



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

MICHAEL O'NEILL, :  
 :  
 :  
 Plaintiff-Below, :  
 Appellant, : No. 23, 2026  
 :  
 v. : Court Below:  
 : Court of Chancery of the  
 SUMMIT MATERIALS, INC., : State of Delaware  
 :  
 Defendant-Below, : C.A. No. 2025-0695-LM  
 Appellee. :

**PLAINTIFF-BELOW/APPELLANT'S REPLY BRIEF**

Daniel E. Meyer (#6876)  
**JOHNSON VAN KWAWEGEN LLP**  
221 W. 10th Street, Suite 423  
Wilmington, DE 19801  
(302) 330-8010  
daniel@jvk-law.com

*Counsel for Plaintiff-Below/Appellant  
Michael O'Neill*

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CITATIONS .....	iii
INTRODUCTION .....	1
ARGUMENT .....	5
I.    The Parties Agree That The Court’s Review Is <i>De Novo</i> .....	5
II.   The Trial Court Erred In Refusing To Apply The Credible Basis Test As The Standard By Which To Judge Plaintiff’s Demand .....	5
III.  The Trial Court Erred In Applying A Bright-Line Rule Barring Plaintiff From Pursuing Inspection Relief Solely Because He Filed A Plenary Action First.....	10
A. <i>Verifone</i> Requires Reversal.....	10
B. <i>CHC Investments</i> and <i>Khanna</i> Require Reversal .....	11
C.  Treating A Change In The Law As A Special Circumstance Is More Faithful To Summit’s Authorities.....	13
D.  Summit’s Second-Guessing Makes No Sense .....	14
IV.  The Trial Court Erred In Interpreting The Access Agreement To Limit Plaintiff’s Right To Inspection Based On Post-Closing Events .....	17
A.  The Court Should Analyze Plaintiff’s Breach of Contract Claim Because Plaintiff Did Not Waive It And The Court of Chancery Addressed It On The Merits .....	17
B.  The Trial Court Erred In Holding That Post-Closing Events Eliminated Plaintiff’s Rights Under The Access Agreement.....	18
V.   Plaintiff Otherwise Has A Credible Basis.....	21

CONCLUSION.....22

## TABLE OF CITATIONS

<b>Cases</b>	<b>Page(s)</b>
<i>Allen v. State</i> , 970 A.2d 203 (Del. 2009) .....	18
<i>Amalgamated Bank v. NetApp, Inc.</i> , 2012 WL 379908 (Del. Ch. Feb. 6, 2012) .....	6, 14
<i>AmerisourceBergen Corp. v. Lebanon Cnty. Emps. ' Ret. Fund</i> , 243 A.3d 417 (Del. 2020) .....	4
<i>An v. Archblock, Inc.</i> , 2023 WL 7320253 (Del. Ch. Nov. 7, 2023) .....	7, 8
<i>Bizzari v. Suburban Waste Servs., Inc.</i> , 2016 WL 4540292 (Del. Ch. Aug. 30, 2016) .....	<i>passim</i>
<i>Cent. Laborers Pension Fund v. News Corp.</i> , 2011 WL 6224538 (Del. Ch. Nov. 30, 2011) .....	6, 14
<i>CHC Inves., LLC v. FirstSun Cap. Bancorp</i> , 2019 WL 328414 (Del. Ch. Jan. 24, 2019) .....	4, 11, 12
<i>Clark v. Sweeney</i> , 2025 WL 3260170 (U.S. Nov. 24, 2025) .....	8
<i>Emps' Ret. Sys. Of Rhode Island v. Facebook, Inc.</i> , 2021 WL 529439 (Del. Ch. Feb. 10, 2021) .....	8, 9
<i>Gandhi-Kapoor v. Hone Capital LLC</i> , 307 A.3d 328 (Del. Ch. 2023) .....	8
<i>Hall v. Mundy</i> , 2025 WL 763420 (Del. Ch. Mar. 11, 2025) .....	8
<i>Khanna v. Covad Commc'ns Grp., Inc.</i> , 2004 WL 187274 (Del. Ch. Jan. 23, 2004) .....	11, 12, 13
<i>King v. VeriFone Holdings, Inc.</i> , 12 A.3d 1140 (Del. 2011) .....	<i>passim</i>

<i>Nat’l Institutes of Health v. Am. Pub. Health Ass’n</i> , 145 S. Ct. 2658 (2025).....	1
<i>Taubenfeld v. Marriott Int’l, Inc.</i> , 2003 WL 22682323 (Del. Ch. Oct. 28, 2003) .....	7, 14
<i>In re Tesla, Inc. Deriv. Litig.</i> , 2025 WL 3689114 (Del. Dec. 19, 2025) .....	18
<i>In re Zendesk, Inc. Section 220 Litig.</i> , 2023 WL 5496485 (Del. Ch. Aug. 25, 2023) .....	19, 20
<b>Statutes &amp; Rules</b>	
8 Del. C. § 220 .....	<i>passim</i>
Del. Ch. Ct. R. 11 .....	6
Del. Ch. Ct. R. 11(b)(2) .....	7, 14
<b>Other Authorities</b>	
Jordan Howell, <i>Delaware Call Interviews Sen. Bryan Townsend About SB21</i> , DELAWARE CALL (Feb. 21, 2025), <a href="https://delawarecall.com/2025/02/21/delaware-call-interviews-sen-bryan-townsend-about-sb21/">https://delawarecall.com/2025/02/21/delaware-call-interviews-sen-bryan-townsend-about-sb21/</a> .....	2
Dorothy Lund and Eric Talley, <i>Should Corporate Law Go Private</i> , EUROPEAN CORPORATE GOVERNANCE INSTITUTE, Law Working Paper 877/2025 (September 2025), <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534959">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534959</a> .....	3
Eric Partridge, USAGE AND ABUSAGE 45 (Janet Whitcut, Ed.) (1995) .....	15
Brian JM Quinn, <i>Just a little adjustment?</i> , M&A LAW PROF BLOG (Feb. 28, 2025), <a href="https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html">https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html</a> .....	3

Eric Talley, Sarath Sanga, and Gabriel Rauterberg, *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/> .....3

## INTRODUCTION

Summit's briefing repeats itself over forty-six pages, but the heart of its argument takes up less than a paragraph:

Plaintiff may respond that he should not be stuck with the consequences of his decision because he could not have anticipated that SB 21's changes to Section 144 would apply retroactively to his Plenary Action. That is neither here nor there. Plaintiff's predicament is a common one—he made a choice that did not turn out as expected. This all-too-familiar scenario does not warrant the creation of a new exception to the preexisting general rule that a Section 220 plaintiff forfeits his proper purpose to investigate wrongdoing once he files a plenary suit.<sup>1</sup>

The argument is wrong from start to finish. Stockholder litigation is a serious thing; it is not a game of Calvinball.<sup>2</sup> Section 220 requires that stockholders act with a proper purpose. But nothing in Section 220 says they must be clairvoyant. Controlling authority—which Summit does not ask this Court to overrule—holds that a “bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a [plenary] action first, does not comport with existing Delaware law or with sound policy.”<sup>3</sup> The trial court's decision did just that.

The parties agreed to an Access Agreement on January 29, 2025, which

---

<sup>1</sup> AB at 37-38.

<sup>2</sup> “Calvinball has only one rule: There are no fixed rules.” *Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2675 (2025) (Jackson, J. concurring in part and dissenting in part).

<sup>3</sup> *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011).

guaranteed Plaintiff “the same right, power, and ability to enforce the Demand as [he] had prior to the closing of the Transaction[.]”<sup>4</sup> The Transaction closed on February 10, 2025. And Senate Bill 21 was introduced one week later.

In response, Plaintiff filed a plenary complaint on February 25, 2025. When he filed the Plenary Action, Plaintiff had good reason to believe that (1) his complaint stated a claim under existing law and (2) Senate Bill 21 would eliminate that theory unless Plaintiff filed a plenary suit before the statute was adopted.

Then, things changed. On March 12, Senate Majority Leader Townsend introduced Senate Substitute 1 for Senate Bill 21, which made the statute retroactive. The revised bill passed on March 25 and Governor Meyer signed it late that night.

Contrary to the Company’s assertions, there is nothing “common” about retroactive legislation. Just four days before Plaintiff filed his complaint, Senator Townsend—who also is an attorney—said, in speaking about SB 21, that “[l]egislation is essentially never retroactive.”<sup>5</sup> Nor was there anything “familiar” about the extraordinary, frantic thirty-six days between the introduction of Senate Bill 21 and the final passage of Senate Substitute 1 for Senate Bill 21. The substance of the bill was radical: “the most significant single-year revision of Delaware’s

---

<sup>4</sup> A0098 ¶2.

<sup>5</sup> A0086, Jordan Howell, *Delaware Call Interviews Sen. Bryan Townsend About SB21*, DELAWARE CALL (Feb. 21, 2025).

corporate code since at least 1967[.]”<sup>6</sup> and a “wholesale rejection [of] the Delaware Supreme Court’s work and the common law.”<sup>7</sup> And the process was, perhaps, more radical still—an “unprecedented realignment of Delaware’s General Corporate Law” emerging from a frantic weekend drafting session by a small group of lawyers who, for the first time in generations, circumvented the Corporation Law Council process.<sup>8</sup>

The decision below elides this reality. The trial court’s holding that Plaintiff’s *post*-closing filing of the Plenary Action vitiated any proper purpose misreads the terms of the parties’ Access Agreement, which guaranteed Plaintiff “the same right, power, and ability to enforce the Demand as Stockholder had *prior* to the closing of the Transaction[.]”<sup>9</sup> It contradicts *AmerisourceBergen II*, which reaffirm[ed] [the] ‘credible basis’ test as the standard by which investigative inspections under Section 220 are to be judged” and rejected an analysis focused on whether “the alleged

---

<sup>6</sup> Eric Talley, Sarath Sanga, and Gabriel Rauterberg, *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/>.

<sup>7</sup> Brian JM Quinn, *Just a little adjustment?*, M&A LAW PROF BLOG (Feb. 28, 2025), <https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html>.

<sup>8</sup> Dorothy Lund and Eric Talley, *Should Corporate Law Go Private*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, Law Working Paper 877/2025 (September 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5534959](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534959) at 1.

<sup>9</sup> A0098 ¶2 (emphasis added).

mismanagement or wrongdoing is actionable.”<sup>10</sup> It contradicts *VeriFone*’s flat rejection of a “bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a [plenary] action first[.]”<sup>11</sup> And it contradicts *CHC Investments*, which recognizes that a stockholder who files a plenary complaint because of “timing pressures” that were “not caused by the plaintiff,” does not forfeit his proper purpose for a books-and-records inspection.<sup>12</sup>

This Court should reverse and remand.

---

<sup>10</sup> *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.’ Ret. Fund* (“*AmerisourceBergen IP*”), 243 A.3d 417, 437 (Del. 2020).

<sup>11</sup> *VeriFone*, 12 A.3d at 1145.

<sup>12</sup> *CHC Inves., LLC v. FirstSun Cap. Bancorp*, 2019 WL 328414, at \*3 (Del. Ch. Jan. 24, 2019).

## ARGUMENT

### I. The Parties Agree That The Court's Review Is *De Novo*

For each question presented, Summit agrees that the Court should apply a *de novo* standard of review.<sup>13</sup>

### II. The Trial Court Erred In Refusing To Apply The Credible Basis Test As The Standard By Which To Judge Plaintiff's Demand

Summit concedes that “*AmerisourceBergen II* held that the question of whether a stockholder has established a proper purpose to investigate wrongdoing does not depend upon whether the claims he seeks to investigate are actionable.”<sup>14</sup> Yet Summit asserts, with bold-italics, that “the question of whether a stockholder’s first-filed plenary action negates his proper purpose to investigate wrongdoing. ... does not relate to actionability *in any way*.”<sup>15</sup>

As Plaintiff explained in his opening brief, however, each of the cases from the *Bizzari* line is premised on the proposition that, in filing a plenary complaint, the stockholder implicitly concedes that the existing record was sufficient to state an actionable claim.<sup>16</sup> Holding that a stockholder loses his proper purpose by taking

---

<sup>13</sup> AB at 21, 28, 39, 45.

<sup>14</sup> AB at 8.

<sup>15</sup> AB at 22 (emphasis original).

<sup>16</sup> OB at 31-32.

steps that concede actionability (*i.e.*, filing a plenary complaint) is inconsistent with *AmerisourceBergen II*.

Summit responds by trying to rewrite its authorities. It says that “[u]nder *Bizzari*, when stockholders file plenary actions, they certify that additional books and records are unnecessary.”<sup>17</sup> That is not what *Bizzari* says. Nor could it because that would conflict with *Verifone*’s holding expressly rejecting a “bright-line rule barring stockholder-plaintiffs from pursuing inspection relief ... solely because they filed a [plenary] action first[.]”<sup>18</sup>

The certification that *Bizzarri* references and that Summit keeps talking about<sup>19</sup> is the certification that a lawyer makes under Rule 11 when she signs a pleading.<sup>20</sup> Rule 11 provides that a lawyer who signs a pleading certifies that “the

---

<sup>17</sup> AB at 22.

<sup>18</sup> *VeriFone*, 12 A.3d at 1145.

<sup>19</sup> AB at 1, 3, 14, 17, 21, 22, 25, 26.

<sup>20</sup> *See, e.g., Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at \*6 (Del. Ch. Aug. 30, 2016) (“Mr. Bizzari and his counsel presumably concluded they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records.”); *Cent. Laborers Pension Fund v. News Corp.*, 2011 WL 6224538, at \*1 (Del. Ch. Nov. 30, 2011) (“As a general matter, by filing its derivative complaint, Central Laborers acknowledged—if, for no other reason than to satisfy its lawyers’ Rule 11 obligations—that it had sufficient information to support its substantive allegations and its allegations of demand futility that would excuse prior demand on the News Corp. board—both necessary to go down the path chosen by it to challenge the Proposed Transaction.”), *aff’d on unrelated grounds*, 45 A.3d 139 (Del. 2012); *Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at \*3 (Del. Ch. Feb. 6, 2012) (“If the purpose of the Section 220 action is to seek information necessary to meet the pleading requirements in a substantive action, the

claims ... are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”<sup>21</sup> In short, the lawyer certifies that the claims are actionable. Relying on that certification as a basis to deny a stockholder’s inspection rights thus contradicts *AmerisourceBergen II*.

Summit relies heavily on *Archblock*,<sup>22</sup> which is the only post-*AmerisourceBergen-II* decision to apply *Bizzari*.<sup>23</sup> Summit concedes that the plaintiff in *Archblock* was *pro se*, wrote his filings with ChatGPT, and never cited *AmerisourceBergen II* or argued that *Bizzari* had been overruled.<sup>24</sup>

Summit says that “the arguments [the *Archblock* plaintiff] raised are irrelevant.”<sup>25</sup> Summit is incorrect. The American “adversarial system of adjudication[] ... follow[s] the principle of party presentation. The parties frame the issues for decision, while the court serves as neutral arbiter of matters the parties

---

Plaintiff should, for purposes of economy, and consistent with the requirements of Rule 11, bring the Section 220 action before filing the substantive action.”); *Taubenfeld v. Marriott Int’l, Inc.*, 2003 WL 22682323, at \*3 (Del. Ch. Oct. 28, 2003) (“In this case, plaintiffs filed their complaint in January 2003. That filing was a certification under Rule 11 that the plaintiffs had enough information to support their allegations.”).

<sup>21</sup> Del. Ch. Ct. R. 11(b)(2).

<sup>22</sup> *An v. Archblock, Inc.* (“*Archblock I*”), 2023 WL 7320253 (Del. Ch. Nov. 7, 2023), *report and recommendation adopted*, 2024 WL 1365983 (Del. Ch. Apr. 1, 2024).

<sup>23</sup> AB at 24-25.

<sup>24</sup> *Id.* at 24.

<sup>25</sup> *Id.*

present. To put it plainly, courts call balls and strikes; they don't get a turn at bat."<sup>26</sup>

That is true in Delaware, just like everywhere else.<sup>27</sup>

The corollary of the party-presentation principle is that “[t]he doctrine of *stare decisis* [does] not mean that a court is shackled by a precedent in which the parties did not advance a critical argument or identify dispositive authority.”<sup>28</sup> Even if *Archblock* had addressed *AmerisourceBergen II*, this Court is not obliged to follow *Archblock*. It has persuasive value only and that persuasive value is minimal because it does not address *AmerisourceBergen II*.

Finally, Summit's attempts to distinguish *Facebook II*<sup>29</sup> are unconvincing. Summit says that the *Facebook II* “plaintiff had not filed a plenary action before seeking books and records and, therefore, had not made any Rule 11 certification that operated as a concession that an inspection of books and records was unnecessary.”<sup>30</sup> So what? The *Facebook II* plaintiff made an *express* concession that

---

<sup>26</sup> *Clark v. Sweeney*, 2025 WL 3260170, at \*1 (U.S. Nov. 24, 2025) (cleaned up).

<sup>27</sup> *Hall v. Mundy*, 2025 WL 763420, at \*3 (Del. Ch. Mar. 11, 2025) (“Judges are not like pigs, hunting for truffles.”) (cleaned up).

<sup>28</sup> *Gandhi-Kapoor v. Hone Capital LLC*, 307 A.3d 328, 353 (Del. Ch. 2023), *aff'd sub nom. CSC Upshot Ventures I, L.P. v. Gandhi-Kapoor*, 326 A.3d 369 (Del. 2024).

<sup>29</sup> *Emps' Ret. Sys. Of Rhode Island v. Facebook, Inc.* (“*Facebook II*”), 2021 WL 529439, at \*6 (Del. Ch. Feb. 10, 2021) (plaintiff did “not forfeit its statutory inspection rights by candidly describing the strength of its potential claims”).

<sup>30</sup> AB at 25.

“it could survive a motion to dismiss in a plenary action by pleading the facts it already possess[e].”<sup>31</sup> That was not enough to defeat inspection.

---

<sup>31</sup> *Facebook II*, 2021 WL 529439, at \*6.

### **III. The Trial Court Erred In Applying A Bright-Line Rule Barring Plaintiff From Pursuing Inspection Relief Solely Because He Filed A Plenary Action First**

#### **A. *Verifone* Requires Reversal**

Strangely, Summit argues that Plaintiff waived any argument under *Verifone*.<sup>32</sup> Plaintiff's pre-trial briefing in front of the Magistrate cited *Verifone* three times,<sup>33</sup> his briefing taking exceptions from the Magistrate's ruling cited *Verifone* eight times,<sup>34</sup> and his opening brief in this Court cited *Verifone* five times.<sup>35</sup> The argument is not waived.

*Verifone* holds that a "bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a [plenary] action first, does not comport with existing Delaware law or with sound policy."<sup>36</sup> *Verifone* holds that "absent some other, sufficient ground for dismissal, that sequence [*i.e.*, filing a plenary action before seeking documents pursuant to Section 220] is not fatal to the prosecution of a Section 220 action."<sup>37</sup>

Summit concedes that "Plaintiff likely had a proper purpose to investigate

---

<sup>32</sup> AB at 4.

<sup>33</sup> A0061, A0082, A0500.

<sup>34</sup> A0572, A0594, A0595, A0604, A0610, A0611, A0643.

<sup>35</sup> OB at 5, 29, 30, 36, 39.

<sup>36</sup> *VeriFone*, 12 A.3d at 1145.

<sup>37</sup> *Id.* at 1150.

wrongdoing up until the time he” filed the Plenary Action.<sup>38</sup> In other words, Summit’s sole basis for resisting inspection is that Plaintiff filed the Plenary Action. The argument cannot be squared with *Verifone*.

**B. *CHC Investments and Khanna Require Reversal***

Applying *Verifone*, the Court of Chancery has recognized that where a plaintiff has filed a plenary complaint because of “timing pressures” that are “not caused by the plaintiff,” the filing of that plenary complaint cannot vitiate the plaintiff’s ability to show a proper purpose for a books-and-records inspection.<sup>39</sup>

Summit (largely) concedes that Plaintiff faced timing pressure because of the impending passage of SB 21, which was not Plaintiff’s fault and which threatened to—and eventually did—re-write Delaware controlling stockholder law.<sup>40</sup> But Summit argues that no Delaware case has considered “alleged timing pressures other than the running of a statute of limitations”<sup>41</sup> and says “Plaintiff fails to demonstrate that any timing pressures he purportedly faced were Summit’s fault, which is fatal to his claim.”<sup>42</sup>

---

<sup>38</sup> AB at 26.

<sup>39</sup> *CHC Invs.*, 2019 WL 328414, at \*3 (citing *Khanna v. Covad Commc ’ns Grp., Inc.*, 2004 WL 187274, at \*3 (Del. Ch. Jan. 23, 2004)).

<sup>40</sup> AB at 30-36. As discussed below, Summit’s second-guessing of Plaintiff’s decisionmaking makes little sense.

<sup>41</sup> *Id.* at 30.

<sup>42</sup> *Id.* at 31.

Both arguments fail. It is hardly a surprise that no Delaware case has considered this argument in the context of a dramatic—and retroactive—legislative change. That’s because there has not been such a dramatic change to the DGCL since 1967, let alone one that was made retroactive to already-completed transactions.<sup>43</sup> *CHC*—which Summit does not argue was wrongly decided—confirms that *Khanna* is not limited to timing pressure caused by a statute of limitations.<sup>44</sup>

*CHC* also confirms that a plaintiff’s inspection rights are preserved as long as “timing pressures [were] caused by the defendant, **or**, at least, not caused by the plaintiff.”<sup>45</sup> Definitionally, a plaintiff who waits to serve a books-and-records demand until the final months before an expiring statute of limitations bears a substantial degree of fault. Yet that was not disqualifying in *Khanna*.<sup>46</sup> And Plaintiff here did not do anything of the sort.

Even if Plaintiff had to show that the Company was at fault, he has done so. In *Khanna*, the Court of Chancery held that the company was at fault for “failing to produce timely the requested documents” in response to a books-and-records

---

<sup>43</sup> Indeed, other than the “market practice” amendments adopted in 2024, undersigned counsel are unaware of any prior amendments to the DGCL that were made retroactively applicable to already-completed transactions.

<sup>44</sup> *CHC*, 2019 WL 328414, at \*3.

<sup>45</sup> *Id.* (emphasis added)

<sup>46</sup> *Khanna*, 2004 WL 187274, at \*4.

demand made sixty-two days before the plaintiff filed his plenary complaint.<sup>47</sup> Here, the Company failed to produce any documents in the forty-two days between Plaintiff serving his demand on January 14, 2025<sup>48</sup> and filing his plenary complaint on February 25, 2025.<sup>49</sup> Summit offers no explanation why the twenty extra days in *Khanna* should make any difference. The statutory deadline is five days.

*Finally*, Summit makes a half-hearted floodgates argument that a ruling for Plaintiff would mean that “the exception would swallow the rule, and the rule itself would cease to exist.”<sup>50</sup> Hardly. As noted above, there has never been a sweeping, retroactive change to the law like SB21. Nor is there likely to be one again.

### **C. Treating A Change In The Law As A Special Circumstance Is More Faithful To Summit’s Authorities**

As noted above, Summit’s authorities denying inspection rights to stockholders who filed a plenary action all rely on the Rule 11 certification that a stockholder’s lawyer makes when filing a plenary complaint. Specifically, they rely on the supposed inconsistency between the lawyer arguing in the Section 220 proceeding that the stockholder needs more documents to develop a claim and the lawyer’s Rule 11 certification in the plenary action that the claims are warranted.<sup>51</sup>

---

<sup>47</sup> *Id.* at \*3-4.

<sup>48</sup> A0100.

<sup>49</sup> B0010–0039.

<sup>50</sup> AB at 33.

<sup>51</sup> *Bizzari*, 2016 WL 4540292, at \*6 (“Bizzari and his counsel presumably concluded

Importantly, however, what a lawyer certifies pursuant to Rule 11 in signing a pleading is that “the claims ... are warranted by **existing** law or by a nonfrivolous argument for extending, modifying, or reversing **existing** law or for establishing new law.”<sup>52</sup> Rule 11 does not require a lawyer to certify that the claims would be viable under a future, yet-to-be-adopted statute (or if a yet-to-be-adopted statute was made retroactive). Thus, the supposed inconsistency on which *Bizzari* and Summit’s other authorities rest does not apply here.

#### **D. Summit’s Second-Guessing Makes No Sense**

Plaintiff’s Opening Brief explained in detail why Plaintiff’s counsel had a good-faith belief that Plaintiff’s claims were warranted by **existing** law when they filed the Plenary Action: (1) a stockholder owning 31% of the Company’s voting stock could be a controller and (2) a transaction in which a controller received a non-

---

they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records.”); *News Corp. I*, 2011 WL 6224538, at \*1 (“[B]y filing its derivative complaint, Central Laborers acknowledged—if, for no other reason than to satisfy its lawyers’ Rule 11 obligations—that it had sufficient information to support its substantive allegations[.]”); *NetApp*, 2012 WL 379908, at \*3 (“If the purpose of the Section 220 action is to seek information necessary to meet the pleading requirements in a substantive action, the Plaintiff should, for purposes of economy, and consistent with the requirements of Rule 11, bring the Section 220 action before filing the substantive action.”); *Marriott*, 2003 WL 22682323, at \*3 (plaintiff’s “filing was a certification under Rule 11 that the plaintiffs had enough information to support their allegations.”).

<sup>52</sup> Ct. Chancery R. 11(b)(2) (emphasis added).

ratable benefits could not be cleansed without a majority-of-the-minority vote.<sup>53</sup> Summit does not respond other than to assert, in conclusory fashion, that it “does not believe that Plaintiff would ever be able to convince the Court of Chancery that Grupo Argos is a controlling stockholder, either before or after SB 21’s introduction[.]”<sup>54</sup>

In an attempt to show Plaintiff to be “at fault,” Summit argues that “Plaintiff did not make any effort to stay the Plenary Action, to amend his complaint, or to otherwise ascertain whether his Plenary Action claims were still viable.”<sup>55</sup> Summit professes confusion about Plaintiffs’ “unsubstantiated assumptions regarding SB 21’s potential impact on his claims.”<sup>56</sup> “If SB 21 really had such a profound impact on the law and on Plaintiff’s claims,” Summit says, “it begs the question [*sic*<sup>57</sup>] why Plaintiff would immediately dismiss his Plenary Action, without making an effort to explore alternative options or ascertain how the law would actually affect his claims.”<sup>58</sup>

---

<sup>53</sup> OB at 2-3, 35, 40-41.

<sup>54</sup> AB at 23.

<sup>55</sup> AB at 15.

<sup>56</sup> AB at 35.

<sup>57</sup> Presumably, Summit meant “raises” the question. Eric Partridge, *USAGE AND ABUSAGE* 45 (1995) (the phrase “begging the question” means “to assume the truth of something that cannot be taken for granted. The phrase does not correctly mean either ‘pose a question’ or ‘avoid giving a straight answer to it.’”).

<sup>58</sup> AB at 16.

That question was answered, in detail, in Plaintiff's opening brief, which explained why Plaintiff's original theory was dead on arrival after SB 21. To wit, as revised, Sections 144(d) and (e)(2)(c) provide that no stockholder owning less than one-third of the voting stock of the company can be a controller.<sup>59</sup> No amount of analysis was going to change that. Defending a motion to dismiss the original complaint would simply have led to a dismissal with prejudice. Summit does not respond to this analysis.

---

<sup>59</sup> OB at 3, 8, 35, 40-41.

#### **IV. The Trial Court Erred In Interpreting The Access Agreement To Limit Plaintiff's Right To Inspection Based On Post-Closing Events**

##### **A. The Court Should Analyze Plaintiff's Breach of Contract Claim Because Plaintiff Did Not Waive It And The Court of Chancery Addressed It On The Merits**

Plaintiff explained in his opening brief why he did not waive his argument that he was entitled to documents under the Access Agreement.<sup>60</sup>

- Plaintiff's complaint pled a breach-of-contract count.<sup>61</sup>
- Plaintiff's briefing before the Magistrate argued that "the Company has refused to ... honor the Access Agreement."<sup>62</sup>
- Plaintiff's briefing before the Magistrate relied on the same contractual language measuring his right to books-and-records as of closing.<sup>63</sup>
- Plaintiff highlighted the same contractual language at oral argument in front of the Magistrate.<sup>64</sup>

Summit does not meaningfully respond to this. It says that "[t]hrough trial, Plaintiff never argued that his Section 220 and Access Agreement claims required

---

<sup>60</sup> OB at 42-43.

<sup>61</sup> See A0038 [Compl., caption] ("Verified Complaint for Breach of Contract"), A0040 ¶7 ("The Access Agreement gives Plaintiff a contractual right to enforce the Demand to the same extent as Plaintiff had prior to the closing of the Transaction."), A0056-57 ¶¶77-84 (breach of contract count).

<sup>62</sup> A0075.

<sup>63</sup> A0090-91 ("Specifically, under the terms of the Access Agreement, the Company agreed that 'for the period of one year after the execution of [the] Agreement, [Plaintiff] [would] continue to have the same right, power, and ability to enforce the Demand as [he] had prior to the closing of the Transaction,' notwithstanding the closing of the Transaction.")

<sup>64</sup> A0532 ("Shortly after that, plaintiff and the company entered into the access agreement, which gives plaintiff a contractual right to enforce the demand to the same extent that plaintiff had prior to the closing of the transaction.").

different legal analyses or were meaningfully distinguishable from one another.”<sup>65</sup> What Summit seems to be saying is that Plaintiff argued that he won under either a contractual or statutory analysis. That’s true. But arguing in the alternative is not a waiver.

Moreover, even if Plaintiff hadn’t raised the argument before the Magistrate, the issue is not waived. As Plaintiff argued in his opening brief,<sup>66</sup> *Tesla* expressly holds that “where, as here, the trial court has addressed in its decision the issues raised on appeal, the arguments on appeal are not waived.”<sup>67</sup> Summit concedes that the Court of Chancery “concluded that this argument fails on its merits.”<sup>68</sup> And Summit does not respond to *Tesla*. Nor could it. Obviously, the same rules that apply to Elon Musk apply to Michael O’Neill.<sup>69</sup>

**B. The Trial Court Erred In Holding That Post-Closing Events Eliminated Plaintiff’s Rights Under The Access Agreement**

Summit argues that “Plaintiff fails to cite a single case that meaningfully supports the notion that the Access Agreement entitled him to anything other than

---

<sup>65</sup> AB at 41.

<sup>66</sup> OB at 43-44.

<sup>67</sup> *In re Tesla, Inc. Deriv. Litig.*, 2025 WL 3689114, at \*10 (Del. Dec. 19, 2025).

<sup>68</sup> AB at 6.

<sup>69</sup> *Allen v. State*, 970 A.2d 203, 217 (Del. 2009) (“Equality of treatment must be afforded to all without regard to differences in social status or economic condition. In a society which cherishes the ideal of equal justice for all and seeks to accord the equal protection of the laws to all ..., it would be difficult to accept any other view.”) (cleaned up).

the same Section 220 inspection rights he possessed before the Merger[.]”<sup>70</sup> This badly misunderstands the argument.

Plaintiff is not asking for anything beyond the inspection rights he had before the Merger closed. To the contrary, the Access Agreement contractually guaranteed Plaintiff “the same right, power, and ability to enforce the Demand as [he] had prior to the closing of the Transaction[.]”<sup>71</sup> And that is what Plaintiff seeks.

It is Summit that is asking that Plaintiff be deprived of his as-of-closing inspection rights. Summit expressly concedes that “Plaintiff likely had a proper purpose to investigate wrongdoing up until the time he” filed the Plenary Action.<sup>72</sup> That means that Summit concedes that Plaintiff had a proper purpose when the Merger closed (*i.e.*, weeks before Plaintiff filed the Plenary Action). Denying Plaintiff his inspection rights necessarily means giving him a *different* “right, power, and ability to enforce the Demand [than he] had prior to the closing of the Transaction.” For that reason, the trial court’s decision misapplied the plain, unambiguous language of the parties’ contract.

Summit cites *Zendesk*<sup>73</sup> but does not respond to the argument in Plaintiff’s

---

<sup>70</sup> AB at 42.

<sup>71</sup> A0098 ¶2.

<sup>72</sup> AB at 26.

<sup>73</sup> *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at \*7 (Del. Ch. Aug. 25, 2023), *report and recommendation adopted*, (Del. Ch. 2023).

opening brief.<sup>74</sup> The “result [was] the same” for both a contractual and statutory analysis *under the specific facts of that case* because the defendant was not making any argument based on a change in circumstances after the transaction closed.<sup>75</sup> *Zendesk* did not make a sweeping pronouncement that the results would always be the same in each and every case involving an access agreement. Nor did it hold that the actual language of an access agreement is irrelevant.

---

<sup>74</sup> OB at 45.

<sup>75</sup> *Zendesk*, 2023 WL 5496485, at \*7 n.76.

## **V. Plaintiff Otherwise Has A Credible Basis**

Summit concedes that “Plaintiff likely had a proper purpose to investigate wrongdoing up until the time he” filed the Plenary Action.<sup>76</sup> It offers no response to Plaintiff’s credible-basis arguments other than its argument that Plaintiff’s filing of the Plenary Action vitiated his proper purpose.<sup>77</sup>

---

<sup>76</sup> AB at 26.

<sup>77</sup> AB at 45.

## CONCLUSION

The Court should reverse and remand to the Court of Chancery, instructing the Court of Chancery that Plaintiff has established a proper purpose and the Court of Chancery should determine the scope of inspection.

Dated: April 2, 2026

### JOHNSON VAN KWAWEGEN LLP

*Of Counsel:*

Christopher J. Orrico  
**JOHNSON VAN KWAWEGEN LLP**  
485 Madison Avenue, 15<sup>th</sup> Floor  
New York, NY 10022  
(646) 836-9630

Joel Fleming  
Amanda Crawford  
**EQUITY LITIGATION GROUP LLP**  
1 Washington Mall #1307  
Boston, Massachusetts 02108  
(617) 468-8602

/s/ Daniel E. Meyer  
Daniel E. Meyer (#6876)  
221 W. 10th Street, Suite 423  
Wilmington, DE 19801  
(302) 330-8010  
daniel@jvk-law.com

*Counsel for Plaintiff-Below/Appellant  
Michael O'Neill*