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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

APPELLANT'S CORRECTED REPLY BRIEF

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INTRODUCTION

The Stock Repurchase Agreement includes a release by Kokorich that is limited by the Carveout. The Carveout excludes from the release any claims arising under "other agreements executed and delivered in connection herewith …." The Chancery Court erroneously defined the phrase "in connection herewith" to mean "contemporaneously," contrary to how numerous courts have construed this phrase. The Court then, in effect, interpreted its own definition to mean *at the same time*. By re-defining the phrase "in connection herewith" to have a strict temporal requirement, the Court changed the meaning of the Carveout and improperly found a waiver of Kokorich's rights in agreements that were negotiated and agreed to in connection with the Stock Repurchase Agreement.

Applying the correct standard of review, with all reasonable inferences drawn in Kokorich's favor, Momentus's motion to dismiss should have been denied. As alleged in the FAC[1], Kokorich conditioned signing the Stock Repurchase Agreement on the parties entering into the May 27 Agreement and the Second Amendment. Those agreements were accordingly among the "other agreements" excluded from the release pursuant to the Carveout. Those two agreements were each based on,

[1] Undefined capitalized terms have the meaning ascribed to them in Kokorich's Corrected Opening Brief ("Opening Brief").

and confirmed, Kokorich's ongoing advancement and indemnification rights under the 2017 Indemnification Agreement.

Momentus's Answering Brief ignores the Chancery Court's failure to adhere to the 12(b)(6) legal standard and ignores multiple unreasonable inferences made in Momentus's favor. It urges this Court to disregard authority showing why the Chancery Court's temporal limitation of the Carveout is incorrect. Momentus then relies upon a nonexistent distinction between the interchangeable phrases "in connection with" and "in connection herewith." The alleged distinction is not supported by any authority.

ARGUMENT

A. Momentus Mischaracterizes Kokorich's Appeal

Momentus mischaracterizes the nature of this appeal. According to Momentus: "Kokorich has appealed only the Chancery Court's dismissal of his claims under the May 27 Letter Agreement and the [Second][2] Amendment."[3] But as stated in Kokorich's Opening Brief, Kokorich's substantive rights to advancement and indemnification originate from the ***2017 Indemnification Agreement*** and ***the Momentus Bylaws***.[4] Kokorich's primary appellate claims thus arise under the Indemnification Agreement and Bylaws, contrary to Momentus's characterization.[5]

B. Momentus Does Not Address Kokorich's Arguments Regarding the Unreasonable Inferences Made by the Chancery Court

As explained in Kokorich's Opening Brief, 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. Among other unreasonable inferences, the Court unreasonably assumed that the parties negotiated and executed the May 27 Agreement and Second Amendment as if the parties intended those agreements to become null and void almost immediately.

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[2] Momentus refers to the Second Amendment to the Separation Agreement as the "Purported Amendment" throughout its Answering Brief ("AAB").
[3] AAB at 3-4.
[4] *See, e.g.* Opening Brief at 25-26.
[5] Kokorich has an additional standalone claim for breach of the May 27 Agreement encompassed by this appeal. *See* A-0064 (Count V).

The Chancery Court's ruling also implies that the Momentus Board passed and delivered its Resolution approving the Second Amendment believing that the rights embodied in the Amendment would be released hours later. That is not a reasonable inference.

Finally, the Chancery Court's ruling implausibly assumes that Momentus forgot about the release upon which it now relies when its lawyers confirmed weeks after the execution of the Stock Repurchase Agreement that Momentus would promptly provide overdue payments for Kokorich's fees and confirmed that Momentus would indemnify Kokorich for a new lawsuit.

Momentus provides no justification for the Chancery Court's unreasonable inferences. There is none. It was error for the Court to dismiss Kokorich's claims.

C. This Court Should Consider Commercial Context in Connection with the Carveout

The FAC alleges that the May 27 Agreement is one of the "other agreements" encompassed by the Carveout.[6] There is no dispute that the May 27 Agreement was "executed and delivered." The FAC alleges a logical and temporal connection between those agreements. It alleges that Kokorich conditioned his willingness to sign the Stock Repurchase Agreement and National Security Agreement on the May 27 Agreement,[7] and that the parties entered into the May 27 Agreement on the

[6] A-0040-43 ¶¶38-41; A-0050-53 ¶¶49-51; A-0059 ¶64.
[7] A-0041-43 ¶39-41.

day they were initially scheduled to sign the Stock Repurchase Agreement and National Security Agreement.[8] These allegations must be accepted as true and alone should have prevented dismissal.

Momentus argues that the parol evidence rule prevents the Court from considering extrinsic evidence about when the Stock Repurchase Agreement and National Security Agreement were originally scheduled to be signed.[9] This argument ignores Delaware's commercial context rule.[10] Courts may consider "the commercial context between the parties," meaning their "view of the overall transaction and associated description[s] of the transaction," in construing commercial agreements "***without running afoul of the parol evidence rule***."[11]

The Carveout contains the undefined phrase "other agreements executed and delivered in connection herewith…." According to Momentus, this Court cannot consider commercial context to understand this language.[12] But in *Chicago Bridge*, this Court reasoned that "[t]he basic business relationship between parties must be understood to give sensible life to any contract."[13] This Court found that the

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[8] A-0051-52 ¶50; A-0242-67.
[9] AAB at 23-24.
[10] This argument also contradicts Momentus's position that the Court should consider commercial context in its favor. AAB at 19-21.
[11] *Greenstar IH Rep, LLC v. Tutor Perini Corp.*, 2019 Del. Ch. LEXIS 1380, at *21 (Del. Ch. Dec. 4, 2019) (emphasis added).
[12] AAB at 23.
[13] *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017).

agreement at issue was unambiguous when "read in full and situated in the commercial context between the parties."[14]

Even before this Court's decision in *Chicago Bridge*, parol evidence could be used to establish facts related to a contract that do not vary or contradict the agreements' written terms. For example, this Court held in *Otto v. Gore* that extrinsic evidence was properly considered to determine whether a party intended to create a trust.[15] As another court explained:

> Although recourse to extrinsic evidence is generally not appropriate in interpreting an unambiguous contract, that does not mean that the court must be blind to the general business context in which a given contract was negotiated. Given the reality that the same word can have more than one general meaning and that the commercial context can influence which meaning the parties intended, the court must take cognizance of the existence of those general meanings in determining whether a contract has only one plausible meaning.[16]

In this case, the commercial context supports a reasonable inference that the May 27 Agreement was one of the "other agreements" made "in connection with" the Stock Repurchase Agreement.

At best for Momentus, the undefined term "other agreements" in the Carveout is ambiguous. In the commercial context pleaded by the FAC, the multiple agreements (including the May 27 Agreement, Second Amendment, Stock

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[14] *Id.* at 926-927.
[15] *Otto v. Gore*, 45 A.3d 120, 131 (Del. 2012).
[16] *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 Del. Ch. LEXIS 33, at *14-15 n.24 (Del. Ch. Feb. 16, 2011).

Repurchase Agreement, and National Security Agreement) were all among the multiple transactions necessary to address government concerns, to divest Kokorich of his ownership interest in Momentus, and to ensure that Kokorich continued to have indemnification rights. "Dismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law."[17] Kokorich has alleged logical and temporal "connections" between the May 27 Agreement and the Stock Repurchase Agreement. At a minimum, these connections show that there is more than one reasonable construction. Accordingly, dismissal was improper.

D. Even if the Court were to Ignore Commercial Context, Extrinsic Evidence is Not Required to Show that the Chancery Court Improperly Excluded the May 27 Agreement from the Carveout

The Chancery Court's restrictive notion that "in connection herewith" must mean *at the same time* is inconsistent with how numerous courts have construed the interchangeable phrases "in connection *with*" and "in connection *herewith*."[18] This is further established by the Stock Repurchase Agreement's inclusion of many clearly stated temporal restrictions in other sections, but not in the Carveout: "On the date hereof"; "on the Closing Date"; "No later than"; "on the First Consummation Date"; "prior to the First Payment Date"; "on the Second Consummation Date"; "after the consummation of"; "As promptly as reasonably

[17] *Appriva S'holder Litig. Co., LLC v. ev3, Inc*., 937 A.2d 1275, 1289 (Del. 2007).
[18] Opening Brief at 28-31.

practicable"; "no later than 5 business days after"; "on or prior to the date hereof"; "less than 2 business days prior to"; "promptly"; "Following the Closing Date" and "Concurrently."[19] These timing limitations show that the parties knew how to impose time limits when they wanted to.[20] Rather than impose a similar timing limitation in the Carveout, the parties used what the Third Circuit has called the vague and pliable phrase "in connection herewith."[21]

E. There is No Meaningful Difference Between "In Connection With" and "In Connection Herewith"

The cases cited in Kokorich's Opening Brief show that the phrase "in connection herewith" in the Carveout does not impose any specific time restriction. Momentus argues that the phrase "in connection with" is broader than the phrase "in connection herewith."[22] None of the cases cited by the parties or the Chancery Court make such a distinction.

Momentus's argument is inconsistent with the *Power & Tel. Supply Co. Inc. v. Suntrust Banks, Inc.* decision that Kokorich cites extensively in the Opening Brief.[23] That court analyzed the phrase "executed in connection **herewith**" and

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[19] A-0206-A-0219, ¶¶ 1, 2, 3, 5, 6.
[20] *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 Del. Ch. LEXIS 353, at *184-85 (Del. Ch. Nov. 30, 2020) (reasoning that the use of efforts-based language in some provisions but not another demonstrated that the drafters "knew how to craft an efforts-based provision when they intended to do so").
[21] *See United States v. Loney*, 219 F.3d 281, 283 (3rd Cir. 2000).
[22] *See* AAB at 25-26.
[23] Opening Brief at 29-30, 33.

found that it did not "limit agreements and writings in connection therewith to any particular time frame."[24] The court held that the term indicates that "no time frame is specified."[25]

Momentus argues that *Suntrust Banks* can be distinguished because it did not involve a general release."[26] There is no reason and no authority to conclude that such a distinction matters.

Momentus distinguishes the phrase "in connection *with*" from the phrase "in connection *herewith*." But Momentus cites no authority showing that the two phrases are interpreted differently.[27] The primary authority upon which Momentus relies is a Texas Court of Appeals case that does ***not*** make a distinction between these two phrases.[28] The Texas Court construed an indemnity provision using the phrase "in connection *herewith*" by analyzing cases using the phrase "in connection *with*" and "in connection herewith" interchangeably.[29]

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[24] *Power & Tel. Supply Co. Inc. v. Suntrust Banks, Inc*., 2005 U.S. Dist. LEXIS 49594, at *23 (W.D. Tenn. May 10, 2005) (emphasis added).
[25] *Id.* at *23-24, n.8.
[26] AAB at 29.
[27] AAB at 28.
[28] *RKI Expl. & Prod., LLC v. Ameriflow Energy Servs., LLC*, 2022 Tex. App. LEXIS 4331 (Tex. App. June 23, 2022).
[29] *E.g., id.,* at *31, *34-36, *37, *38, *41-43.

Momentus also relies on an agreement attached as an exhibit to an unpublished bankruptcy court order.[30] The agreement includes the phrase "at any time executed and/or delivered in connection therewith."[31] Momentus argues that a failure here to include the words "at any time" in the Carveout entitles *Momentus* to an inference in its favor. Momentus is not entitled to any such inferences on a motion to dismiss. Moreover, the bankruptcy order does not contain any analysis or discussion of the quoted phrase.

Momentus relies on the definition of "herewith" in Black's Law Dictionary, but that definition similarly fails to make the distinction Momentus seeks. The Black's Law definition of "herewith" is "with or in this letter or document."[32] If that definition were inserted in place of "herewith" in the Carveout, it would read "in connection with or in this [agreement]…." This phrasing is no different than "in connection with."

The Chancery Court also drew no distinction between "in connection with" and "in connection herewith;" it uses them interchangeably.[33] The single case cited

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[30] *In re Bison Bldg. Materials, LLC*, 2009 Bankr. LEXIS 5077 (Bankr. S.D. Tex. July 1, 2009).
[31] *Id.* at *53.
[32] AAB at 26 (citing *Herewith*, Black's Law Dictionary (11th ed. 2019).
[33] *See, e.g.* Op. at 34 (discussing "the meaning of 'executed and delivered **in connection herewith**'…the May 27 Agreement does not qualify as an agreement 'executed and delivered **in connection' with** the Stock Repurchase Agreement.") (emphasis added).

by the Chancery Court regarding the timing issue used the phrase "in connection with," thus impliedly rejecting Momentus's argument.[34]

F. The Court Should Consider the "In Connection Herewith" Authority Cited by Kokorich in his Opening Brief

Momentus wrongly contends that Kokorich "never objects" to the Chancery Court's temporal interpretation of "in connection herewith," and thus the Court should not consider Kokorich's "broader logical" connection.[35] To the contrary, Kokorich specifically argued below that the May 27 Agreement was one of the "other agreements executed and delivered in connection with" the Stock Repurchase Agreement because: (1) Kokorich conditioned signing the Stock Repurchase Agreement and National Security Agreement upon the May 27 Agreement; and (2) the parties entered into the May 27 Agreement on the same day they were scheduled to sign the Stock Repurchase Agreement and National Security Agreement.[36] During oral argument, Kokorich's counsel also stated: "Momentus has made a temporal argument [that] in connection herewith has a temporal meaning. That's nowhere found in the agreement."[37] Kokorich's position was fairly presented

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[34] Op. at 33, n. 105 (citing *Beal Bank v. Lucks*, 1999 Del. Ch. LEXIS 124, at *25-26 (Del. Ch. June 11, 1999)).
[35] AAB at 24-25.
[36] A-0041-43 ¶39-41; A-0372-374.
[37] A-0306-307.

below.[38]

Kokorich provided new authority in his Opening Brief because Momentus did not cite case law on this issue in the Chancery Court. Momentus merely argued that the May 27 Agreement was executed nearly two weeks earlier.[39] In response, Kokorich likewise relied upon his own factual assertions as to why the May 27 Agreement *did* fall within the Carveout, which were logical and temporal.[40] The Chancery Court first asserted its strict temporal interpretation in its Opinion, in which it provided a restrictive definition for "in connection herewith" that was never suggested by either party.[41] In doing so, it relied upon a single case also not cited by the parties.[42] Accordingly, the need for further authority and briefing on this issue became necessary only after the Court's invocation of its restrictive definition.

In similar situations, this Court has found that it is in the interest of justice to allow parties to present new legal arguments on appeal to address rulings made without prior notice by the trial court,[43] or where the underlying factual arguments

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[38] The Chancery Court incorrectly stated that the parties agreed on this temporal requirement. Opp. at 33.
[39] A-0427.
[40] A-0372-374.
[41] Op. at 33.
[42] *Id.*
[43] *See Reddy v. MBKS Co. Ltd.*, 945 A.2d 1080, 1085-1086 (Del. 2008); *Lawson v. Preston L. McIlvaine Const. Co., Inc.*, 1988 Del. LEXIS 381, at *5-6 (Del. 1988).

were raised.[44] Both circumstances apply here. This Court should consider the authority cited by Kokorich in his Opening Brief, which merely provides additional authority for arguments presented below.

G. No Changes were made to the Stock Repurchase Agreement or National Security Agreement Regarding Indemnification after the May 27 Agreement was Finalized

Kokorich's Opening Brief, citing the FAC, states that no changes relating to indemnification were made to the Stock Repurchase Agreement or National Security Agreement after the May 27 Agreement was finalized.[45] In particular, the key elements—the releases and the Carveout—remained the same.[46] Momentus argues: "the very communications cited by Kokorich demonstrate that the parties continued to negotiate the Stock Repurchase Agreement."[47] But those communications about technical changes do not establish that the parties continued to negotiate any terms relating to indemnification. No such negotiations occurred after May 27, 2021. Momentus's contention is not a basis for the Court to ignore Kokorich's well-pleaded allegations that no such negotiations took place.[48]

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[44] *See Robino-Bay Court Plaza, LLC v. West Willow-Bay Court LLC*, 2009 Del. LEXIS 655, *3-5 (Del. 2009); *North River Ins. Co. v. Mine Safety Appliances Co*., 105 A.3d 369, 382-383 (Del. 2014).
[45] Opening Brief at 18 (citing A-0051-52 ¶50; *see* A-0226-230).
[46] *Id*.
[47] AAB at 30.
[48] The language of the Carveout did not change after May 27, 2021, yet Momentus asks the Court to infer that its meaning somehow changed after that date. There is

H. Momentus is Not Entitled to an Inference that the Parties Wanted to Completely "Sever Their Relationships"

Momentus objects to the Court considering any commercial context identified by Kokorich, but then asks the Court to consider commercial context in its favor.[49] Both releases in the Stock Repurchase Agreement contain carveouts for "other agreements." If the parties wanted to completely sever all relationships, there would have been no such carveouts. Although Momentus repeatedly refers to the releases as "general releases," the carveouts make them limited releases.

None of the cases Momentus relies upon have facts at all similar to this case.[50] The *Geier* case was decided under New York law and contained "no carve-outs."[51] There is no discussion of carveouts in *Hob Tea Room*[52] or *Hicks v. Sparks*.[53] None of the cases cited by Momentus resolve the meaning of the Carveout.

I. Momentus is Not Entitled to Favorable Inferences Based on Ambiguities or Inartful Drafting

Momentus argues that the Kokorich and Momentus releases are essentially the same, but that Momentus expressly carved the Separation Agreement out of its

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no support for this anywhere in the FAC, and it would require an impermissible inference in Momentus's favor.

[49] AAB at 19.

[50] AAB 19-20.

[51] *Geier v. Mozido, LLC*, 2016 Del. Ch. LEXIS 149, at *9 (Del. Ch. Sep. 29, 2016) ("The General Release…contains no carve-outs or limitations.").

[52] *Hob Tea Room, Inc. v. Miller*, 89 A.2d 851 (Del. 1952).

[53] *Hicks v. Sparks*, 89 A.3d 476 (Del. 2014).

release, thus demonstrating that the Second Amendment was not one of the "other agreements" in Kokorich's release.[54] This argument is wrong.

"Other agreements" is not defined in the Stock Repurchase Agreement. As previously shown, there are logical and timing connections between the Stock Repurchase Agreement and the "other agreements" that preserve Kokorich's indemnification rights. They support a reasonable inference that those agreements were carved out of the release. To the extent there is an ambiguity, the parties' intent concerning the term "other agreements" is a factual issue that cannot be decided on a motion to dismiss.[55]

It is not proper to dismiss this case based on an ambiguity or even potential surplusage generated in the time-pressured context of the subject agreements.[56] "Inartfully drafted documents…may make it impossible to avoid rendering a specified term or terms superfluous and at the motion to dismiss stage 'any ambiguity must be resolved in favor of the nonmoving party.'"[57]

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[54] AAB at 14.

[55] *See, e.g. Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (The intent of the parties is generally a question of fact).

[56] *CSH Theatres, LLC v. Nederlander of S.F. Assocs.*, 2015 Del. Ch. LEXIS 115, at *32 (Del. Ch. Apr. 21, 2015).

[57] *Id.*; *see Vianix Del. LLC v. Nuance Communs., Inc.*, 2010 Del. Ch. LEXIS 171, at *56 (Del. Ch. Aug. 13, 2010)(finding inartful drafting rendered contract language ambiguous); *Revolution Retail Sys.,LLC v. Sentinel Techs., Inc.*, 2015 Del. Ch. LEXIS 276, at *62 (Del. Ch. Oct. 30, 2015) ("Because the 'Term' of the Software License Agreement is not defined and that appears to be the product of inartful drafting, the Term of the agreement could be considered ambiguous."); *Washington*

Momentus's contention, first raised on reply below,[58] is that "other agreements" means the National Security Agreement and its annexes. Adopting this interpretation would produce an absurd result.[59] One of those annexes is an agreement between Momentus and an entity controlled by Kokorich's co-founder.[60] Kokorich would have no reason to carve out from his release an agreement that he is not party to. Momentus's interpretation would also result in surplusage because the Stock Repurchase Agreement between Kokorich and Momentus is one of the annexes and would be excluded twice within the Carveout.

Finally, Momentus relies on a case with a different legal standard than applies here.[61] *Roseton* concerned the plaintiffs' preliminary motion for a temporary restraining order. The relevant legal standard on that non-dispositive motion was whether the plaintiffs were likely to prevail on the merits.[62] Momentus's motion to dismiss is dispositive, and requires Kokorich's well-pleaded allegations to be accepted as true and all reasonable inferences to be drawn in his favor.

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v. Preferred Commun. Sys. Inc., 157 A.3d 1226, 1232-33 (Del. 2017) (rejecting narrower construction of "any indebtedness" because any ambiguity had to be resolved in plaintiff's favor, even if defendant's interpretation was "plausible").

[58] A-408.

[59] *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.")

[60] B-072-085.

[61] *See Roseton OL, LLC v. Dynegy Hldgs. Inc.*, 2011 Del. Ch. LEXIS 113 (Del. Ch. July 29, 2011).

[62] *Id*. at *31-33, 41.

J. Momentus Incorrectly Claims that the Parties Did Not Agree to All Essential Terms of the Second Amendment

Momentus argues that the Board Resolution could not indicate an acceptance of an offer because it "empowered" the Momentus officers to negotiate additional terms for the Second Amendment.[63] But no further negotiations occurred. The day the Board approved the Second Amendment, Momentus's counsel emailed the language of the Resolution to Kokorich's counsel. There is a reasonable inference the Momentus officers determined that no "modifications" or "amendments" were "necessary or advisable." There is a reasonable inference, at a minimum, that the parties had reached agreement on all essential terms of the Second Amendment as proposed by Kokorich and approved by the Board.

K. Momentus's Approval of the Second Amendment was Not Conditional or Contingent

Momentus argues that the Board Resolution approving the Second Amendment is "conditional and contingent."[64] But that argument ignores key language in the Resolution.

After acknowledging in "Whereas" clauses in the Separation Agreement and the first amendment to the Separation Agreement, the Resolution describes the sole

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[63] AAB at 35.
[64] AAB at 37.

material term of the Second Amendment—the increase in reimbursable fees—and approves that term. The Resolution states:

> **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….[65]

There is nothing conditional or contingent about the Board's approval.

The Board simultaneously "authorized and directed" corporate officers to "execute and deliver" the Second Amendment.[66] Finally, the Board authorized, but did not direct or require, the officers to make any changes they determined to be "necessary or advisable."[67]

The FAC, and reasonable inferences in Kokorich's favor, establish that: (1) Momentus's attorney delivered the Resolution to Kokorich's attorney on June 7, 2021; (2) the Momentus officers never mentioned any need for changes to the agreement; and (3) Kokorich signed the Stock Repurchase Agreement and National Security Agreement the next day.[68]

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[65] A-0035-37 ¶31; A-0167 (emphasis added).
[66] *Id.*
[67] *Id.*
[68] A-0037, ¶¶31-35.

There is at least a reasonable inference that all required elements of contract formation exist. "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 bargain."[69]

Momentus argues that the Resolution required the agreement to be "conclusively evidenced" by a writing "executed and delivered by Authorized Officers…."[70] But that is not what the Resolution says. The Resolution says that ***if*** the officers make a "determination" that changes are "necessary or advisable," then "***such determination*** [is] to be conclusively evidenced by the execution and delivery of the Letter Agreement by either of the Authorized Officers."[71]

The issue before this Court is whether the Resolution could, under "any reasonably conceivable set of circumstances susceptible of proof,"[72] establish that the parties reached a meeting of the minds sufficient to form a binding agreement. It is not reasonable to infer that the Board's unconditional approval of the one

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[69] *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).
[70] AAB at 37.
[71] A-0167.
[72] *Windy City Invs. Holdings, LLC v. Teachers Ins. & Annuity Ass'n of Am.*, 2019 Del. Ch. LEXIS 203, at *25 n. 70 (Del. Ch. May 31, 2019)(quotations omitted).

material term that the parties ever discussed was negated by nonexistent additional terms never raised by Momentus.

L. The Parties Did Not "Positively Agree" that Further Documentation was Required

Momentus contends that further documentation of the Second Amendment was contemplated and therefore cannot bind the company. But under Delaware law that does not prevent contract formation.[73] In *Sarissa Capital*, both parties contemplated that their oral settlement agreement would be followed by additional "paperwork."[74] But neither party indicated "that the settlement was contingent upon the execution of a written agreement…."[75] The Court held:

> Insofar as the parties might have understood that the agreement…should be formally drawn up and executed, the evidence makes clear that parties did not *positively agree* that such agreement should not be binding until so reduced to writing and formally executed. Here, the manifestations of assent made by Denner and Tyree, respectively, during their 2:30 PM Call were in themselves sufficient to conclude an oral contract between Sarissa and Innoviva.[76]

The *Sarissa Capital* Court issued a declaratory judgment after a trial. Even by a preponderance of evidence standard higher than the standard applicable here, the

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[73] *Sarissa Cap.*, 2017 Del. Ch. LEXIS 842, at *50-51.
[74] *Id.* at 50.
[75] *Id*. at 50-51.
[76] *Id*. (citations and internal punctuation omitted; italics in original).

court found that merely contemplating further documentation did not prevent contract formation.[77]

"The pleading standards governing the motion to dismiss stage of a proceeding in Delaware…are minimal."[78] Yet many of the Chancery Court's findings and Momentus's arguments improperly suggest a summary judgment standard, or even fact finding against Kokorich.[79]

M. Kokorich Addressed the Chancery Court's Ruling Regarding Waiver of the "No Oral Modification" Clause

The Separation Agreement contains a clause requiring any amendment or modification to be in writing and signed by the parties (the "No Oral Modification" clause). Momentus argues that Kokorich failed to address the Chancery Court's erroneous factual finding that the parties' did not intend to waive the No Oral Modification clause when they agreed to the Second Amendment.[80] In fact, Kokorich addressed this erroneous factual finding directly:

> 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 inferences must be drawn

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[77] *Id.* at *52.
[78] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).
[79] *See* Opening Brief at 43-44, 46-47; AAB at 30-31, 36-37; *see, e.g. Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, Inc.*, 624 A.2d 1199, 1205-07 (Del. 1993) (premature to resolve factual issues on motion for judgment on pleadings); *Krasner v. Moffett*, 826 A.2d 277, 279, 287-88 (Del. 2003) (error to resolve factually-intensive inquiry on 12(b)(6) motion).
[80] AAB at 36.

> in Kokorich's favor. 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.[81]

Thus, Kokorich *did* address the issue, and there is a reasonable inference that the Momentus officers decided that delivery of the formal Board Resolution was sufficient "formality." And, Momentus obtained exactly what it wanted from the bargain: Kokorich's attorneys resumed work on the Stock Repurchase Agreement and National Security Agreement and Kokorich signed them.[82]

Delaware law provides that contracts can be formed over the course of negotiations, in multiple writings, once all of the material terms have been agreed upon.[83] The parties' emails and the Board Resolution constitute such a course of agreement.[84] Kokorich has also established how the parties "executed and delivered" the Second Amendment.[85] Momentus simply disregards this analysis.

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[81] Opening Brief at 46-47 (citation omitted).
[82] *Id.* at 41.
[83] *Id.* at 38 (citing authority).
[84] *Id.* at 47-48.
[85] *Id.* at 47.

N. The Interests of Justice are Served by the Court Considering Additional Reasons in Support of Propositions Urged Below Regarding Contract Formation

Momentus asserts that Kokorich waived his argument that the Second Amendment is a binding Type I or Type II preliminary agreement or an implied-in-fact contract.[86] These legal bases for finding contract formation are not a new theory of the case, but rather, additional reasons that support the arguments made below.[87] As this Court has explained:

> [W]e will not permit a litigant to raise in this Court, for the first time, matters not argued below where to do so would be to raise an entirely new theory of his case; but where the argument is merely an additional reason in support of a proposition that was urged below, we find no reason why, in the interest of a speedy end to litigation, the argument should not be considered.[88]

Kokorich's preliminary agreement and implied-in-fact arguments are closely related to the reasons Kokorich urged below for finding that the Second Amendment is a binding agreement. They are based on the same facts that support Kokorich's other legal arguments, namely that the parties' conduct evidences an objective manifestation to be bound on the one material term to the Second Amendment and

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[86] AAB at 39-41.

[87] *Robino*, 2009 Del. LEXIS, at *4-5.

[88] *Id.*, citing *Kerbs v. Calif. E. Airways, Inc.*, 90 A.2d 652, 659 (Del. 1952), *reargument denied* 91 A.2d 62; *Wit Cap. Group, Inc. v. Benning*, 897 A.2d 172, 184 n.48 (Del. 2006) (allowing "new" theory and arguments that were "sufficiently related" to those raised by plaintiffs in court below); and *Mundy v. Holden*, 204 A.2d 83, 87-88 (Del. 1964).

their intent to waive any need for additional formalities.[89] This is not a new theory of the case. As in *Robino*, "[f]actual arguments that would support" the new legal theory "were presented to, and addressed by, the Court of Chancery."[90]

Momentus asserts in conclusory fashion that "the parties' actions do not demonstrate the existence of an implied-in-fact agreement."[91] To the contrary, Kokorich detailed the basis for an implied-in-fact agreement in his Opening Brief.[92] Momentus provides no substantive response.

Momentus also attempts to distinguish *Cox Commc'ns., Inc. v. T-Mobile US, Inc.*[93] on its facts in response to Kokorich's Type I Preliminary Agreement argument.[94] Type I preliminary agreements "reflect a consensus on all points that require negotiation but indicate the mutual desire to memorialize the agreement in a more formal document."[95] A Type II preliminary agreement occurs where the parties "agree on certain major terms, but leave other terms open for future negotiation."[96] Here, the parties reached an enforceable Type I preliminary agreement because they reached consensus on all material terms. *Cox*

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[89] A-346-50, A-362-67.
[90] *Robino*, 2009 Del. LEXIS, at *5.
[91] AAB at 43.
[92] Opening Brief at 40-41.
[93] 273 A.3d 752 (Del. 2022).
[94] AAB at 42.
[95] *Cox Commc'ns.*, 273 A.3d at 761 (internal quotations and citations omitted).
[96] *Id.*

Communications involved a Type II preliminary agreement, and thus Momentus's argument fails to address Kokorich's Type I preliminary agreement argument altogether.

Even with respect to Kokorich's Type II preliminary agreement argument, an "objective, reasonable third party"[97] could certainly find that the parties reached agreement on the one material term formally "approved" by the Board, the increased fees to be advanced by Momentus. If the Momentus officers had determined that any "modifications" or "amendments" were "necessary or advisable," the parties would have been obligated to negotiate the additional terms in good faith.[98]

Momentus cites *Hindes v. Wilmington Poetry Soc'y*[99] for its argument that the Second Amendment is an unenforceable "agreement to agree." But in *Hindes*, the Court found that the parties had failed to reach an agreement on "one of the most important aspects of any agreement," the amount of compensation to be paid.[100] Here, the parties reached agreement on the only material term they ever discussed.

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[97] *Id.* at 760.
[98] *Id.* at 760-61.
[99] 138 A.2d 501, 503-504 (1958).
[100] *Id.* at 503.

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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