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COMMENTARY

PEN MEETING PAPER MIGHT NOT PROVE A MEETING OF THE MINDS

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On August 21, 2019, a Delaware Chancery Court ruled that a fully executed written agreement—signed by relatively sophisticated parties—can be deemed unenforceable if uncertainty exists in the agreement's formation. In *Kotler v. Shipman Associates, LLC*, C.A. No. 2017-0457-JRC (Del. Ch. Aug. 21, 2019, corrected (typo on page four) Aug. 27, 2019), the court ruled that an equity warrant agreement between an employee and her former employer was unenforceable because it did not codify the required objective intent of both parties to be bound by its provisions.

Stacey Kotler worked for Defendant, Shipman Associates, LLC, DBA theBalm, ("theBalm"), from 2003–2009. Slip op. at 8, 30. While employed, she frequently requested an equity stake in theBalm. *Id.* at 9. In early 2007, theBalm offered Ms. Kotler the right to purchase shares of the company through an equity warrant. *Id.* at 11. The parties contested the material terms of the agreement and negotiated for eight months before finally coming to what they thought was a final agreement. *See id.* at 12-30. The forfeiture clause, which may or may not have included the existence of a perpetual non-compete/non-solicit provision, was the most contested material term. *Id.* at 24.

Ms. Kotler eventually left theBalm and began working for a new company. *Id*. at 2-3. Subsequently, while theBalm was considering a sale or reorganization, it contacted Ms. Kotler to determine the potential warrant requirements. *Id*. at 3. However, when theBalm discovered that Ms. Kotler had broken the alleged non-compete provision, theBalm refused to comply with the warrant agreement. *Id*. Ms. Kotler brought suit to enforce the agreement. *Id*.

As it is widely known in contract law, "[t]o form an enforceable contract, the parties must have a meeting of the minds on all essential terms." *Id.* at 42. The parties' intent to be bound is an objective standard based on their dialogue and actions at the time of the agreement, and all material

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terms must be agreed upon. *See id.* at 42-43 (citing *Black Horse Capital, LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2014); *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018)).

The court considered whether a fully executed contract may be deemed unenforceable. It concluded that such a contract could, despite strong evidence—Ms. Kotler's possession of a signed agreement—that it represents the cumulative intention of both parties. Slip op. at 47. Three circumstances led to the court's conclusion:

(1) extrinsic evidence indicated that the parties did not intend to be bound by the agreement;
(2) the party against which enforcement was sought acted in accordance with their reasonable belief of an alternative, final agreement; and
(3) the party seeking to enforce the contract lacked the ability to conclusively demonstrate that the parties came to an agreement, other than by introducing a stand-alone signature page that was allegedly signed by the other party absent the rest of the agreement. *See id.* at 41-47.

Following *Kotler*, a company seeking to shield itself from liability related to contract disputes should, of course, ensure that all parties to the contract intend to be bound by one, complete, unrevised version of the contract. Conversely, a company that believes it is an unwilling party to a signed, but unenforceable, contract should carefully consider whether the three circumstances mentioned above exist before developing its litigation strategy.