EFiled: May 09 2024 12:44PM EDT
Filing ID 73000858
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

OPENING BRIEF OF APPELLANT JASON TERRELL

THE ROSNER LAW GROUP LLC
Scott James Leonhardt, Esq. (DE#4885)
824 N. Market Street, Suite 810
Wilmington, DE 19801
(302) 777-1111
leonhardt@teamrosner.com

Attorneys for Appellation Jason Terrell

OF COUNSEL:
Alexander Klein, Esq.
Donna Aldea, Esq.
BARKET EPSTEIN KEARON ALDEA & LOTURCO, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530
Ph: (516) 745-1500
aklein@barketepstein.com

Dated: May 9, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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 from 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.

The present proceedings reflect the second time this action has reached the Delaware Supreme Court. In the first appeal, this Court reversed the Court of Chancery's determination that the merits of the parties' dispute could be determined by a "Committee" of Kiromic insiders, finding, instead, that any such determination required judicial review *de novo*. *See* A232-259. The Court of Chancery then conducted its *de novo* review and dismissed the action again. This time, it held that an agreement providing that "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)" unambiguously eliminated his pre-existing stock options. The present appeal challenges that determination.

SUMMARY OF ARGUMENT

In dismissing the action for failure to state a claim, the Court of Chancery legally erred in holding that the parties' contract conveyed a third and final round of stock options to Dr. Terrell by unambiguously eliminating his prior two rounds of options. The Court of Chancery's determination failed to apply the presumptively controlling "plain meaning" of the contract's terms (*Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 [Del. 2013]) and failed to construe ambiguity in favor of the Plaintiff, as required. *See VLIW Tech. LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) ("Dismissal … is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law").

STATEMENT OF FACTS

On December 10, 2014, Kiromic entered into a consulting agreement with Dr. Terrell ("Issuance 1"). *See* A015, 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* A015, at ¶9; A026-030.

Nearly a year later, on or about October 2015, the parties began negotiating the terms of an agreement to bring Dr. Terrell onto Kiromic's board of directors. *See* A015, 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* A015-16; A032. 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* A016, 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* A016, at ¶¶17-18; A034-35.

Second, on November 10, 2017, Kiromic entered into an agreement with Dr. Terrell pursuant to its 2017 Equity Incentive Plan ("Issuance 3"). *See* A017, 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* A017, at ¶22; A037-38.

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* A038. 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* A017, 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* A018, 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* A013-24. 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* A102-127. While Issuance 3 preserved prior "securities … issued to you," the Company argued, "securities … issued" did not include granted options. *See* A120.

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* A135-36 (raising such point), a point reinforced by the fact that the defense was seeking dismissal pre-answer. *See* A269 (raising 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* A137-38; A266. 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* A138-39.

The Company's argument faced 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* A200. "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* A201.

Faced with this recognition, Kiromic backed into a position whose weakness should have been 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, 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* A048, at ¶15.1 (the "Committee Provision"). Thus, the Court of Chancery invited another round of briefing to address the Committee Provision's import. *See* A221.

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* A162-167 (by Dr. Terrell); A168-173 (by the Company). The arguments raised for consideration included the Committee Provision's meaning (A163-64), the required standards of interpretation (A163), and the validity of a provision that would allow a contracting party to itself be the adjudicator of its own legal disputes (A165-66).

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* A181 ("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. *See* A190.

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 in 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* A226. 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* A228-29.

On August 23, 2022, Dr. Terrell filed a notice of appeal to the Supreme Court of Delaware. *See* A230-31. After a full round of appellate briefing and an oral argument, this Court reversed the Court of Chancery's dismissal, and it remanded

the case for the Court of Chancery to conduct a "*de novo* interpretation of the relevant agreements." *See* A257.

On August 8, 2023, and August 18, 2023, respectively, the defendant and the plaintiff submitted post-remand letters to the Court of Chancery offering their competing interpretations of this Court's order. *See* A260-69. On January 31, 2024, the Court of Chancery issued a letter opinion, which again dismissed Dr. Terrell's case—this time based upon the premise that Issuance 3 had unambiguously eliminated his prior stock options. *See* Exhibit A. This decision culminated in a judgment entered on March 11, 2024. *See* Exhibit B.

On March 25, 2024, Dr. Terrell filed a notice of appeal. He now seeks, once again, that the Court of Chancery's order and judgment dismissing his case be reversed.

ARGUMENT

THE COURT OF CHANCERY'S PRE-ANSWER DISMISSAL SHOULD BE REVERSED, BECAUSE ITS ANALYSIS OF THE CONTRACT DID NOT APPLY PLAIN MEANING, CONSTRUED ITS TERMS UNREASONABLY, AND FAILED TO CONSTRUE AMBIGUITY AGAINST THE MOVANT.

This case raises 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 the Court of Chancery has now held that in granting Dr. Terrell this final set of options, the Company annulled all prior options it had granted him—and did so unambiguously.

Its pre-answer dismissal of this case should once again be reversed.

A. Question Presented

A stock option agreement preserved for an insider all prior "securities of the Company, if any, issued to [him] on or prior to the date hereof." Yet on a pre-answer motion to dismiss, the Court of Chancery held that the agreement unambiguously did not preserve the insider's pre-existing stock options. Should the Court of Chancery be reversed?

This question was raised before the Court of Chancery. *See* A135-143. *See also* A265-269.

B. Standard of Review

Because this appeal concerns the pre-answer dismissal of a complaint, and because it is based upon the interpretation of a contract and legal conclusions, the Court of Chancery's decision is reviewed *de novo*. *See, e.g., Kuhn Const. Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010).

C. Merits

Facing contract language that expressly preserved "securities of the Company, if any, issued to [Dr. Terrell] on or prior to the date hereof," and explicitly including "options" as a type of security, the Court of Chancery's reading of the contract made three interpretive errors. First, it ignored the plain meaning of the terms in issue. Second, it read the contract to carry a meaning that the parties could not reasonably have intended. And third, it violated the fundamental requirement for ambiguity in the contract to be construed at this stage against the movant. For these reasons, set forth more fully below, we respectfully request that the Court of Chancery's dismissal be reversed.

1. The Court of Chancery Spurned Plain Meaning.

This appeal hinges upon the meaning of the Company's promise to preserve for Dr. Terrell "securities of the Company, if any, issued to [him] on or prior to the date hereof." *See* A035. Because the promise to *preserve* issued securities did not unambiguously allow for the *elimination* of stock options, the pre-answer motion to dismiss should have been denied.

The first basis for reversal is anchored in the agreement's plain text. "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions," this Court has held. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010). In dismissing the action, however, the Court of Chancery held that the preservation of "securities … issued" did not apply to "granted" options. *See* Exhibit A at 19-21. The plain text warranted otherwise.

Plainly, the contract defined stock options as within the umbrella of "securities" in issue. It accomplished this task in the very provision in question—describing "options, equity awards or *other securities*…." *See* A038 (emphasis added). As the Court of Chancery itself suggested, 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* A201 (emphasis added). This plain reading shows that the contract itself contemplated "options" being "issued" and thus preserved them.

This plain reasoning is bolstered by the common sense meaning of the terms "securities," "options," and "issued." The Securities Act of 1933, for example, makes clear that "securities" encompass 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 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, in the context of offering securities, the plain meaning of the term 'issued' is synonymous with 'granted.' The Securities Act again, for example, explains that options may be "issued." *See* 15 U.S.C. §77b(a)(3). And Delaware

courts have followed suit in using these terms interchangeably—in this Court, in the Court of Chancery, and in the very same courtroom where the underlying motion was decided. *See, e.g., Davidow v. LRN Corp.*, 2020 WL 898097 (Del. Ch. Feb. 25, 2020) (reciting that "the 2017 Options … had been *granted*" and that the defendant "had recently *issued* the 2017 Options") (Zurn, V.C.) (emphasis added). *See also Hoffman v. Dann*, 205 A.2d 343, 349 (Del. 1964) (using the term "granted … new options" and "options previously issued" in the same sentence); *Beard v. Elster*, 160 A.2d 731, 735 (Del. 1960) (referring to "options granted" and the "date of issuance" in the same sentence); *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"); *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 976 (Del. Ch. 2001) (using "issue stock options" and "grant of the options" in the same sentence).

The Court of Chancery equated this backdrop with "Terrell point[ing] me to the world outside [the contract]." *See* Exhibit A at 20. But this is true only in the sense that reality in the outside world informs what words mean. Otherwise, every word of a contract would require a definition.[1] Indeed, there would be no such thing as "plain meaning" without resort to the "world outside," and courts would face the

[1] In fact, those definitions themselves would be incomprehensible without imbuing them with meanings derived from "the world outside."

impossible task of applying "*common* sense" without being able to acknowledge what is common. *See, e.g., Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. 1997) ("They must be interpreted in a common sense manner").

Here, confirming what is "plain" and "common" is that the contract itself construed options as a type of security and then referred to securities being "issued"; and that both the Securities Act and Delaware courts widely refer to options being "granted" or "issued" interchangeably. The upshot of the Court of Chancery's decision, then, is that the "reasonable investor whose rights are affected by [this] document" (*id*.) would have to blind himself to this reality. This Court should not endorse such an obligation.

2. The Court of Chancery's Interpretation was Unreasonable.

Dr. Terrell's reading of Issuance 3 is not only supported by the plain meaning of the text, but also by the unreasonableness of the alternative reading endorsed by the Court of Chancery. "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. 2010) (internal quotations and references omitted).

Here, the Court of Chancery held that "securities issued" are different from "options granted," but this reading of Issuance 3 would lead to the type of results that "no reasonable person would have accepted…." *Osborn*, 991 A.2d at 1160. Leading into Issuance 3, Dr. Terrell had been granted more than a million options to purchase Kiromic's common stock. *See* A030-35. 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 is read as the Court of Chancery held, 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. *Compare* 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). 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" (A054 at ¶1), the Court of Chancery construed Issuance 3 as a penalty offering no new consideration to Dr. Terrell at all. There is no

plausible explanation for why a person in Dr. Terrell's position would have a meeting of the minds requiring such a capitulation.

Without denying the unreasonableness of these outcomes, the Court of Chancery held them to be irrelevant to Issuance 3's meaning. "This argument is an unconscionability argument," the court held, and thus any absurdity resulting from one interpretation over another was immaterial unless it rendered the contract unenforceable. *See* Exhibit A at fn. 40 ("The Supreme Court of Delaware rejected Terrell's argument that [the contract] was unconscionable. … I will not belabor the matter"). But this resort to unconscionability was mistaken.

The unreasonableness of a given interpretation is a valid consideration for contract-construction even when the contract is not unconscionable. That is because *reasonableness* helps inform what the contracting parties intended, whereas *unconscionability* is concerned with setting aside what they intended. *See, e.g. Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (separate from unconscionability, determining that it "stretches the bounds of reason to conclude that Osborn, a college graduate and professional tax preparer, would sell her property for a mere pittance based on an undefined, unspecified, implicit term."). *See also In re M.M.*, 2013 WL 1415837, at *3 (Del. Ch. Apr. 4, 2013) (describing standard of unconscionability to "set aside an agreement").

Thus, courts routinely evaluate the reasonableness of competing contract interpretations without resorting to theories of unconscionability at all. *See, e.g., Flagler Holdings VI Beta Inc. v. Airline Accommodations Sols. LLC*, 2023 WL 9053669, at *1 (Del. Ch. Dec. 19, 2023) (discounting contractual interpretation because it would be "unreasonable" and "absurd"); *2009 Caiola Fam. Tr. v. PWA LLC*, 2014 WL 1813174, at *12 (Del. Ch. Apr. 30, 2014) (discounting interpretation that would "produce several improbable and arguably absurd consequences'). *See also Osborn*, 991 A.2d at 1160.

This case presents a good example why these doctrines get reviewed along separate tracks. Unlike the substantive reasonableness of given contract interpretations, unconscionability requires an additional inquiry into "procedural" considerations, like bargaining power and party-sophistication. *See, e.g., Marina View Condo. Ass'n of Unit Owners v. Rehoboth Marina Ventures*, 2018 WL 1172581, at *7-8 (Del. Ch. Mar. 6, 2018) Indeed, it is that procedural facet of the analysis that this Court focused on in evaluating unconscionability during the first appeal between these parties—not the contract's substantive reasonableness. *See Terrell v. Kiromic Biopharma Inc.*, 297 A.3d 610, 624 (Del. 2023) (noting that "Terrell was not a weak counterpart. Rather he was a sophisticated party"). Yet even if Terrell is sophisticated—indeed, especially if he is sophisticated—it is implausible that he would have had a meeting of the minds with Kiromic in which

he traded away a million stock options in order to recoup half as many, with a worse strike price, all without the contract saying so explicitly. *See Osborn*, 991 A.2d at 1160. Even if the contract would be conscionable under either reading, that is not a viable analysis of which reading is more cogent.

3. Even if the contract did not preserve the prior options by its plain language or structure, it was at best ambiguous and thus required denial of the pre-answer motion to dismiss.

Yet at this stage, the job is far simpler than evaluating which of two contract interpretations is stronger. That is because the Court of Chancery dismissed the case pre-answer, where the very existence of ambiguity required that the motion be denied.

The Court of Chancery dismissed Dr. Terrell's lawsuit based upon its determination that under Issuance 3 "shares are 'issued' while options are 'granted.'" *See* Exhibit A at 19. "Agreement 3 never uses the word 'issued' in relation to options," it reasoned, and instead "every use of 'issued,' 'issuance,' and 'issuable'—all thirty-five of them—relates to Shares, not options." *See* Exhibit A at 17 (internal references omitted). Reading the contract otherwise would spell interpretive trouble, the court concluded, for if "issued" securities included granted options then it would render meaningless the acknowledgment that Dr. Terrell held "no other rights to any other options." *See* Exhibit A at 16.

The Court of Chancery's analysis is undermined by the very fact that it relied upon such interpretive gymnastics. The motion in issue arose under Rule 12(b)(6), where courts are not free to "choose between reasonable interpretations of ambiguous contract provisions," but instead must construe "any ambiguity … in favor of the nonmoving party…." *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008). To that end, "[a]mbiguity exists when the provisions in controversy are reasonably or fairly susceptible of different interpretations." *See Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *4 (Del. Ch. Mar. 19, 2021). The upshot of this rule is, here, dismissal required a determination not just that "grants" and "issuances" took meanings different from common parlance in Delaware, and different from the Securities Act, but that the agreement departed from these ordinary meanings *unambiguously*.

If that had been the case, deriving these unusual meanings of words would not have required a fishing expedition into the statistics of various word-combinations in the contract to illuminate the most reasonable intent of the words' meaning. Instead, it would have been incumbent on Kiromic "to make the terms of the operative document understandable to a reasonable investor whose rights are affected." *Penn Mut. Life Ins.*, 695 A.2d at 1149.

Second, even taking the Court of Chancery's reasoning at face value, it is based upon a premise that is not true. While the court held that only stock can be

'issued' under Issuance 3, both the Stock Option Agreement and the Equity Incentive Plan contain provisions welcoming the opposite. Take the Stock Option Agreement, which references "the grant of the Option, the issuance of Shares … or *any other issuance of securities* under the plan." *See* A043 at ¶7.1(d) (emphasis added). If only "Stock" could be "issued," then providing for the "issuance of securities" above and beyond the "issuance of Shares" would have been nonsensical. Similarly, take the Equity Incentive Plan: it gives a committee of the Company the right to "*issue* new Awards" (*see* A061 at ¶9.3) (emphasis added)—where "Awards" refers to not just stock, but also "any Option." *See* A067 at ¶14.

Third, the Court of Chancery's analysis does not solve the problem it claims. According to the Court of Chancery, Issuance 3 "preserves only securities that have been issued, not securities that have been granted," and this "was presumably intentional." *See* Exhibit A at 19. But the same exact cloud descends in the same sentence upon the choice of the word 'securities' over 'stock'—which was also "presumably intentional." As the Court of Chancery highlighted, the parties' agreements contain dozens of instances in which the word 'issued' is expressly linked to stock shares. *See, e.g.,* A054 (referring to "Shares previously issued"); A056 (referring to "prior to the date the Shares are issued"); A060 (referring to when "Shares are … issued in satisfaction of Awards"). This repetition shows that when the parties intended for this link to apply, they said so explicitly. Yet here they did

not express this link. Instead of limiting what is "issued" to "Shares," they linked it more broadly to "securities" (A038)—a term that would be wholly overbroad, and unnecessarily confusing, if the narrower term "Shares" would have sufficed.

Fourth, 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 Issuance 3'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* A038.

This reading—that Dr. Terrell had three sets of options, and only those three sets of options—gave meaning to every word in the issuance. 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* A216.

Construing ambiguity in the agreement against Kiromic 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 could have done so in plain English—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 Court of Chancery to adopt a legally erroneous proposition: that when Issuance 3 *preserved* prior "securities … issued," it *unambiguously eliminated* prior "options … granted." This decision and order should be reversed.

CONCLUSION

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

THE ROSNER LAW GROUP LLC

/s/ Scott James Leonhardt
Scott James Leonhardt (No. 4885)
824 N. Market Street, Suite 810
Wilmington, DE 19801
302-777-1111
leonhardt@teamrosner.com

Attorneys for Dr. Terrell

OF COUNSEL:
Alexander Klein, Esq.
Donna Aldea, Esq.
BARKET EPSTEIN KEARON ALDEA & LOTURCO, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530
Ph: (516) 745-1500
F: (516) 745-1245
aklein@barketepstein.com

Dated: May 9, 2024