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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUMMIT HEALTHCARE OPERATING PARTNERSHIP, L.P., Plaintiff Below, Appellant v. BEST YEARS, LLC, Defendant Below, Appellee.	No. 183, 2026 Court Below: The Court of Chancery of the State of Delaware C.A. No. 2025-1258-JTL

APPELLEE'S ANSWERING BRIEF ON APPEAL

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TABLE OF CONTENTS

Page

RLF1 36135605v.6

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

Appellant Summit Healthcare Operating Partnership, L.P. ("Summit") filed this action to force Appellee Best Years, LLC ("Best Years") to proceed with a proposed $16 million asset sale to which Best Years and its parent company never agreed. The proposed agreement was for Best Years to sell its beneficial interests in five nursing facilities to Summit. It is undisputed that Best Years did not approve or sign the contract that had been drafted for that transaction, and it was never executed by either party. After weighing the evidence at trial, the Court of Chancery found based upon the record evidence that the parties never formed a binding agreement of any kind and entered judgment for Best Years on all of Summit's claims.

Summit's theory of contract formation has changed multiple times. In its Complaint, Summit alleged that the parties reached an agreement on all material terms as of June 19, 2025, when a Best Years representative wrote in an email that he was "aligned on moving forward at the $16 million purchase price," or the next day, June 20, when Summit's CEO sent a one-page, unsigned memorandum listing certain proposed terms of a deal. B2-B3. Summit largely abandoned that theory in post-trial argument, and the Court of Chancery rejected it. The Court found that Best Years made clear in the June 19 email that "Best Years was only beginning the internal approval process" at its parent company and therefore "was not manifesting assent to forming a contract at that time." A113:11-15. The Court also found that the parties did not agree to the terms of the one-page memorandum. A113:11-24; A114:16-20.

Summit also contended that the parties reached an agreement on all material terms on July 31, 2025, when Summit purported to send an "execution version" of a contract that was not then executed. The Court of Chancery rejected that theory too, finding that the parties' communications at that time "affirmatively disconfirm[ed] the existence of an agreement." A115:18-20. Among other things, the Court cited Best Years's communication that the agreement was "going through the usual review steps," to "wait to hear back from our attorney," and that "[w]e're getting close," explaining that the communication was "conclusive" that no agreement had been formed. A115:9-23. In addition, the Court found that the parties had an understanding throughout their discussions that no agreement would be binding until they had executed a definitive agreement. A118:10-15.

During post-trial argument, Summit for the first time advanced an additional, alternative theory that the parties reached either a "Type I" or a "Type II" preliminary agreement. This theory was not pled in Summit's Complaint or otherwise raised before trial. Nevertheless, the Court of Chancery rejected that theory too, explaining that a preliminary agreement still requires "a threshold agreement" to which the parties are bound. A127:7-8. The Court found that the parties here never reached such an agreement. A127:12-13 ("That's not a Type 1 agreement. That's not a Type 2 agreement. It's no agreement.").

Summit then moved for reargument, advancing yet another new theory that the parties reached a "Type II" agreement not on June 19, June 20, or July 31, but on June 26, 2025, when the Investment Committee of Best Years's parent company voted to authorize Best Years to continue negotiating the potential transaction with Summit. The Court of Chancery denied Summit's motion, finding that "[t]he court did not overlook a decision or principle of law or misapprehend any issues of law or fact." B261-B262.

On appeal, Summit advances solely a Type II preliminary agreement theory. Summit does not specify when it now contends such an agreement was reached. In addition, Summit argues that it is entitled to damages. Summit did not seek damages at trial and did not introduce any evidence of damages. Instead, Summit sought only specific performance.

The Court of Chancery's decision should be affirmed. The Court carefully weighed the evidence, assessed witness credibility, and made factual findings that are supported by the record. Those findings, which Summit claims not to challenge, included the factual finding that the parties did not agree to be bound by any sort of agreement, whether preliminary or otherwise, until there was a final, definitive agreement that had been approved and executed by both parties. They also included the factual finding that Best Years did not otherwise manifest an intent to be bound to any kind of agreement at any point in time. Those findings are reviewed only for clear error, and there was no such error. For this reason alone, the Court of Chancery's judgment should be affirmed.

Summit's appeal also fails because Summit waived and failed to preserve the arguments that it now raises on appeal. Summit never sought damages in the Court of Chancery, seeking only specific performance. Indeed, Summit refused to respond to discovery regarding purported damages, failed to present any evidence of damages, and—until now—never argued that it was entitled to expectancy damages. Moreover, Summit's Type II theory itself was not pleaded in its Complaint, addressed in its Pretrial Brief, tried, or even raised until post-trial argument.

Finally, even if a Type II agreement had been reached, Summit failed to prove breach. Under *Cox*, a Type II agreement does not "commit the parties to their ultimate contractual objective"—only to negotiate in good faith—and Best Years did negotiate in good faith.

The judgment of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied**. Summit's first argument is that the Court of Chancery misapplied its factual findings to Delaware law regarding the formation of a Type II agreement. Summit's argument fails. As the Court of Chancery held, the parties agreed "that no one would be bound until there was an actual fully signed agreement. That's not a Type 1 agreement. That's not a Type 2 agreement. It's no agreement." A127:12-13. Although Summit tries to portray the Court's holding as a conclusion of law, Summit is wrong. The Court of Chancery heard the witnesses' testimony and reviewed the numerous trial exhibits to conclude *as a matter of fact* that Best Years would not be bound unless and until it had approved of the contemplated agreement and signed a definitive contract. The Court made additional factual findings that no agreement of any kind was reached on any of the dates on which Summit contended the parties formed a contract. Those factual findings are entitled to deference and can be overturned only upon a showing of clear error. Summit does not even attempt to make that showing.

2. **Denied**. Summit's second argument is that the Court of Chancery's factual findings establish breach of a Type II agreement. This argument also fails for multiple reasons. As set forth above, the Court weighed the evidence and concluded as a factual matter that no agreement of any type was formed. Moreover, even if a Type II agreement had been formed, there was no breach of any obligation

to negotiate in good faith. Best Years did not walk away from the deal or re-trade on terms to which it had previously agreed. Rather, it paused the transaction in response to changes in the relevant geopolitical circumstances and in light of concerns expressed by a Chinese regulator. It only terminated the deal after Summit grew impatient and filed suit.

3. **Denied**. Summit's third argument is that it is entitled to expectancy damages based upon a purported breach of a Type II agreement. This argument fails because no such agreement was formed. But Summit's request for damages is also deficient because Summit failed to preserve it for appeal. Through trial—which was not bifurcated or limited to Summit's request for non-monetary relief—Summit insisted that it was seeking only specific performance. It refused to respond to damages discovery, it did not come forward with fact or expert evidence regarding damages, and it did not mention damages during post-trial argument or even in its written motion for re-argument. Having failed to request damages under a Type II theory or develop any type of damages case, Summit cannot now reverse course on appeal and seek damages.

<u>STATEMENT OF FACTS</u>

A. The Parties Are Sophisticated Corporate Entities with Formal Processes for Entering into Binding Agreements.

1. <u>Best Years and Union Life</u>

Best Years is a wholly owned subsidiary of Union Life. Union Life is a Chinese national insurance company, headquartered in Beijing, with 27 provincial branches, more than 600 subsidiary offices, and about $30 billion in assets under management. Union Life is heavily regulated and employs rigorous internal operating procedures. All investment decisions, including acquisitions and dispositions of property, must be approved by Union Life's Investment Committee (the "Investment Committee"). Investment Committee decisions, in turn, must be submitted to and approved by Union Life's Chairman. *See* A262:22-A263:11.

As the Court of Chancery found, however, approval by Union Life's Investment Committee "doesn't constitute approval to enter into a contract; it constitutes sign-off on the business concept." A104:8-11. Union Life has "a separate approval chain that has to be followed before entering into a contract." A104:11-13.

Specifically, before Union Life or one of its subsidiaries may enter into a contract, the contract must undergo a series of approvals by the heads of relevant departments and senior company executives, including the General Manager of Union Life's Asset Management Department, personnel in its legal department, and its Head of Finance and Chief Executive Officer. This sequential approval process (the "OA Approval Process") is initiated and formally documented in Union Life's office automation ("OA") system. A264:4-13; A266:12-17; *see, e.g.*, A1297-A1299. Only after all required approvals have been obtained may an authorized signatory sign a contract. A266:18-A267:17.

Best Years was formed in 2015. Since approximately July 2024, Best Years has had only one employee, Bin Feng. A258:21-A259:1. Mr. Feng's job title is Senior Investment Manager, and his responsibilities are to manage Best Years's investments in the United States under the supervision of Union Life personnel in China. A343:3-6; A344:2-6. Mr. Feng is not an authorized signatory for Best Years and has no authority to enter into a contract on its behalf. A269:15-17. Mr. Feng is supervised by Likun ("Nikki") Yang, an investment manager in Union Life's office in Beijing. A344:20-A345:11. Ms. Yang reports to Mr. Li He, General Manager of Union Life's Asset Management Department. A258:11-13. Like Mr. Feng, Ms. Yang is not an authorized signatory for Best Years and has no authority to bind Union Life or Best Years to a contract. A259:23-A260:1; A269:15-19.

Best Years's authorized signatory is Ms. Ge Haiyan, Head of Finance at Union Life. A269:8-14. Ms. Ge may sign contracts for Best Years only after the contracts have gone through the entire OA Approval Process. *See, e.g.*, B278. Summit's witnesses admitted that neither Ms. Yang nor Mr. Feng has authority to make agreements on behalf of Best Years, nor have they ever seen Ms. Yang or Mr. Feng sign a contract for Best Years. *See* A211:12-23; A212:15-20; A432:17-24.

2. Summit

Summit is a wholly owned subsidiary of Summit Healthcare REIT, Inc., a real estate investment trust that holds senior housing and care assets. A141:3-24; A143:4-10. Summit's Chief Executive Officer is Elizabeth "Liz" Pagliarini. Summit is managed by a board of directors, which consists of Ms. Pagliarini and two independent directors. A138:17-22; A210:3-15.

Like Best Years and Union Life, Summit has a formal, internal approval process that it must follow before entering into a contract. At trial, Ms. Pagliarini confirmed that before Summit could "close on a transaction, . . . there would first have to be a definitive agreement;" "that definitive agreement would have to be signed by the parties;" "[a]nd the definitive agreement would have to have been approved in a formal resolution or some other formal way by Summit's board." A225:5-23. Upon entering into a definitive agreement for a material transaction, Summit must file an SEC Form 8-K. A250:2-5.

B. Best Years and Summit Have Been Parties to the Joint Venture Since 2015.

In April 2015, Best Years and Summit formed a joint venture called Summit Union Life Holdings, LLC (the "JV"). The business of the JV is to own and operate, through its subsidiaries, a portfolio of skilled nursing, assisted living, and other similar facilities in the United States. *See* B308-B360 (§ 2.4(a)).

Since the JV's inception, Best Years has held a 90% membership interest in the JV. Summit holds the remaining 10%. As of April 2025, there were only seven facilities left in the JV. The JV was seeking to sell two of those remaining properties—Lamar and Shenandoah—leaving only the five properties that are the subject of this dispute. A176:4-A177:11. The parties refer to those five properties collectively as the Creative and Gateway portfolios. A177:5-8.

By early 2025, Summit had grown deeply dissatisfied with its relationship with Best Years, and it wanted to dissolve the JV. A216:5-14. As the Court of Chancery found, Summit had "grown frustrated with the long wait times for Best Years to obtain internal approvals for the sales of assets and other decisions," further observing that "Best Years and parent move diligently and are procedurally focused," and that "[t]he decision-makers are also based in China. That combination does not allow for nimbleness." A99:11-18.

Unbeknownst to Best Years, Summit was also discussing a potential transaction with a third-party, International Equity Partners, Inc. ("IEP"), under which Summit or its assets would be sold to IEP. A177:12-A178:11. According to Summit, IEP did not want to be in a JV with a foreign company. A206:3-16. For this reason, too, Summit wanted to dissolve the JV. A206:17-A207:1.

C. Summit Proposes to Buy Best Years's Beneficial Interests in the Creative and Gateway Portfolios.

On April 11, 2025, Ms. Pagliarini sent Mr. Feng an email concerning the Creative and Gateway Portfolios, asking whether Best Years was "interested in selling [its] interests in those portfolios to Summit." A750. Best Years responded that it was "open to considering that if Summit's offer ends up being the strongest and the best fit." *Id.*

At that time, Union Life was willing to consider selling its U.S. real estate holdings and exiting the U.S. markets. A273:18-A274:3. In particular, Union Life was concerned about geopolitical risks associated with an escalation of tensions between China and the U.S., including a potential trade war, which created risks associated with holding assets in the United States. *Id.*; *see also* A294:22-A295:6.

As Ms. Pagliarini recognized, Summit's potential purchase of Best Years's interests in the Creative and Gateway portfolios would be "completely different than anything [Summit] had done with [Best Years] before." A246:7-11. In prior acquisitions or dispositions, the JV itself contracted with a third-party buyer or seller. A246:12-16. Here, on the other hand, Best Years and Summit were contemplating a potential transaction with each other. A246:17-21; A247:1-5. Accordingly, Best Years itself would be a party to any agreement and would need to obtain approval from Union Life's senior managers and executives through the OA Approval Process before it could agree to be bound. A265:6-16; A266:12-A267:17. Similarly, Summit would require an executed, definitive agreement that had been approved by its board of directors. A210:16-22; A211:4-7.

D. Best Years Agrees to Seek Union Life Approval to Negotiate a Transaction at a $16 Million Purchase Price.

From April to June 2025, Best Years and Summit exchanged emails concerning a potential purchase price for Best Years's beneficial interests in the Creative and Gateway portfolios. *See* B361-B371. After a series of offers and counteroffers, on June 17, 2025, Ms. Pagliarini sent Mr. Feng an email stating that Summit was "prepared to offer $16 million as our final attempt to reach an agreement." B279. She further stated: "If we have a deal, I suggest we skip the LOI phase, and I will have our counsel put together a Membership Interest Purchase Agreement" (a "MIPA"). *Id.*

Mr. Feng responded to Ms. Pagliarini's email on June 19, 2025. He wrote:

> We are aligned on moving forward at the $16 million purchase price and are agreeable to proceeding without an LOI. That said, we would appreciate a brief summary memo outlining the key business terms to help ensure mutual understanding and support our internal review and approval process.

A964. He added: "We will begin our internal approvals promptly while your counsel proceeds with drafting the MIPA." *Id*.

Mr. Feng's request for information to begin Union Life's approval process was familiar to Summit. Throughout their ten-year relationship, Summit often needed to obtain approval from Best Years for JV actions. Accordingly, Summit understood that Best Years needed to obtain approval from Union Life and that Mr. Feng often requested information from Summit before beginning Union Life's approval process. A441:13-23.

E. Summit Sends Best Years a Memorandum to Facilitate Union Life's Approval Process.

In response to Mr. Feng's June 19 request for "a brief summary memo" to "help ensure mutual understanding and support our internal review and approval process," on June 20, 2025, Ms. Pagliarini sent Mr. Feng a one-page memorandum (the "Memorandum"). A998. The Memorandum listed the $16 million purchase price that the parties had discussed and indicated that Summit would prepare an initial draft of a Membership Interest Purchase Agreement ("MIPA"), which would serve as the definitive agreement for the transaction. *Id.*; *see also* A1018. The Memorandum also contained various terms that the parties had not discussed. It also left out critical terms, including how the transaction would be structured—a term which Ms. Pagliarini acknowledged was "material." A228:18-20; *see also* A445:13-15. Although the Memorandum purported to set forth "the principal terms agreed upon by the parties," in fact, many of the terms in the Memorandum had not yet been discussed. *See* A1018; *see also* A102:18-103:3.

After receiving the Memorandum, Ms. Yang initiated Union Life's Investment Committee review process. On June 26, 2025, the Investment Committee met and authorized the project team—Ms. Yang and Mr. Feng—to negotiate the potential transaction with Summit. A286:5-A287:1; A287:24-A288:15. On July 11, Union Life's chairman approved the Investment Committee's decision to continue negotiations. A1072-A1073; A288:11-20. Mr. Feng never told Ms. Pagliarini that Investment Committee approval had been obtained. A364:12-21; A367:20-24; A377:4-15.

F. Summit's CEO Assures Summit's Board of Directors that "Nothing Binding Has Been Executed."

On June 19, 2025, Ms. Pagliarini informed Summit's two independent directors about the potential transaction with Best Years. One of the directors, Steven Roush, responded that the "board [] [s]hould have been involved." A994-A995. Ms. Pagliarini understood Mr. Roush to be concerned because he "thought [Ms. Pagliarini] had gone and signed an agreement with Best Years without going through Summit's board approval process." A223:6-11. Ms. Pagliarini therefore reassured Mr. Roush in writing that "[n]o definitive agreement has been signed. Board approval happens prior to PSA/definitive agreement. We are only at LOI stage." A996. She further reassured the board members the next day by email that "nothing binding has been executed." A1019.

G. The Parties Negotiate a Draft MIPA that Is Never Approved or Executed.

On July 5, 2025, Summit sent Best Years an initial draft of the MIPA. A1050. The draft contemplated a two-party transaction whereby Best Years would sell its interests in the Gateway and Creative portfolios directly to Summit. A1053-A1054. Ultimately, however, Summit decided that this structure was not tax advantageous. Accordingly, by mid-July, the MIPA had been revised to a three-party deal under which the JV would first distribute its interests in the entities holding the five properties *pro rata* to Best Years and Summit, and Best Years would then sell those interests to Summit. *See* A1151. Over the next two weeks, the parties exchanged further emails and drafts about the terms of the potential deal. *See* A1207-A1211.

On July 31, 2025, Ms. Pagliarini sent Summit's board a draft unanimous written consent to approve the proposed transaction. A248:15-22. As Ms. Pagliarini explained, "Summit's procedures" required that all board members approve of the transaction before Summit could sign the MIPA. A211:4-7; A249:12-15. Summit's board members signed the written consent sometime on July 31. B421. Ms. Pagliarini explained, however, that until they signed, the board members were free to reject Summit's entering into the agreement. A248:23-A249:3.

That same day, July 31, 2025, Ms. Pagliarini emailed Mr. Feng asking: "Do you still need to get final IC approval before signing?" A1197. Ms. Pagliarini admitted that she asked this question because she did not know whether Best Years still needed further approvals before it could enter into the MIPA. A251:2-12. Later in the day, *before* Mr. Feng responded to her earlier email, Ms. Pagliarini sent Mr. Feng a second email purporting to attach an execution version of the MIPA. A1255.

The following day, on August 1, Mr. Feng responded to Ms. Pagliarini's first July 31 email. He wrote: "Hi Liz, in response to your questions, there shouldn't be any further IC approvals needed, since there haven't been any material changes. It's just going through the usual review steps before we get the final signature. Let's wait to hear back from our attorney. We're close." A1280. Ms. Pagliarini acknowledged his message and wrote: "Sounds good. Thanks, Bin!" *Id.*

H. Union Life Decides to Pause the Potential Transaction.

On August 4, 2025, Ms. Yang asked the head of Union Life's legal and compliance department to review the draft MIPA. A291:23-A292:19. She wrote:

> I will be submitting an OA (Office Automation) application and kindly request your assistance in reviewing it. If there are any amendments, we will forward the revised version from the Legal and Compliance Department to the administrator (buyer), and submit the new version to OA after agreement. If there are no amendments, I will submit the signing application on the OA system.

B467.

Before Ms. Yang received a response, however, Ms. Yang's supervisor, Li He, told Ms. Yang to pause the approval process. A293:16-A294:1. Ms. Yang ultimately learned that Union Life wanted to pause the transaction for a number of reasons, including macroeconomic and geopolitical factors, as well as concerns raised by Union Life's regulator. A294:9-A295:19; A340:9-20.

Throughout the parties' negotiations, Best Years made clear that Union Life had not approved any kind of agreement with Summit. Neither Ms. Yang nor Mr. Feng ever told Summit that Best Years had approved of the transaction. A297:5-11; A377:4-15. To the contrary, it is undisputed that Mr. Feng told Ms. Pagliarini over the phone "many times" that the contemplated transaction had not been approved and was still under review. A377:16-A378:6. He also reiterated this message in writing. *See* A1282 (Aug 12, 2025: Union Life is "still reviewing" and "it's still going through the internal approval process"); A1285 (September 3, 2025: "the approval's been delayed since regulation got stricter and they need more review time"). As Summit's witnesses admitted, Best Years never said or sent an email communicating that Union Life had approved any kind of agreement with Summit. A254:16-21 (Pagliarini: "I don't recall getting anything like [a communication saying that the MIPA had been approved]"); A457:11-23 (Summit Asset Manager, Ms. Daw: "I do not – I do[n't] recall having any communication" saying that "Union Life has approved the transaction").

On October 31, 2025, Summit filed this lawsuit. As a result of the litigation, Best Years conclusively decided not to go forward with the contemplated transaction. *See* A1294.

I. Summit Asserts Changing Theories of Contract Formation.

Summit has advanced a variety of legal and factual theories to support its contention that the parties formed a contract.

In its Complaint, Summit alleged that the parties reached a "complete agreement on all material terms of the sale on June 19, 2025," when Mr. Feng wrote that he was "aligned on moving forward at the $16 million purchase price," or June 20, when Ms. Pagliarini sent the Memorandum. B2-B3; *see also* B8-B9. Summit's Motion for Expedited Proceedings likewise asserted that "the parties reached complete agreement on all material terms of the sale on June 19, 2025." B27.

Similarly, in its Pretrial Brief on February 27, 2026, Summit contended that the parties reached an "agreement set forth in the Memorandum" that Summit sent on June 20, 2025, and that "Summit began performing under the parties' agreement by preparing an initial draft MIPA which it circulated to Best Years on July 5, 2025." B77. Summit's Pretrial Brief does not argue that the parties reached a Type II agreement or, for that matter, even mention Type II agreements. It does not cite this Court's decisions in *Cox* or *SIGA*. *See* B46 (table of authorities).

Trial was held before the Court of Chancery on March 6 and March 16, 2026. Each side presented the testimony of two witnesses. Consistent with its Pretrial Brief, Summit proceeded on the basis that the parties had agreed on all material terms of a fully enforceable contract. It requested only specific performance and put on no evidence of purported damages.

Indeed, in discovery, Summit refused to provide evidence of damages, stating: "Damages discovery is [] outside the scope of the expedited trial and is premature." B462. Further, as explained in the pretrial order, Summit's position was that "[m]onetary damages alone are inadequate" and that its alleged harm "cannot be adequately compensated via monetary damages." B138.

In light of Summit's approach to the case, including its refusal to respond to damages discovery, Best Years "objected to any evidence of damages, or argument regarding damages, being presented in this case, given Summit's refusal to respond to discovery regarding alleged damages and decision to seek only specific performance and not damages at the non-bifurcated trial." *See* B145. Summit never raised Best Years's objection with the Court of Chancery or sought clarification regarding the scope of the trial. Rather, it pushed ahead, seeking only specific performance.

At post-trial oral argument, Summit abandoned its pleaded theory that an agreement containing all material terms had been reached on June 19 or June 20, stating that it was "not trying to prove that there was a binding agreement as of June 19." A38:1-3. Rather, Summit urged the Court to find that a contract had been formed on July 31, 2025, stating: "We're going to ask the Court to decide that a binding enforceable agreement was reached between the parties as of July 31, 2025. That's when the negotiations were complete" and the terms to a "member interest purchase agreement…were agreed upon." A28:13-19.

At the same post-trial oral argument, Summit raised for the first time the possibility that the parties had formed a Type I or Type II preliminary agreement on June 19. Summit's counsel stated that "We think that's a Type 1 agreement. If it's not a Type 1 agreement, it's certainly a Type 2 agreement." A29:10-13.

J. The Court of Chancery Found that The Parties Never Formed an Agreement of Any Kind.

Following the post-trial argument, the Court of Chancery issued a lengthy bench ruling. The Court held that Summit failed to prove the parties *ever* formed an agreement of any type, and found in favor of Best Years on each of Summit's theories. *See* A96:24-A97:2; A112:9-15 ("I think the post-trial record shows that Summit and Best Years did not form a binding contract.").

1. <u>No Contract Was Formed on June 19 or June 20.</u>

Regarding June 19 and 20, the Court of Chancery analyzed Mr. Feng's email on that date, which stated that Union Life still had to "begin [its] internal approvals." The Court found that this email "demonstrates that Best Years was not manifesting assent to forming a contract at that time" because Mr. "Feng was indicating that Best Years was only beginning the internal approval process." A113:11-15. The Court of Chancery found that this conclusion was "also supported by the fact that the parties hadn't addressed all the material terms by June 19 or 20." A113:22-24.

The Court of Chancery also "consider[ed] significant Summit's internal discussions" in finding that no agreement had been reached. Specifically, the Court found "highly probative" Ms. Pagliarini's reassurance of Summit's independent directors that "no definitive agreement had been signed" and that "nothing definitive has been executed." A114:1-6. As the Court explained, those documents showed that "Summit itself had not completed its own internal approval process" by June 20 and that "Summit didn't regard a transaction as binding until an agreement was signed." A114:7-10.

Finally, the Court of Chancery held that the June 20 Memorandum likewise did not constitute an agreement. As the Court explained, "many of" the terms listed in the Memorandum "hadn't yet been discussed, and what [Ms.] Pagliarini was sending over was proposals that she hoped would be the terms that would be agreed upon by the parties." A102:23-A103:3. Further, neither Summit nor Best Years ever signed the Memorandum, and Best Years "never indicated to Summit that it agreed with the terms set forth in the Memorandum." A103:5-8.

2. No Contract Was Formed on July 31.

The Court of Chancery next rejected Summit's theory that a contract had been formed as of July 31, 2025. In particular, the Court found that, based on the record evidence, the parties had "a baseline recognition that only a signed definitive agreement was going to bind the parties." A114:13-15. The Court also found the parties' "contemporaneous conversation" demonstrate that no binding agreement was reached. A115:17-23. Specifically, the Court highlighted Mr. Feng's response that the transaction was "going through the usual review steps," that they should "wait to hear back from our attorney," and that they were "close." A115:9-16; *see also* A917. The Court found that these communications were "conclusive" in that Mr. Feng's response "affirmatively disconfirms the existence of an agreement." A115:17-23.

3. <u>The Parties Did Not Reach a Type I or Type II Preliminary Agreement.</u>

Finally, the Court of Chancery addressed the arguments that Summit made for the first time at post-trial argument and found that the parties had not reached a Type II preliminary agreement. The Court explained that, for a Type II agreement to exist, "you still need a threshold agreement." A127:7-8. The Court found that the existence of such an agreement was not supported by the record: "I don't think there was ever an agreement to agree. What there was was an agreement that no one would be bound until there was an actual fully signed agreement. That's not a Type 1 agreement. That's not a Type 2 agreement. It's no agreement." A127:8-13.

K. Summit Unsuccessfully Changes Its Theory Again in its Motion for Reargument.

On April 17, 2026, Summit moved for reargument, advancing yet another new theory. *See* B160. This time, Summit argued that the parties formed a "Type II preliminary agreement" on June 26, 2025, when Union Life's Investment Committee authorized the project team to continue negotiating the potential transaction. B168.

Best Years opposed reargument, arguing that the Court of Chancery had not overlooked the issue of Investment Committee approval. *See* B248. Indeed, the Court had found that Investment Committee "approval doesn't constitute approval to enter into a contract; it constitutes sign-off on the business concept," and that Union Life has "a separate approval chain that has to be followed before entering into a contract." A104:8-13. Best Years also argued that Summit had waived its new Type II argument. *See* B252-B253. On April 29, 2026, the Court of Chancery denied Summit's motion, finding that the "court did not overlook a decision or principle of law or misapprehend any issues of law or fact." B261-B262.

L. Summit Appeals and Changes Its Theory Yet Again.

On May 8, 2026, Summit filed its Notice of Appeal. Dkt. 1. Summit's appeal is limited to the Type II agreement theory that it raised for the first time after trial. In its opening brief, however, Summit does not specify when it now contends the parties reached a Type II agreement. In addition, Summit represents that it "does not challenge the Court's findings below." Op. Br. at 26.

Finally, Summit argues for the first time on appeal that Best Years's alleged breach of the Type II preliminary agreement entitles Summit to expectancy damages.

ARGUMENT

I. THE COURT OF CHANCERY'S FINDINGS THAT NO AGREEMENT WAS REACHED ARE SUPPORTED BY THE RECORD AND ARE NOT CLEARLY ERRONEOUS

A. Questions Presented

Whether the Court of Chancery's factual conclusion that the parties did not enter into a Type II preliminary agreement, or any other type of agreement, was supported by evidence in the record.

B. Scope of Review

The Court of Chancery found that the parties did not form a binding agreement of any kind because they did not manifest an intent to be bound. "Whether a party manifested an intent to be bound is a question of fact." *Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 735 (Del. 2020). This Court will not overturn the Court of Chancery's factual findings unless they are clearly erroneous. *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021). This standard is highly deferential. *Id.* A trial court's factual findings are not clearly erroneous if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Id.* at 94-95.

C. Merits of Argument

This Court has recognized the enforceability of certain preliminary agreements. In this case, however, the Court of Chancery found that no such preliminary agreement was formed. That factual finding was amply supported by the record and therefore should be affirmed.

1. Breach of a Type II Preliminary Agreement Requires that the Parties In Fact Formed Such an Agreement.

This Court has recognized that parties can "enter into two types of enforceable preliminary agreements." *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 761 (Del. 2022). "Type I agreements reflect a consensus 'on all the points that require negotiation' but indicate the mutual desire to memorialize the pact in a more formal document. In Type II agreements, the parties 'agree on certain major terms, but leave other terms open for future negotiation.'" *Id.* (citing *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 349 & n.82 (Del. 2013)). "Type I agreements are fully binding; Type II agreements 'do [] not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith[.]'" *Id.*

For a Type II agreement to be enforceable, the parties must have entered into a binding Type II agreement in the first place. *Id.* Nothing in either *Cox* or *SIGA* altered the well-settled principle that formation of a contract of any kind requires, among other elements, that the parties objectively manifested an intent to be bound. *See Eagle Force*, 235 A.3d at 731 (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158-59 (Del. 2010)).

Thus, in cases enforcing Type II agreements, the parties had in fact entered into such an agreement. In *Cox*, for instance, the Type II obligation arose from a written, signed settlement agreement providing that Cox "will enter into a definitive MVNO agreement" on mutually agreed terms. 273 A.3d at 756. In *SIGA*, the preliminary agreement was reflected in multiple signed contracts that expressly obligated the parties to "negotiate in good faith with the intention of executing" additional agreements. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 337-38 (Del. 2013); *see also Bos. Consulting Grp., Inc. v. GameStop Corp.*, 2023 WL 2683629, at *4 (D. Del. Mar. 29, 2023) (signed statement of work); *Omega Cap. Mgmt. Partners, LLC v. Schrage*, 2022 WL 17847192, at *1 (3d Cir. Dec. 22, 2022) (signed agreement). In *GreenTech Consultancy Co., WLL v. Hilco IP Services, LLC* and *Straine DM Holdings LLC v. Breault*, the agreement was evidenced by the parties' performance under the terms of an agreement for several months (*GreenTech*) or multiple years (*Straine*). 2022 WL 1499828, at *11-12 (Del. Super. Ct. May 11, 2022); 2025 WL 275408, at *9 (Del. Super. Ct. Jan. 22, 2025).

Here, there was no such agreement. As detailed herein, the Court of Chancery found that "the record does not show that there was any type of agreement to be bound before the signing of the formal agreement." A117:14-16. The Court elaborated, with respect to an alleged Type II agreement in particular: "I don't think there was ever an agreement to agree. What there was was an agreement that no one would be bound until there was an actual fully signed agreement. That's not a Type 1 agreement. That's not a Type 2 agreement. It's no agreement." A127:8-13.

Those factual findings are reviewed only for clear error. As this Court has held, the determination of "[w]hether a party manifested an intent to be bound is a question of fact." *Eagle Force*, 235 A.3d at 735. "[F]indings of historical fact" including those "based upon credibility determinations[,] . . . physical or documentary evidence or inferences from other facts," are subject to the "clearly erroneous" standard of review. *Id.*; *see also Ocean Bay Mart, Inc. v. City of Rehoboth Beach Del.*, 285 A.3d 125, 136 (Del. 2022). Here, Summit does not even attempt to argue that the Court of Chancery's factual findings were erroneous.

Instead, Summit urges this Court to apply the wrong legal standard. Summit argues that questions of contract formation are reviewed *de novo*, *see* Op. Br. at 15 (citing *Cox*, 273 A.3d at 760), but that is incorrect. In *Cox*, this Court explained that issues of "contract interpretation" are reviewed *de novo*. *Cox*, 273 A.3d at 760. But the question here is one of contract formation, not contract interpretation. As noted above, whether parties intend to be bound is an issue of fact that can be overturned only upon a showing of clear error.

Summit argues that the Court of Chancery "effectively restored the pre-*SIGA* rule that preliminary agreements requiring future documentation are unenforceable absent a final executed contract." Op. Br. at 29. That argument misses the mark.

The Court of Chancery did not hold that, as a matter of Delaware law, a Type II preliminary agreement must be in writing and signed. Rather, the Court of Chancery concluded *as a factual matter* that the parties never reached a preliminary Type II agreement because, based upon the trial record, *these parties* did not intend to be bound to any type of agreement unless and until a definitive agreement was approved and executed. The Court also found that the parties did not otherwise manifest an intent to be bound, through their words or conduct, and in fact found that Best Years expressly disclaimed the existence of a binding agreement.

2. The Record Supports the Court of Chancery's Conclusion that the Parties Did Not Enter Into a Type II Agreement.

Summit's appeal thus fails because the Court of Chancery found, as a factual matter, that the parties did not enter into a Type II agreement, A127:8-13, and that finding was amply supported by the record. In the first place, the record overwhelmingly supports the Court of Chancery's factual finding that the parties intended to be bound only by a signed, written agreement that had been approved pursuant to their respective internal approval processes.[1] *See* A112:16-22 ("[B]oth parties understood that there wouldn't be a binding agreement until there was a fully

[1] Summit asserts that "Best Years did not argue that there was a mutual understanding that only a signed definitive agreement would be effective." Op. Br. at 26. Summit's assertion is incorrect. *See*, *e.g.*, B122-B123 (arguing that sophisticated parties like Best Years and Summit would only agree to a $16 million transaction pursuant to a signed definitive agreement); A62:6-A64:2; A66:2-A68:1; A73:10-A74:22.

signed and executed agreement.”); A114:13-15; A117:12-18; A118:10-15 (recognizing enforceability of preliminary agreements but finding that “the evidence [here] demonstrates that there was, in fact, a mutual understanding that only a signed definitive agreement would be effective”). The following facts were not disputed at trial and are not challenged on appeal:

- Summit knew that Best Years could not enter into an agreement without Union Life approval. A211:19-A212:14.
- Union Life never approved of the contemplated agreement. In fact, the OA Approval Process was not even initiated. A83:13-22; A334:14-17.
- Neither Ms. Yang nor Mr. Feng ever told Summit that Union Life had approved the transaction. A297:5-11; A377:10-15.
- Mr. Feng communicated to Summit verbally and in writing that Union Life approval had not been obtained. A917-A918; A921; A377:16-A378:6.
- Summit witnesses confirmed that they never received a communication from anyone at Best Years saying that Union Life had approved of any agreement. A254:4-21; A457:11-23.
- Summit, for its part, does not consider itself bound unless and until there is a fully executed, definitive agreement, and such agreement must be approved by Summit’s board of directors. A210:8-22; A211:1-7.
- Ms. Pagliarini told her board that nothing would be binding until Summit signed a definitive agreement following board approval. A223:6-11; A223:18-A224:10.
- The draft MIPA itself contemplated that the parties would not be bound until there was a fully executed and approved definitive agreement. A121:22-A122:2.

As this evidence demonstrates, the Court of Chancery had ample support for its factual conclusion that the parties would not be bound to any kind of agreement unless and until they signed a definitive agreement.

3. The Record Supports the Court of Chancery's Factual Findings that Best Years Did Not Manifest an Intent to Be Bound to an Agreement at Any Time.

In addition, the Court of Chancery made detailed factual findings that Best Years did not manifest an intent to be bound to a contract on any of the dates that Summit contended a contract was formed. Those findings further support the Court of Chancery's conclusion that no Type II agreement was formed.

With respect to June 19, the Court found that Mr. Feng's June 19 email "demonstrates that Best Years was not manifesting assent to forming a contract at that time," because Mr. Feng "was indicating that Best Years was only beginning the internal approval process." A113:11-15. The Court found that conclusion was further "supported by the fact that the parties hadn't addressed all the material terms by June 19 or 20." A113:23-24. In contrast to cases involving a binding preliminary term sheet, here the Court found that "Best Years never indicated to Summit that it agreed with the terms set forth in the memorandum" that Summit sent on June 20, and indeed that "many of those terms hadn't yet been discussed." A102:24-A103:8

The *White Winston* case is instructive. *See White Winston Select Asset Funds, LLC v. Good Times Rests., Inc.*, 2022 WL 1659161 (D. Del. May 25, 2022). There, the parties signed a letter of intent indicating they would negotiate an agreement in good faith, but the letter stated that its terms were "not binding," had "no legal effect," and did not "constitute an obligation or commitment…to enter [into the final deal]." *Id*. at *2. The court held that the letter did not constitute a Type II preliminary agreement. *Id*. This case is even further afield, because the parties did not even sign a term sheet, and the Court of Chancery made unchallenged factual findings that Best Years never agreed to be bound by the June 20 memorandum.

With respect to July 31, the Court of Chancery found the parties' "contemporaneous conversation" to be "conclusive" that no binding agreement was reached. A115:17-18. Specifically, the Court found that Mr. Feng's statement that the transaction was "going through the usual review steps," that Summit should "wait to hear back from our attorney," and that the parties were "close," "affirmatively disconfirms the existence of an agreement." A115:9-16; A115:17-23.

In its Motion for Reargument, Summit for the first time contended that the parties reached a Type II agreement on June 26, when Union Life's Investment Committee met. B168. That theory, too, is inconsistent with the Court of Chancery's unchallenged factual findings. The Court found that the Investment Committee only "authorized the project team to continue to negotiate the potential transaction with

Summit," not that it agreed to be bound, even to the general terms of a deal.[2] A103:24-A104:3. There is no evidence that Best Years ever communicated to Summit that the Investment Committee had approved the business concept, let alone that it had agreed to be bound to it before Union Life had approved and signed a definitive agreement. Indeed, Mr. Feng testified that he never told Summit the Investment Committee had approved, and Summit's witnesses did not offer any testimony to the contrary. A367:16-24. Under this Court's precedents, contract formation requires an outward, "overt manifestation of assent" to be bound, *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1229 (Del. 2018), and Summit does not point to any manifestation of assent on June 26. Indeed, the Court of Chancery found—in findings Summit does not challenge—that Best Years never manifested such assent and in fact expressly disclaimed such assent. A112:23-A113:24; A114:21-A115:23.

Unable to challenge any of these extensive factual findings, Summit focuses on the Court of Chancery's statement that the parties had "largely agreed on the terms of the transaction by the end of July." *See* Op. Br. at 11; *see also* A116:22-24. As the Court of Chancery's ruling makes plain, however, the fact that Mr. Feng or Ms. Yang might have been comfortable with the terms of the proposed agreement—

[2] In addition, the final step in the Investment Committee process was the Chairman's signature, which was not obtained until July 11, after Summit sent its first draft of the MIPA. *See* A1072-A1073.

such that they were prepared to initiate the OA Approval Process—was insufficient to form a binding contract. As Summit was aware, neither Ms. Yang nor Mr. Feng had authority to bind Best Years to an agreement (preliminary or otherwise), and Union Life's approval had not been obtained.

Moreover, as the Court of Chancery found, Best Years made clear to Summit that it would not be bound absent formal approval and the execution of a definitive agreement.

II. SUMMIT FAILED TO PRESERVE FOR APPEAL ITS REQUEST FOR DAMAGES UNDER A TYPE II AGREEMENT THEORY.

A. Questions Presented

Did Summit properly preserve for appeal its request for damages for breach of an alleged Type II preliminary agreement?

B. Scope of Review

Under Delaware Supreme Court Rule 8: "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." To determine whether a party preserved an issue for review, the Court will "independently examine the record below." *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 921 (Del. 2023) (internal quotation marks omitted).

C. Merits of Argument

The relief Summit now seeks—expectancy damages for an alleged breach of a Type II agreement—should be rejected because it was not preserved for appeal. Although Summit's Complaint refers to damages, Summit did not pursue damages below. Summit refused to respond to discovery regarding its alleged damages on the ground that it was only seeking specific performance at trial. B462. Even though the trial was not bifurcated or limited to non-monetary relief, Summit failed to put on evidence of damages either through fact or expert testimony. It also did not request damages in its post-trial argument or in its motion for reargument. Having refused to provide discovery regarding damages and failed to develop and present a damages case, Summit cannot now claim that the issue of damages was preserved for appeal.

On page 37 of its appeal brief, Summit claims that its request for damages was preserved on the following pages of the appendix: A28:22-A29:3, A44:3-18, A93:6-10, and A95:24-A96:2. None of the cited material has anything to do with damages. In fact, one of the cited pages makes plain that Summit did *not* seek damages at trial. A28:22-A29:3 (requesting only specific performance and attorneys' fees).

Indeed, the Type II theory that now forms the entire foundation of Summit's appeal was not part of this case until the post-trial oral argument. In its Complaint, motion for expedited proceedings, and pretrial brief, Summit contended that the parties "reached complete agreement on all material terms," not that they reached a preliminary agreement on some terms with a binding commitment to negotiate the remaining terms in good faith. *See* B2 (Complaint); B27 (Motion for Expedited Proceedings); B52-B53 (Pretrial Brief). Because Summit failed to raise its Type II theory until after-trial, the argument was waived. *See, e.g.*, *Bäcker,* 246 A.3d at 108 (finding waiver where argument was raised at "the last possible instant"); *In re Mindbody, Inc. S'holder Litig.*, 332 A.3d 349, 410 (Del. 2024) (defendants "waived their ability to seek a settlement credit because they did not raise this issue until the last footnote . . . on the very last page . . . of their very last post-trial brief").

Moreover, the "interests of justice" do not require this Court to address Summit's request for damages. Summit affirmatively chose not to respond to Best Years's discovery regarding damages and did not respond to Best Years's objection in the Pretrial Order to damages being part of the non-bifurcated trial. Nor did it raise damages at trial, in its post-trial argument, or even in its motion for reargument. Because Summit chose solely to seek specific performance, and it refused to present any evidence of damages, the interests of justice do not require that the Court entertain Summit's damages request now. *See id.* at 410 (holding that entertaining an argument not raised until the last page of defendants' post-trial brief "would conflict with 'fundamental fairness'" to the opposing party).

Although Summit argues that "expectancy damages are the proper remedy," Op. Br. at 37, it nevertheless refers obliquely to specific performance of the MIPA. *Id.* at 4, 41. Any request for specific performance based upon Summit's Type II theory fails for three separate reasons. First, Summit does not even attempt to establish that specific performance of the MIPA is available under Delaware law. It does not brief the issue or cite any case law to support its stray references to specific performance. Therefore, it has failed to properly raise the issue on appeal. Second, specific performance of a Type II agreement is contrary to Delaware law. As *Cox* makes plain, Type II agreements "do[] not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith." *Cox*, 273 A.3d at 761 (citation omitted). An order requiring specific performance of the MIPA would be contrary to *Cox*'s teaching that a Type II agreement merely requires parties to negotiate in good faith and nothing more. Third, the Court of Chancery held that, even assuming some sort of preliminary agreement existed, the MIPA cannot be specifically enforced. The MIPA conditions performance on the truth of the contractual representations and warranties, including the delivery of a signed version of the MIPA. Because those conditions were never met, the Court of Chancery held that "no enforcement could be granted," and "no breach could have happened because the obligation to perform never arose." A122:5-9. Summit's appeal brief ignores entirely this aspect of the Court of Chancery's holding.

Accordingly, the Court should affirm the Court of Chancery's ruling because Summit failed to preserve for appeal its request for damages—the only relief it now seeks. *See*, *e.g.*, *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022) (party fails to preserve issue for appeal where it does not present argument or evidence about it during trial); s*ee also In re Mindbody, Inc.*, 332 A.3d at 410 (party failed to preserve claim for a "settlement credit" where it had not raised the issue until its post-trial brief).

III. <u>SUMMIT DID NOT PROVE THAT BEST YEARS BREACHED A PURPORTED TYPE II AGREEMENT BY FAILING TO NEGOTIATE IN GOOD FAITH</u>

A. Questions Presented

Did Summit establish that Best Years failed to negotiate in good faith where Best Years merely paused the negotiations due to changes in the geopolitical business environment and concerns expressed by its regulator and only terminated negotiations after Summit filed this lawsuit?

B. Scope of Review

The Court of Chancery's factual findings are reviewed only for clear error. *Bäcker,* 246 A.3d at 96.

C. Merits of Argument

Even if a Type II duty to negotiate existed, Best Years did not breach it. A Type II agreement merely obligates parties to negotiate the remaining open terms in good faith. *See SIGA*, 67 A.3d at 349. In *SIGA*, the bad faith was manifest. After the parties signed both a bridge loan agreement and a merger agreement expressly committing them to negotiate in good faith, SIGA proposed new terms that bore no resemblance to the prior agreed-upon terms because it had seller's remorse. *Id.* at 346-47. Its key trial witness had "selective and biased memory" of the parties' prior negotiations and wholly abdicated his obligation to remind SIGA of the terms to which it had previously agreed. *Id.* at 347. Based on these and other facts established at trial, this Court concluded: "Not only did SIGA's negotiating position differ substantially from the LATS's terms, but also the Vice Chancellor also correctly concluded that SIGA took that position in bad faith." *Id*. at 346.

This case is nothing like *SIGA*. To the extent a Type II agreement was formed on June 19/20 (and it was not), Summit's counsel admitted that Best Years negotiated "completely in good faith" through early August. A42:18-22. At that point, Best Years paused the deal because of valid business and legal concerns. As the Court of Chancery observed, the decision to pause was driven by changed macroeconomic and geopolitical factors and concerns expressed by a Chinese regulator. A107:10-18. Mr. Feng—who communicated throughout the process that Union Life had not yet approved of the proposed deal— informed Summit of these concerns, texting that any approval would be delayed because "regulation got stricter," and the "regulator wants to pause the sale." A921-A922. Best Years only called off further negotiations when Summit filed this lawsuit.

As these facts make clear, Best Years acted reasonably and in good faith. Best Years did not re-trade on terms to which it had purportedly agreed; nor did it try to reach a better deal with a third party or engage in any type of deception or sharp practices. *SIGA*, 67 A.3d at 346 ("[B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.”). Rather, Best Years made plain throughout the process that the proposed transaction had not been approved by Union Life and paused the proposed transaction only in light of changed political and economic circumstances and regulatory concerns. Best Years therefore did not breach any obligation to negotiate in good faith.

CONCLUSION

For the foregoing reasons, the Court of Chancery's decision should be affirmed.

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