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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 COURT OF CHANCERY OF THE STATE OF DELAWARE

C.A. NO. 2018-0556-JTL

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiffs[1] sued Ligand for breach of material payment terms in convertible senior Notes issued by Ligand, which Plaintiffs acquired in good-faith for value. In their Complaint, Plaintiffs pled the existence of the Notes and an Indenture, a breach of their terms by Ligand, and resulting harm to Plaintiffs. The Complaint accordingly stated a claim for breach of contract and Plaintiffs are entitled to proceed with discovery.

The Court of Chancery erroneously dismissed the Complaint because it accepted Ligand's proposed interpretation of the operative contract language—an interpretation that required venturing beyond the four corners of the Complaint and rewriting the Indenture governing the Notes. At best, however, Ligand asserted a purported ambiguity in the Indenture's terms that requires discovery. At worst, Ligand proposed—and the Court of Chancery wrongly accepted—a proposed construction of the Indenture that would shift the risk associated with purported errors in certificated securities from issuers to good-faith purchasers, undoing decades of well-established law that places such risk squarely on the shoulders of a security's issuer.

[1] Defined terms have the meaning set forth in Plaintiffs' Opening Brief or Ligand's Answering Brief.

The issue presented on appeal is not the mere reformation of a "mistake," as Ligand contends (a proposition with which even Ligand's own underwriters notably appear to disagree). Rather, the immediate procedural issue is whether Plaintiffs properly pled a claim for breach of contract, which they clearly did. The broader substantive issue is whether long-standing legal protections for good-faith purchasers of certificated securities should be overturned to allow a security issuer like Ligand to amend a security's core payment terms unilaterally and materially without purchaser consent. That substantive point should be addressed only after discovery (including discovery into whether a "mistake" was made at all). But even on its face, Ligand's position on the merits, as articulated in its Answering Brief, cannot stand for at least the following reasons.

First, in relying on Indenture § 9.01(b), Ligand fails to explain how this provision unambiguously provides it with the right to correct a self-proclaimed "error" in the Indenture. Plaintiffs' interpretation is not only reasonable, but does not render meaningless multiple other provisions of the Indenture (§§ 6.07 and 9.06), as well as statutory protections afforded to purchasers under the New York UCC.

Second, Indenture § 6.07—which the Court of Chancery recognized "trumps" § 9.01(b)—precluded Ligand's entry into the Unilateral Amendment because the amendment impaired Plaintiffs' conversion rights without their consent. Neither

Ligand nor the Court of Chancery reasonably explain why the Plaintiffs did not state a claim for breach of contract in light of Indenture § 6.07. It was only through omitting material portions of § 6.07 did the Court below reach its erroneous conclusion.

Third, Plaintiffs pled that Ligand's use of § 9.01 was subject to Indenture § 9.06, which contractually incorporated the protections of TIA § 316(b). Section 316(b) prevents any impairment to Plaintiffs' principal investment without consent. Plaintiffs plead that the principal amount of their investment became impaired through the Unilateral Amendment—a result that Ligand contractually foreclosed by including Indenture § 9.06.

Fourth, Plaintiffs pled that the Notes were issued under New York law. In New York UCC § 8-202, the legislature declared that an issuer *cannot* use a provision such as § 9.01(b) to incorporate terms into a security by reference if doing so would create a conflict. Both the Court of Chancery and Ligand reason that the mere existence of Indenture § 9.01(b) precludes application of UCC § 8-202. That reasoning is plainly flawed as the UCC permits the *existence* of incorporation provisions such as § 9.01(b), but prevents their *use* when doing so would create a conflict.

In sum, taking all of the facts alleged by Plaintiffs as true, the Complaint clearly stated a claim for breach of contract. This Court should accordingly reverse.

ARGUMENT

I. PLAINTIFFS' INTERPRETATION OF INDENTURE § 9.01(B) IS REASONABLE—§ 9.01(B) DOES NOT PROVIDE LIGAND AN ABSOLUTE AND UNQUALIFIED ABILITY TO UNILATERALLY REFORM THE NOTES WITHOUT HOLDER CONSENT

Ligand asserts that its broad reading of Indenture § 9.01(b) controls, is dispositive, and makes "more sense" than Plaintiffs' interpretation. (Answering Br. at pp. 19-23). Ligand is wrong on each assertion.

A. The Court Of Chancery And Ligand's Interpretation Of § 9.01(b) Creates Conflict Within The Indenture

Ligand initially argues that § 9.01(b) should be read broadly to trump all other provisions in the Indenture because it does not contain any qualifying language. (Answering Br. at pp. 21-22). To support this argument, however, Ligand points only to the other provisions of § 9.01, arguing that the absence of qualifying, "without consent" language, demonstrates an intent on the part of the drafters to permit Ligand to amend the Indenture unilaterally to incorporate the Description of the Notes section of the OM. (*Id.*).

Section 9.01, however, cannot be read in a vacuum. In the context of the Indenture as a whole, § 9.01 is clearly qualified by §§ 6.07 and 9.06 of the Indenture. Ligand agrees that this 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." (*Id.* at p. 20 (citing *Glob. Funding*

Grp., LLC v. 133 Cmty. Rd., Ltd., 251 F.Supp.3d 527 (E.D.N.Y. 2017)). The question presented is not just what § 9.01(b) says, but: (a) how § 9.01(b) should be construed in light of other provisions in the Indenture; (b) whether Ligand's interpretation creates conflict within the document (it does); and (c) whether Ligand's interpretation violates the UCC (again, it does).

Ligand's conclusion that § 9.01(b) should serve as a "trumping" provision does not hold under its own logic. The drafters of the Indenture clearly knew how to include the phrase "notwithstanding" to signal that a particular provision "trumped" all other provisions in the Indenture. *See* (Chancery Court Op. at p. 19 (recognizing that "notwithstanding"—found in Indenture § 6.07—is a trumping phrase that controls over any contrary language)); *see also Bank of N.Y. v. First Millennium*, 607 F.3d 905, 917 (2d Cir. 2010) ("This Court has recognized many times that under New York law, clauses similar to the phrase '(n)otwithstanding any other provision' trump conflicting contract terms"). Section 9.01(b) contains no prefatory language (as found in Indenture § 6.07) suggesting that it can or should "trump" the other clear consent and anti-impairment of conversion protections afforded noteholders within the Indenture.

Ligand's further conclusion that § 9.01(b) permits it to correct a self-proclaimed error or defect that came to be when documenting the Indenture also

does not make sense given other language chosen by the drafters in § 9.01. In § 9.01(a), Ligand reserved the ability to "cure any ambiguity, ***omission, defect*** or inconsistency in this Indenture or in the Notes in a manner that does not adversely affect the rights of any Holder in any material respect." (A116) (emphasis added). Certainly, if "conform" meant to cure "any defect or omission"—i.e., fix a "mistake" —Ligand knew how to expressly allow for that possibility. Nothing in § 9.01(b) suggests that was the case however.

Plaintiffs' interpretation of the Indenture is thus more than reasonable. Ligand's overbroad reading of § 9.01(b) should therefore be rejected and this Court should reverse.

B. Ligand's Interpretation Of § 9.01(b) Is Illogical And Does Not "Make Sense"

Ligand next argues that its construction of § 9.01(b) should control because it is more logical and "consistent" with the "original deal." (Answering Br. at pp. 22-23). As support, Ligand states that the "Notes were priced and sold to the underwriters before the Indenture even existed, based on the Description of the Notes. Both Ligand and the underwriters would want to ensure that any Notes sold to third parties would adhere to those terms. . . " (*Id.* at p. 22). As an initial matter, these allegations—concerning what Ligand and third-party underwriters may have "intended" through § 9.01(b)—are well outside of the Complaint, unsupported by

any record cite, and are clearly questions of fact inappropriate for resolution on a motion to dismiss. Moreover, these assertions misstate the long-standing principle that all reasonable inferences should be drawn in favor of the non-moving party. Here, the only reasonable inference to be drawn from the allegations in Plaintiffs' Complaint is that the Notes and Indenture were the *only* binding contracts, superseding any prior OM. (A284).

Procedural deficiency aside, Ligand's "original deal" argument, which the Court of Chancery wrongly accepted, is simply not supported by the language of the OM itself or the Description of Notes section. The OM refers potential purchasers to a "**copy of the indenture**"—indicating one already existed, was drafted, and available for review—and further "urges" readers to review that copy because the Description of Notes section did *not* "define your rights as a holder of the notes." (A205) (emphasis added). There is no indication that if the Indenture conflicted with the OM, the OM would control. In other words, the "original deal" is and was contained in the Indenture and Notes— a notion consistent with long-standing holder in due course protections afforded Plaintiffs.

C. Plaintiffs' Interpretation Of Indenture § 9.01(b) Is Correct, Logical, And Clearly Was Not Waived

Ligand next suggests—wrongly—that Plaintiffs' interpretation of § 9.01(b) is circular, illogical, and would render that provision superfluous. (Answering Br. at

pp. 23-26). Ligand ignores, however, Plaintiff's explanation of how § 9.01(b), properly construed, allows for true "conforming" amendments, *e.g.*, a supplemental amendment adding a legend required by applicable law on the notes. (Opening Br. at p. 37). Ligand's strained "plain language" argument similarly fails to address Plaintiffs' argument that the Unilateral Amendment cannot be read to conform, *i.e.*, "give the same shape, outline or contour" or "harmonize" the OM to the Indenture; rather the Unilateral Amendment clearly was intended to *reform* the Indenture's core payment terms. (*Id.* at pp. 35-36). Simply stated, one cannot bring into harmony two provisions which are clearly different and in conflict. Ligand's overbroad reading of § 9.01(b) as a failsafe mechanism to allow unilateral modification of payment terms accordingly fails.

The Court can also quickly dispatch Ligand's clearly incorrect and misleading suggestion of waiver on the part of Plaintiffs. Ligand posits that any argument regarding § 9.01(b) limiting "Ligand and the Trustee to incorporating only terms from the Description of the Notes that do not conflict with the Original Indenture" was not raised below. However, Plaintiffs clearly briefed this very issue below, beginning on page 17 of their Response to Ligand's Motion to Dismiss under the heading **"A. Ligand Cannot Use Section 9.01(b) to Incorporate Terms from the Offering Memorandum which Conflict with the Indenture."** (A443-448).

In sum, Plaintiffs' explanation and interpretation of § 9.01(b) is more than reasonable. The Complaint accordingly state a claim for breach of contract. This Court should reverse and reject Ligand's arguments to the contrary.

II. PLAINTIFFS' INTERPRETATION OF INDENTURE § 6.07 IS REASONABLE AND SUPPORTS A CLAIM FOR BREACH OF CONTRACT

Ligand attempts to justify the Court of Chancery's explanation of Indenture § 6.07 through three equally flawed arguments. Each should be rejected.

A. Ligand Should Be Estopped From Arguing That The OM Defines The "Original Deal" Only Where It Is Convenient To Ligand

Ligand argues that it is inappropriate for Plaintiffs to direct the Court to language in the Description of Notes section of the OM that demonstrates Plaintiffs' interpretation of Indenture § 6.07 is reasonable and correct. (Answering Br. at pp. 31-32). This argument is also flawed. Ligand cannot selectively cite the OM in order to unilaterally impair Plaintiffs' conversion rights, while ignore the OM's clear mandate that Ligand cannot impair those very same rights without consent. (A229). If Ligand wants to argue that the OM provides the "original deal," it should be judicially estopped from arguing against the Court's consideration of the language in the OM that undermines its position. *See Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109, 2018 WL 3360976 , at *4 (Del. 2018) (judicial estoppel prevents a litigant from changing position and contradicting a prior position that the litigant previously took to induce a particular judicial outcome).

Further, there is nothing inconsistent about Plaintiffs' citation to the OM because the text of Indenture § 6.07 and the OM concerning the same subject matter (consent rights) do *not* conflict. By contrast, Ligand is attempting to incorporate

conversion payment provisions from the OM which clearly conflict with and contradict the payment terms of the Notes.[2] This Court should accordingly reverse.

B. The Plain Language Of Indenture § 6.07 Identifies And Protects Two Independent And Non-Exclusive Rights Of Noteholders

Ligand also argues that "the structure and grammar of [§] 6.07 make clear that the third clause" in the section—beginning with the "right to receive consideration"—"should be modified and treated the same as the first two." (Answering Br. at p. 27). In other words, Ligand is suggesting as follows:

> Notwithstanding any other provision of the 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 **[clause 1]**,or payment of the Fundamental Change Purchase Price on or after the respective due dates **[clause 2]**, or the right to receive consideration due upon conversion of Notes in accordance with Article 10 **[clause 3]**, shall not be impaired or affected without the consent of such Holder . . .

The sole authority Ligand cites for its parsing of § 6.07 is a section of Black's Law Dictionary that undermines its own argument. Specifically, Ligand points to a construction canon stating that the "presumption that when there is a

[2] Additionally, as Plaintiffs have argued in the alternative, nothing precludes this Court from considering extrinsic evidence to the extent the Court believes § 6.07 has two reasonable interpretations and therefore is ambiguous. *See Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 (Del. 2019).

straightforward, parallel construction that involves all nouns or verbs in a series, *a prepositive or postpositive modifier normally applies to the entire series*." (Answering Br. at p. 28) (emphasis added). Here, clauses one and two have the same modifier—the "right to bring suit for the enforcement" whereas clause three has an entirely different modifier: ", or the right to receive." Because the right to bring suit and the right to receive are two distinct modifiers (*see Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1, 7 (2d Cir. 2017)),[3] the canons of Black's Law do not support Ligand's interpretation.

Further, both Ligand and the Court of Chancery's interpretation require one to remove text from § 6.07 to reach a desired interpretation:

> Notwithstanding any other provision of this Indenture, the right of any Holder 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.

See (Chancery Court Op. at p. 19).

This is the opposite of a "straightforward" interpretation and violates the most basic canon of contract interpretation requiring courts to give effect to all words

[3] The Answering Brief does not address the Second Circuit's holding in *Marblegate*, which supports and confirms Plaintiffs' explanation of § 6.07 and the two, independent rights being protected.

chosen by the parties. *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").

Ligand also claims that Plaintiffs' interpretation "collapses under its own weight" because Section 6.07 refers to "such Holder." The phrase "such Holder," however, does not render Plaintiffs' explanation illogical:

> Notwithstanding any other provision of the 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. (emphasis added)

Indenture § 6.07 (emphasis and strikethrough added).

The Indenture defines a "Holder" to mean a "Person or Persons in whose name a Note is registered in the Register." (A074). Here, "such Holder" refers to the Person who can convert Notes and whose consent is required to approve any impairment of the right to receive consideration. Thus, Plaintiffs' construction is not only plausible, it is completely logical.

Ligand also argues, without support and for the first time on appeal, that Plaintiffs' interpretation would prevent noteholders from enforcing the right to

receive consideration. (Answering Br. at p. 29). However, § 6.07 makes clear that the right to receive consideration was not subject to any limitations on suit contained in § 6.06. (A108 (conversion rights "shall not be impaired or affected without the consent of such Holder ***and shall not be subject to the requirements of Section 6.06***")) (emphasis added). Section 6.06 is the only section in the Indenture which limits a holder's right to sue. In drafting § 6.06, Ligand chose not apply § 6.06 to a breach of § 6.07 by Ligand. Accordingly, a right to sue is clearly intended, as was the case here, for any breach of impairment of the right to receive conversion consideration.

C. Ligand And The Court Of Chancery Erroneously Relied On The ABA Model Indenture

Lastly, Ligand continues to rely on § 6.07 of the American Bar Association's 2000 simplified model indenture as support for its asserted interpretation of the Indenture. (Answering Br. at pp. 30-31; Chancery Court Op. at p. 19). However, Ligand offers no response to Plaintiffs' argument that: (a) the Commentaries are not a substitute for construing the plain language of the agreement; and (b) Ligand is presumed to have been on notice of, but chose not to use, the language of the model indenture when it drafted Indenture § 6.07. The drafters of the Indenture intentionally deviated from the model and chose to include a separate and independent *right to receive conversion consideration free from impairment*, offset

by a preceding comma. Indeed, the most material portion of § 6.07 differs from the model, a point both Ligand and the Court of Chancery overlook. Ligand's attempts to explain away the differences between the model indenture and the language in § 6.07 are therefore unpersuasive and should be rejected.

In short, Plaintiffs' interpretation that § 6.07 of the Indenture protects against Ligand's Unilateral Amendment is more than reasonable. The Complaint accordingly state a claim for relief and this Court should reverse.

III. PLAINTIFFS' INTERPRETATION OF INDENTURE § 9.06 IS REASONABLE AND SUPPORTS A CLAIM FOR BREACH OF CONTRACT

Ligand makes two arguments to avoid application of § 316(b) of the TIA. Both seek to rewrite § 9.06 or delete it altogether from the Indenture. These arguments should also be rejected.

A. Ligand Was Required To Comply With TIA § 316(b) In Issuing Any Supplemental Indenture

Initially, Ligand suggests that because the Court of Chancery held that the TIA does not apply by statute, § 9.06 of the Indenture—which clearly incorporates the TIA as a matter of contract by stating that "[e]very supplemental indenture executed pursuant to this Article shall comply with the TIA" (A118)—has no relevance. Ligand posits this to be true because the initial Indenture did not have to comply with the TIA. (Answering Br. at pp. 32-34). This circular logic is erroneous for several independent reasons.

First, if the TIA is inapplicable as a matter of law and there is nothing to "comply" with, § 9.06 of the Indenture serves no purpose at all and can be deleted from the Indenture. Such an argument runs contrary to the well-established and undisputed principle that a court cannot rewrite or ignore the contractual language chosen by the parties. *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). Ligand does not rebut this point in its Answering Brief.

Second, it is well recognized and accepted that parties may contract into the TIA. This is commonplace and precisely what occurred here. *See e.g., In re Semi-Tech Litig., LLC v. Bankers Trust Co.*, 353 F. Supp. 2d 460, 463 (S.D.N.Y. 2005) (court evaluated contract and breach of fiduciary duty claims against indenture trustee based on the TIA given that the indenture broadly stated "[t]he duties and responsibilities of the Trustee shall be as provided in the Trust Indenture Act."); *Abrams v. Bank of Texas, N.A.*, 440 F. App'x. 376, 378 (5th Cir. 2011) (successful plaintiff in breach of contract action was entitled to attorneys' fees because such fees were authorized under § 315(e) of the TIA, and the indenture "incorporates the terms of the Act").

Here, § 316(b) of the TIA provides that no supplemental indenture can impair a noteholder's core payment terms. If Ligand wanted to exclude the most critical and applicable aspect of the TIA governing supplemental indentures, it clearly could have done so by omitting § 9.06 from the Indenture entirely. Ligand chose not to do so. This interpretation is supported by the plain language of § 9.06 and does not create any internal inconsistencies with other provisions of the Indenture.

Third, Plaintiffs are not arguing that Ligand "decided to voluntarily subject itself to all of the otherwise inapplicable requirements of the TIA" as the Answering Brief misleadingly suggests. (Answering Br. at p. 33). Rather, Plaintiffs argued that *only* the terms of a supplemental indenture had to comply with the TIA provision governing supplemental indentures, *i.e.*, § 316(b). The examples of "absurdity" Ligand cites are themselves absurd as those provisions of the TIA do not govern amendments or supplemental indentures. There is simply no exception to TIA § 316(b) which allows an issuer to unilaterally change a contract for self-proclaimed errors.

B. The Unilateral Amendment Did Not Comply With TIA § 316(b)

Ligand further argues that, even if the TIA applied, the Unilateral Amendment complied with the TIA because § 316(b) does not govern conversion rights. Plaintiffs alleged that by incorporating § 316(b) into the Indenture, Ligand intended for them to have consent rights over amendments that would impact their principal investment, including amendments to conversion consideration. (A299-300). Ligand did not incorporate §9.06 on a blank slate.

Ligand also cannot distinguish multiple authorities cited by Plaintiffs, including *Bank of N.Y. v. First Millennium*, 598 F.Supp.2d 550 (S.D.N.Y. 2009) and *Meehancombs Global Credit Opp. Funds, LP v. Caesars Entm't Corp.*, 80 F.Supp.3d 507 (S.D.N.Y 2015), holding that § 316(b) protects against impairment of all

repayment rights derived from principal under a bond. Ligand also makes no effort to explain why a conversion right can or should be distinguished from a "redemption" right (another word also not mentioned in § 316(b) expressly). Indeed, just like redemption rights, as stated in the Notes, a Holder has the right "to convert the ***principal amount*** . . . into cash and shares of Common Stock. . . " (A154) (emphasis added).

Regardless of the statutory text, Plaintiffs' Complaint pled that Ligand's actions clearly and indisputably resulted in Plaintiffs receiving less return on their principal investment than what was stated in the Notes. As a result, Ligand impaired Plaintiffs' principal investment in violation of § 316(b) of the TIA, and Indenture § 9.06.

Ligand attempts to avoid the clear policy implications of its arguments and the Court of Chancery's holding that unilateral amendments are permitted at any time and without notice or consent to noteholders by relying on the "trading price" of the Notes. (Answering Br. at p. 36). However, the trading price of the notes are not relevant to the question of whether a unilateral amendment was permitted under § 316(b) of the TIA. Further, the purpose of § 316(b) is to allow a holder to receive the exact economic return an issuer promised regardless of how other holders value the investment or the issuer's ability to repay—the true "trading price." Therefore,

the sole question under § 316(b) is whether the issuer, here Ligand, took action that impairs the principal return on a holder's investment without the holder's consent. That is precisely what was alleged to have occurred in the Complaint.

IV. LIGAND'S INTERPRETATION OF NEW YORK UCC § 8-202 IS WRONG

Ligand concedes that the Notes are certificated securities subject to New York Uniform Commercial Code § 8-202. (Answering Br. at p. 37). Nevertheless, it seeks to avoid the protections afforded by § 8-202 to investors for four reasons that are all without merit.

First, Ligand argues that § 8-202 does not prohibit effectiveness of the Unilateral Amendment because the Notes include the Conforming Amendment Provision. (Answering Br. at p. 38). This reasoning suffers from the same flawed logic utilized by the Court of Chancery. The issue under § 8-202 is not whether the Note *contains* the Conforming Amendment Provision, but rather if the *use* or *implementation* of the Conforming Amendment provision results in incorporating terms into the Note that conflict with terms in the Note in violation of § 8-202. Indeed, the fact that § 8-202 permits incorporation by reference is a recognition that clauses such as 9.01(b) exist and can be utilized, ***so long as there is no conflict***.

Second, Ligand argues that the detailed conversion formula does not appear on the Notes. (Answering Br. at p. 38). This argument is also unpersuasive. With respect to conversion consideration, the Note itself specifies how the Notes would convert, what holders would receive and how to calculate the conversion consideration. The Note also clearly incorporates the Indenture and states that the

conversion amount is "subject to Sections 10.01 and ***10.03 of the Indenture***. . . " (A154 (emphasis added)). Indeed, as Ligand concedes, the complex conversion formula need not appear in the Note as NY UCC § 8-202(a) allows Ligand to incorporate the precise formula from the Indenture into the Note for brevity so long as the terms of the Indenture do not conflict with those in the Note (which they do not). Importantly, this portion of the Notes discussing conversion rights does *not* refer the holder to any conversion formula that may be set forth in the OM or another document. (*Id.*). Accordingly, the terms of the Note clearly include the conversion consideration formula at issue. Because those terms are stated in the Note, UCC § 8-202(a) prohibits Ligand's attempt to modify the Note's terms through conflicting terms supplied by the OM.

Third, Ligand argues that Plaintiffs' interpretation of § 8-202 would create "unintended consequences." (Answering Br. at pp. 38-39). This is an overstatement of Plaintiffs' interpretation of § 8-202. Plaintiffs are not arguing that § 8-202 precludes *all forms* of incorporation by reference. Plaintiffs acknowledge that issuers can use § 8-202 to incorporate lengthy documents into a note by reference and, indeed, this was appropriately done with respect to incorporation of the conversion formula in the Indenture. Plaintiffs argument is that Ligand could have incorporated the terms of the OM into the Note by stating that the Notes would

convert as set forth in the OM or subject to the definitions contained in the OM, but did not. Had Ligand done so, Plaintiffs would have been on notice that the OM supplied the key conversion terms and no conflict would have existed between the Note and the OM. Here, however, Ligand did not make that election, and by communicating on the face of the Note that the Note would convert as described in a formula more precisely set forth in the Indenture, Ligand unilaterally foreclosed any ability to incorporate conflicting terms from the OM.

Fourth, Ligand contends that Plaintiffs are imposing "strict liability" for "typographical errors in the Indenture." (Answering Br. at p. 39). This argument misstates the law and Plaintiffs' position. Section 8-202 provides a carefully crafted statutory framework which (i) allocates to an issuer the risk of any defects contained in a certificated security and (ii) addresses under what circumstances defenses—including the defense of reformation unilaterally asserted by Ligand here—are appropriate so that the financial markets can efficiently function. Specifically, the New York legislature, through § 8-202, has declared that an issuer of a security has no defense to the enforcement of a security by "a purchaser for value who has taken the security without notice of the particular defense." N.Y. UCC § 8-202(d).

Here, Plaintiffs alleged that when they acquired the Notes they did so for value and without notice of Ligand's "scrivener's error" defense. (A295). As the mere

existence of an incorporation provision under § 8-202(a) cannot allow Ligand to contractually reform the Notes with conflicting terms from the OM, Ligand's defense of scrivener's error must be resolved judicially, following a fact intensive inquiry where Ligand must demonstrate both (i) the existence of a scrivener's error and (ii) that Plaintiffs are not entitled to holder in due course status under UCC 8-202(d) to prevail. *See* N.Y. UCC § 8-202(d). Until that time, Plaintiffs may enforce the Notes in accordance with their terms as written and free of Ligand's self-proclaimed "scrivener's error" defense. It is through this framework that the UCC allows financial markets to function.

For this additional and independent reason, the Complaint stated a claim for relief. This Court should reverse.

V. LIGAND'S BRIEFING ON APPEAL—WHICH AGAIN ATTEMPTS TO SEEK SUMMARY ADJUDICATION OF DISPUTED FACTS THROUGH UNILATERAL STATEMENTS AND DOCUMENTS THAT GO WELL BEYOND THE COMPLAINT—CONFIRMS THE COURT OF CHANCERY ERRED IN RESOLVING THIS CASE ON A MOTION TO DISMISS

Plaintiffs established in their Opening Brief that the Court of Chancery (and Ligand) erred in relying on and resolving a number of disputed factual issues in granting dismissal with prejudice of the operative Complaint. Each of Ligand's attempts to rebut this conclusion fails.

First and foremost, Ligand concedes, by failure to respond, both that reformation is an affirmative defense and that questions of intent are inherently factual and inappropriate for resolution on a motion to dismiss. Nevertheless, it claims that all of the "facts" relied on by the Court of Chancery were contained in the Complaint or the exhibits thereto. (Answering Br. at p. 41). Notably, Ligand fails to show where these disputed "facts" are found in the Complaint or its exhibits. They are not.

Second, Ligand claims that a number of the "facts" that both it and the Court below relied on are subject to "judicial notice." As support, it cites a criminal case, *Stafford v. State*, 59 A.3d 1223, 1232 n. 3 (Del. 2012), where this Court took unremarkable and unopposed judicial notice of a government-hosted website, the Delaware Criminal Justice Information System, containing certain information like driver's licenses, state-issued identification, and criminal history. *Id.* Ligand does

not, and cannot cite, any case that stands for the absurd proposition that a court can *accept as true* out-of-court statements contained on websites and in SEC filings to resolve questions of intent in a private contract. Even on appeal, Ligand's misunderstanding of the standards for judicial notice are clear from its improper reliance on hearsay statements contained in a press release that appear nowhere in the Complaint and would not be admissible in evidence even at trial. (B357-364).

Third, the improper extra-Complaint facts asserted by Ligand raise more questions than are answered, and only further confirm this case is inappropriate for resolution at the pleading stage, without discovery. By way of example only, Ligand does not explain: (a) why it did not provide to Plaintiffs' counsel prior to suit, and still has not provided, any proof of the so-called "scrivener's error"; (b) what position it took or discussions it had with hedge counterparties about the conversion terms in the Indenture; (c) if the calculation agent referenced in the hedges approved the Unilateral Amendment as the hedges require; and (d) why only one of the underwriters apparently agreed with its analysis and use of the Unilateral Amendment, even though two of the underwriters served as calculation agents under the hedges. These are all questions for discovery.

Against this backdrop, Plaintiffs' Complaint clearly stated a claim for breach of contract, and the Court of Chancery erred in resolving factual issues at the motion to dismiss stage. This Court should reverse.

CONCLUSION

For the above reasons, as well as those contained in their Opening Brief, 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: October 15, 2019

CERTIFICATE OF SERVICE

I, Benjamin M. Potts, Esquire, do hereby certify that on October 15, 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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