980); *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159 (3d Cir. 2014); *In re Burlington Coat Factory*, 114 F.3d 1410 (3d Cir. 1997); *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000).

factual inaccuracies underlying this theory, an assessment of the instant motion does not require a detailed assessment of the "mix" of facts as claimed by the opposition. The Court need only review the four corners of the SPA to recognize that Plaintiff's claims fail as a matter of law. Each party expressly agreed and acknowledged, *inter alia*, that: (i) there may be certain undisclosed, potentially material, non-public information in the possession of the other party; (ii) that neither party was legally bound to disclose non-public information; and (iii) crucially, that the parties waived "any and all claims and causes of action . . . relating to or arising out of the disclosure or nondisclosure of such material non-public information or the sale of the Shares pursuant to [the SPA]." See SPA at Sections 2.9 and 3.8. An assessment of this language, in the context of the claims, should be the beginning and end the Court's assessment of the claims at issue.

Because Plaintiff cannot refute the foregoing, its opposition attempts to recast the issues and inject irrelevant, highly speculative allegations into the record that are contradicted by both the SPA and the overwhelming decisional law supporting Defendants' position. For example, Plaintiff claims that Defendants somehow rushed his judgment. However, the parties expressly acknowledged having "adequate information" to make "an informed decision" regarding the execution of the SPA. SPA at Section 2.9(b).

Plaintiff's opposition focuses on inapposite case law concerning the enforceability of standard anti-reliance provisions to bar fraud claims based on affirmative misrepresentations, when the Amended Complaint only alleged fraud by concealment. Plaintiff's opposition ignores Section 2.9(a) of the SPA, which provides that Defendants were not required to disclose the very information that Plaintiff claims Defendants fraudulently concealed. This attempted legal sleight of hand should be rejected. Defendants' motion concerns the enforceability of Section 2.9(a) of the SPA, which acknowledges what is already settled under the law: that Defendants had no duty

disclose potentially material non-public information and that sophisticated investors may assume that risk. The provision is valid and binding and the fact that Plaintiff now wishes it had made a better deal is of no moment. Plaintiff's agreement must be enforced and the Amended Complaint must be dismissed.

LEGAL ARGUMENT

POINT I

BOTH THE FORUM SELECTION CLAUSE AND THE COURT'S LACK OF PERSONAL JURISDICTION OVER DEFENDANTS COMPEL THE DISMISSAL OF PLAINTIFF'S AMENDED COMPLAINT

A. THE FORUM SELECTION CLAUSE IN THE PARTIES' SHARE PURCHASE AGREEMENT IS BINDING AND ENFORCEABLE

Contrary to the opposition's convoluted arguments, the forum selection clause set forth in Section 5.11 of the SPA requires dismissal of the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). That provision clearly and unequivocally establishes the Parties' chosen forum of either Delaware state or federal court using language that has already been upheld in the District of New Jersey. Accordingly, Plaintiff's arguments to the contrary should be rejected, and the Amended Complaint dismissed.

It is well established that "forum selection clauses are presumed to be valid." *Carlyle Inv. Mgmt. LLC v. Monmouth Co. SA*, 779 F.3d 214, 218 (3d Cir. 2015). Plaintiff has offered no basis to overcome that presumption. Its opposition ignores the relevant legal standard which focuses a court's attention on the underlying basis of the dispute (i.e., whether it arises out of the contract that prescribes the forum selection clause) and not the substance of the claims. *See id.* at 220 (explaining forum selection clauses are enforceable as to any claims that arise out a contract, regardless of whether they "even allege contract-based claims"). Here, the SPA is the common thread between Plaintiff's SEC Rule 10b-5 claim and Plaintiff's common law fraud claim, meaning

the forum selection clause controls, and the parties' chosen forum of either Delaware state or federal court must be enforced. *See id.*; *see also Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1245 (Del. Ch. 2010).

Rather than address this standard, Plaintiff alleges that its decision to plead an SEC Rule 10b-5 claim has the effect of invalidating the forum selection clause because, read literally, the clause requires the SEC Rule 10b-5 claim to be filed in the Delaware Chancery Court which allegedly lacks jurisdiction over such claim. *See* Plaintiff's Opposition at p. 8 (citing 15 U.S.C. § 78aa(a)). This twisted textual argument ignores the well-settled law that a party cannot manipulate its pleadings to defeat a forum selection clause. *See, e.g., Carlyle, supra*, 779 F.3d at 220 ("If this were not the rule, a plaintiff could easily avoid a forum selection clause by artfully pleading non-contract claims that stem from the contractual relationship"); *Ashall Homes, supra*, 992 A.2d at 1253 (observing that "Courts in Delaware and other jurisdictions have found that '[a] forum selection clause should not be defeated by artful pleading of claims'") (citation omitted). Moreover, the argument defies the plain language of the SPA which prescribes only two options for the resolution of disputes arising out of the SPA, neither one being New Jersey. The clause provides that the parties "irrevocably and unconditionally consent[] and submit[] . . . any action, suit or proceeding arising out of or with respect to this Agreement and the transactions contemplated hereby to the exclusive general jurisdiction of the Court of Chancery of the State of Delaware . . . (or, if the Court of Chancery of the State of Delaware declines to accept jurisdiction over a particular matter, any federal court within the State of Delaware."). *See* Tirpak Cert., Exhibit A, SPA at 5.11(b).[3] In other words, it contemplates situations where the Delaware Chancery Court

[3] The parties even expressly agreed that they would not attempt to deny or defeat this preselected choice. *See* Tirpak Cert., Exhibit A, SPA at 5.11(c).

may "decline[] to accept jurisdiction" depending on the claims presented. *Id.* In such circumstances, the case would be either removed or re-filed in the Delaware District Court in light of the parties' clear alternative choice of "any federal court within the State of Delaware." *Id.*

To dispel any doubt of the foregoing, the Court need look no further than the District of New Jersey's treatment of a nearly identical forum selection clause in the face of this exact legal challenge. *See Breslow v. Klein*, 2018 U.S. Dist. Lexis 102128 (D.N.J. June 19, 2018). That case concerned a forum selection clause that provided, in pertinent part, that disputes "shall be commenced and prosecuted exclusively in the Court of Chancery and any appellate courts therefrom within the State of Delaware (or if the Chancery Court declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware)." *Id.* at *36. The plaintiffs filed a four-count complaint including allegations of federal securities fraud and common law fraud. *Id.* at *16. The defendant moved for dismissal based in part upon the forum selection clause, which the plaintiffs opposed on the grounds that: (i) its legal claims could not be heard by the Delaware Chancery Court since its jurisdiction is limited to equity, and (ii) its federal securities claim could not be heard by the Delaware Chancery Court because federal courts have exclusive jurisdiction over such claims. *Id.* at *35-36. The District judge properly rejected these claims, holding that "the clause clearly provides that if the Court of Chancery does not accept jurisdiction, then the action may be brought in Delaware state or federal court." *Id.* at *36. That same result should follow here to dismiss Plaintiff's Amended Complaint.[4]

Plaintiff's chief argument concerning the enforceability of the forum selection clause rests on *Troy Corp. v. Schoon*, 2007 Del. Ch. Lexis 38, 2007 WL 949441 (Del. Ch. Mar. 26, 2007), a

[4] Ultimately, the *Breslow* Court transferred the matter to the District of Delaware at the request of the Defendant in the case.

factually distinguishable case. The forum selection clause at issue in that case provided for the Southern District of New York "as the sole and exclusive forum, unless such court is unavailable." *Id.* at *4-5. No alternative venue was prescribed as is the case here. Thus, in a matter involving two Delaware entities and no federal question, the Delaware Chancery Court was well within its rights to disregard the provision and adjudicate the plaintiff's state-based contract claims. *Id.* at *6-7. Importantly, the court expressly noted that it was not "setting aside or refusing to enforce the forum selection clause." *Id.* at *20. It simply recognized that the contractual choice was unavailable and, with no other alternative prescribed, the matter was properly before the Delaware Chancery Court.

The *Troy* decision is inapplicable here. The Amended Complaint arises out of the SPA for stock of a Delaware corporation, and includes both state and federal claims arising out of that agreement that may be properly heard by either Delaware state or federal court. The forum selection clause here designates Delaware Chancery Court as the parties' first choice and that if the Court of Chancery does not accept jurisdiction of the case, then the action should be brought in a Delaware federal court. *See Breslow*, 2018 U.S. Dist. Lexis 102128 at *36. Accordingly, Section 5.11 of the SPA is enforceable and dismissal is warranted because the only acceptable forums for this action are either the Delaware state or federal courts.

B. THE DISTRICT OF NEW JERSEY LACKS PERSONAL JURISDICTION OVER DEFENDANTS

The District of New Jersey lacks personal jurisdiction to adjudicate this matter pursuant to Fed. R. Civ. P. 12(b)(2). Pursuant to the facts at issue in the Amended Complaint, Plaintiff cannot establish that this New Jersey court has personal jurisdiction over Defendants where the alleged

transaction involves: (1) parties from varying states none of which are New Jersey[5]; (2) a sale of shares of a Delaware corporation; and (3) an agreement to file suit only in either Delaware state or federal court. *See Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 173, 180 (D.N.J. 2016) (providing a comprehensive explanation of the relevant factors used to determine general and specific jurisdiction); *see also O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312 (3d Cir. 2007). Once again, Plaintiff's opposition ignores the relevant legal standard[6] and tries to distract this Court with an abstract legal theory that all contracting parties located anywhere in the United States may somehow be subject to the jurisdiction of any court. This is not the law.

As acknowledged in Plaintiff's opposition, none of the Defendants meet the bases for New Jersey's general jurisdiction given their places of incorporation and residency. *See* Plaintiff's Opposition at p. 14. TSRI is a Delaware corporation with its principal place of business in New York. QAR is a Texas corporation primarily controlled by Defendant Fitzgerald, who also resides in Texas. Defendant Tirpak is a resident of Colorado with a principal place of business at the same address as TSRI in New York.

As to specific jurisdiction, Plaintiff's opposition ignores that the relevant standard concerns whether a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," and instead claims it suffices if a party has done business in the United States of America. *Isaacs v. Arizona Bd. of Regents*, 608 F. App'x 70, 74 (3d Cir. 2015) (explaining that to exercise personal jurisdiction over a non-forum defendant, the plaintiff must show "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws") (quotation omitted); *see*

[5] While the focus of the personal jurisdiction analysis concerns Defendants' place of incorporation and activities, it is noteworthy that Plaintiff itself is a Delaware limited liability company.

[6] Indeed, Plaintiff even admits that the cases relied upon were decided in "inapplicable contexts." *See* Plaintiff's Opposition at 17.

also, Ford Motor Co. v. Montana Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (explaining the contacts "must show that the defendant deliberately reached out beyond its home – by, for example, exploiting a market in the forum State or entering a contractual relationship centered there") (internal quotations omitted). However, the lone tie to New Jersey in this case is the fact that Plaintiff's member resides there – which is not the focus of the personal jurisdiction analysis. *See Mellon Bank (East) PSFS, Nat. Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992) (explaining the "fact that a non-resident has contracted with a resident of the forum state is not, by itself, sufficient to justify personal jurisdiction over the nonresident.").

Nothing else about the SPA for the purchase of stock of a Delaware corporation suggests that Defendants purposefully directed activities at the State of New Jersey and, indeed, the parties expressly acknowledged otherwise in the SPA by consenting to personal jurisdiction in only the Delaware state and federal courts. This alone must end the inquiry. "The United States Supreme Court has held that a contractual consent to personal jurisdiction should be enforced unless it would be unreasonable or unjust to do so." *Park Inn Int'l, L.L.C. v. Mody Enters., Inc.*, 105 F. Supp. 2d 370, 373 (D.N.J. 2000) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)); *see also Coyle v. Mathai*, No. 11-5185, 2011 U.S. Dist. LEXIS 133170 at *4 (D.N.J. Nov. 18, 2011) ("Personal jurisdiction is a right that can be waived by agreeing in advance to submit to the jurisdiction of a given court pursuant to a contract with a forum selection clause."); *Danka Funding, L.L.C. v. Page, Scrantom, Sprouse, Tucker & Ford, P.C.*, 21 F.Supp.2d 465, 469 (D.N.J. 1998) (opining that personal jurisdiction can be established solely through a forum selection clause in place of a due process analysis).[7]

[7] The SPA should control and Plaintiff's reliance on TSRI's SEC forms regarding the company's out-of-state customer base has no bearing on the specific transaction between these specific parties.

Accordingly, both the SPA and the limited record make clear that the District of New Jersey lacks personal jurisdiction over Defendants, and the Amended Complaint should be dismissed.

POINT II

PLAINTIFF'S CONFLATED READING OF THE SPA AGREEMENT AND INAPPOSITE CASE LAW CANNOT SAVE ITS COUNT I SEC RULE 10B-5 CLAIM

Plaintiff's opposition completely misses the mark and confuses the issues, devoting the entirety of its attention to Section 2.9(b) of the SPA and inapposite case law as opposed to the issue presented by Defendants' motion: the acknowledgements of Section 2.9(a) that are fatal to its SEC Rule 10b-5 claim. That provision acknowledges settled law that Defendants have no legal duty to disclose any material non-public information which the Amended Complaint baselessly claims should have been disclosed. Tellingly, Plaintiff also fails to address the decision in *Harborview Master Fund, LP v. LightPath Techs.*, 601 F. Supp. 2d 537 (S.D.N.Y. 2009) cited in Defendants' moving papers, which is directly on point and requires dismissal of Plaintiff's SEC Rule 10b-5 claim.

Plaintiff's opposition relies on a strawman argument that the anti-reliance clause in Section 2.9(b) of the SPA constitutes an unlawful anticipatory waiver of an essential element of his federal securities claim. However, Defendants' motion to dismiss Plaintiff's SEC Rule 10b-5 claim does not rely upon the standard anti-reliance clause set forth in Section 2.9(b) of the SPA, which relates to reliance on representations outside those set forth in the SPA. Plaintiffs' motion is based upon the provisions of Section 2.9(a) that provide that Defendants had no duty to disclose to Plaintiff the non-public corporate information that is the subject of the securities fraud claim, which confirms existing Supreme Court and Third Circuit securities law that only requires disclosure of information to correct a misrepresentation. *See Matrixx Initiatives, supra*, 563 U.S. at 45 (2011);

Oran, supra, 226 F.3d at 285-86. Indeed, Plaintiff has not cited to any such misrepresentation by Defendants that required correction and its claim is based solely on Defendants' alleged failure to disclose non-public corporate information.

Plaintiff relies heavily on *AES Corp. v. Dow Chem. Co.*, 325 F.3d 174 (3d Cir. 2003). However, *AES Corp.* is entirely distinguishable from this matter because that case deals with a Plaintiff's right to rely upon extra-contractual affirmative representations in light of an anti-reliance clause and does not create a duty an affirmative duty to disclose under Section 10(b) and Rule 10b-5 where no misrepresentation has been made. The defendants in *AES Corp*. allegedly made numerous knowing misrepresentations regarding the corporation's future performance during pre-contract due diligence[8] and the Court in *AES* determined that defendants could not solely rely upon the contract's standard anti-reliance clause to exculpate themselves from liability for these misrepresentations pursuant to Section 29(a) of the Exchange Act. *AES Corp. v. Dow Chem. Co.*, 325 F.3d at 180-81. Accordingly, the Third Circuit analyzed Section 29(a) of the Exchange Act in the context of a standard anti-reliance clause as it related to alleged knowing misrepresentations made by the defendants and it found the clause insufficient to bar claims related to the misrepresentations as a matter of law. *Id.* The Amended Complaint here fails to allege any such misrepresentation regarding the issuance of stock compensation made by Defendants that required correction through the disclosure of non-public information and the SPA confirms that no such disclosure was required for Plaintiff to enter into the transaction.

[8] "AES contends that Dow knew specific facts about the Elsta Plant that contradicted the representations it had made prior to and during due diligence. Its complaint alleges fourteen affirmative misrepresentations and eight material omissions upon which it relied. Some involved profit and cost projections, but others involved currently existing facts. Further, AES contends that, as part of the scheme to defraud, Dow concealed the true state of the Elsta Plant and frustrated its due diligence efforts by causing Destec and its employees to provide false and misleading information to AES." *Id*. at 177-78.

The circumstances at issue in *AES Corp.* are untethered to the facts here. The parties to the SPA expressly agreed to enter into the transaction without exchanging non-public information and no representations were made relating to such information. *AES Corp*. is not a concealment case. The Court did not address the enforceability of a specific provision whereby the parties agreed non-public corporate information did not need to be disclosed as part of securities transaction in the context of a Plaintiff's later attempt to circumvent this agreement as part of fraud by omission claim. Section 2.9(a) in which Plaintiff expressly acknowledged that ***"the Buyers have no obligation to disclose to him any such material non-public information and [Buyer] hereby waive[s] and release[s], to the fullest extent permitted by law, any and all claims and causes of action that he has or may have against the Buyers"*** bars Plaintiff from now claiming that there was such an obligation to disclose. *See* Tirpak Cert., Exhibit A, SPA at 2.9(a) (emphasis added).

Between the Amended Complaint and Plaintiff's opposition, there remains no claim that Defendants made any affirmative statements relating to the exercise of stock compensation that were plausibly misleading thereby triggering a duty to disclose the alleged omissions. *City of Edinburgh*, 754 F.3d at 174 (no duty to disclose information where company neither makes affirmative statement about issue, nor characterizes it in any manner). Plaintiff claims that by proposing the transaction, Defendants opened a door that obligated them to disclose precisely what the aforementioned case law and the SPA says need not be disclosed. *See* Plaintiff's Br. at 25. The opposition highlights Defendants' limited statements that they had come into money through an unrelated property sale and viewed the subject transaction as a potential investment opportunity for such funds. *Id.* However, these alleged statements are unrelated to the 2020 Equity Incentive Plan or TSRI's business and did not trigger a duty to disclose non-public information relating to TSRI. The opposition's illogical leap fails to meet the heightened pleading standards required by

Fed. R. Civ. P. 9(b), and ignores the binding precedent that governs alleged fraud by omission cases.

The Third Circuit requires some logical connection between the substance of a prior statement and its potentially misleading effect when subsequent information renders the statement false triggering the "duty to correct". *See Oran*, 226 F.3d at 285-86 (explaining a duty to disclose arises only where a defendant makes "an inaccurate, incomplete or misleading *prior* disclosure") (emphasis added). The "duty to correct" is triggered by a "historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company then must correct the prior statement within a reasonable time." *See Burlington Coat Factory*, 114 F.3d at 1430-31 (quotation omitted); *see, e.g.*, *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 282 (3d Cir. 1992) (holding that "if a defendant represents that its lending practices are 'conservative' and that its collateralization is 'adequate,' the securities laws are clearly implicated if it nevertheless intentionally or recklessly omits certain facts contradicting these representations"). Here, there were no representations of facts made related to the restricted stock awards received by TSRI's directors and executives one way or the other, and the Amended Complaint does not allege otherwise. Thus, even the "total mix" standard of review required by *Matrixx* does not save Plaintiff's bare-bones allegations from dismissal here. 563 U.S. 27 at 43 (explaining the "total mix" standard does mean parties must disclose all information in the absence of a duty). Accordingly, Plaintiff's SEC Rule 10b-5 claim must be dismissed as a matter of law.

POINT III

PLAINTIFF'S OPPOSITION FAILS TO ARTICULATE A VIABLE LEGAL BASIS TO SUSTAIN ITS COMMON LAW FRAUD CLAIM

Plaintiff's opposition to dismissal of its common law fraud claim ignores and misstates well-established law relating to the viability of common law fraud claims. Plaintiff fails to address that in Delaware as matter of law a party in an arms' length contractual setting "begins the process without any affirmative duty to speak," and therefore, a fraud claim "cannot start from an omission" *Prairie Capital III, Ltd. P'ship v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015) (explaining). Plaintiff in its opposition admits that the Complaint only alleges a fraud by omission. *See* Plaintiff's Opposition at p.31 ("Plaintiff has clearly stated a [common law fraud] claim based on Defendants' concealment of material information.") Discovery is not necessary regarding Defendants' alleged "concealment of material information" because a fraud by omission claim is not cognizable as a matter of law and Plaintiff has cited no Delaware legal authority to the contrary. Accordingly, Plaintiff's common law fraud claim is subject to dismissal because Delaware does not recognize a fraud by omission claim as part of an arm's length commercial transaction.

Moreover, Plaintiff cites to a discredited unreported decision for the alleged legal proposition that "anti-reliance provisions which disclaim reliance on any representations and warranties outside of the stock purchase agreement do not bar the buyer's claim for fraudulent concealment of material information" and that in order for anti-reliance clauses to act as a bar of fraud by concealment claims, the clause must expressly provide it relates to the omission or non-disclosure of information. *See* Plaintiff's Opposition at p. 30 (citing *TransDigm Inc. v. Alcoa Glob. Fasteners, Inc.*, No. CIV.A. 7135-VCP, 2013 WL 2326881, at *1, *7–10 (Del. Ch. May 29, 2013)). However, Plaintiff fails to cite to this Court the subsequent reported case law rejecting the decision in *TransDigm*.

Specifically, the Court in a reported decision in *Prairie Capital III*[9] noted that "Delaware law permits contracting parties to define in an agreement those representations of fact that formed the reality upon which the parties premised their decision to bargain." *Prairie Capital III*, *supra*, 132 A.3d at 52 (internal citation omitted). The Court ultimately granted the defendant's motion to dismiss holding that "contractual provisions that identify the representations on which a party exclusively relied define the universe of information that is in play for purposes of a fraud claim. A party may use external sources of information to plead that a contractually identified fact was false or misleading, but a party cannot point to extra-contractual information and escape the contractual limitation by arguing that the extra-contractual information was incomplete." *Id*.

Further, the *Prairie Capital* Court held that "to the extent *Transdigm* suggests that an agreement must use a magic word like 'omissions,' then I respectfully disagree with that interpretation. In my view, a provision like the Exclusive Representations Clause has representation-defining effect, and that effect extends to claims based on omissions. A different rule would render provisions like the Exclusive Representations Clause largely ineffective." *Id*. at 54. "When parties identify a universe of contractually operative representations in a written agreement, they remain in that universe. A party that is later disappointed with the written agreement cannot escape through a wormhole into an alternative universe of extra-contractual omissions. *Id*. at 53. The federal courts that have reviewed this issue agree with *Prairie Capital III*'s analysis of Delaware law on anti-reliance clauses and reject *TransDigm*. *See Universal Am. Corp. v. Partners Healthcare Sols. Holdings, L.P.*, 176 F. Supp. 3d 387, 400-03 (D. Del. 2016).

[9] The corporate purchase agreement in *Prairie Capital III* included an Exclusive Representations Clause that similar to the SPA here limited the universe of company information on which the buyer was relying on to: "(a) the results of its own independent investigation and (b) the representations and warranties of the Double E Parties expressly and specifically set forth in this Agreement, including the Schedules." *See id.* at 50. The agreement also included a standard integration clause like the SPA. *Id.*

In any event, even if Plaintiff was correct that Delaware law requires a contract's anti-reliance provision to expressly disclaim reliance on "omission" of information for the contract to act as a bar to a buyer's claim for fraudulent concealment, the SPA includes Section 2.9 which recognizes that Defendants were under no obligation to disclose the very information Plaintiff claims was wrongfully concealed. Accordingly, even under Plaintiff's argument, its common law fraud claim is subject to dismissal as a matter of law. *Cf. Transdigm Inc., supra*, No. 7135-VCP, 2013 Del. Ch. LEXIS 137, at *28-34 (where contract did not disclaim reliance on the non-disclosure of information).

Indeed, it is Plaintiff that has perpetrated a fraud against Defendants by bringing this action in direct contravention of its agreement that Defendants did not have an obligation to disclose non-public corporate information and that Plaintiff would not file suit against Defendants for any such non-disclosure. As the Delaware Chancery Court has recognized:

> To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing -- the lie that it was relying only on contractual representations and that no other representations had been made -- to enable it to prove that another party lied orally or in a writing outside the contract's four corners. For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract. Put colloquially, this is necessarily a "Double Liar" scenario. To allow the buyer to prevail on its claim is to sanction its own fraudulent conduct.

ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1058 (Del. Ch. 2006).

Accordingly, because the Amended Complaint's common law fraud claim seeks to negate and contradict the express language of the SPA, it must be dismissed as a matter of law.

CONCLUSION

For the reasons set forth herein and in the moving papers, the Amended Complaint should be dismissed in its entirety.

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BY: */s/ Leo J. Hurley, Jr*
Leo J. Hurley, Jr., Esq.

DATE: May 31, 2022