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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIKHAIL KOKORICH, *Plaintiff Below,* *Appellant,* v. MOMENTUS INC. *Defendant Below,* *Appellee.*	No. 207, 2023 On Appeal From: Court of Chancery C.A. No. 2022-0722-MTZ **PUBLIC VERSION** **Dated: September 14, 2023**

APPELLEE'S ANSWERING BRIEF

OF COUNSEL

BAKER & McKENZIE LLP
Perrie M. Weiner
Aaron T. Goodman
10250 Constellation Blvd., Suite 1850
Los Angeles, California 90067

Peter P. Tomczak
Michael D. Lehrman
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601

CHRISTENSEN & DOUGHERTY LLP
Joseph L. Christensen (#5146)
Meghan M. Dougherty (#4787)
1000 North West Street, Suite 1200
Wilmington, Delaware 19801
(302) 212-4330

Attorneys for Defendant Below, Appellee

August 28, 2023

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NATURE OF PROCEEDINGS

This appeal arises from the Court of Chancery's final order dismissing appellant Mikhail Kokorich's ("Kokorich") First Amended Complaint ("FAC") because he provided appellee Momentus Inc. ("Momentus") a general release of his claims in a June 8, 2021 Stock Repurchase Agreement (the "SRA"). Kokorich entered the SRA contemporaneously with other agreements [redacted] Under the SRA, Momentus purchased Kokorich's equity interest in itself for [redacted], and Kokorich released and waived all of his claims against Momentus and rights as a former Momentus director and officer.

Thereafter, however, Kokorich sought advancement and indemnification from Momentus for various lawsuits and government investigations in which he was a defendant or target—rights he claimed arose from an October 16, 2017 Indemnification Agreement (the "Indemnification Agreement") and Momentus's governing documents. Momentus declined Kokorich's demands pursuant to the general release; in response, Kokorich asserted that his claims survived the expansive general release under its narrow exclusion for "Claims … under this [SRA] and any of the other agreements executed and delivered in connection herewith" (the "Carveout").

Kokorich filed his initial Complaint seeking advancement and indemnification based on what the Court of Chancery described as "a daisy chain of other agreements and correspondence" consisting of: (i) the 2017 Indemnification Agreement; (ii) a February 11, 2021 Separation Agreement (the "Separation Agreement"), which preserved his rights under the Indemnification Agreement in his initial separation from Momentus; and (iii) what Kokorich claimed constituted a second amendment of that Separation Agreement (the "Purported Amendment"). Op. at 11.[1] Kokorich also asserted claims for advancement and indemnification under Momentus's governing documents and 8 *Del. C.* § 145(c). He also sought [redacted] under a May 27, 2021 Letter Agreement (the "May 27 Letter Agreement"). In the alternative, Kokorich sought to recover under theories of promissory estoppel and fraudulent inducement. Momentus moved to dismiss all counts in Kokorich's complaint pursuant to Court of Chancery Rule 12(b)(6) and, in the alternative, Court of Chancery Rule 12(b)(1) for lacking jurisdiction due to an arbitration clause in the Separation Agreement. On November 14, 2022, Kokorich filed his First Amended Complaint ("FAC"), in which he dropped his claims under the Separation Agreement. On December 2, 2022, Momentus again moved to dismiss all counts in the FAC pursuant to the general

[1] The Court of Chancery's May 15, 2023 Memorandum Opinion was included as Exhibit A to the Corrected Opening Brief of Appellant Mikhail Kokorich. Citations to the Memorandum Opinion in this brief are in the form of "Op. at ___."

release and, in the alternative, for lack of jurisdiction because Kokorich continued to pursue advancement and indemnification under the Purported Amendment and Indemnification Agreement.

After reviewing the parties' briefs and holding oral argument on February 2, 2023, the Court of Chancery on May 15, 2023, issued a detailed 40-page Memorandum Opinion holding the parties did not intend to arbitrate Kokorich's claims. The Court then determined that Kokorich released all of his claims under multiple contracts, the May 27 Letter Agreement, Momentus's governing documents, and promissory estoppel pursuant to the unambiguous terms of the general release, and rejected his arguments that any such claims fell within the Carveout. Op. at 15-40. Addressing the "first daisy in Kokorich's chain" towards reaching the much earlier Indemnification Agreement (*Id.* at 17), the Court of Chancery specifically held: (i) Momentus did not accept and was not bound by the Purported Amendment to the Separation Agreement; (ii) "no such amendment was 'executed and delivered in connection' with the [SRA]," (*Id.* at 25); and thus (iii) Kokorich "cannot contend the Separation Agreement's reference to the Indemnification Agreement and Bylaws carves claims arising under those agreements out of the [r]elease." (*Id.*)

On June 13, 2023, Kokorich filed a notice of appeal. Neither party has appealed the Court of Chancery's jurisdictional ruling. Kokorich has appealed only

the Court of Chancery's dismissal of his claims under the May 27 Letter Agreement and the Purported Amendment.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly held that Kokorich waived and released his claims for advancement and indemnification arising from the May 27 Letter Agreement and the Purported Amendment under the unambiguous general waiver in the SRA. Kokorich offers no basis for his assertion that "[t]he Chancery Court failed to accept all of Kokorich's well-pleaded allegations as true and make all reasonable inferences in his favor." Kokorich Br. at 3. The Court of Chancery correctly identified and applied the governing standard for motions under Rule 12(b)(6). Op. at 16. Kokorich critiques the Court of Chancery's holdings by repeating his claims below without addressing the reasons why the Court of Chancery rightly rejected them. For example, Kokorich refers to extrinsic evidence to argue the Carveout is ambiguous, but as the Court of Chancery rightly held, Delaware law prohibits relying on extrinsic evidence to create an ambiguity where one does not exist based on the plain meaning of contractual terms. Kokorich also ignores express terms in the SRA supporting the Court of Chancery's holding, simply asking for inferences contrary to those unambiguous terms. Additionally, even if the Court of Chancery had examined extrinsic evidence, the communications between the parties and manner in which the parties' previously amended the Separation Agreement support the holding of the Court of Chancery, which meticulously reviewed the record before it. Ultimately, Kokorich's positions

disregard the commercial context of the SRA and its general release as a response to CFIUS, and contravene Delaware's objective theory of contracts.

2. **Denied.** The Court of Chancery correctly decided that Kokorich's general release encompassed the May 27 Letter Agreement, which did not fall within the Carveout for "Claims … under this Agreement and any of the other agreements executed and delivered in connection herewith." Op. at 8, 31-34. Kokorich fails to address that the Court of Chancery rejected his claim because it impermissibly relied on extrinsic evidence. Kokorich Br. at 3; Op. at 33-34. The Court expressly acknowledged Kokorich's argument seeking to tie the May 27 Letter Agreement to the SRA based on its timing, albeit not to the June 8, 2021 execution of the SRA and related agreements addressing CFIUS's [redacted] but to May 27, 2021 as the earlier date when the parties allegedly contemplated executing their agreements. Op. at 33 n. 104. However, Kokorich's temporal focus confirmed that "he appear[ed] to agree with Momentus … that the agreement at issue be executed and delivered contemporaneously with the execution of the [SRA]." *Id.* at 33-34, 10 n. 33. Significantly, the Court of Chancery recognized that other than by timing, "Kokorich d[id] not argue any other connection to the [SRA]." *Id.* at 34. The parties therefore did not diverge on the unambiguous language, "Kokorich point[ed] to no other ambiguous language that would open the door to the extrinsic evidence he offers to expand the meaning of 'executed and delivered in connection herewith,'" and the

unambiguous Carveout did not reach the May 27 Letter agreement executed nearly two weeks before the SRA. *Id.* at 33-34.

The broader logical "connection" pressed in his appeal was never fairly presented below, is not a question properly presented for review, and Kokorich's conclusory reference to the interests of justice does not support reviewing that which the Court of Chancery itself flagged as not having been argued. Even if this Court were to entertain Kokorich's improper new arguments, they should be rejected. By focusing on an earlier, abstract time when the parties were possibly going to enter into their agreements, Kokorich wrongly assumes "this Agreement" captures antecedent drafts and ignores the parties' continuing negotiation and revision of their agreements in the nearly two weeks that ensued from May 27 to June 8, 2021. *See, e.g.,* A-0226-29. At bottom, the inference requested by Kokorich contravenes the commercial context of the SRA, under which the parties severed their relationship [redacted] and the general purpose of general releases.

3. **Denied.** The Court of Chancery correctly decided that the Purported Amendment was not carved out from the SRA's general release under its exclusion for "Claims … under this Agreement and any of the other agreements executed and delivered in connection herewith." Op. at 8, 17-25. Kokorich's demand for a series of inferences from certain documents cannot overcome the express language of those

documents, which the Court of Chancery analyzed in detail before rightly concluding that none of those documents "constitute[d] an acceptance of an offer to amend the Separation Agreement, and no such amendment was 'executed and delivered in connection' with the [SRA]." Op. at 25. In particular, the plain language "will agree" in the email Kokorich primarily relies on "convey[ed] that [Momentus] did not intend to accept an offer to amend the Separation Agreement," and "that the Company would accept the offer at some point in the future." *Id.* at 20. The Court of Chancery noted the Separation Agreement's anti-modification clause combined with the parties' first amendment of it in a compliant separate, signed writing further supported this conclusion. *Id.* at 23. Nor did a Board resolution adopted by Momentus change this result as "any possible acceptance arising from the Board [r]esolution was conditioned on management preparing an agreement," and the FAC never alleged that agreement was ever executed by the Board resolution's "Authorized Officers" or "delivered." *Id.* at 23-24.

In yet more arguments improperly asserted for the first time on appeal, Kokorich identifies "further bases for this Court to find that an agreement was reached regarding the [s]econd [a]mendment." Kokorich Br. at 23. Once again, the Court of Chancery specifically recognized that "Kokorich has not raised any argument that this response was a preliminary agreement or an agreement-to-agree; any such good faith argument is waived," Op. at 22 n. 69, and his "Type I / Type II"

arguments should not be reviewed. DEL. SUPR. CT. R. 8. Should this Court adjudicate these new arguments, Kokorich's arguments should still be rejected under the documents' specific language and the Court of Chancery's reasoning.

STATEMENT OF FACTS[2]

A. The 2017 Indemnification Agreement

Kokorich, a Russian national, co-founded space infrastructure company Momentus. A-0028, ¶ 15. On October 16, 2017, Kokorich entered into the Indemnification Agreement with Momentus's corporate predecessor. A-0028, ¶ 16; A-0079-93.

B. The U.S. Government's Investigation, Kokorich's Resignation, and the February 11, 2021 Separation Agreement

In October 2020, Momentus agreed to merge with a publicly traded special purpose acquisition company (SPAC) named Stable Road Acquisition Corp ("Stable Road"). A-0029, ¶ 17. In January 2021, the Office of the Undersecretary of Defense sent a letter to the U.S. Securities and Exchange Commission ("SEC"), [redacted] with Stable Road, focusing on [redacted]. A-0029-30, ¶¶ 18, 20, A-0045-46, ¶ 43. These investigations threatened the merger and Momentus's ability to obtain regulatory approvals for a test launch of its space vehicle. A-0029-30, ¶ 18.

Thereafter, following [redacted]

[2] Given the procedural posture of the case before the Court of Chancery, the facts detailed in this counterstatement and relied upon throughout this Response Brief are the facts set forth in Kokorich's FAC and the exhibits thereto. A-0022–A-0267. To the extent possible, Momentus has avoided duplicating any facts fairly presented by Kokorich in his Opening Brief. DEL. SUPR. CT. R. 14(B)(V).

[redacted] A-0030, ¶ 21. On February 11, 2021, Kokorich and Momentus entered into the Separation Agreement. A-0032, ¶ 24; A-0115-57. Under the Separation Agreement, Kokorich voluntarily resigned from his positions as CEO and director of Momentus. A-0032, ¶ 24; A-0116 § 1. Momentus also agreed to release any claims "arising out of any aspect of [Kokorich's] employment relationship with and service as an employee, officer, director or agent of [Momentus], or the termination of such relationship or service, that occurred, existed or arose on or prior to the date hereof," excluding a for Cause termination, or a crime or fraud. A-0120-21 § 7. Kokorich also provided a "General Release" in which he waived and released:

> any and all claims … with respect to any matter, including, without limitation, (a) any matter related to [his] employment with [Momentus], (b) the termination of that employment relationship and (c) arising out of, or relating to, any agreement or any awards, policies, plans, programs or practices of [Momentus and other released parties] that may apply to [Kokorich] or in which [he] may participate.

A-0119 § 6. The parties agreed that "[t]he waiver and release contained in [the Separation Agreement] does not apply to (i) [Kokorich's] indemnification rights under the Indemnification Agreement … and the Company's internal governing documents …" A-0120 § 6. "[E]xcept for the surviving provisions of the … Indemnification Agreement … and except as otherwise expressly provided in [the Separation] Agreement," the Separation Agreement "render[ed] null and void any

and all prior or contemporaneous agreements between [Kokorich] and [Momentus] or any affiliate of [Momentus] ….” A-0119-20 § 6, A-0124 § 20.

C. The May 27 Letter Agreement

On May 7, 2021, the [redacted] and advised [redacted] related to [redacted] and [redacted] ”). A-0040-41, ¶ 38. Kokorich requested that Momentus indemnify him for [redacted]. A-0040-42, ¶¶ 38–39.

On May 27, 2021, Momentus and Kokorich executed the May 27 Letter Agreement that addressed Kokorich’s [redacted]. A-0042-43, ¶ 40; A-0237-40. The May 27 Letter Agreement provided:

> In accordance with [the] Indemnification Agreement, the Company agrees to advance Expenses, as defined in the Indemnification Agreement (including reasonable attorney’s fees), and funds…reasonably incurred by you, or on your behalf, in connection with [redacted]

A-0238, ¶ 1.

D. The June 8, 2021 National Security Agreement and SRA

More was needed [redacted] A-0031, ¶ 23. He therefore [redacted]

[redacted]." *Id*. The parties accomplished this through the June 8, 2021 National Security Agreement ("NSA"), and its attached SRA, and other attached agreements. A-0031-32, A-0043. Reflecting part of those negotiations, in a June 6, 2021 email, Kokorich's attorney stated: "Please see attached clean and redline copies of the [NSA] and the Brainyspace [SRA]. We appreciate the government's efforts and hope to resolve all remaining issues tomorrow." A-0228.

On June 7, 2021, the government responded to Kokorich's counsel by identifying some of these remaining issues in nine distinct bulleted paragraphs, which included edits and revisions to the SRA. A-0226-27. In a separate email chain, also on June 7, 2021, Momentus's counsel sent Kokorich's counsel a reproduced portion of resolutions that had been adopted by Momentus's board of directors that "authorized" and "directed" certain "Authorized Officers"

> to execute and deliver the Letter Agreement on behalf of the Company, with such modifications and amendments as either of them may, in their discretion, determine to be necessary or advisable, such determination to be conclusively evidenced by the execution and delivery of the Letter Agreement by either of the Authorized Officers.

A-0035-37, ¶ 31; A-0166-67. Kokorich never alleged any such "Letter Agreement" was ever executed or delivered by the "Authorized Officers."

On June 8, 2021, after concluding negotiations, Kokorich executed the NSA and, as an annex thereto, the SRA. A-0038, ¶ 34; A-0168-204; A-0205-19. The SRA contained a general release, providing that Kokorich

> knowingly and voluntarily releases the Company and its Related Parties (each, a "Company Released Party") to the maximum extent permitted by applicable law from any and all claims, demands, causes of action, obligations, damages, losses, liabilities, promises, debts, costs and expenses of any kind whatsoever, whether at law or in equity, asserted or unasserted, known or unknown, suspected or unsuspected, fixed or contingent (collectively, "Claims"), which Mr. Kokorkich … may have or may claim to have against any Company Released Party arising from or relating to any events, facts, conditions or circumstances existing or arising on or prior to the date hereof, in each case, to the extent related to the Company, including without limitation, Claims that arise from or relate to Mr. Kokorich's … prior relationship with the Company, Mr. Kokorich's … rights or status as an equityholder, employee, officer or director of the Company ….

A-0211 § 5(a). The general release did not apply to "any Claims Mr. Kokorich … may have under this [SRA] and any of the other agreements executed and delivered in connection herewith…." *Id.*[3] The SRA also contained anti-reliance and integration clauses. A-0209 § 3(f).

Parallel to Kokorich's general release, Momentus also provided a mirroring general release of "Claims." In stark contrast to Kokorich's release, however, Momentus's release expressly excluded not only Claims under "this [SRA] and any of the other agreements executed and delivered in connection herewith," but also under "that certain Separation Agreement between the Company and Mikhail Kokorich, dated February 11, 2021," and several other listed agreements. A-0212 § 5(b). Specifically, under Section 5(b) of the SRA, Momentus

[3] The Court of Chancery defined this section of the release the "Carveout," and for this Court's convenience Momentus has continued this convention.

> knowingly and voluntarily releases the Stockholder and its Related Parties (each, a "Stockholder Released Party") to the maximum extent permitted by applicable law from any and all Claims which [Momentus] may have or may claim to have against any Stockholder Released Party arising from or relating to any events, facts, conditions or circumstances existing or arising on or prior to the date hereof, in each case, to the extent related to the Stockholder (**excluding, however, any Claims [Momentus] may have under this Agreement any of the other agreements executed and delivered in connection herewith, that certain Separation Agreement between [Momentus] and Mikhail Kokorich, dated February 11, 2021**, that certain Employee Nondisclosure and Invention Assignment Agreement between [Momentus] and Mikhail Kokorich dated March 10, 2018, that certain Proprietary Information and Inventions Agreement between [Momentus] and Mikhail Kokorich dated November 7, 2018, that certain Non-Competition, Non-Solicitation and Confidentiality Agreement between Mikhail Kokorich and Stable Road Acquisition Corp. dated October 7, 2020 and that certain Lock-Up Agreement dated February 13, 2021, by and among [Momentus], Mikhail Kokorich and certain other parties thereto (the "Lock-Up Agreement") ….

A-0212 § 5(b) (emphasis added).

ARGUMENT

I. THE COURT OF CHANCERY APPLIED THE CORRECT LEGAL STANDARD IN GRANTING MOMENTUS'S MOTION TO DISMISS BASED ON THE UNAMBIGUOUS TERMS OF THE SRA'S GENERAL RELEASE AND THE CARVEOUT

A. Question Presented[4]

Did the Court of Chancery apply the correct legal standards in granting Momentus's Rule 12(b)(6) motion to dismiss Kokorich's claims for advancement and indemnification based on the unambiguous terms of the SRA's general release and the Carveout, and applying established rules of contract interpretation under Delaware's objective theory of contracts? A-0293-322; A-0409-439.

B. Scope of Review

"This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) de novo 'to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Golden Rule Financial Corporation v. Shareholder Representative Services LLC*, 2021, 2021 Del. LEXIS 376, at *9 (Del. Dec. 3, 2021) (quoting *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)). Though the Court is required to "accept all well-pleaded allegations as

[4] Under Delaware Supreme Court Rule 14(b)(vi), "each argument shall be subdivided into 3 parts" including a questions presented section. Kokorich has included three sections in his summary of the argument section and three principal sections in the Merits of Argument section, but only one section outlining the purported questions presented. Momentus proceeds by responding to each argument advanced by Kokorich in a new section, with a counter-question presented for each argument.

true and draw reasonable inferences in favor of the plaintiff," it need not accept conclusory allegations as true nor draw inferences that are not "truly … reasonable." *Id.* Dismissal is appropriate where the plaintiff would not be entitled to relief "under any set of facts that could be proven to support the claims asserted …." *Id.*

C. Merits of Argument

1. The Court of Chancery Correctly Identified and Applied the "Familiar" Standard Governing Motions to Dismiss, and Adhered to Delaware's Objective Theory of Contracts

The Court of Chancery began its legal analysis of Momentus's Rule 12(b)(6) motion by identifying the "familiar" standard governing such motions. Op. at 16. The Court recognized that "'well-pleaded factual allegations are accepted as true,'" which includes those giving the opposing party notice of the claim, and all reasonable inferences must be drawn in favor of the non-moving party. *Id.* (quoting *Savor, Inc. v. FMR Corporation*, 812 A.2d 894, 896-97 (Del. 2002)). Accordingly, as the Court of Chancery also noted, "dismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *Id.* The Court further observed that "where a plaintiff seeks advancement or indemnification pursuant to a mandatory provision, the company bears the burden of demonstrating that such advancement or indemnification is not required." *Id.* at 16.

As a prelude to his arguments about the May 27 Letter Agreement and the Purported Amendment, Kokorich refers to "three distinct points" which he claims prove the Court of Chancery departed from its stated standard and "instead drew unreasonable inferences in favor of the moving party, Momentus." Kokorich Br. at 26. Kokorich in each of his points is asserting that certain extrinsic evidence—the parties' alleged contemplation to enter into the transactions "almost immediately" or "hours after," the May 27 Letter Agreement, or communications "months after" actually entering into the SRA on June 8, 2023—shows the parties could not have meant what the unambiguous general release and Carveout provided. *Id.* None of Kokorich's three "points" demonstrate that the Court of Chancery drew any unreasonable inference, let alone one in favor of Momentus. Rather, in this appeal, Kokorich reasserts as "inferences" his extrinsic evidence arguments that were rightly rejected by the Court of Chancery under the unambiguous terms of the Carveout.

Fundamentally, as the Court of Chancery explained in its Memorandum Opinion, which Kokorich never addressed in his Corrected Opening Brief:

> Delaware adheres to the objective theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party. When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement. If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity. But, [i]f, after applying these canons of contract interpretation, the contract is nonetheless reasonably susceptible [to] two or more interpretations or may have two or more different meanings, then the

> contract is ambiguous and courts must resort to extrinsic evidence to determine the parties' contractual intent.

Op. at 32-33 (alterations in original, internal quotations and citations omitted). Contrary to Kokorich's argument, the Court of Chancery did not "imply" anything, and instead correctly held that the Carveout, as argued by the parties below, was subject to only one reasonable interpretation. Op. at 33. Kokorich's extrinsic evidence cannot vary those terms and create contrary inferences. *See O'Brien v. Progressive Northern Insurance Co.*, 785 A.2d 281, 289 (Del. 2001) ("Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity."); *see also Rossi v. Ricks*, 2008 Del. Ch. LEXIS 99, at *5 (Del. Ch. Aug. 1, 2008) ("Importantly, a contract term is not ambiguous simply because the parties do not agree on its meaning.")

2. Kokorich Disregards the Commercial Context Here that the SRA and Its General Release Were the Parties' Latest Effort to Sever Their Relationships [redacted]

Kokorich's other contentions are proverbial strawmen. The Court of Chancery did not shift any burdens or evaluate any affirmative defense. *Compare* Kokorich Br. at 25 *to* Op. 35 n. 108. Further, while Kokorich acknowledges the commercial context of an agreement in determining whether ambiguity exists, the commercial context actually supports the Court of Chancery's interpretation of the Carveout. "[A] general release … is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless,

arise." *Hob Tea Room, Inc. v. Miller*, 89 A.2d 851, 856 (Del. 1952); *see also Hicks v. Sparks*, 2014 Del. LEXIS 142, at *5 (Del. Mar. 24, 2014). The broad cleansing purpose of a general release frames its interpretation. *See Geier v. Mozido, LLC*, 2016 Del. Ch. LEXIS 149, at *16 (Del. Ch. Sep. 29, 2016) (explaining that "one can discern on the face of the General Release that its purpose is to effect a broad release of claims, intended to cover any pre-existing claims the releasors may have against the releasees," and interpreting under New York law the term "affiliate" in that general release "broadly" in dismissing claims); *see also Hob Tea Room, Inc.*, 89 A.2d at 856-57 ("As we view it, however, it was the plaintiff's burden to prove, by evidence 'in every respect clear and convincing, and free from doubt,' that the actual agreement of the parties was that the release should not be the general one it purports to be.") (citing *Colvocoresses v. W. S. Wasserman Co.*, 4 A.2d 800, 803 (Del. Ch. 1939)). Here, the SRA and its general release represented the parties' repeated effort, after executing the Separation Agreement, to sever their relationship [redacted]. Kokorich's attempt to revive the four year-old Indemnification Agreement through a "daisy chain" of documents, communications, and extrinsic evidence squarely conflicts with the purpose of the general release and the commercial context of the SRA. For this reason and the additional fatal flaws in Kokorich's arguments asserted below, the Court of Chancery carefully reviewed the

implications of the Carveout's unambiguous language and rightly rejected Kokorich's contentions.

II. THE COURT OF CHANCERY CORRECTLY EXCLUDED KOKORICH'S EXTRINSIC EVIDENCE IN DETERMINING THAT THE UNAMBIGUOUS CARVEOUT'S EXCLUSION OF CLAIMS UNDER THE SRA "AND ANY OF THE OTHER AGREEMENTS EXECUTED AND DELIVERED IN CONNECTION HEREWITH" DID NOT PRESERVE HIS CLAIMS UNDER THE MAY 27 LETTER AGREEMENT

A. Question Presented

Did the Court of Chancery correctly determine, based on the arguments fairly presented to it, that the unambiguous terms of the Carveout precluded the extrinsic evidence offered by Kokorich, and thus the Carveout's exclusion of Claims under the SRA "and any of the other agreements executed and delivered in connection herewith" did not preserve Kokorich's claims under the May 27 Letter Agreement? A-0297-A-307; A-0409-435.

B. Scope of Review

As stated above in Section IB of the Argument, "[t]his Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) de novo 'to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Golden Rule Financial Corporation*, 2021 Del. LEXIS 376, at *9.

Significantly, this Court generally "declines to review issues that were not fairly presented to the trial court." *Cassidy v. Cassidy*, 689 A.2d 1182, 1184 (Del. 1997). The Delaware Supreme Court places "great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments …

they did not fully present below." *DFC Global Corporation v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). This Court may consider questions not "fairly presented to the trial court … when the interests of justice so require." DEL. SUPR. CT. R. 8. But the appellant must establish plain error and a "compelling interest of justice that mandates an exception to the waiver doctrine embodied in Supreme Court Rule 8." *Cassidy*, 689 A.2d at 1184–85. Plain errors are "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Id.* at 1184.

C. Merits of Argument

1. Kokorich Impermissibly Relies on Extrinsic Evidence to Argue the Carveout is Ambiguous

In its well-reasoned opinion, the Court of Chancery held that "Kokorich released any claims he had under the May 27 Agreement." Op. at 31. Significantly, "Kokorich [had] argue[d] it was 'executed and delivered in connection' with the [SRA] because the parties had planned to sign both the [SRA] and [NSA] on May 27, but delayed doing so to June 8 only after the May 27 Agreement was signed." *Id.* Kokorich's argument before the Court of Chancery and in this Court, which linked the May 27 Letter Agreement to the SRA "not on the date it was actually signed, but rather on the date the parties at one point intended to sign it, relies on extrinsic evidence, and so requires the Carveout to be ambiguous." *Id.* 31-32.

The Court of Chancery correctly understood Kokorich's argument below as temporally linking the May 27 Letter Agreement to the SRA. The Court recognized Kokorich "appear[ed] to agree with Momentus that the phrase 'executed and delivered in connection herewith' contemplates that the agreement at issue be executed and delivered contemporaneously with the execution of the [SRA]." *Id.* at 33 (referencing A-0306, A-0372-74). Indeed, Kokorich's arguments to the Court of Chancery contain only references to timing. Kokorich asserted that "[t]he parties entered into the May 27, 2021 Letter Agreement **on the same day** that they initially were supposed to enter into the [NSA] and [SRA]." A-0372 (emphasis added). Kokorich contended it was "common sense" that the parties "did not heavily negotiate and execute an agreement that they believed, at the time of signing, **would become null and void hours later** when the [SRA] was scheduled to be signed." A-0373-74 (emphasis added). As such, both Kokorich and Momentus focused on timing. However, for Kokorich to succeed under the parties' shared unambiguous interpretation of the Carveout, he impermissibly needed to rely on extrinsic evidence to close the gap between the May 27 Letter Agreement and the SRA.

2. Kokorich Waived His New, More Expansive Interpretation of "In Connection Herewith" By Never Asserting It Below

Kokorich never objects to the Court of Chancery's legal analysis of the temporally-focused interpretation of "in connection herewith" advanced by both parties below. Instead, unable to refute the Court of Chancery's correct reasoning,

Kokorich now argues for the first time (with supporting case law never cited before) that the May 27 Letter Agreement and the SRA have a broader logical and not just temporal "connection," in a last ditch attempt to reach the extrinsic evidence he needs. But Kokorich waived this argument on appeal by not first making it in the Court of Chancery. *See* DEL. SUPR. CT. R. 8; *Cassidy*, 689 A.2d at 1184-85; *Wainwright*, 504 A.2d at 1100. Nor has Kokorich provided this Court any basis to find reviewing his belated assertion of a "logical" connection is in the interest of justice, as Delaware Supreme Court Rule 8 requires. Put simply, it is not, and this Court should decline to review it. *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378-79 (Del. 2022) ("The Appellants offer no convincing argument that the trial court made a plain error that had the effect of depriving them of a substantial right or clearly shows a manifest injustice" and "[a]s such, we find that the interests of justice do not require us to review this issue").

3. Kokorich's New Argument Incorrectly Analyzes the Phrase "In Connection With," Rather Than the Phrase "In Connection Herewith" Actually Used in the Carveout

The Carveout states that the Stock Purchase Agreement's general release excludes "Claims that … [Kokorich] may have under this Agreement and any of the other agreements executed and delivered in connection herewith, including Stockholder's right to receive the Purchase Price from the Company." A-0211, § 5. Nevertheless, in his Corrected Opening Brief Kokorich without justification refers

to and analyzes "in connection with" instead of the phrase actually used in the SRA, "in connection **herewith**." *Id.* (emphasis added); Kokorich Br. at 2 n. 2. Kokorich's use of "with" rather than "herewith" improperly broadens the scope of the language in the SRA. "Herewith" has a particularized legal definition: "[w]ith or in this letter or document." *Herewith*, Black's Law Dictionary (11th ed. 2019). Whereas "with," which does not have a distinct legal definition, is "used as a function word to indicate a participant in an action, transaction, or arrangement." *With*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/with (last visited August 23, 2023).

The phrase "in connection herewith" has been interpreted by courts as having a narrower construction. In *RKI Exploration & Production, LLC v. Ameriflow Energy Services, LLC*, 2022 Tex. App. LEXIS 4331, at *24 (Tex. App. June 23, 2022), the parties disagreed over the meaning of the phrase "arising in connection herewith." *Id.* The Texas Court of Appeals rejected a broad interpretation of that phrase, principally based on "the plain meaning of the 'herewith' phrase and other courts' interpretation[]" of it. *Id.* at 26. It then explained that "in connection herewith" was a "limiting phrase" intended to narrow the potentially broad scope covered by the word "arising." *Id.* at *32. The appellate court analyzed each portion of the phrase:

> "In" is a preposition that in this context is "used as a function word to indicate limitation, qualification, or circumstance."…"Connection" is

> a noun that denotes a "causal or logical relation or sequence" or a "contextual relation or association."…The phrase "in connection"…is a phrase pointing to the source of origination…Or if looked at in terms of causal nexus, "in connection" signals that what comes next is the triggering event that causes something to originate.
>
> The source of the matter arising in this case is "*herewith*."

Id. at *32-33 (internal citations omitted). Based on that, the *RKI Exploration* court concluded that the phrase "arising in connection herewith" meant "originating from the document or writing in which the phrase is contained." *Id.*at 33.

Here, the phrase "executed and delivered in connection herewith" carries the same narrower meaning. The agreement(s) executed "in connection herewith" were the NSA and its three annexed SRAs. Exhibit 1, B-002-125. In other words, the relevant agreement(s) were those "[w]ith or in" the SRA. *Herewith*, Black's Law Dictionary (11th ed. 2019). Any other reading of the plain language would be unreasonable because it could encompass any number of unforeseen agreements. If the parties intended for the phrase "in connection herewith" to have some broader meaning, they would have stated as much. *See, e.g.*, *In re Bison Building Materials, LLC*, 2009 Bankr. LEXIS 5077, at *53 (Bankr. S.D. Tex. July 1, 2009) (The contract at issue stated "at any time executed and/or delivered in connection therewith."). By failing to include such a temporal expander, it is reasonable to infer that the parties intended for the phrase to carry its commonly-understood meaning.

Kokorich contends that all documents in his set of agreements were "'in connection herewith," regardless of their timing. By reaching for the broadest possible meaning of "in connection with," Kokorich's interpretation "does violence to the very purpose of the limiting language," "'in connection herewith.'" *See RKI Exploration & Production, LLC*, 2022 Tex. App. LEXIS 4331, at *47–48. Were Kokorich correct, then there would be no need to expressly identify the Separation Agreement and multiple other earlier agreements as being carved out from the release. *See* A-0212 § 5(b). Kokorich, in his overbroad interpretation of the phrase "in connection with," offers no basis to limit the Carveout beyond Kokorich's mere assertions of what he alleges is in connection with the release—contrary to both the timing of the release and the certainty required of exceptions to general releases, especially on the facts presented here.

Each of the cases relied upon by Kokorich in footnote 115 is distinguishable on the grounds that they interpret broadly the inapplicable phrase "in connection with," and not "in connection herewith." *See, e.g., Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (interpreting "in connection with"); *Artz v. Barnhart*, 330 F.3d 170, 175 (3rd Cir. 2003) (same); *Khimmat v. Weltman, Weinberg & Reis Co., LPA*, 585 F. Supp. 3d 707, 712-13 (E.D. Pa. 2022) (same); *Center for Biological Diversity v. United States Fish & Wildlife Services*, 33 F.4th 1202, 1232 (9th Cir. 2022)

(same). Kokorich's reliance on *Loney* is further misplaced, as *Loney* was not even a contractual interpretation case.

The aforementioned cases and *Power & Telephone Supply Co. v. Suntrust Banks, Inc.,* 2005 U.S. Dist. LEXIS 49594 (W.D. Tenn. May 10, 2005), are further distinguishable as none of them involve interpreting a general release. The function of a general release is to waive broadly all rights and claims, and the releasing parties must clearly and carefully preserve any claims. *See Hob Tea Room, Inc.*, 89 A.2d at 856-57. Like many general releases, the SRA's general release terminates claims and obligations "prior to the date hereof." Going beyond other general releases, here the SRA's general release was the latest effort [redacted] Thus, in contrast to *Suntrust*, the parties had every reason to prize clarity, certainty, and timing.

What Kokorich asserts is that a reasonable interpretation of "executed and delivered in connection herewith" excludes from the SRA's general release certain unspecified earlier agreements, including the Separation Agreement and the four year-old Indemnification Agreement. But the Separation Agreement was expressly identified when it was carved out from Momentus's mirroring general release in the SRA. And the Indemnification Agreement was expressly identified when it was carved out from the release in the Separation Agreement. It is patently unreasonable to infer that the parties became less—rather than more—clear in their latest attempt

to sever their relationships. *See Julius v. Accurus Aero. Corp.*, 2019 Del. Ch. LEXIS 1343, *22 (Del. Ch. Oct. 31, 2019) ("Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning.").

4. Kokorich's Argument is Based on the Erroneous Premises that Between May 27 and June 8, the SRA Did Not Change, and the Parties Could Not Change Their Positions During Their Ongoing Negotiations

The definition of "herewith" described above also highlights the erroneous premise of Kokorich's argument. Kokorich bases his argument concerning the logical scope of "in connection herewith" on his assertion that "[n]o changes were made to the [SRA] or [NSA] during those 12 days that would affect the parties' prior negotiations and agreements regarding indemnification, because the changes primarily pertained to technical details." Kokorich Br. at 18. Apart from again improperly relying on extrinsic evidence, the very communications cited by Kokorich demonstrate that the parties continued to negotiate the SRA. In addition, Kokorich does not and cannot allege the parties did not change their positions in finally reaching their fully integrated agreement.

The parties did not execute the SRA "hours later" after executing the May 27 Agreement. They kept negotiating. A bulleted list of nine terms of the NSA (and corresponding changes to the three Annexed SRAs) were still being hashed out as late as June 7, as captured in the exhibits to the FAC. A-0226-27; B-002-125. Indeed,

Kokorich's own attorney stated, "Please see attached clean and redline copies of the [NSA] and the Brainyspace [SRA]. We appreciate the government's efforts and hope to resolve all remaining issues tomorrow." A-0228.

Kokorich would have this Court overturn the Court of Chancery's well-reasoned opinion and ignore the subsequent negotiations after the parties entered the May 27 agreement. He asks this Court to extrapolate from extrinsic evidence he cites that parties did not and could not continue negotiating, and that Momentus did not and could not change its mind concerning what was connected to the Stock Purchase Agreement. Such an inference would be both improper and unreasonable. Kokorich thus fails to disprove the Court of Chancery's holding that there was "no other reasonable interpretation" of the unambiguous Carveout allowing the Court to consider extrinsic evidence. Op. at 33–34.[5]

[5] The Court of Chancery rightly held that because Kokorich "point[ed] to no other ambiguous language that would open the door to the extrinsic evidence he offer[ed] …" Op. at 33. In his Corrected Opening Brief, Kokorich does not contend that the SRA's language is ambiguous. During oral argument, counsel for Kokorich did no better, baldly asserting without explanation that "on the face of [the SRA], it is ambiguous." (A-0514:24-0515:1) Counsel further contended that the "in connection herewith" language in the release provision was ambiguous and required the use of extrinsic evidence because it "can't be defined by looking at the body of the agreement[,] … case law[,] … [or] other secondary sources." (A-0497:21-0498:3) These conclusory assertions are insufficient under Delaware's objective theory of contracts to establish any ambiguity in the SRA.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT THE PURPORTED AMENDMENT TO THE SEPARATION AGREEMENT WAS NOT AN ENFORCEABLE AGREEMENT, NOR WAS IT "EXECUTED AND DELIVERED" AS REQUIRED BY THE CARVEOUT

A. Question Presented

Did the Court of Chancery correctly hold that the parties' communications forming the Purported Amendment to the Separation Agreement did not constitute an offer and acceptance creating an agreement, let alone one that was "executed and delivered in connection herewith" as required by the Carveout? A-0297-307; A-0414-430.

B. Scope of Review

This Court's Scope of Review for Section III of Momentus's responsive argument is the same as Section II, and Momentus hereby expressly incorporates Section II(B), including its discussion of waiver under Delaware Supreme Court Rule 8. *See supra* at pp. 22-23.

C. Merits

1. The Purported Amendment Was Never Accepted by Momentus

The Court of Chancery correctly rejected Kokorich's attempt to obtain advancement and indemnification under the 2017 Indemnification Agreement through what the Court characterized as "a daisy chain of other agreements and correspondence." Op. at 11. Kokorich traced his advancement and indemnification

rights under the October 16, 2017 Indemnification Agreement, through the February 11, 2021 Separation Agreement, and then through emails exchanged between the parties between May 21, 2021 and June 7, 2021, that Kokorich claimed constituted the Purported Amendment. Specifically, Kokorich asserted Momentus's counsel, "on behalf of [Momentus], accepted an offer to amend the Separation Agreement through her May 21 email, which was 'confirmed' by her May 28 email and the Board Resolution." Op. at 19 (citing A-0366). Kokorich further argued that the following excerpt from a set of June 7, 2021 resolution of Momentus's Board of Directors accepted or confirmed Momentus's acceptance of an offer:

> [T]he Authorized Officers hereby are … authorized and directed to execute and deliver the Letter Agreement on behalf of the Company, with such modifications and amendments as either of them may, in their discretion, determine to be necessary or advisable, such determination to be conclusively evidenced by the execution and delivery of the Letter Agreement by either of the Authorized Officers.

(the "Board Resolution") (A-0167); Kokorich Br. at 13-14. As the capstone, Kokorich concluded the Purported Amendment constituted an "agreement" that was "executed and delivered in connection herewith" under the Carveout. Kokorich Br. at 14-15.

In addressing Kokorich's argument, the Court of Chancery began "with the first daisy in Kokorich's chain: a purported amendment to the Separation Agreement." Op. at 17. The Court carefully reviewed the email exchanges between respective counsel for Kokorich and Momentus that Kokorich claimed constituted a

binding agreement. *Id.* at 18. The Court held that "[t]he plain language of [Momentus's counsel's] May 21 email conveys that [Momentus] did not intend to accept an offer to amend the Separation Agreement." *Id.* at 20. The May 21 email's language "'will agree' … conveyed that the Company would accept the offer at some point in the future" and "does not evince a present intent to be bound." *Id.* at 20-21. The Separation Agreement's anti-modification clause (along with the parties' prior execution of a signed, written first amendment of the Separation Agreement) support[ed] the conclusion "that [Momentus] would later prepare and execute a binding agreement, or that it would sign a written agreement to amend the Separation Agreement." *Id.* at 22. Consistent with this, Kokorich's counsel's May 28 email expressed his understanding that a written agreement needed to be prepared and signed. *Id.* at 22. As such, "[t]he requirement for future action—here, actual acceptance—precludes a finding that the parties entered into a contract on May 21." *Id.* at 22.

The Court of Chancery also analyzed the conveyance of an excerpt of the Board Resolution, and determined that it "does not constitute an acceptance of the proposed amendment, not did it 'further confirm[]' that the earlier emails accepted an offer." *Id.* at 23 (alteration in original). "On the contrary," the Court explained, "it confirms that [Momentus] did not intend to be bound by [the] May 21 email, and instead contemplated entering into an agreement at a later date." *Id.* The Court noted

in support of this determination that the language of the Board Resolution—"direct[ing] the 'Authorized Officers' to 'execute and deliver the Letter Agreement on behalf of the Company,' and make any such modifications and amendments that they believed 'necessary or advisable'"—was not an "unconditional acceptance" but empowered the Authorized Officers "to proceed in whatever manner they thought best, including accepting the offer by papering and executing a letter agreement or making a counteroffer…." *Id.* The Board Resolution thus could not "constitute the acceptance of an offer," and instead was "further evidence that there was still more to do before the parties entered into a binding agreement." *Id.* at 24. Finally, the Court of Chancery observed that the FAC never alleged the letter agreement referred to in the Board Resolution was ever presented to or signed by Kokorich, or "delivered" to him as the Carveout required.

As an initial matter, Kokorich again offers no valid reason to reverse the Court of Chancery's analysis that Momentus did not enter into any agreement. Instead, without answering why the Court of Chancery was wrong, Kokorich asks this Court to draw inferences simply at odds with the Court of Chancery's conclusions. Kokorich does not and cannot dispute that "will do" is in the future tense. Kokorich then argues that the Court of Chancery "improperly assumed that there were other 'material' or 'essential' terms to be negotiated" (Kokorich Br. at 42-43) so "will do" formed a present agreement. Kokorich's contention, however, fails based on the

language of the communication. "Will do" answers Kokorich's counsel's request to "have Momentus prepare a short agreement documenting this approval for MK's records?" A-0163. Significantly, also, Kokorich ignores his counsel's next sentence: "I modified the prior increase language for your consideration." *Id.* The modified language did not contain the First Amendment's agreement by Kokorich that the increase in the cap on reimbursable legal fees did "not cover any legal fees incurred due to [his] material breach of any obligations to [CFIUS] or any material breaches of any agreements between [him] and [Momentus]." A-0159. Far from representing the parties' agreement, the communication evidences that the parties were still negotiating.

Kokorich acknowledges that the Court of Chancery recognized parties' "course of conduct" can waive a contractual anti-modification clause (Kokorich Br. at 46), but he never responds to the Court of Chancery's holding that "the parties' conduct here, including their modification of the Separation Agreement" through a compliant written first amendment just a few months prior, "shows that they did not intend to waive or modify this provision." Op. at 22. n. 67. Nor does Kokorich address the Court of Chancery's further reasoning that the language committing to prepare or execute a written agreement (as explained above) confirms the parties were abiding by the Separation Agreement's anti-modification provision.

Kokorich's responses to the Court of Chancery's reasoning on the import of the Board Resolution are equally unavailing. Kokorich claims the Board Resolution demonstrates the Momentus board "specifically and expressly approved the ***sole term that had been discussed*** and previously-agreed upon via the May 21, 2021 communications." (Kokorich Br. at 39, emphasis in original). But this argument ignores the conditional and contingent nature of the language in the resolution. Op. at 22-23. Kokorich never explains how the conditional language of the Board Resolution did not empower Momentus officers to negotiate further. Moreover, Kokorich never addressed the Board Resolution's requirement that the letter agreement be "conclusively evidenced" by a writing "executed and delivered by Authorized Officers" (and Kokorich has never alleged this somehow includes outside counsel). No reasonable inference can be drawn to rewrite the Board Resolution into the acceptance Kokorich wants it to be, "[b]ecause any possible acceptance arising from the Board Resolution was conditioned on management preparing an agreement…." *Id.* at 23.

At bottom, the incorrectness of Kokorich's series of inferences is revealed by the absurd result Kokorich seeks. Kokorich asks this Court to reverse the Court of Chancery's ruling by seeking an inference that Momentus accepted the material terms to establish a binding contract by ignoring at least three fatal roadblocks: (1) Momentus's purported acceptance contravenes an anti-modification clause

previously adhered to be the parties; (2) the purported acceptance never uses language of present acceptance and is conditional; and (3) the purported acceptance could only have been carried out by an Authorized Officer to negotiate an agreement that would be "conclusively evidenced by" an agreement "executed and delivered" by those Authorized Officers, which did not occur. Inferences cannot contradict clear contractual terms. *See Shimko v. Honeywell International, Inc.*, 2014 Del. Super. LEXIS 500, *13 (Del. Super. Ct. Sep. 30, 2014) ("[T]he Court must decline to draw an inference … if the record does not contain facts upon which the inference reasonably can be based."). Here, the inferences Kokorich seeks do not singularly, or in aggregate, call into question the correctness of the Court of Chancery's reasoning and ruling.

Finally, Kokorich's attempt to revive the Indemnification Agreement through the Purported Amendment and its underlying agreement, the Separation Agreement, plainly contravenes the unambiguous terms of the SRA. The parties in the SRA identified the Separation Agreement as separate and apart from the "other agreements executed and delivered in connection" with the SRA in Momentus's release, but not in Kokorich's release. *Compare* A-0212 § 5(b) *with* A-0211 § 5(a). If the parties intended to exclude the Separation Agreement from Kokorich's general release, they certainly knew how to and could have done so. But they did not. *See Roseton OL, LLC v. Dynegy Holdings, Inc.*, 2011 Del. Ch. LEXIS 113, at *41 (Del.

Ch. July 29, 2011) (comparing two contractual provisions and noting that the language of the second provision "demonstrates that when the parties intended to make a particular restriction applicable to both DHI and its subsidiaries, they knew how to do so and readily could accomplish that objective"). The releases make obvious the phrase "other agreements" does not include the Separation Agreement; concluding that it does impermissibly renders reference to the Separation Agreement in Momentus's general release mere surplusage. *See Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

2. Kokorich Waived Any Argument that the Purported Agreement was a Preliminary Agreement

Confronted with the Court of Chancery's reasoning, Kokorich offers "further bases for this Court to find that an agreement was reached regarding the [s]econd [a]mendment" of a preliminary agreement or implied-in-fact contract having been reached. Kokorich Br. at 23. Once again, the Court of Chancery expressly held that "Kokorich has not raised any argument that this response was a preliminary agreement or an agreement-to-agree; any such good faith argument is waived." Op. at 22 n. 69. These arguments are waived both below and before this Court. DEL. SUPR. CT. R. 8.

Kokorich admits that "[t]hese doctrines of Type I and Type II preliminary agreements and implied-in-fact contracts were not referenced in [his] opposition briefing below," though claims that "[t]hey are natural extensions of the FAC

allegations and Kokorich's arguments raised below, that a contract was formed based on the parties' communications and conduct regarding the [Purported] Amendment." Kokorich Br. at 23-24 (citing A-0036-37, ¶ 31 (FAC, ¶ 31)); A-0349 (Opp'n Br. at 13); A-0362-68. But the arguments offered by Kokorich to the Court of Chancery did not put it (or Momentus) on fair notice of any such "Type I / Type II preliminary agreements and implied-in-fact contracts" argument. *See Protech Minerals, Inc.*, 284 A.3d at 378-79 (Del. 2022) (quoting DEL. SUPR. CT. R. 8)).

What Kokorich did argue below is precisely the argument that the Court of Chancery reviewed and rejected, but had nothing to do with Type I / Type II preliminary agreements or implied-in-fact contracts. *See* A-0036-37 (Kokorich alleging "Delaware law provides that contracts can be formed over the course of negotiations, in multiple writings, once all of the material terms have been agreed upon."); A-0349 ("Under Delaware law, the parties' May 2021 emails and the Momentus Board Resolution formed a binding contract to amend the Separation Agreement a second time to increase the amount of reimbursable legal fees under the agreement from $700,000 to $950,000, and confirmed the ongoing existence of Kokorich's indemnification rights under the Indemnification Agreement and the Bylaws."); A-0362-68 (arguing that a contract formed by Momentus's acceptance of materials terms, and, therefore, a formal written agreement is not needed notwithstanding an anti-modification clause). Nowhere in those arguments did

Kokorich use the words "Type I," "Type II," "preliminary agreement" or "implied-in-fact," or cite any case in support of or allude to any such theory. The Court of Chancery was correct that no agreement was reached between the parties, and Kokorich waived any preliminary agreement or an agreement-to-agree argument.

3. Kokorich's New Preliminary Agreement Argument Should be Rejected on Its Merits

Even if this Court were to entertain Kokorich's request to infer negotiations resulted in an implied-in-fact contract, the Court should reject it. First, Kokorich asserts, without citation to any factually analogous case, that this Court should look to a purported implicit agreement rather than the clear subsequently executed fully integrated agreement, here the SRA. Type I preliminary agreements exist "'where all essential terms have been agreed upon in the preliminary contract, no disputed issues are perceived to remain, and a further contract is envisioned primarily to satisfy formalities.'" *SIGA Technologies., Inc. v. Pharmathene, Inc*., 132 A.3d 1108, 1141 (Del. 2015) (quoting *Vacold LLC v. Cerami*, 545 F.3d 114, 124 (2d Cir. 2008)). A Type II preliminary agreement is "a contract 'that expresses mutual commitment to a contract' on certain agreed terms, with others to be negotiated." *Id.* The Purported Amendment is neither because the parties did not reach an agreement on *any* material terms required for an agreement.

Kokorich primarily relies on *Cox Communications., Inc. v. T-Mobile US, Inc.*, 273 A.3d 752 (Del. 2022) (describing Type I and II preliminary agreements).

Kokorich Br. at 41, 44. In *Cox Communications*, the parties contemplated but never entered an exclusive partnership agreement, and the language of the parties' [written and executed] service agreement specifically contemplated they would "negotiate in good faith toward a definitive" partnership agreement at a later date. *Id*. at 767. Here, unlike *Cox Communications*, Kokorich and Momentus did not enter any [binding] agreement that contemplated negotiation or entry of a subsequent agreement.

Kokorich also quotes a portion of the opinion in *UniSuper Ltd. v. News Corporation*, 2005 Del. Ch. LEXIS 205, at *20 (Del. Ch. Dec. 20, 2005), that states, "[i]f a board enters into a contract to adopt and keep in place a resolution (or a policy) that others justifiably rely upon to their detriment, that contract may be enforceable…." Kokorich Br. at 48. That unremarkable proposition is inapplicable here because it presumes the existence of a contract. In contrast, the Court of Chancery correctly held Momentus's Board of Directors did not agree to any contractual terms, let alone terms Kokorich could have relied on to his detriment. The Board merely authorized certain "Authorized Officers" to execute, at some undetermined time, a letter agreement. Similarly, the Court of Chancery correctly held Momentus did not deliver to Kokorich any letter agreement referenced in the Board Resolution. *See* Op. at 25. Any such "agreement to agree at a later time," is not an agreement at all. *Hindes v. Wilmington Poetry Society*, 138 A.2d 501, 504 (Del. Ch. 1958).

Despite Kokorich's contentions to the contrary, the parties' actions do not and cannot demonstrate the existence of an implied-in-fact agreement. Op. at 36–42.

4. The Purported Amendment Was Neither Executed Nor Delivered

Not only was the Purported Amendment not an "agreement," it was never "executed and delivered." As the Court of Chancery explained, "the Amended Complaint concedes that the letter agreement referenced in the Board Resolution was never presented to or signed by Kokorich" because Kokorich never asserted the Purported Amendment was delivered to him. Op. at 24. The Court therefore correctly concluded that the Purported Amendment did not fall within the Carveout because there was "no basis to conclude that the agreement referenced in the Board Resolution was 'delivered,'" nor was the Purported Amendment "'executed and delivered'" as required by the Carveout. *Id.*

Nor did the Board Resolution represent an "agreement" that was "executed and delivered in connection herewith" as required by the Carveout and the resolution's own terms. As explained previously, the Amended Complaint does not allege who these "Authorized Officers" were or that they included Momentus's outside legal counsel. *Id*; *see* A-0022-74. More importantly, the June 7, 2021 Board Resolution permitted only the Authorized Officers to enter an agreement with "such modifications and amendments as either of them may, in their discretion, determine to be necessary or advisable." A-0167. That "determination [was] to be conclusively

evidenced by the execution and delivery of the Letter Agreement by either of the Authorized Officers." *Id.* Yet, the FAC contains no allegation that any such letter agreement was executed or delivered.

Kokorich contends that the "FAC alleges that Kokorich conditioned his execution of the [SRA] on Momentus's agreement to the [Purported] Amendment." Kokorich Br. at 35. But, since the Purported Amendment was neither executed nor delivered, there is nothing in the record to support Kokorich's bare allegation. On the contrary, a subsequently executed fully integrated agreement proves that no such conditions were agreed upon by the parties. A-0033-34. It is well-settled that a court need not accept a bare allegation as true. "A trial court is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'" *In re Gen. Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2006) (quoting *In re Santa Fe Pacific Corporation Shareholder Litigation.*, 669 A.2d 59, 65-66 (Del. 1995)). Nor was it "required to accept every strained interpretation of the allegations proposed by the plaintiff …." *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

The aforementioned principle applies strongly when, as here, the allegations contained within the pleading are belied by the documents relied upon and incorporated in that pleading. "[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the

claim as a matter of law." *Id.* at 1083. The Court of Chancery here correctly concluded Kokorich's allegations were insufficient to state a claim because they were contradicted by the agreements executed by the parties, and this Court should affirm that holding. Op. at 15-40.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's order dismissing Kokorich's Amended Complaint.

OF COUNSEL

BAKER & McKENZIE LLP
Perrie M. Weiner
Aaron T. Goodman
10250 Constellation Blvd., Suite 1850
Los Angeles, California 90067

Peter P. Tomczak
Michael D. Lehrman
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601

CHRISTENSEN & DOUGHERTY LLP

/s/ Joseph L. Christensen
Joseph L. Christensen (#5146)
Meghan M. Dougherty (#4787)
1000 North West Street, Suite 1200
Wilmington, Delaware 19801
(302) 212-4330

Attorneys for Defendant Below, Appellee

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