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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. 299,2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0248-MTZ

OPENING BRIEF OF APPELLANT JASON TERRELL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

Doctor Jason Terrell ("Dr. Terrell") commenced this action on March 22, 2021, by filing a verified complaint for a declaratory judgment and specific performance against Kiromic Biopharma, Inc. ("Company" or "Kiromic"), a company for which he had performed consulting services and served on the board of directors. His complaint arose out of a dispute with the Company concerning payment for his services: the Company had paid him in three installments of stock options, but now claimed that the issuance of the final set of approximately 500,000 stock options eviscerated the prior million options the Company had granted him.

On May 20, 2021, the Company moved to dismiss the verified complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim.

The motion to dismiss was fully briefed and the Court of Chancery heard oral argument on October 20, 2021. At the hearing, the Court of Chancery raised *sua sponte* whether it had subject matter jurisdiction over the action, citing a provision in the Company's Stock Option Agreement that allegedly required certain matters to be resolved by a committee of Company agents (the "Committee") rather than by a court (the "Committee Provision"). At the Court's invitation, the parties submitted supplemental letters briefs on the Committee Provision's materiality to the dispute. On January 20, 2022, the Court issued a letter decision that instructed the Committee to consider whether it had jurisdiction over the issues raised in the motion to dismiss,

and if so, to make a ruling on those issues. Ex. A at 17. The Committee thereafter took briefing on the issues from the parties.

On July 21, 2022, the Committee reported its decision: it did have jurisdiction over the dispute, it said, and Dr. Terrell failed to state a claim for relief against the Company. No opinion or other basis for the decision was provided. Ex. B.

On July 26, 2022, counsel for the Company advised the Court of Chancery of the Committee's decision. On August 2, 2022, the Court of Chancery dismissed the verified complaint. Ex. B. Dr. Terrell filed his Notice of Appeal on August 23, 2022. This is the Appellant's Opening Brief.

SUMMARY OF ARGUMENT

1. In dismissing the action for lack of subject matter jurisdiction, the Court of Chancery relied upon a contractual provision that allowed agents of the Company to decide the legal meaning of its own contracts. This provision was unconscionable and void, for it "circumvented" the process of impartial review and granted the Company an "escape device" around liability for intentional misconduct. *See, e.g., Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788, 791 (Del. 1992).

2. The Court of Chancery legally erred in determining that it lacked authority to define the scope of the Committee Provision, for this issue presented a question of law akin to substantive arbitrability. *See, e.g., AIU Ins. Co. v. Lexes*, 815 A.2d 312, 314 (Del. 2003) ("it is for the court, not the appraiser, to decide the scope of the submission where that question is in dispute") (internal references omitted).

3. In dismissing the case upon the determination of the Committee, the Court of Chancery either viewed the Committee's legal conclusions as unreviewable or held that they survived the standard of review that governs non-judicial and non-arbitral decisions. Either way, the Court of Chancery was legally incorrect. *See, e.g., Morris, Nicholas, Arsht & Tunnell v. R-H Int'l, Ltd.*, 1987 WL 33980, at *4 (Del. Ch. Dec. 29, 1987); Committee on Int'l Commercial Disputes, *Purchase Price Adjustment Clauses and Expert Determinations: Issues, Practical Problems and Suggested Improvements*, NEW YORK CITY BAR (June 2013), at 21.

STATEMENT OF FACTS

On December 10, 2014, Kiromic entered into a consulting agreement with Dr. Terrell ("Issuance 1"). *See* A012, at ¶8. Pursuant to Issuance 1, Dr. Terrell agreed to provide consulting services to Kiromic in exchange for only one form of consideration: the option to purchase 500,000 shares of the Company's common stock at a fixed price of fifty cents per share. *See* A012, at ¶9; A023-027.

Nearly a year later, on or around October 2015, the parties began negotiating the terms of an agreement to bring Dr. Terrell onto Kiromic's board of directors. *See* A012, at ¶13. These negotiations culminated in a recognition on October 14, 2015 by the Company's (then) Chief Executive Officer, Maurizio Chiriva Internati, that serving on the board would yield not just the 500,000 options issued pursuant to Issuance 1 but also "1 million shares for your position on the board." *See* A012-13; A029. Thus, through a consulting deal and then board membership, the parties expressly contemplated a gross total of 1.5 million options for Dr. Terrell to purchase Kiromic's common stock.

On January 23, 2017, the parties began a two-step process to execute the board membership arm of this agreement. *See* A013, at ¶15. First, the Company entered into a formal contract with Dr. Terrell pursuant to which Dr. Terrell would receive stock options in exchange for serving on Kiromic's board of directors ("Issuance 2"). *Id*. Pursuant to Issuance 2, Kiromic conveyed the option to purchase 500,004

shares of its common stock at a fixed price of seventeen cents per share. *See* A013, at ¶¶17-18; A031-32.

Second, on November 10, 2017, Kiromic entered into an agreement with Dr. Terrell pursuant to its 2017 Equity Incentive Plan ("Issuance 3"). *See* A014, at ¶21. Pursuant to Issuance 3, Dr. Terrell agreed to continue serving on Kiromic's board of directors in exchange for the option to purchase 500,004 shares of its common stock at a fixed price of nineteen cents per share. *See* A014, at ¶22; A034-35.

As contemplated by Kiromic's CEO in advance of this transaction, the shares awardable under Issuance 3 were in addition to the shares awardable under Issuances 1 and 2: in Issuance 3's words, it superseded prior share-agreements "except securities of [Kiromic] … issued … prior to the date hereof." *See* A035. In full, it reads as follows:

> By signing this Grant Notice, you acknowledge and agree that other than the Shares [governed by 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.

See id.

In September 2019, Dr. Terrell resigned from Kiromic's board due to irreconcilable differences on how Kiromic was being managed. *See* A014, at ¶26. On June 12, 2020, the Company advised Dr. Terrell that it was not recognizing any of the million options it had conferred to him through Issuances 1 and 2. Instead, it claimed, Issuance 3 voided the options granted under Issuances 1 and 2. *See* A015, at ¶¶30-31.

On or about March 22, 2021, Dr. Terrell brought an action in the Delaware Court of Chancery seeking to have Kiromic recognize the million stock options it conveyed to him under Issuances 1 and 2 and to reserve sufficient shares for such options. *See generally* A010-21. In response, on May 20, 2021, the Company sought dismissal of the case based upon the claim that Issuance 3 eviscerated Issuances 1 and 2. *See generally* A099-124. While Issuance 3 preserved prior "securities … issued to you," the Company argued, "securities … issued" did not include granted options. *See* A117.

As Issuance 3 had been drafted by the Company itself, all ambiguities in the agreement had to be construed against the Company rather than it its favor. *See* A132-33 (expressing such point). Yet beyond mere ambiguity, the language in the agreement favored Dr. Terrell through its plain meaning: "securities" is a term that plainly includes "options"; and the terms "issued" and "granted" are plainly interchangeable in the context of a conveyance of securities. *See* A134-35. Indeed,

these plain meanings flowed in the same direction as logic: Issuance 3 was touted as a "Grant" designed to attract talent; yet it would neither be a grant nor attractive if it eviscerated twice as many securities as it offered, or if the options it offered carried—as here—a worse strike price than what the recipient already held. *See* A135-36.

The Company's argument faced heavy skepticism during oral argument before the Court of Chancery, as well. "'You have no other rights to any other options, equity awards, or other securities of the company,'" the Court of Chancery quoted from the agreement, "and I'm wondering why that doesn't essentially equate options as a type of security." *See* A180. "That use of the clause 'or other securities of the Company,' if that means that options are, therefore, a type of security, … then the parenthetical could read 'except options of the Company, if any, issued to you.'" *See* A181.

Faced with this recognition, Kiromic backed into a position whose weakness was facially apparent. The "crucial" point, it now argued, depended upon an alleged difference between options that are "issued" versus those that are "granted." *Id*. The language in the agreement referred to what was "issued," but Dr. Terrell's prior options had been merely "granted," Kiromic argued. *Id*.

Before deciding the merits of the case, however, the Court of Chancery questioned the parties about a provision in the transaction-documents that Kiromic

had not relied upon in its pursuit of dismissal. The dispute about Issuance 3 had arisen under the terms of its Notice of Stock Options Grant (the "Grant Notice"). But in a parallel document provided alongside the Grant Notice, called the Stock Option Agreement (the "SOA"), the parties agreed that "[a]ny dispute regarding the interpretation of this Agreement … be submitted by Optionee or the Company to the Committee for review"—with the "resolution of such a dispute by the Committee [being] final and binding on the Company and Optionee." *See* A045, at ¶15.1 (the "Committee Provision"). Thus, the Court of Chancery invited another round of briefing to address the Committee Provision's import. *See* A201.

On November 15, 2021, the parties submitted simultaneous letter briefs to the Court of Chancery addressing whether Dr. Terrell could obtain judicial review of Kiromic's attempt to divest him of a million stock options notwithstanding the Committee Provision. *See* A159-164 (by Dr. Terrell); A165-170 (by the Company). The arguments raised for consideration included the Committee Provision's meaning (A160-61), the required standards of interpretation (A160), and the validity of a provision that would allow a contracting party to itself be the adjudicator of its own legal disputes (A162-63).

On January 20, 2022, the Court of Chancery held that the meaning of the Committee Provision was itself a question for the Committee to decide—which was to say, the Kiromic Committee could decide the outcome of Kiromic's own disputes,

and the scope of its authority to do so could be decided by the Kiromic Committee itself. *See* Ex. A at 16 ("Section 15.1's Plain Text Charges The Committee With Deciding Its Applicability"). Thus, the Vice Chancellor stayed the case in Court of Chancery while the Committee would decide (a) whether it could deprive Dr. Terrell of judicial review and, if so, (b) whether it would then strip Dr. Terrell of one million vested options. *Id*. at 17.

On March 31, 2022, the parties submitted competing letter-briefs to the Committee. Each letter addressed two issues: whether the Court of Chancery, as opposed to the Committee, should adjudicate the legal dispute between the parties; and whether, on the merits, Dr. Terrell was entitled to all three sets of options at issue. On July 21, 2022, through counsel, the Committee issued an e-mail stating that it had the "exclusive authority … to interpret Dr. Terrell's November 2017 'Notice of Stock Option Grant'" and that Issuance 3 "nullifies any option rights Dr. Terrell may have had under Dr. Terrell's prior agreements with Kiromic." *See* A206-07. In receipt of the Committee's decisions, on August 2, 2022, the Court of Chancery held that it lacked subject matter jurisdiction and dismissed the case. *See* Ex. B. This appeal followed.

ARGUMENT

At the center of this case lies a simple question of contract interpretation. Dr. Terrell performed services for a Company that paid him exclusively in stock options. 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…." Yet in granting Dr. Terrell this final set of options, the Company claimed to annul all prior options it had granted him.

The reason this case is before the Supreme Court is not because the impropriety of this conduct is unclear. It is because the Company has attempted to shelter its misconduct through a more complicated claim that it could decide the outcome of its own legal disputes. In a provision buried in its final payment to Dr. Terrell, the Company stored a clause that purportedly allowed any disputes arising under the interpretation of its Stock Option Agreement to be resolved fully and finally by a committee of its own agents or board members. To make matters worse, the Court of Chancery then allowed the scope of this provision to be decided by the Company's committee itself. Thus, in a contractual clause giving the Company the ability to determine the meaning of its own contracts—to place itself above the law—the Court of Chancery also allowed the Company to apply that incredible power over any issues it desired, limited only by the boundaries of its own aggression.

The upshot of this case is, a biopharmaceutical company converted one million options from one of its former board members and it believes its corporate governance structure ensures that nobody can stop them. This Court should prove them wrong.

The Court of Chancery committed reversible error by: (i) enforcing the contractual provision that placed the Company above the law; (ii) allowing the Company to define the scope of this sheltering provision; and (iii) accepting the Company's legal conclusions despite their palpable impropriety. The Court of Chancery should be reversed.

I. THE COURT OF CHANCERY'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE REVERSED, BECAUSE IT WAS BASED UPON AN UNENFORCEABLE PROVISION.

A. Question Presented

According to the Court of Chancery, the Company's Stock Option Agreement included a provision that allowed agents of the Company to have the final word on the legal meaning of its own contract—eliminating impartial review of the contract's legal meaning, and placing the Company above the law. Was this provision void as against public policy?

This argument was raised before the Court of Chancery. *See* A162-63.

B. Standard of Review

As the validity of the contract raises a pure question of law, it is reviewed *de novo*. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) ("We will review questions of law *de novo*").

C. Merits

"There is a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient." *James v. Nat'l Fin. LLC*, 132 A.3d 799, 812 (Del. Ch. 2016) (internal quotations omitted). "When parties have ordered their affairs voluntarily through a binding contract," that is, "Delaware law is strongly inclined to respect their

agreement"—and it "will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Id*. (internal quotations omitted).

However, "as with many areas of the law, there are countervailing principles that prevent an indisputably important and salutary doctrine from operating as a tyrannical absolute. One such ground is unconscionability, traditionally defined as a contract 'such as no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other.'" *Id*. (quoting *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978).

In the State of Delaware, the "classical liberal's premise concerning the subjectivity … of value has … been dominant … for a very long time. … But … it has not precluded courts, on occasion, from striking down … transfers in which inadequacy of price is coupled with some circumstance that amounts to inequitable or oppressive conduct." *Ryan v. Weiner*, 610 A.2d 1377, 1381 (Del. Ch. 1992). "That is, the 'rule' that courts will not weigh consideration or assess the wisdom of bargains, has not fully excluded the opposite proposition, that at some point courts will do so even in the absence of actual fraud." *Id*.

The circumstances presented in this case present that rare combination of "inadequacy of price … coupled with … oppressive conduct." *Id*.

First, if the Committee's assessment of the SOA were accurate, then it offered Dr. Terrell no meaningful "price" at all to invalidate his million prior options. Issuance 3 was designed to secure board-membership services that Dr. Terrell was already performing under Issuance 2 (A029; A31-32); and for the privilege, the Company allegedly gave him no salary; it made the strike-price on his options two cents worse (*see* A032, offering 500,004 options at strike price of $0.17; *compare* A034, offering 500,004 options at strike price of $.019); and, on net, it eliminated an additional half-million options it had already granted to him. *See* A027, A032, and A034-35. On price alone, "no man in his senses and not under delusion would make" such a deal, and "no honest or fair [company] would accept" it. *James*, 132 A.3d at 812.

Second, the procedures surrounding this exchange of "consideration" were blatantly oppressive. In the case of any dispute about the contours of these agreements, the Committee's reading, if accurate, would shelter the Company from the review of any neutral adjudicator and instead would have the dispute decided by a "Committee" of Kiromic agents. *See* A045, at ¶15.1; A062 (requiring the Committee to consist of "at least one member of the Board"); A065 (explaining that the Committee members comprise those "appointed by the Board to administer [the SOA], or … [simply], the Board"). *See also generally* A051-66 (providing the Committee with vast administrative powers over Kiromic's issuances of stock,

including the power to adjust shares [§2.2], grant awards [§3.1], set exercise periods and conditions [§4.3], and administer the Equity Incentive Plan [§12.1]). Thus even in the face of intentional wrongdoing, the final word about Kiromic's conduct would be decided by administrators of Kiromic—including at least one of its own board members. This type of provision would promote wrongdoing if it were enforceable, and across the State of Delaware it would turn the impartial rule of law into an asset to be negotiated rather than a right to be exercised. The bar for voiding contracts based on public policy is high, but the very principle of respecting parties' contracts is premised on the fact that such contracts are governed by the impartial rule of law—not the say-so of one signatory. *See, e.g., In re Consol. Flood Cases,* 1993 WL 393044, at *13 (Del. Super. Ct. Aug. 13, 1993) (voiding provision that granted "effective assumption of immunity" from tort liability).

This Court has infused unconscionability boundaries like this into the world of arbitration specifically. A contractual provision is void as contrary to the public policy of Delaware when it "circumvent[ed] the arbitration process and provide[d] an arbitration escape device in favor of an insurance company." *Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788, 791 (Del. 1992). Whether under the Federal Arbitration Act or the Delaware Uniform Arbitration Act, after all, there is an "irreducible level

of impartiality [that] must exist in arbitration proceedings,[1] and any arbitrator who is not impartial will be unable to preside over th[e] dispute." *Weiner v. Milliken Design, Inc.*, 2015 WL 401705, at *13 (Del. Ch. Jan. 30, 2015); *Ray Beyond Corp. v. Timaran Fund Mgmt, LLC*, 2019 WL 366614, at *7 (Del. Ch. Jan. 29, 2019) (a "defining characteristic of 'arbitration' is the use of impartial adjudicative procedures which afford each party the opportunity to present its case'") (quoting Gary B. Born, *International Arbitration: Law and Practice* § 1.01(A)(4) (2nd ed. 2016)).

Here, that type of partiality is now touted by the Committee as a feature—not a bug—of its agreement with Dr. Terrell. It "circumvented" his ability to obtain redress through an impartial adjudicator, instead assigning that adjudication task to agents of Kiromic or members of its own board. *See* A045, at ¶15.1; A062; A065. And, if the Court of Chancery's reading were accurate, it gave Kiromic an "escape device" by then allowing Kiromic's Committee to define the breadth of its own powers. *See* Ex. A at 16 (assigning "The Committee With Deciding Its Applicability"). That is, it allowed the Committee to foreclose judicial review over any dispute between the parties, so long as the Committee simply stated that the dispute fell within the Committee Provision's scope. *Id*. Delaware's public policy

[1] For an explanation of the arbitral—as opposed to "expert"—nature of the Committee Provision, see Argument II herein.

does not allow for such circumvention and escape; Kiromic may not steal half a million options from a board member only to then claim that their misbehavior is above the law.

Third, the oppressive substance of this deal would have put a premium on investigating whether it was actually intended by the parties. Yet the investigation into that procedure yields only more trouble. The provision that allegedly stripped Dr. Terrell of a million options, and which gave away his right to neutral adjudication, appears nowhere in Issuance 1, nowhere in Issuance 2, and is nestled into two sentences on the tenth page of Issuance 3. To call this provision "hidden" would not be conjectural. As is apparent from the record, in the initial motion practice before the Court of Chancery the Committee Provision was identified by neither party. *See* Ex. A at 6 ("neither party discussed Section 15.1 in their initial submissions"). Thus the Company wishes to hold Dr. Terrell to the unconscionable terms of this provision, yet this Company-friendly provision was so well buried that the Company itself was unaware of it.

Ultimately, and unusually, this case presents a "public policy interest even stronger than freedom of contract" (*James*, 132 A.3d at 812): namely, the rule of law. If a pharmaceutical company can have its own members decide the legal outcome of its own disputes, then the freedom to contract would become meaningless—for a contract's value is in the very fact that neither side gets to rewrite

it unilaterally. That is what the Company has done here: its contract preserved for Dr. Terrell "securities of the Company … issued to [him] … prior to the date hereof" (*see* A035), yet it unilaterally rewrote that provision to eliminate such securities.

For the very reason that Delaware has a strong public policy in enforcing contracts, the attempt to subjugate contract law to the whims of powerful signatories demands this Court's intervention.

II. THE COURT OF CHANCERY'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE REVERSED, BECAUSE IT WAS BASED UPON A LEGALLY ERRONEOUS FINDING THAT THE COMMITTEE PROVISION'S SCOPE WAS BEYOND JUDICIAL REVIEW.

A. Question Presented

According to the Court of Chancery, the Committee Provision not only allowed the Company's agents to decide the meaning of the Company's agreements, but it allowed the Company's agents to also decide the scope of its own power to blockade access to the judiciary. Was the Court of Chancery's decision to allow the Company itself to define the scope of the Committee Provision legally erroneous?

This question was not raised by the parties before the Court of Chancery. Nevertheless, the interests of justice warrant the Court's consideration of this issue. The reason why it was not raised before the Court of Chancery is because both parties implicitly agreed that the Court of Chancery would be the tribunal to decide the legal limits of the contractual provision at issue. *See generally* A159-164 and A165-170 (neither party claiming that the Court of Chancery lacked authority to decide the provision's limits). The Court of Chancery's holding to the contrary was thus issued *sua sponte*, where this Court's interest of justice review power is particularly compelling. *See, e.g., Reddy v. MBKS Co.*, 945 A.2d 1080, 1086 (Del. 2008) ("In his written opinion, the Vice Chancellor held sua sponte that Reddy's

actions constituted an attempted cancellation of shares…. Because the parties were not heard on this specific issue, it serves the "interests of justice" for us to consider Reddy's claim"); *Lawson v. Preston L. McIlvaine Const. Co.*, 552 A.2d 858 (Del. 1988) ("Because the trial judge, sua sponte, addressed the merits of the … claim, the question was fairly presented to the Superior Court and is thus properly before this Court on appeal").

B. Standard of Review

As the reviewability of the Committee Provision's scope raises a pure question of law, it is reviewed *de novo*. *Plummer*, 861 A.2d at 1242 ("We will review questions of law *de novo*").

C. Merits

If the Committee Provision were enforceable, it would require the Court of Chancery to decide its scope rather than allowing that scope of immunity to be decided by the Company itself. That is because the grant of power to the Committee to unilateraly resolve all questions of law arising under the interpretation of the SOA was a creature of an arbitration clause—not an expert designation—and its substantive scope was thus subject to judicial review.

"[W]hen parties have called for an expert determination[], they normally have not granted the expert the authority to make binding decisions on general issues of law or legal disputes. As a result, the expert is neither expected nor authorized to make final and binding rulings on issues of law." *Penton Bus. Media Holdings, LLC*

v. Informa PLC, 252 A.3d 445, 466 (Del. Ch., 2018) (quoting Committee on Int'l Commercial Disputes, *Purchase Price Adjustment Clauses and Expert Determinations: Issues, Practical Problems and Suggested Improvements*, NEW YORK CITY BAR (June 2013) (the "New York Bar Report").[2] This limiting rule extends from decisions about the merits of a dispute to legal determinations about the scope of an ADR provision. "[I]t is for the court, not the appraiser," this Court has held, "to decide the scope of the submission where that question is in dispute." *AIU Ins. Co. v. Lexes*, 815 A.2d 312, 314 (Del. 2003) (internal references omitted). *See also Penton*, 252 A.3d at 463 (citing New York law approvingly, noting that it "places heavy weight on the scope of the provision and the procedure that the parties are to follow," where "an agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, while the agreement for appraisal extends merely to the resolution of … specific issues….") (internal references and modifications omitted).

This rule is so potent, in fact, that the existence of a neutral's authority to make binding legal decisions is evidence that the parties have not contracted for an "expert determination" at all, but, instead, have agreed to arbitration. *See, e.g.,*

[2] The New York Bar Report is available at: https://www2.nycbar.org/pdf/report/uploads/20072551-PurchasePriceAdjustmentClausesExpertDeterminations--LegalIssuesPracticalProblemsSuggestedImprovements.pdf.

Bakoss v. Certain Underwriters at Lloyds of London, 707 F.3d 140, 143 (2d Cir. 2013) ("contractual language calling for the appointment of an independent tax counsel constitute[d] an enforceable arbitration clause … because the language clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution") (internal reference omitted); *see also Viacom Int'l, Inc. v. Winshall*, 2012 WL 3249620, at *11, fn. 78 (Del. Ch. Aug. 9, 2012) (citing cases).

Applied here, the Court of Chancery was wrong to treat the Committee Provision as "Not an Arbitration Provision." *See* Ex. A at 9. If enforceable, the provision carried the most central characteristics of an arbitration, rather than expert, designation. It allowed the Committee to make "final and binding" decisions as to "any dispute" concerning the agreement's interpretation (*id*. at 2), tracking the "entire controversy" as opposed to "specific issues" authority that marks the duties of an arbitrator. *See Penton*, 252 A.3d at 463. And further into the heartland of arbitration, the issues contemplated for Committee consideration were patently legal—including disputes over contract "interpretation" (Ex. A at 2)—treading far beyond the scope of what an expert is "authorized to make [a] final and binding ruling[] on." *Penton*, 252 A.3d at 466.

The Court of Chancery held that the Committee Provision was not an arbitration clause because (a) it limited the Committee's authority to disputes over

the agreement's interpretation and (b) it did not lay out procedural rules for the presentment of such disputes. *See* Ex. A at 11-12. Consequently, it held, adjudicating the scope of the Committee Provision was not the province of the Court of Chancery, as it would have been if it concerned arbitration; it was the province of the Committee, because it concerned simple contract interpretation. *See* Ex. A at 13 ("because Section 15.1 does not call for arbitration, the … presumption of judicially determined substantive arbitrability does not apply"). The Court of Chancery's reasoning was flawed.

First, as this case demonstrates, the Committee's authority to resolve the dispute was not meaningfully limited to a ceiling beneath the "entire controversy between the parties." *See Penton*, 252 A.3d at 463. The parties' entire dispute centered around the meaning of the SOA. The Committee's authority was so all-encompassing, in fact, that one week after its decision was reported to the Court of Chancery, the Court of Chancery dismissed the litigation through a shortform order—for there was nothing left to decide. *See* Ex. B.

Second, the Court of Chancery did not meaningfully grapple with the fact that the Committee was given authority to adjudicate legal questions. Its reaction to this fact was to say, simply, that the Committee Provision contemplated neither arbitration nor an expert. *See* Ex. A at 11-12. This 'neither' designation flouted the fundamental point of the Court of Chancery's exercise, which was to determine

whether the provision fell closer in line with an arbitration clause or an expert designation. *See, e.g., Penton*, 252 A.3d at 464 (describing factors to consider "when difficult cases arise," governed by lodestar "fundamental difference[s] between an expert determination and arbitration") (quoting the New York Bar Report); *see also* New York Bar Report, at 10 (identifying two, and only two, relevant arenas: "Expert Determinations and Arbitrations"). If 'neither' were an option, there would be no such thing as "difficult cases," for anything that fell outside the bounds of traditional arbitration or traditional appraisal-work would simply fall into that third catchall category.

Third, the Court of Chancery relied heavily upon *Penton* in deciding whether the Committee Provision should be likened to an arbitration clause or an expert-designation. *See* Ex. A at 9 (addressing the "scholarly" opinion recited in *Penton*). Yet *Penton* itself leans strongly against the conclusion reached by the Court of Chancery. Most centrally, it set a presumption against letting neutrals decide the scope of their own review. "Although Delaware cases have not expressly adopted a default rule for use when the agreement is silent," it held, "the logic of the decisions suggests that an expert charged with making a narrow determination will not have authority to interpret the governing agreement unless the contract says so." *See Penton*, 252 A.3d at 466. It then offered a roadmap for how contracting parties may rebut this presumption: in assigning decision-making authority, contracting parties

"should state that the [third-party] is to act as an expert and not as an arbitrator." *Id.* at 462 (quoting the New York Bar Report). Yet this is precisely what the Committee Provision in this case does not say.

Fourth, by declining to have the scope of the Committee Provision determined by a judge, the Court of Chancery left in place an outcome that was paradoxical. Though the Court of Chancery viewed the Committee Provision as offering only limited authority to the Committee, it then allowed the Committee to determine the scope of its own authority. *See* Ex. A at 16-17. Thus, the Committee was supposed to be limited to determining questions of "interpretation" of the SOA, but suppose for example that the Committee claimed authority to adjudicate a battery claim brought against one of its board members. If the Committee deemed the battery claim (falsely) to arise under the SOA, the Court of Chancery's reasoning would allow that decision to stand as beyond the scope of judicial review—for, "the Committee must determine Section 15.1's scope." *See* Ex. A at 16.

Ultimately, this perverse incentive structure was curbed by the arbitral nature of the Committee's authority. That authority to make legal and final determinations governing the entire scope of the parties' dispute, in turn, should have been subject to substantive review by a judge akin to substantive arbitration. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (explaining judicial review

of substantive arbitrability). The Court of Chancery wrongfully sheltered the Committee from judicial review, and its decision should therefore be reversed.

III. THE COURT OF CHANCERY'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE REVERSED, BECAUSE IT DISMISSED THE ACTION WITHOUT ADDRESSING, OR INVITING BRIEFING ON, THE SUSTAINABILITY OF THE COMMITTEE'S LEGAL CONCLUSIONS.

A. Question Presented

According to the Court of Chancery, the "Committee" determination was not arbitral. The conclusions of non-arbitrator adjudicators are subject to review for fraud, bad faith, and palpable mistake, yet the Committee's determination was presumed valid without applying this standard of review. Should the Court of Chancery's dismissal be reversed?

This question was not raised by the parties before the Court of Chancery. Instead, the Court of Chancery ordered the parties to obtain the legal conclusions of the Committee and to then report back to the Court of Chancery with those findings. *See* Ex. A at 17. After this report of the Committee's findings, there were no more conferences, briefing schedules or arguments; the matter was simply dismissed without addressing the required standard of review of the Committee's conclusions. *See* A001-002 (showing report to Court of Chancery of Committee's decision on July 26, 2022, and the Court of Chancery's dismissal of the action seven days later,

on August 2, 2022). "Because the parties were not heard on this specific issue, it serves the 'interests of justice' … to consider [the] claim." *Reddy*, 945 A.2d at 1086.

B. Standard of Review

As the reviewability of non-arbitral decisions raises a pure question of law, it is reviewed *de novo*. *Plummer*, 861 A.2d at 1242 ("We will review questions of law *de novo*").

C. Merits

By immediately dismissing the action upon the Committee's determinations, the Court of Chancery did one of two things: it either assumed that the review of non-arbitral decision-makers are non-reviewable by judges; or it reviewed the decision and silently upheld the Committee's conclusions on the merits. Either way, it erred.

1. The Court of Chancery Erred By Assuming that the Committee's Decision was Unreviewable.

Even if the Committee Provision were truly not an arbitration clause, the Court of Chancery still erred in immediately dismissing the case upon the Committee's determination. That is because the decisions of experts remain subject to judicial review—and, indeed, the standard of that review is broader than what exists over arbitration. *See, e.g., Morris, Nicholas, Arsht & Tunnell v. R-H Int'l, Ltd.*, 1987 WL 33980, at *4 (Del. Ch. Dec. 29, 1987) ("this Court is not limited in

its review of an appraisal as it would be in the case of arbitration"). Permitting review in cases of "fraud, bad faith or palpable mistake," expert-determinations permit litigants like Dr. Terrell a more substantial layer of oversight. *See, e.g.,* New York Bar Report, at 21 ("The standard of 'fraud, bad faith or palpable mistake' allows courts greater discretion in reviewing the merits of an expert determination, when compared to arbitration awards") (citing cases, including *Morris, Nichols, Arsht & Tunnell*). In particular, "[e]xpert determinations, … unlike arbitrations, can generally be reviewed for errors of law," such that "legal determinations are subject to plenary review." *Id*. at 22 (citing *Amerex Group Inc. v. Lexington Ins. Co*., 678 F.3d 193 (2d Cir. 2012)).

This oversight was particularly appropriate here because the "Committee" assigned to evaluate legal questions of contract law was not required to comprise lawyers or judges; it was made up of those "appointed by the Board to administer [the SOA], or … [simply], the Board." *See* A045, at ¶15.1; A062; A065. Yet in the case of complex legal conclusions from non-experts, the Court of Chancery did not invite briefing to address the validity of the Committee's legal conclusions. It accepted those conclusions wholesale and dismissed the case.

Ultimately, if this Court concludes that the Court of Chancery correctly identified the nature of the Committee Provision, and if it declines to decide the merits of the litigation itself, it should remand the case the Court of Chancery with

leave for the parties to address whether the Committee's conclusions withstand the standard of review of partiality, fraud, bad faith, or palpable mistake.

2. If the Court of Chancery's Decision is Construed as Having Sustained the Committee's Decision beyond the Palpable Mistake Standard, it Erred.

Buried beneath all of the procedural hurdles surrounding this litigation is, at bottom, an utterly clear legal question that the Committee resolved through palpable error: when Issuance 3 preserved all prior "securities of the Company … issued to [Dr. Terrell]," did it preserve prior options that had been granted to him? The answer is plainly yes.

i. Under its Plain Terms, Issuance 3 Did Not Eviscerate the Options Previously Issued under Agreements 1 and 2.

Kiromic's view of Issuance 3 is and always has been divorced from the plain meaning of its material terms. The term "securities" encompasses a wide range of investment contracts—including options. *See, e.g.,* 15 U.S.C. § 78c(a)(10) ("The term 'security' means any … option"). Were it otherwise, misconduct in the purchase or sale of options would fall beyond the grasp of federal securities regulations—which it plainly does not. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) ("the holders of … options … to purchase or sell securities have been recognized as 'purchasers' or 'sellers' of securities for purposes of Rule 10b-5"); *Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp.2d

212, 230-31 (S.D.N.Y. 2008) (defendant was accused of back-dating stock options; allegations of securities fraud sustained). So widely is this understood, in fact, that options and other similar investments have spawned a term of art: the 'derivative security.' *See, e.g., Morrison v. Madison Dearborn Capital Partners III L.P.*, 463 F.3d 312, 314-15 (3d Cir. 2006) ("A derivative security is any options, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security….") (internal quotations and emphases omitted).

Similarly, there is no distinction between the terms "granting" and "issuing." The Company has contended that "granting" applies only to options while "issuing" applies only to stock, but this is utterly self-serving and fabricated. Consider federal securities law, where Section 2(3) of the Securities Act of 1933 specifically describes options contracts as being "issued." *See also Davidow v. Lrn Corp*., 2020 WL 898097 (Del. Ch. Feb. 5, 2020) (Zurn, V.C.) (referring to the "issuance" of stock options). The Company's view of the word 'issued' is thus contrary to how the term is used by federal law and by the Delaware case law—and requires ignoring those sources as wrong *unambiguously*. *See, e.g., Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. Sup. Ct. 1997) (construing contract ambiguity against the drafter).

Therefore, where plain-meaning is the starting point for analyzing the parties' contract, it defines "security" to include 'options' and it defines "issued" to be synonymous with 'granted.' In an environment where even ambiguity must be construed against the Company, the decision to construe Issuance 3 in favor of the Company and against its plain meaning is palpably improper.

ii. The Company's Reading of Issuance 3 is Commercially Unreasonable.

"In placing a construction on a written instrument, reasonable rather than unreasonable interpretations are favored by law," where an "unreasonable interpretation" is one that "produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. Sup. Ct. 2010) (internal quotations and references omitted).

Here, Kiromic argued that "securities issued" are different from "options granted," but, in addition to being linguistically false, this interpretation—backed by the Committee—would also be commercially unreasonable. Leading into Issuance 3 Dr. Terrell had been granted more than a million options to purchase Kiromic's common stock. *See* A027-32. About half of those options were payment under Issuance 1 for the consulting services Dr. Terrell performed for over two years—the only payment the Company gave him for that labor. Yet if Issuance 3 were as the

Committee claimed, that payment for years of consulting services would be dropped to zero.

Similar irrationality stumbles over the 500,004 (additional) options conferred to Dr. Terrell under Issuance 2. Those options had a strike price of $0.17 per share. According to Kiromic, however, ten months later a meeting of the minds sprouted a stock option "Grant" that eviscerated those options in return for ones with a worse strike price. *See* A032 (Issuance 2 offering 500,004 options at strike price of $0.17); A034 (Issuance 3 offering 500,004 options at strike price of $.019). Thus, while labeled a "Grant" issued to "provide incentives to attract, retain and motivate eligible persons whose present and potential contributions are important to the success of the Company" (A051, at ¶1), the Committee construed Issuance 3 as a penalty offering no new consideration to Dr. Terrell at all.

There is no plausible explanation for why anyone in Dr. Terrell's position would have a meeting of the minds requiring such a capitulation. The Committee's conclusion to the contrary—with no analysis—is plainly a reflection of its conflict of interest rather than a sound expression of the law or the parties' intentions.

iii. Under the Committee's Reading of Agreement 3, there Would Not be the Requisite Consideration for a Valid and Binding Contract.

The Committee's view was not just a palpably unreasonable construction of the contract, but one that sows the seeds of its own destruction. If the Committee's

interpretation of Issuance 3 were correct, then it would confer no new consideration to Dr. Terrell and, thus, would not constitute a binding contract in the first place. *See, e.g., Haft v. Dart Group Corp.*, 841 F. Supp. 549, 573 (D. Del. 1993) ("It is a fundamental tenet of contract law that a valid contract requires good or valuable consideration"). *See also James J. Gory Mechanical Contracting, Inc. v. BPG Residential Partners V, LLC*, 2011 WL 6935279, at *2 (Del. Ch. Dec. 30, 2011) ("a promise to fulfill a pre-existing duty such as a promise to pay a debt owed, cannot support a binding contract because consideration for the promise is lacking") (internal quotations omitted).

To secure board-membership services that Dr. Terrell was already performing under Issuance 2, Kiromic would be giving him zero additional stock options but, instead, a two-cent hike on the strike price—consideration that is neither "good" nor "valuable," and indeed worse than what was "pre-existing." The contrary and plausible reading of Issuance 3 is instead to align it with the explicit promises of the Company's CEO: namely, not as a worse version of a pre-existing options agreement, but as the last step in providing Dr. Terrell "500k shares for your consult[ing] plus 1 million shares for your position in the board." *See* A029.

To the extent that the Court of Chancery upheld the Committee's decision on the merits, that decision rested upon an interpretation of Issuance 3 that was

unenforceable and contrary to the plain intentions of the parties. The dismissal of Dr. Terrell's action should be reversed.

iv. The Company's "Whole Text Cannon" Argument Fails.

The Company's reading of Issuance 3 was flawed even by its own terms. Essentially, Kiromic argued that if Issuance 3 were read to preserve Issuances 1 and 2, then its reference to other commitments or communications regarding options would be superfluous. But this was palpably false. First, it is incorrect on the surface. Issuance 3 can plainly be read to mean what it would mean in any commercially reasonable setting—that Kiromic was issuing Dr. Terrell a new set of options, that the new options did not affect his other options, and that no other communications with Dr. Terrell should be read to confer upon him anything less or more than that. In the Grant's words, "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." *See* A035.

This reading—that Dr. Terrell had three sets of options, and only those three sets of options—gave meaning to every word in the Grant. Or to borrow language from the Court of Chancery's questioning at oral argument, it "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* A182-196.

On a subterranean level, Kiromic's very resort to this argument was self-destructive. Kiromic's argument simply cannot account for the plain meaning of the critical words in the Grant—"securities" and "issued"—because granting an option is *clearly* an act of issuing a security. By resorting to an argument about gratuitousness, then, Kiromic was implicitly claiming that the words 'securities' and 'issued' are ambiguous as used in the Grant and should be read differently from their ordinary meaning. Yet that is precisely what Delaware law prohibits: not only does Delaware law create a presumption in favor of "plain meaning," *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. Sup. Ct. 2013), but ambiguity must be construed against the contract's drafter rather than in its favor. *Penn Mut. Life Ins.*, 695 A.2d at 1149.

Here, there was no question who that drafter was: on the top of the Grant Notice, in centered, bold, upper-case lettering, was reference to one party: "**KIROMIC, INC.**"

Construing ambiguity in the agreement against Kiromic was thus required, and took on special importance in a case like this one. Through Issuance 3, the Company claimed that it eliminated years of pay to a consultant, that it hurt the strike price on half a million (additional) options, and that it cut in half the compensation promised by the Company's CEO for serving on the board of directors—all by adopting a special and narrow definition of the terms "security" and "issued" without saying so. If these were truly the Company's intentions, it would have been incumbent on it "to make the terms of the operative document understandable to a reasonable investor whose rights are affected," *id.*, rather than robbing that investor, Dr. Terrell, of a million options by modifying the plain meaning of contract terms from the shadows.

At bottom, a finding in favor of Kiromic required the Committee to make an irrational, capricious and palpably erroneous determination: that when Issuance 3 *preserved* prior "securities … issued," it *unambiguously eliminated* prior "options … granted." The Committee's legal determination was palpably improper; and to the extent the Court of Chancery upheld that determination on the merits, its decision dismissing the action in favor of the Company should be reversed.

CONCLUSION

For all of the foregoing reasons, Dr. Terrell respectfully requests reversal of the Court of Chancery's decision.

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