

Sheppard Mullin Obtains Dismissal of Multimillion Dollar Stock Option Dispute in Delaware Chancery Court

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Sheppard Mullin represented biotherapeutics company Kiromic BioPharma, Inc. in litigation spanning three years and an appeal to the Delaware Supreme Court in connection with a former company director's suit over stock option contracts.

On January 31, 2024, the Delaware Chancery Court decisively ruled in Kiromic's favor, dismissing the former Kiromic director's claims that he was entitled to exercise options to purchase more than one million shares in the company pursuant to two options agreements. The Chancery Court agreed with Kiromic that a waiver clause in a third options contract between Kiromic and the director superseded all prior options contracts and extinguished the rights to all unexercised options under those contracts. In particular, the Court rejected Terrell's argument that the two prior options contracts fell within a carveout in the waiver clause for "securities of the Company, if any, issued" to the plaintiff prior to the date of the third contract. Rather, the Court held, unexercised options, though they may be "securities" under federal securities laws and at common law, are not "issued" securities. "Issued" securities, under the language of the contract, refer only to issued shares of stock.

The path that this case took to arrive at dismissal was circuitous. Back in 2021, the Chancery Court initially declined to reach our contract arguments, instead dismissing on the technical grounds that the third options agreement delegated these issues to a committee of the Kiromic board. After the committee reaffirmed Kiromic's position, the plaintiff appealed to the Delaware Supreme Court, arguing that the committee (composed of non-lawyers) was not authorized to pass on questions of contract interpretation under Delaware law and that, in any event, Kiromic's interpretation of the waiver provisions in the third agreement was unconscionable. After oral argument in early 2023, the Delaware Supreme Court reversed and remanded for the Chancery Court to independently review the committee's decision *de novo*, but decisively rejected the plaintiff's unconscionable argument, finding (as Sheppard Mullin argued) that "Terrell was not a weak counterpart. Rather, he was a sophisticated party, charged by virtue of his directorship with participating in the management of the company."

The Delaware Supreme Court's finding of no-unconscionability was key to Kiromic's success on remand. Besides agreeing with Kiromic regarding the interpretation of the waiver clause in the third options contract, the Chancery Court expressly relied on the Supreme Court's determination regarding no-unconscionability in concluding that no new consideration was required in order for the third options contract to supersede and extinguish the prior two options contracts. The case is *Jason Terrell v. Kiromic BioPharma, Inc.*, Civil Action No. 2021-0248-MTZ, in the Delaware Court of Chancery.

The Sheppard Mullin litigation team consisted of Rob Friedman, Josh Schlenger and Katherine Anne Boy Skipsey.

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