EFiled: Jun 25 2024 10:34AM EDT
Filing ID 73458182
Case Number 131,2024

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

REPLY BRIEF OF APPELLANT JASON TERRELL

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Dated: June 25, 2024

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THE COMPANY FAILS TO ESTABLISH THAT THE CONTRACT UNAMBIGUOULSY WARRANTED DISMISSAL.

As the competing briefs now make clear, the present appeal revolves around one tangible question: whether a contract that preserved "securities … issued" to an employee allowed his employer to purge stock options that had been "granted" to him. Because of the procedural status of the case, the Court of Chancery's answer to that question—yes—meant that it found the contract to allow for this purge unambiguously. That determination was in error. Despite the claims by the employer, Kiromic Biopharma Inc. (the "Company"), therefore, this Court should reverse the Court of Chancery's dismissal of the action and remand it for further proceedings on the merits.

Here on appeal, the Company argues that its contract with former employee and board member Dr. Terrell unambiguously allowed the elimination of his prior stock options because (A) any other reading of the contract would imbue it with surplusage, (B) his resort to reasonableness is undermined by the consideration he received in his final set of options and by this Court's prior holding that the contract fell short of being unconscionable, and (C) the Company's favored reading of the contract aligns with the document's differential treatment between what can be "issued" versus "granted." *See* Resp. Br. at 16-28.

Ultimately, these arguments fail to do the work that the Company claims. Because the parties' contract was either plainly in Dr. Terrell's favor or ambiguous, the dismissal of this action should be reversed.

A. The Surplusage-Avoidance Canon Does Not Warrant Affirmance.

The first argument presented by the Company is that dismissal should be affirmed in order to avoid "Key Provisions" in the parties' contract being rendered "Surplusage." *See* Resp. Br. at 16. In particular, the contract acknowledged "no other rights to any other options … notwithstanding any commitment … regarding options, … 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 "No Other Rights" clause). If the contract preserved Dr. Terrell's prior stock options, the Company reasons, then the No Other Rights clause would lose all meaning. *See* Resp. Br. at 16-19.

The most central defect in the Company's reasoning is that, even taken at face value, it just replaces one type of surplusage for another. Lost to an ellipses in the Company's rendition of the No Other Rights clause is its limitation—namely, that Dr. Terrell has no other rights "except securities of the Company, if any, issued … on or prior to the date hereof…." (A038) (the "Exception"). If it were true that the contract allowed the Company to eliminate the prior securities it had granted to Dr.

Terrell, then this Exception would become surplusage—as, according to the Company, it would refer to securities that do not exist.

Drilling deeper down on this point, using the logic of the Company renders it impossible to reconcile the No Other Rights Clause and the Exception without surplusage. According to the Company, the Exception can only refer to exercised options rather than unexercised options. *See* Resp. Br. at 18. But "exercised option" is just another way of saying "stock," "shares," or "equity"—terms that the contract uses repeatedly. If the parties truly meant the Exception to be limited narrowly to such stock, it would render the heavier weight borne by the broader term "securities" utterly gratuitous.

Indeed, the Company's reading of the Exception would twist this corner of the contract into a pretzel. If the Exception were limited to exercised options—*i.e.*, equity—then in the same sentence the contract would *disclaim* "equity awards" while at the same time *preserving* equity. In the contract's words, it would eliminate "rights to any other … equity awards" while, in the Company's view, preserving "[equity in] the Company." *See* A038. Avoiding surplusage is a laudable goal, but not at the expense of creating other surplusage and inconsistency.

The way to avoid this paradox is to do exactly what Dr. Terrell's reading already does: not to distinguish *issued securities* from *granted options*, but to distinguish securities that have already been formally issued, on one hand, and those

that have been the subject of mere "commitment[s] or communication[s] regarding . . . securities," on the other hand. That is to say—as the Court of Chancery previewed during oral argument—that the contract "essentially just say[s], yes, I'm accepting these particular options in this particular transaction and no others"; and "if there's something out there that says, maybe someday we'll give you some more, that … is what falls under 'notwithstanding' and gets kicked[.]" *See* A216. This reading adopts the plain meaning of the terms "securities" and "issued," it avoids the strange outcome in which *issued securities* would not include *granted options*, and, as set forth in Dr. Terrell's initial brief and more fully below, it comports with the common sense conception of this contract that allows a "Grant" to refer to a valuable new asset rather than the elimination of one million others.

Because the Company had already issued options to Dr. Terrell, his contract with the Company preserved them. The Court of Chancery's dismissal should therefore be reversed.

B. The Company's Analysis of Reasonableness is Inapt.

Dr. Terrell's reading of the contract draws support from the fact that the Company's alternative reading leads to absurd outcomes of the type that no reasonable person in Dr. Terrell's position would have accepted. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). While contracting parties are allowed to enter into bad deals, the law favors the construction of contracts that

elevates the reasonable above the unreasonable. *Id*. ("reasonable rather than unreasonable interpretations are favored by law"). Here, this favor for reasonableness has a straightforward application: it corroborates the validity of Dr. Terrell's reading of the contract, helping to avoid a reading that would see one party waive his entire fee for years of consulting services to his employer, and which would replace a second set of options with a third set anchored to a strike price that was 11% worse. *See* A030 (showing Issuance 1 options). *See also* A035 (Issuance 2 offering 500,004 options at strike price of $0.17) *and* A037 (Issuance 3 offering 500,004 options at strike price of $.019).

In the face of these dramatic costs—a materially worse strike price on one set of options, and the complete elimination of another set—the Company's response mistakes the forest for the trees. It argues that the final set of options have an exercise period that concludes later than the deadlines attendant to the other two issuances. *See* Resp. Br. at 21. This technically qualifies as "consideration," the Company argues, so the Court's review of reasonableness ought to end there. *Id*. at 21-22. Concluding, the Company highlights that this Court already reviewed the contract and held it to not be unconscionable, which it claims should scrap the role of reasonableness in the interpretation of this contract. *Id*.

The Company's analysis does not grapple with the crux of Dr. Terrell's appeal. His appeal does not hinge on the technical requirements of consideration,

nor does it focus on whether a contract should be held enforceable within a given set of considerations. Instead, the appeal challenges whether the Company's rendition of the considerations is accurate in the first place. The fact that the Company's rendition leads to absurd consequences is squarely relevant to that evaluation—for, in this Court's words, it would "stretch[] the bounds of reason to conclude that [Dr. Terrell], a college graduate and [board member], would sell h[is] property for a mere pittance based on an undefined, unspecified, implicit term." *See, e.g., Osborn*, 991 A.2d at 1160.

This outcome is precisely what the Company would have the Court now endorse. Based upon a construction of the term *issued securities* that departs from the plain meaning of the words "issued" and "securities," and based upon a contract that offers no special definition of either word, the Company would have the Court believe that it had a meeting of the minds with Dr. Terrell that purged him of one million stock options for the benefit of a mere ten-month extension on a ten-year set of options. The far more reasonable interpretation of the deal is that it shadowed the express promise from the Company's CEO—to pay Dr. Terrell not just 500,000 options for his role as a consultant but also "1 million shares for your position on the board." *See* A015-16; A032. That is to say, the far more cogent interpretation of the contract is for *issued securities* to encompass *granted options*—for Dr. Terrell

to receive the payments he was promised—and for Dr. Terrell's prior options to therefore be preserved.

C. The Company's Attempt to Silence the Ambiguity Fails.

Finally, the Company does not dispute that affirming the Court of Chancery requires deeming the contract *unambiguously* in its favor. Instead it argues that the contract meets that heavy standard, because its favored reading avoids surplusage, pays homage to the link elsewhere in the contract between the words "issued" and "shares" (as opposed to options), and coincides with caselaw treating the words "options" and "granted" differently. *See* Resp. Br. at 23-28. The Company's analyses are deeply flawed. While this Reply addresses the Company's surplusage argument above, *see supra* Section A, what follows is an explanation why the Company's remaining contentions fail to hold water.

First, the Company draws the wrong lesson from the provisions elsewhere in the contract showing "shares" being "issued." As the Court of Chancery highlighted, the parties' contract contains dozens of instances in which the word 'issued' is linked to stock shares. *See, e.g.,* A054; A060. *See also* Resp. Br. at 25-26. Yet this repetition shows the opposite of what the Company claims: not that the word 'issued' implies mere stock, but that when the parties intended to limit the term 'issued' to stock it said so explicitly. Notably, the contract documents contain other instances in which the Company did not impose this limitation. *See, e.g.,* A061 at

¶ 9.3 (giving Company the right to "issue new Awards"); A067 at ¶14 (defining "Awards" as not just stock but also "any Option"). The most central example forms the basis of this case: the promise to preserve "issued" "*securities*" rather than just issued stock. *See* A038.

Given the repetitiveness with which the Company referred to "stock" being "issued," the Company's resort to this repetition leaves a lasting irony. Despite pages of argument about giving meaning to every word-choice in a contract, the Company confronts the most critical contract provision in issue in this case. That provision contains a selection of the term issued "securities" rather than issued "shares," yet the Company assigns no meaning to that choice at all.

Second, the Company's treatment of the caselaw fails to account for the basic point that those cases demonstrate. That is, the synonymous nature of the words "granted" and "issued" is corroborated by a wide variety of courts that have used them interchangeably—in the same case, and sometimes in the same sentence. *See, e.g., Davidow v. LRN Corp.*, 2020 WL 898097, at *3 (Del. Ch. Feb. 25, 2020) ("LRN issued 2.2 million options … without ever disclosing any information about the grants"). *See also HControl Holdings LLC v. Antin Infrastructure Partners S.A.S.*, 2023 WL 3698535, at *24 (Del. Ch. May 29, 2023) ("the board consistently used the words 'grant' and 'issue' to describe conferring stock options").

Notably, the Company's treatment of the caselaw simply ignores an additional set of cases that continue the trend—namely, *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 976 (Del. Ch. 2001) and *Hoffman v. Dann*, 205 A.2d 343, 349 (Del. 1964)—both of which were cited in Dr. Terrell's opening brief, both of which refer to options being "granted" or "issued" in the same sentence, and neither of which the Company mentions in response.

Nevertheless, these were mere examples of the many instances in Delaware and beyond in which courts refer to options being "issued" or "granted" synonymously. *See also Desimone v. Barrows*, 924 A.2d 908, 938 (Del. Ch. 2007) (referring to "options grants … in which stock options [were] issued to rank-and-file employees"); *United States v. Treacy*, 639 F.3d 32, 49 (2d Cir. 2011) ("Monster issued … stock option grants"); *Galef v. Alexander*, 615 F.2d 51, 54 (2d Cir. 1980) ("On October 1, 1974, the Committee issued new options … conditioned on the surrender of options that had been granted during 1973"). The upshot of these cases is that the Company's reading of the contract here—and the reading adopted by the Court of Chancery—ran contrary to utterly common usage of the terms in issue, and they claimed that that common usage of the terms was incorrect *unambiguously*. Yet neither the plain meaning of the terms, the caselaw, nor the structure of this contract supports that contention.

The Court of Chancery's dismissal of the action was erroneous, and it should now be reversed.

CONCLUSION

For all of the foregoing reasons, and those set forth in his principal brief, Dr. Terrell respectfully requests reversal of the Court of Chancery's decision.

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Dated: June 25, 2024