UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM 8-K

Current Report Pursuant
to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): **May 2, 2017 (April 30, 2017)**

INNOVIVA, INC.
(Exact Name of Registrant as Specified in its Charter)

Delaware	**000-30319**	**94-3265960**
(State or Other Jurisdiction of Incorporation)	(Commission File Number)	(I.R.S. Employer Identification Number)

2000 Sierra Point Parkway
Brisbane, California 94005
(650) 238-9600
(Addresses, including zip code, and telephone numbers, including area code, of principal executive offices)

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

o Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

o Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

o Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

o Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (17 CFR §230.405) or Rule 12b-2 of the Securities Exchange Act of 1934 (17 CFR §240.12b-2).

Emerging growth company o

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. o

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Item 7.01 Regulation FD Disclosure.

On May 1, 2017, Innoviva, Inc., a Delaware corporation (the "Company"), filed a Brief in Support of its Cross Motion for a Status Quo Order Confirming the Directors of Innoviva Pending Resolution of the Section 225 Action and in Opposition to Plaintiffs' Motion for Entry of Status Quo Order in the Delaware Court of Chancery in connection with previously disclosed case captioned *Sarissa Capital Domestic Fund LP, et al. v. Innoviva, Inc.*, C.A. No. 2017-0309-JRS (Del. Ch. April 20, 2017). On April 30, 2017, the Company also filed a Brief in Support of its Motion to Dismiss the Verified Complaint, as corrected on May 1, 2017, in the Delaware Court of Chancery in connection with previously disclosed case captioned *Sarissa Capital Domestic Fund LP, et al. v. Innoviva, Inc.*, C.A. No. 2017-0309-JRS (Del. Ch. April 20, 2017). A copy of each of Defendant Innoviva, Inc.'s Brief in Support of its Motion to Dismiss the Verified Complaint and Defendant Innoviva, Inc.'s Brief in Support of its Cross Motion for a Status Quo Order Confirming the Directors of Innoviva

Pending Resolution of the Section 225 Action and in Opposition to Plaintiffs' Motion for Entry of Status Quo Order are furnished herewith as Exhibit 99.1 and Exhibit 99.2, respectively, to this Current Report on Form 8-K and are incorporated herein by reference.

The information furnished pursuant to Item 7.01 of this Current Report on Form 8-K and in each of Exhibit 99.1 and Exhibit 99.2 shall not be deemed to be "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), is not subject to the liabilities of that section and is not deemed incorporated by reference in any filing of the Company's under the Securities Act of 1933, as amended, or the Exchange Act, except as otherwise expressly stated in such filing or document.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

Exhibit Number	Description
99.1	Defendant Innoviva, Inc.'s Corrected Brief in Support of its Motion to Dismiss the Verified Complaint
99.2	Defendant Innoviva, Inc.'s Brief in Support of its Cross Motion for a Status Quo Order Confirming the Directors of Innoviva Pending Resolution of the Section 225 Action and in Opposition to Plaintiffs' Motion for Entry of Status Quo Order

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

INNOVIVA, INC.

Date: May 2, 2017

By: /s/ Eric d'Esparbes
Eric d'Esparbes
Chief Financial Officer

Exhibit 99.1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SARISSA CAPITAL DOMESTIC FUND LP, SARISSA OFFSHORE MASTER FUND LP, SARISSA CAPITAL FUND GP LLC, SARISSA CAPITAL FUND GP LP, SARISSA CAPITAL OFFSHORE FUND LP LLC, SARISSA CAPITAL MANAGEMENT GP LLC, SARISSA CAPITAL MANAGEMENT LP,

Plaintiffs,

v.

INNOVIVA, INC.,

Defendant.

C.A. No. 2017-0309-JRS

DEFENDANT INNOVIVA, INC.'S CORRECTED BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS THE VERIFIED COMPLAINT

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DATED: May 1, 2017

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PRELIMINARY STATEMENT

This is a Section 225 action brought by an affiliated group of stockholders ("Sarissa") based on a purported breach of contract. But Sarissa does not allege facts from which it is reasonably conceivable that it had a contract. Specifically, the Verified Complaint Pursuant to 8 *Del. C.* § 225 and for Specific Performance (the "Complaint") does not allege that it received a manifestation of assent from anyone with authority to bind Innoviva, Inc. ("Innoviva" or the "Company") to all material terms of the alleged contract.

What the Complaint alleges is not unusual in hotly contested proxy contests: two parties negotiated to try to reach a contract, got close to agreeing on the terms of a contract, but terminated discussions before any contract was reached.

No contract was formed between the parties for at least these reasons:

First, by its very terms, the draft written agreement the parties were negotiating required execution and delivery to form a binding contract.

Second, Sarissa does not allege that it reached any agreement to all material terms with anyone who had authority to bind Innoviva.

Third, Sarissa's own allegations show that the parties never agreed on at least two material terms of the proposed agreement — the identity of the second Sarissa director nominee and the contents of the press release.

As a result, the Complaint should be dismissed.

STATEMENT OF FACTS[1]

A. The Parties.

Plaintiffs Sarissa Capital Domestic Fund LP, Sarissa Offshore Master Fund LP, Sarissa Capital Fund GP LLC, Sarissa Capital Fund GP LP, Sarissa Capital Offshore Fund LP LLC, Sarissa Capital Management GP LLC, and Sarissa Capital Management LP (previously defined as "Sarissa") allegedly own 3.425 million shares (approximately 3.14%) of Innoviva common stock in the aggregate. (Compl. ¶ 9) Before filing the Complaint, Sarissa ran a proxy contest to replace three of Innoviva's seven directors. (Compl. ¶¶ 10-11)

Innoviva is a Delaware corporation headquartered in California. (Compl. ¶ 10) Sarissa alleges that Innoviva's "sole business is collecting royalties on certain drugs from GlaxoSmithKline ('GSK')." (Compl. ¶ 10)

B. The Individuals Mentioned In The Complaint.

Mr. George W. Bickerstaff, III serves as the Managing Director of M.M. Dillon and Co., LLC, an investment banking firm. (Compl. Ex. A) Mr. Bickerstaff was one of three Sarissa nominees for Innoviva's 2017 annual meeting of stockholders (the "Annual Meeting"). (Compl. ¶¶ 11, 31) During settlement discussions, the parties discussed appointing Mr. Bickerstaff as one of two

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(1) Facts are assumed true only for purposes of this Motion.

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additional members of the Board. (Compl. ¶¶ 9, 31-33) His name is reflected in the text and the signature lines of all three exhibits to the Complaint. (Compl. Exs. A-C) Sarissa asks the Court to order that Mr. Bickerstaff be appointed to the Board. (Compl., WHEREFORE)

Mr. Jules Haimovitz is the President of the Haimovitz Consulting Group, a private media consulting firm. (Compl. Ex. A) Mr. Haimovitz was one of three Sarissa nominees for the Annual Meeting. (Compl. ¶ 11; Compl. Ex. A) During settlement discussions, the parties discussed appointing Mr. Haimovitz as one of two additional members of the Board as part of a potential settlement. (Compl. Ex. A) Sarissa does not seek to have Mr. Haimovitz appointed to the Board.

Dr. Odysseas Kostas "is a senior analyst at Sarissa Capital Management LP." (Bookout Aff. Ex. 1)[2] Dr. Kostas was one of three Sarissa nominees for the Annual Meeting. (Compl. ¶¶ 11, 31) During settlement discussions, Sarissa proposed Dr. Kostas as a replacement for Mr. Haimovitz. (Compl. ¶¶ 9, 19, 31-33) His name does not appear on Exhibit B to the Complaint

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(2) Exhibits referenced herein, unless otherwise noted, are attached to the Transmittal Affidavit of Arthur R. Bookout in Support of Defendant Innoviva, Inc.'s Brief in Support of its Motion to Dismiss the Verified Complaint and are cited to as "Bookout Aff. Ex. __," filed herewith.

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in either the text or the signature line. (Compl. Ex. B) Sarissa asks the Court to order that Dr. Kostas be appointed to the Board. (Compl., WHEREFORE)

Mr. Mark DiPaolo is the General Counsel of Sarissa, and participated in settlement discussions with Innoviva on Sarissa's behalf. (Compl. ¶¶ 14, 16, 18-19, 24-25, 29) Mr. DiPaolo was listed as the "Authorized Person" on the signature lines for all Sarissa entities listed in the draft agreement: Sarissa Capital Domestic Fund LP, Sarissa Capital Offshore Master Fund LP, Sarissa Capital Fund GP LLC, Sarissa Capital Fund GP LP, Sarissa Capital Offshore Master Fund LP LLC, Sarissa Capital Management GP LLC, and Sarissa Capital Management LP. (Compl. Ex. B) Mr. DiPaolo has "decades of merger and acquisition experience." (Compl. ¶ 14)

Dr. Alexander Denner is the Founding Partner of Sarissa and is alleged to have talked twice with Mr. James Tyree about a possible settlement. (Compl. ¶¶ 15-16, 18)

Mr. James Tyree is the Vice Chairman of the Board, and is alleged to have had two conversations with Dr. Denner in connection with the settlement negotiations. (Compl. ¶¶ 15-16, 18)

Mr. Richard Grossman, Esq. is a lawyer at the New York office of Skadden, Arps, Slate, Meagher & Flom LLP, and is an experienced corporate mergers and acquisitions lawyer. (Compl. ¶ 12) Mr. Grossman was Innoviva's

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lead lawyer for its proxy contest with Sarissa, and participated in settlement discussions with Sarissa. (*See* Compl. ¶¶ 12-14, 16, 18-19, 22, 24-25, 29)

Mr. Grossman's associate (the "associate") is alleged to have sent two emails to Sarissa with respect to the settlement discussions. (*See* Compl. ¶¶ 20, 22; *see also* Compl. Exs. B-C)

Mr. Michael W. Aguiar is the Chief Executive Officer of Innoviva, and a member of the Board. (Compl. ¶¶ 10-11) Sarissa does not allege that Mr. Aguiar participated in any settlement discussions.

C. Innoviva's Bylaws Require Board Approval To Expand The Board And Add New Members.

The Amended and Restated Bylaws of Innoviva, Inc. (the "Bylaws," attached hereto as Bookout Aff. Ex. 2)[3] require approval of a resolution of a majority of the whole Board to expand the size of the Board:

> Number, Tenure and Qualifications. Subject to the rights of the holders of any series of Preferred Stock to elect additional directors under specified circumstances, the number of directors shall be fixed from time to time exclusively by the Board of Directors pursuant to a resolution adopted by a majority of the Whole Board ….

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(3) Innoviva, Inc., Current Report (Form 8-K), Ex. 3.1 (Feb. 8, 2017). *See In re Wheelabrator Techs. Inc. S'holders Litig.*, C.A. No. 11495, 1992 WL 212595, at *11 (Del. Ch. Sept. 1, 1992) (finding that the court may take judicial notice of a company's publicly filed corporate governance documents in connection with motion to dismiss under Rule 12(b)(6)). *See also* D.R.E. 201(b) (a court may take judicial notice of a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

(Bylaws § 3.2)

In addition, vacancies on the Board may be filled by a "majority vote of directors then in office":

> Vacancies. Subject to the rights of the holders of any series of Preferred Stock then outstanding, newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board of Directors resulting from death, resignation, retirement, disqualification, removal from office or other cause shall, unless otherwise provided by law or by resolution of the Board of Directors, be filled in accordance with the Governance Agreement and only by a majority vote of the directors then in office, though less than a quorum ….

(Bylaws § 3.9) Sarissa does not allege that it or anyone else identified in the Complaint was unaware of the requirements in the Bylaws.

D. Innoviva's Counsel Proposes A Formal Agreement With A Standstill; Sarissa Rejects The Proposal.

Between April 18 and April 19, the parties engaged in substantive discussions to settle the proxy contest brought by Sarissa in which it sought, among other things, to replace three of seven Innoviva directors with Sarissa nominees. (Compl. ¶ 11)

At 11:29 p.m. on April 18, 2017, Mr. Grossman sent Sarissa a draft settlement agreement, noting that "'the Board has not reviewed the draft or approved the Company's entering into a settlement agreement at this time … [sic] As I mentioned on our call, our Board is convening early tomorrow morning and will *review the status of the agreement then*.'" (Compl. ¶¶ 12-13) (emphasis

added) Sarissa alleges that it rejected the draft settlement agreement out of hand because it contained a "standstill." (Compl. ¶¶ 12, 14)[4]

Mr. DiPaolo responded at 3:32 a.m. on April 19, 2017. Sarissa's allegation in paragraph 14 of the Complaint contains a telling ellipse. After thanking Mr. Grossman for sending the draft agreement, Mr. DiPaolo responded in full as follows:

> We are not philosophically opposed to having a very simple agreement without a standstill. Unfortunately I don't think there is time to get this done via agreement. ***Our deal is very simple and shouldn't require any agreement.*** If the board adds two of our nominees to the board, then this will all be over tomorrow morning. Please convey this to your client.

(Bookout Aff. Ex. 3) (portion removed by ellipses emphasized) So as of 3:32 a.m. on April 19, 2017, Sarissa did not want a written agreement at all — the opposite of what Innoviva was proposing. Mr. Grossman replied that he would convey Sarissa's position to the Company. (Compl. ¶ 14)

E. Innoviva Proposes A Simple Written Agreement To Appoint Two Nominees, With No Standstill.

At a meeting on the morning of April 19, 2017, the Board "agreed to enter [sic] a simple agreement with no standstill," which was communicated

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(4) "Typically, a standstill agreement will prohibit a hostile bid in any form, including a hostile tender offer to acquire stock control of the other contracting party and/or a proxy contest to replace all or some of its directors." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1219 (Del. 2012). Sarissa does not allege that the standstill operated atypically.

"shortly before 2:00 pm [sic]" on April 19 to Sarissa's founder, Dr. Denner, by Mr. Tyree. (Compl. ¶ 15)[5] Sarissa does not allege any additional approval by the Board.

Sarissa alleges that on the phone call between Mr. Tyree and Dr. Denner, "the Vice Chairman and Dr. Denner agreed to a settlement in which two Sarissa nominees would be placed on the board." (Compl. ¶ 15) Notably, Sarissa does not allege any agreement on whom the nominees were supposed to be, just that there had been an agreement between Dr. Denner and Mr. Tyree on the concept that there would be two.

F. Innoviva's Counsel Sends A Draft Settlement Agreement With Messrs. Bickerstaff And Haimovitz As The Proposed Nominees.

Mr. Grossman thereafter sent Mr. DiPaolo a two-page draft agreement for him to review that contemplated expanding the Board to nine members (from seven) and adding two Sarissa nominees, identified as George W. Bickerstaff, III and Jules Haimovitz. (Compl. ¶ 16; Compl. Ex. A) The draft agreement was conditioned on the issuance of an attached press release. The draft agreement also required Sarissa to agree, among other things, to (i) "irrevocably withdraw the notice of stockholder nomination for individuals for election"; (ii) "terminate its solicitation of proxies in connection with the 2017 Annual Meeting"; and

(5) Mr. Grossman later told Mr. DiPaolo that the Board had "'cried uncle'" and agreed that an agreement would not need to require a standstill. (Compl. ¶ 16)

(iii) "within two (2) business days from the date hereof, cause a stipulation of dismissal with prejudice to be filed with respect to the [Section 220 action filed in the Court of Chancery]." (Compl. Ex. A) Mr. Grossman allegedly told Mr. DiPaolo that the Board had agreed to add two nominees to the Board as part of the settlement. (Compl. ¶ 16)

G. Sarissa Rejects Innoviva's Draft Agreement And Changes One Of The Nominees To Dr. Kostas.

At 2:55 p.m., Sarissa sent Innoviva's counsel a revised proposed agreement that changed the identity of one of the nominees from the draft agreement that Innoviva's counsel sent. (Compl. ¶ 18) Sarissa alleges that Mr. Tyree and Dr. Denner had spoken,[(6)] and that Dr. Denner's comments were reflected in Sarissa's mark-up of the draft agreement. (Compl. ¶ 18) Notably, Sarissa does not allege that Mr. Tyree and Dr. Denner agreed on the identity of the two nominees Sarissa was now proposing. Nor does Sarissa allege that Innoviva's counsel was privy to the discussions or was authorized to agree to the revised nominees.

At 3:30 p.m., Messrs. DiPaolo and Grossman spoke, and Mr. Grossman conveyed that "all of the comments were acceptable," but that he would "need to run it by his co-counsel—not the board." (Compl. ¶ 19) Mr. Grossman

(6) Sarissa does not allege any additional conversations between Mr. Tyree and Dr. Denner after this second conversation.

also asked for Mr. DiPaolo's comments to the draft press release. (Compl. ¶ 19) Mr. DiPaolo indicated they would include "Dr. Denner providing a quote"; Innoviva's counsel responded "he hoped Dr. Denner would be 'nice' in his quote." (Compl. ¶ 19) Mr. DiPaolo responded that "[Dr. Denner] always is [nice]" and the two allegedly chuckled over this remark by Mr. DiPaolo about his boss. (Compl. ¶ 19)

At 4:19 p.m., another round of comments, which are contained in Exhibits B and C to the Complaint, came from the associate. (Compl. ¶ 20) As Sarissa concedes, it had yet to provide its comments to the press release. (Compl. ¶ 20)

While Sarissa alleges that the "changes in the agreement were very minor and consisted primarily of the elimination of the press release contingency," the text and signature block of Exhibit B to the Complaint only name one Sarissa nominee. (Compl. ¶ 21; Compl. Ex. B at 1, 5) Moreover, the press release requirement remained in the draft agreement. The description of the timing of the issuance of the press release was merely changed from being a condition precedent to the agreement to instead being an action that would take place (along with other effects of the proposed agreement) only after execution. The draft reflects that the parties understood that the final contract would have to be executed by someone with a "Title" at Innoviva and that if "executed in two or more counterparts

(delivery of which … together shall constitute a single agreement ….")." (Compl. Ex. B at 2-3)

H. Sarissa Changes A "Material Point" Related To The Press Release.

At 4:24 p.m., Sarissa proposed a further change to the draft settlement agreement regarding the timing of the issuance of the press release, proposing that it would go out "immediately." (Compl. ¶ 22) At 4:29 p.m., the associate responded: "'That change is OK with us.'" (Compl. ¶ 22)

Sarissa alleges that this communication from the associate about Sarissa's change to the timing of the issuance of the press release marked resolution of the last "material point[]" to which Sarissa and Innoviva needed to agree, and, at that moment, "the parties' agreement became binding under the law." (Compl. ¶ 23)

I. Sarissa Rejects Innoviva's Counsel's Draft Press Release And Proposes A Materially Different Press Release.

However, at 4:42 p.m., Sarissa responded to Innoviva's counsel's draft press release. (Compl. ¶ 24) Sarissa did not accept Innoviva's counsel's draft, but instead proposed a materially different press release. Sarissa glosses over the actual comments it provided, alleging now that they were just "loose ends" and that these "suggestions … were previously orally provided to [Innoviva's counsel] as indicated above" and that "some of its proposals were 'just our advice.'" (Compl. ¶ 24) Sarissa's selective quotation of its email does not

accurately describe what was said in the email or included in the press release. There was also nothing "'nice'" about the comments. (Compl. ¶ 19) Sarissa's changes sought to highlight the "reluctance" of Innoviva's critical business partner and largest stockholder — GSK — to provide support for what Sarissa called "necessary change," and to do so in contrast to "independent shareholders." (Bookout Aff. Ex. 1)

Sarissa does not allege that Innoviva ever accepted Sarissa's revised version of the press release. In addition to the revised proposed press release, Sarissa continued to send emails to Innoviva's counsel without response, including attaching signature pages.[7] (Compl. ¶¶ 24-25)

At approximately 7:00 p.m. on April 19, 2017, Mr. Grossman informed Sarissa that the Board had determined not to continue with settlement discussions. (Compl. ¶ 29)[8]

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(7) Perhaps tellingly, Sarissa does not allege that it sent any documents with the signature pages. What's worse for Sarissa, the actual signature pages Sarissa sent ***match neither Exhibit B nor C.*** Compare Compl. Ex. B at 5 (bottom signature line reflecting "By: **___** Name: " and Compl. Ex. C at 5 (bottom signature line reflecting "By: **___** Name: Odysseas Kostas" footer: "Redline Innoviva - Letter Agreement Settlement - Sarissa 1442349v3 and Innoviva — Letter Agreement Settlement - Sarissa 1442349v4A 4/19/2017 4:07:33 PM" with Bookout Aff. Ex. 4 at 5 (bottom signature line reflecting By: /s/ Odysseas Kostas Name: Odysseas Kostas, M.D.) (emphasis added to "M.D.").

(8) Just prior to paragraph 29, the Complaint takes a multi-paragraph detour through actions Sarissa imagines Mr. Aguiar took on the afternoon of April 19. (Compl. ¶¶ 26-28) Sarissa alleges, solely "upon information and belief," that Mr. Aguiar "quietly kept soliciting proxies" after an agreement was reached, "caused the board to hold another meeting" after a stockholder declared it would vote in favor of Innoviva's slate, and was "substantially responsible" for the Board's decision to refuse to proceed further with discussions. (Compl. ¶¶ 26-28) Sarissa does not — and cannot — allege any facts to support its conclusions.

On April 20, 2017, the Annual Meeting was held. Sarissa's three nominees were defeated. (Compl. ¶ 32) Sarissa does not allege otherwise. [9] To the contrary, it alleges that a large stockholder decided to vote against Sarissa, which decided the vote. (Compl. ¶ 28)

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(9) On April 28, 2017, Innoviva publicly filed the certified results demonstrating that Innoviva's seven nominees were elected as directors to the Board. (Innoviva, Inc., Current Report (Form 8-K) (Apr. 28, 2017), attached hereto as Bookout Aff. Ex.5)

ARGUMENT

A motion under Court of Chancery Rule 12(b)(6) to dismiss for failure to state a claim will be granted if it appears with reasonable certainty that the plaintiff could not prevail upon any set of facts that can be inferred from the pleadings. *See* Ct. Ch. R. 12(b)(6). In applying Rule 12(b)(6), the Court must "accept well pleaded allegations as true and draw reasonable inferences in favor of the plaintiff." *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009). However, conclusory allegations should never be accepted as true. *Id. See also In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (to support a conclusion, a plaintiff must make "'specific supporting factual allegations'" (citation omitted)). Moreover, the Court "is required to accept only those 'reasonable inferences that logically flow from the face of the complaint'" and not "'every strained interpretation of the allegations proposed by the plaintiff.'" *In re Gen. Motors (Hughes)*, 897 A.2d at 168 (citation omitted).

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE SARISSA DOES NOT PLEAD ALL NECESSARY ELEMENTS FOR A CLAIM OF BREACH OF CONTRACT.

"Under Delaware law, a party asserting a breach of an oral agreement must prove the existence of an enforceable contract by a preponderance of the evidence." *Pulieri v. Boardwalk Props., LLC*, C.A. No. 9886-CB, 2015 WL 691449, at *5 (Del. Ch. Feb. 18, 2015). In addition, Sarissa seeks the remedy of

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specific performance. (Compl., Preamble) That requires it to prove its claims by clear and convincing evidence.

> "A party must prove by clear and convincing evidence that he or she is entitled to specific performance and that he or she has no adequate legal remedy. A party seeking specific performance must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance."

Pulieri, 2015 WL 691449 at *5 (citation omitted). Thus, to survive a motion to dismiss, Sarissa must allege facts from which "it is reasonably conceivable that [it] could establish a right to specific performance by clear and convincing evidence." *Id.* (dismissing complaint because it failed to adequately allege an oral contract).

Here, Sarissa cannot get past the first element: a valid contract.

In Delaware, a contract exists only when "a reasonable man would, based upon the 'objective manifestation of assent' and all of the surrounding circumstances, conclude that the parties intended to be bound by contract." *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1101-02 (Del. Ch.

1986). Even when there is a signed writing — which does not exist here — a contract is not formed unless the parties have agreed to all material terms of the contract. *Id.* at 1102. "It is when ***all*** of the terms that the parties themselves regard as important have been negotiated that a contract is formed." *Id.* (emphasis added). Those terms must be "sufficiently definite" in order for a contract to exist. *Pulieri*, 2015 WL 691449, at *6. *See also* 1 *Williston on Contracts* § 3:2 (4th ed. 2016). That is because

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"Delaware courts have long recognized that equity has no role in supplying a contract's essential terms where a party seeks specific performance, 'since that would be rather to make than to execute an agreement.'" *Pulieri*, 2015 WL 691449, at *6 (citation omitted). As the Court noted in *Leeds*, the existence of some terms — even in a finalized writing — does not create a complete agreement because "multi-faceted commercial transactions" can only proceed in stages:

> Until it is reasonable to conclude, in light of all of these surrounding circumstances, that ***all*** of the points that the parties themselves regard as essential have been expressly or (through prior practice or commercial custom) implicitly resolved, the parties ***have not finished their negotiations and have not formed a contract***. Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial transactions could hardly proceed in any other way. *See International Telemeter Corporation v. Teleprompter Corporation*, 592 F.2d 49 (2d Cir. 1979) (Friendly, J., concurring).

521 A.2d at 1102 (emphasis added); *see also id.* at 1102 n.4 (quoting 2 Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* at 1584-86 (1968)) (describing typical course of dealing in a significant commercial transaction in which lawyers "come up with a draft which meets the approval of all of them, and of their clients" and "only then … [do] the parties … proceed to the actual formation of the contract" through a closing or by "simultaneous execution or delivery in the course of a more or less ceremonial meeting, of the document or documents prepared by the lawyers")); *Grunstein v. Silva*, C.A. No. 3932-VCN,

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2014 WL 4473641, at *17 (Del. Ch. Sept. 5, 2014) (stating that a "reasonable negotiator could rationally assume" that a "complex" agreement "would necessarily have to be reduced to writing for all of the essential terms to be fully agreed upon"), *aff'd*, 113 A.3d 1080 (Del. 2015) (TABLE); *id.* at *20 ("The parties circulated legal documents that sophisticated parties would expect to memorialize their rights and obligations. A reasonable negotiator, all things being equal, would be less likely to conclude that a high-level oral agreement … constituted all of the material terms to an agreement and had been assented to after these failed attempts to formalize more detailed agreements.").

"[I]t is a basic matter of contract law that, to be binding, an acceptance of an offer 'must be identical with the offer and *unconditional*.'" *Schwartz v. Chase*, C.A. No. 4274-VCP, 2010 WL 2601608, at *7 (Del. Ch. June 29, 2010) (emphasis in original) (citation omitted). Thus, "[w]here the parties fail to agree on one or more essential terms, there is no binding contract." *Patel v. Patel*, C.A. No. 07C-07-020 RRC, 2009 WL 427977, at *3 (Del. Super. Ct. Feb. 20, 2009). This principle operates with equal force in the context of settlement agreements. *See, e.g., id.* at *4 (concluding no valid settlement agreement existed where an executed, purportedly "simple" agreement omitted key terms and was to be submitted to counsel to be formalized); *Schwartz*, 2010 WL 2601608, at *7, *8 n.71 (finding no binding settlement agreement where party signs agreement but

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simultaneously raises additional issues or where party was "comfortable" with changes to written document but otherwise demonstrated intent to make execution a condition precedent).

As set forth below, there are at least the following reasons why Sarissa's breach of contract claim must fail. First, on its face, the draft agreement that the parties were discussing required execution and delivery as a prerequisite to form a binding contract; that never happened. Second, Sarissa fails to allege that it ever had any binding agreement — let alone clear and convincing evidence of what exactly the terms of the alleged "oral—and written—agreements" were — with anyone with authority to bind Innoviva. In particular, Sarissa fails to allege that it believed that Mr. Grossman (or anyone else) had authority to bind Innoviva to take actions that require a majority vote of the Board. Third, based on the Complaint and the documents incorporated by reference therein, there are at least two material terms absent from the alleged agreement — which two directors would be seated and the contents of the press release. Fourth, it is not reasonably conceivable that, at an ultimate judicial determination, Sarissa will meet its burden by clear and convincing evidence and be entitled to specific performance.

II. THE DRAFT AGREEMENT CONTEMPLATED THAT WRITTEN EXECUTION BY A REPRESENTATIVE OF INNOVIVA AND DELIVERY WERE PREREQUISITES TO A CONTRACT.

The language of Exhibit B to the Complaint, which Sarissa alleges was the parties' draft agreement, makes clear that the parties contemplated written execution of any agreement by all parties and delivery of those executed agreements as prerequisites to an enforceable contract. *See Leeds*, 521 A.2d at 1102.

First, Exhibit B to the Complaint states: "In consideration for, among other things, the willingness of Sarissa to take the actions outlined in the preceding paragraph, the Company (i) confirms, represents and warrants to Sarissa that, ***concurrently with the execution of this letter agreement***, it has (A) increased the size of the Company's board of directors (the '<u>Board</u>') to nine (9) members, (B) appointed each of George W. Bickerstaff, III and as a director of the Company (each, a Sarissa Designee and collectively, the Sarissa Designees) …." (Compl. Ex. B at 1) (emphasis added) Second, Exhibit B states: "This letter agreement may ***be executed*** in two or more counterparts (***delivery of which may be by facsimile or via email*** as a portable document

format (.pdf)) ***which together shall constitute a single agreement*** …." (Compl. Ex. B at 2) (emphasis added) Finally, Exhibit B makes clear in the very first sentence that "the entities and natural

persons set forth on the second and third ***signature pages*** … ***hereby***." (Compl. Ex. B at 1) (emphasis added)

Not surprisingly, given that the draft agreement contemplated changes to the size and composition of the board of directors of a Delaware corporation, the parties, through the explicit terms of Exhibit B to the Complaint, stated that there would be a binding contract "***hereby***" only upon "***execution***" or once "***executed in two or more counterparts***" by authorized representatives of all parties, as reflected on the signature pages, and which executed pages were to be "***delivere*[d] *… by facsimile or via email***." (Compl. Ex. B at 1-2) (emphasis added) This is common in contracts such as Exhibit B where "execution or delivery[10] … of the document or documents prepared by the lawyers" is "the actual formation of the contract." *Leeds*, 521 A.2d at 1102 n.4 (citation omitted). *See also Bryant v. Way*, C.A. No. 11C-01-164 RRC, 2012 WL 1415529, at *10 (Del. Super. Ct. Apr. 17, 2012)

(10) For logistical reasons, it is common practice to gather signature pages to a draft agreement before it is finalized so that once an agreement is final and approval is obtained by those with authority to enter into a contract, those signature pages can be delivered to the other parties to the contract. (*See* Compl. ¶ 20) *See, e.g.*, Brad Dashoff and John Antonacci, Organizing Transaction Closings, GPSolo eReport Vol. 1, No. 9 (Apr. 2012), *available at* http://www.americanbar.org/publications/gpsolo_ereport/2012/april_2012/organizing_transaction_closings.html ("Collect signatures pages to all transaction documents in advance. Once you can identify all of the documents needed for closing, you should go ahead and prepare the signature pages and send them to the client."). Whether a contract would have been final on execution by all parties or upon delivery of those signatures is not at issue, as there is no allegation that anyone signed any document on behalf of Innoviva.

(same, holding that emails did not constitute an agreement); *Grunstein*, 2014 WL 4473641, at *31 (finding no contract where the draft letter agreement "explicitly conditioned its effectiveness upon receipt … of an executed copy"); *Alpine Inv. Partners v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276, 1280 (Del. Ch. 2002) (holding that, when provision required "'execution of a counterpart signature page,'" that action only "bec[a]me[] effective upon the … executi[on of] a counterpart signature page" (citation omitted)). Similarly, because delivery is required, there is no valid contract without delivery. *See Alpine*, 794 A.2d at 1278. Thus, based on Exhibit B on its face, the parties contemplated that there would only be a binding contract upon execution of a written agreement, either in one document or in counterparts, and delivery.[11]

(11) Despite the fact that Sarissa later sent signature pages (untethered to any document and altered from the pages attached to Exhibit B to the Complaint to add Dr. Kostas's name (attached hereto as Bookout Aff. Exs. 4 and 6), Sarissa contends that "at 4:29 p.m." with an email from the associate, saying, "'that change is OK with us'" and that "[a]t that point in time (if not sooner), all material points were resolved and the parties' agreement became binding under the law." (Compl. ¶¶ 22-24) Thus, Sarissa must not be contending that its signature pages bound Innoviva, as the contract was allegedly formed prior to their delivery. (Compl. ¶¶ 22-23 ("At that point in time (if not sooner), all material points were resolved and the parties' agreement became binding under the law.") Tellingly, not only does Sarissa not attach its altered signature pages to the Complaint or allege what it was signing, it also does not allege anyone signed any agreement on behalf of Innoviva. Finally, it alleges that it "asked for Innoviva's signature papers ***in return***" — further evidence that to form a contract here, execution and delivery were required. (Compl. ¶ 24) Like here, where a settlement agreement "ha[s] been carefully drafted and edited heavily by both parties," it cannot "suddenly turn … into a document that [Sarissa] unilaterally could accept or reject." *Schwartz*, 2010 WL 2601608, at *9.

Sarissa would like the associate's response of "'that change is OK with us'" to bind Innoviva to a fully formed contract. (Compl. ¶¶ 22-23) ("[T]hat change" means the change from "'as soon as practicable' language to 'immediately.'" (Compl. ¶ 22)) But that is not the law. Agreement on "one small change" to a draft written agreement does not manifest agreement to a contract. The Court has held that, when a settlement agreement has been heavily negotiated, an email from counsel stating that his client was "'comfortable with the document'" is insufficient to form a binding agreement. *See Schwartz*, 2010 WL 2601608, at *8 n.71 (finding that email from counsel stating that its client was "comfortable with the document'" in context of heavily negotiated written document did not create binding agreement) (citation omitted). Emails between counsel cannot suddenly turn a heavily negotiated draft into a binding contract at the moment Sarissa unilaterally decides in hindsight. *Schwartz*, 2010 WL 2601608, at *9.

In response, Sarissa presumably will point to *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282 (Del. Ch. 2004), *aff'd*, 867 A.2d 903 (Del. 2005) (TABLE), the only case it cited as support for its Opening Brief in Support of Motion for

Expedited Proceedings and Motion for Entry of Status Quo Order. But *Loppert* does not help Sarissa.

In that case, plaintiff David Loppert brought a books and records action against defendant WindsorTech. *Loppert*, 865 A.2d at 1284. The parties agreed to the key term to settle the litigation, and the defendant's counsel twice referenced the existence of a "deal." *Id.* at 1285, 1286 n.24. Thereafter, plaintiff's counsel circulated draft exhibits for the settlement agreement and stated that plaintiff was expecting defendant's answer in the books and records action since the settlement agreement had not yet been signed. *Id.* at 1285. Defendant's counsel then terminated the agreement, and plaintiff's counsel filed an independent lawsuit to enforce the settlement. *Id.*

The Court enforced the settlement and explained that, under those circumstances, the "deal" the parties struck was binding even though it had not yet been reduced to a signed writing because "all the substantial terms" had been agreed upon and there was "nothing left for future settlement." *Id.* at 1287 (citation omitted). Here, unlike in *Loppert*, there was still something left to be negotiated, and there was no "overt manifestation of assent," *i.e.*, a "deal," on several material terms, as explained below. Indeed, "[f]rom the perspective of a reasonable negotiator, this exchange of documents and proposals is indicative of

negotiation involving offers and counteroffers." *Grunstein*, 2014 WL 4473641, at *19.[12]

III. SARISSA DOES NOT ALLEGE THAT IT HAD AN AGREEMENT WITH ANYONE WITH AUTHORITY TO BIND INNOVIVA.

The Complaint suffers from another fatal flaw: it does not allege that it made a contract with someone who had actual authority to bind Innoviva, or someone whom Sarissa could have objectively and reasonably believed had apparent authority to bind Innoviva.

Sarissa does not allege that it negotiated directly with an officer of Innoviva, but claims that a contract was formed by communications from Innoviva's counsel. "If an agent is performing the negotiations, the agent must possess authority to act in the stead of the client in order for any negotiations

(12) Exhibit B (assuming that is what Sarissa sent signature pages to) is, once signed by one party, best characterized as an invitation to offer. In an invitation to offer, "the subject matter is already specific and most of the terms are already understood." 1 *Corbin on Contracts* § 2.3 (2016). However, the request is "not itself … taken to be the operative offer." *Id.* In response, the bidder/customer can sign the order and also "specify or limit the power of acceptance." *Id.* "Finally, the principal represented by the solicitor must express acceptance in compliance with terms of the offer and the usual rules governing acceptance." *Id.* In commercial negotiations, "'[a] standard method of making an offer is to submit to the offeree a written agreement signed by the offeror and to invite the offeree to sign on a line provided for that purpose.'" *LMP Enters., Inc. v. Bank of Del.*, C.A. No. 84C-JL-103, 1985 WL 189244, at *2 (Del. Super. Ct. Aug. 12, 1985) (quoting Restatement (Second) of Contracts § 26, comment (e) (1981)).

between agents to be binding." *Del. Dep't of Educ. v. Doe*, C.A. No. 4088-CC, 2008 WL 5101623, at *1 (Del. Ch. Nov. 21, 2008). An agent's authority must be actual (express or implied) or apparent.[13]

Thus, the Complaint must be dismissed unless it alleges facts from which it is reasonably conceivable that Sarissa could prove by clear and convincing evidence that it reached agreement on all alleged material terms with someone with express, implied, or apparent authority to bind Innoviva to those alleged material terms. Sarissa does not do this, but instead attempts to cobble together a contract from various communications with three different individuals,

(13) An agent's authority must either be express, implied, or apparent. Express authority must be evident from an oral or written agreement. Implied authority is derived from actual authority and allows the agent to act "based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent."

Del. Dep't of Educ., 2008 WL 5101623, at *1 (citation omitted).

"Apparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing. To find apparent authority, the party seeking to show the existence of such authority must show reliance on indicia of authority originated by the principal, and such reliance must have been reasonable."

Flaa v. Montano, C.A. No. 8632-VCG, 2013 WL 5498045, at *10 n.72 (Del. Ch. Oct. 4, 2013) (citation omitted); *Henderson v. Chantry*, C.A. No. 1486-K, 2002 WL 244692, at *4 (Del. Ch. Feb. 5, 2002) (citation omitted). *See also Del. Dep't of Educ.*, 2008 WL 5101623, at *1.

none of whom had express, implied, or apparent authority to enter into a definitive contract expressing all of the material terms that Sarissa claims were in the contract.

A. Sarissa Does Not Allege That Mr. Tyree, Mr. Grossman Or The Associate Had Express Authority To Enter Into The Contract Sarissa Alleges.

"'Express authority must be evident from an oral or written agreement.'" *Del. Dep't of Educ.*, 2008 WL 5101623, at *1 (citation omitted). Here, Sarissa does not allege such an agreement.

Sarissa claims that a term of its contract with Innoviva was that Innoviva would expand the Board by two seats and appoint Mr. Bickerstaff and Dr. Kostas to the vacancies. (Compl. ¶¶ 31-32) Under the DGCL and the Bylaws, that action would have required the Board to approve and appoint them by resolution. 8 *Del. C.* § 223(a)(1). (Bylaws §§ 3.2, 3.9) But Sarissa does not allege that those fundamental corporate acts had taken place or that the Board authorized anyone to bind the Company to a contract requiring the Board to undertake those fundamental corporate acts.

This requirement for Board approval was made clear at the outset. On April 18, 2017, Innoviva's counsel made clear that the Board had to approve entering into a settlement agreement. (Compl. ¶ 13) Even in the context of negotiations regarding the settlement of litigation (which this was

primarily not),

where attorneys are often authorized to enter into settlement agreements, such a statement indicates an intent not to be bound. *See Schwartz*, 2010 WL 2601608, at *8 (finding no valid settlement agreement because "[n]ear the outset of negotiations," the attorney for the objecting party made the terms of consent clear and never "remove[d] this condition or [took] any actions inconsistent with it"). *See also Del. Dep't of Educ.*, 2008 WL 5101623, at *2.

Sarissa acknowledges Board involvement and alleges that there was agreement to some of the concepts of a settlement agreement. For example, Sarissa alleges that Innoviva's counsel represented that "the board had 'cried uncle'" and relented on the earlier requirement that a settlement agreement require a standstill. (Compl. ¶¶ 12, 16) Sarissa also alleges that "Innoviva held a very long board meeting on the morning of April 19th and—faced with the prospect of losing the contest—agreed to enter a simple agreement with no standstill." (Compl. ¶ 15) In contrast, Sarissa does not allege that the Board voted to appoint Mr. Bickerstaff and Dr. Kostas to the Board or that the Board authorized anyone to bind it to do so. As a result, the Complaint fails.

Sarissa cannot get around this failure of pleading by contending that it is reasonably conceivable that the Board acted to add Mr. Bickerstaff and Dr. Kostas as directors because that would be a temporal impossibility based on the allegations of the Complaint. ***When the Board met, what was on the table — thus***

all that could have been approved by a vote of the Board — was the appointment of Messrs. Bickerstaff and Haimovitz, not Mr. Bickerstaff and Dr. Kostas, which is the pair Sarissa prays be added to the Board. (Compl., WHEREFORE)

This series of events, the sequence of which is indisputable, is set forth below in detail:(14)

- in a ***"very long board meeting on the morning of April 19th"*** — the Board met to "review the status of the agreement"; Sarissa alleges the Board agreed that two Sarissa nominees would be appointed (Compl. ¶¶ 13, 15);
- Sarissa alleges that Dr. Denner and Mr. Tyree spoke by phone shortly before 2:00 p.m. (Compl. ¶ 15);
- Innoviva's counsel then sent a draft agreement to Mr. DiPaolo, which Sarissa alleges "'reflect[ed] what [Innoviva's counsel] underst[oo]d the discussions were between [Dr. Denner] and one of our directors.'" (Compl. ¶ 16) This draft agreement, including the "DRAFT — April 18, 2017 — 9:00pm PT Scenario: Settlement" press release, listed Messrs. Bickerstaff and Haimovitz as the nominees. (Compl. Ex. A)
- Sarissa alleges a second conversation between Dr. Denner and Mr. Tyree occurred after Sarissa's counsel sent the Bickerstaff/Haimovitz draft agreement (Compl. ¶ 18); and
- Sarissa alleges that, after that conversation, Mr. DiPaolo sent Innoviva's counsel a revised draft agreement that replaced the independent Mr. Haimovitz with Sarissa's employee, Dr. Kostas. (Compl. ¶ 18) Notably, Sarissa does not allege that Mr. Tyree

(14) Sarissa makes no allegation that the Board agreed to Sarissa's late-afternoon material comments on the press release, which suffers from the same temporal issues as the allegations regarding Sarissa's new appointee.

agreed to this change, only that "[Mr. Tyree] and Dr. Denner had spoken and that [Mr. DiPaolo's] comments were attached." (Compl. ¶ 18)

Sarissa does not allege that any more conversations occurred with Mr. Tyree.

Thus, it is not reasonably conceivable that Mr. Tyree or Innoviva's counsel had received actual (express or implied) authority from the Board to enter into an agreement that changed Messrs. Bickerstaff and Haimovitz to Mr. Bickerstaff and Dr. Kostas. As a result, there is no contract.

B. Sarissa Cannot Rely On Apparent Authority.

Sarissa also cannot argue that it is reasonably conceivable that Mr. Tyree, Mr. Grossman or the associate had apparent authority to bind Innoviva to the terms of the alleged agreement. Tellingly, Sarissa alleges "throughout the negotiations [Mr. Grossman] was careful to let Sarissa know the authority he had" (Compl. ¶ 12), but never alleges that it somehow believed that Mr. Grossman or his associate had authority to bind Innoviva to an act that required the Board's approval.

"'[A]pparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing. To find apparent authority, the party seeking to show the existence of such authority must show reliance on indicia of authority originated by the principal, and such reliance must have been

reasonable.'" *Flaa v. Montano*, C.A. No. 8632-VCG, 2013 WL 5498045, at *10 n.72 (Del. Ch. Oct. 4, 2013) (citation omitted). *See also Del. Dep't of Educ.*, 2008 WL 5101623, at *1. "Apparent authority can be demonstrated when the principal 'knowingly permits the agent to assume' authority to act on its behalf so 'as to preclude a denial of its existence.'" *Del. Dep't of Educ.*, 2008 WL 5101623, at *1 (citation omitted).

Here, there are no allegations in the Complaint to state a claim that "'the principal [Innoviva] knowingly or negligently permit[ted]'" Innoviva's counsel "'to exercise'" apparent authority which was "'not actually granted'" or "'which [Innoviva's counsel] held [itself] out as possessing.'" *See Flaa*, 2013 WL 5498045, at *10 n.72 (citation omitted). Sarissa does not plead any "'indicia of authority originated by the principal'" — let alone reliance on such indicia. *Id.*

Nor are there any allegations that the Board as principal "knowingly or negligently" did anything other than that the "board had 'cried uncle'" to a standstill and, at most, on the facts alleged in the Complaint, approved adding two nominees, which temporally had to be through a "simple agreement" that required a vote of the Board and contemplated execution by someone with an Innoviva title. (Compl. ¶ 16)

A principal is only bound by its agent's agreement if the counterparty "relies on the agent's apparent authority in good faith and is justified in doing so

by the surrounding circumstances." *See Flaa*, 2013 WL 5498045, at *10 n.72. *See also Ranger Ins. Co. v. Pierce Cty.*, 192 P.3d 886, 890-91 (Wash. 2008) ("To create apparent authority, a principal's objective manifestations 'must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable.'") (citation omitted)). Here, the Complaint itself concedes that Innoviva's agent did not hold itself out as having authority to bind the Board in these circumstances.

For example, Sarissa cannot dispute that every version of the draft agreement contemplated a signature by an Innoviva representative, and not Innoviva's counsel. (*E.g.*, Compl. Ex. A at 3; Compl. Ex. B at 3) Sarissa alleges that Mr. Grossman noted that the comments in the Bickerstaff/Kostas revised draft agreement were fine to him, but that he would "need to run the language by his co-counsel—not the board." (Compl. ¶ 19) Sarissa's statement does not make clear whether Innoviva's counsel actually said that he did not need to run Sarissa's changes "by the Board" or whether he simply omitted any reference to the Board. Sarissa's vague language is presumably purposeful — Innoviva's counsel had stated from the beginning that the settlement needed to be approved by the Board and a Board vote was required by the Bylaws. (Compl. ¶ 13) Sarissa does not allege why it now asks the Court to believe that Innoviva's counsel had apparent

authority because it somehow held itself out as possessing that authority, especially to accept changes to the nominees in the absence of the necessary Board vote.(15)

In particular, it is not reasonably conceivable that Sarissa relied on an email at 4:29 p.m. from the associate, which Sarissa concedes only responded to the requested change from Sarissa on the timing of the issuance of the press release, to conclude that "all material points were resolved" such that "the parties' agreement became binding under the law." (Compl. ¶¶ 22-23) The Complaint alleges that, when the associate sent the 4:29 p.m. email, the last version of the draft agreement (in the form of Exhibit B to the Complaint):

i. had a blank for the name of the second nominee in both the text and the signature line;

ii. did not include a draft of the press release, which had yet to be negotiated, other than that it had to include Dr. Denner saying something "'nice'" about Innoviva;

iii. contained unsigned signature lines for Innoviva, which included "Name:" and "Title:"; and

iv. contemplated fundamental corporate acts for which a legally required vote — which could not have happened — was "confirmed, represented and warranted" to have happened.

(Compl. ¶¶ 19-23; Compl. Ex. B)

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(15) Similarly, the allegations in the Complaint do not make it reasonably conceivable that Sarissa displayed objectively "reasonable" "reliance on indicia of authority originated by the principal." *Flaa*, 2013 WL 5498045, at *10 n.72. Sarissa does not plead any "indicia of authority originated by the principal" — let alone reliance on such indicia.

In sum, Sarissa was advised from the outset that the full Board needed to approve the settlement agreement; it is undisputed that the Board did not approve and could not have approved the final terms. Moreover, Sarissa vacillates between agents for Innoviva — Mr. Tyree and Innoviva's counsel — when it is convenient, but does not allege that Mr. Tyree said that the Board approved the substitution of Dr. Kostas, let alone that the Board voted to approve that change, as required by the Bylaws, and does not provide any facts from which is it reasonable to infer that Innoviva's counsel had the authority to bind the Company to a new nominee.

Finally, while Innoviva's counsel may have agreed to remove the press release from its earlier status as condition precedent and change it to a requirement that it be issued "immediately" or "as soon as practicable," nowhere does Sarissa allege that this "very minor" change (whichever one it was)

changed the fact that the contents of the press release was a material term of any agreement. (Compl. ¶¶ 20-22; Compl. Ex. B at 1) With no allegations to support an objectively reasonable belief by Sarissa that Innoviva's counsel had apparent authority from the Board to bind the Company, no possible agreement by the Board on all material terms, and no reasonable reliance on any supposed apparent authority, there is no contract.

IV. SARISSA DOES NOT ALLEGE AGREEMENT ON ALL MATERIAL TERMS OF A CONTRACT.

The Complaint also fails because Sarissa does not plead facts from which it is reasonably conceivable that it will prove by clear and convincing evidence that there was a manifestation of assent on all material terms from anyone affiliated with Innoviva — regardless of any authority. As an initial matter, Sarissa alleges no written agreement, executed or otherwise, that incorporates even the subset of terms that it claims are all of the "material points." (Compl. ¶ 23) While Sarissa sent "signature pages" — which themselves were different from the last documents Sarissa alleged were sent from Innoviva's counsel — the fact that it provided signatures after Innoviva's counsel stopped discussions makes no difference. What did Sarissa sign?

In any event, there were two material terms upon which no agreement is alleged: (1) the identities of the two Sarissa nominees, and (2) the language of the press release.

A. Sarissa Does Not Allege That Innoviva Agreed To Allow A Sarissa Employee To Substitute For One Of Sarissa's Proposed Independent Directors.

Sarissa fails to allege facts from which the Court can reasonably infer by clear and convincing evidence that Innoviva manifested assent to Mr. Bickerstaff and Dr. Kostas as the two Sarissa nominees. If Sarissa is arguing that it had an agreement about the identities of the two nominees, the Complaint

shows the contrary. Sarissa alleges that when Mr. DiPaolo sent the revised draft agreement substituting Dr. Kostas for Mr. Haimovitz, Mr. Grossman told Mr. DiPaolo that Mr. Grossman needed to run it by co-counsel. (Compl. ¶ 19) When the associate subsequently sent a revised draft agreement to Mr. DiPaolo, the clean version only listed one nominee's name in the body of the draft agreement and on the signature page. (Compl. ¶ 20; Compl. Ex. B)[16] While it is not reasonable to believe that Innoviva's counsel possessed the authority to bind Innoviva and the Board, even if it did, there was no agreement on the identities of the nominees.

B. Sarissa Concedes That There Was Never An Agreement On The Press Release Language.

Another material term of the draft agreement — the press release — was not yet agreed upon. Sarissa does not even try to allege there was an agreement on the language of the press release — nor could it. Instead, Sarissa alleges that the language of the press release was just a "ministerial thing" and not material to an agreement. But the language of the draft agreement, as well as Sarissa's own actions and allegations, undercut its argument.

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(16) Exhibit C, which is alleged to be a "redlined draft[]" that reflected "our comments to the letter agreement, clean and marked against your draft" (Compl. ¶ 20), shows Dr. Kostas's name in purple in the text and purple in the signature block, indicating a formatting change. (*See* Compl. Ex. C at 1, 5, 7 (noting "Format changes: 2")). Regardless of the cause of this aberration in the redline, which is not alleged or even acknowledged in the Complaint, Exhibit B lacks a second name and Sarissa does not allege that it signed Exhibit B or C or that it is trying to specifically enforce Exhibit B or C.

The draft agreement made clear that the press release was a material term. First, it was attached to the draft agreement. (*E.g.*, Compl. Ex. A) Second, the draft agreement was originally executed "upon issuance of the attached press release." (Compl. Ex. A) Third, when the timing of the issuance of the press release shifted to some point after the execution of the contract, the press release itself did not lose its status as a material term — it was placed alongside the rest of Sarissa's obligations in the first paragraph of the draft agreement, which included withdrawal of the proxy contest and dismissal of the Section 220 litigation. (Compl. Ex. B) The draft agreement states that the Company's performance was to be "[i]n consideration for" the actions taken in the first paragraph of the document, which included issuing the press release. (Compl. Ex. B)

It is not surprising that the draft agreements included in the Complaint placed emphasis on the press release. Sarissa for weeks had waged a very public proxy contest, in which it claimed, among other things, that Innoviva management and directors were being paid "extraordinary sums … for doing little more than cashing GSK's royalty checks." (Compl. ¶ 10) The Court is familiar with the scope of Sarissa's claims against Innoviva from its Verified Complaint Pursuant to 8 *Del. C.* § 220 in the ongoing litigation, captioned *Sarissa Capital Domestic Fund*

LP v. Innoviva, Inc., C.A. No. 2017-0216-JRS.[17] Nor is it surprising that the press release appeared when Sarissa "rejected" the standstill in the original draft settlement agreement. (*Compare* Compl. ¶ 12 *with* Compl. Ex. A) Without the protection from further adverse action by Sarissa, positive public statements take on increased importance.

Consistent with that focus, Sarissa alleges that Mr. Grossman told Mr. DiPaolo that any comments to the draft press release from Dr. Denner should be "'nice.'" (Compl. ¶ 19) While Mr. DiPaolo agreed, the message from Mr. Grossman was clear. (Compl. ¶ 19) However, when Sarissa did provide changes, they were not "'nice.'" (*Id.*; Bookout Aff. Ex. 1) Among other things, Sarissa added an extensive quote from Dr. Denner negatively commenting on

GSK — Innoviva's critical business partner and largest stockholder. (Bookout Aff. Ex. 2 at 2) Sarissa also changed the identity of the second Sarissa nominee from Mr. Haimovitz to Dr. Kostas. (*Id.*) While Sarissa alleges that it "thought some of its proposals were 'just our advice,'" it is mischaracterizing its own sentence. The full email from Mr. DiPaolo states:

> Attached are our changes to the press release. Note that we don't like tinkering with other people's quotes but we advise the Waltrip's quote should at least acknowledge that shareholders had issues and that the board listened… Just our advice…

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(17) The Court can take judicial notice of public statements made by Sarissa in other proceedings. *See In re Gen. Motors (Hughes)*, 897 A.2d at 170-71.

(Bookout Aff. Ex. 1 at 1) There is no reasonable inference that Mr. DiPaolo's "advice" referred to the changes in the press release mark-up he attached. He specifically refers to Waltrip's quote in the press release and prefaces his "advice" by saying that "we don't like tinkering with "other people's quotes." (*Id.*) Sarissa cannot pull back from its overreaching and anything but "'nice'" quote from Dr. Denner, and claim it now accepts the original language of the press release.

Nor is it reasonable to infer that Sarissa thought Innoviva would have accepted Sarissa's negative comments toward GSK. Sarissa admits that Innoviva never accepted Sarissa's changes. (Compl. ¶ 25) As a result, there was no contract. *See Janky v. Batistatos*, 559 F. Supp. 2d 923, 928 (N.D. Ind. 2008) (holding no enforceable settlement where one party sent a draft that included, among other new terms, a requirement that the other party issue an unfavorable press release); *Marshall v. City of Farmington Hills*, 578 F. App'x 516, 521-22 (6th Cir. 2014) (reversing trial court's dismissal of an action and holding that there was no valid settlement agreement between the parties because appellant did not agree to the precise language of a press release, appellant stopped negotiating after the first round of comments, and appellant "had no duty to accept the press release

and was free to reject the counter-offer and withdraw from the contract") (citation omitted).[18]

Sarissa alleges that "the precise language of the press release … was a ministerial thing." (Compl. ¶ 23) Not surprisingly, Sarissa never alleges why Innoviva would have thought the language was ministerial, or why the timing of the press release was a "material point[]" (Compl. ¶ 23), but the language of the press release was not. That is not a reasonable inference and, as a result, it is not reasonably conceivable that anyone affiliated with Innoviva, regardless of authority, manifested assent to all material terms of an agreement. That failure requires the Complaint to be dismissed.

V. SARISSA IS NOT ENTITLED TO SPECIFIC PERFORMANCE AS A MATTER OF LAW.

Sarissa is not entitled to specific performance as a matter of law because it has failed to plead sufficiently definite contract terms. In Delaware, it is well-established that specific performance may only be granted when a contract is sufficiently definite. *E.g.*, *Pulieri*, 2015 WL 691449, at *6; *Black Horse Capital*,

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(18) Sarissa sending signature pages mere minutes after materially altering the press release does not provide facts sufficient to allege an agreement. (Compl. ¶ 24) Under Delaware law, there is no enforceable contract where a party executes a settlement agreement but concurrently raises a new, material issue. *See Schwartz*, 2010 WL 2601608, at *7 (concluding that no settlement agreement exists where party signs agreement but simultaneously questions another part of the agreement).

LP v. Xstelos Holdings, Inc., C.A. No. 8642-VCP, 2014 WL 5025926, at *18-20 (Del. Ch. Sept. 30, 2014) (dismissing claim for specific performance where plaintiff failed to plead sufficiently definite contract terms); *Simms v. Schwartz*, 134 A. 99, 99 (Del. Ch. 1926) ("[U]nless the contract between the parties is complete and certain in all its essential parts, that is, unless the whole terms of the contract are clear and definitely ascertained, equity will not compel specific performance ... since that would be rather to make than to execute[] a contract." (citation omitted)); 25 Williston on Contracts § 67:4 (4th ed. 2016) ("By the great weight of authority, equity will not grant specific performance unless the terms of the contract are sufficiently certain for the court to decree with some exactness what the defendant must do."). Notably, the burden of proof for "an award of specific performance … is clear and convincing evidence." *Pulieri*, 2015 WL 691449, at *5.

Sarissa's allegations do not come close to meeting this burden. Based on the circumstances described above, it is not reasonably conceivable that Sarissa will be able to obtain specific performance and meet its burden of clear and convincing evidence. For example, what is the language of the press release? The Complaint does not say, and that is fatal to Sarissa's claim.

Nor is it reasonably conceivable that a Delaware court would compel a board of directors of a Delaware corporation to take the fundamental acts that

Sarissa demands based on an alleged contract cobbled together from a series of discussions with two separate individuals, emails and documents that do not objectively manifest assent by an individual with authority to enter into a contract containing all material terms. These circumstances allege no contract, let alone one with sufficient definiteness to specifically enforce.

CONCLUSION

For all of the foregoing reasons, Innoviva respectfully requests that the Court grant the Motion and dismiss the Complaint with prejudice.

/s/ Robert S. Saunders

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DATED: May 1, 2017

Exhibit 99.2

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SARISSA CAPITAL DOMESTIC FUND LP, SARISSA OFFSHORE MASTER FUND LP, SARISSA CAPITAL FUND GP LLC, SARISSA CAPITAL FUND GP LP, SARISSA CAPITAL OFFSHORE FUND LP LLC, SARISSA CAPITAL MANAGEMENT GP LLC, SARISSA CAPITAL MANAGEMENT LP,	:	
Plaintiffs,	:	
v.	:	C.A. No. 2017-0309-JRS
INNOVIVA, INC.,	:	
Defendant.	:	

DEFENDANT INNOVIVA, INC.'S BRIEF IN SUPPORT OF ITS CROSS MOTION FOR A STATUS QUO ORDER CONFIRMING THE DIRECTORS OF INNOVIVA PENDING RESOLUTION OF THE SECTION 225 ACTION AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF STATUS QUO ORDER

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PRELIMINARY STATEMENT

Defendant Innoviva, Inc. ("Innoviva" or the "Company"), by and through its undersigned counsel, hereby submits this brief (i) in support of its Cross Motion (the "Cross Motion") for A Status Quo Order Confirming The Directors Of Innoviva Pending Resolution Of The Section 225 Action (the "Confirming Status Quo Order") and (ii) in opposition to Plaintiffs' Motion (the "Motion") for Entry of Status Quo Order (the "Status Quo Order"). The Court should deny the Motion and grant the Cross Motion. The reasons for Innoviva's Cross Motion and opposition to the Motion are set forth in Innoviva's Brief in Support of its Motion to Dismiss the Verified Complaint (the "Motion to Dismiss Brief") and as follows:

Sarissa has brought a claim under Section 225 of the DGCL to specifically enforce an alleged settlement agreement and to compel Innoviva to expand the Board of Directors of Innoviva (the "Board") from seven to nine directors and to appoint Mr. George W. Bickerstaff, III and Dr. Odysseas Kostas, to fill the two vacancies. The nominees Sarissa seeks to have this Court install on the Board would not (and could not) control Innoviva even if they were seated, and Sarissa does not seek to remove any current director. (*See* Op. Br. at 13 ("Innoviva's board, pursuant to the Letter Agreement, should have two Sarissa representatives and nine members." (citing Compl. ¶ 35; Compl. Ex. B))

Nonetheless, Sarissa argues, without any factual or legal basis, that this Court should enter the Status Quo Order, which requires, through interim injunctive relief, that the Board give Sarissa's General Counsel and its Delaware counsel ten business days' advance notice of nearly any significant action Innoviva may take — including actions that are publicly announced and currently under way — for the period pending the resolution of Sarissa's Section 225 action.

As Sarissa acknowledges, "'[i]n order to justify entry of a *status quo* order, ***which is essentially a temporary restraining order***, [Sarissa] must demonstrate 1) that the order will avoid imminent irreparable harm; 2) a reasonable likelihood of success on the merits; and 3) that the harm to plaintiffs outweighs the harm to defendants.'" (Op. Br. at 8 (citing *Raptor Sys., Inc. v. Shepard*, C.A. No. 13614, 1994 WL 512526, at *2 (Del. Ch. Sept. 12, 1994) (emphasis added)) Sarissa cannot meet a single element necessary to the get interim injunctive relief it seeks. Put simply, a status quo order is only granted in situations involving control disputes where there is a reasonable likelihood of success on the merits of the underlying dispute, there is imminent irreparable harm, and the balance of the equities weighs in favor of the moving party. None exist here.

Nevertheless, the composition of the Board has been called into question by Sarissa's lawsuit, however meritless. In the absence of the Confirming Status Quo Order, confirming that Michael W. Aguiar, Patrick G. LePore, Barbara

Duncan, Catherine J. Friedman, Paul A. Pepe, James L. Tyree, and William Waltrip comprise the Board during the pendency of this Section 225 action, the validity of any actions taken by Innoviva may be questioned by third parties, which threatens imminent irreparable harm to the Company. No status quo order is appropriate here except one providing that, until this litigation is resolved, the current directors comprise the Board. A [Proposed] Status Quo Order Confirming The Directors Of Innoviva (previously defined as the "Confirming Status Quo Order") has been filed herewith.

However, if the Court concludes that Sarissa has demonstrated an entitlement to a status quo order, the most that would be appropriate would be a much narrower version of Sarissa's proposed Status Quo Order; one that would limit Board action unless such action is either (i) approved by at least five of the current directors (the same vote that would be required if Sarissa's nominees were seated); or (ii) taken after providing five business days' notice to Sarissa's counsel and then only for actions that could not be taken by a committee of the Board created with the votes of at least five directors.(1) An exemplar of such a proposed order and a redline to Sarissa's [Proposed] Status Quo Order are attached hereto as

(1) For the avoidance of doubt, (ii) would be applicable only where the Board, with a vote of four of the seven directors, seeks to approve a transaction requiring a stockholder vote or to amend Innoviva's bylaws.

Bookout Aff. Exhibits 1 and 2, respectively.(2) As this Court has previously held, that is the most that would be necessary to eliminate any supposed claim of imminent irreparable harm to Sarissa. *See Red Zone LLC v. Burke*, C.A. No. 1799-N, Tr. at 29-30 (Del. Ch. Nov. 23, 2005) (TRANSCRIPT) (denying request for status quo order where three of seven seats on a board were subject to dispute). In all events, any status quo order requiring notice to Sarissa must be subject to the entry of an acceptable confidentiality agreement. An exemplary draft of a proposed order containing such a confidentiality agreement is attached hereto as Bookout Aff. Exhibit 3.

In sum, only the Confirming Status Quo Order is necessary because the facts show that Sarissa cannot meet a single element required for the Status Quo Order.

(2) Exhibits referenced herein, unless otherwise noted, are attached to the Transmittal Affidavit of Arthur R. Bookout, in Support of Defendant Innoviva, Inc.'s Brief in Support of its Cross Motion for A Status Quo Order Confirming The Directors Of Innoviva Pending Resolution Of The Section 225 Action, and are cited to as "Bookout Aff. Ex. ___," filed herewith.

STATEMENT OF ADDITIONAL FACTS[3]

The relevant facts alleged in, and documents attached to or incorporated by reference in, the Verified Complaint Pursuant to 8 *Del. C.* § 225 and for Specific Performance (the "Complaint") are set forth in the Motion to Dismiss Brief.[4]

But those facts only tell part of the story. As shown below, the more complete story confirms that there is no reasonable likelihood of success on the merits of Sarissa's underlying claims.

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(3) The "additional facts" are those facts set forth herein and in the affidavits of Mr. Richard J. Grossman and Mr. James L. Tyree in Support of Defendant Innoviva, Inc.'s Cross Motion for A Status Quo Order Confirming The Directors Of Innoviva Pending Resolution Of The Section 225 Action, filed herewith, and are cited as "Grossman Aff." and "Tyree Aff.," respectively.

(4) The Motion to Dismiss Brief is incorporated by reference herein in its entirety. The facts alleged in the Complaint and discussed therein are only assumed true for the purposes of the Motion to Dismiss, this Motion, and this Cross Motion, and are not admitted.

A. Allegations In The Complaint That Are False And/Or Misleading And/Or That Sarissa Had No Basis To Allege Which Further Negate Any Reasonable Likelihood Of Success On The Merits.[5]

In one of the inconsistencies between the Complaint and the Opening Brief, Sarissa alleges that "Mr. Grossman told Mr. DiPaolo that the board had 'cried uncle'—ie, conceded—to the deal proffered by Sarissa and would add two Sarissa nominees to the board with nothing more than a simple agreement setting forth the mechanics to get it done." (Compl. ¶ 16) In the Opening Brief, Sarissa says that "Mr. Grossman told Mr. DiPaolo that the board had 'cried uncle'—ie, conceded—the request for a standstill." (Op. Br. at 3 (citing Compl. ¶ 16)) The Opening Brief is closer to the truth; the Complaint is misleading. When Mr. Grossman said "cried uncle," he meant that the Board had authorized him to continue negotiations toward a settlement agreement without a standstill. (*See* Grossman Aff. ¶ 15) "Cried uncle" was not a surprising phrase to use, given the

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(5) The Court must assume all of the actual facts alleged in the Complaint are true, but, as shown in the Motion to Dismiss Brief, the Complaint does not state a claim, so resolution of any disputes potentially created herein is not necessary to resolve the Motion to Dismiss. Allegations that are inconsistent with the documents attached to or incorporated by reference to the Complaint are addressed in the Motion to Dismiss. Furthermore, this is a non-exclusive list of alleged supposed facts, assertions, speculation and conjecture that is misleading, false, or simply wrong, compiled on an expedited basis. Failure to include or reference any particular allegation in the Complaint is not an admission that any such allegation is admitted or otherwise true.

"extended period [that] Innoviva also insisted on a 'standstill,'" a requirement it was no longer pursuing. (Compl. ¶ 12)

Sarissa alleges that "[a]ll that was left was agreeing to the precise language of the press release, which as the attorneys had previously noted was a ministerial thing." (Compl. ¶ 23) This allegation is an inaccurate reflection of what Mr. Grossman said. The ministerial thing was the timing of the issuance of the press release, not its content. (Grossman Aff. ¶ 17)

Sarissa alleges that "Mr. Aguiar caused the board to hold another meeting [sometime shortly after 4.29 p.m. on April 19, 2017]—a very different meeting than the one that morning—and at this meeting the board decided that it would not honor its agreements." (Compl. ¶ 28) Sarissa has no basis to make this allegation. A 5:15 p.m. meeting of the Board on April 19, 2017 had been scheduled since at least the night before, pursuant to an email sent at 12:11 a.m. on April 19, 2017. (Grossman Aff. ¶ 8 ; Grossman Aff. Ex. 2) Thus, Mr. Aguiar did not "cause[] the board to hold another meeting[.]" (Compl. ¶ 28)

Sarissa alleges "at around 7 p.m. on April 19th Mr. Grossman informed Mr. DiPaolo that the board would not proceed with the agreement." (Compl. ¶ 29; Op. Br. at 5) This is an inaccurate reflection of what Mr. Grossman said. On that phone call, Mr. Grossman said to Mr. DiPaolo: "'The Board has decided not to proceed with the discussions we had been having. The meeting is

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going forward tomorrow morning in Philadelphia at 8:30 a.m. As promised, we will send you the form of general ballot later this evening.'" (Grossman Aff. ¶ 23)

Sarissa implies in its Complaint that Mr. Aguiar would have been replaced in the election, but for "[a] large stockholder whose vote would decide the proxy contest agreed to vote in favor of the management slate at the last minute." (Compl. ¶ 28; *see also id.* at ¶ 27 ("Indeed, it appears that it was only the prospect of losing the proxy fight (***and [Mr. Aguiar's] seat on the board***) that got [Mr. Aguiar] to agree to talk about settlement at all (having two of nine directors thinking you are hugely overpaid is bad—but not as bad ***as having three of seven and not having a seat yourself***))." (emphasis added)) The official voting results show that at the "last minute," even if the "large stockholder" agreed to vote for Sarissa's slate of three nominees, Mr. Aguiar would have won his seat on the Board. (Innoviva, Inc., Current Report (Form 8-K/A), Item 5.07 (Apr. 28, 2017), attached hereto as Bookout Aff. Ex. 4) In spite of the implication of its allegations in the Complaint, Sarissa cannot dispute that Mr. Aguiar's Board seat did not hinge on this large stockholder's vote. Mr. DiPaolo undoubtedly knew that by the time he verified the Complaint.

B. Certain Key Facts Absent From The Complaint, But In Sarissa's Possession.[6]

Mr. Tyree stated to Dr. Denner in a call with Dr. Denner following the first April 19, 2017 Board meeting: "We will take two directors, but you have to say something nice about us in the press release.'" (Tyree Aff. ¶ 6) Mr. Tyree and Dr. Denner did not mention or discuss — let alone agree to — any specific individuals. (Tyree Aff. ¶ 6)

At the 2017 Annual Meeting of Innoviva stockholders, Dr. Kostas, speaking on behalf of Sarissa, described Innoviva as an "abscess," and the "'cure for an abscess is to open it up and let the pus out.'" (Grossman Aff. ¶ 24)

C. Certain Key Facts Not Alleged In The Complaint, But Which Sarissa Cannot Dispute.[7]

The Board did not vote to appoint Mr. Bickerstaff and Dr. Kostas to the Board at the April 19 Board meeting held on the morning and early afternoon of April 19, 2017, or at any other time. (Grossman Aff. ¶¶ 12-13)

All votes of the Board on April 19, 2017 were unanimous, with all directors present for the votes on April 19, 2017. (Grossman Aff. ¶¶ 10-11)

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(6) The Court need not consider these facts in connection with the Motion to Dismiss, except as set forth in the Motion to Dismiss. Furthermore, this is a non-exclusive list of key facts compiled on an expedited basis.

(7) The Court need not consider these facts in connection with the Motion to Dismiss, except as set forth in the Motion to Dismiss. Furthermore, this is a non-exclusive list of key facts compiled on an expedited basis.

D. Allegations Made On Information And Belief Should Not Be Credited For Purposes Of The Motion And The Cross Motion.

Sarissa acknowledges that its allegations are "upon knowledge as to themselves and upon information and belief as to all other matters." (Compl. Preamble) Therefore, any speculation regarding conduct of which Sarissa lacks "knowledge" is necessarily on information and belief, and inherently suspect. *See* 5 Charles A. Wright, et al., *Federal Practice and Procedure* § 1224 (3d ed. 2017) ("Some cases suggest that when allegations are made on the basis of information and belief, the facts on which the pleader's belief is founded also should be alleged. Such supporting allegations seem to be unnecessary and inconsistent with the philosophy of the federal pleading rules, except when … the matter pleaded in some way casts aspersions on the defendant's moral character."). Given that this action involves a hotly contested proxy contest with serious, but unfounded, accusations by Sarissa of wrongdoing by the Board, and where Sarissa has already used litigation to advance its goals, the Court should not credit allegations made upon information and belief.

Sarissa alleges that "[u]pon information and belief, Mr. Aguiar and/or others at Innoviva used the settlement as an option and continued soliciting proxies." (Compl. ¶ 17) The Court should not credit the allegation that "Mr. Aguiar and/or others at Innoviva used the settlement as an option," as Sarissa has no factual basis to support this allegation made on information and belief. (Compl.

¶ 17) Upon information and belief, discovery from Sarissa will prove that Sarissa, not Innoviva, used the prospect of a settlement as an option.

Sarissa alleges that "[u]pon information and belief, Innoviva's CEO, Michael Aguiar was substantially responsible for th[e] decision" by the Board as "whether to proceed with honor and integrity or with trickery and momentary advantage, in breach of its contractually binding obligations. It chose the latter." (Compl. ¶ 26) The Court should not credit that "Michael Aguiar was substantially responsible for this decision," as Sarissa has no actual knowledge to support this allegation made on information and belief. (Compl. ¶ 26)

Sarissa alleges that "[u]pon information and belief, [Mr. Aguiar has shown no sign of being willing, much less eager, to have his compensation reduced to anywhere close to market levels] is why Mr. Aguiar had been hostile to the idea of talking with Sarissa from the start." (Compl. ¶ 27; bracketed text is from ¶ 26 and replaces "this" in ¶ 27) Sarissa alleges no factual basis that Mr. Aguiar had been hostile to the idea of talking with Sarissa from the start or that his reason for doing so is that he does not want his compensation — which is set by the Compensation Committee of the Board, comprised of entirely independent directors — adjusted to "market levels."

ARGUMENT

I. NO STATUS QUO ORDER OTHER THAN A CONFIRMING STATUS QUO ORDER IS NEEDED HERE BECAUSE CONTROL IS NOT AT ISSUE.

Sarissa says the Court typically grants status quo orders where there exist "'***control disputes*** ... to preserve a corporation's affairs until a final judicial determination resolves the summary proceeding.'" (Op. Br. at 8 (quoting *Salamone v. Gorman*, C.A. No. 9870-VCN, 2014 WL 3905598, at *2 (Del. Ch. July 31, 2014) (emphasis added); Op. Br. at 8 ("A status quo order is frequently warranted in order to 'preclude[] the directors presently in control of the corporation from engaging in transactions outside the ordinary course of the corporation's business ***until the control issue is resolved***.'" (citing *Arbitrium* (*Cayman Islands*) *Handels AG v. Johnston*, C.A. No. 13056, 1994 WL 586828, at *3 (Del. Ch. Sept. 23, 1994) (emphasis added))))

That may be true, but this case does not involve a control dispute. Unlike "the usual case ... in [Section] 225 contexts[,]" which involve issues of control over 50% or a majority of the board, where the dispute involves only a minority of the board seats, this Court has refused to grant a status quo order. *Red Zone*, Tr. at 29-30; *cf. Capital Link Fund I, LLC v. Capital Point Mgmt., LP*, C.A. No. 11483-VCN, 2015 WL 7731766, at *3 (Del. Ch. Nov. 25, 2015) (noting that

"status quo orders are generally the more appropriate interim remedy in the context of a control challenge").

Sarissa cites no case where the Court granted a status quo order where a majority of board seats were undisputed.(8) Innoviva is aware of only one case that addresses a similar situation where a plaintiff sought a status quo order in the absence of a control dispute — *Red Zone LLC v. Burke*. In *Red Zone*, the Court addressed an analogous situation involving a Section 225 challenge to only a minority (three out of seven) of board seats. The Court refused to grant the status quo order. *Red Zone* is dispositive of the Motion.

II. SARISSA HAS NOT MET ITS BURDEN TO SHOW THAT A STATUS QUO ORDER IS NECESSARY TO AVOID IMMINENT IRREPARABLE HARM.

To obtain the Status Quo Order, Sarissa acknowledges that it must meet its burden to show "'that the order will avoid imminent irreparable harm.'" (Op. Br. at 8 (quoting *Raptor Sys., Inc.*, 1994 WL 512526, at *2)) It fails to do so.

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(8) The cases that Sarissa cites belie its argument. *See, e.g.*, *Arbitrium (Cayman Islands) Handels AG v. Johnston*, C.A. No. 13056, 1994 WL 586828, at *1 (Del. Ch. Sept. 23, 1994) (majority stockholder alleged that it had validly removed the incumbent board, which had "actively managed [the company] for over a decade"); *Salamone v. Gorman*, C.A. No. 9870-VCN, 2014 WL 3905598, at *1 (Del. Ch. July 31, 2014) (second Section 225 action after first found that four directors were validly elected by majority stockholder and, subsequently, the directors were deadlocked 50/50); *Raptor Sys., Inc. v. Shepard*, C.A. No. 13614, 1994 WL 512526, at *3 (Del. Ch. Sept. 12, 1994) (granting a status quo order where election of entire board was in dispute).

Sarissa argues that because the draft agreement the parties were discussing (Exhibit B to the Complaint) references "[i]rreparable harm," that is sufficient for the entry of the Status Quo Order. (Op. Br. at 11-12) What Exhibit B (which it does not appear Sarissa argues is the contract it seeks to enforce) actually says is: "Irreparable damage for which money damages are not a sufficient remedy would result from any breach or threatened breach of this letter agreement. Accordingly, the parties ***are entitled to specific performance*** in respect of their respective ***obligations hereunder*** without the need to post a bond or other collateral in connection therewith." (Compl. Ex. B) (emphasis added) Exhibit B contemplates specific performance of the "obligations hereunder," which will be decided with an ultimate judicial determination of the underlying claims and does nothing to address irreparable harm necessary for the Status Quo Order.(9) Thus, Sarissa's argument is entirely circular.

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(9) Sarissa cites to two cases, *Delaware Elevator, Inc. v. Williams*, C.A. No. 5596-VCL, 2011 WL 1005181 (Del. Ch. Mar. 16, 2011), and *Kansas City Southern v. Grupo TMM, S.A.*, C.A. No. 20518-NC, 2003 WL 22659332 (Del. Ch. Nov. 4, 2003), for the proposition that a contractual stipulation to irreparable harm is binding on the defendant. Both of these cases, however, are inapposite and involve entirely different facts. *Delaware Elevator, Inc.* involved an action for enforcement of a non-compete agreement under Maryland law. Importantly, and unlike in the present case, the Court in *Delaware Elevator, Inc.* found that the non-compete agreement was validly entered into because both the plaintiff and the defendant had signed the agreement. Moreover, the Court, in discussing irreparable harm, noted that "[i]n Delaware, a contractual stipulation to irreparable harm does not force the Court's hand but is sufficient to support injunctive relief." *Delaware Elevator, Inc.*, 2011 WL 1005181, at *15 (citation omitted). In *Kansas City Southern*, in light of a pending arbitration proceeding, the Court granted an injunction preventing the allegedly breaching party from taking actions contrary to an agreement that was signed by both parties. Analyzing the irreparable harm prong, the Court stated:

> Although a contractual stipulation as to the irreparable nature of the harm that would result from a breach cannot limit this Court's discretion to decline to order injunctive relief, such a stipulation does allow the Court to make a finding of irreparable harm provided the agreement containing the stipulation is otherwise enforceable. If the facts plainly do not warrant a finding of irreparable harm, this Court is not required to ignore those facts, especially since the "parties cannot confer subject matter jurisdiction upon a court."

Kansas City S., 2003 WL 22659332, at *5 (citations omitted).

Sarissa also argues that "litigants need not affirmatively prove irreparable harm, as the Court will infer it." (Op. Br. at 13 (quoting *Credit Lyonnais Bank Netherland, N.V. v. Pathe Commc'ns Corp.*, C.A. No. 12150, Tr. at 27-28 (Del. Ch. July 9, 1991) (TRANSCRIPT) (Allen, C.))) While that may be true where actual control of the board is at stake, as was the case in *Credit Lyonnais*, the Court should not presume irreparable harm here because there is none.

Sarissa's argument (not in its brief) is that the participation of Mr. Bickerstaff and Dr. Kostas, while "[t]hey would only be two of nine and thus could not force the board to do anything," would be "liberating" to the other directors.

(Compl. ¶ 32) Sarissa's assertion that "the board would be obligated to hear their voices and listen to their thoughts and opinions on how the Company should move forward" ignores the fact that Sarissa, through its proxy contest, has made its view more than clear about how the "Company should move forward." (Compl. ¶ 32; *e.g.*, Bookout Aff. Exs. 5-6 (Sarissa's March 30, 2017 and April 12, 2017 Investor Presentations, respectively) Mr. Bickerstaff and Dr. Kostas(10) are capable of doing so as well.

Sarissa's argument also ignores Delaware law in a way that undercuts any irreparable harm. (Compl. ¶ 32) A board has the ability to form committees that "shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation … but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation." 8 *Del. C.* § 141(c)(1)-(2). Thus, of the items listed on Sarissa's [PROPOSED] Order Maintaining Status Quo, only 3. c. "entering into or agreeing to any transactions, the consummation of

(10) At the Annual Meeting, Dr. Kostas made clear his view that "Innoviva" is an "abscess" that needs to be "'open[ed] … up'" to "'let the pus out.'" (Grossman Aff. ¶ 24; Grossman Aff. Ex. 6)

which would require the approval of or vote by Innoviva stockholders" and "3. d. amending, modifying, or repealing Innoviva's Bylaws or Charter" could not be accomplished by a committee of the Board. (Dkt. # 1)(11) Such a committee could be formed without Mr. Bickerstaff and Dr. Kostas, and that committee could have the full power and authority of the Board with no obligation to "hear their voices."

Sarissa does not present any reason why the sitting seven directors, who were duly elected by Innoviva stockholders, should be precluded from taking any legal action. This includes all corporate actions outside the ordinary course of business, including those which the Innoviva directors, in their business judgment, consider to be in the Company's best interests. *See Red Zone*, Tr. at 31-32. Sarissa's argument would open the doors to a single disgruntled purported director — or the activist stockholder who nominated him or her — holding hostage the functions of a duly elected board of directors. That result would be inconsistent and, in fact, at odds, with policies surrounding Delaware law.(12) 8 *Del. C.* § 141.

(11) Portions of 3. e. and f. relating to fundamental transactions, which cannot be approved absent a stockholder vote, may not be approved by a committee, but 3. c. renders those provisions redundant in these circumstances. (Status Quo Order § 3.c, 3.e, 3.f)

(12) Unlike in *Red Zone*, and in the *Arbitrium* and *Salamone* cases that Sarissa cites, this case does not involve a situation where certain directors alleged to have been validly removed continued to sit on the Board. Therefore, the practical reasons that animate the grant of status quo orders, such as ensuring stability and non-disruptive changes in corporate administration, do not apply where, as here, the authority of all of the Board members is undisputed, as all will remain seated regardless of the outcome of Section 225 action. *See Arbitrium*, 1994 WL 586828, at *3 ("[A] status quo arrangement ... [restricts] the directors presently in control of the corporation .... That is done to assure stability." (citations omitted)).

At most, to eliminate any supposed imminent irreparable harm, the Court could order that the incumbent Board not take certain actions unless such actions receive the affirmative vote of at least five of the seven Board members, and which could not be accomplished by a committee of the Board. *Cf. Red Zone*, Tr. at 31-32 (accepting representation that certain actions will be taken by unanimous vote of four directors where the challenge involved removing and replacing three of seven directors). There can be no risk of "unauthorized action" where an action that Section 141(c)(1)(2) prohibits from being taken by a committee is affirmed by at least five board members. *Cf. Credit Lyonnais Bank Netherland, N.V. v. Pathe Commc'ns Corp.*, C.A. No. 12150, Tr. at 28 (Del. Ch. July 9, 1991) (TRANSCRIPT) (Allen, C.) (explaining that status quo orders are imposed where there is "the risk that an unauthorized party will ultimately have the power over corporate assets and procedures").

Finally, Sarissa cites to no case that finds or even addresses imminent irreparable harm in these circumstances. However, *Red Zone* does:

> [Counsel for the party seeking the status quo order] is right in a somewhat more theoretical sense that even one person who is elected a director has the right to participate in board deliberations; but while

> that may be true, the fact that that may not happen for a period of time while there is a contest I think does not threaten the kind of irreparable harm that generally is necessary to support the entry of an order of this nature, which really is in the nature of a temporary restraining order. Since no other irreparable harm is threatened imminently, the usual basis for entering orders of this nature is missing.

Tr. at 30 (refusing to grant status quo order).

Just so here.

III. SARISSA DOES NOT HAVE A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS UNDERLYING CLAIM.

Sarissa admits that it must show "'a reasonable likelihood of success on the merits'" to obtain a Status Quo Order. (*See* Op. Br. at 8 (citation omitted)) Sarissa has not even met the requirements of pleading a reasonably conceivable claim, so there is no likelihood of success at all. Even if

that were not true, Sarissa has not shown that it has met the more rigorous "reasonable likelihood of success" standard necessary for the Court to grant the Motion.

The additional facts remove any doubt about what happened on April 18-20, 2017. To be sure, there are more facts, including facts which go back to the beginning of the proxy contest. If necessary, Innoviva stands ready to conduct discovery and prove them. However, the additional facts make clear that Sarissa does not have a reasonable likelihood of success on the merits.

A. The Motion To Dismiss Demonstrates That It Was Not Reasonably Conceivable That Sarissa Had An Agreement With Anyone With Authority To Bind Innoviva, Absent An Executed Agreement, And The Additional Facts Prove It.

The Complaint presupposes that at the Board meeting on April 19, 2017, the Board voted to approve, or authorized someone to bind it to agree to vote to approve, the addition of Mr. Bickerstaff and Dr. Kostas to the Board as part of a settlement of Sarissa's proxy contest. (Compl. ¶ 15; Op. Br. at 3) That is not alleged, and it is not reasonably conceivable. (Mot. to Dismiss Br. at III.B) The additional facts prove it never happened. (*See* Grossman Aff. ¶ 13) The Board met, but did not vote to appoint both Mr. Bickerstaff and Dr. Kostas to the Board, nor did it grant authority to anyone to bind it to do so. (Grossman Aff. ¶¶ 12-13)

Sarissa argues that once it became clear the incumbents had won, over-compensated management hastily called another Board meeting and convinced the Board to breach the contract that its agents supposedly had entered into. (Compl. ¶¶ 26, 28-29; Op. Br. at 5) That is not reasonably conceivable, and the additional facts prove that too did not happen. (Mot. to Dismiss Br. at III. B) The 5:15 p.m. Board meeting was set from at least 12:11 a.m. the night before. (Grossman Aff. ¶ 8; Grossman Aff. Ex. 2) Both Messrs. Tyree and Grossman are on the email setting the time and were at the Board meeting. The fact that the Board had not approved Dr. Kostas and that a Board meeting was to be held at 5:15 p.m. are reflected in the language of Exhibit B of the Complaint, which

requires execution and delivery after the necessary Board vote to be binding. (Mot. to Dismiss Br. at II)[13]

B. The Motion To Dismiss Demonstrates That It Was Not Reasonably Conceivable That Sarissa Alleged Agreement On All Material Terms, And The Additional Facts Prove That The Identity Of The Two Sarissa Nominees And The Content Of The Press Release Were Material Terms.

There are at least two material terms missing from the alleged agreement: the identity of the second nominee and the content of the press release. The Complaint and documents incorporated by reference therein make clear that the parties did not reach agreement on these two material terms. (Mot. to Dismiss Br. at IV) The additional facts prove it.

1. The additional facts show why the identities of the two nominees were a material term, and that the parties did not reach agreement on Messrs. Bickerstaff and Haimovitz or Mr. Bickerstaff and Dr. Kostas.

While it is difficult to fathom how the identity of a nominee could not be a material term to a settlement agreement that would appoint two of three nominees to a board of directors, the Complaint does not allege much about the

(13) The Complaint is not clear what Mr. DiPaolo was referring to when he emailed "call me to discuss logistics," but one reasonable inference is that he was referring to the logistics of obtaining the necessary vote of a majority of the Board. (*See* Compl. ¶ 25; Mot. to Dismiss Br. at III.C) Mr. DiPaolo is the General Counsel of Sarissa and has decades of experience, including with Sarissa's advance notice of its nomination of candidates for election as directors in the proxy contest. Regardless, Mr. DiPaolo was almost certainly aware of the contents of the bylaws. No other inference is reasonable.

nominees. It repeatedly references Sarissa's "two nominees" without naming them, except the legal conclusion that "Odysseas Kostas, M.D. and George Bickerstaff, III are the two Sarissa nominees whom the parties agreed would be placed on Innoviva's board under the terms of the parties' agreement." (Compl. 9; *see also id.* ¶¶ 8, 11, 14-16; Mot. to Dismiss Br. *passim*)

The Complaint does not even mention Mr. Haimovitz by name, yet the documents make clear it was either Dr. Kostas or him.[14] Unlike Dr. Kostas, Mr. Haimovitz is not affiliated with Sarissa in any way other than agreeing to serve as its nominee. (Innoviva, Inc., Proxy Statement (Schedule 14A) at 3 (Mar. 13, 2017), attached hereto as Bookout Aff. Ex. 7) Thus, he would be an independent director and, presumably, not beholden to Sarissa. (*See id.*) As the Court is familiar with from the Section 220 action pending before it, Dr. Kostas is a Sarissa employee who works for Dr. Denner. As his employee, Dr. Kostas can be called in to effectuate the wishes of Dr. Denner on behalf of Sarissa. As the Court also knows from the Section 220 action pending before it, Dr. Kostas was the one who had most of the interactions — outside of the negotiations regarding a potential settlement of the proxy contest at issue in this litigation — with representatives of Innoviva. *See generally Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, C.A.

(14) The draft press release that is "exhibit A" to Exhibit A to the Complaint describes Mr. Haimovitz.

No. 2017-0216-JRS, Dkt. #1 (Complaint). The additional facts show that those interactions were not positive, at least based on Dr. Kostas's statement at the Annual Meeting. (Grossman Aff. ¶ 24; Grossman Aff. Ex. 6) The identity of a board member is inherently material, but here it was particularly so because it was the difference between another independent director and the employee of an activist stockholder.

2. The additional facts explain why the content of the press release was a material term to the contract, and the timing of the issuance of the press release was ministerial.

Sarissa alleges that "[a]ll that was left was agreeing to the precise language of the press release, which as the attorneys had previously noted was a ministerial thing." (Compl. ¶ 23) Notwithstanding the rule of the last antecedent, the Complaint leaves wiggle room for Sarissa to argue in the Motion to Dismiss that the "ministerial thing" refers to "agreeing to the precise language of the press release." (Compl. ¶ 23) There was no such "not[ing]" from Mr. Grossman. The "ministerial thing" was the "timing of the issuance of the press release," not its "content." (Grossman Aff. ¶ 17) That the "ministerial" thing refers to the timing of the issuance of the press release also explains the back and forth on the timing of its issuance. (Grossman Aff. ¶ 17) First being before, then "'as soon as practicable'" after execution, then "immediately." (Compl. ¶¶ 20-22; Compl. Ex. B)

In contrast, the content of the press release was a highly material term to the parties. (*See* Mot. to Dismiss Br. at IV.B) The origin of this is the decision of the Board to "cr[y] uncle" and relent on its insistence to a standstill in any settlement agreement. The terms of the standstill proposed by Innoviva also included a non-disparagement clause. (Grossman Aff. ¶ 7; Grossman Aff. Ex. 1 § 2(a)(v)) In the absence of an agreement with standstill and non-disparagement provisions, Sarissa could continue to disparage the Company and the Board.

With this in mind, Mr. Grossman informed Mr. DiPaolo that Dr. Denner had to say something "'nice' in his quote" in the press release. (Compl. ¶ 19; Grossman Aff. ¶ 16) Given the hostility of the proxy contest, this was a particularly important ask of Sarissa. The "chuckl[ing]" over the statement by Mr. DiPaolo makes clear that Dr. Denner is not "'always'" nice. (Compl. ¶ 19) Indeed, Mr. Tyree conveyed the same message to Dr. Denner directly when he stated: "you have to say something nice about us in the press release." (Tyree Aff. ¶ 6)

Thus, the additional facts prove that the content of the press release was a material term. They also prove that the parties knew Dr. Denner had to say something "nice" about Innoviva, which was material to Innoviva so much so that the Board discussed that it would be a "kumbaya" press release. (Grossman Aff. ¶¶ 12, 16)

3. The additional facts show that Sarissa rejected a material term with its not nice rewrite of the press release attacking Innoviva's most important partner, GSK.

So then what happened? As alleged in the Complaint, "[a]t 4:41 p.m., Mr. DiPaolo sent an email to Innoviva's legal team with some suggestions on the press release language, all of which were previously orally provided to Mr. Grossman, as indicated above (making clear that Sarissa thought some of its proposals were 'just our advice')." (Compl. ¶ 24)

The Complaint attaches three exhibits. The 4:41 p.m. email (which was received at 4:42 p.m) is not one of them. (Grossman Aff. ¶ 18 (attaching 4:42 p.m. email); Grossman Aff. Ex. 4) The Complaint also references "suggestions" when what was attached to the email was a Microsoft Word document with track changes marked on the previous press release. (Grossman Aff. Ex. 4) The Complaint also references that it is "making clear that Sarissa thought some of its proposals were 'just our advice.'" (Compl. ¶ 24) But the only thing that "just our advice" could refer to was the statement that "we don't like tinkering with other people's quotes." (Grossman Aff. Ex. 4) Presumably, this statement would apply with equal force to any attempt by Innoviva to change Dr. Denner's statement. At 4:42 p.m., Mr. DiPaolo sent the following:

Alexander Denner, Ph.D., founder of Sarissa Capital, stated: "Sarissa is very grateful for the overwhelming support we received from independent shareholders. Despite GSK's reluctance to support necessary change, independent shareholders were victorious in bringing about this positive outcome. The new Innoviva will be focused on capital allocation to optimize shareholder value. We look forward to working with the new board for the benefit of all shareholders. " ~~"I am happy to have reached this agreement with Innoviva and believe that George and Jules will be strong additions to the Company's Board in the shared goal of enhancing shareholder value. Innoviva's Board has demonstrated a willingness to accept shareholder input, and as a shareholder, I look forward to future productive dialogue."~~

(Grossman Aff. Ex. 4 at 2-3)[15]

That is not nice. And neither is this litigation. But it should end this litigation just as it ended any chance of a binding contract under Delaware law.(16)

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(15) GlaxoSmithKline plc (through Glaxo Group Limited) ("GSK") is crucial to Innoviva's success. GSK is Innoviva's largest stockholder, as well as its critical business partner. (Innoviva, Inc., Annual Report (Form 10-K) at 10-11, 23-24 (Feb. 28, 2017), excerpt attached hereto as Bookout Aff. Ex. 8) This is no secret. Innoviva told its stockholders in its most recent Form 10-K that "[f]or the foreseeable future we will derive all of our royalty revenues from GSK and our future success depends on GSK's ability to successfully develop and commercialize the products in the respiratory programs partnered with GSK." (*Id.* at 10 (emphasis removed)) On April 13, 2017, GSK publicly announced that it would support the Company's nominees. (Innoviva, Inc., Schedule 13D/A, Item 4 (Apr. 13, 2017), attached hereto as Bookout Aff. Ex. 9) Dr. Denner's attack on GSK's "reluctance" highlights the tension between Sarissa and Innoviva and its crucial partner, GSK.

(16) For there to be a contract, there must be offer and acceptance. *See* Farnsworth on Contracts § 3.3 (2d ed. 1998); Restatement (Second) of Contracts § 22(1) (1981). Rejection of a material term creates, at most, a counteroffer, and terminates the offeree's power of acceptance. Restatement (Second) of Contracts § 39 & cmt. a.

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* * *

As shown above, additional facts prove there is no contract here for several reasons. As a result, Sarissa cannot show a reasonable likelihood of success on the merits of its underlying claims.

IV. THE BALANCE OF THE EQUITIES FAVORS ENTERING THE CONFIRMING STATUS QUO ORDER AND DENYING OR STRICTLY LIMITING THE SCOPE OF ANY STATUS QUO ORDER.

Sarissa contends that the balance of the equities supports entry of the Status Quo Order for two reasons, neither of which hold any weight.

Sarissa argues that, absent the Status Quo Order, "management can do everything in its power to further entrench its position and siphon value from the Company, and it can further attempt to take actions that would minimize Sarissa's inevitable influence on the Company[]." (Op. Br. at 13-14) Sarissa does not set forth what "management," as opposed to the Board, could do to entrench itself or siphon value. Sarissa's allegations regarding "siphon[ing] value," in the form of allegedly excessive management compensation — which is set by the Compensation Committee of the Board — have nothing to do with the underlying dispute because this litigation is not seeking to have anyone appointed to the Compensation Committee. If that were not enough, there can be no entrenchment where all current directors will remain on the Board. *City of Westland Police & Fire Ret.*

Sys. v. Axcelis Techs., Inc., 1 A.3d 281, 286 (Del. 2010) ("*Blasius Indus*[*tries*] ... holds that where a corporate board acts 'for the primary purpose of impeding the exercise of stockholder voting power ... the board bears the heavy burden of demonstrating a compelling justification for such action.'" (citing *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988))). No actual entrenchment is alleged here.

Sarissa's argument that management could "further attempt to take actions that would minimize Sarissa's inevitable influence on the company" ignores that Mr. Aguiar would retain his Board seat and, as CEO — along with other employees — serves at the pleasure of the Board members.

In contrast, Innoviva has already announced an expense review and certain financing transactions, of which the Status Quo Order may require advance notice.(17) *See Peeters v. ITech Med., Inc.*, C.A. No. 6538-VCN, Tr. at 29 (Del. Ch. Sept. 14, 2011) (TRANSCRIPT) (holding that the status quo order will "apply prospectively" and "[t]hat would not affect an existing arrangement for generating cash, however dilutive, even though it may be dilutive"). This expense review is

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(17) (Innoviva, Inc., Current Report (Form 8-K), Ex. 99.1 (Apr. 10, 2017) (press release announcing prepayment of $50 million of the Company's royalty notes as part of a larger $150 million capital return plan for 2017), attached hereto as Bookout Aff. Ex. 10; Innoviva, Inc., Proxy Statement (Schedule 14A) (Apr. 13, 2017) (press release announcing comprehensive review of costs), attached hereto as Bookout Aff. Ex. 11)

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being conducted by a committee of the Board. (Grossman Aff. ¶ 6) In addition, there are numerous other actions covered by the Status Quo Order which Innoviva may wish to take and for which Sarissa has no right to demand advance notice.

Thus, the balance of the equities weighs heavily in favor of denying the Motion and granting the Cross Motion.

CONCLUSION

For all of the foregoing reasons, Innoviva respectfully requests that the Court deny the Motion and in doing so rule on whether there is a reasonable likelihood of success on the merits of the underlying claims. In addition, Innoviva respectfully requests that the Court grant the Cross Motion as promptly as possible.

Respectfully submitted,

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