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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Michael Simons, *on behalf of himself and all other similarly situated former holders of Series A Convertible Participating Preferred Stock and AMC Preferred Equity Units of AMC Entertainment Holdings, Inc.*, Plaintiff Below, Appellant, *v.* AMC Entertainment Holdings, Inc., Defendant Below, Appellee.	No. 457, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0835-MTZ

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

AMC broke its promise to treat preferred shareholders equally. In violation of the applicable agreement, AMC devised a Distribution exclusively for common shareholders that was "deemed to be issued" before the preferred shares had been converted.[1] AMC's brief struggles to justify that conduct head on. Instead, it implores this Court to foreswear the correct interpretation of the contractual provisions. AMC seeks to disregard Plaintiff's textual analysis by asserting that his arguments are new, despite this Court's clear contrary precedent. AMC's laches defense to this exceedingly prompt lawsuit flies in the face of the benchmark three-year statute of limitations. Plaintiff filed suit *one business day* after the Court of Chancery lifted the status quo order and *the same day* AMC announced the timing of the Distribution. AMC implies that the ends justify the means—that its violations should be overlooked to help it remedy its own prior alleged violation of common shareholder rights. And it repeatedly emphasizes an undisputed fact—that the Distribution was issued after Conversion—as if that absolves it of the scheme it devised and executed. AMC's efforts fail.

When AMC engages with the appropriate textual and legal analyses, it largely rests on the Court of Chancery's opinion without resolving its manifold flaws.

[1] Capitalized terms have the same meaning as in Plaintiff's Opening Brief ("Opening").

AMC's position is extraordinary. It argues that the Court of Chancery's definition of "deemed to be issued" is the only reasonable interpretation despite arguing below that *another* interpretation was the only reasonable one, never explaining how the interpretation would function in the real world, and identifying no examples of the phrase being used as it describes. Plaintiff offers the best (and at least a plausible) interpretation of "deemed to be issued" based on established textual interpretation principles. The grant of the motion to dismiss should be reversed.

ARGUMENT

I. THE DISTRIBUTION WAS "DEEMED TO BE ISSUED" ON OR BEFORE THE RECORD DATE.

AMC promised that preferred shares would "participate equally in any" distribution, have the "same economic value and voting rights" as common shares, and that AMC would not diminish their relative value. A022; B033. AMC codified those promises in the Certificate. But it *did* dilute preferred shareholder rights by issuing stock exclusively to common shareholders. AMC claims it cannot be held accountable because the Distribution issued after the preferred shares had been converted. However, the best reading of the documents demonstrates that AMC is wrong about what it promised preferred shareholders and accordingly the entire arrangement violated the Certificate. AMC's reading has no limiting principle. In the context of a settlement, AMC's Distribution issued 1 share for every 7.5 shares of common stock held. But its legal position would have allowed it to issue 10 or 100 shares for every 7.5 shares instead—diluting preferred shareholder rights almost entirely—even outside the context of a settlement.

a. AMC's Narrow Reading of Section VI is Wrong.

AMC argues that because the Distribution was *issued* after Conversion, the plain text of the Certificate forecloses Plaintiff's claims. AMC's Answering Brief ("Answering") 17–19. While the timing of the events here is undisputed, AMC's first argument fails to credit the language in Section VI(c) of the Certificate, which

ensures that preferred shareholders are also entitled to distributions that are "deemed to be issued" before Conversion even if they were "issued" (meaning actually delivered) afterward. A049. As AMC later concedes: "If a distribution were 'deemed to be issued' prior to Conversion, holders of APEs would be entitled to" it. Answering 27. The meaning of "deemed to be issued" is the heart of this dispute.

b. The Distribution was "Deemed to be Issued" on or Before the Record Date.

As an initial matter, AMC's argument that this Court should "disregard" Plaintiff's reasoning as new is squarely foreclosed by this Court's precedent. Answering 20. While litigants are barred from advancing "an entirely new theory of [the] case," this Court has repeatedly held that when an "argument is merely an *additional reason in support of a proposition urged below*, there is *no acceptable reason* why in the interest of a speedy end to litigation the argument should not be considered." *Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) (quoting *Kerbs v. Cal. E. Airways*, 90 A.2d 652, 659 (Del. 1952)).[2] In *Kerbs* this Court rejected complaints that the litigant "did not urge this precise reason for the illegality" because they "argue[d] its illegality" in general. *Kerbs*, 90 A.2d at 659. This is consistent with Supreme Court Rule 8, which focuses on "*questions* fairly presented to the trial court" and does not require that every justification for every position be advanced

[2] Unless otherwise noted, emphasis in quotations is added.

below. The cases AMC cites do not contradict this understanding. Answering 20 n.65. Two cases addressed what *evidence* constitutes "the record on appeal."[3] And the third involved a litigant who completely failed to preserve her central appellate position "that California law should apply."[4] "Rule 8 does not bar" arguments as long as the "broader issue" was raised below, even at "oral argument." *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014), *as revised* (Nov. 10, 2014).

Plaintiff repeatedly argued below that "the Special Distribution may be deemed issued" prior to Conversion and "[a]t the very least, AMC's inclusion of this phrase creates ambiguity." A112; A178. Plaintiff was unequivocal that "it makes the most sense" for the Distribution to have been deemed to be issued before Conversion. A181–82. Plaintiff supported this position with textual, contextual, precedential, and logical arguments below. A111–20. Plaintiff's reasoning in the Opening Brief is a continuation of those arguments supporting the same position taken below.

Further analysis challenging the nuances of the Court of Chancery's conclusions is also appropriate. The court's reasoning deviated sharply from either side's briefing below, including AMC's then-position that stock is deemed issued

[3] *Del. Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997); *Price v. Boulden*, 99 A.3d 227 (Del. 2014).
[4] *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 989 (Del. 2013).

when it is delivered. A208–09, B349. An appellant may challenge a trial court's novel textual interpretation "even if he failed to raise the issue" below. *See United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003); *see also Allen v. Scott*, 257 A.3d 984, 992 (Del. 2021) (motions for reargument are not required).

Further, Plaintiff pleaded facts alleging the Distribution was "deemed to be issued" by AMC on or before the Record Date. AMC repeatedly claims that Plaintiff did not plead who would have deemed the settlement payment issued and when. Answering 21–22, 25, 26, 31. But the Amended Complaint alleges that the Distribution was "deemed to be issued on August 24, 2023 by virtue of the Record Date." A039. The Complaint further details the dates on which AMC proposed the final Distribution, the date the Court of Chancery granted final approval, and the date AMC took procedural steps to execute the Distribution before Conversion. A017; A030. The Amended Complaint makes clear who did the deeming by quoting the Certificate's description of "shares of Common Stock issued (or deemed to be issued) *by the Corporation*." A024. It further alleges that AMC "deliberately" timed the scheme, including a Record Date "prior to the Conversion." A031.

AMC's critiques of Plaintiff's legal analyses fare no better than its efforts to get this Court to ignore them.

First, AMC critiques Plaintiff's definitional argument that the Distribution was "deemed to be issued" when, prior to Conversion, AMC *decided* to issue it.

AMC straw-mans Plaintiff's analysis of "deem" as depending upon "'Middle English' and 'Old English'" definitions of other words. Answering 22. In truth, Plaintiff also cites multiple state supreme courts, federal courts, and dictionaries (both legal and standard) which define the word "deem" (not another word) as "to decide." Opening 17–18. AMC straw-mans Plaintiff a second time in the same sentence, claiming Plaintiff argues that "'deem' *exclusively* means 'decide.'" Answering 22–23 (emphasis in original). Plaintiff readily acknowledges that persuasive authorities provide support for *both* Plaintiff's definition and other definitions of the word "deem." *Words can have two meanings.* AMC cannot negate one meaning by baldly asserting another and ignoring contrary authority. While Plaintiff's reading is more persuasive here, this Court need not definitively choose one single definition. A motion to dismiss is inappropriate if two plausible interpretations exist. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). The Court of Chancery should resolve the dispute on remand after development of the record, including a holistic review involving extrinsic evidence and trade usage.

AMC is correct that the phrase "deemed to be issued" should be read as a whole. Answering 23. Plaintiff does so throughout, including evaluating it as a three-verb phrase and with whole-phrase, plain-English examples like "earlier today, a Distribution was deemed to be issued by the board." Opening 20–24.

Second, AMC criticizes Plaintiff's analysis of AMC's other uses of the word "deem" as being from another agreement (the Deposit Agreement). Answering 23–24. But the Deposit Agreement and the Certificate (which the Deposit Agreement references fifteen times) must be considered together as a matter of law. A055–76. They are parallel agreements regarding *the same transaction*, involving *the same parties*, published on *the same day*. *Comerica Bank v. Glob. Payments Direct, Inc.*, Del. Ch., No. 9707–CB, Bouchard, C., 2014 WL 3567610, at *7 (July 21, 2014) (collecting cases); A054; A044; B263. "Contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract." *Id.*; *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926–27 & n.61 (Del. 2017), *as revised* (June 28, 2017) (quoting Restatement (Second) of Contracts § 202 (1981)); *Trexler v. Billingsley*, 166 A.3d 101 (Del. 2017). AMC further claims that the uses of the word "deem" in the Deposit Agreement have different contexts, but it never explains why the contexts differ *meaningfully*. Answering 24. AMC's repeated use of "deem" to mean "decide" is probative of what it meant by including "deemed to be issued" in the Certificate on the same day.

Third, AMC responds to five pages of grammatical argument with two sentences. *Compare* Answering 25 *with* Opening 20–24. AMC first claims (ironically without analysis or citation) that Plaintiff's argument is "entirely

conclusory." Answering 25. Unlike AMC's assertion, however, Plaintiff's grammatical analysis is not conclusory—it starts with the at-issue text, applies standard grammatical methods, analyzes illustrative examples, and then draws its conclusion. Opening 20–24. Plaintiff's argument breaks down how compound verb phrases work—showing that timing hinges on the first "active" verb ("deemed") rather than later "object" verbs ("to be issued")—and then applies this principle to AMC's conduct. *Id.* Plaintiff's analysis, which AMC never substantively addresses, demonstrates that the Distribution was "deemed to be issued" prior to Conversion—when AMC made its final distribution decision. *Id.* AMC then recycles its assertion (rebutted above) that Plaintiff failed to plead sufficient facts. Answering 25.

Fourth, AMC claims Plaintiff's legal fiction analysis is inconsistent with allegations in the amended complaint—but fails to explain *how*—and advances a policy argument. Answering 25. Both arguments are dispatched by a correct understanding of Plaintiff's analysis. Courts around the country, Black's Law Dictionary, and other authorities make clear the word "deem" can create a legal fiction. *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 307 n.9 (2d Cir. 2007) (quoting Black's Law Dictionary 446 (8th ed. 2004)). A Record Date is when the corporation determines who is eligible for a stock issuance. Opening 25–28. To ensure the stock is "deemed to be issued" to the correct individuals, the company establishes a legal fiction that the stock *was* issued on that day. *Id*. As alleged in the

complaint, the Distribution was "deemed to be issued on August 24, 2023 by virtue of the Record Date." A039.

AMC also advances a spurious policy concern: that Plaintiff's approach would "cause havoc" by treating corporate announcements as actual stock issuances. Answering 25. This conflates issuance and deemed issuance. Plaintiff's definition of *deemed issuance* would not change the formalities necessary to *actually issue* stock. Further, AMC's predicted "havoc" presupposes that Plaintiff's approach is not already standard. In fact, "deem" is already used "to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is[.] *All other uses of the word should be avoided*." *Shi Liang*, 494 F.3d at 307 n.9. Even AMC and the Court of Chancery's definition of "deem" as to "regard as," Answering 21 (quoting A209), is consistent with "deem" creating a legal fiction—e.g., "the post-midnight filing is deemed to be (or regarded as) timely."

Fifth, AMC derides Plaintiff's criticisms of the Court of Chancery's opinion as "random" but cannot justify why or how "deemed to be issued" applies to distributions that are never issued. Answering 26.

Despite being challenged to do so, AMC failed to identify even one real-world "scenario where preferred stockholders must ever be protected against dilution because of a stock that is never issued" or how such a scenario could affect the

conversion rate. Opening 30. AMC's only response is a truism: "If a Distribution were 'deemed to be issued' prior to Conversion, [preferred shareholders] would be entitled to distributions according to the terms of the" Certificate. Answering 27. It is remarkable that, after a decision below and full briefing here, this Court is left guessing about how the purportedly *only plausible reading* of "deemed to be issued" would actually function as part of the anti-dilution provision.

AMC claims that the Court of Chancery engaged with the possibility that a distribution can be both "issued" and "deemed to be issued" by: (1) giving a separate meaning to "deemed to be issued" and (2) criticizing Plaintiff's pleadings. Answering 26. These arguments are nonresponsive. Opening 28. The Court of Chancery stated without any support: "'Deemed to be issued' *cannot be referring to stock that is actually issued*; it must be referring to stock that someone, some authority or instrument, has considered or judged to be issued *even though it was not*." A208. That assertion is wrong because a singular distribution can have a date when it is issued *and* a date when it is deemed to be issued.

Logical examples prove that something can have one attribute and be deemed to have a different one. In an employment context, an employee can have an actual start date *and* a date on which they are deemed to have started (for some purpose like receiving benefits). In bankruptcy law, a discharge of debt can be "deemed to have issued when it should have issued rather than when it actually issued" on

another date. *In re Magundayao*, 313 B.R. 175, 180 (Bankr. S.D.N.Y. 2004). And in criminal law, "having actually served thirty days, [an inmate can be] deemed to have served forty days." *O'Neil v. Thayer*, 200 N.E. 299 (N.Y. 1936). In each instance, there is an actual fact and a deemed fact. Here, the Distribution was actually issued after Conversion *and* "deemed to be issued" prior to Conversion. Under the legal fiction approach, for the purpose of ensuring that a defined set of individuals at a particular time received the Distribution, AMC deemed the stock to be issued on the Record Date and actually issued it on the delivery date.

AMC defends the Court of Chancery's definition of "deemed to be issued" on the grounds that it avoids surplusage. Answering 26. But this cannot render Plaintiff's definition unreasonable because Plaintiff's approach also avoids surplusage (by giving "deemed to be issued" a different definition than "issued"). Opening 27.

AMC also never engages with Plaintiff's actual argument regarding Section VI(d) of the Certificate, which deals with never-issued distributions. Answering 26. Plaintiff does not argue that VI(d) is directly applicable to AMC's conduct here. *Compare* Opening 29–30 *with* Answering 26. Plaintiff argues that "deemed to be issued" in VI(c) is not meant to grapple with never-issued distributions (as the Court of Chancery concluded) because VI(d) deals with precisely those scenarios instead. *Id*. Section VI(d) illustrates that, prior to issuance of a distribution, the conversion

rate can be adjusted when the distribution is "declared or announced" and then "readjusted" if the distribution is cancelled. A050. This is further reinforced by the rest of Section VI, which makes clear that the conversion rate (CR_1) can be adjusted "immediately after the close of business *of the Record Date*." A049.

AMC takes an absolutist position that "deemed to be issued" has *only one* correct meaning—the Court of Chancery's. That meaning was not advanced by either side below. A208–09. And it excuses AMC's violation of its promises to preferred investors. B033. Plaintiff, by contrast, freely acknowledges that multiple plausible definitions of "deemed to be issued" can exist, although Plaintiff strongly maintains that the best reading favors him. As long as *one* definition is consistent with textual interpretation principles and could yield the conclusion that the Distribution was "deemed to be issued" before Conversion, the grant of the motion to dismiss must be reversed. *VLIW Tech.*, 840 A.2d at 615; *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

II. PLAINTIFF'S ANALYSIS OF "DEEMED TO BE ISSUED" IS CORRECT EVEN IF THE TERM IS AMBIGUOUS.

To determine an agreement's meaning, Delaware law first considers the text. *Exit Strategy, LLC v. Festival Retail Fund BH, LP*, 326 A.3d 356, 364 (Del. 2024). As demonstrated above, AMC plausibly violated the Certificate on its face. AMC has not proven that Plaintiff's interpretation produces an absurd result or is otherwise unreasonable, so the Certificate is at least ambiguous. *Osborn*, 991 A.2d at 1160. The reasonableness of Plaintiff's position is bolstered by the structure of the Certificate and extrinsic evidence, particularly when interpreting the contract against AMC as the drafter (per *contra proferentem*). *Id.*; *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003).

First, Plaintiff's interpretation of the Certificate *avoids* absurd results. Stock that is never issued is not dilutive and therefore should not trigger anti-dilution protection or affect the conversion rate. *See* Opening 29–30. Nevertheless, that is precisely what AMC's interpretation of the Certificate dictates. AMC and the Court of Chancery claim that "deemed to be issued" "must be referring to stock that someone, some authority or instrument, has considered or judged to be issued even though it was not." Answering 21 (quoting A207–08). AMC never explains what that really means nor when it could or should apply. AMC also advances a similar definition that purports to allow for some circumstances where a stock is issued *and* deemed to be issued: "A distribution is deemed to be issued when an authority or

instrument says it was issued, even and *especially if* it was not actually issued." Answering 29 (quoting A209). But AMC still fails to articulate when and how "an authority or instrument says it was issued" in a way that is distinct from Plaintiff's interpretations. *Id.*

Second, AMC fails to rebut the fact that the phrase "deemed to be issued" and comparable phrases typically refer to the Record Date in similar contexts. Opening 33–37. It claims Plaintiff only provided five "cherry-pick[ed]" examples that do not "demonstrate that a term has a 'common trade usage.'" Answering 30. Plaintiff included five representative exemplars to avoid inundating the court at the pleading stage with the "many" available instances. A186. Plaintiff invited AMC to provide counterexamples to contradict Plaintiff's demonstrated trade usage. Opening 36. But AMC did not identify a single one. Answering 30.

Third, AMC argues that the whole-text canon is not violated because preferred shareholders had no anti-dilution protections after Conversion. Answering 31. The whole-text canon provides that, if a plausible reading allows, harmony and coherence should be preferred. *Riad v. Brandywine Valley SPCA, Inc.*, 319 A.3d 878, 884 (Del. 2024). AMC's interpretation empowers it to wipe out the preferred shareholders' interests (thereby breaking the promised economic and voting-rights equivalence) without limitation by sandwiching the Conversion date between the Record Date and delivery date. This possibility is inconsistent with an "Anti-

Dilution" provision and with the issuance of "*preferred* stock." A049; A044. Here, Plaintiff's ordinary reading of "deemed to be issued" is harmonious with the Certificate's anti-dilution protections.

AMC tries to justify its subversion of anti-dilution as a necessary evil. It claims the Distribution was "expressly designed to compensate holders of Common Stock for an alleged harm arising as a result of the Conversion." Answering 32. This is flawed on two levels. First, it puts the cart before the horse. Common shareholders' "alleged harm" was just that—an allegation that was never litigated to final judgment. Second, the actions the common shareholders challenged were all AMC's conduct. AMC cannot get off scot-free from harming preferred shareholders because it was trying to recompense harm *AMC* allegedly inflicted on another group.[5] Two wrongs do not make a right.

AMC further claims it cannot compensate preferred shareholders in this action without harming common shareholders. Answering 43. But AMC's failure of imagination is not a get-out-of-jail-free card. AMC has always been able to (and still can) pursue a global settlement of all claims against it by both common shareholders and former preferred shareholders. Instead, AMC went in the exact opposite direction. AMC sought to release the claims of the preferred shareholders via the

[5] Conversion is triggered by "Stockholder Approval," which requires common shareholder votes and can only be sought by "*the Board in its sole discretion*." A045.

settlement *without inviting them to the table or compensating them for harms*. Opening 12. Indeed, a preferred shareholder *did* seek to intervene and argue that the settlement harmed preferred shareholders, but these attempts were rebuffed. A197; *see also In re AMC Ent. Holdings, Inc. S'holder Litig.*, 299 A.3d 501, 521 & n.100 (Del. Ch. 2023).

III. AMC VIOLATED THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Even if this Court finds that Plaintiff's interpretations are *unreasonable* and AMC did not violate a hyper-technical reading of the Certificate, reversal is still necessary under the covenant of good faith and fair dealing. Opening 40–42. The implied covenant applies when a party unreasonably frustrates "the fruits of the bargain that the asserting party reasonably expected." *See Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017) (quoting *Nemec v. Sharder*, 991 A.2d 1120, 1126 (Del. 2010)). AMC raised hundreds of millions of dollars selling preferred shares in part via the anti-dilution protections it later subverted.

If AMC's textual reading is correct, the covenant steps in to fill the clear gap in the Certificate and preserve the economic and voting-rights equivalence AMC promised preferred shareholders. The express purpose of the Certificate's anti-dilution provision was to ensure that at all times—both before and after Conversion—preferred shareholders would receive anything that common shareholders got. A022 ("Should AMC institute a dividend *in the future*, each AMC Preferred Equity Unit and each share of common stock participate equally in any dividend."). The clear premise of the Certificate's anti-dilution provisions is as follows.

Pre-Conversion:

> Preferred shareholders are distinct from common shareholders, but they will get any distributions common shareholders do (including by adjusting the Conversion Rate). A049.

Post-Conversion:

> Preferred shareholders have *become* common shareholders, so they automatically receive any distribution that goes to common shareholders. A045–46.

AMC argues that because the Special Distribution was *delivered* post-Conversion, all preferred shareholder rights under the Certificate have dissipated. Answering 34. This ignores the key issue. In general, after Conversion, preferred shareholders have *become* common shareholders and should receive any stock distribution to common shareholders. A045–46. If the only relevant date to this analysis was the delivery date, as AMC now contends, then the Distribution should have gone to the former preferred shareholders also. But, as AMC is loath to acknowledge, *the delivery date is not the only relevant date*. AMC structured its scheme intentionally to set a Record Date before Conversion and a delivery date after Conversion in order to break the promised economic and voting-rights equivalence and deny preferred shareholders the benefit of the anti-dilution provision.

AMC's rebuttal acknowledges the premise of this argument but misses the point. It argues: "Once the Conversion occurred, the APEs ceased to exist, and Plaintiff could no longer have any reasonable expectation of receiving dividends with respect to the APEs." Answering 35. AMC ignores the *reason* preferred shareholders would not expect distributions based on their preferred status after Conversion. After Conversion, they would have a "reasonable expectation of receiving dividends with respect to" their newly minted *common* status. AMC thwarted that expectation. AMC cannot claim that preferred shareholders should have predicted that AMC would account for their preferred status before Conversion (via the Record Date) and then cut them out of the loop by setting delivery after Conversion. This was pure gamesmanship.

AMC functionally admits that a gap exists in the anti-dilution provision. By AMC's own admission, the settlement agreement was "expressly designed" to provide a "benefit" to common shareholders but not to preferred shareholders. Answering 32, 43. If AMC was textually permitted to give this "benefit" to only the common shareholders in contravention of its manifold promises and contractual obligations, the implied covenant fills that gap. *See also Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 504 n.93 (Del. 2019) (citing *Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581, 597 (Del. 1948)) (implied covenant also serves to protect against one party exercising

discretion to act "in a way that is impliedly proscribed by the contract's express terms.").

IV. SECTION III PROVIDES ADDITIONAL GROUNDS FOR REVERSAL.

The settlement payment breached Section III of the Certificate, which promised preferred shareholders any "cash dividends or distributions" that common shareholders received at the same time and on the same terms. Opening 43–45.

AMC argues that Section III(a) only provided preferred shareholders a right to pre-Conversion distributions. Answering 37–38. But under Section III(b), any distribution to common shareholders is also payable to any preferred shareholders "at the close of business on the same day as the *Record Date*." A047. AMC circularly argues that III(b) refers back to III(a), but that does not resolve the dispute. Answering 38. There is at least ambiguity as to whether III(b)'s reference to the "Record Date" or III(a)'s exclusion of post-Conversion distributions controls. Further, Section III(a) specifically calls out distributions to common shareholders with "Record Date[s]" before the original issuance of the preferred stock (the "Closing Date") and says these shall not go to preferred shareholders. A047. Accordingly, the logic of this provision and *expressio unius* confirm that preferred shareholders must receive *other* distributions with Record Dates before Conversion, including the Distribution here.

AMC argues that Section III's application to "cash dividends and distributions" includes only cash, not stock distributions. Answering 38–39. AMC supports its position with other text in Section III that refers to "cash dividends" and

"cash distributions." *Id.* That inference is backwards. The drafters clearly knew how to modify distributions with the word "cash" but chose not to in Section III(a)(i). AMC also quotes Plaintiff's argument and states that it is "incorrect as a matter of law" without citation to any law. Answering 39.

V. AMC'S LACHES DEFENSE FAILS.

AMC's invocation of laches to dispatch—at the pleading stage—a case filed one business day after the Court of Chancery allowed the Distribution to proceed should be rejected out of hand. Answering 40.

"[A]ffirmative defenses, *such as laches*, are not ordinarily well-suited for treatment on" a motion to dismiss. *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009). Laches requires "unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Id.* at 182.

A proper laches analysis looks to the applicable statute of limitations for guidance. *Id*. at 183 ("Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law"). Delaware's three-year statute of limitations for breach of contract is not dispositive, but it is a strong benchmark for the appropriate laches period. 10 Del. C. § 8106.

This case was filed on August 14, 2023, seeking contract damages one business day after the Court of Chancery's approval of the Distribution and lifting of the status quo order, and *the exact same day* that AMC announced the timing of the breach. Answering 14, 15. The case was filed fourteen days *before* the Distribution on August 28, 2023. *Id.* In other words, Plaintiff filed suit to recover

monetary damages for a wrongful act that was still two weeks from occurring. This is not unreasonable delay. Even applying the longest possible delay AMC asserts (the Board's *pre-approval* announcement of a *proposed* settlement), Plaintiff filed after four months, far less than the three-year statute of limitations period.

Logic forecloses AMC's argument. The settlement payment was not certain to occur until the Court of Chancery approved it. Plaintiff could not have reasonably filed this case any sooner. AMC does not cite any law establishing that Plaintiff could have challenged a non-final settlement that was subject to a status quo order. Answering 15–16. If Plaintiff had, AMC surely would have argued that his claims were not yet ripe.

The cases AMC cites are inapposite. *Bean v. Fursa Capital Partners, LP* barred claims filed more than three years after they accrued (based on the analogous statute of limitations) but *allowed* all claims made within three years to proceed. Del. Ch., No. 7566–VCP, Parsons, V.C., 2013 WL 755792, at *5 (Feb. 28, 2013). *Whittington v. Dragon Group, L.L.C.*, applied a twenty-year laches threshold and supports the rule that "the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law." 991 A.2d 1, 9 (Del. 2009). This is such a case. *Whittington*'s reference to "as little as one month" (*id.* at 8) comes from *Stengel v. Rotman*, Del. Ch., No. CIV.A.18109, Strine, V.C., 2001 WL 221512, at *7 (Feb. 26,

2001). *Stengel*, which had myriad disanalogous factual peculiarities, involved a claim for declaratory relief challenging a special election of directors. *Id.* That is precisely the sort of board action that cannot be compensated by monetary damages, unlike the claim here.

AMC implies that Plaintiff should have sought to block approval of the settlement by injunctive relief, rather than filing a suit for monetary damages flowing from AMC's breach of contract. Answering 42. This Monday morning quarterbacking fails for at least three reasons.

First, Plaintiff's injury is compensable by monetary damages, so Plaintiff could not have sought injunctive relief. *Mudrick Cap. Mgmt. L.P. v. QuarterNorth Energy Inc*., Del. Ch., No. 2024-0106-LWW, Will, V.C., 2024 WL 807137, at *4, *9 (Feb. 26, 2024) (injunctive relief requires "irreparable injury," meaning "harm for which there can be no remedy at law" because "an award of compensatory damages will not suffice").

Second, laches attaches to guard against a delay in *when* an action is filed, not to second-guess litigation strategy decisions regarding *how* a case is prosecuted. Plaintiff cannot identify any law (and AMC has cited none) suggesting that the failure to expedite an action or seek particular relief has any bearing on laches. Answering 42.

Third, AMC ignores key procedural history at the heart of this case. The Court of Chancery initially *declined* to approve the settlement precisely because it contained a release of preferred shareholders' claims regarding the dilution of their shares—the claims Plaintiff now brings. Opening 12–14. The Court of Chancery approved the settlement only after this release was removed. *Id.* Under AMC's laches argument, Plaintiff should have sought to block this *revised* settlement, even though the entire purpose of the revision was to permit preferred shareholders to bring the case Plaintiff ultimately brought in a timely fashion. *Id.* AMC was on notice of the likelihood of this suit long before proceeding with the Distribution. AMC also ignores that a preferred shareholder *did* attempt to intervene because the settlement harmed preferred shareholders. A197; *In re AMC Ent. Holdings, Inc. S'holder Litig.*, 299 A.3d at 521 n.100.

AMC cannot demonstrate the required prejudice. "Prejudice" refers to some "disadvantage" placed on the defendant, including "from the loss of evidence or faded memories." *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 1000 (Del. Ch. 2024). No such prejudice exists here. AMC *wanted* and initiated Conversion to clear up its balance sheet and mollify investors. Opening 12–15; *supra* note 5. AMC cannot now claim prejudice because it may be forced to pay for its wrongdoing.

CONCLUSION

For these reasons and those in Plaintiff's Opening Brief, the Court of Chancery's ruling should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Michael Simons, *on behalf of himself and all other similarly situated former holders of Series A Convertible Participating Preferred Stock and AMC Preferred Equity Units of AMC Entertainment Holdings, Inc.*, Plaintiff Below, Appellant, *v.* AMC Entertainment Holdings, Inc., Defendant Below, Appellee.	No. 457, 2024 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2023-0835-MTZ

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