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Case No. 2023-0470-PRW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEVEN F. URVAN, Plaintiff, v. AMMO, INC.; SPEEDLIGHT GROUP I, LLC; FRED W. WAGENHALS; CHRISTOPHER D. LARSON; JOHN P. FLYNN; JESSICA M. LOCKETT; RICHARD R. CHILDRESS; HARRY S. MARKLEY; RUSSELL WILLIAM WALLACE, JR.; ROBERT J. GOODMANSON; and ROBERT D. WILEY, Defendants.	)	C.A. No. 2023-0470-PRW PUBLIC VERSION FILED JULY 25, 2023

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

On April 30, 2021, AMMO acquired GunBroker.com from Urvan.[1] AMMO paid almost a quarter billion dollars, comprised of cash, assumed debt, and AMMO stock. Assisted by their experienced and competent advisors, the parties memorialized the transaction's terms in a fully-integrated merger agreement with an anti-reliance provision. *See* Ex. 1 (the "Merger Agreement" or "MA"). The parties agreed that many of the representations in the Merger Agreement would terminate ninety days after the Merger closed. Urvan needed the Merger, and he needed it to close by May 1, 2021. Otherwise, his entities would have defaulted on a $50 million payment obligation.

As a negotiated term of the Merger, Urvan joined the AMMO board of directors (the "Board") and became AMMO's Chief Strategy Officer simultaneous with the closing of the Merger (the "Closing"). After approximately sixteen months as an AMMO director and employee, Urvan initiated a proxy contest in an effort to seize control of the Company. In late August 2022, he nominated a competing director slate to replace the entire Board. In early November 2022, AMMO and Urvan resolved the proxy contest by increasing the Board to nine directors and

[1] Undefined capitalized terms have the meanings used in the April 28, 2023 complaint. Dkt. 1 (the "Complaint"). "GunBroker.com" means GunBroker, as that term is used in the Complaint.

permitting Urvan to nominate two others to the Company's board slate. The Company also agreed to form a committee to search for a successor for AMMO's CEO (the "CEO Succession Planning Committee"). The Board appointed Urvan and another of his director nominees to that committee.

After becoming frustrated with his inability to control Company policy through the Board or a favored CEO successor, Urvan tried a different approach. He filed this lawsuit to rescind the almost two-year-old Merger and regain control of GunBroker.com. Here, Urvan alleges for the first time that the Company's representations in the Merger Agreement were materially false and misleading. The contractual representations on which he relies terminated more than twenty months before he sued, so he has constructed fraud claims under Delaware common law and the Arizona Securities Action (the "ASA") in an effort to avoid this time-bar.

Urvan has waited too long. The parties agreed they were relying only on the representations in the Merger Agreement. They further agreed they would raise any claims for breach of those representations promptly. The Company's Code of Ethics required directors and employees like Urvan to report any fraudulent, illegal, or unethical behavior immediately. Urvan never raised any of his newfound "issues" with the Board, directly with any independent director, or with the Company's counsel. Instead, Urvan waited nearly two years to file this action and allege that the Company and its directors, officers, and agents committed fraud in connection

with the Merger. Urvan now asks the Court to rescind the Merger. Urvan's delay was unreasonable and prejudiced Defendants and the Company's stockholders. Laches bars all of Urvan's claims.

Urvan's fraud and ASA claims also fail on the merits. The anti-reliance provision limits Urvan's claims to representations that appear in the Merger Agreement. For many of the contractual representations he challenges, Urvan has not adequately alleged they were materially false or misleading. Furthermore, he has not adequately alleged he justifiably relied on those contractual representations in signing the Merger Agreement or that a reasonable seller would have done so.

Urvan alleges the Individual Defendants are liable for the Company's purported fraud. That claim fails for multiple reasons. As a threshold matter, the Court lacks personal jurisdiction over the Individual Defendants. Only the Company made the challenged contractual representations. The forum-selection provision in the Merger Agreement does not bind the Individual Defendants, who are not parties to that agreement. The Individual Defendants lack sufficient minimum contacts with Delaware for the Court to exercise personal jurisdiction over them. In any event, Urvan has not adequately pled the Company committed fraud. Moreover, under the intra-corporate conspiracy doctrine, the Individual Defendants could not have aided and abetted any Company fraud. Urvan has also failed to plead substantial assistance in the alleged fraud.

For these and other reasons explained below, the Court should dismiss the Complaint with prejudice against all Defendants.

FACTUAL BACKGROUND[2]

AMMO began operations as an ammunition manufacturer in March 2016. Form 10-K (Aug. 19, 2020) at 11.[3] Until the Merger, AMMO was a designer, producer, and marketer of ammunition and munition component products for recreation, personal protection, law enforcement, and the military. *Id.* at 4. AMMO traded as a "penny stock" until the listing of its common stock on the Nasdaq Capital Market on December 1, 2020. *See* Form 8-K (Dec. 4, 2020).

A. AMMO Discloses the Whistleblower Complaint

On September 24, 2019, AMMO received notice that a former Company director and officer, Hanrahan, had filed a complaint against the Company with the U.S. Department of Labor, which led to an investigation by the Occupational Safety and Health Administration ("OSHA"). Form 10-Q (Nov. 14, 2019) at 12; *see* Compl. ¶ 8. On November 14, 2019, AMMO disclosed the existence of this "Whistleblower Complaint" and the OSHA investigation. *See* Form 10-Q (Nov. 14,

[2] In ruling on Defendants' motion to dismiss, the Court may consider the Complaint, documents integral to the Complaint, and undisputed facts of which the Court may take judicial notice. *See, e.g.*, *In re MeadWestvaco S'holders Litig.*, 168 A.3d 675, 678 (Del. Ch. 2017).

[3] All citations to SEC filings reference AMMO's SEC filings.

2019) at 12. AMMO referenced the Whistleblower Complaint and the OSHA investigation in fifteen more public filings before the Closing. *See* Form 10-Q (Feb. 14, 2020) at 12; Form S-1 (Mar. 4, 2020) at 63, F-10; Form S-1 (Mar. 4, 2020) (Amend. No. 1) at 63, F-10; Form 424B3 (Mar. 23, 2020) at 63, F-10; Form 10-K (Aug. 19, 2020) at F-15; Form 10-Q (Aug. 19, 2020) at 14; Form S-1 (Sept. 15, 2020) at 54, F-15, F-40; Form S-1/A (Nov. 9, 2020) (Amend. No. 1) at 54, F-15, F-40; Form 10-Q (Nov. 13, 2020) at 14; Form S-1/A (Nov. 19, 2020) (Amend. No. 2) at 45, F-15, F-40; Form S-1/A (Nov. 19, 2020) (Amend. No. 3) at 45, F-15, F-40; Form 424B4 (Dec. 2, 2020) at 45, F-15, F-40; Form 10-Q (Feb. 12, 2021) at 14; Form 424B5 (Mar. 11, 2021) at S-6; Form 424B5 (Mar. 14, 2021) at S-6.

The eleven public disclosures on or after August 19, 2020, explained that the Board had formed a special committee in response to the Whistleblower Complaint. These eleven disclosures reported that the special committee, advised by independent legal counsel, found no SEC violations or other wrongdoing. The special committee recommended corporate governance enhancements, which the Company promptly implemented. *See, e.g.*, Form 10-Q (Feb. 12, 2021) at 14.

B. AMMO Discloses Material Weaknesses in Its Financial Reporting

On March 4, 2020, AMMO disclosed that its "[m]anagement realized there were deficiencies in the design or operation of the Company's internal control that adversely affected the Company's internal controls which management considers to

be material weaknesses." Form S-1 (Mar. 4, 2020) at 28. AMMO disclosed the presence of material weaknesses in ten more public filings before the Closing. *See* Form S-1A (Mar. 13, 2020) (Amend. No. 1) at 28; Form 424B3 (Mar. 23, 2020) at 28; Form 10-Q (Aug. 19, 2020) at 29; Form S-1 (Sept. 15, 2020) at 27; Form S-1A (Nov. 9, 2020) (Amend. No. 1) at 27; Form 10-Q (Nov. 13, 2020) at 31; Form S-1A (Nov. 19, 2020) (Amend. No. 2) at 18–19; Form S-1A (Nov. 19, 2020) (Amend. No. 3) at 18–19; Form 424B4 (Dec. 2, 2020) at 18–19; Form 10-Q (Feb. 12, 2021) at 33.

Despite the material weaknesses, the Company disclosed its belief "that the financial information presented [in each relevant filing] is materially correct and fairly presents the financial position and operating results of the [the relevant period], in accordance with U.S. GAAP." Form 10-Q (Aug. 19, 2020) at 29; Form 10-Q (Nov. 13, 2020) at 31; Form 10-Q (Feb. 12, 2021) at 33.

C. AMMO Pursues the Acquisition of GunBroker.com

GunBroker.com is the largest online marketplace dedicated to the lawful sale of firearms and hunting, shooting, and related products. Compl. ¶ 27. Before the Merger, GunBroker.com claimed to have more than six million registered users and annual revenues of $60 million. *Id*.

In January 2021, AMMO expressed interest in acquiring GunBroker.com. *See id.* ¶ 28. Between January 28 and April 30, 2021, AMMO's and GunBroker.com's

legal, financial, and other professional advisors, along with their organizational personnel, performed due diligence and negotiated the terms of a transaction. *See id.* ¶ 40 (referencing "the advisory firms engaged by [AMMO]"); MA § 13.1 (identifying outside counsel). Urvan alleges the following pre-Merger events and communications.[4]

Date	Participants	Event(s); Item(s)	Compl. ¶
1/28/21	Urvan; Wagenhals; Larson	Phone call	29
2/2/21	Urvan; Wagenhals; Larson	Dinner in AZ	30
2/3/21	Urvan; Wagenhals; Larson	Dinner in AZ	30
2/2/21 – 2/4/21	Urvan; Wagenhals; Larson, Flynn; Wiley; "numerous key AMMO employees"	In-person meetings at AMMO headquarters in Scottsdale, AZ	30
2/9/21	AMMO; IA Tech, LLC	Letter of intent	35
2/11/21	AMMO	Press release regarding letter of intent	52
2/15/21 – 2/20/21	Urvan; Wagenhals; Larson; Flynn; Wiley; Goodmanson; "others"	In-person meetings at AMMO headquarters in Scottsdale, AZ	38
2/22/21 – 2/23/21	Larson; Nicholson, unnamed GunBroker.com employees	In-person meeting at GunBroker.com's offices in Atlanta, GA	39
April 2021	AMMO	Written AMMO investor presentation	53

Urvan alleges "Larson, Wagenhals, and Flynn in particular were intimately involved in the negotiations and worked through specific terms and provisions with

[4] Pleading fraud under Rule 9(b) requires particularized allegations. *See, e.g.*, *PR Acqs., LLC v. Midland Funding LLC*, 2018 WL 2041521, at *8 (Del. Ch. Apr. 30, 2018). Accordingly, only the allegations concerning specific communications are relevant to Urvan's fraud claims.

Urvan and his counsel." Compl. ¶ 33. According to Urvan, "Flynn was the point person for legal issues associated with the Merger, while Wagenhals and Larson focused on the business terms and economics of the deal." *Id*. However, Urvan does not allege that any of these individuals negotiated, prepared, or revised the contractual representations that Urvan now challenges.

D. The Board Approves the Merger

Urvan alleges all AMMO directors, except Markley, met to "review, consider, and approve the Merger" on April 21, 2021. Compl. ¶ 40. He further alleges all AMMO directors except Markley signed a written consent to approve the Merger on April 29, 2021. *Id.* ¶ 41. Urvan claims "each of the directors received and analyzed the reports prepared by the advisory firms" before the April 21 meeting. *Id.* ¶ 40.

E. The Parties Execute the Merger Agreement and the Merger Closes

Urvan needed the Merger to close by May 1, 2021. Urvan's entities were parties to a May 31, 2019 financing agreement in the amount of $65 million (the "Financing Agreement"). *See* MA Disclosure Sched. § 4.3 (referencing Financing Agreement). Urvan's entities would be in default under the Financing Agreement if they did not make a $50 million payment by May 1, 2021. *See* Ex. 2 ¶¶ 25–28.[5]

[5] Exhibit 2 is the answer and counterclaims Urvan filed in the federal lawsuit styled *SharkDiver Consulting, LLC v. Gemini Direct, LLC*, C.A. No. 1:22-cv-03889-ELR (N.D. Ga.). The Court may take judicial notice of Urvan's public filings in that lawsuit. *See, e.g.*, *Nelson v. Emerson*, 2008 WL 1961150, at *2 n.2 (Del. Ch. May 6,

On April 30, 2021, AMMO, Speedlight[6], Urvan, and Urvan's company (the "Merger Parties") executed the Merger Agreement. Ex. 1; Compl. ¶ 1. The Merger closed the same day. *See* MA § 13.13. This quick closing enabled Urvan to make the payment under the Financing Agreement and avoid "the catastrophe of the . . . [Financing Agreement] default." Ex. 2 ¶ 74.[7]

Lucosky Brookman LLP represented AMMO in connection with the Merger Agreement; Arnall Golden Gregory LLP (legal counsel) and Maxim Group (investment banker) represented Urvan. *See* MA §§ 4.27, 6.2(a)(i), 13.1.

1. AMMO Makes Representations That Survive for Ninety (90) Days After Closing

Section 5 of the Merger Agreement contains the representations AMMO and Speedlight made to Urvan. *See* Compl. ¶ 58 ("Section 5 of the Merger Agreement contains material, express representations and warranties ***by AMMO and SpeedLight*** to Urvan . . . ." (emphasis added)). Urvan bases his claims on the representations by AMMO and Speedlight in Sections 5.7, 5.11(b), 5.15(h), 5.26(a), 5.26(d), and 5.26(h) of the Merger Agreement (the "Challenged Representations").

2008) (drawing facts from "documents filed in the related federal court proceedings" and citing opinions).

[6] Speedlight was a wholly-owned AMMO subsidiary formed to hold the merged GunBroker.com entities and operational assets.

[7] Urvan alleged in a separate lawsuit that failing to close the Merger would have caused him "severe economic stress[.]" Ex. 2 ¶ 72.

Section 9.1 of the Merger Agreement provides the Challenged Representations "shall survive the Closing and shall remain in full force and effect until the expiration of ninety (90) days after the Closing Date" (the "Survival Clause"). Accordingly, the Merger Parties agreed they would make any contractual challenges to the Challenged Representations by July 29, 2021.

2. <u>AMMO Makes the Litigation Representation</u>

In Section 5.7 of the Merger Agreement, AMMO represented it was not facing litigation that would prevent the Merger or cause a Material Adverse Effect (the "Litigation Representation"). AMMO represented in relevant part:

> There is no claim, action, suit, proceeding, arbitration, complaint, charge or investigation pending or to Parent's knowledge, currently threatened in writing
>
> (a) against Parent or any officer, director or employee of Parent arising out of their employment or board relationship with Parent; (b) that questions the validity of this Agreement or the right of Parent to enter into it, or to consummate the transactions contemplated by this Agreement; or
>
> (c) to Parent's knowledge, that reasonably would be expected to have, either individually or in the aggregate, a Material Adverse Effect.

MA § 5.7 (spacing added). The rest of the Litigation Representation provided examples of proceedings that, if significant enough, could jeopardize the Merger or cause a Material Adverse Effect, including:

> actions, suits, proceedings or investigations pending or threatened in writing (or any basis therefor known to Parent) involving the prior employment of any of Parent's employees, their services provided in connection with Parent's business, any information or techniques allegedly proprietary to any of their former employers or their obligations under any agreements with prior employers.

Id.; *see* Compl. ¶¶ 65, 129.a.

3. AMMO Makes the Related-Party Transactions Representation

In Section 5.11(b) of the Merger Agreement, AMMO made representations about transactions with related parties (the "Related-Party Transactions Representation"). AMMO represented in relevant part:

> None of [AMMO's] directors, officers or employees, or any members of their immediate families, or any Affiliate of the foregoing are, directly or indirectly, indebted to [AMMO] or, to [AMMO's] knowledge, have any . . . financial interest in any material contract with [AMMO].

MA § 5.11(b); *see* Compl. ¶¶ 72, 129(b).

4. AMMO Makes the Key Employees Representation

In Section 5.15(h) of the Merger Agreement, AMMO made representations about its directors and Key Employees (the "Key Employees Representation"). AMMO represented in relevant part:

> To [AMMO's] knowledge, none of the Key Employees or directors of [AMMO] has been . . .
>
> (ii) convicted in a criminal proceeding or named as a subject of a pending criminal proceeding (excluding traffic violations and other minor offenses); [or]

> (iii) subject to any order, judgment or decree (not subsequently reversed, suspended, or vacated) of any court of competent jurisdiction permanently or temporarily enjoining him or her from engaging, or otherwise imposing limits or conditions on his or her engagement in any securities, investment advisory, banking, insurance, or other type of business or acting as an officer or director of a public company[.]

MA § 5.15(h) (spacing added); *see* Compl. ¶¶ 78, 90, 96. The Merger Agreement defined "Key Employees" as: "when used with respect to [AMMO], Fred W. Wagenhals, John P. Flynn, Chris Larson and Robert D. Wiley." MA § 1.33.

5. <u>AMMO Makes the SEC Filings Representation</u>

In Section 5.26(a) of the Merger Agreement, AMMO made representations about its SEC filings (the "SEC Filings Representation"). AMMO represented in relevant part:

> [AMMO] has timely filed . . . all registration statements, prospectuses, reports, schedules, forms, statements, and other documents (including exhibits and all other information incorporated by reference) required to be filed or furnished by it with the SEC.

MA § 5.26(a); *see* Compl. ¶¶ 98, 129.d.

6. <u>AMMO Makes the Financial Statements Representation</u>

In Section 5.26(d) of the Merger Agreement, AMMO made representations about the financial statements AMMO filed with the SEC (the "Financial Statements Representation"). AMMO represented in relevant part:

> The financial statements (including any related notes) contained or incorporated by reference in the [AMMO] SEC Documents:
>
> (i) complied as to form in all material respects with the Securities Act and the Exchange Act, as applicable, and the published rules and regulations of the SEC applicable thereto,
>
> (ii) were prepared in accordance with GAAP . . . applied on a consistent basis unless otherwise noted therein throughout the periods indicated and
>
> (iii) fairly present, in all material respects, the financial position of Parent as of the respective dates thereof and the results of operations and cash flows of Parent for the periods covered thereby.

MA § 5.26(d) (spacing added); *see* Compl. ¶¶ 103, 129.d.

7. AMMO Makes the Internal Controls Representation

In Section 5.26(h) of the Merger Agreement, AMMO made representations about its internal controls for financial reporting (the "Internal Controls Representation"). AMMO represented in relevant part:

> [AMMO] maintains a system of internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) of the Exchange Act) that is sufficient to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP[.]

MA § 5.26(h); *see* Compl. ¶¶ 103, 129.d.

8. The Merger Parties Disclaim Reliance on Extra-Contractual Representations

In Section 13.10 of the Merger Agreement, the Merger Parties agreed to a standard integration provision (the "Integration Provision"), which provided:

> [T]his Agreement, including such [GunBroker.com] Disclosure Schedule, [AMMO] Disclosure Schedule, Schedules, Exhibits and such other agreements, supersede any prior understandings, negotiations, agreements or representations by or among the [Merger] Parties, written or oral, to the extent they related in any way to the subject matter hereof or thereof.

They also agreed to limit their reliance to representations in the Merger Agreement and its ancillary documents (the "Reliance Limitation Provision"), agreeing that:

> [A]ll promises, representations, understandings, warranties and agreements with reference to the subject matter hereof, and all inducements to the making of this Agreement relied upon by all the [Merger] Parties hereto, have been expressed herein or in such [GunBroker.com] Disclosure Schedule, [AMMO] Disclosure Schedule, Schedules, Exhibits or such other agreements[.]

MA § 13.10. Through the Integration Provision and the Reliance Limitation Provision, the Merger Parties expressly and unambiguously disclaimed reliance on extra-contractual representations (the "Anti-Reliance Provision").

9. The Merger Parties Agree To Litigate Their Disputes in Delaware

In Section 13.9 of the Merger Agreement, the Merger Parties agreed Delaware law governed their agreement and a court sitting in Delaware would have exclusive

jurisdiction over "all matters arising out of or relating to th[e] Agreement and any of the transactions contemplated [t]hereby" (the "Forum-Selection Provision"). The Individual Defendants were not Merger Parties and therefore did not agree to the Forum-Selection Provision.

F. Urvan Joins the Board and Becomes an AMMO Employee

In connection with the Merger, Urvan became an AMMO director and AMMO's Chief Strategy Officer. Compl. ¶ 50. In those positions, he was required to abide by AMMO's Code of Conduct. *See* Ex. 3 (the "Code") (filed as Exhibit 14.1 to Form 10-Q (Feb. 12, 2021)); *see also* MA Ex. A (Urvan Employment Agreement) § 2.3 ("Employee shall be subject to the . . . policies and procedures set forth in the [Code], all of which are incorporated herein in full by reference. Employee's violation of the terms of such documents shall be considered a breach of the terms of this Agreement."). The Code required Urvan to disclose the types of issues that he now alleges.

Section 26 of the Code required "each director, officer, and employee" to "promptly bring to the attention of the Chief Executive Officer, the Chief Financial Officer, the Chief Operating Officer, the legal counsel, or the Audit Committee of AMMO, as appropriate in the circumstances,"

> [a]ny information the individual may have concerning (a) significant deficiencies in the design or operation of internal controls that could adversely affect the

> Company's ability to record, process, summarize, and report financial data or (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's financial reporting, disclosures, or internal controls [and] . . .
>
> [a]ny information the individual may have concerning evidence of a material violation of the securities or other laws, rules, or regulations applicable to the Company and the operation of its business, by the Company or any agent thereof, or of violation of this Code.

Section 28 of the Code required all "[d]irectors, officers, and employees" to "report any observed illegal or unethical behavior and any perceived violations of laws, rules, regulations, or this Code[.]"

Despite these requirements, for almost two years after the Closing Urvan did not disclose the wrongdoing he now alleges.

G. Hanrahan Takes Her Dispute to Court

On February 16, 2022, Hanrahan filed the Hanrahan Complaint in the United States District Court for the District of Arizona. Ex. 4; *see also* Compl. ¶ 70. Hanrahan based her allegations on the Whistleblower Complaint, which AMMO disclosed sixteen times before the Merger. *Supra* § A. On June 29, 2022, AMMO referenced the Hanrahan Complaint in its annual report. Form 10-K (June 29, 2022) at 14. Urvan signed this Form 10-K as an AMMO director. *See id.* at 59.

H. Urvan Tries to Take Control of the Company Through a Proxy Contest

On August 25, 2022, Urvan initiated a proxy contest (the "Proxy Contest") and nominated a slate of candidates to replace the entire Board. *See* Ex. 5 (the "Proxy Contest Settlement Agreement" or "PCSA") § 1(a).[8] On August 29, he sent a letter to AMMO stockholders in support of the Proxy Contest. *See* Sched. DFAN14A (Aug. 29, 2022).

One of Urvan's stated bases for the Proxy Contest was AMMO's plan to separate the legacy GunBroker.com business from AMMO's legacy ammunition business. *See id.* Urvan also called into question the fitness of AMMO's CEO. *See id.* The letter disclosed that Urvan would "lead AMMO on [a]n interim basis" if his nominees were elected. *Id.* The letter did ***not*** allege that AMMO's SEC filings were deficient or accuse AMMO of fraud in connection with the Merger.

Urvan issued multiple public statements about AMMO in connection with the Proxy Contest. *See, e.g.,* Sched. DFAN 14A (Aug. 30, 2022); Sched. DFAN 14A (Sept. 19, 2022). Nowhere did those statements allege that AMMO's SEC filings were deficient or accuse AMMO of fraud in connection with the Merger.

On November 3, 2022, AMMO and Urvan settled the Proxy Contest. Form 8-K (Nov. 7, 2022). AMMO agreed to increase the size of the Board to nine

[8] AMMO filed the Proxy Contest Settlement Agreement as Exhibit 10.1 to a November 3, 2022 Form 8-K.

directors. Urvan and his nominees (the "Urvan Group") would be entitled to fill three seats. PCSA § 1(b).

I. Urvan Tries To Influence the Company Through the CEO Succession Process

The Proxy Contest Settlement Agreement required the Board to form a new, four-director committee "charged with planning the succession for the Chief Executive Officer of the Company[.]" PSCA § 1(d). Urvan and another member of the Urvan Group became members of this CEO Succession Planning Committee. *See id.*

J. Urvan Sues to Unwind the Merger Two Years After It Closed

On April 28, 2023, almost two years after the Merger closed, Urvan filed this lawsuit (the "Action"). Dkt. 1. Due to the Survival Clause, Urvan cannot allege claims for breach of the Merger Agreement. Instead, Urvan asserts fraud claims based on alleged facts he never reported under the Code or asserted during the Proxy Contest. Despite Urvan's advocacy in the Proxy Contest against the spinoff of GunBroker.com, *see supra* § H, Urvan's Complaint requests partial rescission of the Merger, *see* Compl. at Prayer for Relief, ¶ 2.

On June 13, 2023, Defendants moved to dismiss the Complaint in full and with prejudice against all Defendants. Dkt. 20.

ARGUMENT

"Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief." *In re Alloy, Inc.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011). Delaware courts do not "accept conclusory allegations unsupported by specific facts, nor do [they] draw unreasonable inferences in the plaintiff's favor." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). "[F]ailure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim." *Alloy*, 2011 WL 4863716, at *6. "'[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.'" *Fortis Advisors LLC v. Allergan W.C. Hldg. Inc.*, 2019 WL 5588876, at *5 (Del. Ch. Oct. 30, 2019) (citation omitted).

"Delaware courts can exercise personal jurisdiction over nonresident defendants by consent through conduct, statutory means, or by 'dint of a contractual arrangement.'" *Golden v. ShootProof Hldgs., LP*, 2023 WL 2255953, at *4 (Del. Ch. Feb. 28, 2023) (citation omitted). "When a defendant moves to dismiss under Rule 12(b)(2), the plaintiff has the burden to show a prima facie case of personal jurisdiction over a nonresident defendant by demonstrating 'specific facts,' and not 'rely[ing] on mere conclusory assertions.'" *Id.* (citation omitted).

I. LACHES BARS PLAINTIFFS' CLAIMS

"Laches is an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right, and resulting in prejudice to the adverse party." *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009). Laches is a doctrine "rooted in the maxim that equity aids the vigilant, not those who slumber on their rights." *Id.* (internal quotation marks and citation omitted). Laches applies to all unreasonably late claims, including fraud claims. *See, e.g.*, *Olga J. Nowak Irrevocable Tr. v. Voya Fin., Inc.*, 2022 WL 2359628, at *9 (Del. Ch. June 30, 2022) (dismissing equitable and constructive fraud claims based on laches), *aff'd*, 291 A.3d 207 (Del. 2023); *Krahmer v. Christie's Inc.*, 903 A.2d 773, 779–83 (Del. Ch. 2006) (denying motion to amend claims for equitable fraud as futile because of statute of limitations).

Here, Urvan waited to manufacture his fraud and securities claims until after he concluded that the Proxy Contest and the heavily-negotiated Proxy Contest Settlement Agreement failed to achieve his desired outcome. His unreasonable delay has prejudiced Defendants and AMMO's stockholders.

A. Plaintiff Delayed in Bringing His Claims

Urvan bases his claims on the Challenged Representations. In the Survival Clause, Urvan agreed the Challenged Representations would terminate ninety days after the Merger closed. *See* MA § 9.1; *supra* § E.1. The survival period of

representations serves as a contractual statute of limitations. *See, e.g., HBMA Hldgs., LLC v. LSF9 Stardust Hldgs. LLC*, 2017 WL 6209594, at *6 (Del. Ch. Dec. 8, 2017) (citing *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *3, *6 (Del. Ch. July 11, 2011)). Accordingly, the Merger Parties contemplated that Urvan would bring any claims based on the Challenged Representations by July 29, 2021—ninety days after closing. Urvan waited to raise the Challenged Representations until April 28, 2023—728 days after closing. He knew the bases of his claims much earlier.

Litigation Representation: Urvan alleges the Merger Agreement was fraudulent because it did not disclose the Whistleblower Complaint before OSHA. Compl. ¶¶ 8, 65–71. However, AMMO referenced the Whistleblower Complaint in ***sixteen*** public filings before the Merger Parties signed the Merger Agreement. *Supra* § A. The Merger Agreement expressly references AMMO's public filings. *E.g.*, MA §§ 5.26(a), 5.26(d). Any reasonable stockholder would have been on notice of the Whistleblower Complaint.

Financial Statements Representation: Urvan alleges the Merger Agreement should have disclosed "material weaknesses" in the Company's financial reporting. Compl. ¶¶ 103–04, 107–09. In fact, AMMO disclosed this information in ***eleven*** public filings before the Merger. *Supra* § B. ***The disclosure Urvan cites***

in support of his fraud claim occurred in June 2021. *See* Compl. ¶ 107.[9] Accordingly, Urvan concedes he waited at least twenty-two months to challenge this representation. During those twenty-two months, Urvan served on the Board, heard from AMMO's outside auditors and counsel, and heard first-hand about AMMO's financial controls and reporting.

SEC Filings Representation and Internal Controls Representation: Urvan alleges the SEC Filings Representation and the Internal Controls Representation were false because AMMO purportedly failed to file disclosures related to insider stock sales. Compl. ¶¶ 98–107. Urvan bases his claim on the Whistleblower Complaint and the Hanrahan Complaint. *See id.* ¶¶ 67, 70, 99–102, 104–08, 129.d. Hanrahan filed the Whistleblower Complaint in August 2019. *Supra* § A. AMMO referenced it in ***sixteen*** (16) public filings before the Merger. *Id*. Eleven of those disclosures explained that a Board special committee, advised by independent legal counsel, found no wrongdoing. *Id*. AMMO's last Form 10-Q before the Merger disclosed that AMMO had implemented corporate governance enhancements based on the special committee's recommendations. *Id*. Any reasonable investor in Urvan's position would have known about the Whistleblower Complaint ***before*** the Merger.

[9] The Complaint identifies this disclosure as a Form 10-***Q***. However, AMMO filed a Form 10-***K*** in June 2021, four months after the February 2021 Form 10-Q.

Hanrahan filed the Hanrahan Complaint on February 16, 2022, more than fourteen months before Urvan filed the Complaint. Compl. ¶ 70. AMMO referenced the Hanrahan Complaint in a June 29, 2022 disclosure, Form 10-K (June 29, 2021) at 14, and AMMO reported the settlement of that dispute in a November 14, 2022 disclosure, Form 10-Q (Nov. 14, 2021) at 14.

Finally, Urvan was an AMMO director and senior employee for nearly two years before he filed his claims. The Code required Urvan to promptly disclose any purported issues with AMMO's SEC filings or internal controls. Urvan never did so.

Key Employees Representation: Urvan alleges the Key Employees Representation was fraudulent because it did not disclose Larson's Consent Judgment or SEC Settlement, Compl. ¶¶ 5, 7, 80–89, or Flynn's misdemeanor DUI and six-month suspension from the Arizona Bar, *id.* ¶¶ 91–96. If necessary, the record will show that Urvan knew, or should have known, about these events ***before*** the Merger closed.[10] Urvan concedes that he discussed Larson's SEC troubles with Lockett in April 2022, a year before he filed his lawsuit. Compl. ¶ 84. Urvan also

[10] The Complaint never alleges otherwise. In fact, the Complaint highlights a Merger Agreement provision that recognizes Urvan might have known the facts underlying his claims. *See* Compl. ¶ 111 (citing MA § 9.8).

concedes that he knew about Flynn's suspension after he became an AMMO director, *see id*. ¶ 89.c, although he does not specify a date.

B. Plaintiff's Delay Was Unreasonable

Filing suit outside the analogous statute of limitations is presumptively unreasonable. *See Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 788 (Del. Ch. 2014). The Survival Clause created a ninety-day contractual statute of limitations. *Supra* § I.A. The Court should apply that statute of limitations by analogy for laches purposes.

Urvan's delay would be unreasonable even if the Court applied the default statutes of limitations by analogy.[11] "An unreasonable delay can range from as long as several years to as little as one month. The temporal aspect of the delay is less critical than the reasons for it." *Whittington*, 991 A.2d at 7–8.

Here, Urvan's delay was tactical. Urvan signed the Merger Agreement even though he knew the facts underlying many, if not all, of the Challenged Representations. He did not seek to unwind the allegedly fraudulent transaction. Instead, he launched the Proxy Contest to try to seize control of the Board. *Supra* § H. In the Proxy Contest, he never raised any fraud allegations against the Board,

[11] The statute of limitations for fraud and unjust enrichment claims is three years. *Seiden v. Kaneko*, 2015 WL 7289338, at *7 (Del. Ch. Nov. 3, 2015). The statute of limitations for ASA claims is two years after discovery of the material misrepresentation or omission. *See* A.R.S. § 44-2004(B).

AMMO management, or any Key Employees under the Merger Agreement. Through a settlement, he obtained a third of the seats on the AMMO board. *See id.* He also received a seat on the CEO Succession Planning Committee. *Supra* § I. He filed the Action only after failing to obtain his goals in the Proxy Contest, through the Proxy Contest Settlement Agreement, and as a member of the CEO Succession Planning Committee.

Urvan's delay is particularly unreasonable given the Survival Clause and his position as an AMMO director and former managerial employee. The Survival Clause required Urvan to bring any claims based on AMMO's representations within ninety days. *Supra* § E.1.[12] The Code required Urvan to promptly disclose the issues of which he now complains. *Supra* § F. Urvan acted unreasonably by waiting to raise these purported issues. He doubled down on his unreasonable delay by requesting rescission. *Supra* § J.

[12] The Survival Clause was consistent with other Merger Agreement provisions that reflected the Merger Parties' agreement that they would address issues promptly. For example, the Merger Parties had ten days after receiving written notice to cure any alleged misrepresentations before a counter-party could terminate Merger Agreement. MA §§ 10.1(b)(i), 10.1(c)(i). The Merger Agreement set a prompt schedule for the Merger Parties to calculate and finalize working capital adjustments to the purchase price. *See id.* § 3.4. The Merger Parties had only ten days to decide whether to terminate the Merger Agreement after receiving notice of certain events. *See id.* § 6.4(b). The Merger Agreement required the Merger Parties to give prompt notice of indemnifiable events. *See id.* § 9.5(a), (c).

C. Plaintiff's Delay Has Prejudiced Defendants and the Company's Stockholders

Urvan's delay prejudiced Defendants by preventing them from addressing the purported issues in a timely manner—before AMMO expended substantial financial and staff resources to integrate AMMO's and GunBroker.com's assets and operations. As explained above, one of the purposes of the Merger Agreement and the Code was to prevent this very type of harm. *See supra* § I.B.

Urvan's delay also prejudiced AMMO stockholders. AMMO acquired a major business unit in the Merger. AMMO has issued numerous public financial statements for the post-merger entity. AMMO stockholders have relied, and continue to rely, on these public disclosures. Urvan publicly spoke out against the proposed separation of the GunBroker.com and ammunition businesses. Now Urvan seeks to separate GunBroker.com from AMMO via rescission two years later—after AMMO deployed enormous financial and staff resources to integrate and enhance the unified operations. These efforts added substantial value to the GunBroker.com business AMMO purchased for almost a quarter billion dollars. The Court should dismiss Urvan's claims based on laches. *See Fed. United Corp. v. Havender*, 11 A.2d 331, 348 (Del. 1940) ("Sitting by inactive and in what amounts to silence, when every consideration for the rights of others demanded prompt and vigorous

action, and until affairs had become so complicated that a restoration of former status was difficult, if not impossible, is conduct amounting to laches.").

* * *

For these reasons, the Court should dismiss all counts against all Defendants with prejudice. The Court should also award Defendants their reasonable fees, costs, and expenses in responding to Urvan's untimely claims.

II. THE COURT LACKS PERSONAL JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

The Individual Defendants are not Delaware residents. The Court can exercise personal jurisdiction over them only if they contractually agreed to submit to the Court's jurisdiction or if their conduct gives the Court a statutory basis to exercise jurisdiction. *See, e.g.*, *Golden, LP*, 2023 WL 2255953, at *4. If a Delaware statute purports to give the Court jurisdiction over the Individual Defendants, the Court must then "inquir[e] into whether the exercise of personal jurisdiction over the defendants would be consistent with due process." *BAM Int'l, LLC v. MSBA Gp. Inc.*, 2021 WL 5905878, at *5 (Del. Ch. Dec. 14, 2021); *see also Hazout v. Tsang Mun Ting*, 134 A.3d 274, 278 (Del. 2016) ("[A]ny exercise of personal jurisdiction under the statute [must be] consistent with due process, by applying the established minimum contacts test from *International Shoe* and its progeny.").

Urvan alleges the Court has personal jurisdiction over the Individual Defendants based on the Forum-Selection Provision, Delaware's long-arm statute, and the corporate and LLC versions of the implied consent statute. Compl. ¶¶ 25–26.[13] These arguments fail.

A. The Forum-Selection Provision Does Not Give the Court Personal Jurisdiction over the Individual Defendants

Urvan alleges the Forum-Selection Provision gives the Court personal jurisdiction over the Individual Defendants. Compl. ¶ 25. But the Individual Defendants are not parties to the Merger Agreement. Wagenhals signed the Merger Agreement solely in his capacity as a Company officer. *See* Compl. ¶ 139(b) (alleging that Wagenhals, "in his capacity as CEO, had executed the Merger Agreement containing AMMO's Reps and Warranties"). That is insufficient to establish personal jurisdiction over Wagenhals. *See Golden*, 2023 WL 2255953, at *4–9 (holding that CEO did not consent to personal jurisdiction in Delaware even though he negotiated and signed merger agreement with Delaware forum-selection clause on behalf of Delaware corporation); *BAM Int'l*, 2021 WL 5905878, at *11–14 (holding that CEO did not consent to personal jurisdiction in Delaware even

[13] The Complaint quotes forum-selection provisions from documents other than the Merger Agreement, but Urvan does not allege those provisions give the Court personal jurisdiction over the Individual Defendants. *See* Compl. ¶¶ 37 & n.4, 49 & n.6

though he negotiated and signed escrow agreement with Delaware forum-selection clause on behalf of Delaware corporation). The remaining Individual Defendants did not sign the Merger Agreement at all.

A forum-selection provision can bind a non-party only if the non-party "has a sufficiently close relationship to the agreement, either as an intended third-party beneficiary under the agreement or based on principles of estoppel." *Golden*, 2023 WL 2255953, at *6 (internal quotation marks and citation omitted). Here, the Individual Defendants are not third-party beneficiaries under the Merger Agreement. *See* MA § 13.7 (disclaiming third-party beneficiaries); *Golden*, 2023 WL 2255953, at *6–7 (addressing similar provision).

Nor are the Individual Defendants "closely related" to the Merger Agreement for estoppel purposes. *See Golden*, 2023 WL 2255953, at *7; *BAM Int'l*, 2021 WL 5905878, at *12. They could not foresee being subject to the Forum-Selection Provision given their tangential relationship to the Merger Agreement. *See Golden*, 2023 WL 2255953, at *7–8; *BAM Int'l*, 2021 WL 5905878, at *12–13; *see also Zausner Foods Corp. v. ECB USA, Inc.*, 2022 WL 609110, at *9 (D. Del. Jan. 31, 2022) (finding no personal jurisdiction over individuals who negotiated acquisition of Delaware corporation), *report and recommendation adopted*, 2022 WL 884235 (D. Del. Mar. 25, 2022).

According to Urvan, every director, officer, and agent of a Delaware corporation can expect to answer in Delaware for every contract the corporation enters with a Delaware forum-selection provision. That is not, and should not be, the law. The Forum-Selection Provision does not give the Court personal jurisdiction over the Individual Defendants.

B. Each Individual Defendant Lacks Sufficient Minimum Contacts with Delaware for the Court to Exercise Statutory Personal Jurisdiction

Urvan pleads three purported statutory bases for the Court to exercise personal jurisdiction over the Individual Defendants—10 *Del. C.* § 3104, 10 *Del. C.* § 3114, and 6 *Del. C.* § 18-109. Compl. ¶ 26. The Court cannot exercise personal jurisdiction over the Individual Defendants based on any of these statutes because the Individual Defendants lack sufficient contacts with Delaware to satisfy due process. *See BAM Int'l*, 2021 WL 5905878, at *5 ("Regardless of the statutory predicate for jurisdiction, so long as a statute exists that confers jurisdiction, Delaware courts then proceed to an analysis of the minimum contacts test to ensure due process.").

In *BAM International*, the Court held it lacked personal jurisdiction over the CEO and CFO of a Delaware corporation with respect to claims arising out of a commercial contract with Delaware choice-of-law and forum-selection provisions. 2021 WL 5905878. Here, the facts closely track those in *BAM International*.

	BAM International	***Urvan v. AMMO***
Plaintiff	Delaware corporation	Non-Delaware-resident individual
Defendants	CEO and CFO of Delaware corporation	Directors, officers, and agents of Delaware corporation
Contract	Escrow agreement	Merger agreement
Claim	Tortious interference	Fraud
Individual defendants parties to contract?	No	No
Individual defendants negotiated or signed contract?	Yes	Yes
Delaware choice-of-law provision?	Yes	Yes
Delaware forum-selection provision?	Yes	Yes
Situs of contract negotiations	Outside Delaware	Outside Delaware[14]
Principle places of business	Outside Delaware	Outside Delaware

The *BAM International* Court found these alleged facts insufficient to satisfy the constitutional requirements for minimum contacts. The lawsuit did "not involve the entity's status as a corporate citizen of Delaware. . . [T]he contract at issue [was]

[14] The Complaint does not specifically allege where negotiations over the Merger Agreement took place. The Complaint references due diligence meetings in Arizona and Georgia. Compl. ¶¶ 29–32, 39. Urvan brings claims under the ASA, which indicates that he believes the negotiations occurred in Arizona. *See* A.R.S. § 44-1991(a) (applying to "a transaction or transactions within or from this state").

simply commercial, and [did] not involve the vindication of the General Corporation Law of Delaware. *Id.* at *10. Accordingly, "Delaware ha[d] no real interest in this case other than the exercise of personal jurisdiction over officers and directors, which [wa]s . . . insufficient in light of the constitutional due process rights owed to the [Individual] Defendants." *Id.*; *see also Li v. Xu-Nuo Pharma, Inc.*, 2022 WL 17588101, at *4 (Del. Super. Dec. 13, 2022) (holding that court lacked personal jurisdiction over non-resident because "Ms. Li's claim against Mr. Xu sounds in tort, does not implicate corporate governance practices, and, according to Ms. Li for this specific count, asserts alleged acts taken in his personal capacity."). The same reasoning applies here.

The Individual Defendants lack sufficient minimum contacts to support personal jurisdiction under Delaware's long-arm statute[15] or the implied consent statutes.[16]

* * *

Because the Court lacks personal jurisdiction over the Individual Defendants, the Court cannot resolve Urvan's aiding and abetting fraud, ASA, or unjust enrichment claims against the Individual Defendants.

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[15] Urvan's long-arm statute allegation fails for another reason. The Court recently ruled that the statute did not support jurisdiction on facts substantially similar to the facts here. In *Golden v. ShootProof Holdings, LP*, the plaintiff argued the defendants "'engaged in substantial acts which caused the merger of two Delaware corporations,' 'are or were officers or directors of Delaware entities, including [Holdings GP] and [a] nonparty . . . Delaware corporation created for the purpose of the transaction that is the subject of th[e] complaint,' and 'made various fraudulent statements that give rise to the cause of action underlying the Complaint.'" 2023 WL 2255953, at *8 (footnote omitted) (alterations in original). The *Golden* Court ruled that "[n]one of these acts support long-arm jurisdiction." *Id.* For one thing, "'[c]ausing' a merger governed by Delaware law, by itself, does not satisfy Section 3104(c)." *Id.* For another thing, "[a] Delaware court cannot exercise personal jurisdiction over a director or officer for an act of the corporation simply because the officer or director directed the corporation to take that act." *Id.* The *Golden* Court noted that the allegedly false statements were not made in Delaware, as confirmed by the fact that the plaintiff brought claims under another state's blue sky laws. *See id.* at *9. Here, Urvan has alleged facts that are substantially identical to the ones the *Golden* Court rejected. *See also Zausner Foods*, 2022 WL 609110, at *9 (holding long-arm statute did not confer personal jurisdiction over individuals who negotiated acquisition of Delaware corporation).

[16] Urvan's implied consent statute allegation fails against Flynn. Flynn was not an AMMO director, nor did he hold a position listed in 10 *Del. C.* § 3114(b).

III. PLAINTIFF'S FRAUDULENT INDUCEMENT CLAIM FAILS

Count I of the Complaint is a claim for fraudulent inducement. Urvan does not request contractual indemnification for alleged breaches of the Merger Agreement. He could not do so, because the Challenged Representations have expired. *Supra* § I.A.

To state a claim for fraudulent inducement, a plaintiff must adequately plead: "(1) a false representation, (2) that the defendant knew or believed the representation to be false or was recklessly indifferent as to its truth, (3) that the defendant intended to induce action, (4) that the plaintiff acted in justifiable reliance upon the representation, and (5) causally related damages." *Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *19 (Del. Ch. Mar. 9, 2022).

A. Urvan May Not Rely on Alleged Extra-Contractual Statements Because of the Anti-Reliance Provision

The Integration Provision and the Reliance Limitation Provision together create the Anti-Reliance Provision. *Supra* § E.8. Through the Anti-Reliance Provision, Urvan effectively disclaimed reliance on extra-contractual representations.

"Delaware law does not require magic words to disclaim reliance." *IAC Search, LLC v. Conversant LLC*, 2016 WL 6995363, at *6 (Del. Ch. Nov. 30, 2016) (internal quotation marks and citation omitted). "[T]he combination of a standard

integration clause and a clause representing affirmatively what information a [party] relied on" is sufficient. *Id.* at *7 (internal quotation marks omitted); *see also MidCap Funding X Tr. v. Graebel Cos., Inc.*, 2020 WL 2095899, at *20 (Del. Ch. Apr. 30, 2020) ("Because Plaintiffs represented that they only relied on the particular information set forth in the Settlement Agreement, then that statement establishes the universe of information on which that party relied." (internal quotation marks and citation omitted)).

The Anti-Reliance Provision prevents reliance on representations outside the four corners of the Merger Agreement, even in support of fraud claims. *See, e.g.*, *RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 119 (Del. 2012) (affirming dismissal of fraud claim based on anti-reliance provision); *MidCap Funding*, 2020 WL 2095899, at *18–21 (dismissing fraudulent concealment and misrepresentation claims based on anti-reliance provision); *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *7–10 (Del. Ch. July 9, 2002) (dismissing fraud, misrepresentation, mutual mistake, and estoppel claims based on anti-reliance provision). Accordingly, Urvan cannot rely on any alleged extra-contractual misrepresentations in support of his fraud claim. *Cf.* Compl. ¶¶ 32,

51–53, 112–27 (allegations concerning purported extra-contractual representations).[17]

Urvan appears to concede he cannot claim extra contractual fraud. He limits Count I of the Complaint to representations in the Merger Agreement. *See id.* ¶¶ 128–35. These too fail.

B. Urvan Failed To Allege Falsity or Justifiable Reliance Adequately

Fraud requires a false statement. *See, e.g.*, *Arwood*, 2022 WL 705841, at *19. Fraud also requires justifiable reliance. *See id.* "To demonstrate justifiable reliance 'the misrepresentation forming the basis for the fraud or negligent misrepresentation claim must be material, and the plaintiff generally cannot rely, for example, on . . . representations that are obviously false.'" *Wu v. Del. Tech. Cmty. Coll.*, 2022 WL 11584092, at *5 (Del. Super. Oct. 20, 2022) (citation omitted). "[I]t is axiomatic that a plaintiff does not justifiably rely on a defendant's misrepresentation if the plaintiff knows that the representation is false." *Arwood*, 2022 WL 705841, at *19;

[17] Even if Urvan could rely on extra-contractual representations, the Court would disregard any alleged events after the parties signed the Merger Agreement. *See* Compl. ¶¶ 54–57, 119–27. Urvan could not have relied on those events in deciding to enter the Merger Agreement. *See Trusa v. Nepo*, 2017 WL 1379594, at *9 (Del. Ch. Apr. 13, 2017) (explaining that alleged misrepresentations must have occurred before signing "if Trusa relied on them to sign the Agreement").

see also PR Acqs., 2018 WL 2041521, at *11 (dismissing fraud claim based on lack of justifiable reliance).[18]

Here, the only reasonable conclusion is that Urvan would have closed the Merger regardless of what AMMO represented in the Challenged Representations. Urvan had to close the Merger by May 1, 2021 to avoid the "severe economic stress" of a default under the Financing Agreement. *Supra* § E. Accordingly, Urvan could not have reasonably relied on the Challenged Representations.

Furthermore, Urvan never reported any alleged wrongdoing for nearly two years before he filed the Complaint. This undermines his assertion that he justifiably relied on any of the Challenged Representations.

As explained below, Urvan fails to allege falsity or reliance for additional reasons.

Litigation Representation: Urvan asserts the Litigation Representation required AMMO to disclose the Whistleblower Complaint. He misreads the provision. The Litigation Representation addresses litigation ***against*** AMMO or its officers, directors, or employees "that questions the validity of [the Merger

[18] Urvan quotes the sandbagging language in Section 9.8 of the Merger Agreement, Compl. ¶ 111, but that provision does not excuse Urvan from adequately pleading justifiable reliance as an element of a fraud claim. *See Arwood*, 2022 WL 705841, at *23–27 (dismissing fraud claim for lack of justifiable reliance despite agreement with sandbagging provision).

Agreement] or the right of [AMMO] to enter into it, or to consummate the transactions contemplated by [the Merger Agreement," or "that reasonably would be expected to have, either individually or in the aggregate, a Material Adverse Effect." MA § 5.7; *supra* § E.2. The Complaint does not allege the Whistleblower Complaint challenged the validity of the Merger or reasonably could be expected to result in a Material Adverse Effect. Nor could it. Hanrahan's unproven allegations had no effect on the Merger.

Contrary to Urvan's assertion, the Litigation Representation does ***not*** address a "potential investigation or litigation ***by*** a current or former employee" against AMMO. Compl. ¶ 66 (emphasis added). Representations like the Litigation Representation are distinct from representations on employment matters. *Compare* ABA Model Merger Agreement for the Acquisition of a Public Company § 2.14 and Commentary (legal proceedings representation) (Ex. 6), *with id.* § 2.17 and Commentary (labor and employment matters representation) (Ex. 7).

Even if the Litigation Representation required AMMO to disclose the Whistleblower Complaint, Urvan could not plead justifiable reliance based on that omission. Urvan should have already known about the Whistleblower Complaint. AMMO disclosed it in ***sixteen*** public filings before Urvan signed the Merger Agreement. *Supra* § A.

Related-Party Transactions Representation: According to Urvan, the Related-Party Transactions Representation was false because of a purported $24.5 million contract between AMMO and a company allegedly owned by Larson's brother. Compl. ¶¶ 72–76, 129.b; MA § 5.11(b). The Complaint alleges "[i]ndependence and lack of nepotism were important to Urvan in becoming AMMO's largest shareholder."[19] Compl. ¶ 73.

Urvan does not adequately allege the falsity of the Related-Party Transactions Representation. Urvan alleges that Andrew Larson was the owner of the company solely "on information and belief." Compl. ¶ 74. As an AMMO director, Urvan had the ability to access information concerning AMMO's contractors.[20] Given this access, Urvan cannot meet the Rule 9(b) requirements by alleging a financial interest on "information and belief." *See Roma Landmark Theaters, LLC v. Cohen Exhibition Co.*, 2020 WL 5816759, at *18 (Del. Ch. Sept. 30, 2020) (dismissing fraudulent concealment claim for failure to meet Rule 9(b) requirements; rejecting allegation based on "information and belief" where plaintiff had access to information to plead allegation definitively); *see also Metro Commc'n Corp. BVI v.*

[19] Urvan's allegation is ironic. Susan Lokey, GunBroker.com's CFO before and after the Merger, is Urvan's sister.

[20] Urvan's access as a director exceeded what he received in the extensive due diligence before the Merger.

Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 150 n. 57 (Del. Ch. 2004) (stating that "allegations made upon 'information and belief' do not satisfy Rule 9(b)").

Moreover, the Complaint contains no well-pled facts from which the Court could credit Urvan's assertion that knowing about this alleged contract would have been material to his decision to close the Merger. Urvan does not allege that this alleged contract was unfair to the Company or on non-market terms.[21] Accordingly, he has failed to allege that the contract showed nepotism or a lack of independence. *See Nepotism*, Merriam-Webster.com ("favoritism (as in appointment to a job) based on kinship"), *available at https://www.merriam-webster.com/dictionary/nepotism* (last accessed June 20, 2023).

SEC Filings Representation: Urvan asserts the SEC Filings Representation required AMMO to disclose information about alleged insider stock trades. Compl. ¶¶ 98–102; *see* MA § 5.26(a). In support, Urvan relies on the unproven allegations in the Hanrahan Complaint. Compl. ¶¶ 99–102, 129.d.

The SEC Filings Representation covers documents "required to be filed or furnished ***by*** [AMMO] with the SEC[.]" MA § 5.26(a) (emphasis added). By contrast, the Hanrahan Complaint alleges that AMMO's Section 16 ***executive***

[21] On September 26, 2022, AMMO announced that the Wisconsin construction project "was executed successfully, on-time and within our budget[.]" Form 8-K (Sept. 26, 2022), Ex. 99.1.

officers did not properly disclose trades in AMMO stock or that they had removed restrictive legends on their shares of AMMO stock. *See, e.g.*, Ex. 4 ¶¶ 15, 19, 21–23. The Hanrahan Complaint does not allege that ***AMMO*** was required to disclose those purported activities.[22] Urvan does not explain why the purported failure of insiders to disclose their personal trades triggered an ***AMMO*** disclosure obligation. In any event, an independently-advised special committee determined that the allegations underlying the Hanrahan Complaint lacked merit, and the Company resolved them with no admission of wrongdoing. *Supra* §§ A, I.A. Accordingly, Urvan has not adequately alleged that the SEC Filings Representation was false.

Nor has Urvan adequately pled justifiable reliance. Urvan concedes that "Wagenhals, Larson and others finally began to disclose their [allegedly] improper stock transactions" on March 11, 2020. Compl. ¶ 105. That was more than a year before the Merger. Furthermore, Hanrahan filed the Whistleblower Complaint "alleging extensive financial, accounting, and reporting violations by the company" in August 2019, nine months before the Merger. *Id.* ¶ 67. The Company disclosed the existence of the Whistleblower Complaint sixteen times before the Merger closed. *Supra* § A.

[22] The Hanrahan lawsuit was settled on July 22, 2022 with no finding of wrongdoing. *Supra* § G; Compl. ¶ 70.

Financial Statements Representation: Urvan asserts AMMO breached the Financial Statements Representation. *See* Compl. ¶¶ 103–07; MA § 5.26(d). He does not explain how. He alleges there were errors in AMMO's stock ledger and capitalization table, *id.* ¶ 104, but those documents are not "financial statements" for purposes of the Financial Statements Representation. *See Financial Statement*, *Black's Law Dictionary* (11th ed 2019) ("A balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities."); *Financial Statement*, Merriam-Webster.com ("a statement of one's status with regard to money or wealth"), *available at* https://www.merriam-webster.com/legal/financial%20statement (last accessed June 29, 2023).

Each AMMO Form 10-Q since August 19, 2020 has disclosed "the Company believes the financial information presented herein is materially correct and fairly presents the financial position and operating results" of the prior three months. Urvan tacitly concedes the material accuracy of AMMO's financial statements, which is all the Financial Statements Representation requires. *See* Compl. ¶ 103; MA § 5.26(d). The Code required Urvan as a director and employee to report any suspected disclosure violations. Ex. 3 §§ 26, 28. Urvan did not report anything for nearly two years before filing the Complaint. If he had justifiably relied on these purportedly false statements, he would have said something sooner.

Internal Controls Representation: Urvan asserts AMMO breached the Internal Controls Representation because AMMO publicly disclosed material weaknesses in AMMO's financial reporting and internal controls in June 2021. Compl. ¶¶ 104, 107; *see* MA § 5.26(h). Urvan has not adequately alleged that the disclosed weaknesses violated the requirements of the Internal Controls Representation. AMMO represented in the Merger Agreement it had a system of internal controls "that is sufficient to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP[.]" MA § 5.26(h).[23] The June 2021 disclosure on which Urvan relies did not contradict that representation. In fact, as noted above, each AMMO Form 10-Q since August 19, 2020 disclosed "the Company believes the financial information presented herein is materially correct and fairly presents the financial position and operating results" of the prior three months. *Supra* § B.

Even if Urvan had adequately pled falsity, he has not adequately alleged justifiable reliance. AMMO disclosed the material weaknesses in its financial reporting in ***nine*** public filings before the parties signed the Merger Agreement.

[23] Urvan also points to ***alleged*** insider trading. Compl. ¶¶ 105–06. However, he never explains how stock trades fall within the scope of "financial reporting and the preparation of financial statements for external purposes in accordance with GAAP." MA § 5.26(h).

Supra § B. The Internal Controls Representation explicitly references AMMO's public filings concerning internal controls. MA § 5.26(h) ("Parent has evaluated the effectiveness of Parent's internal control over financial reporting and . . . presented in any applicable Parent SEC Document that is a report on Form 10-K or Form 10-Q (or any amendment thereto) its conclusions about the effectiveness of the internal control over financial reporting[.]"). The June 2021 disclosure on which Urvan relies is similar to the February 2021 disclosure that Urvan concedes was made before the Merger. *See* Compl. ¶ 107. Urvan was on notice of this issue before he signed the Merger Agreement. *Supra* § B.

* * *

The Court should dismiss Count I for fraudulent inducement against AMMO and Speedlight with prejudice.

IV. PLAINTIFF'S AIDING AND ABETTING FRAUD CLAIM FAILS ON THE MERITS

Only AMMO and Speedlight made the Challenged Representations. *See* MA § 5. Urvan concedes this fact. Compl. ¶ 58. The Individual Defendants neither made the Challenged Representations, nor executed the Merger Agreement.[24] In an

[24] As noted above, Wagenhals executed the Merger Agreement on AMMO's behalf in his corporate capacity.

effort to keep them in the case, Urvan asserts in a conclusory manner each Individual Defendant aided and abetted AMMO and Speedlight in their alleged fraud.

"The elements of aiding and abetting fraud are (i) underlying tortious conduct, (ii) knowledge, and (iii) substantial assistance." *PR Acqs.*, 2018 WL 2041521, at *15 (internal quotation marks and citation omitted). Urvan has failed to adequately allege at least two of the elements—underlying fraud and substantial assistance. Additionally, the intra-corporate conspiracy doctrine defeats Urvan's aiding and abetting claims against AMMO's directors, officers, and agents.

A. Urvan Has Not Adequately Alleged an Underlying Fraud

Urvan has not adequately alleged fraud against AMMO and Speedlight. *Supra* § III. Accordingly, Urvan's aiding and abetting fraud claim against the Individual Defendants fails. *See PR Acqs.*, 2018 WL 2041521, at *15 ("Because the underlying tortious conduct claim fails, Midland's aiding and abetting claim against OPC also fails."); *see also Trusa*, 2017 WL 1379594, at *12 (dismissing aiding and abetting fraud claim for failure to plead underlying fraud).

B. Urvan Has Not Adequately Alleged that the Individual Defendants Provided Substantial Assistance in the Company's Alleged Fraud

"For harm resulting to a third person from the tortious conduct of another, a person is liable if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct

himself[.]" Restatement (Second) of Torts § 876 (Am. Law Inst. 1979). "The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." *Id.* cmt. d; *see also In re Oracle Corp. Deriv. Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) ("[T]he court may consider, among other factors, the nature of the tortious act that the secondary actor participated in or encouraged, including its severity, the clarity of the violation, the extent of the consequences, and the secondary actor's knowledge of these aspects and the amount, kind, and duration of assistance given, including how directly involved the secondary actor was in the primary actor's conduct." (cleaned up) (footnotes omitted)).

Here, Urvan fails to identify the individual(s) who purportedly negotiated, drafted, or revised the Challenged Representations. Urvan was a Merger Party—the Individual Defendants were not. He should know this information. He alleges, in a conclusory (and false) manner, that Flynn "draft[ed] and revis[ed] portions of the Merger Agreement," Compl. ¶ 139.c, but he does not allege that Flynn or any other Individual Defendants drafted or revised the Challenged Representations. Without alleging what any Individual Defendant did in connection with the preparation of the Challenged Representations, Urvan cannot adequately plead substantial assistance.

Markley: Urvan alleges no specific connections between Markley and the Challenged Representations. According to Urvan, Markley did not attend the Board meeting to discuss the proposed Merger and did not sign the written consent approving the Merger. Compl. ¶¶ 40–41. Urvan does not allege that Markley reviewed the Merger Agreement. The only allegations connecting Markley to the Challenged Representations are that: (i) "each of the directors received and analyzed the reports prepared by the advisory firms," *id.* ¶ 40; (ii) "[e]ach of the Defendants reviewed and approved, ***or had the opportunity to review and approve***, AMMO's Reps and Warranties prior to the Merger Agreement's execution," *id.* ¶ 59 (emphasis added); (iii) [t]he Individual Defendants knew that [the Challenged Representations] . . . were false, *id.* ¶ 139; (iv) "[t]he Individual Defendants . . . caused or help cause AMMO to make" the alleged misrepresentations, *id.*; and (v) "Markley . . . received and reviewed due diligence materials in connection with the Merger," *id.* ¶ 139.e.

Those conclusory allegations are insufficient to plead substantial assistance. To state a fraud-based claim against individuals, the plaintiff "is required to identify specific acts of individual defendants . . . ." *Sparton Corp. v. O'Neil*, 2017 WL 3421076, at *8 (Del. Ch. Aug. 9, 2017) (internal quotation marks and citation omitted). Alleging that Markley (and every other outside director) "caused or help cause AMMO to make" the Challenged Misrepresentations, Compl.¶ 139, does not plead substantial assistance. *See Sparton Corp.*, 2017 WL 3421076, at *8 ("Sparton

lists the names of certain Defendants 'and others' and states that they 'assisted' O'Neil but does not identify who specifically did what or how they 'assisted' in allegedly misstating the invoices or financial statements. And in its briefing, Sparton acknowledges that it cannot 'yet identify the specific roles of the co-conspirators.' These allegations fail to satisfy Rule 9(b).").

Likewise, alleging that Markley (and every other outside director) knew the Challenged Representations were false does not plead substantial assistance.[25] "Mere awareness is not sufficient to rise to the level of substantial assistance." *Riverside Fund V, L.P. v. Shyamsundar*, 2015 WL 5004924, at *5 (Del. Super. Aug. 17, 2015) (dismissing aiding and abetting fraud claim). "'Knowing participation' means just that—the alleged aider and abettor must know the fiduciary is breaching his fiduciary duty and then ***must participate, in some way, in that breach***." *In re Xura, Inc. S'holder Litig.*, 2019 WL 3063599, at *3 (Del. Ch. July 12, 2019) (emphasis added); *see also Oracle Corp.*, 2020 WL 3410745, at *12 ("[G]iven the general unwillingness of our law to impose a duty to speak, how could mere silence be cognizable as substantial assistance in tortious aiding and abetting?").

[25] That conclusory allegation also fails to plead the knowledge element of aiding and abetting. *See Sparton Corp.*, 2017 WL 3421076, at *8 ("[A] mere allegation that a defendant 'knew or should have known' about a false statement is not sufficient to plead the requisite state of mind." (footnote omitted)).

Lockett, Childress, Wallace, and Goodmanson: Urvan's allegations concerning Lockett, Childress, Wallace, and Goodmanson are the same as his inadequate allegations concerning Markley, except that he alleges that these outside directors attended a Board meeting to discuss the proposed merger and signed the written consent approving the Merger. Compl. ¶¶ 40–41, 59, 139, 139.e. Those additional group allegations do not save Urvan's claim against these directors. As explained in the prior section, Urvan has the burden to plead specific acts of substantial assistance by specific individuals. *See Sparton Corp.*, 2017 WL 3421076, at *8; *see also Trusa*, 2017 WL 1379594, at *9 ("A plaintiff cannot lump together defendants but must 'identify specific acts of individual defendants' and 'who made any particular misrepresentation.'" (footnote omitted)); *see also Dufresne, Tr. of Dufresne Fam. Tr. v. PDC Energy, Inc.*, 2019 WL 688006, at *3 (D. Colo. Feb. 19, 2019) (applying Delaware law) (dismissing aiding and abetting claims against outside directors who allegedly approved transactions). As explained in the prior section, Urvan's conclusory allegations of knowledge do not plead substantial assistance (or knowledge).

Wiley, Larson, Flynn, and Wagenhals: The intra-corporate conspiracy doctrine defeats Urvan's aiding and abetting claims against Wiley, Larson, Flynn, and Wagenhals. *Infra* § IV.C. Even if it did not, Urvan has not adequately alleged substantial assistance by these defendants.

Urvan alleges that Wiley, Larson, Flynn, and Wagenhals "kn[ew] that terms of the Merger Agreement were materially false and misleading." Compl. ¶¶ 139.a (Larson), 139.b (Wagenhals), 139.c (Flynn), 139.d (Wiley). However, as explained above, that conclusory allegation does not adequately allege knowledge or substantial assistance.

Urvan does not attempt to allege that Wiley was responsible for negotiating, drafting, or revising the Challenged Representations. *See* Compl. ¶ 139.e. He does not allege that Wiley approved the Merger Agreement.

Urvan alleges additional facts about Larson, Flynn, and Wagenhals, but those allegations do not support a reasonable inference that they substantially assisted in the preparation of the Challenged Representations.

Urvan alleges that Larson "acted as AMMO's lead negotiator in connection with the Merger, including by proposing terms and making misrepresentations and omissions to Urvan about material aspects of the transaction[.]" Compl. ¶ 139.a. Urvan does not allege that Larson was involved in drafting the Merger Agreement or negotiating, drafting, or revising the Challenged Representations. Urvan alleges only that Larson made extra-contractual misrepresentations about business issues. *See id.* ¶¶ 32, 112–24; *see also id.* ¶ 33 ("Wagenhals and Larson focused on the business terms and economics of the deal.").

Urvan alleges that Wagenhals negotiated aspects of the Merger and signed the Merger Agreement on AMMO's behalf. However, Urvan does not allege that Wagenhals was involved in drafting the Merger Agreement or the Challenged Representations. Urvan emphasizes that Wagenhals negotiated business and economic issues. *Id.* ¶ 33. That is unremarkable. CEOs and other senior management representatives routinely undertake the same type of non-legal conduct in large business transactions constructed, orchestrated, and documented by outside legal and other advisors.

Urvan makes relatively detailed assertions about Flynn's involvement in the Merger. He alleges that: (i) "Flynn was the point person for legal issues associated with the Merger," *id.*; (ii) "Urvan and his deal counsel interacted regularly with Flynn regarding legal issues related to the Merger," *id.* ¶ 94; and (iii) Flynn "acted as AMMO's in-house legal representative in connection with the Merger, including by drafting and revising ***portions of*** the Merger Agreement," *id.* ¶ 139.c (emphasis added). Setting aside the falsity of Urvan's allegations, they do not plead substantial assistance.[26] Urvan never alleges that Flynn drafted, revised, or otherwise

[26] The procedural posture constrains Defendants' ability to address Urvan's numerous false and defamatory allegations. Urvan's defamatory allegations concerning Flynn are particularly problematic. Defendants will address those allegations at the proper time. However, the significant involvement of AMMO's outside counsel in all aspects of due diligence, negotiations, and contractual drafting

substantially assisted in the preparation of the Challenged Representations. Urvan was a Merger Party. He must meet the Rule 9(b) pleading standards using the information within his knowledge. His failure to allege that Flynn was responsible for the Challenged Representations is fatal to his aiding and abetting claim against Flynn. *See Roma Landmark*, 2020 WL 5816759, at *18; *see also RCS Creditor Tr. v. Schorsch*, 2017 WL 5904716, at *16 (Del. Ch. Nov. 30, 2017) (dismissing fiduciary duty and aiding abetting claims: plaintiff alleged that officer purposefully withheld information from board slide deck, but Court found allegation insufficient because "Plaintiff does not even say who removed this information from the slide deck, or whether [the officer] was actually involved in the preparation of the slides").

C. The Intra-Corporate Conspiracy Doctrine Defeats Plaintiff's Aiding and Abetting Claim Against the Individual Defendants

"[O]fficers and agents cannot aid and abet their principal or each other in the commission of a tort." *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at *11 (Del. Super. June 6, 2012); *see also, e.g.*, *Medlink Health Sols., LLC v. JL Kaya, Inc.*, 2023 WL 1859785, at *9 (Del. Super. Feb. 9, 2023) (dismissing aiding and abetting fraud claim against officers and agents); *BAM Int'l*, 2021 WL 5905878, at *8 ("Employees acting within the scope of their employment are

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demonstrated that Flynn was not practicing law in connection with the Merger. *See* MA § 13.1.

identified with the corporate defendant itself so that they may ordinarily advise the defendant to breach its own contract without themselves incurring liability in tort . . . ." (cleaned up) (citation omitted)). Sometimes called the "intra-corporate conspiracy doctrine," this principle defeats Urvan's aiding and abetting fraud claim against each Individual Defendant.

Urvan concedes Wagenhals was AMMO's CEO and Wiley was its CFO. Compl. ¶¶ 15, 23. Urvan alleges that Flynn was an AMMO Vice President. *Id.* ¶ 17. Urvan further alleges that Larson was "AMMO's *de facto* CEO and CFO." *Id.* ¶ 5. Based on Urvan's allegations, the intra-corporate conspiracy doctrine applies to these Individual Defendants. *See, e.g.*, *Anschutz Corp. v. Brown Robin Cap., LLC*, 2020 WL 3096744, at *17–18 (Del. Ch. June 11, 2020) (dismissing aiding and abetting claim against LLC officers).

The intra-corporate conspiracy doctrine also defeats Urvan's aiding and abetting fraud claim against AMMO outside directors Lockett, Childress, Markley, Goodmanson, and Wallace. To the extent Urvan tries to tie these directors to the Challenged Representations, he implies that they were human actors somehow responsible for the entity defendants' actions. *Supra* § IV.B. Accordingly, the intra-corporate conspiracy doctrine applies to them as well. *See Universal Cap. Mgmt., Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *4 (Del. Super. Feb. 1, 2012) ("[D]irectors cannot conspire with their corporation." (citing *Amaysing Techs.,*

Corp. v. Cyberair Commc'ns, Inc., 2005 WL 578972 (Del. Ch. Mar. 3, 2005)); *cf. Buttonwood Tree Value Pr's, L.P. v. R.L Polk & Co.*, 2014 WL 3954987, at *5 (Del. Ch. Aug. 7, 2014) ("[A] corporation cannot aid and abet violations by the fiduciaries who serve it. This is because, as the Plaintiffs themselves recognize, a corporation acts through its directors. The only way that Polk could have aided and abetted its directors' breaches of fiduciary duties is *through* those directors—the very same actors whom the Company is alleged to have aided.").

V. PLAINTIFF'S ARIZONA SECURITIES ACT CLAIM FAILS

A. Urvan Cannot State a Claim Under A.R.S § 44-1991(A)(1) or A.R.S § 1991(A)(3) Because He Bases His Claim Only on Alleged Misrepresentations

Urvan attempts to shoehorn his fraudulent inducement claim into a claim under the ASA. *See* Compl. ¶¶ 144–51. He purports to bring a claim based on each subsection of ASA § 44-1991(A).

Section 1991(A) "tracks the language of SEC Rule 10b–5." *Sell v. Gama*, 295 P.3d 421, 425 (Ariz. 2013). Arizona courts "will interpret the ASA by following settled federal securities law unless there is a good reason to depart from that authority." *Id*. Based on Section 10b-5 jurisprudence, federal courts sitting in Arizona have held that a plaintiff cannot state a claim under Section 1991(A)(1) or Section 1991(A)(3) "premised solely on assertions of misstatements and omissions." *In re Allstate Life Ins. Co. Litig.*, 2013 WL 5161688, at *13 (D. Ariz. Sept. 13, 2013)

(citing *Red River Res., Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, at *10 (D. Ariz. June 29, 2012)).

Here, the only wrongdoing that Urvan has attempted to allege with any specificity is based on purported misrepresentations and omissions under Section 44-1991(A)(2). Urvan alleges only in conclusory fashion Defendants engaged in a fraudulent scheme or course of business necessary to support a claim under Section 44-1991(A)(1) or Section 44-1991(A)(3). *See* Compl. ¶ 146 (alleging Defendants "otherwise engag[ed] in fraudulent conduct with respect to the Merger Agreement and during the Merger negotiations"). Accordingly, Urvan's ASA claim should be dismissed to the extent it is based on Section 1991(A)(1) or Section 1991(A)(3).

B. Urvan Has Not Adequately Alleged a False or Misleading Representation of Material Fact Under Section 1991(A)(2)

Section 1991(A)(2) of the ASA makes it "a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, . . . directly or indirectly to . . . [m]ake any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." A.R.S. § 44-1991(A).

The elements of ASA securities fraud are "substantially similar" to the elements of Delaware common law fraud. *Stuchen v. Duty Free Int'l, Inc.*, 1996 WL 33167249, at *5 & n.12 (Del. Super. Apr. 22, 1996) (providing elements of Delaware common law fraud, explaining "elements of statutory fraud are substantially similar" and noting A.R.S. § 44-1991 was "indistinguishable for present purposes" with corresponding Delaware statute). Urvan's ASA claim fails for the same reasons his fraudulent inducement claim fails. *Supra* § III.

1. Urvan's ASA Claim Is Limited to the Challenged Misrepresentations

The Anti-Reliance Provision limits the scope of representations on which Urvan may base his ASA claim. *Cf. Golden*, 2023 WL 2255953, at *10–15 (addressing Washington Securities Act, which is nearly identical to ASA; *compare* RWC 21.20.430(5), *with* A.R.S. § 44-2000); *see also Rissman v. Rissman*, 213 F.3d 381, 383 (7th Cir. 2000) ("Arnold['s] . . . entire case rests on Randall's oral statements. Yet Arnold assured Randall that he had not relied on these statements. Securities law does not permit a party to a stock transaction to disavow such representations—to say, in effect, 'I lied when I told you I wasn't relying on your prior statements' and then to seek damages for their contents. Stock transactions would be impossibly uncertain if federal law precluded parties from agreeing to rely

on the written word alone."). Accordingly, Urvan's ASA claim is limited to the Challenged Representations. *Supra* § III.A.

2. Urvan Has Not Adequately Alleged That Any Challenged Representation Was Materially False or Misleading

"The elements of a securities fraud claim under the [ASA], are 'almost identical' to its federal counterpart[,]" to the point that courts "will analyze the state and federal securities fraud claims simultaneously." *New Enters. Ltd. v. SenesTech Inc.*, 2018 WL 6313193, at *6 (D. Ariz. Dec. 3, 2018). Section 44-1991(A)(2) prohibits the making of "any untrue statement of ***material*** fact[.]" The element of "[m]ateriality is satisfied when there is a substantial likelihood that the disclosure of the [truth] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *New Enters.*, 2018 WL 6313193, at *6 (internal quotation marks and citation omitted) (alteration in original); *see also id.* ("The requirement of materiality is satisfied by a showing of substantial likelihood that, under all the circumstances, the misstated or omitted fact would have assumed actual significance in the deliberations of a reasonable buyer." (quoting *Hirsch v. Ariz. Corp. Comm'n*, 352 P.3d 925, 932–33 (Ariz. Ct. App. 2015)). "Claims arising under section 44–1991(A) have a heightened pleading standard pursuant to section 44–2082(A) and (B) similar to Federal Rule of Civil

Procedure 9(b)." *In re Greenbelt Prop. Mgmt., LLC*, 2013 WL 7874084, at *2 (Bankr. D. Ariz. Dec. 4, 2013) (citations omitted).

Here, the Complaint alleges that, "[h]ad Urvan known of the true state of facts concerning AMMO, he would not have entered into the Merger Agreement or completed the Merger on the terms set forth therein." Compl. ¶ 149. Even if true, it is irrelevant. Under the ASA, what matters is "what a ***reasonable investor*** would have done under the circumstances [and], more importantly, why." *New Enters.*, 2018 WL 6313193, at *7 (emphasis added); *see also Hirsch*, 352 P.3d at 933 ("Under this test, there is no need to investigate whether an omission or misstatement was actually significant to a particular buyer." (citation omitted)).

As explained above, Urvan has not adequately alleged that the Litigation Representation, the SEC Filings Representation, the Financial Statements Representation, and the Internal Controls Representation were false in any way. *Supra* § III.B. Moreover, Urvan has not adequately alleged that any of the Challenged Representations would have been materially false or misleading to a reasonable investor in light of the total mix of information available. *See id*. A reasonable investor would not call off a $240 million deal based on the alleged falsity of the Challenged Representations.

Urvan's failure to plead a material disclosure violation is fatal to his ASA claim. *See Caruthers v. Underhill*, 287 P.3d 807, 820 (Ariz. Ct. App. 2012)

(affirming summary judgment dismissal of Section 44-1991(A) claim due to plaintiffs' failure to prove material omissions).

VI. PLAINTIFF'S UNJUST ENRICHMENT CLAIM FAILS

To adequately plead an unjust enrichment claim, a plaintiff must adequately plead "the absence of justification." *See, e.g.*, *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006). Urvan cannot adequately plead this element because each of his other claims fail.

Urvan's unjust enrichment claim also fails for an independent reason. His claims are based on written representations in a contract. "When the complaint alleges an express, enforceable contract that controls the parties' relationship, . . . a claim for unjust enrichment will be dismissed." *Id.*; *see also MidCap Funding*, 2020 WL 2095899, at *17 (dismissing unjust enrichment claim).

Finally, Urvan's unjust enrichment claim fails against the Individual Defendants for a third reason. "An enrichment 'must not be speculative, attenuated, or too indirect to support a relationship to the loss.'" *OptimisCorp v. Atkins*, 2023 WL 3745306, at *25 (Del. Ch. June 1, 2023). Urvan alleges AMMO benefitted by purchasing GunBroker.com too cheaply and the Individual Defendants benefitted as alleged AMMO stockholders. *See* Compl. ¶ 162. Those allegations are not sufficient to allege a direct relationship between the Individual Defendants and the alleged unjust enrichment. *See OptimisCorp*, 2023 WL 3745306, at *25 (rejecting

argument that "principals" of company were unjustly enriched when their company benefitted).

CONCLUSION

Defendants respectfully request that the Court dismiss all claims against all Defendants with prejudice, and award Defendants their reasonable fees, costs, and expenses in connection with the Action.

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Words: 13,168

CERTIFICATE OF SERVICE

I certify that on July 25, 2023, my firm served true and correct copies of the *Public Version of Defendants' Opening Brief in Support of Their Motion to Dismiss the Complaint* upon the following counsel of record via File & Serve*Xpress*:

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