# Court of Chancery Holds "Executed" Contract Unenforceable, Highlighting the Risks of Using Stand-Alone Signature Pages

Related People:
Alexandra M. Joyce

## Delaware Law Update

*09.13.2019*

The Delaware Court of Chancery's recent decision in *Kotler v. Shipman Associates, LLC,*[1]serves two important reminders for practitioners and clients: First, parties to a contract should keep thorough records of contract negotiations. Second, parties should keep the proposed agreement and corresponding signature pages together at all times. Because the parties in *Kotler* failed to do both, the court held that a "fully executed" agreement was not enforceable.

### Case Background

Stacey Kotler was an independent contractor engaged as a salesperson for Shipman Associates, Inc.,[2] a company engaged in the business of selling cosmetics. For years Kotler sought an equity share in the company, and the company eventually offered to grant Kotler a warrant to purchase equity. Thereafter, negotiations for a warrant agreement began. However, noticeably absent from the record in this case was *any* contemporaneous evidence of those negotiations, including records of communications between the parties (email or otherwise) and notes. The parties did not make or keep such records. Kotler herself believed that she had hired counsel during these negotiations, but could not recall who she had hired and possessed no record of who had represented her. The only evidence provided to the court were drafts of the warrant agreement, including an "executed" draft provided by Kotler, and the parties' testimony provided with faded memories.

The Court of Chancery reviewed the various drafts that were exchanged between the parties over many months. Non-compete and non-solicitation terms were of material importance to the parties. The company was unwavering in its demand for perpetual non-compete and non-solicitation terms, but Kotler sought to exclude such terms or otherwise countered with less restrictive terms. The exchanging of drafts was, at best, sloppy.

After a number of drafts had been exchanged, and after the company sent Kotler what it thought was a final warrant agreement for execution, Kotler made further changes to the agreement without the company's knowledge, including fixing typographical errors, materially modifying the non-solicit lookback period, and limiting the contract's forfeiture provision. Kotler then sent either her modified draft (without notifying the company of her changes) or a stand-alone signature page to the CEO of the company by mail for signature. Unaware of Kotler's changes, the CEO signed the signature page and returned it to Kotler. The CEO did not retain a copy of what she signed because it was not countersigned by Kotler. Kotler then signed her draft.

Several days later, Kotler spoke to the company's president, and during that conversation they agreed to reduce the number of shares subject to the warrant. Kotler created a revised draft of the agreement incorporating

the change to the number of shares. Kotler then attached the CEO's previously signed signature page and her own signature page to the latest draft and kept the "executed" contract for herself. Thus, although both parties knew they had signed a contract in 2007, the parties had different understandings of that contract's final terms because of the manner in which the drafts were modified and signature pages were exchanged. The differing drafts came to light nearly 10 years later when the company was preparing for sale, which would trigger Kotler's right to purchase shares under the warrant agreement. A dispute arose over which version was agreed to, and Kotler sued.

## Court of Chancery Decision

In finding Kotler's "fully executed" contract unenforceable, the court relied on well-settled contract principles. The court found that, despite the agreement being fully executed, the signature page was attached to a version of the contract that was not the version that the CEO signatory intended to execute. Because a contract cannot be enforceable if the parties did not objectively manifest an intent to be bound to material terms, the court held that the terms of Kotler's "executed" agreement did not express the consent of the parties to the material terms.

## Takeaways

As a practical matter, the mass use of email as a means of communication between transacting parties necessarily creates a record of negotiations and exchanges of drafts. Best practice is to keep the proposed agreement and corresponding signature pages together at all times. However, to the extent parties need to exchange stand-alone signature pages for timing reasons or due to locations of the parties, practitioners and clients must be careful to ensure that signatures are appended to the terms actually agreed upon by the parties.

[1] C.A. No. 2017-0457-JRS, 2019 WL 4025634 (Del. Ch. Aug. 21, 2019, corrected, Aug. 27, 2019).

[2] Shipman Associates, Inc. is now Shipman Associates, LLC.