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IN THE

Supreme Court of the State of Delaware

AG ONCON, LLC, AG OFCON, LTD, AND
OPTI OPPORTUNITY MASTER FUND,
Appellants/Plaintiffs-Below,

v.

LIGAND PHARMACEUTICALS, INC.,
Appellee/Defendant-Below.

NO. 300, 2019

APPEAL FROM THE CHANCERY COURT OF THE STATE OF DELAWARE

C.A. NO. 2018-0556-JTL

[CORRECTED] APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Plaintiffs AG Oncon, LLC, AG Ofcon, Ltd., and Opti Opportunity Master Fund ("Plaintiffs") appeal from an order of the Chancery Court dismissing their Complaint with prejudice.

Plaintiffs are good-faith subsequent purchasers for value of certificated securities (specifically, convertible senior notes (the "Notes")) issued by Defendant Ligand Pharmaceuticals, Inc. ("Ligand") in the public securities markets. Plaintiffs relied on the clear terms of the Notes when deciding to purchase them. Ligand subsequently amended the Notes' conversion rights—unilaterally and without Plaintiffs' consent—through a "supplemental indenture" that replaced the Notes' payment terms with conflicting terms from a non-binding, private offering memorandum.

In dismissing Plaintiffs' Complaint, the Chancery Court held that (i) an issuer of public securities can unilaterally replace essential payment terms on the face of the security with conflicting terms from a non-binding, private offering memorandum and (ii) the issuer's unilateral change of these terms can bind subsequent purchasers for value. The Chancery Court based its ruling on a provision in the Indenture incorporated by the Notes, that, according to the court, "permits

Ligand to amend the Indenture to conform" to the "Description of the Notes" section of the offering memorandum.

The Chancery Court's ruling is at odds with the plain language of the Indenture itself, and eviscerates consent protections afforded to investors by centuries-old doctrine embodied in the Uniform Commercial Code and the Trust Indenture Act. Both the Indenture and New York law clearly prohibit Ligand from (i) incorporating into a certificated security conflicting terms in an offering memorandum, and (ii) modifying a security's core payment terms without holder consent. Moreover, because these protections apply to nearly all securities traded in public financial markets, the Chancery Court's ruling creates uncertainty, leaving purchasers to guess whether a security's terms are enforceable or subject to the issuer's unilateral modification.

SUMMARY OF ARGUMENT

1. The Chancery Court reversibly erred in dismissing Plaintiffs' claims based on an incorrect interpretation of the Indenture and its plain language.

A. Section 6.07 of the Indenture clearly and unambiguously protected against Ligand's unilateral impairment of Plaintiffs' conversion rights. The Chancery Court's contrary interpretation of § 6.07 rewrites its plain terms and renders specific language included by Ligand to protect against impairment superfluous.

B. Section 9.06 of the Indenture further protected against impairment of conversion rights in violation § 316(b) of the Trust Indenture Act ("TIA")—a statutory provision that provides protections analogous to § 6.07. The Chancery Court disregarded § 9.06's plain language.

C. The Chancery Court's interpretation and use of Indenture § 9.01(b) violates § 8-202 of the New York Uniform Commercial Code ("UCC"). The UCC prohibits Ligand from using conflicting terms in a private offering memorandum to override payment terms stated on the face of the Notes. Section 8-202 exists for the very purpose of protecting investors from having to determine whether conflicting terms even exist, much less govern their investment.

D. Alternatively, the Chancery Court's interpretation of § 9.01(b) creates clear conflict and ambiguity within the Indenture. Plaintiffs' interpretation of the Indenture warranted discovery.

2. The Chancery Court reversibly erred in dismissing the Complaint by going outside its four corners to rule on Ligand's motion.

A. The Chancery Court improperly relied on facts set forth in Ligand's briefing that did not appear in, and contradicted, the Complaint.

B. The Chancery Court further erred in resolving disputed factual assertions and affirmative defenses raised by Ligand—including the defense of mistake—in favor of Ligand.

STATEMENT OF FACTS

A. Overview

Plaintiffs are investment funds. (Chancery Court's Op., Exhibit A hereto, at p. 1). Plaintiffs purchased convertible Notes publically issued by Ligand. (*Id.*). Plaintiffs did not acquire the Notes as part of their private offering. (*Id.*). Plaintiffs were not involved in drafting the Notes or the terms of an indenture dated August 18, 2014 (the "Indenture") incorporated by the Notes. (*Id.*).

Ligand issued the Notes as certificated securities under New York law. (A71). Ligand was represented in the issuance by a large law firm known for its financial services work, including convertible debt offerings. (A283). As alleged in the Complaint, Plaintiffs purchased the Notes in good-faith, for value, without notice of defect, and with the belief that the terms of the Notes contained the complete and final agreement underlying their investment. (A295).

Prior to issuing the Notes, Ligand prepared an offering memorandum dated August 12, 2014 ("Offering Memorandum" or "OM"). (A290). The OM was not negotiated and did not purport to bind Ligand or any other purchaser of Notes. (A180 ("nothing contained in this [OM] or the documents incorporated by reference herein is, nor should you rely upon it as, a promise or representation, whether as to the past or the future")). Seven days prior to issuing the Notes, Ligand issued a press release announcing its intention, "subject to market conditions and other forces" to

issue $225 million in convertible notes. (A292). That disclosure stated "[t]he initial conversion rate, interest rate and certain other terms of the notes *will be determined by negotiations between Ligand and the [underwriters]*." (*Id.*) (emphasis added). Plaintiffs were not part of those negotiations, including the specific market conditions and other forces Ligand and the underwriters encountered. (A295).

Ligand's common stock is publicly traded. (A284). Therefore, potential investors can view the Notes' terms through public disclosures filed by Ligand with the U.S. Securities and Exchange Commission (the "SEC"). Ligand elected to issue the Notes as private, unregistered securities. (A179). Indeed, Ligand made the OM "strictly confidential" and declared distribution of the OM, including to subsequent purchasers, "unauthorized." (A180).

B. Conversion Terms Were Stated on the Face of the Notes

Ligand issued the Notes with an interest rate of 0.75%. (A140). The low rate meant investors would profit only if Ligand's common stock appreciated significantly in value. (A284). Specifically, to convert the Notes, Ligand's stock price needed to appreciate from $54.98 (as of August 12, 2014) to in excess of $97.56 (by 70%) for at least twenty of the last thirty trading days of the prior quarter end. (A119).

Counting on Ligand's stock to appreciate was anything but a certainty. In the decade prior to the Notes' issuance, Ligand's common stock never approached

$100/share, let alone for 20 of 30 days prior to the close of a quarter. (A433-434). Ligand's stock traded below $50 per share just prior to the Note issuance. (*Id.*). Moreover, even if the common stock achieved record highs, it had to sustain those heights for fifty trading days following conversion for investors to receive a return. (A124). Stated differently, if after conversion the common stock dipped below $75.04/share investors would receive only the original principal amount of their investment. (*Id.*). Even the $75.04 share price represented an increase of nearly 50% from the closing price when Ligand issued the Notes. (*Id.*). In short, the interest rate under the Notes did not compensate investors for the considerable investment risk. This made the Notes' conversion terms by far the most critical economic aspect of the Notes. (A303).

The Notes' terms informed investors what they would receive upon conversion:

> 6. Conversion.
>
> (c) [sic] Subject to and upon compliance with the provisions of the Indenture (including, without limitation, the conditions to conversion of this Note set forth in Section 10.01 of the Indenture), a Holder hereof has the right, at such Holder's option, to convert the principal amount hereof or any portion of such principal amount that is $1,000 or an integral multiple thereof, subject to Sections 10.01 and 10.03 of the Indenture, into cash and shares of Common Stock, if any (subject to the Company's right to deliver cash in lieu of all or a portion of such shares

> of Common Stock), at the Conversion Rate in effect on the Conversion Date. The Conversion Rate shall initially equal 13.3251 shares of Common Stock per $1,000 and is subject to adjustment as described in the Indenture.

See (A154).

The Notes further informed investors that Ligand would calculate the Daily Settlement Amount, and its components, in accordance with how Ligand defined those terms in the Indenture. (A153). Finally, Ligand made clear that the Notes' terms "include those stated in the Indenture and those made part of the Indenture by reference to the TIA." (*Id.*). Ligand did not elect to make the Notes subject to the OM or any section of the OM. (*Id.*).

Because the conversion terms were essential to Plaintiffs' return on principal investment, Ligand promised Plaintiffs that it would not modify or impair Plaintiffs' conversion rights without first seeking written consent. (A108, A117-118). Specifically, § 6.07 of the Indenture states:

> ***Notwithstanding any other provision of this Indenture,*** the right of any Holder to bring suit for the enforcement of payment of principal, accrued and unpaid interest (including Additional Interest and Special Interest), if any, or payment of the Fundamental Change Purchase Price on or after the respective due dates, or ***the right to receive consideration due upon conversion of Notes in accordance with Article 10, shall not be impaired or affected without the consent of such Holder and shall not be subject to the requirements of Section 6.06***.

(A108) (emphasis added).

Additionally, § 9.06 further provided that "[e]very supplemental indenture" "shall comply with the [TIA]," including its protections against impairment of repayment rights. (A118). Plaintiffs relied on these clear and unambiguous statements in the Notes to determine their conversion rights. (A285).

C. Ligand Entered into Hedge Transactions Based on the Indenture's Terms

Contemporaneously with the issuance of the Notes, Ligand entered into private hedge transactions designed to provide investors additional security regarding payment. (A271). Ligand designed the hedge transactions to protect against a significant increase in share price. (*Id.*). Ligand publically disclosed the existence of the hedge transactions upon entry into the Indenture. (*Id.*). The hedges incorporated and mirrored Ligand's payment obligations under the Notes. (*Id.*). Ligand's public announcement informed investors that Ligand prepared itself to satisfy the Notes' payment obligations based on the Indenture's terms. (*Id.*). As the hedges reflect the terms of the Notes, additional sophisticated counsel representing Ligand and the hedge counterparties likely reviewed the Indenture and its drafts prior to issuance of the Notes. (A283).

D. Ligand Unilaterally Amends the Indenture

In February 2018, Ligand (ostensibly in response to a proposed conversion), purported to enter into a First Supplemental Indenture (the "Unilateral

Amendment"). (A285). In the Unilateral Amendment, Ligand sought to replace the definition of "Daily Share Amount," a material defined term appearing in the definition of Daily Settlement Amount—the term defining conversion consideration. (A285-286). By redefining Daily Share Amount, Ligand sought to materially decrease the consideration a Note holder would receive on conversion. (*Id.*). The Unilateral Amendment was done without prior notice to or consent from the Plaintiffs. (*Id.*).

Ligand promised the Trustee it would disclose the Unilateral Amendment publicly with the SEC, but did not do so. (A286). In late May of 2018, Ligand publicly disclosed the existence of a Second Supplemental Indenture which led to the realization that a first supplemental indenture must, unbeknownst to Plaintiffs, exist. (A304). After obtaining a copy of the Unilateral Amendment, Plaintiffs notified Ligand that it was not binding. (*Id.*). Ligand, through its counsel, informed Plaintiffs that Ligand believed it could unilaterally amend the Notes under Indenture Section 9.01(b) to "conform the terms of the Notes or Indenture to the description of the notes section in the Offering Memorandum" because according to Ligand the Indenture "contained an obvious defect." (A281). In that same correspondence, Ligand provided a copy of the OM. (*Id.*). Ligand did not provide the draft indenture or information on the hedge transactions. (*Id.*). In the same correspondence, Ligand,

through counsel, reported that only *one* of the four underwriters concluded that the terms of the Indenture conflicted with the terms of the OM. (*Id.*).

E. The Unilateral Amendment Conflicts with the Offering Memorandum

The OM clarified that Ligand could not unilaterally amend the Notes. The OM stated that the Notes' binding terms would be as set forth in the Notes and Indenture. The OM expressly provided that purchasers would acquire the Notes on a "when, as and if issued" issued basis. (A247). The OM further provided that the Notes and Indenture (and not the OM) define the rights of the Holders:

> ***The following description is a summary of the material provisions of the notes and the indenture and does not purport to be complete. This summary is subject to, and is qualified by reference to, all of the provisions of the notes and the indenture, including the definitions of certain terms used in the notes and the indenture. We urge you to read these documents because they, and not this description, define your rights as a holder of the notes.***

(A205) (emphasis added).

The OM also stated that conversion rights could not be unilaterally impaired:

> Each holder shall have the right to receive payment or delivery, as the case may be, of: [principal, interest, and]
>
> • ***the consideration due upon conversion of, its notes***, on or after the respective due dates expressed or provided for in the indenture, or to institute suit for the enforcement of any such payment or delivery, as the case may be, ***and such right to receive such payment or delivery, as the***

> ***case may be, on or after such respective dates shall not be impaired or affected without the consent of such holder***.

(A229) (emphasis added).

Ligand also stated that the Indenture's terms, once final, would replace conflicting terms contained in the OM:

> **Documents Incorporated by Reference**
>
> We have "incorporated by reference" in this offering memorandum certain documents that we file with the SEC. This means that we can disclose important information to you by referring you to another document filed separately with the SEC. This information incorporated by reference is a part of this offering memorandum, unless we provide you with different information in this offering memorandum or the information is modified or superseded by a subsequently filed document. **Any information referred to in this way is considered part of this offering memorandum from the date we file that document**.

(A258) (emphasis added).

The Unilateral Amendment nevertheless sought to (a) utilize a term in the OM to establish Plaintiffs' legal rights to conversion consideration and (b) impair conversion consideration without their consent. (A303). Accordingly, Plaintiffs filed their Complaint on July 27, 2018. (A016). A Verified Supplemental Complaint (hereinafter "Complaint") clarifying Plaintiffs' respective conversion dates was filed on September 12, 2018. (A014, A312-340). Ligand filed a Motion to Dismiss the Supplemental Complaint, which was fully briefed and argued on April 1, 2019.

(A003). On May 24, 2019, the Chancy Court issued its Memorandum Opinion. (Exhibhit A hereto). On June 13, 2019, the Chancery Court issued an Order dismissing the Complaint in its entirety with prejudice. (Exhibit B hereto).

F. The Chancery Court's Ruling

In the Opinion, the Chancery Court recited the legal proposition that, in deciding a motion to dismiss, facts are to be drawn from the Complaint, assumed to be true, and inferences therefrom drawn in Plaintiffs' favor. (Ex. A at p. 10). The Opinion does not, however, draw facts solely from the Complaint. (*Id.* at pp. 1-9). For example, the Opinion assumes that the OM was final and binding, and any differences between the Indenture and OM reflect a mistake in the Indenture. (*See, e.g.*, Ex. A at p. 8 (referring to an "erroneous formula" in the Indenture). The Complaint, however, makes no such factual assertion and, to the contrary, alleges that not all parties involved in the formation of the Indenture agreed it contained a "defect" or mistake. (A281).

As another example, the Opinion states, without any reference to allegations in the Complaint, the following:

> Unfortunately, the indenture used a different term in the denominator of the conversion formula. Instead of referring to the daily VWAP, the indenture referred to the "Daily Principal Portion." That term was defined as one-fiftieth of the principal due on the note. It was a fixed dollar amount ($20 per $1,000 of issuance) that had nothing to do with the trading price of Ligand's stock, and its use made no sense in light of what the

> formula attempted to calculate. Exercising its right to conform the terms of the indenture to the offering memorandum, Ligand replaced the reference to the Daily Principal Portion with a reference to the daily VWAP.

(Ex. A at p. 2).

However, none of the above "facts" are drawn from the Complaint. The Complaint plead that per Ligand "The initial conversion rate, interest rate and certain other terms of the notes will be determined by negotiations between Ligand and the [underwriters]." (A292). The Complaint also referenced the hedge transactions that would significantly reduce Ligand's payment obligations under the Notes. (A293). The Complaint also did not and could not speculate as to whether or not any formula "made sense" as Plaintiffs plead that they were not involved in the drafting of the OM or Indenture, instead relying on the Note. (A295-296).

The Opinion also states that "the plaintiffs claim they are entitled to conversion consideration amounting to $4 billion." (Ex. A at p. 2). Plaintiffs, however, have not specified the damages they seek.

The Opinion further references a chart purporting to show that Ligand did not have enough authorized shares to satisfy noteholder conversions using a hypothetical and constant share price of $207.17. (Ex. A at p. 8). Again, this did not come from the Complaint—it came from Ligand's motion. *Compare* (Ex. A at p. 8) *with*

(A386). Regardless, as Ligand admitted, the number of authorized shares is irrelevant because the conversion obligations here were to be cash-settled. (A374).

The Chancery Court made three principal legal rulings. First, the court ruled that Indenture § 9.01(b) (what it labeled as the "Conforming Amendment Provision") permitted Ligand to modify the Notes with a conflicting provision from the OM. (Ex. A at pp. 8-12).

Second, the Chancery Court ruled that Ligand could materially and adversely affect Plaintiffs' rights through the Conforming Amendment Provision despite the express provisions in §§ 6.07, 9.02, and 9.06. (Ex. A at pp. 15-16). As to Indenture § 6.07, which includes "notwithstanding" trumping language, the Chancery Court believed that Ligand's asserted interpretation—that the provision affected only enforcement rights—was the only reasonable and unambiguous interpretation. (Ex. A at pp. 18-19).

Lastly, it ruled that the Unilateral Amendment does not violate the TIA because: (i) the Notes were not registered and TIA § 316(b) is thus inapplicable; (ii) Indenture § 9.06—which provides that "every supplemental indenture executed pursuant to this Article shall comply with the TIA"—is inapplicable because it does not expressly cite § 316(b); and (iii) § 316(b) does not prevent impairment of conversion rights derived from a principal investment. (Ex. A at pp. 20-27).

ARGUMENT

I. THE CHANCERY COURT ERRONEOUSLY DISMISSED THE COMPLAINT WITH PREJUDICE

A. Question Presented

Given that the UCC and multiple provisions in the Indenture expressly prohibit impairment of conversion rights without noteholder consent, did the Chancery Court commit reversible error in holding that the Complaint failed to state a claim for breach of the Indenture based on Ligand's Unilateral Amendment? This issue was preserved below at A442-72; Ex. A at pp. 1-10.

B. Standard and Scope of Review

The Supreme Court reviews *de novo* a lower court's grant of a motion to dismiss under Chancery Civil Rule 12(b)(6). *RBC Capital Markets, LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014); *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011). In reviewing the Chancery Court's dismissal of Plaintiffs' Complaint, this Court must (1) accept all of the well-pleaded factual allegations therein as true, (2) accept even vague allegations as well-pleaded if they gave Ligand notice of the claim, (3) draw all reasonable inferences in favor of Plaintiffs, and (4) not affirm a dismissal unless Plaintiffs would not be entitled to recover under any reasonably conceivable set of circumstances. *RBC Capital Markets*, 87 A.3d at 639; *Central Mortg. Co.*, 27 A.3d at 535.

The pleading standards applicable to the motion to dismiss stage in Delaware have been described by this Court as "minimal" or "low." *Central Mortg. Co.*, 27 A.3d at 536. Under Delaware law,[1] a complaint need not contain heightened fact pleadings of specifics, rather it "need only give general notice as to the nature of the claim asserted" to avoid dismissal. *Universal Capital Mgmt. v. Micco World, Inc.*, 2012 WL 1413598, at *2 (Del. Super. Feb. 1, 2012) (citation omitted). This Court has repeatedly held that "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability"'—a standard akin to determining whether the claim is possibly true. *Central Mortg. Co.*, 27 A.3d at 537 & n. 13. "All that matters at the motion to dismiss stage," then, is that the well-pleaded complaint alleges a claim that, if proven, would "entitle [the plaintiff] to relief under a reasonably conceivable set of circumstances." *Id.* at 538. Thus, at the motion to dismiss stage, "it matters not which party's assertions are actually true." *Id.* Indeed, a trial court may believe as a factual matter that it ultimately may be impossible for

[1] Although New York law applies to the substance of Plaintiffs' breach of contract claims because the Indenture contains a choice of law provision providing for the application of New York law, Delaware law applies to procedural issues such as the standard of review on a motion to dismiss. *See, e.g., Noddings Inv. Grp., Inc. v. Capstar Commc'ns., Inc.,* 1999 WL 182568, at *2 (Del. Ch. Mar. 24, 1999) (applying Delaware standard of review on motion to dismiss in dispute over contract governed by New York law).

a plaintiff to prove its claims at a later stage of the proceeding, "but that is not the test to survive a motion to dismiss." *Id.* at 536.

C. Merits of Argument

The facts alleged in the Complaint were more than sufficient to meet the "low" threshold for surviving Ligand's motion to dismiss below. *Central Mortg. Co.*, 27 A.3d at 536. The Complaint adequately plead each of the essential elements of a breach of contract claim. Specifically, Plaintiffs alleged that they (i) were good-faith purchasers for value of securities issued by Ligand, (ii) Ligand improperly issued the Unilateral Amendment without seeking Plaintiffs' consent in violation of the express terms of the Indenture (and TIA) and (iii) suffered damages. (A283-308); *RBC Capital Markets, LLC*, 87 A.3d at 640 (setting forth elements of breach of contract claim under New York law – "the making of an agreement, performance by the plaintiff, breach by the defendant, and damages . . ."). The Chancery Court incorrectly interpreted and disregarded multiple provisions in the Indenture that prohibit material, unilateral changes like the Unilateral Amendment.

1. Plaintiffs Plead Sufficient Factual Allegations in the Complaint to State a Claim for Breach of the Indenture Based on § 6.07

First, the Chancery Court erroneously held that Indenture § 6.07 "does not independently protect" Plaintiffs' conversion rights from amendment. (Ex. A at p. 19). While the court correctly recognized that § 6.07 is a trumping provision that

must be given precedence over other provisions of the Indenture (*id.*), it did not actual apply those principals when interpreting § 6.07. Rather, the court looked to other sections of the Indenture to interpret the scope of § 6.07. Interpreting the scope of § 6.07 by reference to other sections of the Indenture constitutes legal error as the result was that § 6.07 is not actually treated as a stand-alone trumping provision. *See Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 83-4 (1st Dep't 2013) (notwithstanding clause trumps conflicting terms even where it renders another clause meaningless).

As illustrated below, § 6.07 protects two separate and independent "rights": (i) the right to receive conversion payments free from impairment or affect without holder consent *and* (ii) the right to bring suit to enforce non-payment of principal, interest, or the Fundamental Change Purchase Price. The Chancery Court's interpretation of § 6.07 only makes sense if specific, additional language set forth in red below that Ligand chose *not* to use were included in the Indenture:

Indenture Section 6.07	**Ligand and The Chancery Court's Interpretation of Section 6.07**
Notwithstanding any other provision of this Indenture, the right of any Holder to bring suit for the enforcement of payment of principal, accrued and unpaid interest (including Additional Interest and Special Interest), if any, or payment of the Fundamental Change Purchase Price on or after the respective due dates, *or* ***the right to receive consideration due upon conversion of Notes in accordance with Article 10 [the "Conversion Protection Right"], shall not be impaired or affected without the consent of such Holder and shall not be subject to the requirements of Section 6.06.***	***Notwithstanding any other provision of this Indenture,*** the right of any Holder to bring suit for the enforcement of payment of principal, accrued and unpaid interest (including Additional Interest and Special Interest), if any, or payment of the Fundamental Change Purchase Price on or after the respective due dates, or **the right to bring suit for the enforcement of** ~~***the right to receive***~~ ***consideration due upon conversion of Notes in accordance with Article 10,*** shall not be impaired or affected without the consent of such Holder and shall not be subject to the requirements of Section 6.06**.**

Plaintiffs' interpretation of the Indenture is correct and explains why the word "right" appears twice, with the second right—the right at issue here—being in an independent clause offset by commas.[2] *See Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1, 7 (2d Cir. 2017) (interpreting the statutory TIA provision from which § 6.07 is based, noting that "these two rights are best viewed

[2] This interpretation also explains why § 6.07 concludes with "*and shall not be subject to the requirements of Section 6.06.*" Section 6.06 of the Indenture limits the right to bring suit in certain instances. By including *and not subject to Section 6.06*, Ligand made clear Holders not only are protected against impairment, but also have the individual right to bring suit to enforce the Indenture's original payment terms.

as distinct from one another . . . [t]he former right, it seems to us, prohibits non-consensual amendments of core payment terms . . . [t]he latter right (to sue) ensures that individual bondholders can freely sue to collect payments owed under the indenture."). The Chancery Court erred by not making a distinction between *both* rights protected by § 6.07, as directed by *Marblegate*, and refusing to give full meaning and effect to Ligand's choice of words. *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 16 N.E.3d 1165, 1174 (N.Y. 2014) (indenture, like any other contract, should be construed to give "effect to the precise words and language used").

Plaintiffs' interpretation of § 6.07 also finds support in the language of the OM. The OM makes clear that the right to receive conversion payments, and the separate right to institute suit for payment would both "not be impaired or affected without the consent" of a holder:

> **Each holder shall have the right to receive payment or delivery**, as the case may be, of: . . .
>
> - the consideration due upon conversion of,
>
> - its notes, on or after the respective due dates expressed or provided for in the indenture, **or to institute suit for the enforcement of any such payment or delivery, as the case may be, and such right to receive such payment or delivery, as the case may be, on or after such respective dates shall not be impaired or affected without the consent of such holder**.

OM at p. 47 (A229) (emphasis added).

The Chancery Court erred in selectively relying on only parts of the OM while ignoring the above provision clearly protecting against nonconsensual impairment of conversion rights.

The Chancery Court also erred in relying on the commentaries to § 6.07 of the American Bar Association's 2000 simplified model indenture as support for its preferred interpretation. (Ex. A at p. 19; Exhibit C hereto). Foremost, the Commentaries are not a substitute for construing the plain language of the agreement. *Quadrant*, 23 N.Y.3d at 564-65 (declining to adopt ABA Commentaries' explanation of what parties typically intend in an indenture in favor of the words actually used). Indeed, the New York Court of Appeals has held that "where the language of the contract is clear," courts may not look beyond "the terms of the document to give effect to the parties' intent." *Quadrant*, 23 N.Y.3d at 564.

Moreover, the 2000 ABA model simplified indenture uses specific, additional prefacing language, underlined below, addressing the right to convert that Ligand chose not to adopt here:

> ***Section 6.07*. Rights of Holders To Receive Payment.**
>
> Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to receive payment of Principal and interest on the Security, on or after the respective due dates expressed in the Security, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of the Holder.

> Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to bring suit for the enforcement of the right to convert the Security shall not be impaired or affected without the consent of the Holder.

See Am. Bar Ass'n, Revised Model Simplified Indenture, 55 Bus. Law. 1115, 1215 (2000) (underline added).

If anything, Ligand's omission of the underlined language contained in the model indenture confirms Plaintiffs' interpretation of § 6.07's plain language is correct and consistent with Ligand's intent. *See Quadrant*, 16 N.E.3d at 1178 (construing indenture according to plain terms which arguably conflicted with model indenture commentaries because "parties sophisticated and well versed in this area of the law—like the parties here—are well aware of these commentaries . . .").[3] This Court should therefore reverse.

[3] Ligand argued below that § 6.07 cannot preclude an amendment to payment terms because it appears in the Indenture article dealing with defaults. However, Ligand's decision to include the Conversion Protection Right in Section 6.07 is commonplace. Any attempt to impair or affect conversion rights is not binding so that when a Holder converts its Notes it can sue for payment. Further, section headings "are not intended to be considered a part [of the Indenture] and shall not modify or restrict any of the terms or provisions [there]of." Indenture § 12.13 (A144).

2. Plaintiffs Plead Sufficient Factual Allegations in the Complaint to State a Claim for Breach of the Indenture Based on § 9.06, Which Expressly Incorporates Protections Against Impairment of Conversion Rights Provided Under the TIA

The Chancery Court erred in dismissing the Complaint for another, independent reason. The Chancery Court misinterpreted and overlooked the clear protections provided to holders under Indenture § 9.06 against impairment of conversion rights without their consent. Section 9.06 reads as follows:

> Section 9.06 *Conformity with Trust Indenture Act*. ***Every supplemental indenture*** executed pursuant to this Article [9] ***shall comply with the Trust Indenture Act.***

Indenture § 9.06(b)(emphasis added).

There is only one clear interpretation of the Indenture's inclusion of the language found in § 9.06: Ligand chose to make clear that the protections of the TIA and its § 316(b) applied to any supplemental indenture. Section 316(b) of the TIA, which serves as the model for Indenture § 6.07, states, in pertinent part:

> Notwithstanding any other provision of the indenture to be qualified, **the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security**, or to institute suit for the enforcement of any such payment on or after such respective dates, **shall not be impaired or affected without the consent of such holder**, . . .

TIA, 15 U.S.C. § 77ddd(b) (emphasis added).

Every supplemental indenture issued under Article 9 of the Indenture—including the Unilateral Amendment—was thus required to comply with TIA § 316(b) and its protections against impairment of payment rights without holder consent. The Chancery Court erred in disregarding the plain language of § 9.06, and further erred in opining that, even if §316(b) applied, it would not control the Unilateral Amendment.

a. The Chancery Court's Opinion Incorrectly Disregarded the Plain Language of § 9.06

Instead of reading § 9.06 of the Indenture in accordance with its plain language, as New York law requires (*see Quadrant*, *supra*, 23 N.Y.3d at 564), the Chancery Court held that "[§] 9.06 must mean that any supplemental indenture shall comply with the [TIA] ***to the same extent as the original indenture***." (Ex. A at p. 25) (emphasis added). According to the Chancery Court's opinion, such an interpretation was necessary to "avoid inconsistencies with other references in the Indenture to specific sections of the [TIA]." (*Id.*) The Chancery Court's conclusion, however, is not supported by any explanation of these hypothetical "inconsistences." Indeed, none of the other Indenture sections cited in the Court's opinion which refer to specific TIA sections have any bearing on the issuance of supplemental indentures. *See* (Ex. A at p. 24, n. 6). Ligand in fact admitted in its briefing below that § 9.06 "incorporates a statutory standard into the private contract." (A415).

The Chancery Court's reading of § 9.06(b) not only renders that provision superfluous, but also rewrites the Indenture to read into it specific language—*i.e.*, "to the same extent as the original indenture"—that Ligand could have but chose not to use. Both actions run contrary to New York law. *See Global Funding Grp., LLC v. 133 Cmty. Rd. Ltd.*, 251 F.Supp. 3d 527, 531 (E.D.N.Y 2017) ("a Court 'must consider the entire contract to avoid adopting an interpretation that would result in an inconsistency between provisions or that would render a particular provision superfluous.'"); *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 618 F. Supp. 2d 280, 301 (S.D.N.Y. 2009) ("'[a] court may not rewrite a term of [the Indenture] by 'interpretation' when that term is clear and unambiguous on its face,' even 'to accord with [the Court's] instinct for the dispensation of equity under the facts of a case'") (citing *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir.1981)); *see also Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (like in all breach of contract cases, when a court is determining the parties' rights under an indenture, the court cannot alter the terms of the agreement or allow them to be violated or disregarded). The Court thus erred in its interpretation of § 9.06.

b. The Chancery Court's Opinion Incorrectly Concluded That § 316(b) of the TIA Does Not Protect Against Impairment of Conversion Rights

Compounding its error in disregarding § 9.06 of the Indenture, the Chancery Court also incorrectly held that the Unilateral Amendment did not fall within the scope of § 316(b) of the TIA, even if it applied, because § 316(b) "does not extend to consideration received under a conversion right." (Ex. A at p. 25). As support for its conclusion, the Court's opinion relied on *dicta* contained in a footnote from *RBC Capital Markets, LLC v. Educ. Loan Tr. IV*, 2011 WL 6152282, at *6, n. 36 (Del. Ch. Dec. 6, 2011). The *RBC* opinion, however, did not address whether §316(b) of the TIA applies to conversion rights. Instead, that case addressed a dispute regarding the applicability of a no-action clause[4] to a breach of contract claim brought by bondholders alleging that interest payments made under the subject indenture "were lower than they should have been" as a result of the bond issuer causing the Trust "to make fee payments in excess of the limits imposed by [s]upplemental [i]ndentures." *Id.*, 2011 WL 6152282 at *1, 6. The securities at issue

[4] "The purposes of a no-action clause are to prevent individual holders of notes from bringing unworthy or unpopular actions . . . ." *RBC*, 2011 WL 6152282 at *2. Here, unlike *RBC*, an overwhelming majority of the holders approved of the claim pursued below. *See* (Ex. A at p. 4 "In total, [plaintiffs] acquired notes reflecting a principal amount of approximately $ 212 million, representing 95% of the issued and outstanding notes.").

were auction rate notes, not convertible bonds. *Id.* The facts of *RBC* thus find no parallel here.[5]

In addition to its erroneous reading of *RBC*, the Chancery Court ignored the weight of legal authority confirming § 316(b) of the TIA provides a fundamental protection against impairment of any core payment term absent holder consent. *See Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1, 10 (2d Cir. 2017). Indeed, in interpreting § 316(b), courts have consistently held that "principal," as the term is used in the statute, is to be read broadly and includes not only the promise to return the *face* amount of principal, but all *economic rights derived from the principal of the investment*.

For example, in *UPIC & Co. v. Kinder-Care Learning Ctrs. Inc.*, 793 F. Supp. 448, 455 (S.D.N.Y. 1992), plaintiff alleged defendant breached § 316(b) by failing to make mandatory redemption payments following exercise of plaintiff's "put" right. The issuer argued that Section 316(b)'s principal and interest protection did not protect redemption payments. The court found "no basis in the plain language of Section 316(b) to interpret narrowly the definition of 'principal,' or to limit the

[5] Moreover, the *RBC* footnote cited by the Chancery Court below describes a New York case, *Feder v. Union Carbide Corp.*, 141 A.D.2d 799 (2d Dep't 1988), that does not discuss the scope of the TIA.

definition to principal maturing pursuant to a particular mechanism set forth in the Security or Indenture." *Id.*; *see also Brady v. UBS Fin. Servs., Inc.,* 538 F.3d 1319, 1325 (10th Cir. 2008) (same); *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas*, 2010 WL 2680336, at *5-6, n. 4 (D. Kan. July 1, 2010) (issuer cannot amend put rights without consent because protections under § 316(b) are absolute and extend to any impairment of rights derived from principal investment). Under the court's reasoning in *UPIC,* any payment that derives from principal or is payable at the option of the holder in surrendering the principal amount of its investment qualifies as "principal" for purposes of § 316(b).

The *UPIC* analysis is precisely why courts and commentators speak to § 316(b) as protecting "core payment" terms under a bond. *See Bank of New York v. First Millennium, Inc.*, 598 F. Supp. 2d 550, 565 (S.D.N.Y. 2009), aff'd, 607 F.3d 905 (2d Cir. 2010) ("the purpose of 'Section 316(b) is to require the consent of bondholders of an indenture security for any changes in payment terms.'"). Thus, "[a]s [a] result of section 316(b), a company cannot—outside of bankruptcy—alter its obligation to pay bonds without the consent of each bondholder." *Meehancombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 512-13 (S.D.N.Y. 2015).

Like the put right in *UPIC*, conversion payments represent a demand obligation derived from principal and are thus subject to the protections of § 316(b). As set forth in § 10.01 of the Indenture, each Holder has the right to convert a "principal amount of its Notes" into a conversion payment—the Daily Settlement Amount—under Indenture § 10.03. The Chancery Court recognized that conversion payments derive from factors including (a) the principal amount of Notes converted, (b) the rate at which principal converts to common stock, and (c) the price of the common stock. (Ex. A at pp. 1-5).

The interplay between the principal amount and the conversion payments underscores the danger of any rule that would limit Section 316(b)'s reach to conversion rights, consistent with its purpose. If, as the Chancery Court concluded conversion payments are not protected under the TIA because they are unrelated to "principal," it follows that issuers could amend terms in an Indenture such as the Conversion Rate or Daily Settlement Amount in such a way so as to result in a "busted conversion"—a Holder's conversion of $1,000 of bonds yielding less than $1,000 in payments. This result is not what Congress intended, and one that would undermine the multi-billion dollar U.S. convertible bond market. Congress could have, but did not exclude conversion rights, or for that matter convertible notes,

when it first adopted the TIA in 1939 or when it later amended the TIA through the Trust Indenture Reform Act of 1990.

Upholding the Chancery Court's ruling would also have negative ramifications to the $7.5 trillion U.S. corporate bond market with respect to, among other things, standard mandatory and optional redemption payments, sinking-fund obligations and pre-payment premiums. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (uniformly interpreting common indenture provisions like Section 316(b) is "essential to the effective functioning of the financial markets"). If, as the Chancery Court concluded, Section 316(b) did not apply to conversion rights, the $225 billion convertible bond market would lack TIA protections with respect to the most important economic rights contained in such bonds.

Furthermore, the Chancery Court erred in not considering whether, by incorporating § 316(b) into the Indenture, Ligand intended—as it stated in the Description of Notes section of the OM—to protect against impairment of conversion rights derived from the holder's principal investment. Even assuming there was ambiguity in this question, the Chancery Court should have construed any such ambiguity against Ligand in favor of broader protection to the Plaintiffs. *See Jacobson v. Sassower*, 489 N.E.2d 1283 (N.Y. 1985) (New York law requires

ambiguity to "be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language").

In sum, the Chancery Court erred in its interpretation of § 9.06 of the Indenture and the conclusion that it did not incorporate the anti-impairment protections afforded by §316(b). Section 9.06 provided Plaintiffs clear protection against impairment of conversion rights in connection with the issuance of any supplemental indenture by Ligand. Plaintiffs thus stated a reasonably conceivable claim for Ligand's breach of § 9.06 of the Indenture. The Chancery Court should accordingly be reversed.

3. The Chancery Court Incorrectly Relied on § 9.01(b) of the Indenture

The Chancery Court erred in dismissing Plaintiffs' breach of contract claim given the specific protections against impairment of conversion rights provided in §§ 6.07 and 9.06. The Chancery Court's contrary reliance on § 9.01(b) was error for two reasons.

a. The Chancery Court's Interpretation of § 9.01(b) Is Impermissible Under § 8-202 of New York's Uniform Commercial Code

First, the Chancery Court's interpretation of § 9.01(b) is impermissible under § 8-202 of New York's UCC. The Notes, which are "certificated securities" under the New York UCC, are governed by the following provision in § 8-202:

> Even against a purchaser for value and without notice, ***the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference*** on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, ***to the extent the terms referred to do not conflict with terms stated on the certificate***.

N.Y. U.C.C. § 8-202(a) (emphasis added).

The Chancery Court mistakenly concluded that § 8-202 did not prevent Ligand from modifying the terms of the Notes with a conflicting provision from the OM because the Conforming Amendment Provision is incorporated into the Note. (Ex. A at p. 13). This circular argument ignores that the breach alleged in the Complaint does not depend on whether the Conforming Amendment Provision *exists*. It indisputably does. Rather, Plaintiffs' Complaint alleged that Ligand's *use* of § 9.01(b) was impermissible as it allowed Ligand to make the Note subject to terms from the OM which conflicted with terms in the Note itself. Subjecting the Notes to conflicting terms from the Offering Memorandum is precisely what § 8-202 prohibits. The Chancery Court erred in failing to consider the Conversion Terms set forth in the Notes and their trumping effect over conflicting provisions in the OM as § 8-202 requires.

The importance of the protections afforded by New York UCC § 8-202 are particularly paramount to investors such as Plaintiffs. The Chancery Court's opinion unsettles bedrock protections for investors by allowing issuers to make the terms of a certificated security subject to conflicting terms from an offering document. *See* Official Cmt. 1 to N.Y. U.C.C. Law § 8-202 ("Courts have generally held that an issuer is estopped from denying representations made in the text of a security") (*citing Delaware-New Jersey Ferry Co. v. Leeds*, 186 A. 913, 916 (Del. Ch. 1936) ("If an innocent purchaser for value cannot rely on the verity of what the complainant itself represented by its certificate to be true, there could be no security whatever in transactions of purchase and sale of [certificated securities]. Confidence which is the support of all business relations would be destroyed on a vest and incalculable scale.")).

The policy consequences of upholding the Chancery Court's ruling are severe for any investor considering purchasing a security with a "conforming amendment" provision. Based on the Chancery Court's opinion, good faith purchasers cannot rely on the payment terms stated on the face of a note in making investment decisions. This result is contrary to the critical policy aims of § 8-202 of the Uniform Commercial Code which allows good faith purchasers to rely on the terms of securities to create an efficent and fair securities market. *Id.* at § 8-202(a)-(e).

Under the UCC, it is the issuer, and not the purchaser, who is solely responsible for documenting the terms of the security it intends to issue. *Id.* at § 8-202(d). The Chancery Court's opinion results in issuers avoiding all responsibility and forcing market participants to speculate as to what an issuer intended. Allowing the terms of a certificated security to speak for itself even in the face of conflicting materials referred to in the security is the only way to create an efficent securities market and allocates the risk to the issuer of making sure the terms fo the security are correct and as intended.

This Court should accordingly reverse.

b. The Chancery Court's Interpretation of § 9.01(b) Is Inconsistent With The Plain Meaning of "Conform" And Creates Conflict—Not Harmony—Among The Offering Memorandum And The Indenture

Second, the Chancery Court's interpretation of § 9.01(b) is not consistent with its plain language. Under § 9.01(b), Ligand was permitted to issue a supplemental indenture without notice only to the extent it "conformed" the terms of the Indenture or the Notes to the "Description of the Notes" section in the OM. *See* (Ex. A at p. 9). However, the Chancery Court's interpretation of "conform" is at odds with that term's plain meaning, which is defined as "bring[ing] into harmony or accord." Merriam-Webster's Dictionary, 2019, https://www.merriam-

webster.com/dictionary/conform (last visited Aug. 19, 2019). Stated differently, "conform" does not mean "reform."

Harmonizing or "conforming" the OM's provisions regarding payment terms due upon conversion was impossible in light of the OM itself reciting that the Indenture, and not the OM controlled in that regard:

> The [Description of the Notes Section] is a summary of the material provisions of the note and the indenture and does not purport to be complete. **This summary is subject to, and is qualified by reference to, all of the provisions of the notes and the indenture, including the definitions of certain terms used in the notes and the indenture. We urge you to read these documents because they, and not this description, define your rights as a holder of the note**

OM at p. 23.

The OM also provides that it is superseded by the Indenture once it was publically filed:

> **Documents Incorporated by Reference**
>
> We have "incorporated by reference" in this offering memorandum certain documents that we file with the SEC. This means that we can disclose important information to you by referring you to another document filed separately with the SEC. This information incorporated by reference is a part of this offering memorandum, unless we provide you with different information in this offering memorandum or the information is modified or superseded by a subsequently filed document. **Any information referred to in this way is considered part of this offering memorandum from the date we file that document**.

(A258).

The Chancery Court dismissed the passages above as immaterial to Ligand's actions purportedly because Ligand, "at all times and for all purposes," "relied on the terms of the Indenture," and not the Offering Memorandum. (Ex. A at pp. 12-13). The Chancery Court's reasoning is wrong given that the terms sought to be incorporated by the Unilateral Amendment were set forth in the OM and clearly conflicted with Indenture. Such a result runs contrary to the plain meaning and intent of § 9.01(b). By way of example only, a true "conforming" amendment under § 9.01(b) could have been a supplemental indenture that added a legend required by applicable law on the notes that were not included at the time of issuance.

4. Alternatively, the Indenture's Terms are Ambiguous and the Chancery Court Erred in Prematurely Dismissing the Complaint With Prejudice

In the alternative, reversal is appropriate because the Chancery Court erred in dismissing the Complaint with prejudice and refusing Plaintiffs an opportunity to obtain extrinsic evidence from Ligand. Under Delaware's notice pleading standard, "a plaintiff is not required to plead any evidence in support of allegations in a complaint." *American Tower Corp. v. Unity Commc'ns, Inc.*, 2010 WL 1077850, at *1 (Del. Super. Mar. 8, 2010) (holding that plaintiff need not "present evidence sufficient to support the factual allegations in its Complaint, but is merely required to place [Defendant] on notice of the cause of action asserted"); *see also Mason v.*

Redline Transp. Corp., 2009 WL 1231248, at *1 (Del. Super. Apr. 30, 2009) ("consideration of a motion to dismiss does not call for a review of underlying proof or evidence").

As this Court recently explained in *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 (Del. 2019), "[i]f, after applying these canons of contract interpretation, the contract is nonetheless "reasonably susceptible [to] two or more interpretations or may have two or more different meanings," then the contract is ambiguous and courts must resort to extrinsic evidence to determine the parties' contractual intent."[6] In order to find that a contract is unambiguous, and grant a dispositive motion the Court must conclude that it is "reasonably susceptible to only one interpretation." *Id.* (reversing grant of summary judgment where parties offered plausible competing explanations of commercial contract).

As detailed above, the Indenture, when viewed as a whole, giving effect to all provisions, reveals that Ligand unambiguously intended for holders such as Plaintiffs to have consent protections against impairment of conversion rights. At a

[6] New York law also prohibits dismissal where a contract is susceptible to more than one interpretation. *See Telerep, LLC v. U.S. Int'l Media, LLC*, 903 N.Y.S.2d 14, 16 (N.Y. App. Div. 2010) ("Because we find that the contracts here are reasonably susceptible of more than one interpretation and thus are ambiguous, the complaint should not have been dismissed . . .").

bare minimum, however, dismissal was inappropriate because Plaintiffs' interpretation of the Indenture based on provisions conflicting with § 9.01(b) was at least reasonable. *See Sunline Commercial Carriers*, 206 A.3d at 847 (holding that whereas here "contract's terms contradict each other, are susceptible to two meanings, and are thus ambiguous.").

Even if the language relied on by the Chancery Court in § 9.01(b) can be interpreted to mean that Ligand retained a right to "conform" the Indenture to the Description of the Notes section in the OM, there are a number of provisions in the OM itself which state it does not control or define a holder's rights. *See, e.g.*, OM at p. 23 (A205). Further confirming that the Indenture was at least ambiguous are: (a) Ligand's citation to extrinsic evidence in its motion to dismiss; (b) the Chancery Court's erroneous reliance on that extrinsic evidence; and (c) Ligand's assertion of the fact-based, affirmative defense of scrivener's error.

Reversal of the Chancery Court's Opinion is warranted for this alternate reason.

II. THE CHANCERY COURT ERRED IN RELYING ON FACTUAL ASSERTIONS MADE BY LIGAND OUTSIDE OF THE COMPLAINT TO DECIDE THE MOTION TO DISMISS

A. Question Presented

Did the Chancery Court commit reversible error when, in deciding the Motion to Dismiss, it: (a) relied upon facts outside of the Complaint; (b) resolved affirmative defenses raised by Ligand in its favor; and (c) resolved factual inferences against the Plaintiffs? This issue was preserved below at A430; A440-42; A473-74; Ex. A at pp. 10-28.

B. Standard and Scope of Review

The Supreme Court reviews *de novo* a lower court's grant of a motion to dismiss under Chancery Civil Rule 12(b)(6). *RBC Capital Markets,* 87 A.3d at 639. The determination of whether a complaint states a "reasonably conceivable claim" is generally limited to facts alleged in the complaint. *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996) (reversing lower court's interpretation of a document's intent at 12(b)(6) stage). Prematurely ruling on affirmative defenses is also grounds for reversal. *See Reid v. Spazio*, 970 A.2d 176, 183-84 (Del. 2009) (reversing lower court's ruling on laches defense at 12(b)(6) stage: "[u]nless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate").

Furthermore, it is reversible error for a lower court to resolve factual inferences in favor of the moving party, including regarding the intent or truthfulness of documents. *Vanderbilt*, 691 A.2d at 612.

C. Merits of Argument

In dismissing Plaintiffs' claims, the Chancery Court improperly rejected Plaintiffs' interpretation of the relevant contract provisions in favor of Ligand's proposed construction—an exercise that required reaching far beyond the four corners of the Complaint to rewrite the agreements in a way that contradicts their clear language. The court thus not only failed to give effect to the documents' unambiguous terms, but in fact created a perceived ambiguity in their interpretation and then proceeded (improperly) to adjudicate that purported ambiguity.

For example, the Chancery Court relied on numerous facts asserted *in Ligand's Motion to Dismiss*:

- On page 7 of the Opinion, the court concluded as fact that "[u]sing the Daily Principal Portion as the denominator for the Daily Share Amount ***radically changed the conversion calculation***." (Ex. A at p. 7) (emphasis added)
- The Chancery Court went on to conclude, based on Ligand's assertion of "scrivener's error," that "The Daily Share Amount ***was supposed to reflect the in-the-money portion of the conversion consideration***, and using the daily VWAP as a denominator meant that the trading price would be used to convert the value back into shares and maintain the conversion rate." (Ex. A at pp. 7-8) (emphasis added).

- On page 8 of the Opinion, the court pasted a chart contained in Ligand's Motion to Dismiss Brief (A386) purporting to illustrate the "the total number of shares Ligand would issue upon conversion using the formula in the Offering Memorandum" compared to the number of shares authorized by Ligand's Charter. (Ex. A at p. 8).

- In the same chart contained on page 8 of the Opinion, the Chancery Court concludes as fact that the Indenture contains an error by describing the "potential shares required using [the] ***erroneous formula***" (Ex. A at p. 8) (emphasis added).

- Throughout the Opinion, the Chancery Court describes the non-binding OM as reflecting the terms of the "original deal." (Ex. A at pp. 17, 19, 20).

None of the above "facts" appears in the Complaint. Rather, each reflects the Chancery Court's improper resolution of factual disputes, adjudication of intent, the affirmative defense of mistake, all *in Ligand's favor*. *See Mcllquham v. Feste*, 2001 WL 1497179, at *6 (Del. Ch. Nov. 16, 2001) (explaining that reformation defense requires a fact-intensive inquiry and proof by clear and convincing evidence); *Wilson v. E. Elec. & Heating, Inc.*, 550 A.2d 35 (Del. 1988) ("Intent of the parties is a fact question").

There was no factual basis to conclude the conversion formula set forth in the Indenture was "erroneous" without accepting Ligand's claim of scrivener's error. The Chancery Court had no factual basis to conclude what the "Daily Share Amount" was "supposed" to reflect, without speculating and accepting Ligand's

claim of "scrivener's error." And, the Chancery Court had no factual basis to conclude that the Indenture's formula would necessarily require consideration in excess of what Ligand could deliver without accepting Ligand's claim of scrivener's error and version of events. Plaintiffs should have been provided the opportunity to challenge Ligand's assertions and, to the extent that the "original deal terms" were to control under the Chancery Court's interpretation of 9.01(b), Ligand had the burden of establish a mistake through clear and convincing evidence supported by an admissible factual record.

What the Complaint actually plead was that the terms in the OM were "subject to, and is qualified by reference to, all of the provisions of the notes" and that those documents "define [Plaintiffs'] rights." (A291-92). In other words, the "original deal" was contained in the Indenture and Notes, not the OM. Only where the Notes and Indenture did not conflict could Ligand utilize § 9.01(b). The Chancery Court found that Ligand could use § 9.01(b) to supply the "original deal terms" and simply assumed, despite the language in the OM, and without any evidence in the record that the "original terms" are those set forth in the OM. This was clear error and should be reversed.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court reverse the Chancery Court's grant of Ligand's motion to dismiss, remand this case for further proceedings, and award Plaintiffs such other and further relief as this Court deems just.

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Dated: September 11, 2019

CERTIFICATE OF SERVICE

I, Daniel M. Kirshenbaum, Esquire, do hereby certify that on September 11, 2019, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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