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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON TERRELL, Plaintiff Below, Appellant, v. KIROMIC BIOPHARMA, INC., a Delaware corporation, Defendant Below, Appellee.	)	No. 131,2024 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0248-MTZ

APPELLEE'S ANSWERING BRIEF

June 10, 2024

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NATURE OF PROCEEDINGS

Plaintiff-Appellant Dr. Jason Terrell ("Terrell") commenced the underlying action on March 22, 2021, by filing a verified complaint in the Court of Chancery against Defendant-Appellee Kiromic Biopharma, Inc. ("Kiromic"), seeking: (i) a declaratory judgment that he is entitled to exercise certain options allegedly granted to him under a December 2014 consulting agreement and January 2017 non-employee director agreement, and specific performance for Kiromic to reserve shares corresponding to those options; and (ii) a declaratory judgment that he was entitled to indemnification from Kiromic in connection with fees and costs incurred in this action. (*See* A013-A024.)

On May 20, 2021, Kiromic moved to dismiss the verified complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim. (*See* A096-A127.) As to the claim for declaratory judgment in connection with the alleged options, Kiromic argued, *inter alia*, that any such prior options were superseded by a waiver clause in a later options grant notice and agreement that Terrell entered into with Kiromic in November 2017 (months after Terrell had joined Kiromic's board) as part of the board's effort to create a standardized equity incentive plan. As to the indemnification claim, Kiromic asserted that it failed as a matter of law because Terrell's suit was brought in his personal capacity.

On June 21, 2021, Terrell filed his opposition to the motion to dismiss. (*See* A128-A145.) In that opposition, however, he voluntarily dismissed his indemnification claim, leaving only the options-related declaratory judgment claim. (*See* A132, A143.) Kiromic filed its reply brief on July 7, 2021. (*See* A146-A161.)

Oral argument on the motion to dismiss was held before the Court of Chancery on October 20, 2021. (*See* A191-A222.) During the argument, the Court invited the parties to submit further briefing on the issue of whether the November 2017 Stock Option Agreement between the parties—which invested the "Committee" (defined as a committee, composed of at least one director, tasked with administering Kiromic's equity incentive plan) with exclusive jurisdiction to resolve disputes regarding the interpretation of the agreement itself—impacted the Chancery Court's jurisdiction to resolve the parties' contract dispute. (*See* A221.) The parties simultaneously submitted letter briefs on the issue on November 15, 2021. (*See* A162-A173.)

On January 20, 2022, the Court issued a letter decision on the motion to dismiss (*see* A174-A190) that instructed the parties to submit two questions to the Committee: (i) whether the Committee's exclusive jurisdiction to interpret the November 2017 options agreement also extended to the waiver in the accompanying grant notice that was incorporated by reference into the November 2017 options

agreement; and (ii) if so, whether the release in the grant notice superseded and extinguished any options granted to Terrell under prior agreements. (*See* A190.)

The Committee subsequently answered both questions in the affirmative and the parties jointly reported the outcome to the Court of Chancery. (*See* A223-A227.) In response, the Court of Chancery issued an order on August 2, 2022, granting Kiromic's motion to dismiss based on the Committee's determination without conducting its own *de novo* review of the contract interpretation issue. (*See* A228-A229.)

Terrell subsequently appealed to this Court, challenging the Court of Chancery's deferral to the Committee and also raising unconscionability arguments with respect to Kiromic's interpretation of the November 2017 options agreement. (*See* A230-A231.) While this Court reversed and remanded in order for the Court of Chancery to conduct a *de novo* review, it determined that there was "no merit in Terrell's alternative unconscionability arguments[,]" noting that "Terrell was not a weak counterpart. Rather, he was a sophisticated party, charged by virtue of his directorship with participating in the management of the company." *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 624 (Del. 2023); (A258).

Following remand, the parties submitted dueling letter briefs to the Court of Chancery addressing the impact of this Court's decision on the Court of Chancery's further consideration of Kiromic's motion to dismiss. (*See* A260-A269.) By letter

decision dated January 31, 2024, the Court of Chancery granted Kiromic's motion to dismiss on the original grounds advanced by Kiromic back in 2021—namely, that the November 2017 options agreement unambiguously extinguished and superseded any prior options agreements with Kiromic.[1] The parties thereafter stipulated to a form of final judgment, which the Court of Chancery entered on March 11, 2024.[2]

Terrell filed his Notice of Appeal on March 25, 2024, and filed his opening Brief with this Court on May 9, 2024. (*See* D.I. 1, D.I. 8.)

This is Kiromic's answering brief.

[1] The Court of Chancery's letter decision is attached to Terrell's opening brief ("Brief" or "Br.") as Exhibit A ("Ex. A") and is available on Westlaw. *See Terrell v. Kiromic Biopharma, Inc.*, 2024 WL 370040 (Del. Ch. Jan. 31, 2024), *judgment entered*, (Del. Ch. 2024).

[2] A copy of the final judgment is attached to Terrell's Brief as Exhibit B ("Ex. B").

SUMMARY OF ARGUMENT

Denied. The Court of Chancery correctly dismissed Terrell's complaint for failure to state a claim pursuant to Court of Chancery Rule 12(b)(6). The Court of Chancery determined correctly that the only reasonable reading of the waiver provisions in the stock option grant notice at issue was that those provisions unambiguously extinguished and superseded all prior options contracts between Terrell and Kiromic. Terrell's interpretation of those waiver provisions was not a reasonable alternative reading that created ambiguity sufficient to withstand a Rule 12(b)(6) motion to dismiss, as it failed to give effect to the explicit references to "commitment[s]" and agreements concerning "options" set forth in the waiver provisions. *See, e.g.*, *Glaxo Group Limited v. DRIT LP*, 248 A.3d 911, 918 n.28 (Del. 2021) ("Delaware courts read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage.") (citations and internal quotation marks omitted) (ellipses in original). The carve-out in the waiver for "securities of the Company, if any, issued to" Terrell prior to the grant notice has no application here, as the plain meaning and context of the grant notice made clear that this clause referred only to issued shares of stock, not granted options. (*See* A038.)

COUNTER-STATEMENT OF FACTS

A. Terrell and Kiromic Enter into the Prior Agreements

On December 10, 2014, Terrell and Kiromic entered into a consulting agreement (the "Consulting Agreement"), under which Kiromic granted Terrell the option to purchase 500,000 shares of its common stock at a strike price of $0.50 per share in exchange for Terrell's consulting services. (*See* A015, A026-A030.)[3] The exercise term for the options under the Consulting Agreement was to expire December 10, 2024. (*See* A027, A030.)

On January 23, 2017, Terrell and Kiromic entered into a "Non-Employee Director Agreement" (the "Jan. 2017 Agreement,"[4] and together with the Consulting Agreement, the "Prior Agreements"), under which Kiromic granted Terrell the option to purchase 500,004 shares of its common stock at a strike price of $0.17 per share in exchange for Terrell's services as a non-employee member of Kiromic's board. (*See* A034-A035.) The exercise term under the Jan. 2017 Agreement was scheduled to expire on January 23, 2027. (A035.) As Terrell acknowledges in his Complaint, he "served on Kiromic's board of directors from January 2017 to September 2019." (A016 ¶ 16.) As described in the next section, this included the

[3] All Appendix citations herein are to the appendix to Terrell's Brief. This Court referred to the Consulting Agreement in its prior decision as "Agreement 1." *See Terrell*, 297 A.3d at 613; (A236).

[4] This Court referred to the Jan. 2017 Agreement as "Agreement 2." *Id.*

period in which Kiromic's board approved a new equity incentive plan, which included a new options grant to Terrell.

B. Terrell Enters into the November 2017 Agreement and a Waiver of His Prior Option Rights Under the Prior Agreements

On November 10, 2017, Kiromic and Terrell entered into a "Notice of Stock Option Grant / 2017 Equity Incentive Plan" (the "Grant Notice") and an accompanying Stock Option Agreement (the "SOA") and Equity Incentive Plan (the "Plan"), under which Kiromic granted Terrell the option to purchase 500,004 shares of Kiromic's common stock at a fixed price of $0.19 per share. (*See* A037-A038 (Grant Notice); A039-A053 (SOA); A054-A069 (Plan).)[5] The exercise term for these options is due to expire on November 9, 2027 (ten years from the grant date of November 10, 2017). (*See* A037 (Grant Notice).)

The last paragraph of the Grant Notice, immediately above the parties' signatures and set forth in a larger font size, is a waiver clause providing that Terrell agrees that, other than the options granted to him under the Grant Notice and SOA, he has "no other rights to any other options . . . notwithstanding any commitment or communication regarding options . . . made prior to the date hereof" (the "Waiver"):

> By signing this Grant Notice, you acknowledge and agree that other than the Shares, ***you have no other rights to any other options, equity awards or other securities of the***

[5] Kiromic refers to these three interrelated November 2017 agreements herein as the "November 2017 Agreement." In its prior decision, this Court referred to them as "Agreement 3." *See Terrell*, 297 A.3d at 613; (A236).

> ***Company (except securities of the Company, if any, issued to you on or prior to the date hereof, if any), notwithstanding any commitment or communication regarding options, equity awards or other securities of the Company made prior to the date hereof***, whether written or oral, including any reference to the contrary that may be set forth in ***your offer letter, consultant agreement or other documentation with the Company*** or any of its predecessors.

(A038 (Grant Notice).)[6]

The SOA provides that it "shall be governed by and construed in accordance with the internal laws of the State of Delaware as such laws are applied to agreements between Delaware residents entered into and to be performed entirely within Delaware." (A049 (SOA § 18).)

C. The Present Dispute

In September 2019, Terrell resigned from Kiromic's Board. (*See* A017 ¶ 26.) On March 22, 2021, Terrell commenced the underlying action against Kiromic, seeking, among other things, a declaration that he is entitled to exercise options under the Prior Agreements, as well as under the November 2017 Agreement, because the carveout within the Waiver for "except securities of the Company, if any, issued to you on or prior to the date hereof" purportedly includes granted but unexercised options. (*See* A013-A024 (Complaint).) Kiromic then filed a motion to dismiss, asserting that Terrell's declaratory judgment claim was barred by the

[6] Unless otherwise noted, all emphasis herein is added.

Waiver in the Grant Notice, which extinguished and superseded the Prior Agreements. Kiromic's motion was briefed in the normal course. (*See* A096-A127 (Kiromic Motion and Opening Brief); A128-A145 (Terrell Answering Brief); A146-A161 (Kiromic Reply).)

Oral argument on the motion was held before the Court of Chancery on October 20, 2021. (*See* A191-A222 (Transcript).) During argument, the Court of Chancery invited the parties to submit supplemental briefing on the question of whether Section 15.1 of the SOA (which delegated exclusive interpretive authority to a "Committee" of the board charged with managing the Plan) deprived the Court of Chancery of jurisdiction over questions of contract interpretation. (*See* A221.) The parties submitted simultaneous letter briefs on the issue to the Court of Chancery on November 15, 2021. (*See* A162-A167 (Terrell letter brief); A168-A173 (Kiromic letter brief).)

On January 20, 2022, the Court of Chancery issued a letter decision to the parties on the motion to dismiss (the "First Decision"). (*See* A174-A190.) In the First Decision, the Court of Chancery determined that it is for the Committee to decide whether (i) Section 15.1 of the SOA gives the Committee the authority to interpret the Grant Notice, and (ii) if so, whether the Waiver in the Grant Notice superseded and nullified Terrell's options under the Prior Agreements. (*See* A190.) The Court of Chancery directed the parties to submit these issues to the Committee

and "inform the Court of the Committee's decision(s)." (*Id.*) Pending receipt of the Committee's decision(s), the Court of Chancery stayed the action. (*See id.*)

On July 21, 2022, the Committee (through its separate counsel) answered both contract interpretation questions in the affirmative via e-mail. (*See* A226.) The parties, through Kiromic's counsel, thereafter jointly notified the Court of Chancery of the Committee's determinations via letter dated July 26, 2022. (*See* A223- A227.) On August 2, 2022, the Chancery Court issued an order granting Kiromic's motion to dismiss based on the reasoning in its First Decision and the Committee's determinations. (*See* A228-A229.)

On August 23, 2022, Terrell filed a notice of appeal to this Court, arguing the Committee's determinations were incorrect and subject to judicial review. (*See* A230-A231.) The parties briefed the appeal in due course. In his own briefing, and at oral argument, Terrell maintained not only that the Court of Chancery's deferral to the Committee's determinations on questions of contract interpretation should be reversed, but that "Agreement 3 as interpreted by the Court of Chancery was unconscionable and therefore unenforceable." *Terrell*, 297 A.3d at 623; (A257). Among other things, "Terrell claim[ed] that Agreement 3 presents the 'rare combination of inadequacy of price . . . coupled with . . . oppressive conduct.'" *Id.* (quoting Terrell's opening brief, at 13).

In its May 4, 2023 opinion, this Court reversed the Court of Chancery's dismissal, and remanded the case for the Court of Chancery to conduct a *de novo* review of the relevant agreements. (*See* A234-A259.) Critically, in that opinion, this Court determined that Terrell's unconscionability arguments were meritless, and made specific findings regarding Terrell's sophistication as a contract counterparty. (A258.) In particular, the Court rejected the contention "that Agreement 3 [the November 2017 Agreement that contained the Waiver] as interpreted by the Court of Chancery was unconscionable and therefore unenforceable." *Terrell*, 297 A.3d at 623; (A257). The Court refuted this contention squarely on grounds that Kiromic had raised in briefing and at oral argument on appeal—namely, that Terrell was both sophisticated and knowledgeable by virtue of the fact that he sat on the board at the very time that his options agreement was approved:

> [W]e find no merit in Terrell's alternative unconscionability arguments. Unconscionability—"a concept that is used sparingly"—traditionally requires that "the party with superior bargaining power used it to take advantage of his weaker counterpart." ***Terrell was not a weak counterpart. Rather, he was a sophisticated party, charged by virtue of his directorship with participating in the management of the company.*** As such, his claim, which implies that he could not understand the 11-page Stock Option Agreement and, in particular, the straightforward language of Section 15.1, rings hollow.
>
> "[C]ourts are particularly reluctant to find unconscionability in contracts between sophisticated [parties]." We are disinclined to do so here.

Id. at 624 (citations and footnotes omitted); (A258).

The case was then remanded to the Court of Chancery to re-consider the motion to dismiss in light of this Court's opinion. On August 8, 2023 and August 18, 2023, respectively, Kiromic and Terrell submitted post-remand letters to the Court of Chancery addressing the significance of this Court's May 2023 opinion on the remaining contract interpretation issues. (*See* A260-A264 (Kiromic's letter); A265-A269 (Terrell's letter).)

On January 31, 2024, the Court of Chancery issued a letter opinion (the "Second Decision"), again dismissing Terrell's declaratory judgment claim, but this time based on the contract interpretation arguments advanced in Kiromic's original motion papers, as buttressed by this Court's opinion. (*See* Ex. A.) The Court of Chancery held that, pursuant to the Waiver in the Grant Notice, the November 2017 Agreement extinguished all prior "unexercised options," notwithstanding a carveout for "securities of the Company, if any, issued" to Terrell prior to the date of the contract. (*Id.* at 5.) Accordingly, Terrell's claim was barred by the plain meaning and only reasonable interpretation of the contract. In the words of the Court of Chancery, "[t]he Grant Notice contains an express waiver. 'A clearer statement is difficult to imagine." (*See id.* at 13.)

As to Terrell's contention that the Prior Agreements fell within the carve-out in the Waiver for "securities of the Company, if any, issued to" Terrell prior to the

November 2017 Agreement, the Court of Chancery noted that, even though "securities" under the federal securities laws are defined broadly to include options, the word had a narrower meaning in the carve-out clause, and referred only to "issued" shares of stock—that is, *exercised* options. (*Id.* at 21.) As the Court of the Chancery found, "Agreement 3 never uses the word 'issued' in relation to options. Instead, every use of 'issued,' 'issuance,' and 'issuable'—all thirty-five of them—relates to Shares, not options." (*Id.* at 17-18) (footnote omitted). Further, "[t]he definitions of 'Shares and 'Exercise Price' both include the word 'issuable;' the definition of 'Option' does not." (*Id.* at 18) (footnote omitted). And "[t]o describe the Company's delivery of an option to purchase shares, Agreement 3 only uses the word 'grant.'" (*Id.*) Indeed, "Agreement 3 makes clear that options and shares are different: 'an optionee shall not have any of the rights of a stockholder with respect to any Shares unless and until such Shares are issued to the optionee.'" (*Id.* at 18-19) (cleaned up).)

Accordingly, the Court of Chancery concluded, "under Agreement 3's language, that while an option is a security, it is not an issued security." (*Id.* at 14.) Specifically, "[t]he Carveout [within the Waiver] preserves only securities that have been issued, not securities that have been granted," which "was presumably intentional." (*Id.* at 19.) (internal citation omitted). "If the parties intended for the Carveout to include grants and not just issuances, they would have included the word

'grant[ed],' as they did other times where 'grant and issuance' were to be construed together. (*Id.*) (footnote omitted).

The Court of Chancery also rejected Terrell's argument that "he could not have agreed to a relinquishment of his rights because such a waiver is unreasonable," because—purportedly—" 'Agreement 3 . . . confer[red] no new consideration to Dr. Terrell[.]'" (*Id.* at 12 n.40.) As the Court of Chancery noted, a waiver of a prior right (in this case, to unexercised options) does not require new consideration under Delaware law. (*See id.* ("A waiver is a "voluntary . . . relinquishment of a known right.' . . . It does not require support by consideration")) (citations omitted). The Court of Chancery also noted that Terrell's "unreasonableness" argument was in substance the same unconscionability argument he had advanced before this Court, which this Court, in determining that Terrell, as a sophisticated party who was "not a weak counterpart," had rejected in its May 2023 opinion. (*See id.*)

On March 11, 2024, the Court of Chancery entered a stipulated form of judgment submitted by the parties, which—consistent with the Second Decision—dismissed Terrell's declaratory judgment claim with prejudice. (*See* Ex. B.) On March 25, 2024, Terrell noticed this appeal. (*See* D.I. 1.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT THE WAIVER IN THE GRANT NOTICE UNAMBIGUOUSLY EXTINGUISHED TERRELL'S UNEXERCISED OPTIONS UNDER ANY PRIOR AGREEMENTS BETWEEN TERRELL AND KIROMIC

A. Questions Presented

The options grant notice at issue contained a waiver clause providing that,

> other than the Shares [meaning, the options granted under the grant notice], you have no other rights to any other *options*, equity awards or other securities of the Company (except securities of the Company, if any, *issued* to you on or prior to the date hereof, if any), notwithstanding any *commitment* or communication regarding *options*, equity awards or other securities of the Company made prior to the date hereof, whether *written* or oral, including any reference to the contrary that may be set forth in your offer letter, *consultant agreement* or *other documentation* with the Company or any of its predecessors.

(A038.)

The Court of Chancery determined that this waiver clause unambiguously extinguished and superseded options granted under two prior options agreements between Terrell and Kiromic, and that those prior options agreements did not fall within the waiver's carve-out for "securities of the Company, if any, issued to" Terrell prior to the grant notice. On this basis, the Court of Chancery granted Kiromic's motion to dismiss the complaint. Was the Court of Chancery's determination correct?

The parties briefed these issues repeatedly over the course of multiple briefs and letter briefs before the Court of Chancery, including following this Court's remand. (*See* A102-127, A128-145, A146-161, A162-A167, A168-A173, A223-A227, A260-A264, A265-A269; *see also* Br. 10-11).

B. Scope of Review

A Vice Chancellor's decision to grant a motion to dismiss is reviewed *de novo*. *See, e.g.*, *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 359–60 (Del. 2013) ("We review the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6), *de novo*.") (internal citation omitted). Likewise, *de novo* review applies when the Court of Chancery's dismissal hinges, as it does here, "upon its interpretation of the parties' contracts[.]" *Terrell*, 297 A.3d at 616–17; (A243).

C. Merits of the Argument

1. Terrell's Contract Interpretation Fails Because It Renders Key Provisions Meaningless and Mere Surplusage

The Court of Chancery properly rejected Terrell's interpretation of the Grant Notice per uncontroversial Delaware rules of contract construction. In particular, Terrell's interpretation failed to satisfy those rules because, in taking the position that the Waiver preserved all prior options contracts, it impermissibly assigned *no meaning* to the phrase "you have no other rights to any other *options* . . . *notwithstanding* any *commitment* or communication regarding *options*, equity awards or other securities of the Company made prior to the date hereof, whether

written or oral, including any reference to the contrary that may be set forth in your offer letter, *consultant agreement*[7] or *other documentation with the Company* or any of its predecessors." (A038.)

The principal case upon which Terrell relies in his opening brief, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010), confirms this analysis. There, this Court held that it "will read a contract as a whole and . . . will give each provision and term effect, so as not to render any part of the contract mere surplusage." *Id.* at 1159 (citing *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010)). Moreover, this Court "will not read a contract to render a provision or term 'meaningless or illusory.'" *Id.* (citing *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.").

On this basis, the Court in *Osborn* rejected an interpretation of the real estate sale agreement at issue that "would render the explicit $50,000 purchase term meaningless or mere surplusage." *Id.* at 1160. Likewise, in *Glaxo Group Limited*, this Court rejected an interpretation of a patent license and settlement agreement that "read[] the word 'or' out of the agreement." 248 A.3d at 918. And, in *Sunline*

[7] Notably, Terrell's first options agreement with Kiromic was a "Consulting Agreement." (*See* A026-A030.)

Commercial Carriers, Inc. v. CITGO Petroleum Corp., 206 A.3d 836 (Del. 2019), this Court reversed a Superior Court ruling that the underlying term agreement "expired by its own terms on March 31, 2014" on the grounds that it "ignore[d] the fact that the Term Agreement's text states that its 'terms shall remain in effect until the Master Agreement is expired or terminated,'" and therefore failed to give that provision "effect." *Id.* at 839 (footnote omitted).

Terrell's interpretation of the Grant Notice runs afoul of this basic principle of Delaware contract construction. Terrell's reading of the carveout in the Waiver for "securities of the Company, if any, issued to you on or prior to the date hereof" covers any and all prior unexercised options contracts.[8] The fundamental problem with that reading, though, is that it gives no effect to the references in the Waiver to "any *commitment* or communication regarding *options*." Indeed, nowhere in his opening brief does Terrell actually explain what "any *commitment* or communication regarding *options*" refers to if prior unexercised options contracts are not superseded by the Waiver clause. This is not surprising, as the Waiver clause supersedes any "written" options commitment, including as set forth in a prior "consultant agreement or other documentation with the Company"—just like Terrell's Prior Agreements.

[8] *See, e.g.*, Br. 10 ("The third and final set of options preserved his initial two sets of payments, namely, the 'securities of the Company, if any, issued to [him] on or prior to the date hereof . . .'").

As the Court of Chancery concluded correctly here, "The Grant Notice contains an express waiver. 'A clearer statement is difficult to imagine.'" (Ex. A, at 13 (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)).

2. The Court of Chancery Properly Rejected Terrell's Unreasonableness Argument

Terrell maintains that the Court of Chancery should have denied the motion to dismiss because Kiromic's interpretation of the Grant Notice is purportedly "unreasonable." (Br. 15-19.) According to Terrell, Kiromic's interpretation of the Grant Notice (vindicated by the Court of Chancery) renders the November 2017 Agreement "a penalty offering no new consideration to Dr. Terrell at all[,]" and that "[t]here is no plausible explanation for why a person in Dr. Terrell's position would have a meeting of the minds requiring such a capitulation." (*Id.* 16-17.) This argument, however, misapplies both standards governing contract consideration and contract reasonableness. And, as the Court of Chancery observed correctly, it has already been substantively rejected by this Court in its prior opinion.

"An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Osborn*, 991 A.2d at 1160. As noted, Terrell maintains that Kiromic's interpretation is unreasonable because there was purportedly no new consideration for the Waiver in the November 2017 Agreement. This misses the mark for several reasons.

First, Terrell's contention that new consideration is required for a waiver of a prior right is wrong as a matter of law. As the Court of Chancery correctly noted, "A waiver is a 'voluntary . . . relinquishment of a known right.' . . . It does not require support by consideration."[9] Notably, a waiver "is not facially invalid" or unreasonable merely because a party contends it waives a right that "is simply too important to waive." *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 574, 576 (Del. Ch. 2023) (finding that "[a] comparison to what [] individuals can waive" under Delaware law "suggests that [a contract] is not facially invalid" simply because it waives an important "property interest associated with a share of stock") (*id*. at 576). "As the Delaware Supreme Court has observed, '[c]learly, our legal system permits one to waive even a constitutional right,'" including "fundamental rights associated with [] personal liberty" such as the "right to trial by jury," "right to be present for trial and confront the witnesses," "right to counsel," and "rights to personal liberty by entering a guilty plea." *Id.* at 574–75 (internal citations omitted).

[9] *See* Ex. A, at 12 n.40 (citing *Realty Growth Inv. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982); 13 Richard A. Lord, Williston on Contracts § 39:15 (4th ed. 2023); *In re Coinmint, LLC*, 261 A.3d 867, 893 (Del. Ch. 2021)); *see also Munro v. Beazer Home Corp.*, 2011 WL 2651910, at *6 (Del. Com. Pl. June 23, 2011) ("While it is true that the modification is unenforceable because it is supported only by past consideration, lack of consideration does not bar enforcement of a waiver."); *Landgarten v. York Rsch. Corp.*, 1988 WL 7392, at *3 (Del. Ch. Feb. 3, 1988) ("A waiver, by contrast to a contract modification, does not require either a new contract or new consideration. It is the intentional and voluntary relinquishment of known rights.") (internal citation omitted).

Indeed, "[i]t is not self-evident why Delaware law would afford greater protection to a property interest associated with a share of stock . . . than it does for those fundamental liberty and property interests." *Id* at 576. As such, Terrell's argument that the Waiver is unreasonable for lack of consideration (Br. 19) is groundless.

Second, and in any event, the Grant Notice did furnish Terrell with consideration not present in the Prior Agreements. Delaware courts "limit [their] inquiry into consideration to its existence and not whether it is fair or adequate." *Osborn*, 991 A.2d at 1159 (citation and internal quotation marks omitted). Indeed, "[e]ven if the consideration exchanged is grossly unequal or of dubious value, the parties to a contract are free to make their bargain." *Moscowitz v. Theory Ent. LLC*, 2020 WL 6304899, at *16 (Del. Ch. Oct. 28, 2020) (quoting *Acker v. Transurgical, Inc.*, 2004 WL 1230945, at *4 (Del. Ch. Apr. 22, 2004)). "Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny." *Id.*

Though Terrell studiously avoids addressing it, the November 2017 Agreement *did* furnish new consideration not set forth in the Prior Agreements—a longer exercise period for the granted options. Specifically, whereas the Prior Agreements provided for exercise periods that would expire in December 2024 and January 2027, respectively, the November 2017 Agreement extended beyond both of those expiration dates to November 2027, giving Terrell additional time and

opportunity to unlock greater value from his options. This is valuable consideration in the options context.[10]

Third, contrary to Terrell's misreading, this Court has indeed already considered and rejected Terrell's unreasonableness arguments as part of its consideration of Terrell's unconscionability arguments. In its prior decision, this Court considered "Terrell['s] claim[ ] that Agreement 3 presents the 'rare combination of inadequacy of price . . . coupled with . . . oppressive conduct.'" *Terrell*, 297 A.3d at 623 (internal citation omitted); (A257). This Court, however, found "no merit" in any of Terrell's unconscionability arguments on the grounds that "Terrell was not a weak counterpart. Rather, he was a sophisticated party, charged by virtue of his directorship with participating in the management of the company." *Id.* at 624; (A257). This dispatches Terrell's current unreasonableness arguments: not only did the Court deem the "inadequacy of price" argument to be

[10] Delaware courts recognize the time value of a longer exercise period. "The value of an option has two components: (i) intrinsic value, which is the market value of the option at any specific moment in time; and, (ii) time value, which is the value attributable to the option's potential to appreciate in the future." *AT&T Corp. v. Lillis*, 953 A.2d 241, 244 n.2 (Del. 2008). When "old options [are] replaced with new options because the old (underlying) stock is being replaced with new (underlying) stock . . . by its very nature, the 'economic position' of the options will invariably incorporate the expected time value of the new options." *Id.* at 254-55; *see also In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1067 (Del. Ch. 2015) (because of "the time-value of money, stockholders would not be indifferent between $40 million in cash paid to them in 2014 and $63.5 million paid to Activision in 2015[,]" and this benefit would be considered adequate).

unavailing, but it determined that there was no unconscionability that would warrant "judicial scrutiny" of "the adequacy of consideration." *See Moscowitz*, 2020 WL 6304899, at *16.

Accordingly, the Court of Chancery correctly concluded that the Waiver does not fail for unreasonableness or lack of consideration.

3. The Grant Notice is Not Ambiguous

Recognizing that Kiromic's interpretation of the Waiver accords with Delaware rules of contract construction, Terrell pivots and argues, in the alternative, that the Court of Chancery should not have resolved the contract interpretation issue because the Waiver is, purportedly, ambiguous. (Br. 19-23.)

Merely because Terrell maintains that the Waiver is to be interpreted in a certain way, however, does not render the provision ambiguous. Indeed, "parties' steadfast disagreement over interpretation [of a contract] will not, alone, render the contract ambiguous." *Osborn*, 991 A.2d at 1160 & n.23 (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.").

No ambiguity is present here for the simple reason that Kiromic's interpretation is the only one that gives effect to all portions of the Waiver, including the crucial "notwithstanding" clause. (*See supra* 17-20.) Given this, Kiromic's

interpretation is the only reasonable reading of the Waiver, and it was therefore proper for the Court of Chancery to grant Kiromic's motion to dismiss.

Terrell nonetheless maintains that the reference to "securities . . . issued" in the Waiver's carveout clause somehow creates an ambiguity requiring extrinsic evidence because "options" are a variety of "securities" under the federal securities laws. (*See* Br. 19-23.) This argument is a red herring, as the question is not whether options are ever considered securities (they of course are),[11] but whether *the parties here intended* the reference to "securities . . . issued" in the carve-out to mean not only issued shares of stock (as in the case of *exercised* options), but also granted but unexercised options. This argument is meritless for the simple reason that the meaning of "securities . . . issued" can be ascertained within the four corners of the November 2017 Agreement and interpreted in such a way as to give effect not only to the carveout but to the "notwithstanding" clause in the Waiver. *See Osborn*, 991 A.2d at 1159 (the court "will read a contract as a whole and . . . will give each provision and term effect"); *see also Murphy Marine Servs. of Delaware, Inc. v. GT USA Wilmington, LLC*, 2021 WL 2181424, at *10 (Del. Ch. May 28, 2021) ("unless a contract is ambiguous, [courts] may only look to the four corners of the agreement.") (footnote omitted); *Stein v. Wind Energy Holdings, Inc.*, 2022 WL

[11] The ink that Terrell spills marshaling cases that treat options as a subset of securities for purposes of the securities laws are therefore unilluminating. Those cases did not involve contract interpretation issues and are therefore irrelevant here.

17590862, at *5 (Del. Super. Dec. 13, 2022) ("If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent.") (internal citation omitted).

Here, the unmistakable meaning of the carveout, when considering all provisions of the November 2017 Agreement, is that the carveout for "securities . . . issued" pertains only to shares of *stock* issued to Terrell (including as a result of exercise of options). This is so for several reasons:

First and foremost, as noted *supra* pages 17-20, if Terrell's interpretation were accepted, then the carveout for "securities . . . issued" would swallow up the entire Waiver by preserving any and all prior options contracts. This would render the "notwithstanding" clause (which constitutes more than half of the Waiver) mere surplusage. That is an interpretation that cannot be reconciled with Delaware rules of contract construction.

Second, as the Court of Chancery correctly noted, the November 2017 Agreement as a whole *consistently* uses the word "issued" to refer to stock, but not granted but unexercised options:

- "Agreement 3 never uses the word 'issued' in relation to options. Instead, every use of 'issued,' 'issuance,' and 'issuable'—all thirty-five of them—relates to Shares, not options."

- "The definitions of 'Shares and 'Exercise Price' both include the word 'issuable;' the definition of 'Option' does not."
- To describe the Company's delivery of an option to purchase shares, Agreement 3 only uses the word 'grant."
- "Agreement 3 makes clear that options and shares are different: 'an optionee shall not have any of the rights of a stockholder with respect to any Shares unless and until such Shares are issued to the optionee.'"

(*See* Ex. A, at 17-19) (cleaned up).)

Even the inapposite case law Terrell marshals confirms that, in normal plain English parlance, options are referred to as being "granted," while stock is referred to as being issued. For example, in *Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp.2d 212 (S.D.N.Y. 2008)—which, to repeat, did not involve contract interpretation issues—the defendant misrepresented that the price of stock options "would be set 'at the time of [the] *grant*'" of the options for no less than the fair market value of the stock as of that date. *Id.* at 230. The court used the terms "options" and "grant" together multiple times: "in many instances options were dated before all *grant-making* processes were finalized;" "other controls over the option *grant process*;" "a significant portion of the stock *options granted*;" "backdated option *grants*." *Id.* at 231 (cleaned up). In contrast, the court used the

term "issue" when discussing the options being *exercised* at a particular stock price. *Id.*

Davidow v. LRN Corp., 2020 WL 898097 (Del. Ch. Feb. 25, 2020), similarly highlights that "issued" and "granted" are not synonymous, and that the former is specific to shares of stock, not the grant of options. In that case, which likewise did not involve contract interpretation, the Court of Chancery defined the "2017 Options" as "an undisclosed *grant* of 'spring-loaded' stock options." *Id.* at *3. The court also generally used the term "grant" when referring to options and the term "issue" when referring to stock options being exercised: "[LRN] had 6,020,000 shares of stock *issuable* upon the *exercise* of stock options" (*id*. at *1); "its board repriced 2,733,507 stock options *granted* to 'various employees across the Company'" (*id*. at *2); "[t]his was the first time stockholders learned of the Appraisal and that additional options, i.e. the 2017 Options, had been *granted*;" "LRN had not *granted* options since 2009" (*id*. at *4); "LRN had not *granted* options since 2008" (*id*. at *10); "the Company also repeatedly *granted* cheap options" (*id.* at *12).

The one contract interpretation case that Terrell cites, *HControl Holdings LLC v. Antin Infrastructure Partners S.A.S.*, 2023 WL 3698535 (Del. Ch. May 29, 2023), actually cuts against Terrell because it shows how the parties would have phrased their agreement if they intended the term "issued" to refer to options. There, as

Terrell quotes in his brief, the Court of Chancery stated that "the board *consistently* used the words 'grant' and 'issue' to describe conferring stock options." *Id.* at *24 (footnote omitted). Here, the November 2017 Agreement uses those terms differently, as explained above. Further, the board in *HControl* had cancelled "'all options previously *granted*' and resolved that 'each holder of Terminated Options [was] hereby *issued* 1,000 Shares of the capital of the Company[.]" *Id.* at *30 (cleaned up). *HControl* is, on its facts, distinguishable from this case and only serves to reinforce Kiromic's contract interpretation.

Because the Grant Notice is unambiguous, the Court should not look at extrinsic sources "to relieve . . . [Terrell] of the burdens of [the] contract [he] wish[es] [he] had drafted differently but in fact did not." *Stein* 2022 WL 17590862, at *5 (internal citation omitted).

4. The Court of Chancery Correctly Resolved the Contract Interpretation Issue at the Rule 12(b)(6) Stage

Similarly meritless is Terrell's suggestion that contract interpretation issues cannot be resolved at the Rule 12(b)(6) phase. (*See* Br. 19-20.) As an initial matter, that is contrary to black letter Delaware law, pursuant to which the Court of Chancery routinely disposes of contract cases by applying rules of contract interpretation at the pleadings stage. *See, e.g.*, *Energy Transfer, LP v. Williams Companies, Inc.*, 2023 WL 6561767, at *11, *13 (Del. Oct. 10, 2023) (dismissing contract claim under Rule 12(b)(6), finding "[t]he Court of Chancery properly

applied Delaware contract interpretation principles and determined" that the relevant contract provisions were "clear on [their] face" and "there [was] no reasonable reading of [the provisions] that support[ed] [plaintiff's] argument"); *SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *5 (Del. Ch. May 19, 2023) (dismissing contract claim under Rule 12(b)(6) as *"[s]ituated in its proper context, the [p]arenthetical [c]lause confirm[ed]*" there was only one reasonable interpretation of the contract . . . *[the parenthetical clause could not] be read to pollute the larger linguistic sea in which it swims*. Put doctrinally, 'the meaning from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan'") (internal citation omitted); *Merck & Co. v. Bayer AG*, 2023 WL 2751590, at *11 (Del. Ch. Apr. 3, 2023), *aff'd,* 308 A.3d 1190 (Del. 2023) (dismissing contract claim under Rule 12(b)(6) because, *inter alia*, plaintiff's interpretation "artificially put" different sections of the contract "in conflict with one another, such that one or the other would contain a meaningless provision") (footnote omitted).

Terrell's cases are not to the contrary. In *Kahn v. Portnoy*, 2008 WL 5197164, at *3, *6 (Del. Ch. Dec. 11, 2008), the Court of Chancery found the contract at issue was ambiguous as there were two exculpatory provisions regarding directors' personal liability and the court was "unable to explain these provisions as anything other than poor drafting or a strategy of 'if one exculpatory provision is good, then

two must be better.'" *Id.* at *6. "Because any ambiguity must be resolved in favor of the nonmoving party, defendants [were] not entitled to dismissal under Rule 12(b)(6)[.]" *Id.* at *3. Similarly, the only reason this Court reversed the Court of Chancery's grant of a Rule 12(b)(6) motion to dismiss in *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606 (Del. 2003), was because there was, on the face of the contract, an ambiguity: specifically, "the provisions at issue in the Agreement [were] susceptible to more than one reasonable interpretation." *Id.* at 615. That is not the case here, as Terrell's purported interpretation does not give *any* meaning or effect to more than half of the Waiver, and therefore, is *per se* unreasonable.

Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc., 2021 WL 1053835 (Del. Ch. Mar. 19, 2021), is not even on point procedurally, as that involved a summary judgment decision and the Court of Chancery found "[n]either party [] meaningfully contend[ed] that the definition of [the contract] [was] ambiguous[.]" *Id.* at *4.

Here, the Grant Notice is unambiguous and Terrell's interpretation of the Waiver is unreasonable on its face because, as noted, it is inconsistent with the use of key terms throughout the November 2017 Agreement and runs counter to contract construction rules by rendering almost half of the Waiver surplusage and null. Accordingly, Kiromic respectfully submits that the Court should affirm the Court of Chancery's grant of Kiromic's motion to dismiss.

CONCLUSION

For the foregoing reasons, Kiromic respectfully requests that this Court affirm the judgment of the Court of Chancery in full.

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