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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

REPLY BRIEF OF APPELLANT JASON TERRELL

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INTRODUCTION

This Court's intervention is required to invalidate an unconscionable contract provision that seeks to allow a company to dictate the meaning of its own contracts, and which the company is relying upon to shelter a patently self-serving and incorrect determination that "options" are not "securities." In response, the company, Kiromic Biopharma, Inc. ("Kiromic"), does not address the doctrine of unconscionability. It also ignores this Court's precedent governing the judicial reviewability of alternative dispute resolution ("ADR") provisions, misapplies the case law it does address, and ultimately asks this Court to sustain an interpretation of a contract that would rob a former director of the very same stock options that the contract promises to preserve.

Kiromic's arguments do not withstand scrutiny, and the Court of Chancery's dismissal should be reversed.

ARGUMENT

I. SECTION 15.1 OF THE STOCK OPTION AGREEMENT IS UNCONSCIONABLE.

Kiromic agreed to preserve for Dr. Terrell the "securities of the Company … issued to [him] … prior to the date hereof" (A035), then after Dr. Terrell resigned it reimagined that provision to eliminate those same securities. This case is before the Supreme Court to determine whether principles of contract-freedom permit this reimagining. That is, it is before this Court to determine whether it is unconscionable for a contracting party to bury a provision into a deal that says the contract means whatever one of its signatories says it means—such that a company like Kiromic, as here, could simply decree that options are not "securities." *See* Respondent's Brief ("Resp. Br.") at 31.

In response to this task, Kiromic does not meaningfully address conscionability. Limiting its discussion of the topic to one sentence, Kiromic says that the issue of conscionability is resolved by the fact that the provision in question was not an arbitration clause. "This settles the question of whether Section 15.1 is an unconscionable provision," Kiromic argues, because "Terrell's lead case[,] … *Worldwide*[,] … did not involve an expert determination clause, but rather an 'arbitration provision'…." *See* Resp. Br. at 16.

Kiromic's argument is flawed. Preliminarily, it is true that *Worldwide*[1] did not involve "an expert determination clause"—but neither does this case. *See* Ex. A at 12 ("Section 15.1 is not squarely an 'expert determination' either"). The upshot of Kiromic's argument, then, is not just that parties can unilaterally change the meaning of their own contracts through "expert determination" clauses, but, worse, that they can engage in this behavior in any ADR context outside the bounds of arbitration.

Kiromic's analysis simply does not address the problems associated with such an outcome. If a company could insert provisions into a contract claiming that it means whatever its directors say it means, this would undermine the fundamental premise of what a contract is: not the *post-hoc* wishes of one party, but a meeting of the minds reflected in a whole document's plain meaning. *See, e.g., Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 771 (Del. 2022) ("Delaware courts read the agreement as a whole and enforce the plain meaning").

Suppose, for example, that Kiromic fell short on liquidity and developed a clever idea. Rather than raising money through outside investors or lenders, it would simply decree that its Stock Option Agreement with Dr. Terrell required him to donate five hundreds thousand dollars to keep the company afloat—even though the

[1] *Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788, 791 (Del. 1992).

plain meaning of the agreement included no such requirement. If Kiromic's argument on the present appeal were sound, then, as long as it avoided arbitration, the freedom-of-contract would allow it to dictate this nefarious outcome.

Attempting to dull this risk, Kiromic emphasizes that the Committee was comprised of "independent directors" (Resp. Br. at 25)—but this point only underscores the problem. Members of a company's board of directors, including the members of this Committee, are "charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders." *Cede & Co. v. Technicolor, Inc.*, 624 A.2d 345, 360 (Del. 1993). Dr. Terrell is seeking recognition of more than a million options that the company owes him, but these options would come at the expense of the company's shareholders. If the Committee-directors had the power to unilaterally eliminate this expense without risk of judicial review, as Kiromic claims, then a director's "unyielding" duty would not just allow for the victimization of Dr. Terrell, but would require it.

Nevertheless, it is true that parties can sign agreements that have unfavorable consequences. The freedom of contract means having the freedom to enter into bad deals. But on occasion there are "public policy interest[s] even stronger than freedom of contract." *James v. Nat'l Fin. LLC*, 132 A.3d 799, 812 (Del. Ch. 2016). And this case presents such public policy interests, for if Kiromic succeeds then it will birth an era in Delaware in which powerful parties do not simply negotiate

favorable terms to be upheld by the rule of law, but where they negotiate away the rule of law altogether.

At a bare minimum, a negotiation of this type would require scrutiny to ensure that it reflected a meeting of the minds—that Dr. Terrell truly intended to allow Kiromic to decide the meaning of its own contract with him. Yet even modest scrutiny proves this not to be the case. First, as Dr. Terrell highlighted in his opening brief—and as Kiromic does not dispute in its response—Section 15.1, relegated to two sentences on the tenth page of the agreement, was so well hidden that neither party was aware that it even existed. *See* Ex. A at 6 (noting that neither party discussed Section 15.1 in their initial submissions to the Court of Chancery). And second, the substance of the provision is such that "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.

Addressing this substance, Kiromic argues that for the cost of trading in one million stock options and giving Kiromic the right to dictate the meaning of its own contract with him, Dr. Terrell received benefits to his options' strike prices and exercise periods. *See* Resp. Br. at 37-38. But this gloss caves under scrutiny. Most notably, in citing a better exercise price, Kiromic compares the options arising under Issuance 3 to the options issued to Dr. Terrell in Issuance 1. *Id*. There, it is true, the strike price of $.19/share compares favorably to the $.50/share governing his first

set of options. Yet this analysis ignores Issuance 2—which Kiromic claims to have also eviscerated. And for Issuance 2, the strike price was two cents per share better than the options arising under Issuance 3. *See* A032 (showing strike price in Issuance 2 of only $.17/share). Thus for the benefit of extending the exercise deadline by ten months in the year 2027, Dr. Terrell would have (i) traded in options with a better strike price for options with a worse strike price, (ii) given away an additional half-million options for free, and (iii) granted to Kiromic the right to play judge and jury of the meaning of its own agreement with him. That is, the agreement would reflect the classic example of "inadequacy of price … coupled with … oppressive conduct" for which the doctrine of unconscionability exists to remedy. *See, e.g., Ryan v. Weiner*, 610 A.2d 1377, 1381 (Del. Ch. 1992).

Kiromic's decision to limit its discussion of conscionability to questions of arbitrability carries one final consequence. That is, if the Court determines that Section 15.1 was indeed an arbitration clause, then Kiromic will have made no remaining challenge to the agreement's unconscionability. In that event, as Kiromic has now tacitly conceded, the agreement would violate the "irreducible level of impartiality [that] must exist in arbitration proceedings, [where] any arbitrator who is not impartial [is] unable to preside…." *Weiner v. Milliken Design, Inc.*, 2015 WL 401705, at *13 (Del. Ch. Jan 30, 2015). *See also Worldwide Ins. Grp.*, 603 A.2d at 791 (provision was void was it "circumvent[ed] the arbitration process and

provide[d] an arbitration escape device in favor of an insurance company"). As set forth below, Section 15.1 should have been construed as such an arbitration clause, and thus for this reason, too, it does not survive the doctrine of unconscionability.

II. KIROMIC'S ANALYSIS OF SUBSTANTIVE ARBITRABILITY IS FLAWED.

To limit the scope of judicial review, Kiromic argues that Section 15.1 is "not an arbitration clause." *See* Resp. Br. at 16. Though the provision gives the Committee the power to make purely legal determinations, Kiromic argues, parties are allowed to "give an expert the authority to interpret a contract" (Resp. Br at 20) (quoting *Penton Business Media Holdings, LLC v. Informa PLC*, 252 A.3d 445 (Del. Ch. 2018)) and this particular contract conveyed to the Committee only limited authority and rules rather than the full panoply of rights and procedures typically attendant to an arbitrator. *See* Resp. Br at 21-23. Consequently, Kiromic reasons, the Court of Chancery was correct in declining to independently review the scope and meaning of Section 15.1—a point allegedly solidified by *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393 (Del. 2010). *See generally* Resp. Br. at Section I.

Kiromic's argument misapplies the relevant legal analysis, it erroneously downplays the scope of Section 15.1, and it misconstrues *Kuhn.*

A. Kiromic Misapplies the Case Law.

First, Kiromic's argument simply does not address this Court's case law on the reviewability of expert-designations. "[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). Such "scope" is precisely what was "in dispute" in this case, as both parties vigorously contested whether Section 15.1 governed a dispute over the Grant Notice. *See* A159-170. Thus, while Kiromic does not acknowledge *AIU*, this Court's precedent holds that it was "for the court"—not the Committee—to "decide the scope of [Section 15.1]." *Id*.

Second, in relying instead upon the Court of Chancery's decision in *Penton*, Kiromic magnifies *Penton*'s dicta and ignores its substantive analysis. Yes, *Penton* acknowledges the theoretical possibility that "parties could give an expert the authority to interpret a contract." *See Penton*, 252 A.3d at 448; Resp. Br. at 20.[2] But the far more relevant analysis from *Penton* explains the tremendous uphill battle

[2] Kiromic erroneously begins this quotation with a capitalized 'P'—giving the reader the impression that this statement is a full sentence. In reality, the word "parties" begins with a lowercase 'p' because it follows the word "Although" in the same sentence—as in, "Although parties could give an expert the authority to interpret a contract, here they did not." *See Penton*, 252 A.3d at 448. Read in proper context, the quoted statement is clearly *dicta* rather than the affirmative holding it is represented to be.

facing any claim that Section 15.1 is non-arbitral. "[W]hen parties have called for an expert determination[]," *Penton* explains, "they normally have not granted the expert the authority to make binding decisions on general issues of law or legal disputes." *Id*. at 466. Thus, *Penton* explains that "[a]s a result, the expert is neither expected nor authorized to make final and binding rulings on issues of law." *Id*. This analysis is echoed repeatedly in other courts. *See, e.g., 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. 2012) (citing cases).

This doctrine culminates in *Penton*'s recommendation that to avoid the presumptive force of arbitration in a clause of this nature, the contract should explicitly contain "expert not arbitrator" language. *See Penton*, 252 A.3d at 462. Yet this holding is simply ignored in Kiromic's attempt to deem Section 15.1 non-arbitral—a clause that, on its face, is designed to give the Committee power to make rulings on issues of law, and which contains no "expert not arbitrator" language at all.

Third, Kiromic offers no defense of the Chancery's Court's novel holding that Section 15.1 fits into neither one of the categories contemplated by *Penton*. *See* Exhibit A at 11-12. While Section 15.1 arguably presents one of the "difficult cases" contemplated by *Penton*, to be analyzed through the "fundamental difference[s] between an expert determination and arbitration" (*Penton*, 252 A.3d at 464), Kiromic offers no explanation for why "difficult cases" would even exist if they could fall between the poles of arbitration and expert clauses and into a third and catchall category.

Notably, the New York Bar Report[3] on which *Penton* relies is devoted to evaluating whether a clause calls for an "Arbitrator or Expert Determination"—and it never acknowledges any alternative catchall category. *See id*. at 9, 23. "The law of many countries has long recognized the existence of two distinct contractual dispute resolution alternatives to litigation," it instead recognized, and it identified those options as "(i) arbitration and (ii) expert determination." *Id*. at 10. In vindicating *Penton* as a "scholarly opinion" that "supplies the framework" that

[3] 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"), available at: https://www2.nycbar.org/pdf/report/uploads/20072551-PurchasePriceAdjustmentClausesExpertDeterminations--LegalIssuesPracticalProblemsSuggestedImprovements.pdf.

should govern this case (Resp. Br. at 16-17), Kiromic abandons the Court of Chancery's analysis, which erroneously departs from that framework.

B. Kiromic Misconstrues Section 15.1's Scope.

In claiming that Section 15.1 was non-arbitral, Kiromic undersells the provision's scope. According to Kiromic, arbitration clauses typically outsource an "entire controversy" whereas here the parties have other disputes over which the Committee would have no authority if the case proceeded beyond the pleadings. *See* Resp. Br.at 21-22. This analysis relies too heavily on circumstances beyond the four corners of the agreement, and too little on the agreement's actual substance.

Under Delaware law, endeavors to interpret a contract's meaning ought to be limited to the extent possible to the contract's four corners. *See, e.g., GMV Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). Here, the four corners of Section 15.1 demonstrate that it is broadly meant to capture "[a]ny dispute regarding the interpretation of this Agreement." *See* A045. Thus if it is true, as Kiromic says, that the "Agreement" comprises the "Plan, the Grant Notice and the Exercise Agreement," then what Section 15.1 governs is both factual and legal: the number of options granted, the exercise price, the exercise deadline; and the legal relationship between Issuance 3 and Issuances 1 and 2—all of which are creatures of either the Stock Option Agreement, the Plan, the Grant Notice or the Exercise Agreement. Provided that a dispute arose over Issuance 3, in

other words, Section 15.1 would govern the "entire controversy"—as it ultimately did before the Court of Chancery.

To rebut this point, Kiromic raises the possibility of other disputes regarding other issuances of options to Dr. Terrell. *See* Resp. Br. at 22. Those disputes would not fairly be governed by Section 15.1, Kiromic argues, and thus Section 15.1 should not be read as an arbitration clause. But by construing the meaning of Issuance 3 based upon disputes over Issuances 1 and 2, Kiromic is conducting contract interpretation based upon matters *dehors* the contract—a clear violation of Delaware law. *GMV Capital Investments, LLC*, 36 A.3d at 779.

To illustrate the problem, take a classic example of what would be considered a "broad" arbitration clause: one that refers for arbitration "all disputes arising in any way under the Agreement." *Milton Investments, LLC v. Lockwood Bros., II, LLC*, 2010 WL 2836404, at *6 (Del. Ch. July 20, 2010). Even if Section 15.1 adopted that language here, it would not encompass a dispute arising under Issuance 1 or Issuance 2, as those disputes pertain to different agreements. Of course, that would not convert the *Milton* clause into an expert-designation; that is because the breadth of an arbitration clause is measured in relation to the contract in which it arises—not in relation to what parole evidence says about the scope of a dispute between two parties.

Hidden in Kiromic's analysis is yet another problem. To downplay the scope of Section 15.1, it relies upon disputes that can arise under Issuances 1 and 2. Yet this analysis presumes the central premise that its dismissal motion rejected—that Issuances 1 and 2 stand independently from Issuance 3. *See* Resp. Br. at 37 (claiming that "Terrell unambiguously waived any prior option rights set forth in the Prior Agreements by signing the Grant Notice"). If Kiromic stands behind the notion that Issuance 3 eviscerated Issuances 1 and 2, then its theoretical cases beyond Section 15.1's grasp do not exist. Its logic thus leads to a conclusion that undermines the dominant force of its motion: that Section 15.1 is non-arbitral because Issuance 3 does not affect Issuances 1 and 2.

Ultimately, the totality of circumstances surrounding Section 15.1 demonstrate that should have been treated as arbitral in nature. The Court of Chancery's order to the contrary should be reversed.

C. Kiromic's Analysis of *Kuhn* is Erroneous.

Finally, Kiromic argues that the non-arbitral quality of Section 15.1 is dictated by this Court's analysis in *Kuhn Construction, Inc. v. Diamond State Port Corp.* 990 A.2d 393 (Del. 2010). After all, Kiromic reasons, in *Kuhn* the Court "held that a dispute resolution provision that gave a referee interpretive authority over underlying contract documents was not an arbitration provision." *See* Resp. Br. at

20. Thus, Kiromic reasons, the interpretive authority given to the Committee was not part of an arbitration clause either.

Kiromic's analysis of *Kuhn* is wrong. *Kuhn* is not a case about the differences between arbitration clauses and expert clauses. Indeed, the word "expert" appears nowhere in the decision. Instead of analyzing whether an arbitration clause existed, in fact, *Kuhn* simply analyzed an arbitration clause's scope. Hence its holding: that the clause in issue was narrow enough to permit litigation, rather than arbitration, of particular claims. *See Kuhn*, 990 A.2d at 394 ("the referee clause on these facts do not clearly require arbitration and Kuhn may litigate its claims"). *See also id*. at 397 (engaging in contract construction to determine that if the "arbiter [was meant] to resolve *all* disputes arising from the contract …, then the reference to Delaware courts in Article 3 either means nothing or misleads").

This distinguishing feature of *Kuhn* is apparent from the very nature of the decision. The analysis of the clause's scope in *Kuhn* was performed by judges—not the contemplated "referee." Yet if Kiromic were correct, and *Kuhn* was actually deciding that the referee-clause was non-arbitral in nature, then according to Kiromic's logic its scope would not have been decided by the Court at all. *See* Exhibit A at 13 ("It was important to decide whether Section 15.1 is an arbitration provision because that informs how to determine who decides its applicability to the dispute").

In this sense, *Kuhn* does provide a useful guidepost for the analysis of this case—but not for the reasons Kiromic claims. It is useful because it shows that Section 15.1, like *Kuhn*'s referee-clause, should have been adjudicated by a judge.

III. KIROMIC'S ANALYSIS OF JUDICIAL REVIEW IS ERRONEOUS.

Kiromic offers a substantive response to the question whether the Committee erred in deciding the merits of this action. According to Kiromic, Issuance 3 eviscerated Issuances 1 and 2 to Dr. Terrell, because when it preserved for him "securities of the Company … issued to you" it preserved only "*stock*"—not any other types of securities. *See* Resp. Br. at 30-31 (italics in original). This argument is flawed.

First, Kiromic's argument ignores a fundamental preliminary point: if the Committee truly did engage in a non-arbitral decision, as it claims, then this would have enlarged the scope of the Chancery's Court review of the Committee's conclusions. *See, e.g., Morris, Nichols, 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"). *See also* New York Bar Report at 21 (permitting review on grounds of, *inter alia*, "bad faith or palpable mistake").

Indeed, such review would have been particularly important in a case like this one, because the "Committee" decided a purely legal question despite having no required legal training and having an obvious conflict of interest over the dispute's outcome. *See* A045 at ¶15.1; A062; A065. Yet the Court of Chancery here neither

engaged in, nor called for, any analysis over the sustainability of the Committee's rulings.

Kiromic's only response to this problem is to claim that Dr. Terrell could have sought "reargument." *See* Resp. Br. at 26. But a motion to reargue is not a prerequisite to an appeal. To the contrary, this Court has explained that it retains interest-of-justice jurisdiction in cases such as this one, where "the parties were not heard on th[e] specific issue" before the Court of Chancery decided it. *See, e.g., Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008). If in the end this Court determines that the Court of Chancery correctly identified the nature of Section 15.1, and if it declines to decide the merits of this litigation itself, it can accomplish the goal that Kiromic seeks by simply remanding the case for an adjudication of whether the Committee's analysis on the merits survives judicial review.

Nevertheless, second, if this Court reaches the merits of the dispute then it should confirm that the Committee's decision was palpably erroneous. Kiromic's defense of the Committee's decision is two-pronged: it says that "securities … issued" refers to only stock—not options—because only stock can be "issued" whereas an option would be "granted." *See* Resp. Br. at 31. And it argues that reading "securities" to be limited to "stock" is required to avoid superfluity in the contract. *See* Resp. Br. at 32-33. Both arguments are palpably incorrect.

Neither one of Kiromic's arguments grapples with the fact that it was Kiromic who drafted the agreement—not Dr. Terrell. As this Court has explained, "it is the obligation of the issuer of securities to make the terms of the operative document understandable to a reasonable investor whose rights are affected…." *See, e.g., Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. 1997). "Thus," as relevant here, "if the contract in such a setting is ambiguous, … the contract must be construed against the drafter." *Id*. Clearly and definitely, Issuance 3 does not eviscerate Issuances 1 and 2 unambiguously.

To the extent the relationship between the issuances is unambiguous, it is unambiguous because Issuance 3's plain meaning preserves Issuances 1 and 2 rather than eliminating them. By its own admission, Kiromic's argument relies upon using a non-plain meanings—such that the word "securities" is limited to simply stock and not options. *See, e.g.,* Resp. Br. at 33 ("The issue is not how the single word 'security' is defined in federal securities statutes"). This effort flouts the black-letter law of Delaware, which requires that "[a]ny undefined words are given their commonly understood, plain meaning." *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1036 (Del. 2012). *See also In re Sorea Ins. Coverage Appeals*, 240 A.3d 1121, fn. 67 (Del. 2020) ("'Delaware case law is well settled that undefined words are given their plain meaning based upon the definition provided by a dictionary'") (quoting *State of Delaware Dept of Nat. Res. And Envir. Control v. McGinnis Auto*

& Mobile Home Salvage LLC, 225 A.3d 1251, 1260-61 (Del. 2020) [Valihura, J. dissenting]).

Palpably, the plain meaning of the word 'securities' includes options. That is why options are treated as securities in both the statutory law and case law. *See, e.g.,* 15 U.S.C. § 78c(a)(10) ("The term 'security' means any … option"). *See also 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); *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). It is also why Kiromic has never come forward with a single instance, in any statute or case, in which options were treated as non-securities. This would be the first to do so.[4]

[4] Kiromic's reliance upon the words "issued" versus "granted" simply ignores that both federal and state law refer to options being "issued"—just like Issuance 3. *See* Securities Act of 1933, at § 2(3) (describing options contracts as being "issued");

Giving plain meaning to the word 'securities' will not lead to superfluity in the agreement, either. 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. 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.

The plain meaning of Issuance 3 preserved the prior options that had been granted to Dr. Terrell. The Committee's determination that it unambiguously eliminated those prior options is palpably incorrect and should have been reviewed by the Court of Chancery prior to the case being dismissed, or if the Court of Chancery did review it, it erred by holding that it satisfied the applicable standard of review.

Davidow v. Lrn Corp., 2020 WL 898097 (Del. Ch. Feb. 5, 2020) (referencing the "issuance of stock options").

CONCLUSION

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

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