IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

YATRA ONLINE, INC., Plaintiff, v. EBIX, INC., EBIXCASH TRAVELS, INC., REGIONS BANK, BMO HARRIS BANK N.A., BBVA USA, FIFTH THIRD BANK, NATIONAL ASSOCIATION, KEYBANK NATIONAL ASSOCIATION, SILICON VALLEY BANK, CADENCE BANK, N.A., and TRUSTMARK NATIONAL BANK. Defendants.	C.A. No. 2020-0444-JRS **PUBLIC [REDACTED] VERSION AS FILED JANUARY 29, 2021**

PLAINTIFF'S OMNIBUS ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiff Yatra Online, Inc. ("Yatra") respectfully submits this answering brief in opposition to the motions to dismiss the Verified Amended Complaint (the "Amended Complaint") filed by defendants: (i) Ebix, Inc. ("Parent") and EbixCash Travels, Inc. ("Merger Sub" and, together with Parent, "Ebix") and (ii) Regions Bank, BMO Harris Bank N.A., BBVA USA, Fifth Third Bank, National Association, KeyBank National Association, Silicon Valley Bank, Cadence Bank, N.A., and Trustmark National Bank (collectively, the "Lender Defendants").[1]

PRELIMINARY STATEMENT

Ebix contracted to merge with Yatra (the "Merger"). It promised valuable consideration and supported that promise with a cash put right (the "Put Right"), which all parties agree had a value of $257 million. Then the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") [REDACTED] [REDACTED] COVID hit, dramatically impacting Ebix's financial stability, share price, and relative percentage of market capitalization equating to the value of the Put Right; and Ebix began to equivocate as to whether it would comply with its obligations.

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

First, Ebix slow walked, and then grossly breached, its obligation to file a Form S-4 (the "S-4") with the SEC within 45 days of the signing of the merger agreement (the "Merger Agreement").[2] Then it conveniently failed to tell Yatra that it was the recipient of [redacted] when Yatra attempted to determine the Commission's timing for clearing the S-4. And, [redacted]

By some point in early spring 2020, Ebix had gone from "slow walking" its performance under the Merger Agreement to actively looking for any possible exit, whether or not a breach of contract or fraud, as the value represented by the Put Right obligation climbed from less than 20% to more than 50% of its market capitalization. When Yatra threatened to declare a breach and file appropriate disclosures, Ebix, facing the need to complete its annual audit and its undisclosed renegotiation of its credit agreement (the "Credit Agreement"),[3] temporized, dissembled and outright lied to Yatra. This shameful conduct culminated in a "proposal" to renegotiate the underlying economics of the deal to replace the Put

[2] Unless otherwise specified, references to "Section" or "§_" are to the Merger Agreement. *See* Transmittal Affidavit of Daniel Meyer ("Meyer Aff."), Ex. 1.

[3] *See* Meyer Aff., Ex. 2.

Right with a different form of consideration. *Expressly without waiving its rights to proceed to enforce the Merger Agreement as written*, Yatra agreed to explore with Ebix a renegotiation on the basis of the terms proposed.

Unbeknownst to Yatra, however, Ebix never intended to negotiate or honor the terms it dangled in front of Yatra. Instead, it aimed to delay just long enough to get its auditors to sign off on its financials and its lenders to agree to amend the Credit Agreement before Ebix unceremoniously pulled its proposed terms off the table, which it did after achieving its ulterior objectives.

Ebix's lenders, meanwhile, having negotiated the ninth amendment to the Ebix Credit Agreement (the "Ninth Amendment")[4] *expressly to allow the Put Right to be issued,* pulled back that right in negotiating the tenth amendment to the Credit Agreement (the "Tenth Amendment")[5] and making the issuance of the put right an immediate event of default under the agreement, which, if triggered, would accelerate Ebix's more than $400 million of secured indebtedness, effectively precluding the Merger as written. Of course, having dealt with the Put Right not once but twice in separate negotiations, the Lender Defendants knew precisely what they were doing and clearly ***intended*** to prohibit Ebix from performing its obligations under the Merger Agreement.

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[4] *See* Meyer Aff., Ex. 3.

[5] *See* Meyer Aff., Ex. 4.

When called to account for its misdeeds, Ebix claims that Yatra surrendered all of its rights to seek a damages remedy when it terminated the Merger Agreement and must have instead sued for specific performance to force a marriage with a partner who had lied and cheated it; failed to mention an [redacted] [redacted] and made clear through its conduct that it was not to be trusted. But Ebix's attempts to evade responsibility for its myriad breaches of contract all rest on the incorrect premise that the effective date of Yatra's termination of the Merger ***preceded*** the filing of this lawsuit. As shown below, that is not correct as a matter of law. But even if that were not the case, Ebix's reading of the Merger Agreement is incorrect and its attempts to turn a simple survival clause into a waiver of remedies ignores not only the plain language of the clause it relies upon, but also other applicable provisions of the agreement which are in conflict with Ebix's preferred interpretation. Similarly, Ebix's attempts to defeat Yatra's fraud and good faith and fair dealing claims on purely technical grounds fail for the reasons set forth herein.

As for the Lender Defendants, they rely heavily on the argument that the law of the Republic of India must apply to the claims against them and that tortious interference with contract is not recognized in that body of law. They do this by citing a handful of (U.S.) federal cases, which are easily distinguishable. To the

contrary and as shown by expert affidavit under Court of Chancery Rule 44.1,[6] the lenders are simply wrong: the law of India does recognize the tort.[7]

Similarly unavailing is the Lender Defendants' position that if the law of India is not applied here, then the appropriate choice of law is that of the State of Georgia. That argument fails because Georgia law, properly read, is not meaningfully in conflict with the law of this State, which expressly governs the Merger Agreement. The Lender Defendants' attempts to escape liability based on arguments about causation, proximate cause, and privilege fail as well, based on the well plead allegations of the Amended Complaint.

At base, all Defendants' attempts to isolate and attack *individual* allegations of the larger, integrated story of corporate treachery and deceit must fail. No reasonable reading of the Merger Agreement allows a party to dissemble, temporize, equivocate, outright lie, and then avoid liability by raising numerous (incorrect) technical arguments. Equity does not abide fraudsters or those whose intermeddling

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[6] *See* Meyer Aff, Ex. 5 ("AZB Op.").

[7] Curiously, while advancing their Indian law argument, the Lender Defendants have not bothered to put forward expert testimony, relying instead on an 18-year-old Connecticut federal case and the affidavit of foreign law filed in *that* case. Whatever that affidavit may (or may not) have said about Indian law, Yatra notes that it predates at least some of the cases relied on by the only expert testimony put before *this* Court, that adduced by Yatra.

with a valid contract helps perpetrate the fraud. This case should proceed through discovery and trial.

STATEMENT OF FACTS

I. Yatra And Ebix Negotiate And Enter The Merger Agreement, Which Includes The Crucial Put Right

On February 13, 2019, Robin Raina ("Raina"), the chief executive officer ("CEO") of Ebix, told Dhruv Shringi ("Shringi"), the CEO of Yatra, that Ebix wanted to explore a strategic transaction with Yatra. ¶33. On February 24, 2019, following several discussions between Raina and Shringi, Ebix sent to Yatra's board of directors (the "Board") a proposal to acquire 100% of Yatra's outstanding stock. ¶34. Then, without Yatra's permission, Ebix publicly disclosed the terms of its proposal on March 11, 2019. ¶36.

Following months of negotiations, Yatra and Ebix executed the Merger Agreement on July 16, 2019 (the "Signing Date"). ¶39. The Merger Agreement provided for a stock deal where, upon the closing (the "Closing"), each Yatra share would be converted into the right to receive Ebix convertible preferred stock (the "Convertible Preferred Stock") in accordance with a fixed exchange ratio. ¶40. The parties also agreed on a Put Right as part of the Merger consideration, enabling former Yatra stockholders who did not exercise the conversion right to have their stock redeemed for $5.31 per share in cash during the 25th month after the Closing. *Id*. The Put Right was a heavily negotiated, material component of the Merger

Agreement, and it implied a Yatra equity value of $257 million.[8] ¶41. As of the Signing Date, the value of the Put Right equaled approximately 17.50% of Ebix's market capitalization. *Id*. The Merger Agreement did not impose any adjustments to Yatra's Put Right should Ebix's market capitalization change vis-à-vis the Put Right value.

The Merger Agreement included a number of representations and warranties, as well as post-signing, pre-Closing covenants, which were tied to closing conditions for the Merger. ¶43. As relevant to this action, the Merger Agreement includes the following provisions that Ebix breached:

- <u>Section 4.8</u>: Ebix represented and warranted that all prior ***and*** future public disclosures complied or would comply with all SEC rules and regulations and federal securities laws (collectively, the "Accuracy Provisions"). ¶44.

- <u>Section 4.10</u>: Ebix represented that: (i) all prior ***and*** future financial statements complied or would comply with applicable accounting requirements; and (ii) it had not received regulatory inquiries into its accounting practices or policies between December 31, 2018 and the Signing Date (collectively, the "Accounting Provisions"). ¶46.

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

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[8] The Merger Agreement also provided that Ebix would assume certain outstanding Yatra warrants, which would be convertible into the same Convertible Preferred Stock in accordance with a specified calculation and accompanied by the same Put Right. ¶42.

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

The Merger Agreement did not have an automatic termination provision; rather, the parties had a discretionary termination right (the "Outside Date Termination Right"). ¶177. Either party could terminate the Merger Agreement after April 12, 2020 (the "Outside Date"), provided that such party had not breached the Merger Agreement resulting in the failure of the Closing. ¶54. After the Signing Date, both parties believed the Closing would occur well in advance of the Outside Date. ¶55.

II. Ebix Drags Its Feet Preparing And Filing the Crucial S-4

In order for Ebix to issue the Convertible Preferred Stock to Yatra as Merger consideration, Ebix had to file and the SEC had to declare effective the S-4. As a publicly traded equity instrument, the Convertible Preferred Stock was required to be registered by the Securities Exchange Act of 1933. Ebix would only have the currency to pay Yatra under the Merger Agreement if it received this SEC approval. ¶49. Ebix covenanted, pursuant to the S-4 Provisions, to file the S-4 with the SEC no later than 45 days after the Signing Date (*i.e.*, August 30, 2019), and thereafter to "use its reasonable best efforts" to have the SEC declare the S-4 effective "as promptly as practicable after such filing." ¶56; § 6.1(a). Ebix intentionally delayed and breached these crucial obligations.

A key consideration for the preparation of the S-4 was whether Ebix would have to include pro forma financials for the post-Merger company. ¶57. The results of a "significance test" analysis would determine whether such financials would need to be included. *Id.* Ebix prepares its financials in accordance with U.S. GAAP ("GAAP"). ¶58. Yatra, however, had historically prepared its financials in accordance with International Financial Reporting Standards ("IFRS"). *Id.* Converting Yatra's financials from IFRS to GAAP would be a time-intensive process. ¶59.[9]

Despite Yatra pressing Ebix for the results of its significance test immediately after the Signing Date, Ebix ignored the issue altogether and dragged its feet, which ultimately delayed the determination of the significance test and the preparation of the pro forma financials. ¶¶59-60, 64-69. Ebix's delay became so offensive that, on August 26, 2019, Shringi personally sent an email to Ebix and its counsel to force them into action. ¶69.

Finally, on September 4, 2019, Ebix confirmed Yatra's prior conclusion that pro forma financials ***would*** be needed for the S-4 and requested Yatra to prepare GAAP financials for the prior two years. ¶71. On October 17, 2019, Yatra provided Ebix with the requested GAAP financials, which enabled Ebix to quickly compile

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[9] Ebix had been aware of the format of Yatra's financials since the beginning of negotiations in March 2019. ¶58.

pro forma financials. ¶76. Thereafter, Ebix's stock price fell sharply, from a closing high of $43.05 on November 5, 2019 to a closing low of $31.06 on November 22, 2019. ¶79. As a result, the relative value of the Put Right increased to nearly 26% of Ebix's market capitalization.

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

III. Ebix [REDACTED] Fails To Secure SEC Approval Of The S-4

Unbeknownst to Yatra until it reached out to the SEC to inquire as to the timing of the effectiveness of the S-4, Ebix [REDACTED] ¶85.

Between September 12, 2019 and the date of Yatra's eventual termination of the Merger Agreement, Ebix [REDACTED] ¶90. Market practice is to work quickly and collaboratively with the SEC to [REDACTED] ¶91. Yet, in the ***nine*** months [REDACTED]

which resulted in the SEC being unwilling to deem effective the S-4, in turn preventing the Merger from closing. ¶¶91, 122.

¶100.

Indeed, apparently to quell Yatra's concerns, on January 28, 2020, Ebix informed Yatra that Ebix's

¶103.

Throughout this period, Ebix remained evasive a

For instance,

¶105. This stubbornness coincided with a drastic drop in Ebix's stock price. As of March 23, 2020, the Put Right equaled approximately 60.67% of Ebix's market capitalization. ¶113.

On March 27, 2020,

Yatra made a formal demand for such information from Ebix, pursuant to its information rights under Section 6.4 of the Merger Agreement. ¶¶111, 114. On March 30, 2020, Ebix's counsel provided Yatra's counsel

¶115.

IV. Ebix Fakes Renegotiation To Lull Yatra Into Not Protecting Its Rights

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

On April 8, 2020, Yatra sent Ebix a notice under the Merger Agreement informing it that: (i) Ebix was in breach of the Merger Agreement based upon its repeated and inexcusable delays in the preparation and filing of the S-4 and its

and (ii) due to Ebix's breaches,

the Outside Date Termination Right was unavailable to Ebix. ¶138. The notice also acknowledged:

> While the Merger Agreement that the parties previously negotiated and executed ***is binding and enforceable as is***, in order for Yatra and its Board of Directors to carefully assess any such proposal by Ebix, and for the benefit of both parties to work together to consummate the Merger, Yatra is agreeable to extending the Outside Date for a period of two weeks, until April 26, 2020.

¶139. The Notice made clear, however, that this was "on the condition that such extension ***does not constitute a waiver of or otherwise impair Yatra's rights to enforce the Merger Agreement***." *Id.*

On April 12, 2020, the parties agreed to extend the Outside Date until April 27, 2020, and thereafter agreed to two more extensions—until April 30, 2020 and May 4, 2020. ¶¶140, 142.

A. Ebix Dangles Revised Terms In Front Of Yatra

On Sunday, May 3, 2020—a day before the latest extended Outside Date—Ebix provided a term sheet (the "Heads of Terms") for a renegotiated deal. ¶143. On the last trading day before this proposal, the Put Right equaled approximated 44.17% of Ebix's market capitalization. ¶41.

Ebix's proposed Heads of Terms kept the Merger in play and caused Yatra not to immediately sue for specific performance, terminate the deal, or seek other

relief after the lapse of the Outside Date. ¶143. The Heads of Terms included, among other things, that:

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

¶144.

Although the Heads of Terms contemplated a stock dividend to Yatra, it soon became clear the offer would require Ebix to issue more than 20% of its stock, thus necessitating an Ebix shareholder vote under NASDAQ rules. ¶145. In response, on or about May 3 or May 4, 2020, several days before the execution of the Tenth Amendment to the Credit Agreement, Shringi and Raina had telephonic discussions in which Raina agreed to modify and enhance certain provisions of the Heads of Terms, including: (i) a reduction in the total number of shares issued in the stock dividend to be offset with equivalent economic consideration in a different form to avoid a vote of Ebix stockholder while still providing Yatra with valuable economic consideration in lieu of the Put Right; (ii) Ebix would assume the risk associated [redacted] and (iii) Ebix

would provide a loan in the amount of $10 million to Yatra on commercially reasonable terms. ¶146. The parties never formally executed the Heads of Terms, and Yatra made clear to Ebix that it would require full and transparent diligence into Ebix's [redacted] ¶148.

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

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

In particular, in the Ninth Amendment, dated as of September 27, 2019, Ebix and the Lender Defendants explicitly provided for the Put Right, demonstrating they all understood the impact of that provision in the Merger Agreement. *Id.* The parties added the defined term "Yatra Disqualified Equity Interests," which specifically addressed the Convertible Preferred Stock to be issued as Merger consideration ***inclusive of the Put Right***. ¶154.

Respecting the "Indebtedness" definition, the Ninth Amendment expressly ***carved out*** "Yatra Disqualified Equity Interests in an amount up to $260,000,000" (*i.e.*, the approximate projected cash exercise value of the Put Right) such that its

issuance, ***inclusive of the Put Right***, would not run afoul of the Credit Agreement's covenants related to the prohibition of incurring "Indebtedness." ¶155.

Ebix and the Lender Defendants reversed course in the Tenth Amendment, and practically foreclosed Ebix's ability to issue the Put Right to Yatra, issue any other equivalent non-equity consideration, or otherwise remedy Ebix's breach by seeking specific performance. On May 7, 2020, unbeknownst to Yatra, when the Merger Agreement was in full force and effect, Ebix and the Lender Defendants executed the Tenth Amendment. ¶157. As of this date, the Put Right equaled approximately 40.37% of Ebix's market capitalization. *Id.*

The Tenth Amendment added the defined term "Yatra Acquisition" that expressly ***removed*** the Put Right from the transaction with Yatra that the Lender Defendants approved:

> "Yatra Acquisition" means the purchase of Yatra Online, Inc., a Cayman Islands exempted company limited by shares ("Yatra"), by the Borrower pursuant to that certain agreement between Borrower and Yatra dated July 16, 2019, as such agreement may be amended or otherwise modified after July 16, 2019 by the Borrower and Yatra to contemplate Equity Interests of the Borrower as the sole consideration for Yatra and to remove from the consideration the cash put option contemplated by the initial agreement.

¶162 (Highlighting added.)

Moreover, the definition of "Yatra Disqualified Equity Interests" was amended in the Tenth Amendment to prohibit Ebix from issuing the Put Right as part of the Merger consideration:

"Yatra Disqualified Equity Interests" means the preferred Equity Interests issued by the Borrower to the sellers of Yatra, solely for the purposes of consummating the Yatra Acquisition so long as such Equity Interests (a) have no maturity date, (b) are not mandatorily redeemable or otherwise subject to any "put" at the option of the holder, (c) are only redeemable at the option of the issuer for (i) a 30-day period commencing on the date that is 36 months after the date of issuance thereof and (ii) a 30-day period commencing on the date that is 48 months after the date of issuance thereof, (d) do not provide for any scheduled payments of dividends in cash prior to the date that is four years after the date of issuance thereof and (e) after the date that is four years after the date of issuance thereof, are subject to an annual cash dividend not in excess of $5,300,000 in the aggregate.

¶163 (Highlighting added.)

"Yatra Disqualified Equity Interests," in turn, was carved out of the Tenth Amendment's definition of "Indebtedness." ¶164. Thus, were Ebix to issue the Put Right, the Put Right now would fall within the definition of "Indebtedness." ¶165. This is of significance since, with certain inapplicable exceptions, Section 8.1 of the Tenth Amendment prohibits the incurrence of "Indebtedness." ¶166.

Because the Tenth Amendment removed the Put Right from the carve-out structured for the Yatra deal in the Ninth Amendment, the mere issuance of the Put Right (and not just its subsequent exercise by former Yatra stockholders) would be an impermissible incurrence of "Indebtedness" and an immediate breach of Section 8.1 of the Tenth Amendment. *Id.* A breach of Section 8.1 of the Tenth Amendment, in turn, would result in an Event of Default under Section 9.1(c).[10] ¶167. Upon an Event of Default, the lenders under Section 9.2 of the Tenth Amendment would have

[10] The issuance of the Put Right would also violate Ebix's negative covenants related to "Investments" in Section 8.5 of the Tenth Amendment and likewise trigger an Event of Default. ¶171.

the ability to (i) accelerate Ebix's debt and (ii) foreclose on its collateral (*i.e.*, ***all*** of Ebix's assets, including assets acquired from Yatra). *Id.* Ebix did not and does not have the cash on hand to pay off such debt if accelerated. ¶169.

C. Ebix Continues To String Yatra Along

On May 8, 2020 (*i.e.*, the day after the effective date of the Tenth Amendment), an email from Yatra's counsel to Ebix's counsel spurred Ebix into illusory action. ¶176. In the email, Yatra expressed a willingness to renegotiate the Merger within certain parameters. *Id.* The email also attached a draft press release that Yatra would disseminate should Ebix purport to terminate impermissibly the Merger Agreement, and it included discussion of [REDACTED] ¶177. With Ebix set to announce its first quarter financial results three days later, on May 11, 2020, it wanted to avoid the stockholder scrutiny sure to follow upon [REDACTED] [REDACTED] ¶179.

On May 14, 2020, Yatra and Ebix agreed to a fourth extension of the Outside Date (the "Extension Agreement"),[11] which not only pushed out the Outside Date to June 4, 2020, but also imposed certain affirmative obligations on Ebix that mirrored the parameters set forth in the May 8, 2020 email, including to:

- make its officers and legal counsel available for diligence sessions "necessary to satisfactorily assess the diligence issues" (the "Diligence Covenant");

[11] *See* Meyer Aff., Ex. 6.

- provide Yatra a proposed draft of the revised certificate of designations of the Convertible Preferred Stock (the "COD Covenant");
- provide Yatra a proposed draft Merger Agreement amendment, which "shall include provisions for an interim $10,000,000 financing from Ebix to Yatra"; and
- "promptly provide revised drafts of transaction documents . . . and negotiate in good faith with Yatra." (the "Good Faith Covenant.")

¶180. Unsurprisingly, Ebix failed to live up to these contractual obligations.

On May 18, 2020, in accordance with the Diligence Covenant, Yatra, Ebix, and their advisors met for a diligence session. ¶182. [REDACTED] *Id.* Despite Yatra having the right to ask questions "necessary to satisfactorily assess the diligence issues" [REDACTED] Ebix unapologetically refused to provide any detail. *Id.* Instead, Ebix merely pointed Yatra to its public filings, and Raina stated, [REDACTED] ¶183. Ebix also refused to share [REDACTED] *Id.*

Additionally, Ebix did not provide Yatra a proposed draft of the revised certificate of designations as required by the COD Covenant. ¶184. And, Ebix did not fulfil its obligations under the Good Faith Covenant either. More specifically, pursuant to the Extension Agreement, Ebix agreed to send Yatra a proposed draft

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

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

- Under the Heads of Terms, Ebix agreed that Yatra would have the ability to raise up to $10 million in incremental capital prior to the Closing, but such financing would have to be reviewed and approved by Ebix. Instead of allowing Yatra to access capital on market terms, Ebix proposed a predatory structure that could allow Ebix to seize one of Yatra's crown jewel assets for pennies on the dollar. Specifically, Ebix proposed that it would lend the $10 million to Yatra and take the equity of one of Yatra's subsidiaries as collateral. Such subsidiary is worth multiple times $10 million. Ebix's offer required that, if the revised merger agreement were terminated ***for any reason***, Yatra would have to repay the loan ***within ten days or else Ebix could foreclose on all of the equity of the subsidiary***.

- Ebix [redacted] and the S-4 not being deemed effective. Specifically, Ebix [redacted] and this break fee would be in addition to any other remedies that Yatra could seek under the Merger Agreement and the Extension Agreement. This break fee concept is entirely absent from the Draft Amendment.

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

On May 26, 2020, in a final attempt to avoid litigation, Yatra sent to Ebix a term sheet for a revised deal (the "Revised Term Sheet"). ¶190. Ebix refused to respond to Revised Term Sheet until it received written responses to diligence questions and the parties held a diligence call. ¶191. On May 31, 2020, Yatra responded to Ebix's written questions and offered to hold a diligence call on June 2, 2020. *Id.* Ebix continued its games and refused to hold a diligence call until Yatra provided even more information, and refused to provide [redacted] [redacted] ¶192.

The extended Outside Date of June 4, 2020 thereafter elapsed. ¶193. Accordingly, Yatra declared material breaches of the Merger Agreement and the Extension Agreement. *Id.* It provided its notice of termination of the Merger Agreement (the "Termination Notice") by email to Raina, as required by the Merger Agreement, at 4:02 p.m. ET on June 5, 2020.[12] *Id.* Under the Merger Agreement, email notices "shall be deemed duly given [] on the date of delivery . . . if sent prior to 5:00 p.m. (***local time of the recipient***)." § 9.2. Raina resides and works in India, so he necessarily received this email ***after*** the 5:00 p.m. cut-off time. ¶193.

[12] Meyer Aff., Ex. 7.

Additionally, the Merger Agreement requires that a valid notice sent by email have a "confirmation of receipt by the recipient." § 9.2. Raina never provided any confirmation of receipt.

Yatra filed the original complaint (the "Original Complaint") against Ebix at 4:04 p.m. ET on June 5, 2020,[13] *i.e.*, prior to the effectiveness of the Termination Notice. ¶193. On June 19, 2020, or less than two weeks after Yatra terminated the Merger Agreement, [REDACTED] ¶194. On August 9, 2020, Ebix filed a Form 10-Q that made public the Tenth Amendment. ¶174. Yatra filed the Amended Complaint on September 25, 2020.

ARGUMENT

"The pleading requirements to survive a Rule 12(b)(6) motion . . . 'are minimal.'" *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 724 (Del. Ch. 2014) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)). The Court must: (i) "accept all well-pleaded factual allegations . . . as true"; (ii) deem "even vague allegations" as "well-pleaded" if they give sufficient notice; (iii) "draw all reasonable inferences in favor of the plaintiff"; and (iv) "deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances." *Id.* at 725.

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[13] Meyer Aff., Ex. 8.

Indeed, "[t]he trial court may dismiss a complaint under Rule 12(b)(6) ***only*** where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001); *see also Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (providing that complaint is "well-pleaded" if it puts opposing party on notice of claim brought against it); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under "Delaware's judicial system of notice pleading, a plaintiff need not plead evidence" but must "only allege facts that, if true, state a claim upon which relief can be granted").

I. Yatra Did Not Waive Its Ability To Seek Money Damages Under The Merger Agreement

"Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003). Although "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law," the Court "cannot choose between two differing reasonable interpretations of ambiguous provisions." *VLIW*, 840 A.2d at 614-15. "Because any ambiguity must be resolved in favor of the nonmoving party, defendants are not entitled to dismissal under Rule 12(b)(6) unless the interpretation

of the contract on which their theory of the case rests is the *only* reasonable construction as a matter of law." *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) (emphasis in original). Moreover, Courts will not adopt a contract interpretation that "produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Osborne ex rel. Osborne v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

Tellingly, Ebix never denies that it violated (i) the Accuracy Provisions, the Accounting Provisions, the S-4 Provisions, or the Best Efforts Provision of the Merger Agreement or (ii) the Diligence Covenant, the COD Covenant, or the Good Faith Covenant of the Exchange Agreement. Rather, Ebix argues that it may evade judicial review entirely because Yatra waived its ability to seek money damages under the Merger Agreement. That argument fails because: (a) the effectiveness of any termination of the Merger Agreement occurred ***after*** Yatra filed the Original Complaint and (b) even if Yatra had terminated the Merger Agreement prior to filing the Original Complaint, the Merger Agreement does not foreclose Yatra's ability to seek money damages for Ebix's breaches, or, at best, is ambiguous as to the effect of termination on Yatra's remedies.

A. The Effectiveness Of Any Termination Of The Merger Agreement Occurred After Yatra Filed The Original Complaint

Even if the Court accepts Ebix's interpretation of Section 8.2 (the "Effect of Termination Provision"), Yatra may still seek money damages for breaches of the

Merger Agreement and the Exchange Agreement. Ebix contends that the Effect of Termination Provision extinguished the parties' liability for breach of contract, with certain inapplicable exceptions, following the termination of the Merger Agreement. Ebix Br. at 26.[14] Because Yatra filed the Original Complaint ***before*** the effectiveness of any termination, however, this argument fails.

Under Ebix's interpretation, the parties contractually established a sort of "statute of limitations" period for breaches of the Merger Agreement that ran concurrently with the term thereof from the Signing Date and expired immediately upon its termination.[15] However, Yatra commenced litigation ***prior*** to effective termination, and as such, even under Ebix's incorrect interpretation of the contract, preserved the ability to seek damages ***following*** the expiration of such period. *See, e.g.*, *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *10 (Del. Ch. Nov. 27, 2013) ("[A] contractual limitations period means that filing litigation is required to preserve a cause of action beyond the limitations period.").

Yatra filed the Original Complaint at 4:04 p.m. ET on June 5, 2020.[16] Although Yatra sent the Termination Notice to Raina at 4:02 p.m. ET on June 5,

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[14] Ebix Defendants' Opening Brief in Support of Their Motion to Dismiss the Verified Amended Complaint ("Ebix Br.").

[15] As explained *infra*, Yatra contests Ebix's argument that the parties may not seek to impose liability following the termination of the Merger Agreement.

[16] *See* Meyer Aff., Ex. 8.

2020,[17] such notice could only become effective the ***next day at the earliest*** under the plain terms of the Merger Agreement. Under Section 9.2, any notice of termination must be in writing and, if sent by email, "shall be deemed duly given [] on the date of delivery . . . if sent prior to 5:00 p.m. (***local time of the recipient***)." Since Raina lives and works in India, he received the Termination Notice well after midnight, in the early morning hours of June 6, 2020.[18]

In fact, the Termination Notice became effective ***days after*** June 6, 2020. Under Section 9.2, email notices are only effective if there is a "confirmation of receipt by the recipient." Raina is Ebix's listed recipient under the Merger Agreement, but he never confirmed receipt of the Termination Notice.[19] There can be no dispute that this litigation was instituted prior to the effectiveness of the Termination Notice.

Ebix urges this Court to ignore these inconvenient facts as "irrelevant." Ebix Br. at 28 n.7. As described above, however technical, filing suit before termination serves as Yatra "putting its stake in the ground" and unambiguously preserves

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[17] *See* Meyer Aff., Ex. 7.

[18] The Court should take judicial notice that India is 10.5 hours ahead of Eastern Standard Time. *See State v. Grinnage*, 2017 WL 1201160, at *4 (Del. Com. Pl. Mar. 16, 2017) (taking judicial notice of daylight savings time).

[19] Yatra notes that the Merger Agreement requests any notices sent to Ebix also to be sent to Bass, Berry & Sims PLC, but the Merger Agreement makes clear that any copies sent to Bass, Berry & Sims PLC "shall not constitute notice" to Ebix. § 9.2.

Yatra's rights to seek damages, even under Ebix's mistaken reading of the contract. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *15 (Del. Ch. July 11, 2011) (noting that the presence of "express" termination language "strengthens the argument of those commentators who equate the termination date for representations and warranties with the last day to sue on those representations and warranties.").

B. Terminating the Merger Agreement Prior to Filing Suit Does Not Preclude Yatra's Right to Sue for Money Damages

Although Yatra filed its suit before terminating the Merger Agreement, even if the timeline played out differently, termination does not absolve Ebix of its breaches, and the relevant provisions of the Merger Agreement are, at best, ambiguous. This Court should deny the motion to dismiss not only because of the timing of the termination but also because the Merger Agreement's limitations of remedies does not clearly preclude money damages, and Ebix's reading of the Effect of Termination Provision conflicts with other contractual terms.

i. Any Limitations Of Remedies Must Be Clearly Expressed

Limitations of remedies must be clear as day ***and unambiguous***. *See Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 549 (Del. Super. Ct. 2005) (Slights, J.), *aff'd*, 886 A.2d 1278 (Del. 2005) ("Although the parties may, in their contract, specify a remedy for a breach, that specification does not exclude other legally recognized remedies. An agreement to limit remedies must be clearly

expressed in the contract."). Contrary to Ebix's *ipse dixit* that the Effect of Termination Provision is "plain and unambiguous," Ebix Br. at 26, the provision is anything but.

In its entirety, the Effect of Termination Provision reads:

> **Section 8.2 Effect of Termination**. In the event of any termination of this Agreement as provided in Section 8.1, the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto, except for the confidentiality provisions of Section 6.4 (Access to Information) and the provisions of Section 3.26 (No Other Representations and Warranties; Disclaimers), Section 4.17 (No Other Representations and Warranties; Disclaimers), Section 6.7 (Expenses), this Section 8.2, Section 8.3 (Termination Fees) and Article IX (General Provisions), each of which shall survive the termination of this Agreement and remain in full force and effect; provided, however, that, subject to Section 8.3(a)(iii), nothing contained herein shall relieve any party from liability for damages arising out of any fraud occurring prior to such termination, in which case the aggrieved party shall be entitled to all rights and remedies available at law or equity. The parties acknowledge and agree that nothing in this Section 8.2 shall be deemed to affect their right to specific performance under Section 9.9 prior to the valid termination of this Agreement. In addition, the parties agree that the terms of the Confidentiality Agreement shall survive any termination of this Agreement pursuant to Section 8.1 in accordance with its terms.

Rather than being a provision that ***extinguishes*** monetary relief, it instead makes clear what contractual obligations carry forward post-termination. Thus, as might be expected, the Effect of Termination Provision sets out that certain obligations survive the termination of the Merger Agreement, like the obligation to pay a termination fee, the obligation to reimburse expenses in certain circumstances,

and certain confidentiality obligations. This is commonplace in mergers and acquisitions contracts.

Ebix takes this otherwise innocuous provision, and through alchemy, transmutes it into an absolute bar on Yatra's ability to seek monetary damages. Specifically, Ebix argues that the language, "[i]n the event of any termination of this Agreement . . . the obligations of the parties shall terminate and there shall be no liability on the part of any party with respect thereto," must be read as terminating the right to sue for damages after termination of the Merger Agreement, with certain exceptions for fraud and the enumerated obligations that survive. Ebix Br. at 26.

At the outset, this language does nothing whatsoever to address monetary liability for a ***prior breach*** of any representation, warranty, or covenant. Indeed, there is nothing in the quoted language suggesting that it operates retrospectively, *i.e.*, to wipe out the ability to sue for damages for wrongs that had arisen ***prior to*** termination. And, the fact that the Effect of Termination Provision expressly preserves the parties' ability to seek specific performance prior to termination does nothing to undermine Yatra's ability to seek money damages for pre-termination breaches. *Interim Healthcare*, 884 A.2d at 549.

Likewise, the supposed limitation on liability that Ebix advocates for is not found in the Effect of Termination Provision. Rather, Ebix's entire argument falls

apart when the question is asked "what do the words 'with respect thereto'[20] modify?" Does "with respect thereto" modify "the obligations of the parties" as Ebix argues, or, instead does it modify "any Termination of this Agreement"? Yatra contends that the proper (and the only reasonable) reading of the phrase, "no liability . . . with respect thereto," does not wipe out damages owing for prior breaches of "obligations." Instead, this phrase makes clear that there is no special liability for "any termination of this Agreement." And, to the extent that the Court determines that the Effect of Termination Provision can fairly be read more than one way, then it is facially ambiguous and dismissal cannot be granted ***as a matter of law***. *Portnoy*, 2008 WL 5197164, at *3.

ii. Ebix's Reading Of The Effect Of Termination Provision Conflicts With Section 9.9(c)

A bedrock tenant of contract interpretation is that agreements "are to be read as a whole," with each provision "interpreted in harmony with the other provisions." *W. Ctr. City Neighborhood Ass'n v. W. Ctr. City Neighborhood Planning Advisory Comm., Inc.*, 2003 WL 241356, at *7 (Del. Ch. Jan. 24, 2003). However, the Effect of Termination Provision, read the way Ebix would have the Court read it, directly conflicts with another provision in the Merger Agreement. In particular, Section 9.9(c) expressly contemplates that monetary damages are available to Yatra. Thus,

[20] The Court will find this language on the fourth line of the provision set out above.

construing the Effect of Termination Provision as a bar on the right to seek damages for any past violation of covenants, representations, or warranties eviscerates Section 9.9(c) and cannot be squared with fundamental interpretation principles.

Section 9.9(c) begins by setting forth the right to seek specific performance "in addition to ***any other remedy*** that may be available . . . at law and in equity, ***including money damages***," and making certain defenses unavailable in such an action. Section 9.9(c) continues:

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

Examining this provision makes clear just how feckless Ebix's argument is.

At the outset, Section 9.9(c) uses the defined term "Proceeding." That term is defined in Section 9.12 as "any suit, action . . . or litigation commenced, brought, conducted or heard by or before . . . any Governmental Entity." "Governmental Entity" in turn is defined in Section 3.5 to include "any . . . state or local court." Thus, by its very terms, the Merger Agreement contemplates that a party could *terminate the contract and then bring a suit for specific performance of the* ***terminated*** *agreement*. Moreover, this same provision expressly states that a party's right to commence "***any*** Proceeding" (*i.e.*, a case in state court) does not restrict or

limit its right to terminate the contract or pursue other remedies "***including monetary damages***."

Yatra's reading, on the other hand, harmonizes these provisions. Importantly, the Effect of Termination Provision provides that "Article IX (General Provisions) . . . shall survive the termination of this Agreement and remain in full force and effect." In other words, Section 9.9(c) (discussed above) survives termination and thus the plain language of the Effect of Termination Provision ***preserves*** the parties' abilities to pursue remedies, including money damages, by initiating any "Proceeding" after the termination of the Merger Agreement.

Adopting Ebix's interpretation leads to an absurd result, which is an additional reason it should be rejected. *Capella Holdings, LLC v. Anderson*, 2017 WL 5900077, at *5 (Del. Ch. Nov. 29, 2017) (Slights, V.C.). Under Ebix's reading of the Effect of Termination Provision, in order for Yatra to maintain a suit for money damages to hold Ebix accountable for its myriad of material breaches, Yatra would have had to sue but not terminate the Merger Agreement.[21] This result makes no sense practically or commercially, and the Court should reject such an interpretation.

[21] Even if the Merger Agreement was never terminated, Yara's obligations thereunder would have ceased, because Ebix materially breached the Merger Agreement (and Ebix does not contend otherwise). Hornbook contract law provides that a defendant's material breach cuts off a plaintiff's continued performance obligations under the agreement. *See, e.g.*, *Word v. Johnson*, 2005 WL 2899684, at *4 (Del. Ch. Oct. 28, 2005).

Put simply, there is no way to read the plain language of Section 9.9(c) and harmonize that Section with Ebix's proposed interpretation of the Effect of Termination Provision. Yatra's reading of the Effect of Termination Provision, on the other hand, harmonizes the two.

The parties contemplated and contracted for a certain degree of flexibility as to the timeline of suits and termination. For instance, the express ability to seek specific performance ***after*** termination of the Merger Agreement—a concept otherwise not known in our law—suggests that flexibility.[22] In any event, the right to sue for monetary damages was plainly contemplated by the parties. It is set forth in Section 9.9(c). Given the flexible approach to the timing of remedial lawsuits, any suggestion that the Effect of Termination Provision must be read to bar suits for breaches prior to termination must be rejected as irreconcilable with the plain language of Section 9.9(c) and is otherwise nonsensical.

C. The Survival Clause Does Not Limit The Parties' Ability To Seek Remedies For Pre-Termination Breaches

i. Ebix Misreads The Plain Language Of The Survival Clause

Ebix's infatuation with Section 9.1 (the "Survival Clause") is a red herring. Survival clauses like Section 9.1 merely provide "that only certain covenants,

[22] In a curious error, Ebix implicitly acknowledges the oddness of this provision. *See* Ebix Br. at 38 (incorrectly asserting that Yatra "terminated the Merger Agreement and thereby eliminated its ability to specifically enforce the Merger Agreement and its provisions related to the Put Right").

representations, warranties and agreements would survive the consummation or termination of the Merger." *Dolan v. Altice USA, Inc.*, 2019 WL 2711280 (Del. Ch. June 27, 2019) (Slights, V.C.). The Survival Clause here includes ***no language*** restricting or eliminating remedies.

Ebix argues that, because Section 9.1 does not enumerate the Accuracy Provisions, the Accounting Provisions, the S-4 Provisions, the Best Efforts Provision as surviving the termination of the Merger Agreement, "Yatra's right to sue" on breaches of such provisions "would terminate upon termination of the Merger Agreement pursuant to the Survival Clause." Ebix Br. at 28. Not so, and tellingly Ebix does not quote or cite ***any*** language in the Survival Clause that cuts off "Yatra's right to sue."

As a preliminary matter, because Yatra filed the Original Complaint ***before*** the termination of the Merger Agreement, and ***before*** the Survival Clause and the Effect of Termination Provision even kicked in—the Court's analysis should stop here. That said, nothing in the plain language of the Survival Clause limits remedies. *Interim Healthcare*, 884 A.2d at 549.

In relevant part, the Survival Clause provides, with certain exceptions, that:

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

Thus, the Survival Clause functions to cut off the parties' continuing obligations to comply with the Merger Agreement's provisions, including the Accuracy Provisions, the Accounting Provisions, the S-4 Provisions, and the Best Efforts Provision ***after*** the consummation of the Merger or the termination of the Merger Agreement. It does ***nothing*** to affect the parties' rights to sue for prior breaches.

Importantly, the Survival Clause provides that Article IX (including Section 9.9(c)) and the Effect of Termination Provision "shall survive the termination of this Agreement." This cross-reference lends additional support for Yatra's harmonious reading of the Merger Agreement, since the Survival Clause states that certain provisions will survive, post-termination, that entitle Yatra to seek money damages. Like the argument for the Effect of Termination Clause, Ebix's interpretation of the Survival Clause eliminating Yatra's ability to sue for money damages arising from pre-termination breaches contradicts Section 9.9(c).

ii. The Survival Clause Does Not Limit Yatra's Ability To Seek Money Damages Under The Extension Agreement

Likewise, the Survival Clause does nothing to Yatra's ability to sue for breaches of the Extension Agreement that occurred prior to the termination of the Merger Agreement. Again, because Yatra filed the Original Complaint before terminating the Merger Agreement, the Survival Clause is not even implicated. And, the Survival Clause only provides that obligations under the Extension Agreement

will not continue. The Survival Clause does ***not*** restrict remedies for prior breaches of the Extension Agreement.

iii. The Cases That Ebix Cites Are Inapposite

For the foregoing reasons, Yatra's breach of contract claims survive Ebix's motion under Rule 12(b)(6). Nevertheless, it is worth noting that the cases that Ebix cites are inapposite, because all but one[23] involved transactions that had ***closed***, rather than merger agreements that had been terminated.[24]

There are pivotal differences between an aggrieved party seeking money damages from its contractual counterparty following termination versus closing of a merger. In the post-closing context and analogizing to real estate transactions, this Court has recognized that "[a]bsent contract language providing to the contrary, pre-closing representations about the acquired property interest become ineffective post-closing under the same rationale that causes representations about real property to

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[23] *Stöbich Fire Prot. Sys., LP v. Smoke Guard, Inc.* did not involve an M&A transaction; rather, it is a three-page order denying a motion for a temporary restraining order, in part because of a lack of likelihood of success on the merits where a "non-compete provision . . . expired with the termination" of a distribution agreement. No. 1:14-cv-00802-LPS, ¶3 (D. Del. June 25, 2014) (ORDER). Ebix also says that that case applied *GRT* in its holding. Ebix Br. at 28. Not so—*GRT* is not cited once in this order.

[24] *See Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 923 (Del. 2017); *HBMA Holdings, LLC v. LSF9 Stardust Holdings LLC*, 2017 WL 6209594, at *2 (Del. Ch. Dec. 8, 2017); *GRT*, 2011 WL 2682898, at *4; *France Brevets, S.A.S. v. Clean Energy Mgmt. Sols., LLC*, No. 1:16-cv-00262-GMS, at 2-3 n.4 (D. Del. Sept. 15, 2017) (ORDER).

merge with a warranty deed." *Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg. LLC*, 2015 WL 139731, at *14 (Del. Ch. Jan. 12, 2015). In effectuating a closing, M&A counterparties have decided to scramble the proverbial eggs after the opportunity to diligence each other during the post-signing, pre-closing period. *See GRT*, 2011 WL 2682898, at *13 (emphasis in original) ("It is therefore common in cases where the representations and warranties expire at closing for the parties to conduct robust due diligence *pre-closing*, with it being understood that the contractual representations and warranties will be true as of the closing date and can provide a basis to avoid closing to the extent that their truth is made a condition to closing, but will not provide a basis for a post-closing lawsuit.").

Different considerations are at play here. Nothing analogous to representations merging into a warranty deed have occurred; to the contrary, Yatra seeks to hold Ebix accountable for its litany of breaches ***prior*** to closing. Yet, Ebix unabashedly contends that it makes no difference how grossly it misbehaved and misled. It was free to game and ruse and disregard its obligations—provided only that Ebix did not commit fraud[25] there can be no monetary liability for its breach of contract. The effect of Ebix's argument is that it could have signed the Merger Agreement for sport, treating its obligations as optional, never intending to issue the

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

consideration, taking Yatra off the market for a year or more, giving itself pure optionality on whether to proceed, and then simply refusing to proceed with the deal it made (when it became too rich and inconvenient), all without incurring a cent of liability. That simply cannot be the case, is not the law, and is not what the Merger Agreement provides.

II. Ebix Breached The Implied Covenant Of Good Faith And Fair Dealing

Although "[t]he implied covenant is a limited remedy whose application is a cautious enterprise," this is one case where it does real work. *In re CVR Refining, LP Unitholder Litig.*, 2020 WL 506680, at *13 (Del. Ch. Jan. 31, 2020). Ebix breached the implied covenant in at least two ways. First, Ebix breached it by purporting to renegotiate the terms of the Merger Agreement—without any intent to close on the renegotiated terms—to induce Yatra to forbear from exercising remedies until Ebix could accomplish ulterior objectives (*i.e.*, amending its Credit Agreement, finalizing its audit, and announcing its financial results). Second, Ebix breached the implied covenant by entering into the Tenth Amendment, without ever disclosing it to Yatra, effectively prohibiting Ebix from closing the Merger with its Put Right intact.

To state a claim for breach of the implied covenant, a plaintiff "must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d

872, 888 (Del. Ch. 2009). "The implied covenant of good faith and fair dealing inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Id.* The implied covenant cannot be waived. *See Pierce v. Int'l Ins. Co. of Illinois*, 671 A.2d 1361, 1366 (Del. 1996) ("So that the reasonable expectations of parties to a contract will not be defeated, we have held that a duty of good faith and fair dealing attaches to every contract, and this duty cannot be disclaimed.").

The implied covenant fills contractual gaps where the parties "would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 443 (Del. 2005). "While this test requires resort to a counterfactual world—what if—it is nevertheless appropriately restrictive and commonsensical." *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*, 685 A.2d 365, 376 (Del. Ch. 1996).

Ebix argues that express terms of the Merger Agreement already prohibit the two breaches enumerated above such that the implied covenant has no utility here. Ebix Br. at 49. In particular, Ebix cites the following portion of the Best Efforts Provision (*i.e.*, Section 6.5(a)):

> [Ebix] shall . . . use [its] reasonable best efforts to take, or cause to be taken, as promptly as practicable, all actions necessary, proper or advisable to consummate the Merger as promptly as practicable,

> including to use reasonable best efforts to, as promptly as practicable, (i) cause all of the conditions to Closing to be satisfied . . .

Each breach, however, goes far beyond the scope of the Best Efforts Provision and calls for the implied covenant.

By feigning an interest to re-negotiate the Merger Agreement (while the contract was still in full force and effect), Ebix lied to Yatra and caused Yatra real harm by lulling it into not exercising remedies until the Put Right was no longer available. Lying to a contractual counterparty—post-signing, pre-closing—is misconduct that greatly exceeds a failure to use "reasonable best efforts . . . to consummate the Merger as promptly as practicable." In other words, the explicit requirement to use reasonable best efforts to close the Merger is ***not*** equivalent to an implicit prohibition on actively misleading the other party in order to prevent it from enforcing its contractual rights. *See Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, 2008 WL 1746974, at *13 n.60 (Del. Ch. Apr. 7, 2008) (Strine, V.C.) (citing *Rus Inc. v. Bay Indus., Inc.*, 322 F.Supp.2d 302, 315 (S.D.N.Y. 2003)) ("giving pretextual reasons may breach implied covenant when there is an explicit contractual duty to use reasonable best efforts to meet explicit conditions").

Rus, Inc. v. Bay Industries, Inc., 322 F.Supp.2d 302 (S.D.N.Y. 2003), is instructive. In early January 2001, the plaintiff Recticel agreed to sell the stock of its wholly-owned subsidiary, Soundcoat, to defendant Bay. *Id*. at 305. Both Soundcoat's and Bay's profits fell in February 2001, and Recitel alleged that the

transaction was no longer advantageous to defendants, which then "proffered a variety of pretextual issues as grounds on which they could avoid their duty to close." *Id*. at 315. Defendants even refused to close after a renegotiation of Soundcoat's purchase price. *Id*. Applying New York law,[26] the court denied summary judgment and held that, under ***both*** the agreement's reasonable best efforts provision and the implied covenant, the defendant "would be liable for acting in bad faith if it did not intend for its negotiations to result in the closing, or if it purposely acted in a manner that prevented the closing from occurring." *Id.*

Vice Chancellor Laster has aptly summarized the key takeaway here: "Absent explicit anti-reliance language pursuant to which a sophisticated party knowingly assumes risk, a court can ***presume*** that the question '***Can I lie to you?***' would have been met with a resounding ***'No.'***" *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 443 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013); *see also Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017) ("Stated another way, some aspects of the deal are ***so obvious*** to the participants that they never think, or see no need, to address them.").

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[26] The requirements of the implied covenant are the same under New York and Delaware law. *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *23 (Del. Ch. Dec. 19, 2017). And, as noted above, then-Vice Chancellor Strine cited *Rus, Inc.* approvingly.

And, in the words of Chancellor Allen, finding that Ebix's lying breached the implied covenant is "commonsensical." *Schwartzberg*, 685 A.2d at 376.

Similarly, Ebix's entry into the Tenth Amendment, effectively foreclosing the issuance of the Put Right or any consideration other than stock, is misconduct that exceeds the restrictions of the Best Efforts Provision. The explicit requirement to use reasonable best efforts to close the Merger is ***not*** equivalent to an implicit prohibition on actively interfering with the ability to issue Merger consideration. As described in further detail in Section III, *infra*, Ebix's entry into the Tenth Amendment contractually precluded it from issuing the Put Right—if it did so, Ebix would have caused an immediate event of default under the Credit Agreement, allowing its lenders to accelerate the debt and foreclose on Ebix's assets—including those acquired from Yatra. And, after the execution of the Tenth Amendment, the deal under the Merger Agreement (an all-stock transaction accompanied by the Put Right exercisable after 25 months) was no longer practically available to Yatra, because its stockholders would hold shares in a potentially insolvent company.

Thus, for all the reasons explained above, Ebix's entry into the Tenth Amendment constitutes a second, independent breach of the implied covenant. At bottom, the oft-quoted purpose of the implied covenant is to prevent "arbitrary or unreasonable conduct" that prevents receipt of "the fruits of the bargain." *Dunlap*, 878 A.2d at 442. By entering into the Tenth Amendment, Ebix intentionally denied

Yatra the $257 million Put Right. If a casebook ever needed an illustration of where "issues of compelling fairness" mandated the application of the implied covenant, this action would be a prime example. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 993 (Del. 1998).

III. Ebix Committed Fraud On Yatra

The elements of fraud are well established, and the Amended Complaint alleges with sufficient particularity the requisite "who, what, where, and when" to survive the motion to dismiss. The party asserting fraud must allege: (1) the defendant made a false representation of material fact; (2) it was made with the knowledge or belief that the representation was false, or made with reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction was taken in justifiable reliance on the representation; and (5) the plaintiff suffered damage as a result of reliance on the representation. *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). "Fraud need not take the form of an overt misrepresentation; it also may occur through concealment of material facts, or by silence when there is a duty to speak." *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *6 (Del. Ch. Dec. 23, 2008). Although "[a]n unfulfilled promise of future performance will not convert a potential contract claim into a claim sounding in fraud," if, "at the time

the promise was made the speaker had no intention of performing," then there is a viable fraud claim. *Id*. at *7.

Similar to its breach of the implied covenant,[27] Ebix committed a fraud on Yatra by falsely expressing a willingness to renegotiate the terms of the Merger Agreement—without any intent to close on the renegotiated terms (or any commercially reasonable terms for that matter)—to induce Yatra to forbear from exercising remedies until Ebix could get its house in order (*i.e.*, amending its Credit Agreement, finalizing its audit, and announcing its financial results). *Cf. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829, at *43-45 (Del. Ch. Dec. 3, 2018) (post-trial opinion finding liability for fraud where defendant concealed existential threats to a relationship with a key commercial counterparty).

A. Ebix's False Statements

i. Hindsight 20/20—Why Ebix Defrauded Yatra

Perhaps motivated by the economic reality that the value of the Put Right was growing in relation to the dropping Ebix stock price, out of the gate, Ebix was cagey and unengaged in the Merger process as agreed and contemplated by the Merger Agreement. As early as November 2019, but in no event later than the declaration

[27] Fraud is a subspecies of breach of the implied covenant. *See ASB*, 50 A.3d at 444 ("Proving fraud thus offers one way of establishing a breach of the implied covenant, but not the only way.").

of the global outbreak of the COVID-19 pandemic by the WHO on March 11, 2020, Ebix determined that it would not close the Merger. ¶¶79, 113, 133. Ebix's stock price dropped more than 52%, from $38.60 on February 14, 2020 to $16.89 on April 9, 2020 (the last trading day prior to the initial Outside Date). ¶221. Indeed, from the Signing Date to April 9, 2020, Ebix saw the value of the Put Right (at face value) rise from about 17.50% of Ebix's equity value to about 49.93%.

Due to its material breaches of the Merger Agreement, Ebix could not exercise the Outside Date Termination Right and walk away from the deal after April 12, 2020. ¶138. Ebix also did not want a messy divorce from Yatra, because litigation and bad press could inhibit Ebix's ability to secure a clean annual audit, renegotiate its Credit Agreement to allow for increased flexibility under financial maintenance

covenants, and [redacted] prompting stockholder scrutiny [redacted] at a time when its stock price was already sliding. ¶141. In other words, Ebix had to keep Yatra at bay, at least until Ebix could accomplish these other goals.

Ebix adopted a game plan: offer to renegotiate with Yatra on favorable terms without ever intending to actually negotiate in good faith and close the Merger; make promises that it knew it would not keep; and induce Yatra into forbearing from exercising its specific performance, termination, or other litigation options until the time that the auditors had signed off on the 2019 audit, the banks had finalized the Tenth Amendment, and Ebix had released its financial results. In short, fraud writ large.

ii. Ebix Made A Number Of False Statements To Yatra

Ebix made numerous false promises and representations to Yatra about Ebix's willingness to renegotiate the Merger Agreement in good faith when Ebix never intended to enter into an amended deal on the revised terms it proposed to Yatra. The lies began on April 4, 2020, when Raina committed to the Board to propose a revised deal within 48 hours. ¶¶133, 136. He never did. ¶137. Ebix then secured

three extensions of the Outside Date—until May 4, 2020—while it worked with its auditors and negotiated with its lenders. ¶¶140, 142.

Finally, on May 3, 2020, *i.e.*, one day prior to the latest Outside Date and before Ebix had finalized the Tenth Amendment and announced its financial results, Ebix provided Yatra with the Heads of Terms for a renegotiated deal. ¶143. The Heads of Terms laid out a transaction that kept Yatra at the "(re)negotiation table" and caused Yatra to not immediately sue for specific performance, terminate the deal, or seek other relief. *Id.* The Heads of Terms included, among other things, provisions pursuant to which:

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

¶144.

It soon became clear that the proposed stock dividend would require Ebix to issue more than 20% of its stock, thus necessitating a shareholder vote under NASDAQ rules, which neither side wanted to happen. ¶145. In response, on or about May 3 or May 4, 2020, Shringi and Raina had telephonic discussions in which

Raina agreed to modify and enhance certain provisions of the Heads of Terms, including:

- a reduction in the total number of shares issued in the stock dividend to be offset with equivalent economic consideration in a different form to avoid a vote of Ebix stockholder while still providing Yatra with valuable economic consideration for the demise of the Put Right;

- Ebix would assume the risk associated with [redacted] and

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

¶146.

When Ebix later delivered the Draft Amendment on May 18, 2020, *i.e.*, after executing the Tenth Amendment and holding its earnings call, the formal draft documentation of the revised deal all together deleted certain material terms that had been agreed upon pursuant to the Heads of Terms and the subsequent discussion between Shringi and Raina. ¶186. Namely, the Draft Amendment:

- did not contain a draft certificate of designations including concrete terms of the new proposed preferred stock;

- did not include offsetting economics for the reduction in the stock dividend;

- offered to provide $10 million of capital on predatory, non-market terms; and

- omitted entirely the $10 million regulatory [redacted] break fee.

¶233.

The predatory loan proposal was especially egregious. Ebix proposed that it would lend Yatra the $10 million and take the equity of one of Yatra's subsidiaries as collateral. ¶234. Such subsidiary is worth multiples of $10 million. *Id.* Ebix's offer required that, if the revised merger agreement were terminated ***for any reason***, Yatra would have to repay the loan ***within ten days or else Ebix could foreclose on all of the equity of the subsidiary***. *Id.* When Yatra's counsel questioned Ebix's counsel about this "bait and switch," Ebix's counsel simply advised that the previously promised economic terms were "off the table." ¶235.

iii. Ebix Never Intended To Renegotiate With Yatra

Yatra's fraud claim rests on a promissory fraud theory, *i.e.*, Ebix renegotiated the Merger Agreement in bad faith and did not intend to enter into a revised deal. "To assert a claim for promissory fraud, the plaintiff [] must plead specific facts that lead to a reasonable inference that the promissor had no intention of performing at the time the promise was made." *Winner Acceptance*, 2008 WL 5352063, at *10.

Ebix argues that "[n]one of the alleged false statements create an inference that Ebix never intended to renegotiate." Ebix Br. at 44. This argument conveniently ignores the facts and circumstances alleged that beg the conclusion (or at least the reasonable inference) that Ebix was stringing Yatra along:

- Ebix needed to avoid litigation under the Merger Agreement while it finalized its annual audit, amended its Credit Agreement, and released its earnings;

- In order to get breathing room to accomplish these goals and induce Yatra to continue extending the Outside Date, Ebix served up the Heads of Terms, and then Raina had a subsequent conversation with Shringi;

- With that breathing room, Ebix finalized the Tenth Amendment and had its earnings call;

- Ebix never disclosed to Yatra that it had renegotiated it Credit Agreement and foreclosed the Put Right or any hope of consideration other than stock under the Tenth Amendment;

- With the Tenth Amendment out of the way, Ebix served up a Draft Amendment that grossly deviated from the Heads of Terms (as modified by the phone call) and contained plainly unreasonable terms; and

- When Yatra's counsel questioned Ebix's counsel about this "bait and switch," Ebix's counsel simply advised that the previously promised economic terms were "off the table."

This is not just a case of failed renegotiation. This is a case where Ebix's business was rapidly deteriorating and it needed to reassure its investors, creditors, and auditors that the ship could stay afloat. So Yatra was duped into becoming part of Ebix's charade; Ebix pretended to continue with its acquisition streak with Yatra's merger projecting continued business growth to the market to deceive Yatra (and the market); Ebix lulled Yatra into discussions; and, once Ebix had accomplished its ulterior motives (most significant of which was the Tenth Amendment), Ebix dropped its pretenses making a renegotiated deal commercially infeasible.

B. Yatra Justifiably Relied On Ebix's False Statements And Refrained From Enforcing Its Rights Under the Merger Agreement

"Whether a party's reliance was reasonable is not generally suitable for resolution on a motion to dismiss," because "[t]he question of whether one's reliance was reasonable generally is a question of fact." *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *7 (Del. Super. Ct. Sept. 25, 2015). "The reasonableness of one's reliance on false information depends on all of the circumstances." *Vague v. Bank One Corp.*, 850 A.2d 303 (Del. 2004) (TABLE). That said, the Amended Complaint alleges particularized facts that Yatra reasonably relied on Ebix's offers to renegotiate the Merger Agreement, and in doing so forbeared from exercising its rights under the contract.

Yatra negotiated the original Merger Agreement and had a contractual Put Right, but also was willing to consider a renegotiation on like valuable economic terms that were proposed by Ebix in order to close the Merger and avoid protracted litigation and the attendant distraction to Yatra's executives and business in enforcing the original Merger Agreement. ¶223. Yatra found the Heads of Terms, as modified by the subsequent telephone conversation, sufficiently palatable to continue the re-negotiation. ¶230. Of special importance to Yatra was the promise to solve the NASDAQ vote problem with alternative (and valuable) consideration, as well as Ebix's agreement to assume part of the regulatory risk posed by [redacted]

[REDACTED] by committing to pay a substantial fee [REDACTED] [REDACTED] *Id.* Moreover, the offer to finance Yatra was important to it and played a key role in Yatra's decision not to take steps to protect its rights under the Merger Agreement, which continued in full force and effect. *Id.* Yatra neither knew, nor had any reason to suspect, that Ebix was acting in bad faith and gaming the Merger Agreement and the clock to buy itself time to keep Yatra from exercising its rights while it renegotiated its Credit Agreement. *Id.*

Ebix argues that "Yatra's assertions of reliance fail because, even after Yatra ended the renegotiations . . . it still did not sue for specific performance." Ebix Br. at 37-38. This argument ignores the chronology of events here—Ebix confuses when Yatra would have sued had Ebix not lied to it. Both parties thought the deal would close well before the initial Outside Date of April 12, 2020. ¶55. By its fraud, Ebix lulled Yatra into granting multiple extensions of the Outside Date and not filing the Original Complaint until June 4, 2020. By this point in time, the specific performance remedy was both unlikely legally ("a party seeking specific performance must act with alacrity or lose its rights"[28]) and infeasible practically (there was too much bad blood between the parties for a harmonious business combination). Thus, and as described in more detail below, ***because*** of Ebix's fraud,

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[28] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *13 (Del. Ch. Jan. 24, 2005).

specific performance was off the table by the time of filing of the Original Complaint.

C. Yatra Suffered Damages As A Result Of Its Reliance On Ebix's False Statements

Yatra's reliance on Ebix's pretend promises caused it harm. Immediately after Ebix's accomplished its objectives, Ebix promptly reneged on the key promises it had made to induce Yatra's forbearance and refused to perform under the original Merger Agreement. By this point in time, specific performance was effectively foreclosed as a remedy, since it would have caused an ***immediate*** event of default under the Credit Agreement. ¶¶160-67. Yatra clearly had a contractual right to seek specific performance under the Merger Agreement,[29] and like all contractual rights the right to seek specific performance has value. Ebix, with the help of its lenders ***gutted*** that right by surreptitiously contracting away its ability to issue the Put Right under the Tenth Amendment.

If Ebix issued the Put Right, Yatra stockholders would have held worthless stock as Merger consideration. The issuance of the Put Right would have caused an immediate event of default under the Tenth Amendment, allowing Ebix's lenders to accelerate the debt and foreclose on Ebix's assets. ¶167. Such an occurrence would imperil Ebix's solvency, rendering the Merger consideration received by Yatra

[29] *See* § 9.9(c).

stockholders (*i.e.*, Ebix's stock) valueless. ¶169. Thus, Ebix has it backwards that "it was undeniably *possible* that a court would grant Yatra specific performance of the Put Right notwithstanding the difficulties it posed for Ebix." Ebix Br. at 41 (emphasis in original). The difficulties here would have been for ***Yatra***, because its right to specific performance was worthless after the execution of the Tenth Amendment.

Contrary to Ebix's argument, and as specifically alleged in the Amended Complaint, issuance of the Put Right would have ***immediately*** triggered an event of default under the Credit Agreement; such default would not have been keyed off former Yatra stockholders exercising the conversion feature 25 months down the road. ¶167; Tenth Amendment §§ 8.1, 9.1(c). The ***mere issuance*** of the Put Right qualifies as Indebtedness (as "other similar deferred or contingent obligations incurred in connection with any Acquisition recognized as a liability on the balance sheet of the Borrower and its Subsidiaries in accordance with GAAP"), and there are no exceptions to the general prohibition on the issuance of Indebtedness to allow for it. ¶¶164-66. And, Ebix did not have sufficient cash on hand to pay off amounts owed to its lenders. ¶169.

Ebix speculates that the Lender Defendants would have been willing to waive the event of default had Ebix issued the Put Right to Yatra. Ebix Br. at 39. Not only is this speculation inappropriate and glib at the motion to dismiss stage, it also runs

directly contrary to known facts. Ebix and the Lender Defendants had just specifically amended the Credit Agreement to prohibit issuance of the Put Right—it strains credulity that the Lender Defendants would volte-face and allow it.

IV. The Lender Defendants Tortiously Interfered With Yatra's Rights Under The Merger Agreement

In a dizzying pursuit for Indian law to apply, which the Lender Defendants deem as the most favorable substantive law on tortious interference, they urge this Court to engage in a futile choice of law analysis without first clearing the basic hurdle of whether a conflict truly exists. *See Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 773 (Del. Ch. 2014) ("If application of the competing laws would yield the same result, then no genuine conflict exists and the Court should avoid the choice-of-law analysis altogether."). It does not. Yatra's Amended Complaint properly states a claim for tortious interference against the Lender Defendants under Delaware, Georgia, New York, and even Indian law.

Restatement (Second) of Torts, Section 766 explains the tort of intentional interference with contract as follows:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Delaware and New York courts have adopted this definition (and the Restatement's corresponding analysis), and Georgia's Supreme Court has relied on it as well. *WP*

Devon Assocs., L.P. v. Hartstrings, LLC, 2012 WL 3060513, at *3-4 (Del. Super. Ct. Jul. 26, 2012); *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*, 50 N.Y.2d 183, 189 (N.Y. Ct. App. 1980), *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 503 S.E.2d 278, 282 (Ga. 1998).

Hence, Delaware and New York law do not conflict and both have distilled the elements that are necessary to plead a tortious interference claim as follows: "(1) a contract, (2) about which [the] defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury." *WP Devon Assocs.*, 2012 WL 3060513, at *4 & n.40 (denying motion to dismiss a tortious interference claim against a secured creditor for causing a sale of substantially all of debtor's assets to pay itself and making the debtor unable to pay its lessor).

Similarly, under Georgia law:

> In order to prevail on a claim alleging tortious interference with contract, a plaintiff must establish the existence of a valid contract and that the defendant acted intentionally, without privilege or legal justification, to induce another not to enter into or continue a business relationship with the plaintiff, thereby causing the plaintiff financial injury.

Atlanta Mkt. Cent. Mgmt., 503 S.E.2d at 282. The Lender Defendants advance a slight variation on Georgia's pleading standard by relying on a lower appellate court's (summary judgment) decision in *Smith v. Morris, Manning & Martin, LLP*, 666 S.E.2d 683 (Ga. Ct. App. 2008). In *Smith*, the court added the need for the

defendant's "improper action or wrongful conduct" to state a claim. *Id*. at 694. The Lender Defendants overplay the semantic impact of the addition of these words and, in any event, Yatra's factual allegations satisfy that element.

Moreover, Indian Law too recognizes the tort of wrongful interference with contract and does not shield the Lender Defendants from liability for improperly meddling in a Delaware merger. Shopping for a choice of law here is futile. And a convoluted, destination-driven "analysis" of the most significant relationship test does not result in a dismissal as a matter of law. Because, as discussed more fully below, Indian courts have long observed that "interference with the performance of a contract is an actionable wrong unless there be justification for interfering with the legal right." AZB Op. ¶3.

As such, the substantive laws do not conflict nor produce a different result, making the choice of law inquiry unwarranted. Yatra's Amended Complaint adequately alleges the requisite elements of tortious interference under Delaware law, and this Court should deny the Lender Defendants' motion to dismiss.

A. Delaware Has The Most Significant Relationship To Yatra's Tortious Interference Claims Against The Lender Defendants

Although Yatra contends it is unwarranted, should this Court find it necessary to address the choice of law analysis, Delaware has the most significant relationship to the Merger Agreement and to Yatra's claim for tortious interference against the Lender Defendants.

When the application of substantive law is in dispute (and here it is not), Delaware courts have adopted the analytical roadmap of the Restatement (Second) of Conflicts, Section 6 for its guiding principles. Because the Lender Defendants perceive Indian law as the most favorable and presumptively fatal to Yatra's tortious interference claim (which it is not), they urge the Court to adopt it to excuse their misdeeds as a matter of law. Alternatively, the Lender Defendants select Georgia's substantive law as the court's second-best alternative, as its lower court's precedent arguably heightens the pleading requirements for tortious interference beyond the reach of the allegation of the Amended Complaint. These arguments fail. Nonetheless, and significant to this analysis is that Yatra and Ebix contracted for Delaware law as their substantive law and forum for disputes arising out of the Merger Agreement. Equally critical, on a clear day, the Lender Defendants chose New York law and forum for the Credit Agreement and perfected their security interests against Ebix by filing their UCC-1 in Delaware, the state with the most interest in this Merger.

Section 145 of the Restatement (Second) of Conflict of Laws provides that "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, ***with respect to that issue***, has the most significant relationship to the occurrence and the parties under the principles stated in §6."

Section 6 of the Restatement (Second) of Conflict of Laws, in turn, sets forth the following factors to be considered by a court in determining the applicable law:

> (1) the need of the interstate and international systems, (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied.

Adding another layer of analysis, Section 145 of the Restatement (Second) of Conflict of Laws then lists relevant contacts a court may also consider: (i) the place where the injury occurred; (ii) the place where the conduct causing the injury occurred; (iii) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (iv) the place where the relationship, if any, between the parties is centered.

i. Delaware Is Yatra's Place Of Injury

The crux of this dispute is the failed Merger between Yatra and Ebix. The Merger Agreement is governed by Delaware law, and the most significant relationship analysis of this tortious interference claim necessarily touches substantive Delaware law on questions of the Merger Agreement's validity. The Lender Defendants argue that Ebix's repudiation severed the causation link, forum selection clause, and the Merger parties' expectations thereunder, particularly that of Yatra—all considerations governed by Delaware law. But for the Defendants'

wrongful conduct, Yatra would have become a subsidiary of a Delaware corporation. It is, therefore, no coincidence than that the Lender Defendants perfected their security interest in Ebix's assets by filing UCC-1 in the State of Delaware.

Unlike personal injury tort cases or foreclosure actions, wherein the "general notion that the effect of a loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business," in this failed Merger case the place of injury for Yatra was not in India, the location of its headquarters, but rather in Delaware, wherein it contracted to survive the Merger as a subsidiary of Ebix, a Delaware entity. *See Eureka Res., LLC v. Resources-Appalachia, LLC*, 62 A.3d 1233, 1241-42 (Del. Super. Ct. 2012) (Slights, J.) (denying the motion to dismiss a tortious interference claim because the issue of privilege "is highly fact-intensive" and applying "the liberal notice pleading standards" warrants deference to plaintiff when determining whether plaintiff has plead a viable claim). Consequently, to Yatra, Delaware was the place of injury due to the Lender Defendants' tortious conduct.

ii. The Lender Defendants Caused The Injury In Delaware

While the Lender Defendants deem the place of injury-causing conduct as a "neutral factor," the filing of the UCC-1 to perfect the Lender Defendants' security interest in Ebix's assets took place in Delaware. As such, Yatra submits that the

very act of perfecting security interests under the Credit Agreement in Delaware demonstrates that Delaware prevails on this prong of the relationship analysis.

iii. The Parties' Domicile, Residence, Nationality, Place Of Incorporation, And Place Of Business Is A Neutral Factor

As they concede, the Lender Defendants' principal places of business span several states, while Ebix is headquartered in Georgia and Yatra is incorporated in Cayman Islands and has its headquarters in India. This factor does not assist the choice of law analysis and is neutral.

iv. The Parties' Relationship Centers In Delaware

For the purposes of their substantive request to dismiss the tortious interference claim under Georgia law (discussed in more detail below), the Lender Defendants advocate that they are no strangers to the Merger Agreement by virtue of their economic interest in Ebix. And as such, they assert they are privileged to interfere in the Merger Agreement without any accountability for the injuries such meddling causes to Yatra. Lender Defs. Br. at 27-28.[30] Yet, for the conflict of laws analysis, the Lender Defendants sing a different tune, telling this Court that "[t]here is ***no relationship*** between Plaintiff and the Lenders." Lender Defs. Br. at 15. Rather, the Lender Defendants go on, "Plaintiff and the Lenders have ***separate***

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[30] Opening Brief of Regions Bank, BMO Harris Bank, N.A., BBVA USA, Keybank National Association, Silicon Valley Bank, Cadence Bank, N.A. and Trustmark National Bank in Support of Motion to Dismiss Count V of Plaintiff's Verified Amended Complaint for Failure to State a Claim ("Lender Defs. Br.").

relationships with Ebix pursuant to their respective contractual dealings—the Merger Agreement between Plaintiff and Ebix, and the Credit Agreement between the Lenders and Ebix." *Id.* at 15-16. The Lender Defendants cannot have it both ways and, because the Lender Defendants ask this Court to find that they are no strangers to the Merger Agreement, this Court may apply the Merger Agreement's forum selection and the choice of law provisions to the Lender Defendants.

Delaware is the epicenter of this Merger Agreement and the pivotal transaction that gave rise to Yatra's claims against the Lender Defendants. Yatra's headquarters in India hardy bears on the issue of where its relationship to Ebix and the Lender Defendants centers. Neither can Ebix's headquarters in Georgia challenge the importance of Delaware to this Merger. Consequently, Delaware is where the parties' relationship is centered, and this factor weighs squarely in Delaware's favor.

v. Policy Considerations Heavily Support Application Of Delaware Law

When considering relevant policies, Delaware has "an interest in deterring tortious interference with contract and punishing those who may interfere." *In re Bracket Holding Corp. Litig.,* 2017 WL 3283169, at *19 (Del. Super. Ct. July 31, 2017). The fulcrum of this dispute is the failed Delaware Merger between Ebix and Yatra. Deterring such tortious interference by the Lender Defendants is squarely within this Court's purview and amply satisfies the second, third, fourth, and the

sixth policy considerations of Section 6 of the Restatement (Second) of Conflict of Laws.

Moreover, Yatra's justified expectation to become a subsidiary of a Delaware corporation further bolsters this factor. Applying Delaware law to matters bearing on mergers of Delaware corporations also creates certainty, predictability, and uniformity of result, as well as eases the determination and application of the law under the seventh policy consideration.

The Lender Defendants seem to contend that they never expected to be held accountable under Delaware law because it would be "unfair" to hold them liable under the local law of one state when they had justifiably molded their conduct to conform to the requirements of another state. Lender Defs. Br. at 17 n.10 (*citing* Restatement (Second) of Conflicts of Laws § 6 cmt. G). The Credit Agreement is governed by New York law and there being no conflict between Delaware and New York laws on tortious interference, this contention is unhelpful. Moreover, the Lender Defendants readily and willingly perfected their security interest under the Credit Agreement by filing UCC statements in Delaware. As such, any argument that application of Delaware law to their tortious interference claim is "unexpected" is equally without merit.

Finally, the Lender Defendants rely on a toxic pesticide case that caused damages to a banana plantation in Ecuador for support of the proposition that

application of Indian law here bears on the needs of the interstate and international systems. *See Marquinez v. Dole Food Co*., 2020 U.S. Dist. LEXIS 171294, at *17 (D. Del. Sept. 18, 2020). Not only is the case inapplicable, but it is also hard to discern what interest India would have in applying its laws to United States chartered banks tortiously interfering with Delaware's corporate merger activity. This policy likewise squarely favors Delaware law under both first and third factors.

B. Yatra Adequately Pleads Tortious Interference Under Delaware Law

Delaware courts have distilled the elements to sustain a tortious interference claim as follows: "(1) a contract, (2) about which [the] defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury." *WP Devon Assocs.*, 2012 WL 3060513, at *4 n.40.

Satisfying the first two elements, Yatra's Amended Complaint alleges that Ebix and Yatra were parties to the Merger Agreement, about which the Lender Defendants were well aware. ¶¶150-56. So aware, in fact, that the Lender Defendants amended the Credit Agreement on September 27, 2019 to exempt part of Yatra's non-stock merger consideration, the Put Right, via the Ninth Amendment from the definition of "Indebtedness" following the execution of the Merger Agreement. *Id*.

As Ebix slow-played its Merger obligations and otherwise flaunted Merger Agreement deadlines beginning in the summer of 2019, its capital and liquidity outlook began to dim, conceivably stirring the Lender Defendants' concerns over the state of Ebix's business. As 2020 unfolded (and likely much earlier in the lifespan of this Merger), Ebix's stock further declined and buyer's remorse set in with the value of the Put Right, a fixed obligation, ballooning in comparison to Ebix's market capitalization. It is reasonable to infer that the Lender Defendants were becoming increasingly concerned with the Put Right, because if the Merger closed, the Put Right stood to deplete Ebix's cash position [redacted] [redacted] ¶155.

As described above, even after Raina told Yatra that the Merger was not going to contain the Put Right, the parties continued to negotiate. And, as Yatra engaged in good faith negotiations to attempt to avoid litigation, unbeknownst to Yatra, Ebix engaged in fraud and sham negotiations causing Yatra to fundamentally change its legal position.[31] Nonetheless, the Merger Agreement continued in full force and

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[31] Lender Defendants leverage much of their causation analysis on Yatra's willingness to re-negotiate the Merger during spring of 2020 following Raina's statement regarding the Put Right. The evidentiary significance of that statement is overplayed and contrary to Delaware law because Ebix's "continued negotiations support the conclusions that its words and conduct did not constitute an unequivocal refusal to perform." *Horizon Pers. Commc'ns., Inc. v. Sprint Corp.*, 2006 WL 2337592, at *25 & n.210 (Del. Ch. Aug. 4, 2006) (finding that party's entry into a Forbearance Agreement evidenced absence of an intent to breach the merger before

effect, irrespective of Raina's statement concerning the Put Right. And the Lender Defendants knew that—there was no announcement of the termination of the Merger Agreement until June 2020, and all remedies remained available to Yatra.

Thus, by mid-April 2020, it is reasonable to infer that the Lender Defendants were already negotiating the Tenth Amendment with Ebix to orchestrate an event of default under Credit Agreement had the Merger closed on its terms. This was entirely concealed from Yatra. The Lender Defendants did not wait and see how Ebix and Yatra were going to "renegotiate." Instead, they sabotaged the Merger all together by contractually prohibiting Ebix from issuing crucial Merger consideration. In turn, the Lender Defendants caused Ebix to breach the Merger Agreement on May 7, 2020, when it signed the Tenth Amendment, resulting in injury to Yatra due to the denial of the issuance of the Put Right.

i. The Lender Defendants' Tortious Interference Was Improper And Without Justification

To determine whether a party's acts were improper, or without justification, Delaware looks to the Restatement (Second) of Torts for the following factors:

> (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the others 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 interest of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

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its close.)

eCommerce Indus. v. MWA Intelligence, Inc., 2013 WL 5621678, at *37 (Del. Ch. Sept. 30, 2013). Here, there was no justification for the Lender Defendants' negotiation and execution of the Tenth Amendment with Ebix while (i) the Merger Agreement remained in full force and effect; (ii) the Lender Defendants knew that the Merger Agreement remained in effect; and (iii) Yatra was continuing in good faith to negotiate revised Merger terms while also unaware of the financial machinations of the Lender Defendants.[32]

In arguing that Georgia law exculpates the Lender Defendants, they contend that they were justified and privileged in their interference with the Merger Agreement because of their status as secured creditors having "an absolute right" to amend the Credit Agreement whenever they deemed so appropriate "in the ordinary course of business." Lender Defs. Br. at 27-28. This assertion strains credulity and, as discussed more fully below, misstates Georgia law. And, under Delaware law, secured creditor status does not *de facto* invalidate a tortious interference claim. For instance, in *WP Devon Associates*, a shopping center operator brought an action against its defaulting tenant and its secured creditor, who so depleted the borrower's assets as to make it impossible for the tenant to pay its rent. In denying the motion

[32] Also noteworthy is that Steven M. Hamil, Ebix's CFO as of April 13, 2020, had previously been the lead banker at Regions Bank who worked with Ebix and signed the Credit Agreement and two amendments thereto. ¶¶118-19.

to dismiss, the Superior Court found that it was reasonably conceivable that the secured creditor caused the debtor to sell substantially all of its operating assets because the secured creditor desired to get paid on its debt at the expense of borrower's other creditors, and such preferential over-reach was improper. *WP Devon Assocs.*, 2012 WL 3060513, at *4.

At bottom, the Lender Defendants were aware of the Merger consideration and necessarily discussed with Ebix the Put Right as part of the negotiation and execution of the Tenth Amendment. As Ebix's secured creditors, the Lender Defendants have a motive to restrict cash going "out the door," such as through the issuance of the $257 million Put Right. In other words, the Lender Defendants knew that the Tenth Amendment's prohibition of the Put Right was to their benefit and to Yatra's detriment, and they still tortiously amended the Credit Agreement while the Merger Agreement remained in full force and effect. Such self-serving interference is improper and is without justification.

ii. The Lender Defendants' Conduct Proximately Caused Yatra's Injury

The Lender Defendants' interference with the Merger Agreement culminated in the execution of the Tenth Amendment causing direct injury to Yatra vis-à-vis Merger consideration. But the Tenth Amendment was not signed in a vacuum or put together in a day, and it is reasonable to infer that much of Ebix's conduct respecting Yatra, from March to May 2020, was motivated by the Lender

Defendants' concerns and requirement that Ebix not issue the Put Right in exchange for relaxing financial covenants under the Credit Agreement. Like in *WP Devon Associates*, when secured creditor interferes with the financial abilities and the liquidity of its borrower, the resulting injury to borrower's counterparties is necessarily caused by such interference. 2012 WL 3060513, at *4. In other words, the Lender Defendants were pulling the strings on Ebix's ability to consummate the Merger with Yatra. But for the execution of the Tenth Amendment, Yatra's Put Right, [redacted] Instead, the Lender Defendants changed the definition and impermissibly foreclosed on Yatra's rights. Irrespective of Ebix's other motivations, the Lender Defendants' conduct here caused Yatra's injury.

C. Indian Law Recognizes The Tort Of Wrongful Interference With Contract

A group of US-chartered banks and secured creditors of a Delaware corporation urge this Court to apply Indian law to absolve them of all liability for the claim of tortious interference with a Delaware merger agreement where their borrower was merging with a Cayman Islands company. Why do the Lender Defendants advocate that Indian law has the most significant relationship to the dispute before this Court? Because their research found a handful of dated United States District courts decisions, adjudicating factually distinct cases and relying on affidavits of Indian counsel (notably absent from the Lender Defendants' opening

brief) and bearing no relation to the present matter, have stated that in those decisions "Indian law does not recognize such a claim." Lender Defs. Br. at 22 (*citing MM Glob. Servs. v. Dow Chem. Co.*, 283 F. Supp.2d 689 (D. Conn. 2003)). This "showing" falls short of the requisite establishment under Court of Chancery Rule 44.1 of substantive foreign law. As the Supreme Court recently instructed in *Germaninvestments AG v. Allomet Corp.*, 225 A.3d 316 (Del. 2020), at a minimum, Delaware law requires "the movant's initial submission [to] be fulsome enough to address the foreign law ***in the context of the specific circumstances at issue***, and that the parties . . . should carefully evaluate the need for expert input." *Id.* at 337. Lender Defendants ignored this guidance and failed to address the specific facts at hand, nor did they offer this Court any affidavits, not even the affidavits upon which the cited decisions relied.

In compliance with Court of Chancery Rule 44.1, Yatra submits herewith the expert affidavit of AZB & Partners, an Indian law firm comprised of experienced advocates and solicitors. As made clear in the affidavit and discussed below, Indian courts "rely on judgments of common law countries especially the United Kingdom" and have "recognized the economic tort of unlawful interference with contract." AZB Op. ¶2.[33]

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[33] *See also* AZB Op. ¶5 (discussing several cases that have recognized and applied the "principle of tortious interference").

Because Indian courts have long recognized the tort of inducing a breach of contract and have granted injunctive and monetary relief for tortious unjustified interference with third party's contract there appears to be no choice of law conflict between Delaware and Indian laws requiring the most significant relationship analysis.

Specifically, "[t]he Calcutta High Court ("**Cal HC**") in *Lindsay International Pvt. Ltd. v. Laxmi Niwas Mittal* ("**Lindsay**"),[34] observed that, 'interference with the performance of a contract is an actionable wrong unless there be justification for interfering with the legal right.'" AZB Op. ¶3. The division bench of the Delhi High Court in *INOX Leisure Limited v. PVR Limited*[35] referred to previously decided cases[36] by various High Courts and observed that "the said concept (of tortious interference) is well-known in law to constitute a cause of action to file a suit for damages/injunction." AZB Op. at ¶3. The elements of the tort of interference under Indian law require: "(i) use by the defendant of unlawful means, thereby (ii)

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[34] (2018) 1 CALLT 254 (HC).

[35] Delhi High Court, RFA OS 26/2020, decided on June 24, 2020.

[36] *See Tata Sons Ltd. v. Mastech Corp.* (1996(2) CTC 752); *Balailal Mukherjee & Co. (P) Ltd. v. Sea Traders Private Ltd.,* (1991) 1 CALLT 287 (HC)); *Oravel Stays Pvt. Ltd. v. Hoteliers Welfare Ass'n*, Delhi High Court, (CS (OS) No. 322/2019, order dated 19 July 2019); *Ambience Space Sellers Ltd. v. Asia Indus. Techs. Pvt. Ltd.* (1998 (18) PTC (Bom)); *Aasia Indus. Techs. Ltd. v. Ambience Space Sellers Ltd.,* (1998 (18) PTC 316 (Bom)); *Lindsay Int'l Pvt. Ltd. v. Laxmi Niwas Mittal* (2018) 1 CALLT 254 (HC)).

interfering with the actions of a third party in relation to the claimant; (iii) intention to cause loss to the claimant; and (iv) damages. Another element added by the courts is that the act of the intervener must be done without lawful justification." AZB Op. ¶4.

Moreover, not only are the Lender Defendants simply wrong regarding the state of Indian law, the decisions they cite are so factually distinguishable and inapplicable to Yatra's claim against the Lender Defendants that they cannot even be persuasive to this Court. In *MM Global Services v. Dow Chemical Company*, 283 F. Supp. 2d 689 (D. Conn. 203), the court confronted allegations of antitrust violations, Connecticut Unfair Trade Practices Act, and anti-competitive behavior by affiliated distributors of chemical products in India. Because India deems competitive activity to be privileged by law, claims sounding of tortious interference as among competitors are not cognizable under Indian law today or in 2003.[37] In *Glenwood Systems, LLC v. Med-Pro Ideal Solutions, Inc.*, 2010 WL 11527383 (D. Conn. May 4, 2010), the Connecticut federal district court again confronted anti-competitive behavior by Indian counterparties accused of violations of Connecticut

[37] *See* AZB AffOp. ¶7 (noting that under Section 27 of the Indian Contract Act, 1872, agreements "that restrain[] anyone from exercising a lawful profession, trade or business of any kind" are void, but "the principles enshrined in Section 27 have so far been applied only in the context of employers and ex-employees and has thereafter been extended to include competitors . . . based on the facts and circumstances of these cases").

Unfair Trade Practices Act and tortious interference with business expectancies (and not contracts) that also involved industry competitors as well as issues of Indian employment contracts, namely post-employment non-compete covenants, also not cognizable under Indian law. The Lender Defendants' next citation is to *Soma Technologies v. Dalamagas*, which relies on *MM Global Services* and *Glenwood* and is another unfair competition case dealing with business expectancies among competitors specifically limiting this holding to "claims of tortious interference with contracts, tortious interference with business expectations, and common law unfair competition ***of the sort Soma has advanced here***." 2017 WL 2056904, at *11 (N.C. Super. Ct. May 11, 2017).

The Lender Defendants offer no support as to why anti-competitive restriction in Indian law would have any bearing on secured creditors' liability for tortiously interfering in a Delaware merger agreement and offer no affidavit as required by Court of Chancery Rule 44.1 to sustain their burden on establishing foreign law. Contrary to Lender Defendants' conclusory assertion that "Plaintiff's tortious interference claim fails as a matter of law because Indian law does not recognize a claim for tortious interference with contract," Lender Def. Br. at 22, Indian courts:

> [H]ave recognized three ways in which interference with the subsisting contract may arise, *i.e.*, (i) procuring a breach or preventing the performance of the contract, either by intervener himself or with the help of agents; (ii) intervener does acts on the person/property of claimant disabling him from performing his contractual obligations with another person; and (iii) when the intervener persuades a third

> party to do acts which interferes with claimant's performance of his contractual obligations with another person.

AZB Op. ¶6.

The foregoing elements and the Indian case law applying tortious interference claims closely track the Delaware's articulation of the pleading requirements adopted from the Restatement (Second) of Torts, Section 766. It follows that the same analysis negates Lender Defendants' assertion that Indian law wholesale exculpates their conduct. Lender Defendants negotiated with Ebix and amended the terms of their Credit Agreement while the Merger Agreement remained in full force and effect, thereby interfering with Yatra's consideration thereunder, intentionally causing Yatra damages.

D. Yatra Adequately Pleads Tortious Interference Under Georgia Law

Alternatively, the Lender Defendants urge this Court to absolve the Lender Defendants' predatory conduct in interfering with the Merger Agreement by arguing that, as a matter of Georgia law, (i) the Lender Defendants' conduct was proper, (ii) the Lender Defendants acted with "privilege," and (iii) there was no causal connection or proximate causation between the execution of the Tenth Amendment

and Ebix's breach of the Merger Agreement or Yatra's damages thereunder. These arguments (and the cases cited in support) fail.

As set forth above, under Georgia law, "[i]n order to prevail on a claim alleging tortious interference with contract, a plaintiff must establish the existence of a valid contract and that the defendants acted intentionally, without privilege or legal justification, to induce another not to enter into or continue a business relationship with the plaintiff, thereby causing the plaintiff financial injury." *Atlanta Mkt. Ctr. Mgmt.*, 503 S.E.2d at 282.

While not material to the outcome, it is noteworthy that the Lender Defendants rely entirely on caselaw from Georgia's Court of Appeals (mostly post-discovery and post-trial appeals) that recite the evidentiary threshold for tortious interference elements and add the language of "improper action" or "wrongful conduct" to the first element of the claim as set forth by the Georgia Supreme Court. *Compare id.* (relying on Restatement (Second) tort definition that does not require "malice" or "improper actions wrongful in themselves"), *with Fortson v. Brown*, 690 S.E.2d 239 (Ga. Ct. App. 2010). Tracing the Lender Defendants' citations to the source of "improper act" and "malicious intent" leads to *Arford v. Blalock*, 405 S.E.2d 698 (Ga. Ct. App. 1991), wherein in a post-trial appeal decision the court examined the sufficiency of the ***evidence*** that must support a verdict (as opposed to a pleading requirement on a 12(b)(6) motion) for tortious interference with business relations.

In discussing these evidentiary thresholds as it pertains to "improper conduct" and "privilege to interfere," the court explained that while privilege may run from the tortfeasor to the one it induces into action or forbearance, the improper act goes to the victim. Consequently, the analysis looks at the Lender Defendants' conduct ***as to Yatra***, not Ebix.[38]

i. The Lender Defendants' Conduct Was Improper Vis-à-vis Yatra

As explained above, it was improper and wrongful for the Lender Defendants to amend the Credit Agreement at the expense of Yatra. The Tenth Amendment foreclosed Yatra's ability to receive the Put Right, and it also foreclosed any possibility for Yatra to seek specific performance of the Merger had the "re-negotiations" fallen through since it would have caused an immediate breach under the Credit Agreement.

Relying on *Fortson v. Brown*, 690 S.E.2d 239 (Ga. Ct. App. 2010) and *Nobel Lodging, Inc. v. Holiday Hospitality Franchising*, 548 S.E.2d 481 (Ga. Ct. App. 2001), the Lender Defendants confuse the element of improper conduct vis-à-vis Yatra with what they deem to be an "absolute privilege" of the Lender Defendants to exercise a contractual right vis-à-vis Ebix under the Credit Agreement. Neither case supports the Lender Defendants' position. In *Fortson*, the plaintiff entered into

[38] As to Ebix, and also improper, the Lender Defendants' interference caused Ebix to breach the Merger Agreement in effect as of May 7, 2020 when Ebix signed the Tenth Amendment.

a real estate transaction with Gonzalez (a party not named in a suit) to purchase 26 properties. In connection with the proposed deal, Gonzalez met with defendant Brown, his loan officer at Regions Bank, who advised Gonzalez to "discuss the matter with an attorney" because "the transaction documents were confusing." Plaintiff Fortson claimed that this advice was tortious as it caused the real estate deal to fall through. In affirming dismissal, the court held that the advice to delay a transaction to seek legal advice "simply [did] not rise to the level of improper conduct required to make a showing of tortious interference." *Id.* at 242. Equally unhelpful is *Nobel Lodging*, a debt action involving the defendants' failure to pay on a guarantee. The court confronted a counterclaim for tortious interference where the franchisor refused to consent to the transfer of the franchise to a third party acting well within his "contractual privilege" to simply refuse transfer under the terms of that agreement. 548 S.E.2d at 484.

The Lender Defendants also rely on *Dalton Diversified, Inc. v. AmSouth Bank*, 605 S.E.2d 892 (Ga. Ct. App. 2004) for the out-of-context quote that "[t]he actions by a secured creditor exercising its contractual rights does not constitute the wrongful improper conduct necessary for [a tortious interference claim.]" *Id.* at 898; Lender Defs.' Br. at 26. In *Dalton*, defendant AmSouth Bank held a valid security interest under a credit agreement that vested title and right of possession in certain invoices in the Bank until certain debt was paid in full. Because the debt was never

paid, the court found that AmSouth Bank had an absolute right and was privileged to exercise its secured creditor rights under the credit agreement (and did not consider whether AmSouth Bank could amend the credit agreement to better its posture). This is not what happened to Yatra here.

The amendment of the definition of "Indebtedness" in the Tenth Amendment fundamentally altered and neutered the economic reality of the Merger for Yatra under the Merger Agreement while it remained in full force and effect. This act of expressly prohibiting Ebix's contractual performance economically harmed Yatra. It is not even close to foreclosing on assets pursuant to a perfected security interest granted under a credit agreement. The negotiation and the execution of the Tenth Amendment is precisely the predatory action that is deemed improper under Georgia law.

Moreover, the Lender Defendants acted intentionally and with malice. In explaining what "malice" means in the context of tortious interference, the *Arford* court stated that "the term malicious, used in this connection is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of plaintiff's rights, and with the intent to interfere therewith." 405 S.E.2d at 704. The court went on that, "[p]ersuading a person to break a contract for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff is

a malicious and actionable act if injury arises from it." *Id*. at 704-05. That is precisely what the Lender Defendants did here.

ii. The Lender Defendants Are Not Privileged To Meddle In Delaware's Merger

The Lender Defendants next contend that as secured creditors of Ebix, they have "a financial interest in Ebix" and by extension "a legitimate economic interest" in the Merger. Lender Defs. Br. at 27. Consequently, the Lender Defendants assert that their improper actions cannot be deemed to have been a tortious interference under Georgia law because they acted "with privilege." *Id*. The Lender Defendants rely on a handful of soundbites from Georgia caselaw to bolster this argument. Namely, they cite to *Dalton* for the quote that "[i]f the defendant has a legitimate economic interest in either the contract or a party to the contract, then the defendant is not a stranger to the contract and acts with privilege." 605 S.E.2d at 898. As explained above, *Dalton*'s utility to the Lender Defendants' argument is nil since the case is so factually distinct. The Lender Defendants spend no ink explaining their "legitimate economic interest" in the Merger that would have justified amending the definition of the "Indebtedness" from the Ninth Amendment to the Tenth Amendment and causing Ebix to breach the Merger Agreement. As consolation, they merely offer up that:

> [T]he Lenders frequently amend the Credit Agreement in the ordinary course of business, and such amendments are expressly contemplated and permitted by the Credit Agreement. As a result, the Lenders'

> execution of the Tenth Amendment was privileged and the Lenders cannot be liable for interfering with the Merger Agreement as a matter of law.

Lender Defs. Br. at 28. But the Lender Defendants cite no cases wherein a secured lender ***amended*** the terms of the credit agreement to cause a breach of another of its borrower's contract, rather than exercise existing contractual remedies.

The Lender Defendants next recycle the same argument that due to their secured creditor status of Ebix, they were not "strangers" to the Merger Agreement and thereby were privileged to interfere by amending the terms of the Credit Agreement while the Merger Agreement was in full force and effect to deprive Yatra of the Merger consideration. In support of this daring attempt at legal absolution, the Lender Defendants cite to *Mabra v. SF, Inc*. 728 S.E.2d 737, 740 (Ga. Ct. App. 2012) for the proposition that having a financial interest in the contract gives defendants privilege as a matter of law. In *Mabra*, the plaintiffs distributed fresh produce to defendant Host International, Inc. for Atlanta airport concessionaires. After Host notified plaintiffs that it decided to stop ordering produce from them, it changed the distributor to SF, Inc. The plaintiffs sued both Host and SF, Inc. for tortious interference and conspiracy. On a motion to dismiss, the court found that Host was privileged to change its food distributors and therefore neither Host nor the new produce provider could have been liable for tortious interference as a matter of law. While Host was not a named party to the distribution contract at issue, it was not a

stranger to this *interwoven contractual arrangement* and was the party *actually ordering* and receiving fresh produce from the plaintiffs. As such, Host was free (or privileged) to take its business elsewhere. This case offers no support to the Lender Defendants' argument, and rather highlights its weakness. Yatra had no idea that Lender Defendants were meddling with the Merger terms.

Unlike Host, the Lender Defendants had no control over the Merger Agreement within the parameters of the Credit Agreement (absent tortious conduct that occurred here). Whatever protections secured creditors negotiate with Ebix, their economic interests and such protections were spelled out by the Credit Agreement, and to suggest that creditors have a free flowing "privilege" to interfere with their borrowers' contracts by amending the terms to trigger breaches of existing contracts (because everyone is free to amend) would wreak havoc on the certainty and predictability of contract so prized in Delaware jurisprudence. Indeed, the Lender Defendants here knew that by entering into the Tenth Amendment, they were causing Ebix to breach the Merger Agreement—notwithstanding Ebix' representation to the contrary. Lender Defs. Br. at 26. This is not the kind of "***legitimate*** economic interests of the defendant or a legitimate relationship of the defendant to the contract, so that it is not considered a stranger, interloper, or meddler." *Disaster Servs., Inc. v. ERC P'ship*, 492 S.E.2d 526, 529 (Ga. Ct. App. 1997).

The Lender Defendants further misconstrue the "stranger" doctrine as encompassing all manner of debtor and creditor relationship giving rise to a non-sensical exculpatory regime wherein secured creditors may freely interfere with their borrowers' contracts by triggering defaults. They offer no support for such a broad reading. Rather, in *Lyman v. Cellchem International, LLC*, the court explained that "all parties to a comprehensive interwoven set of contracts are not liable for tortious interference with any of the contracts or business relationships" so intertwined. 779 S.E.2d 474, at 478 (Ga. Ct. App. 2015). These are not the factual circumstances here and there is no basis to find that the Merger Agreement and the Credit Agreement are so intertwined as to excuse the Lender Defendants' intentional interference in amending its terms to eviscerate the Merger consideration. Indeed, Yatra was never privy to the Credit Agreement and had no idea the Tenth Amendment was even executed until it discovered it in a public filing months ***after*** Yatra already instituted this action.

iii. If The Lender Defendants Were Not Strangers To The Merger Agreement, Then They Are Bound By the Forum Selection Clause of the Merger Agreement And Delaware Law Controls

Should this Court accept the Lender Defendants' "no stranger" to the Merger Agreement defense, Delaware law mandates that they be bound by the Merger Agreement's forum selection provision and subject to Delaware law. Delaware courts employ a three-prong test to determine whether a non-signatory may be bound

by a forum selection clause: (i) is the forum selection clause valid?; (ii) is the non-signatory ***closely related*** to the contract?; and (iii) does the claim arise from his standing relating to the agreement? *Bracket Holding,* 2017 WL 3283169, at *15. Having professed their privilege to interfere with the Merger Agreement, the Lender Defendants amply satisfy the second and third prongs of the forum selection test. Even as non-signatories, their purported "financial interest" in Ebix fulfills the "closely related" requirement. And the tortious interference claim arose directly from the Lender Defendants' standing to induce Ebix's breach of the Merger Agreement.

Thus, application of Georgia law to the tortious interference claim actually demonstrates why Delaware law ultimately applies and Yatra has satisfied the pleading requirements for tortious interference.

iv. The Lender Defendants' Tortious Conduct Caused Ebix To Breach The Merger Agreement And Caused Yatra's Injury

The Lender Defendants' causation defense (both proximate as to Ebix's breach and to Yatra's damages for the interference thereunder) hinges on Ebix's purported repudiation of the Merger Agreement prior to the execution of the Tenth Amendment. In support, the Lender Defendants rely on Raina's statement in April that Ebix was not going to issue the Put Right, ignoring that Ebix continued to renegotiate the Merger terms with Yatra well into May, tellingly without ever disclosing the Tenth Amendment or its implications to the Merger. The Lender

Defendants also rely on the fact that the SEC never declared the S-4 effective, which was a prerequisite to the issuance of the Put Right. Lender Defs. Br. at 31. Neither fact negates causation as a matter of law or exculpates the Lender Defendants' tortious interference.

First, irrespective of Raina's statement regarding the Put Right, or the Lender Defendants' knowledge or complicity therein, at the time of the execution of the Tenth Amendment, the Merger Agreement remained in full force and effect and Yatra possessed the contractual Put Right. Execution of the Tenth Amendment impeded Yatra's right and made it a breach by Ebix to close the Merger Agreement. That in and of itself amply demonstrates causation between the Lender Defendants' tortious conduct and Ebix's breach.

Second, the Lender Defendants' repudiation argument is further without merit because Raina's statement did not amount to anticipatory breach. The Merger Agreement is governed by Delaware law. Ebix's continued negotiations with Yatra after Raina's statement show that, irrespective of Raina's words, Ebix's conduct "did not constitute an unequivocal refusal to perform" the Merger Agreement and therefore, there was no anticipatory breach or repudiation, as parties continued to renegotiate the merger terms. *See Horizon Pers. Commc'ns.*, 2006 WL 2337592, at *25 & n.210.

Third, the execution of the Tenth Amendment also precluded Yatra's ability to seek specific performance under the Merger Agreement since it would have triggered a default under the Credit Agreement. Such a default would have enabled the Lender Defendants to call the debt and absent repayment (for which Ebix lacked the cash) immediately foreclose on Ebix's assets, thereby effectively rendering Yatra's Merger consideration (Ebix's stock with a Put Right exercisable in 25 months) valueless. It can be reasonably inferred that this is precisely the reason the Lender Defendants and Ebix entered into the Tenth Amendment in the first place. Tellingly, Ebix only sent Yatra its revised term sheet on May 3, 2020, a day before the then-applicable Outside Date, to buy time until the amendment was executed four days later.

Lastly, it is clear that the SEC could have declared the S-4 effective had the Defendants not engaged in the slew of misconduct alleged in the Amended Complaint. Indeed, Ebix "miraculously" achieved the prerequisite for such a declaration—t[redacted]—mere weeks after Yatra filed of the Original Complaint.

v. The Amended Complaint Pleads That The Lender Defendants' Conduct Caused Yatra's Injury

As discussed above, Yatra pled the requisite causal connection between the Lender Defendants' tortious interference and its injury. Without much factual support or citation to the Amended Complaint, the Lender Defendants state that

"Plaintiff's allegations demonstrate that Ebix would not and could not issue the Put Right even in the absence of the Tenth Amendment." Lender Defs. Br. at 33. That is not accurate—the SEC could have approved the S-4, and Yatra could have sought to specifically enforce the Merger Agreement absent the Tenth Amendment. At bottom, neither Raina's statements concerning the Put Right, nor Ebix' failure, as of the time of its breach, to receive SEC approval of the S-4 negate the Lender Defendants' interference in the ultimate demise of the Merger between Ebix and Yatra.

CONCLUSION

For the reasons explained above, Plaintiff respectfully requests that the Court deny the Defendants' Motions to Dismiss.

Dated: January 22, 2021

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CERTIFICATE OF SERVICE

I, Gregory V. Varallo, hereby certify that, on January 29, 2021, the foregoing *Public [redacted] version of Plaintiff's Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss* was filed and served via File & Serve*Xpress* upon the following counsel of record:

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