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Case Number 207,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIKHAIL KOKORICH, Plaintiff-Below, Appellant, v. MOMENTUS, INC., a Delaware Corporation, Defendant-Below, Appellee.	No. 207, 2023 On Appeal from the Court of Chancery C.A. 2022-0722-MTZ **PUBLIC VERSION FILED AUGUST 4, 2023**

APPELLANT'S CORRECTED OPENING BRIEF

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Dated: August 4, 2023

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NATURE OF PROCEEDINGS

Defendant/Appellee Momentus Inc. refuses to honor its obligations to advance fees and indemnify its co-founder and former officer and director, Plaintiff/Appellant Mikhail Kokorich for the expense of lawsuits and government investigations relating to Kokorich's company work.

Kokorich sued Momentus for refusing to indemnify him and advance expenses in accordance with several agreements, including an Indemnification Agreement and Momentus's governing documents. Momentus's only stated reason for refusing to indemnify Kokorich is a release provision in a Stock Repurchase Agreement. The release, however, contains an exception for claims arising under the Stock Repurchase Agreement or under "other agreements executed and delivered in connection" with the Stock Repurchase Agreement ("Carveout"). Kokorich asserts two agreements are within the Carveout: the parties' May 27, 2021 Letter Agreement ("May 27 Agreement") for advancement and indemnification, and the second amendment to the parties' Separation Agreement formed via the parties' exchanged e-mails and a Momentus Board Resolution ("Second Amendment" or "Second Amendment to the Separation Agreement").

Momentus moved to dismiss Kokorich's claims under Chancery Court Rules 12(b)(6) and 12(b)(1). The Chancery Court dismissed all of Kokorich's claims

based on its conclusion that the claims were barred by the release in the Stock Repurchase Agreement.[1] The Chancery Court rejected Kokorich's position that the May 27 Agreement and Second Amendment are within the Carveout. The Chancery Court ruled that the May 27 Agreement was not executed "in connection with" the Stock Repurchase Agreement.[2] The Chancery Court also found that the parties' communications agreeing to the Second Amendment and/or the Momentus Board Resolution explicitly approving that agreement "did not constitute an acceptance of an offer to amend the Separation Agreement, and no such amendment was executed and delivered."[3]

[1] A copy of the Memorandum Opinion of the Chancery Court dismissing the FAC is attached hereto as Exhibit A (hereinafter as "Op."). Kokorich is not appealing the Chancery Court's dismissal of his claims for statutory mandatory indemnification, promissory estoppel, or fraudulent inducement (FAC, Counts VI, VIII-IX).
[2] Op. at 34. The Stock Repurchase Agreement states, "in connection herewith." This brief will use "with" instead of "herewith" throughout.
[3] Op. at 24-25.

SUMMARY OF ARGUMENT

1. The Chancery Court erred in dismissing Kokorich's claims for indemnification and advancement. The First Amended Complaint ("FAC") states claims against Momentus for refusing to indemnify Kokorich and failing to advance Kokorich's attorney fees and other expenses.[4] The Chancery Court failed to accept all of Kokorich's well-pleaded allegations as true and make all reasonable inferences in his favor, as required on a motion to dismiss. Instead, the Chancery Court made unreasonable inferences and factual findings regarding the intent of the parties and the meaning of the Carveout in favor of the moving party. Specifically, the Chancery Court's ruling implies that the parties negotiated and executed the May 27 Agreement and Second Amendment to the Separation Agreement as if the parties intended those agreements to be null and void almost immediately, thus rendering these agreements and the Carveout meaningless. The Chancery Court reached its conclusion notwithstanding Momentus's later actions indicating that it understood that Kokorich had not waived indemnification and advancement rights, and that payments on its advancement obligations were simply delayed.

[4] A-0057-66 ¶¶58-86, 90-91 (FAC, Counts I – V and VII).

2. The Chancery Court erred in finding that the May 27 Agreement was not one of the "other agreements" executed and delivered in connection with the Stock Repurchase Agreement and thus preserved advancement and indemnification rights. There is no dispute that the May 27 Agreement was "executed and delivered." A trier of fact could reasonably infer that the May 27 Agreement was executed "in connection with" the Stock Repurchase Agreement. Specifically, Kokorich made that agreement a condition to his signing the Stock Repurchase Agreement, and the parties executed the May 27 Agreement on the same day they were originally scheduled to execute the Stock Repurchase Agreement. At a minimum, the Carveout is subject to more than one reasonable interpretation, and the Chancery Court failed to properly consider extrinsic evidence creating an inference that the May 27 Agreement was one of the "other agreements" subject to the Carveout. The May 27 Agreement was expressly based upon, and confirmed the ongoing existence of, the Indemnification Agreement.

3. The Chancery Court erred by finding that the Second Amendment to the Separation Agreement was not one of the "other agreements" executed and delivered in connection with the Stock Repurchase Agreement. A trier of fact could reasonably infer that Momentus intended to be bound by the Second Amendment to the Separation Agreement based on the parties' objective manifestation of mutual

assent. The factfinder could also reasonably infer that Momentus waived any need for further or more formal documentation of that Second Amendment. Further, the trier of fact could reasonably infer that the Second Amendment was one of the "other agreements" subject to the Carveout because Kokorich conditioned signing the Stock Repurchase Agreement upon the Second Amendment. And, the Momentus Board of Directors adopted and delivered to Kokorich, on the day the Stock Repurchase Agreement was scheduled to be signed, a resolution approving the Second Amendment. The Second Amendment to the Separation Agreement confirmed the continuing enforceability of the Separation Agreement, which states that the Indemnification Agreement "shall remain in full force and effect."

STATEMENT OF FACTS[5]

A. The Indemnification Agreement

Kokorich is the co-founder, former CEO, and a former Director of Momentus, a space infrastructure company headquartered in San Jose, California.[6] On October 16, 2017, Kokorich entered into an Indemnification Agreement with Momentus.[7] The Indemnification Agreement obligates Momentus to indemnify Kokorich "to the fullest extent permitted by law."[8] It obligates Momentus to advance all expenses incurred, including attorney's fees, and indemnify Kokorich against all sums paid or imposed on Kokorich for any proceedings "by reason of" Kokorich's status as an officer or director of Momentus.[9] The Indemnification Agreement endures as long as Kokorich is exposed to liability or expense related to his corporate status as an officer or director of Momentus.[10]

Kokorich voluntarily resigned from Momentus in January 2021.[11] Kokorich is now a defendant in various lawsuits and has been a witness or subject of various

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[5] A Timeline of Key Events filed with the FAC is in the Appendix at A-0075-78.
[6] A-0028 ¶15.
[7] A-0028 ¶16; A-0079-93. Momentus was formerly known as Space Apprentices Enterprise Inc., the signatory to the Indemnification Agreement. A-0080.
[8] A-0079-93.
[9] *Id.*; A-0081-82 §§1, 2.
[10] A-0089, §10.
[11] A-0028 ¶15.

government investigations, all relating to his corporate status as an officer and director of Momentus.[12] Momentus has refused to indemnify Kokorich or advance his legal fees and other expenses incurred in these lawsuits and investigations.[13]

B. The Momentus Bylaws

The Amended and Restated Bylaws of Momentus dated February 13, 2020, like the Indemnification Agreement, obligate Momentus to indemnify Kokorich and to advance expenses incurred in connection with any proceeding arising by reason of Kokorich's status as a director and officer of Momentus, to the maximum extent permitted by Delaware law.[14]

C. Planned Merger and Test Launch

To raise capital for research and development, Momentus agreed in October of 2020 to merge with a company called Stable Road Acquisition Corp.[15] In the fall of 2020, Momentus was also preparing for a planned test launch of its space vehicle.[16] Both the merger and planned test launch were important for Momentus's continued operation and success.[17]

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[12] A-0045-49 ¶43-47.
[13] A-0023-24 ¶4.
[14] A-0023 ¶3; A-0108 §6.1; A-0109 §6.3.
[15] A-0029 ¶17.
[16] *Id*.
[17] A-0029-30 ¶18.

D. Government Investigations

Mr. Kokorich is a Russian citizen residing in Switzerland.[18] He is an entrepreneur focused on the aerospace industry. Foreign-owned companies in the space industry are scrutinized by the U.S. government for potential national security issues.[19] In January 2021, the Office of the Under Secretary of Defense notified the SEC of its concerns about foreign control of Momentus.[20] [redacted][21] The [redacted] threatened the pending merger and Momentus's ability to obtain regulatory approvals for the planned test launch of its space vehicle.[22]

[redacted] and allow the merger and test launch to proceed, Kokorich decided to resign voluntarily from Momentus.[23] Kokorich worked with Momentus to help it resolve the [redacted][24] The parties submitted a Joint Voluntary Notice to the Committee on Foreign Investments in the United States ("CFIUS") regarding [redacted]

[18] A-0025 ¶9, A-0030 ¶19.
[19] A-0029-30 ¶18.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] A-0030 ¶21.
[24] A-0031 ¶22.

[redacted][25] CFIUS then commenced its own investigation (the "CFIUS Momentus Investigation").[26]

Kokorich's cooperation was essential to Momentus's planned merger and test launch.[27] Recognizing its duty to indemnify Kokorich and its need for his continuing assistance, Momentus confirmed in a Separation Agreement that it would pay Kokorich's legal fees and expenses relating to his separation from Momentus, including, specifically, the CFIUS Momentus Investigation and the SEC Investigation.

In May 2021, the [redacted] about [redacted] relating to [redacted] (including [redacted][28] [redacted] whether [redacted].[29] Those [redacted] and thus [redacted] falls

[25] A-0030 ¶20.
[26] A-0030 ¶20, A-0045-46 ¶43.
[27] A-0031 ¶22; A-0045-46 ¶43.
[28] A-0040-41 ¶38.
[29] *Id*.

within the scope of the Indemnification Agreement.[30] Through the May 27 Agreement, Momentus agreed to advance and indemnify Kokorich for any fees and other expenses associated with the [redacted][31] but it nonetheless refused to honor its agreement and has not made a single payment of Kokorich's related fees and expenses.[32]

E. The Separation Agreement

Kokorich and Momentus entered into the Separation Agreement dated February 11, 2021.[33] Among other things, Kokorich agreed to cooperate with Momentus and Stable Road to assist with consummating the merger and resolving [redacted][34] The Separation Agreement provides that Momentus will continue to indemnify Kokorich and reimburse up to $500,000 in legal fees related to the separation, the SEC Investigation, and the CFIUS Momentus Investigation.[35]

The Separation Agreement states that "the Indemnification Agreement shall remain in full force and effect."[36] The Separation Agreement includes a release of certain rights by Kokorich, but states that the release "does not apply to [Kokorich's]

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[30] *Id*.
[31] A-0041-42 ¶¶39-40.
[32] A-0046-47 ¶44.
[33] A-0030 ¶21; A-0032 ¶24; A-0116-57.
[34] A-0032 ¶24.
[35] A-0032 ¶24; A-0125 §24.
[36] A-0032-33 ¶25; A-0122 §12.

indemnification rights under the Indemnification Agreement… and the Company's internal governing documents."[37]

F. The National Security Agreement and Stock Repurchase Agreement

Two agreements that were necessary to resolve the [redacted] were a National Security Agreement and the Stock Repurchase Agreement facilitating Momentus's purchase of Kokorich's stock.[38]

G. The Second Amendment to the Separation Agreement: Momentus Board of Directors Formally Approves Parties' Agreement to Increase the Amount of Legal Fees Covered by the Separation Agreement

Kokorich's legal fees arising from the separation and the ongoing SEC and CFIUS Momentus investigations exceeded the parties' initial expectations.[39] As a result, the Separation Agreement was amended twice to increase the reimbursement amounts. The first amendment, not in dispute, increased the reimbursable legal fees under the Separation Agreement from $500,000 to $700,000.[40]

On May 20, 2021, Kokorich's attorney, Justin Huff, emailed Momentus's attorney, Jeanine McGuinness, to request a second amendment to the Separation Agreement to increase the amount of reimbursable legal fees from $700,000 to

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[37] A-0032-33 ¶25; A-0119-20 §6.
[38] A-0033-34 ¶27.
[39] A-0033 ¶26.
[40] *Id*.; A-0159-61.

$950,000.[41] On or about the same day, Mr. Huff spoke by phone with Ms. McGuiness, and Mr. Huff informed her that Kokorich would not move forward with the Stock Repurchase Agreement or National Security Agreement unless Momentus agreed to amend the Separation Agreement again and honor its indemnification obligations going forward.[42]

The next day, May 21, 2021, Ms. McGuinness confirmed via email "the company will agree to the requested increase in legal fees ($250,000)."[43] Ms. McGuinness' email inquired: "Would you please convey to Mikhail and ask him if Dorsey may resume work?"[44] Ms. McGuinness's inquiry reflects her understanding that Kokorich and his counsel would move forward with the Stock Repurchase Agreement and National Security Agreement only if Momentus agreed to amend the Separation Agreement a second time, thus confirming the continuing application of the Indemnification Agreement and Bylaws as stated in the Separation Agreement.[45]

On May 28, 2021, Mr. Huff asked Ms. McGuinness to prepare a short letter agreement further documenting the parties' agreement to amend the Separation

[41] A-0034-35 ¶28; A-0163-65.
[42] A-0034-35 ¶28.
[43] A-0034-35 ¶28; A-0163-65.
[44] A-0034-35 ¶28; A-0163-65.
[45] A-0032-33 ¶25; A-0034-35 ¶28.

Agreement a second time.[46] In his email, Mr. Huff sent proposed language for the amendment:

> Legal Fees Reimbursement. You entered into a letter agreement with the Company on February 11, 2021 governing the terms of your separation (the 'Separation Agreement'). Section 24 of the Separation Agreement was amended to increase the amount of reimbursable legal fees from $500,000 to $700,000 on March 1, 2021, and this agreement hereby amends Section 24 of the Separation Agreement again to increase the amount of reimbursable legal fees from $700,000 to $950,000, **subject to the terms and conditions set forth in the Separation Agreement**, ***and as agreed to by the Company on May 21, 2021.***[47]

Ms. McGuiness responded the same day, stating: "Will do, Justin."[48]

On June 7, 2021, the Momentus Board of Directors adopted a formal resolution that expressly approved the agreement to "increase the amount of reimbursable legal fees from $700,000 to $950,000, subject to the terms and conditions set forth in the Separation Agreement …."[49] The Board Resolution states:

> **Approval of Side Letter**
>
> **WHEREAS**: The Company entered into a letter agreement dated February 11, 2021 with Mikhail Kokorich (the "Separation Agreement").
>
> **WHEREAS**: The Separation Agreement was amended by that certain Side Letter dated March 1, 2021 between the Company and

[46] A-0035 ¶29; A-0163-65.
[47] A-0035 ¶29; A-0163-65 (emphasis added).
[48] A-0035 ¶30; A-0163-65.
[49] A-0035-37 ¶31; A-0167.

> Mr. Kokorich to amend Section 24 of the Separation Agreement to increase the amount of reimbursable legal fees from $500,000 to $700,000.
>
> **RESOLVED**: **That the letter agreement further amending Section 24 of the Separation Agreement to increase the amount of reimbursable legal fees from $700,000 to $950,000, subject to the terms and conditions set forth in the Separation Agreement (the 'Letter Agreement') is hereby approved**, and the Authorized Officers hereby are, and each of them acting singly is, authorized and directed to execute and deliver the Letter Agreement on behalf of the Company, with such modifications and amendments as either of them may, in their discretion, determine to be necessary or advisable, such determination to be conclusively evidenced by the execution and delivery of the Letter Agreement by either of the Authorized Officers.[50]

The same day, Ms. McGuinness conveyed the adopted Resolution's language to Kokorich's attorney by email.[51] Ms. McGuinness stated: "Justin, the below board resolutions were approved today by Momentus' directors."[52] Momentus never requested any further documentation and never identified any additional terms of the agreement. The timing of the Board Resolution was not a coincidence. Ms. McGuinness delivered the Resolution on the day the Stock Repurchase Agreement and National Security Agreement were scheduled to be signed. As shown by Ms. McGuiness's emails, Momentus wanted to ensure that Mr. Kokorich signed

[50] *Id.* (emphasis added).
[51] A-0037 ¶32; A-0167.
[52] A-0037 ¶32; A-0167.

those agreements.[53] Although the parties were scheduled to sign these agreements on June 7, 2021, the day the Board Resolution was provided to Kokorich's counsel, the signing was delayed until the next day.[54] The government notified the parties during the evening of June 7 that its attorneys would do a final review and sign off on the Stock Repurchase Agreement and National Security Agreement the next morning, and the Stock Repurchase Agreement and National Security Agreement were then executed on June 8, 2021.[55]

The Board Resolution and its timing are an "objective manifestation" of the parties' agreement that Kokorich did not release his indemnification rights as the Momentus Board confirmed those rights.[56]

H. May 27, 2021 Letter Agreement

The May 27 Agreement also confirmed Kokorich's rights under the Indemnification Agreement, which provided for advancement and indemnification to Kokorich based expressly upon the Indemnification Agreement. Like the Second Amendment to the Separation Agreement, Kokorich conditioned signing the Stock Repurchase Agreement on Momentus agreeing to the May 27 Agreement. And, it

[53] A-0034-35 ¶28; A-0037 ¶32; A-0163-65; A-0167.
[54] A-0038 ¶34.
[55] A-0038 ¶34; A-0221-36.
[56] A-0035-37 ¶31-32; A-0038 ¶34, n. 3.

was likewise scheduled to be signed on the same day that the Stock Repurchase Agreement was scheduled for execution. Thus, Momentus confirmed Kokorich's ongoing indemnification rights by way of two separate agreements negotiated and executed in connection with the Stock Repurchase Agreement.

More specifically, Kokorich's attorney, Michael Baker, promptly informed Momentus's counsel of the [redacted] and requested confirmation that Momentus would indemnify Kokorich.[57] On May 24, 2021, Mr. Baker spoke by phone with an attorney for Momentus, Dan Kim.[58] During the call, Mr. Baker indicated that Kokorich would not sign the National Security Agreement or Stock Repurchase Agreement unless Momentus confirmed its obligations under the Indemnification Agreement with respect to the [redacted].[59]

Mr. Baker then had a follow-up call with Dan Kim and another attorney for Momentus, Ms. McGuiness, about Momentus's indemnity obligations.[60] On May 26, 2021, Ms. McGuinness confirmed by email that Momentus would indemnify Kokorich with regard to the [redacted].[61] As the

[57] A-0041-42 ¶39.
[58] *Id.*
[59] *Id*.
[60] *Id*.
[61] A-0042-43 ¶40.

parties had discussed, Momentus's agreement to indemnify Kokorich was a condition of Kokorich agreeing to sign the National Security Agreement and Stock Repurchase Agreement.[62]

Momentus and Kokorich executed a Letter Agreement dated May 27, 2021.[63] The Letter Agreement states in part:

> **You entered into an Indemnification Agreement** with Momentus, Inc. (f/k/a Space Apprentices Enterprise Inc.) (the 'Company') as of October 16, 2017 (the 'Indemnification Agreement'). **In accordance with such Indemnification Agreement**, the Company agrees to advance Expenses, as defined in the Indemnification Agreement (including reasonable attorney's fees), and funds in respect of any judgments, penalties, fines and amounts paid in settlement, actually and reasonably incurred by you, or on your behalf, in connection with the [redacted][4]

The parties entered into the May 27 Agreement on the same day that they anticipated signing the National Security Agreement and Stock Repurchase Agreement.[65] [redacted], Momentus, and Kokorich faced [redacted] to finalize and execute those agreements by May 27, 2021.[66] After the parties executed and delivered the May 27 Agreement, the parties and the

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[62] *Id*.
[63] *Id*.
[64] *Id*.; A-0238-40 (emphases added).
[65] A-0041-42 ¶39; A-0051-52 ¶50.
[66] A-0041-42 ¶39; A-0051-52 ¶50; A-0242-67.

government agreed that they could not finalize and execute the Stock Repurchase Agreement or National Security Agreement that day and extended the timeline.[67] The parties signed those agreements 12 days later.[68] No changes were made to the Stock Repurchase Agreement or National Security Agreement during those 12 days that would affect the parties' prior negotiations and agreements regarding indemnification, because the changes primarily pertained to technical details.[69] The releases and "other agreements" language in the Carveout remained the same.[70]

I. Stock Repurchase Agreement Release and Carveout

The Stock Repurchase Agreement accomplished the divestment requirements of the National Security Agreement. It contains mutual releases of certain claims.[71] The Carveout in Kokorich's release expressly *excludes* from the release any claims arising under the Stock Repurchase Agreement "and any of the other agreements executed and delivered in connection herewith …"[72] Two of those "other agreements" are the May 27 Agreement and the Second Amendment to the Separation Agreement.[73]

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[67] A-0051-52 ¶50; A-0242-67.
[68] A-0168-219.
[69] A-0051-52 ¶50; *see* A-0226-230.
[70] A-0051-52 ¶50; *see* A-0226-230.
[71] A-0050-51 ¶49; A-0211-12 §5.
[72] A-0050-51 ¶49; A-0211-12 §5(a).
[73] A-0050-51 ¶49.

At no point during the parties' negotiations leading up to, or during, the execution of the National Security and the Stock Repurchase Agreement did Momentus ever indicate that it believed Kokorich was waiving his rights to indemnification and advancement – the same rights that Kokorich had just negotiated as a condition of signing the National Security Agreement and the Stock Repurchase Agreement.[74] By virtue of the Carveout, Kokorich did not waive his rights to indemnification and advancement mere hours after he obtained confirmation from Momentus of those ongoing rights.[75]

J. SEC and Class Action Lawsuits Following Stock Repurchase Agreement

Following execution of the Stock Repurchase Agreement, several lawsuits were filed naming Kokorich as a defendant and alleging that Kokorich made false statements or omissions in relation to the merger while he was a Momentus officer. In July 2021, the SEC sued Kokorich in the U.S. District Court for the District of Columbia ("SEC Lawsuit").[76] Then, three securities class action lawsuits were filed in July and August 2021 in the U.S. District Court for the Central District of California, all later consolidated ("Class Action Lawsuits").[77] Kokorich requested

[74] A-0052-53 ¶51.
[75] *Id.*; *see* A-0075-78.
[76] A-0048 ¶46.
[77] A-0048-49 ¶47.

advancement and indemnification for these lawsuits. Momentus initially indicated that it anticipated indemnifying Kokorich, but it later reversed course and refused based upon its belatedly discovered release argument.[78]

K. Momentus's Post-Signing Conduct

Momentus's actions after the execution of the National Security Agreement and Stock Repurchase Agreement were inconsistent with the position it is taking in this litigation.[79] Between June and October 2021, Kokorich's counsel submitted more than 15 invoices to Momentus, totaling over $800,000, for work performed in connection with the lawsuits and investigations.[80] Kokorich's counsel made multiple requests for overdue payments.[81] During that five-month period, neither Momentus nor its counsel ever denied Momentus's advancement or indemnification obligations, or asserted that Kokorich released his indemnification and advancement rights.[82] Instead, Momentus's counsel explained during an August 2021 call with Kokorich's counsel that, because of the merger, Momentus was behind in payments, including payments to its own attorneys, as well as Kokorich's attorneys, and that

[78] A-0054-55 ¶53.
[79] A-0053-54 ¶52.
[80] *Id.*
[81] *Id*.
[82] *Id*.

Momentus expected to catch up on its bills now that the merger was complete.[83]

During the same call, Momentus's counsel also discussed Kokorich's pending request for indemnification with respect to the SEC lawsuit that was commenced long after the Stock Repurchase Agreement was signed.[84] Momentus's counsel stated that he expected Momentus would confirm its indemnification of Kokorich for the new lawsuit.[85] At no point during this August 2021 call did Momentus's counsel suggest that Kokorich had released his indemnification or advancement rights under the Indemnification Agreement.[86]

If Momentus's contemporaneous understanding was that Kokorich released his indemnification and advancement rights through the Stock Repurchase Agreement, surely Momentus would have asserted that position during this conference, or sometime during the next few months, when Momentus continued to receive invoices from Kokorich's counsel.[87] But Momentus first asserted its belated release argument in November 2021, approximately five months after the Stock Repurchase Agreement was executed.[88] Momentus's conduct reflects the parties'

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[83] *Id*.
[84] A-0054-55 ¶53.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.

understanding that Kokorich's indemnification rights survived the execution of the Stock Repurchase Agreement.[89]

L. Proceedings Giving Rise to Advancement and Indemnification Obligations

Kokorich seeks indemnification and advancement of legal fees and expenses in connection with the SEC and CFIUS investigations, the SEC Lawsuit, and the Class Action Lawsuits.[90] Pursuant to Section 7(d) of the Indemnification Agreement, Kokorich also seeks advancement of his expenses in connection with his efforts to recover under two insurance policies covering Momentus's current and former directors and officers.[91] Kokorich also seeks reimbursement of attorneys' fees and expenses incurred in connection with enforcing his rights under the Indemnification Agreement.[92]

[89] A-0055-56 ¶54.
[90] A-0045-46 ¶43.
[91] A-0049-50 ¶48, A-0061-62 ¶¶73-78.
[92] A-0065-66 ¶¶90-91.

ARGUMENT

THE CHANCERY COURT ERRED IN GRANTING MOMENTUS'S RULE 12(B)(6) MOTION TO DISMISS KOKORICH'S CLAIMS FOR INDEMNIFICATION AND ADVANCEMENT OF LEGAL FEES AND EXPENSES (COUNTS I - V AND VII)

A. Questions Presented

Did the Chancery Court err in dismissing Kokorich's claims for indemnification and advancement where there are reasonable inferences that: (1) the May 27 Agreement is one of the "other agreements" executed and delivered in connection with the Stock Repurchase Agreement; and (2) the Second Amendment to the Separation Agreement is also one of the "other agreements" executed and delivered in connection with the Stock Repurchase Agreement? These questions were addressed below[93], and considered by the Chancery Court.[94]

Kokorich has identified further bases for this Court to find that an agreement was reached regarding the Second Amendment. These doctrines of Type I and Type II preliminary agreements and implied-in-fact contracts were not referenced in Kokorich's opposition briefing below. They are natural extensions of the FAC allegations and Kokorich's arguments raised below, that a contract was formed

[93] A-0040-43 ¶¶38-41; A-0050-53 ¶¶49-51; A-0059¶ 64; A-0033-37 ¶¶27-32; A-0038 ¶¶34-35, n.3; A-0372-74; A-0368-72.
[94] Op. at 15-25, 31-34.

based on the parties' communications and conduct regarding the Second Amendment.[95] Therefore, these arguments should be considered by the Court "in the interests of justice" under Rule 8.

B. Scope of Review

This Court reviews a trial court's grant of a motion to dismiss *de novo.*[96]

C. Merits of Argument

1. The Chancery Court Failed to Correctly Apply the Legal Standard for a Rule 12(b)(6) Motion by Drawing Unreasonable Inferences in Favor of Momentus and Failing to Hold Momentus to its Burden

This appeal is a *de novo* review of the Chancery Court's Order dismissing the FAC for failure to state a claim. The applicable legal standard is:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'[97]

"Long standing Delaware case law holds that a complaint will survive a motion to dismiss if it states a cognizable claim under any 'reasonably conceivable' set of circumstances inferable from the alleged facts."[98]

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[95] A-0036-37 ¶31; A-0349; A-0362-68.
[96] *Hart v. Parker*, 236 A.3d 307, 309 (Del. 2020) (reversing dismissal).
[97] *Savor, Inc. v. FMR Corp*., 812 A.2d 894, 896-97 (Del. 2002) (citations omitted).
[98] *Windy City Invs. Holdings, LLC v. Teachers Ins. & Annuity Ass'n of Am.*, 2019

The burden of proof is on Momentus for two reasons. First, where a plaintiff seeks advancement or indemnification pursuant to a mandatory provision, as here, the company bears the burden of demonstrating that such advancement or indemnification is not required.[99] Second, "[w]hen a motion to dismiss relies upon affirmative defenses, such as waiver and release," the burden is on the party asserting the affirmative defense, and "the Court may dismiss a claim if the plaintiff includes in its pleadings facts that incontrovertibly constitute an affirmative defense to a claim."[100]

There are no facts alleged in the FAC that "incontrovertibly constitute an affirmative defense to a claim."[101] The FAC clearly alleges that the release contains the Carveout for "other agreements executed and delivered in connection herewith."[102] The FAC identifies two of those "other agreements," the May 27 Agreement and the Second Amendment to the Separation Agreement, and explains in detail how and why they are included within the Carveout, and why those agreements confirm the continued enforceability of the Indemnification Agreement

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Del. Ch. LEXIS 203, at * 25 n. 70 (Del. Ch. May 31, 2019).

[99] *See, e.g. Krauss v. 180 Life Sciences Corp.*, 2022 Del. Ch. LEXIS 54, at *8 (Del. Ch. Mar. 7, 2022).

[100] *Capano v. Capano*, 2003 Del. Ch. LEXIS 125, at *7 (Del. Ch. Nov. 14, 2003).

[101] *Id.*

[102] A-0050-53 ¶¶49-51.

and Bylaws.[103]

The Chancery Court failed to correctly apply the 12(b)(6) legal standard and instead drew unreasonable inferences in favor of the moving party, Momentus. The unreasonable inferences that follow from the Chancery Court's decision include three distinct points:

> **(1) <u>The Chancery Court's decision implies that negotiations for the May 27 Agreement and Second Amendment were meaningless</u>***:* By the logic of the decision, the parties extensively negotiated the May 27 Agreement and Second Amendment to the Separation Agreement, despite knowing that these two agreements were going to be null and void as a result of the Stock Repurchase Agreement release almost immediately after they were each entered into.[104]
>
> **(2) <u>The Chancery Court decision implies that the Momentus Board Resolution was meaningless</u>**: By the logic of the decision, the Momentus Board Resolution approving the Second Amendment to the Separation Agreement was meaningless and the parties understood that it would be rendered moot only hours after Momentus delivered it to Kokorich.[105]
>
> **(3) <u>The Chancery Court ignored Momentus's Inconsistent Actions after signing the Stock Repurchase Agreement</u>:** By the logic of the decision, Momentus forgot about the release for five months after the Stock Repurchase Agreement was executed while the counsel for the parties repeatedly communicated regarding Kokorich's unreimbursed legal fees. Such communications included Momentus's counsel indicating during a meeting months after the execution of the Stock Repurchase Agreement that the overdue payments for Kokorich's fees

[103] A-0033-40 ¶¶27-37; A-0040-43 ¶¶38-41.
[104] A-0035-37 ¶¶ 31-32; A-0043 ¶41; A-0051-52 ¶50; A-0242-67.
[105] A-0035-37 ¶31 and A-0051, ¶49 n. 7.

would be forthcoming and Momentus would be indemnifying Kokorich for a new lawsuit.[106]

These unreasonable inferences violate the 12(b)(6) standard.

2. The Court of Chancery Erred in Finding that the May 27 Agreement Was Not One of the "Other Agreements" Executed and Delivered "in Connection" with the Stock Repurchase Agreement

(a) There is a Reasonable Inference that the May 27 Agreement is Subject to the Carveout

The Stock Repurchase Agreement's Carveout includes any claims arising under the Stock Repurchase Agreement "and any of the other agreements executed and delivered in connection herewith …"[107] There is no dispute that the May 27 Agreement was "executed and delivered."[108] The Stock Repurchase Agreement does not define the phrases "other agreements" or "in connection herewith."

The FAC alleges that the May 27 Agreement is one of the "other agreements" contemplated by the Carveout.[109] The FAC itself establishes a "connection" between the May 27 Agreement and the Stock Repurchase Agreement. It alleges that Kokorich conditioned signing the Stock Repurchase Agreement and National

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[106] A-0054-55 ¶53.
[107] A-0050-51 ¶49; A-0211-12, §5(a).
[108] *See* A-0022-74; A-0238-40; A-0242-67.
[109] A-0040-43 ¶¶38-41, A-0050-53 ¶¶49-51, A-0059 ¶64.

Security Agreement upon the May 27 Agreement.[110] And, the parties entered into the May 27 Agreement on the same day that they were initially scheduled to sign the National Security Agreement and Stock Repurchase Agreement. Only after the May 27 Agreement was executed and delivered did the parties reschedule the timeline for the Stock Repurchase Agreement and National Security Agreement signing, never making any changes affecting the parties' negotiation over indemnification.[111] Both establish a "connection with" the Stock Repurchase Agreement, particularly when all reasonable inferences are made in Kokorich's favor.

The Third Circuit analyzed the phrase "in connection with" in *United States v. Loney*, 219 F.3d 281 (3d Cir. 2000). The Third Circuit reviewed an array of dictionaries and other sources, finding that the phrase "in connection with" captures "a very wide variety of different relationships …."[112] The Third Circuit found that the phrase "is notable for its vagueness and pliability…."[113]

> Other dictionary definitions of the term 'connection' are similarly broad: One defines the term simply as 'an association or a relationship.' … Another explains that the term expresses a 'relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement).' Another defines it as 'association; relationship' …. Together these definitions suggest that the phrase 'in connection with' **expresses some relationship or association, one**

[110] A-0041-43 ¶39-41.
[111] A-0051-52 ¶50; A-0242-67.
[112] *Id.* at 284 (citations omitted).
[113] *Id.* at 283 (citations omitted).

> **that can be satisfied in a number of ways** such as a causal or logical relation or other type of relationship.[114]

Despite this array of meanings[115] of "in connection with," the Chancery Court unreasonably inferred that the phrase requires execution "contemporaneously"—despite the absence of any such requirement — and that the May 27 Agreement had to be executed and delivered at the exact same time as the Stock Repurchase Agreement.[116] That specific approach has been rejected. In *Power & Tel. Supply Co. v. Suntrust Banks, Inc.*,[117] for example, the court stated:

> Plaintiff contends that [a] Commitment Letter is not a 'Credit Document' because it was executed two months after the 2000 Credit Agreement and therefore was not **'executed in connection herewith'** the documents enumerated in the section because the phrase 'in connection herewith' purportedly means 'at the same time' as the Agreement. **However, the plain language of the agreement does not limit 'agreements and writings in connection therewith' to any particular time frame.** … The plain language of the agreement

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[114] *Id.* at 284 (citations omitted) (emphasis added).

[115] *See also, e.g.*, *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (holding that the Supreme Court of the United States "has often recognized that 'in connection with' can bear a 'broad interpretation.'"); *Artz v. Barnhart*, 330 F.3d 170, 175 (3rd Cir. 2003) (rejecting "interpreting the broad phrase 'in connection with' to mean 'immediately follow[ing].'"); *Khimmat v. Weltman, Weinberg & Reis Co., LPA*, 585 F. Supp. 3d 707, 712 (E.D. Pa. 2022) (finding that "[t]he phrase 'in connection with' is a broad one that implies some relationship or association, nothing more."); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 33 F.4th 1202, 1232 (9th Cir. 2022) (finding that the term "in connection with" is broad and means "[i]n relation to; with respect to; concerning.").

[116] Op. at 33, n.105.

[117] 2005 U.S. Dist. LEXIS 49594, at *23 (W.D. Tenn. May 10, 2005).

therefore does not support Plaintiff's contention ….[118]

The *Suntrust Banks* court further held: "Plaintiff contends that the dictionary definition of **'herewith'** is 'along with this.' Even by that definition, no time frame is specified."[119]

Like the agreement in *Suntrust Banks*, the Stock Repurchase Agreement contains no time restriction for the phrase "in connection herewith." If the parties meant "at the same time as" or "on the same day" it would have been easy to include this language in the Carveout. The parties did not. But even if some temporal restriction could properly be inferred on a Rule 12(b)(6) motion, the facts alleged in the FAC satisfy that standard.

The single case relied upon by the Chancery Court, *Beal Bank,* does not address the issue presented here.[120] In *Beal Bank*, the Court found that an Assignment of Rents was signed on the same day as a Mortgage, and therefore the Assignment was "executed and delivered in connection with" the Mortgage.[121] That is not a surprising outcome. But the issue here is whether an agreement that is *not* signed on the same day, simply because the execution of the Stock Repurchase

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[118] *Id.* at *23 (emphasis added).
[119] *Id.* at *23-24, n. 8 (emphasis added).
[120] Op. at 33, n. 105 (citing *Beal Bank v. Lucks*, 1999 Del. Ch. LEXIS 124, at *25-26 (Del. Ch. June 11, 1999)).
[121] *Beal Bank*, 1999 Del. Ch. LEXIS at *25-26.

Agreement was delayed, could also be "in connection herewith." The *Beal Bank* case does not address that issue.

(b) The Chancery Court Should Have Considered Extrinsic Evidence and the Commercial Context in Construing Whether the May 27 Agreement is Subject to the Carveout

The FAC alleges that the May 27 Agreement and the Second Amendment to the Separation Agreement are "other agreements" within the scope of the Carveout.[122] The Stock Repurchase Agreement does not define "other agreements." While Section 6(f) of the Stock Repurchase Agreement references the National Security Agreement, the phrase "other agreement**s**" is plural and cannot mean just the National Security Agreement. Kokorich offered a reasonable interpretation of this clause that included the May 27 Agreement and the Second Amendment to the Separation Agreement. Momentus's motion to dismiss disputed that these were included in the "other agreements" but did not offer its own definition.[123] Likewise, the Court did not identify any "other agreements" contemplated by the Carveout and

[122] A-0040-43 ¶¶38-41; A-0050-53 ¶¶49-51; A-0059 ¶64; A-0033-37 ¶¶27-32; A-0038 ¶¶34-35, n.3.
[123] A-0297-307. Momentus only belatedly offered an interpretation in its reply brief. A-0407-08, n. 1

instead confined its analysis to a time restriction that is inconsistent with how other courts interpret "in connection with."[124]

"When … the meaning and application of contract terms are uncertain, a court fulfills [its] duty [to preserve the parties' expectations that form the basis of a contractual relationship] by considering extrinsic evidence."[125] By contrast, a contract is unambiguous when the agreement "leaves no room for uncertainty" and there is "only one reasonable interpretation."[126] In evaluating ambiguity, courts may consider "the commercial context between the parties," meaning their "view of the overall transaction and associated description[s] of the transaction without running afoul of the parol evidence rule."[127] The commercial context pleaded by Kokorich supports a reasonable inference that the May 27 Agreement was unambiguously one of the "other agreements" made "in connection with" the Stock Repurchase

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[124] Op. at 32-34.

[125] *Eagle Indus., Inc. v. DeVilbiss Health Care*, *Inc*., 702 A.2d 1228, 1233-34 (Del. 1997); *see Hartley v. Consol. Glass Holdings, Inc*., 2015 Del. Ch. LEXIS 253 (Del. Ch. Sept. 30, 2015) (no release found where the parties' overt acts, dealings, and correspondence supported the interpretation that the parties did not intend to release certain obligations).

[126] *Greenstar IH Rep, LLC v. Tutor Perini Corp*., 2019 Del. Ch. LEXIS 1380, *21 (Del. Ch. Dec. 4, 2019) (citations and quotation marks omitted).

[127] *Id.* (citations and quotation marks omitted); *see also Pearl City Elevator, Inc. v. Gieseke*, 2021 Del. Ch. LEXIS 54, *22 (Del. Ch. Mar. 23, 2021) ("I begin the contract construction exercise by considering the basic business relationship between the parties so that I may give sensible life to the Agreement when construing its terms") (citation and quotation marks omitted).

Agreement. Again, the FAC pleads that the parties negotiated and intended to execute the May 27 Agreement, Stock Repurchase Agreement, and National Security Agreement together, and Kokorich even conditioned executing the Stock Repurchase Agreement on the May 27 Agreement.

At best for Momentus, the Carveout is ambiguous, particularly when viewed in light of the commercial context demonstrating that the parties viewed executing several agreements (including the May 27 Agreement, Second Amendment to the Separation Agreement, Stock Repurchase Agreement, and National Security Agreement) as part of a broader transaction. The parties offered dueling alternative interpretations of the undefined term, "other agreements." Even if it was inclined to construe "in connection with" more narrowly than other courts have, the Chancery Court should have considered extrinsic evidence in construing the Carveout.[128] Based on that extrinsic evidence, a trier of fact could reasonably infer that the May 27 Agreement is one of the "other agreements" subject to the Carveout.[129] Accordingly, dismissal was not appropriate.[130]

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[128] *Eagle Indus.*, 702 A.2d at 1233-34.

[129] While the Chancery Court did not address any limitations on extrinsic evidence with respect to the Second Amendment to the Separation Agreement, the same analysis applies, and likewise requires the consideration of extrinsic evidence in interpreting the Carveout.

[130] *See Appriva S'holder Litig. Co., LLC v. ev3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007) (citation omitted) ("Dismissal is proper only if the defendants' interpretation

(c) The May 27 Agreement is Based on, and Confirms the Ongoing Existence and Enforceability of, the Indemnification Agreement

Like the Separation Agreement, the May 27 Agreement specifically cites Momentus's continuing obligations under the Indemnification Agreement: "You entered into an Indemnification Agreement with Momentus, Inc. … as of October 16, 2017 (the 'Indemnification Agreement')." In accordance with such Indemnification Agreement, the Company agrees to advance Expenses …" This confirmed the parties' understanding and intent that Momentus would continue to indemnify Kokorich and advance expenses both before and after execution of the Stock Repurchase Agreement. This is precisely why Kokorich made the May 27 Agreement a condition of signing the Stock Repurchase Agreement and excluded it from the release. Otherwise, the May 27 Agreement — signed on the day the parties were scheduled to sign the Stock Repurchase Agreement — would have been meaningless.

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is the only reasonable construction as a matter of law," meaning it is unambiguous).

3. The Chancery Court Erred in Finding that the Second Amendment to the Separation Agreement was not one of the "Other Agreements" Executed and Delivered "in Connection" with the Stock Repurchase Agreement

(a) There is a Reasonable Inference that the Second Amendment to the Separation Agreement was one of the "Other Agreements" Subject to the Carveout

On June 7, 2021, the Momentus Board formally "approved" the Second Amendment to the Separation Agreement.[131] Momentus delivered the Board Resolution to Kokorich's counsel that same day.[132] June 7 was the rescheduled timeline for executing the Stock Repurchase Agreement and National Security Agreement.[133] Because of another delay by the government, those agreements were signed the next day.[134]

The FAC alleges that Kokorich conditioned his execution of the Stock Repurchase Agreement on Momentus's agreement to the Second Amendment.[135] There is a reasonable inference that the Second Amendment was one of the "other agreements" excluded from the release.

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[131] A-0035-37 ¶31.
[132] A-0037 ¶32.
[133] A-0038, n. 3; A-0051-52 ¶50; A-0260-61.
[134] A-0038, ¶34, n. 3; A-0226.
[135] A-0033-35 ¶¶27-28; A-0038-40 ¶¶36-37; A-0042-43 ¶¶40-41.

(b) The Second Amendment to the Separation Agreement Confirmed the Continuing Enforceability of the Indemnification Agreement

Like the May 27 Agreement, the Second Amendment to the Separation Agreement confirmed the enforceability of the Indemnification Agreement. The Board Resolution states that that the agreement to increase the amount of reimbursable legal fees from $700,000 to $950,000 is "**subject to the terms and conditions set forth in the Separation Agreement** …."[136] The Separation Agreement states that "the Indemnification Agreement **shall remain in full force and effect** …."[137] There is a reasonable inference, at a minimum, that the parties intended for the Indemnification Agreement to survive the execution of the Stock Repurchase Agreement.

(c) There is a Reasonable Inference that the Parties Reached an Agreement on the Only Material Term, and Momentus Intended to be Bound

"Under Delaware law, the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. A valid contract exists when (1) the parties have made a bargain with sufficiently definite terms; and (2) the parties have manifested mutual assent to be bound by that

[136] A-0035-37 ¶31; A-0167 (emphasis added).
[137] A-0032-33 ¶25; A-0122 §12 (emphasis added).

bargain."[138] "[A]ll essential or material terms must be agreed upon before a court can find that the parties intended to be bound by it and, thus, enforce an agreement as a binding contract. What terms are material is determined on a case-by-case basis, depending on the subject matter of the agreement and on the contemporaneous evidence of what terms the parties considered essential."[139]

"It is basic that overt manifestation of assent — not subjective intent — controls the formation of a contract …."[140] Whether the parties manifested an intent to be bound "is to be determined objectively based upon their expressed words and deeds as manifested at the time ...."[141] The Court's determination "must be premised on the totality of all such expressions and deeds given the attendant circumstances and the objectives that the parties are attempting to attain."[142]

"Where one of the parties … expresses its beliefs to the other side during the negotiation process ***or in the course of dealing after consummation***, such expressions may be probative of the meaning that the parties attached to the

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[138] *Sarissa Cap. Domestic Fund LP v. Innoviva, Inc.*, 2017 Del. Ch. LEXIS 842, at *43 (Del. Ch. Dec. 8, 2017) (quotation marks and citations omitted).
[139] *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018) (citations omitted).
[140] "*Indus. Am.," Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971).
[141] *Debbs v. Berman*, 1986 Del. Ch. LEXIS 361, at *18 (Del. Ch. Jan. 29, 1986).
[142] *Id*. at *18-19.

contractual language in dispute."[143] Here, not only did Momentus express its understanding that the parties reached agreements regarding Kokorich's ongoing indemnity rights, but its actions after signing (i.e. failing to mention the release for five months while indicating that it would be making overdue payments and providing indemnification for a new lawsuit) are probative of its understanding of these agreements.

Moreover, contracts can be formed over the course of negotiations, through multiple writings and oral statements.[144] As the Chancery Court has explained:

> [O]ur inquiry is the 'objective' one: whether a reasonable man would, based upon the 'objective manifestation of assent' and all of the surrounding circumstances, conclude that the parties intended to be bound by contract…. 'This is not a simple or mechanical test to apply. Negotiations typically proceed over time with agreements on some points being reached along the way towards a completed negotiation. **It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed.**[145]

"Thus, determination of whether a binding contract was entered into will depend on the materiality of the outstanding issues in the draft agreement and the circumstances

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[143] *In re IBP, Inc. S'Holders Litig. v. Tyson Foods*, *Inc.*, 789 A.2d 14, 55 (Del. Ch. 2001) (emphasis added).
[144] *See Sarissa Cap.*, 2017 Del. Ch. LEXIS 842, at *43-53 (emails, draft agreement and phone call formed agreement); *Gomes v. Karnell*, 2016 Del. Ch. LEXIS 177, at *9-15 (Del. Ch. Nov. 30, 2016).
[145] *Greetham v. Sogima L-A Manager LLC*, 2008 Del. Ch. LEXIS 160, at *34, *53 (Del. Ch. Nov. 3, 2008) (citations and quotation marks omitted) (emphasis added).

of the negotiations."[146]

The "totality" of the parties' expressions and deeds demonstrates a reasonable inference that: (1) the parties expressed an intent to be bound; (2) the agreement was sufficiently definite as to its material terms; and (3) there was consideration.[147] Here, the Second Amendment to the Separation Agreement contained only one material term: Momentus agreed to amend the Separation Agreement to increase the amount of reimbursable fees to induce Kokorich to resume work and sign the Stock Repurchase Agreement and National Security Agreement.[148] There are no other terms—much less "material" terms—that required further negotiation. Thus, there is a reasonable inference that Momentus and Kokorich agreed to all "material" or "essential" terms of their contract through their negotiations. The Momentus Board specifically and expressly approved the ***sole term that had been discussed*** and previously-agreed upon via the May 21, 2021 communications. The Board did not instruct or require the Momentus officers to make any "modifications and amendments" to the agreement, it merely authorized them to do so. They never did. A reasonable inference is that the authorized officers saw no need for any

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[146] *Id.* at *54; *see also Urban Green Techs., LLX v. Sustainable Strategies 2050 LLC*, 2017 Del. Super. LEXIS 60, at *11-12 (Del. Super. Feb. 8, 2017) (finding binding agreement from negotiations "evidenced in emails" and testimony).
[147] *Estate of Osborn v. Kemp,* 991 A.2d 1153, 1158 (Del. 2010).
[148] *See* A-0038-40 ¶¶36-37; A-0163-65.

"modifications and amendments," and believed that delivery of the Board Resolution itself was sufficient to bind the parties.

The FAC also sufficiently alleges facts supporting finding an implied-in-fact contract.[149] "A contract may exist as either an express contract or an implied-in-fact contract because they are legal equivalents - the first being arrived at by language and the second by actions that demonstrate a meeting of the minds."[150]

As explained by this Court:

> … an offer that invites an acceptance by performance will be deemed accepted by such performance unless there is a manifestation of intention to the contrary. Thus, in the establishment of a contractual obligation, the favored rule shifts the emphasis away from a manifestation of intent to accept to a manifestation of intent not to accept; thereby establishing, it would appear, a rebuttable presumption of acceptance arising from performance when the offer invites acceptance by performance. The law thus rightfully imputes to a person an intention corresponding to the reasonable meaning of his words and deeds.[151]

Here, the parties' words and actions "demonstrate a meeting of the minds."[152] Momentus's attorney stated in her email: "I received confirmation that the company

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[149] A-0034-35 ¶28; A-0035-37 ¶31; A-0163-65; A-0167.
[150] *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 Del. LEXIS 449, at *9 (Del. Oct. 1, 2014) (citations and internal quotation marks omitted); *see Ridley v. Bayhealth Med. Ctr., Inc.*, 2018 Del. Super. LEXIS 138, at *14-15 (Del. Super. Mar. 20, 2018).
[151] *Fulton Indus., Inc.*, 285 A.2d at 416 (citations omitted).
[152] *Phillips*, 2014 Del. LEXIS 449, at *9.

will agree to the requested increase in legal fees ($250,000).… Would you please convey to Mikhail and ask him if Dorsey may resume work?"[153] Kokorich's attorneys did resume work, and the agreements were finalized. The Board then approved the Second Amendment and promptly informed Kokorich of the Board Resolution.[154] As expected and desired by Momentus, Kokorich signed the Stock Repurchase Agreement and the National Security Agreement the next day. The parties' words and actions reflect an implied-in-fact contract.

Even if, *arguendo*, that the parties did not reach a formal final agreement, the parties formed a binding "Type I agreement."[155] "Delaware law has long recognized that parties may make an agreement to make a contract ... if the agreement specifies all the material and essential terms including those to be incorporated in the future contract."[156] The Delaware Supreme Court recognizes "two types of enforceable preliminary agreements" (Type I and Type II).[157] As relevant here, "Type I agreements reflect a consensus on all the points that require negotiation but indicate

[153] A-0034-35 ¶28; A-0163-65.
[154] A-0035-37 ¶31; A-0167.
[155] *See Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 761 (Del. 2022) (citations omitted).
[156] *Id.* (quotations omitted).
[157] *Id.*

the mutual desire to memorialize the pact in a more formal document.... Type I agreements are fully binding."[158]

The FAC alleges that Kokorich asked Momentus to increase the amount of reimbursable legal fees by $250,000.[159] That was the only requested amendment to the Separation Agreement. Momentus's counsel confirmed that "the company will agree to the requested increase in legal fees ($250,000)."[160] The Momentus Board expressly "approved" the increase, specifically linking it to the Separation Agreement.[161] Even if the Court were to conclude that some further letter agreement was needed, these allegations are sufficient to state a claim that the parties reached an enforceable Type I preliminary agreement, since the parties reached an agreement on all material terms.

(d) The Court Erred by Resolving Factual Questions to Infer that Other "Material" Terms Remained to be Negotiated

Factual issues should not be resolved on a motion to dismiss, since all reasonable inferences must be drawn in favor of the non-moving party. The Chancery Court improperly assumed that there were other "material" or "essential"

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[158] *Id.* (citations and internal punctuation omitted).
[159] A-0033-37 ¶¶27-33.
[160] A-0034-35 ¶28.
[161] A-0035-37 ¶31; A-0167.

terms to be negotiated.[162] Yet, there is nothing in the record supporting this assumption, since the parties had a meeting of the minds on the only material term. The Chancery Court should not have attempted to resolve an issue of fact between the Board's express approval of the Second Amendment and the language authorizing, but not requiring, the officers to negotiate any other "necessary" terms.[163] "The intent of the parties is generally a question of fact ...."[164] "Where the evidence is conflicting and two inferences are possible, ... the question is for the jury."[165]

The Court relied on *Ramone v. Lang*[166] for the proposition that the potential for Momentus to negotiate further with Kokorich foreclosed any conclusion that there was a contract.[167] But in *Ramone* there was evidence that the parties continued to negotiate numerous terms.[168] In contrast, the parties here did not conduct any further negotiations. And the fact that the Board's Resolution stated that Authorized Officers "may" make modifications and amendments as necessary does not imply

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[162] Op. at 23-24.
[163] *Id*.
[164] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).
[165] *Ripsom v. Beaver Blacktop, Inc.*, 1988 Del. Super. LEXIS 117, at *33-34 (Del. Super. Apr. 6, 1988) (citation omitted).
[166] *Ramone v. Lang*, 2006 Del. Ch. LEXIS 71 (Del. Ch. Apr. 3, 2006).
[167] Op. at p. 23.
[168] *Ramone*, 2006 Del. Ch. LEXIS 71, at *39-41.

that any negotiations were necessary or that they occurred.[169] There is a reasonable inference that there were no other material or essential terms left to negotiate. Thus, the parties had an enforceable agreement no later than when Momentus's Board identified the specific terms of the agreement, and stated that the agreement "is hereby approved," and Momentus delivered the Board Resolution to Kokorich's counsel.

Even assuming *arguendo*, that there were any additional terms, the parties reached a Type II preliminary agreement whereby the parties "agree on certain major terms, but leave other terms open for future negotiation."[170] Momentus was thus obligated "to negotiate the open issues in good faith," but failed to do so.[171]

(e) There is a Reasonable Inference that Momentus Waived any Need for Further or More Formal Documentation of the Second Amendment to the Separation Agreement

A plan to formalize an agreement "is not dispositive" unless the parties "**positively agree** … that there will be no binding contract until the formal document is executed." [172] "[T]he fact that the parties … manifest an intention to prepare and

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[169] A-0035-37 ¶31, A-0167.
[170] *Cox Commc'ns, Inc.* 273 A.3d, at 761 (citations omitted).
[171] *Id.*
[172] *Anchor Motor Freight*, 716 A.2d at 156 (emphasis added); *see Universal Prods. Co., Inc. v. Emerson*, 179 A. 387, 394 (1935); *see also Loppert v. Windsortech, Inc.*, 865 A.2d 1282, 1287 n.33 (Del. Ch. 2004) (*"*The fact that *Universal Products Co.*

adopt a written memorial **will not prevent contract formation** if the evidence reveals manifestations of assent that are in themselves sufficient to conclude a contract."[173] The parties' intent is generally a factual issue.[174]

In this case, neither party "positively" required a formal written document to memorialize the Second Amendment. The Board's Resolution stated that it "hereby approved" the Second Amendment.[175] It did not state that its approval was conditioned on the delivery of further documentation. Viewing the allegations in a light most favorable to Kokorich, the Board's approval constitutes a binding agreement.

Momentus's attorney's earlier statements on May 21, 2021 further evidence its intent to be bound: "I received confirmation that the company will agree to the requested increase in legal fees ($250,000). … Would you please convey to Mikhail and ask him if Dorsey may resume work?"[176] This agreement was again confirmed by the parties' e-mails on May 28, 2021, which further memorialized what had already been "agreed to by the Company on May 21, 2021."[177]

… and *Anchor Motor Freight* … use the term 'positive' is not lost on the Court.").
[173] *Loppert,* 865 A.2d at 1288 (emphasis added).
[174] *Anchor Motor Freight*, 716 A.3d at 156*;* accord *Sarissa Cap*., 2017 Del. Ch. LEXIS 842 at *44-45.
[175] A-0035-37 ¶31; A-0167.
[176] A-0034-35 ¶28; A-0163-65.
[177] A-0035 ¶30, A-0163-65.

The fact that the Separation Agreement required amendments to be in writing is also not dispositive even if written emails failed to satisfy such a literal requirement.[178] "The prohibition against amendment except by written change may be waived or modified in the same way in which any other provision of a written agreement may be waived or modified, including a change in the provisions of the written agreement **by the course of conduct of the parties**."[179] "[P]arties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit."[180]

The Chancery Court acknowledged that Delaware law permits parties to modify or waive the requirement for an amendment to be in writing.[181] But the Chancery Court found no possibility of a waiver here, relying on the parties having previously agreed to an earlier amendment with more formality.[182] The Chancery Court improperly inferred based on prior conduct that these parties would *never* waive a formality requirement. This is a factual issue, for which all reasonable

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[178] *Pepsi-Cola Bottling Co. v. Pepsico, Inc*., 297 A.2d 28, 33 (Del. 1972).
[179] *Id. (*emphasis added).
[180] *Id*.; *accord Leo Katz & Eslo Indus., Inc. v. Adjustable Steel Prods. Co*., 1989 Del. Super. LEXIS 223, at *7-8 (Del. Super. Jun. 14, 1989) (holding that a clause requiring modifications to be in writing did not prevent the parties from entering into an oral agreement).
[181] Op. at n. 67.
[182] *Id.*

inferences must be drawn in Kokorich's favor.[183] It is reasonable to infer that the parties believed a formal Board Resolution, delivered by counsel the day that the Stock Repurchase Agreement was to be signed, was sufficient "formality." It is improper to assume on a motion to dismiss that contracting parties always follow the exact same procedures, particularly when, as here, their conduct demonstrates otherwise.

(f) There is a Reasonable Inference that the Parties "Executed and Delivered" the Second Amendment to the Separation Agreement

Alternatively, there is a reasonable inference that a binding contract was "executed and delivered" through the parties' emails and the Board Resolution.[184] Agreements can be formed by email and electronic communications may constitute valid signatures.[185] Emails sent by a party's attorney can also form binding agreements.[186] Here, there is a reasonable inference that the parties' agreement

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[183] *See, e.g. Southeastern Chester Cnty. Refuse Auth. v. BFI Waste Servs. of Pa.,* 2015 Del. Super. LEXIS 260, at *12 (Del. Super. June 1, 2015) ("[W]aiver claims are generally issues of fact, requiring an extensive review of the facts").

[184] A-0034-35 ¶¶28-30; A-0163-65; A-00167.

[185] *Trexler v. Billingsley*, 166 A.3d 101 (Del. 2017); *see R.B. v. K.S.*, 2012 Del. Fam. Ct. LEXIS 86, at *15 (Del. Fam. Ct. Nov. 28, 2012) ("Delaware Courts have found electronic communications may constitute valid contracts and signatures") (citations omitted).

[186] *Trexler*, 2017 Del. LEXIS 254 at *8-10 (finding email from attorney formed binding agreement); *Spacht v. Cahall*, 2016 Del. Super. LEXIS 535, at *7 (Del. Super. Oct. 27, 2016) (holding that email from attorney "manifested her clients'

reached via the exchange of their counsel's e-mails on May 20 and 21, 2021 was "executed and delivered."[187] E-mails exchanged by the parties' counsel on May 28, 2021, further memorialized the agreement previously reached on May 21, 2021.[188]

Like emails, Board resolutions may create enforceable agreements.[189] The Board Resolution was adopted by the Board and delivered to Kokorich's counsel only hours before the parties signed the Stock Repurchase Agreement. Thus, the Board Resolution was executed and delivered in connection with the Stock Repurchase Agreement.[190]

Further, the term "execute" does not only mean to sign. One definition of "execute" is to "put completely into effect" and "to perform what is required to give validity to."[191] For example, in *Sarissa Capital*, the court found that an agreement was formed through a series of phone calls, e-mails, a draft settlement agreement, and a phone call confirming the terms of the draft settlement agreement, despite one

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assent to be bound to the parties' agreement and memorialized the key terms of that agreement.").

[187] A-0034-35 ¶28; A-0163-65.

[188] A-0035 ¶30; A-0163-65.

[189] *See UniSuper Ltd. v. News Corp.*, 2005 Del. Ch. LEXIS 205, at *20 (Del. Ch. Dec. 20, 2005) ("If a board enters into a contract to adopt and keep in place a resolution (or a policy) that others justifiably rely upon to their detriment, that contract may be enforceable…").

[190] A-0035-38 ¶¶31-34, n. 3.

[191] Execute, Merriam Webster's Dictionary, available at: https://www.merriam-webster.com/dictionary/execute.

of the parties later determining that they did not want to sign the settlement agreement.[192] What is needed to give validity to an agreement is objective manifestation of assent to the essential terms of the agreement.[193] Here, this was achieved via the parties' May 2021 emails and confirmed in Momentus's Board Resolution.

Finally, the Chancery Court incorrectly found that "Kokorich has not argued that the [Second Amendment] was 'delivered' to him."[194] To the contrary, Kokorich both alleged, and provided copies of, the communications forming the agreement between the parties that were *delivered* to Kokorich via his counsel.[195]

[192] *Sarrisa Cap*., 2017 Del. Ch. LEXIS 842, at *43-53.
[193] *See id.*
[194] Op. at 25.
[195] A-0034-37 ¶¶28-32, A-0038 ¶35, A-0059 ¶64; A-0163-65; A-0167.

CONCLUSION

Kokorich respectfully requests that the Court reverse the Chancery Court's May 15, 2023 Memorandum Opinion and accompanying May 15, 2023 Order, and remand for further proceedings on the merits.

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Dated August 4, 2023

CERTIFICATE OF SERVICE

I, Alessandra Glorioso, hereby certify that on August 4, 2023, a true and correct copy of the Public Version of Appellant's Corrected Opening Brief was served by File & ServeXpress on the following attorneys of record:

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