IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TANG CAPITAL PARTNERS, LP; KNIGHTHEAD MASTER FUND, LP; RA CAPITAL HEALTHCARE FUND, L.P.; RTW MASTER FUND, LTD; ISZO CAPITAL LP; and BLACKWELL PARTNERS, LLC, Plaintiffs, v. DAVID Y. NORTON; GINGER D. CONSTANTINE, M.D.; ALAN L. HELLER; STEPHEN O. JAEGER; WILLIAM F. OWEN, J.R., M.D.; LEE S. SIMON, M.D.; VIRGIL THOMPSON; and U.S. BANK NATIONAL ASSOCIATION, Defendants, and SAVIENT PHARMACEUTICALS, INC., a Delaware corporation, Nominal Defendant.	)	*Civil Action No. 7476-VCG*
SAVIENT PHARMACEUTICALS, INC., Plaintiff, v. TANG CAPITAL PARTNERS, LP, Defendant.	)	*Civil Action No. 7611-VCG*

MEMORANDUM OPINION

Date Submitted: July 23, 2012
Date Decided: July 27, 2012

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GLASSCOCK, Vice Chancellor

This matter involves a simple question: can a note holder buying its note subject to an indenture be held to have waived (or be contractually estopped from asserting) its statutory right to seek appointment of a receiver for its debtor, if the indenture agreement so provides? In the factual scenario presented here, I find the answer to be yes.

I. BACKGROUND

The following facts are undisputed unless otherwise noted.

A. The Parties

Savient Pharmaceuticals, Inc. ("Savient" or the "Company"), is a biopharmaceutical company incorporated in Delaware and operating out of East Brunswick, New Jersey. Savient's principal asset is its worldwide ownership and license rights of a drug product known as KRYSTEXXA, the only drug that has been approved by the U.S. Food and Drug Administration (the "FDA") for the treatment of refractory chronic gout, a form of gout that is resistant to conventional treatment.

The Plaintiffs are holders of Savient's 4.75% convertible senior notes due in 2018 (the "Notes"), which are unsecured and subject to the terms of an indenture pursuant to which the Plaintiffs hold their Notes (the "Indenture"). Tang Capital Partners, LP ("Tang"), owns Notes with a face value of $38,950,000, and is Savient's largest creditor. Knighthead Master Fund, LP, owns Notes with a face

value of $6,959,000; RA Capital Healthcare Fund, L.P., owns Notes with a face value of $570,000; RTW Master Fund, LTD, owns Notes with a face value of $1,300,000; IsZo Capital LP owns Notes with a face value of $500,000; and Blackwell Partners, LLC, owns Notes with a face value of $430,000. Collectively, the Plaintiffs own Notes with a face value of $48,709,000, which represents approximately 40% of the outstanding Notes.[1]

The individual Defendants are all members of Savient's board of directors (the "Board").

U.S. Bank National Association ("USBNA") is a national banking association held by U.S. Bancorp, a Delaware corporation. USBNA serves as trustee for the Indenture governing the relationship between the Note holders and Savient. USBNA is also trustee for the indenture to which Savient's senior secured notes are subject.[2]

B. Savient's Recent Performance

Though the Company's performance is not at issue on the motions addressed in this Opinion, a brief summary of the background of this litigation provides helpful context. The FDA approved KRYSTEXXA for the treatment of refractory chronic gout in adult patients in December 2010, and the drug officially launched

[1] Verified Second Am. Compl. ¶ 62.

[2] These secured notes were issued through an exchange transaction with then-existing Note holders, none of whom are plaintiffs here. That transaction is discussed more fully below.

in the United States market in February 2011. Savient has invested substantial resources in obtaining FDA approval and establishing an infrastructure for the development, marketing, and launch of KRYSTEXXA. The drug's initial sales performance has been dismal. The parties dispute the reasons for KRYSTEXXA's poor performance, but those reasons are not at issue here. Suffice it to say that Savient's Board believes that the drug will succeed, and the Company has invested millions of dollars toward that end. Conversely, the Plaintiffs believe that KRYSTEXXA is a failed product with a near-zero prospect of return and that Savient's investment in the drug is depleting the Company's cash reserves, which the Plaintiffs contend must be preserved in the interests of Savient's creditors.

C. New Debt Financing Leads to Litigation

In late 2011, Savient's Board began to consider financing options to obtain additional capital and restructure Savient's existing debt. The Board approved a financing transaction that would exchange some of the Company's existing unsecured Notes for new senior secured notes with a later maturity date. The approved financing (the "Exchange Transaction") involved the exchange on a dollar-for-dollar basis of certain Notes with an aggregate face value of approximately $108 million with Senior Secured Discount Notes ("SSDNs"). The exchanging Note holders would also purchase additional SSDNs for approximately $47 million in cash. The SSDNs would extend the maturity date of the exchanged

Notes by around fifteen months. The SSDNs' coupon began at a lower rate than the Notes', at 3% for three months, but the rate would subsequently increase to 12%.

In response to the approval of the Exchange Transaction, Tang, then the lone plaintiff in this action, filed its initial Complaint, alleging derivative claims for declaratory relief that Savient is insolvent and for breach of fiduciary duty and waste against Savient's Board, on the ground that the Board is wrongfully depleting the assets of the Company as it spirals toward bankruptcy. Tang also sought the appointment of a receiver under Section 291 of the Delaware General Corporation Law ("DGCL")[3] to manage the Company's affairs. Shortly thereafter, Tang moved for expedited proceedings and for a temporary restraining order ("TRO") enjoining the Exchange Transaction on account of the breaches of fiduciary duty alleged against the Board. I heard argument on those motions on May 7, 2012, and denied the TRO application. In my ruling, I found that because Tang had not sufficiently alleged that the Board members were interested or could not otherwise exercise their business judgment, Tang had not alleged colorable breach of fiduciary duty claims.

The Exchange Transaction ultimately closed in May 2012. Tang was among the Note holders offered the opportunity to participate in the exchange, but

[3] 8 *Del. C.* § 291.

declined for reasons that the parties dispute.[4] Through the Exchange Transaction, Savient exchanged around $108 million in Notes for SSDNs, raised around $44 million in new capital, and issued additional SSDNs of roughly equivalent fair market value, with a face value of approximately $63 million. Like the Notes, the SSDNs are subject to an indenture for which USBNA serves as trustee.

D. First Amended Complaint and Renewed Motion to Expedite

At the May 7, 2012, oral argument, regarding Tang's remaining claim for the appointment of a receiver, I found that the matter should be "expedited" consistent with the summary nature of receivership actions brought under Section 291 of the DGCL. I suggested holding a hearing eight to ten weeks out, but left it to the parties to confer about scheduling.

On May 21, 2012, the Plaintiffs (Tang now joined by other Note holders) filed their First Amended Complaint ("FAC"). The FAC asserted many of the same claims I had found not colorable two weeks prior. Namely, the FAC sought a declaration that Savient is insolvent and brought derivative claims alleging waste and breach of fiduciary duty in connection with the approval and consummation of the Exchange Transaction. The FAC also alleged breach of fiduciary duty and waste claims in connection with the Board's approval of retention awards for

[4] Tang asserts that it declined to participate because it felt that the Exchange Transaction was unfair to the Note holders who were not given the chance to participate. The Defendants argue that Tang's true reason for not participating was that Savient rejected Tang's request that its Notes be converted to equity in the Company.

certain Savient executives. On May 25, 2012, the Plaintiffs filed a Renewed and Supplemental Motion for Expedited Proceedings, seeking the expedition of all of the claims in the FAC, save the count challenging the executive retention awards. The Plaintiffs' alleged basis for seeking expedition on these counts was essentially that the Company continued to burn cash at an alarming rate in its efforts to market KRYSTEXXA.

I again heard argument on the renewed motion to expedite on May 31, 2012, and for the same reasons I had refused to expedite Tang's derivative claims, I again denied the Plaintiffs' motion. While the Plaintiffs alleged that Savient's financial picture had changed, Delaware law had not, and I again found it unlikely that the Board's decision to pursue the commercialization of KRYSTEXXA rather than close up shop would be outside the purview of the protection afforded by the business judgment rule. Nevertheless, I again directed that the Plaintiffs' receivership claim should proceed summarily and scheduled a hearing on that issue to take place July 23–24, 2012.

E. The Receivership Claim and the No-Action Clause

The Defendants have moved to dismiss the Plaintiffs' receivership claim for lack of standing, arguing that the Plaintiffs have not met the pre-suit requirements of a No-Action Clause ("NAC") in the Indenture.[5]

[5] The progression of this action has not been a model of efficiency. In its response to the Plaintiffs' request for expedition of its receivership claim, the Defendants argued that the Plaintiffs were precluded from seeking a receivership on account of their not having met the pre-suit requirements of the Indenture's No-Action Clause. The Defendants had not at that point moved to dismiss for lack of standing on this ground, but rather asserted the standing argument as a basis for denying the Renewed Motion to Expedite as to the receivership claim. I found that discovery on the receivership claim should proceed on the schedule originally contemplated, i.e., eight to ten weeks from the date of oral argument on the first motion to expedite, and that briefing on the Defendants' forthcoming motion to dismiss for lack of standing should proceed simultaneously. The dispositive issue of the Plaintiffs' standing under the NAC would not be fully briefed and before me on a motion to dismiss or for summary judgment until shortly before trial on the receivership issue.

On June 8, 2012, the Defendants moved to dismiss the Plaintiffs' receivership claim. In that motion, the Defendants argued that the Plaintiffs had not even attempted to allege that the conditions required by the NAC that were necessary to confer standing on the Plaintiffs to pursue a receivership had been met. Indeed, neither the Complaint nor the First Amended Complaint contained an allegation that an "Event of Default" had occurred under the Indenture, a necessary condition to escape the NAC's prohibitions. On the contrary, in its opening brief in support of its TRO motion, Tang argued, "Nor is this the type of action that might be brought by the Indenture Trustee. As a threshold matter, the Trustee has no standing to bring suit in this case on behalf of the Note holders under Section 6.07 of the Indenture *because there has not been an Event of Default* (as defined in Section 6.01 of the Indenture). As such, the notice provisions of Section 6.06 of the Indenture do not apply here." *See* Pl.'s Br. Supp. Mot. TRO at 17 n.3 (emphasis added). In response to the June 8 motion to dismiss, I entered a stipulated scheduling order which provided that the Defendants would answer the motion to dismiss on June 22, 2012.

In a letter filed contemporaneously with the Defendants' June 8 motion to dismiss, counsel for the Defendants informed me that on June 7, Tang notified Savient that Tang and other Note holders had sent a notice to USBNA claiming that an Event of Default *had* occurred under the Indenture because this Court had not dismissed or stayed Tang's receivership claim by May 31, and claiming that as a result the Notes were due in full under the terms of the Indenture. This position was of course dramatically different than the one Tang had taken at the outset of this litigation, where, as described above, it argued that the NAC did not apply because no Event of Default had occurred. The June 8 letter accompanying the Defendants' motion to dismiss was the first time I was informed that the 30-day pendency of a receivership action could create an Event of Default under the Indenture.

The NAC limits actions that may be brought against the Company by the Note holders and provides as follows, in relevant part:

> Section 6.06. *Proceedings by Holders.* Except to enforce the right to receive payment of principal . . . or interest when due, or the right to receive payment or delivery of the consideration due upon conversion, *no Holder of any Note shall have any right by virtue of or by availing of any provision of this Indenture to institute any suit,* action or proceeding in equity or at law upon or under or with respect to this Indenture, *or for the appointment of a receiver*, trustee, liquidator, custodian or other similar official, or for any other remedy hereunder, unless:
>
> (a) such Holder previously shall have given to the Trustee written notice of an Event of Default and of the continuance thereof, as hereinbefore provided;
>
> (b) Holders of at least 25% in aggregate principal amount of the Notes then outstanding shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder;
>
> (c) such Holders shall have offered to the Trustee such security or indemnity reasonably satisfactory to it against any loss, liability or expense to be incurred therein or thereby;
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> (d) the Trustee for 60 days after its receipt of such notice, request and offer of security or indemnity, shall have neglected or refused to institute any such action, suit or proceeding; and
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> (e) no direction that, in the opinion of the Trustee, is inconsistent with such written request shall have been given to the

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On June 21, 2012, one day before their response to the Defendants' motion to dismiss was due, the Plaintiffs moved for leave to file their Second Amended Complaint, adding allegations regarding the Plaintiffs' standing to bring this action, a claim for the removal of USBNA as Indenture trustee, and a claim for declaratory judgment that an Event of Default occurred under the Indenture on May 30, 2012 (30 days after the filing of the original Complaint). I granted the motion to amend and directed that briefing proceed on the Defendants' motion to dismiss.

> Trustee by the Holders of a majority in principal amount of the Notes then outstanding within such 60-day period pursuant to Section 6.09 . . . .[6]

The Plaintiffs concede that they did not make demand on the Indenture trustee, USBNA, before instituting this action. The Defendants argue that the Plaintiffs' receivership claim is covered by the language of the NAC, and that because the Plaintiffs did not make demand or meet any of the other pre-suit requirements, they are barred from pursuing their receivership claim. The Defendants further argue that, in any case, there has not been an "Event of Default" triggering a right to bring a covered action.

The Plaintiffs argue in the first instance that the NAC by its terms does not apply to statutory receivership actions, but rather only to actions brought under a specific provision of the Indenture. The Plaintiffs further contend that even if the NAC covers statutory receivership actions, they are permitted to pursue a receivership without making demand because an Event of Default has occurred and USBNA's dual obligations to Savient's secured and unsecured note holders cause the trustee to be conflicted in a way that renders demand futile.[7] The parties have

[6] Indenture § 6.06, Opening Br. Supp. Pls.' Mot. Summ. J. Ex. A at 33–34 [hereinafter Indenture].

[7] I ultimately do not reach the issue of whether USBNA is conflicted because I find that an Event of Default, a prerequisite to the Plaintiffs' receivership action, has not occurred.

cross-moved for summary judgment on the issue of whether an Event of Default has occurred.[8]

In support of their argument that an Event of Default has occurred, a prerequisite to bringing an action covered by the NAC, the Plaintiffs cite Section 6.01(j) of the Indenture. Section 6.01(j) provides as follows:

> Section 6.01. *Events of Default.* The following events shall be "Events of Default" with respect to the Notes:
>
> . . . .
>
> (j) an involuntary case or other proceeding shall be commenced against the Company . . . seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of the Company . . . and such case or other proceeding shall remain undismissed and unstayed for a period of 30 consecutive days.[9]

This action was filed on April 30, 2012. Prior to my oral ruling on July 23, 2012, the Plaintiffs' claim seeking the appointment of a receiver remained undismissed and unstayed for a period greater than 30 days. The Defendants raise several arguments as to why I should not measure this period from the filing date of the original Complaint. Because of my findings in this Opinion, those arguments are mooted.

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[8] In a separate action filed by Savient against Tang that is now consolidated with the present litigation, Savient seeks (1) a declaration that an Event of Default has not occurred and (2) damages for alleged tortious interference on the part of Tang. *See* Verified Complaint, *Savient Pharm., Inc. v. Tang Capital Partners, LP*, No. 7611-VCG (Del. Ch. filed June 8, 2012). The parties have cross-moved for summary judgment on Count I of Savient's Complaint and Count VII of the Plaintiffs' Second Amended Complaint; both counts seek a declaration as to whether an Event of Default has occurred.

[9] Indenture § 6.01(j).

At oral argument on July 23, 2012, I found that the NAC covers statutory receivership actions and that the pendency of this action for 30 days did not trigger an Event of Default. For the reasons articulated at oral argument and explicated below in this Opinion, I dismiss the Plaintiffs' receivership claim and grant summary judgment in favor of the Defendants on the cross motions for summary judgment on the issue of whether an Event of Default has occurred.[10]

II. STANDARDS OF REVIEW

A. Rule 12(b)(6) Standard

The standard of review for a motion to dismiss under Court of Chancery Rule 12(b)(6) is well known. In ruling on such a motion, this Court (1) accepts all well-pled factual allegations as true, (2) accepts even vague allegations as well-pled provided they give the opposing party notice of the claim, (3) draws all reasonable inferences in favor of the non-moving party, and (4) grants the motion to dismiss only if the opposing party would not be entitled to recover under any reasonably conceivable set of circumstances.[11]

B. Summary Judgment Standard

Court of Chancery Rule 56(c) provides the standard of review for summary judgment motions. This Court will grant a party's motion for summary judgment

[10] For purposes of calculating the time for appeal or reargument of this opinion, my oral decision of July 23, 2012, is withdrawn, and this Memorandum Opinion substituted therefor.
[11] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

where the record reflects that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.[12] Where the parties have filed cross motions for summary judgment and have not represented to the court that there remains an issue of fact material to the disposition of either motion, this Court deems the subject of those motions submitted for decision on a stipulated record.[13]

C. Standard of Review for the Dispositive Motions at Issue

The issues related to whether an Event of Default has occurred and whether the Plaintiffs have standing in light of the NAC to pursue a receivership claim necessarily intertwine. The dispositive motions on these issues, though subject to differing standards of review, similarly cover much of the same ground. As the following analysis will make clear, in resolving these motions, I rely on undisputed facts and on an interpretation of the Indenture that does not resort to extrinsic evidence. Thus, the standard of review applied to the Event of Default and standing issues ultimately does not affect my analysis, and so is not addressed further below.

[12] Ch. Ct. R. 56(c).
[13] *Id.* 56(h).

III. ANALYSIS

A. The NAC Covers Statutory Receivership Actions

I first address whether the NAC applies to the Plaintiffs' statutory claim for a receivership. As discussed above, the NAC provides that Note holders have no right to bring certain enumerated actions or proceedings, including a receivership action, "by virtue of or by availing of any provision of [the] Indenture."[14] The Plaintiffs read the NAC narrowly as applying only to claims arising directly from a provision of the Indenture, and they argue that because their receivership claim avails of a statutory provision and not a provision of the Indenture, the pre-suit requirements of the NAC do not apply. The Defendants argue that "by virtue of or by availing of any provision" should be construed to bar actions that arise out of any rights or status conferred on the Note holders by the Indenture. I read the NAC as the Defendants do.

1. The Plain Meaning of Section 6.06 Supports the Defendants' Interpretation[15]

In interpreting the terms of a contract, the court's role is to effect the parties' intent.[16] The controlling indicator of this intent is the plain meaning of the

[14] Indenture § 6.06.

[15] The parties agree that New York law applies in interpreting the Indenture. Neither party has cited and I am not aware of any case law indicating that the principles of contract interpretation under New York law, so far as relevant to this case, differ materially from those under Delaware law. *See Elliott Assocs., L.P. v. Bio-Response, Inc.*, 1989 WL 55070, at *3 n.1 (Del. Ch. May 23, 1989) (interpreting an indenture governed by New York law and similarly finding no relevant distinctions between Delaware and New York principles of contract interpretation").

language used in the contract.[17] Extrinsic evidence will inform this Court's determination of the parties' intent only where the contractual language is ambiguous.[18] I find the language of Section 6.06 of the Indenture to be unambiguous, and so I do not look beyond its plain meaning.

To the extent relevant to the dispute here, Section 6.06 provides that

> no Holder of any Note shall have any right *by virtue of or by availing of any provision of* this Indenture to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Indenture, or for the appointment of a receiver, . . . or for any other remedy hereunder," unless certain pre-suit requirements are met.[19]

The parties essentially dispute whether "of any provision of" modifies both "by virtue" and "by availing," or only the latter. More specifically, the issue is whether the language quoted above should be read as prohibiting actions arising "by virtue of [any provision of] or by availing of any provision of [the] Indenture," as the Plaintiffs contend, or "by virtue of[,] or by availing of any provision of[,] [the] Indenture," as the Defendants argue. The Plaintiffs read the language in a way that renders a portion of it superfluous, as no discernible difference exists between an action arising "by virtue of any provision of" the Indenture and an action "availing of any provision of" the Indenture. By contrast, under the Defendants' reading, "by

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[16] *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).
[17] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 1605146, at *26 (Del. Ch. May 4, 2012).
[18] *Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at *10 (Del. Ch. July 29, 2012).
[19] Indenture § 6.06 (emphasis added).

virtue of the Indenture" indicates coverage of such causes of action available to a plaintiff by virtue of its status as a Note holder. Distinguished from status-type claims are those that "avail[ ] of any provision of" the Indenture. General rules of construction favor giving meaning to each term in a contract and avoiding superfluity,[20] and so I find the Defendants reading of Section 6.06's language persuasive.

Along with the above reasoning, I find that additional language in Section 6.06 not cited by either party compels me to find that the NAC applies to statutory receivership actions. The NAC precludes a "right . . . to institute any suit, action or proceeding in equity or at law upon or under or with respect to [the] Indenture, *or* for the appointment of a receiver, . . . or for any other remedy hereunder."[21] It is clear to me that, by this language, the NAC covers actions "for the appointment of a receiver" in addition to and separately from those "upon or under or with respect to [the] Indenture."

[20] *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 741 (Del. Ch. 2008) ("It is a maxim of contract law that, given ambiguity between potentially conflicting terms, a contract should be read so as not to render any term meaningless."); *Pasternak v. Glazer*, 1996 WL 549960, at *3 (Del. Ch. Sept. 24, 1996) ("An interpretation of a contract that renders one or more terms redundant is not preferred over a construction that gives effect to each of the agreement's terms."); *but see U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *15 ("While redundancy is sought to be avoided in interpreting contracts, this principle of construction does not go so far as to counsel the creation of contract meaning for which there is little or no support in order to avoid redundancy.").

[21] Indenture § 6.06 (emphasis added).

2. The *Elliott* Case Is Directly On Point and Not Credibly Refuted by the Plaintiffs

This Court has previously interpreted a no-action clause with nearly identical language and found that it encompassed statutory receivership actions. In *Elliott Associates, L.P. v. Bio-Response, Inc.*,[22] this Court analyzed whether a no-action clause barred the plaintiffs' claim for the appointment of a statutory receiver, among other claims. The language of the indenture's no-action clause in *Elliott* was nearly identical to that of the NAC here and provided that, barring the satisfaction of certain pre-suit requirements,

> [n]o Holder of any Security shall have any right by virtue of or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder.[23]

Applying New York law, the *Elliott* court found that under this language the "Debenture holders [were] expressly denied the right to bring an action for the appointment of a receiver without first following the specified procedure relating to the Trustee."[24]

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[22] 1989 WL 55070.
[23] *Id.* at *6.
[24] *Id.* at *7. *See also Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *5–*6 (Del. Ch. June 2, 1992) (interpreting a similar no-action clause and finding that "no matter what legal theory a plaintiff advances, if the trustee is capable of satisfying its obligations, then any claim that can be enforced by the trustee on behalf of all bonds, other than a claim for the recovery of past due interest or principle, is subject to the terms of a no-action clause of this type").

In so holding, the *Elliott* court distinguished the holding in *Noble v. European Mortgage & Investment Corp.*,[25] where this Court found that the no-action clause at issue did not preclude a statutory receivership action. In *Noble*, this Court found controlling an express carve-out in the no-action clause which provided that

> [n]othing in this Section or elsewhere in this indenture . . . shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay the principal and interest of the bonds . . . nor affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment.[26]

The *Noble* court found that the above provision "quite clear[ly] . . . reserve[ed] to the bondholders complete liberty of action to enforce all payments due them . . . so long as the procedure they adopt[ed] [was] not under the indenture."[27] The *Elliot* court distinguished *Noble* on the ground that nothing in the *Elliott* indenture reserved to plaintiffs the right to commence actions relating broadly to payment of amounts owed.[28] Neither does the Indenture here contain such a reservation.[29]

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[25] 165 A. 157 (Del. Ch. 1933).
[26] *Id.* at 219.
[27] *Id.* at 222.
[28] *See Elliott*, 1989 WL 55070, at *7.
[29] The Plaintiffs contend that the *Elliott* court's dismissal of a fraud claim on substantive grounds rather than by application of the no-action clause indicates that the NAC language used here similarly does not bar extra-contractual claims. The Plaintiffs' interpretation of *Elliott* simply ignores that the court unequivocally found that, notwithstanding the fact that certain causes of action might exist outside the purview of the indenture, the no-action clause in *Elliott*, nearly identical to that here, "expressly denied the right to bring an action for the appointment of a receiver without first following the specified procedure relating to the Trustee." *Id.* at *7. Of course, the instant Indenture permits suits "to enforce the right to receive payment of principal . . . or interest *when due*," *see* Indenture § 6.06 (emphasis added), a right not at issue here.

Thus, the Plaintiffs' receivership claim is clearly covered by the NAC, under the rationale of *Elliott*.

3. This Result Does Not Contravene Public Policy or Cause Delaware Law, As We Know It, to Unravel

In its briefing and at oral argument, the Plaintiff raised two arguments purporting to invoke the important public policy considerations that underlie a creditor's statutory right to seek the appointment of a receiver to manage the affairs of an insolvent Delaware corporation. In the first of these arguments, raised in their briefing, the Plaintiffs contend that the cause of action created by DGCL Section 291 exists for important public policy reasons and therefore clearly confers standing separately from the provisions of the Indenture. The Plaintiffs cited

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The Plaintiffs also cite *Metropolitan West Asset Management, LLC v. Magnus Funding, LTD*, 2004 WL 1444868 (S.D.N.Y. June 25, 2004), for the proposition that,

> [w]here . . . a "no action" provision applies by its terms to only claims relating to an "Event of Default" *seeking payment on the notes themselves*, such clauses do not prevent noteholders from bringing extra-contractual tort claims or breach of contract claims that are not of the type to which the "no action" provision, by its terms, applies.

Id. at *5 (emphasis added). So finding, the court held that the no-action clause did not preclude the plaintiffs' breach of contract claims that were unrelated to payment on the notes but nonetheless arose out of the indenture. *Id.*

It is unclear what support the Plaintiffs finds in *Metropolitan West*. The NAC in this case does not by its terms apply only to claims "seeking payment on the notes themselves." On the contrary, the NAC *exempts* from its provisions actions brought "to enforce the right to receive payment of principal . . . or interest when due, or the right to receive payment or delivery of the consideration due upon conversion." Indenture § 6.06. By contrast, in *Metropolitan West*, the no-action clause, as interpreted by the court, simply barred actions by note holders seeking payment in the wake of an uncured "Event of Default." *See Metro. W.*, 2004 WL 1444868, at *4–*5. The NAC at issue here is easily distinguished, and I do not read *Metropolitan West* to be inconsistent with this Court's holding in *Elliott*.

Mackenzie Oil Co. v. Omar Oil & Gas Co[30] at length. Though the referenced passages discuss the importance of the receivership remedy for creditors and stockholders, *Mackenzie* provides no support for the Plaintiffs' argument that this importance allows (or, for that matter, justifies) the judicial setting aside of contractual curtailments of statutory causes of action entered into by sophisticated parties.

The Plaintiffs' second public policy point is similar to their first and was raised for the first time at oral argument.[31] The Plaintiffs argued that even if the NAC by its terms bars or serves as a waiver of the right to seek a receivership, such waiver is void as against public policy. Upon request, the Plaintiffs were unable to cite any case law holding that sophisticated commercial parties may not contractually alter their rights to pursue statutory remedies. DGCL Section 291 *allows* a creditor or stockholder of an insolvent corporation to apply for a receivership;[32] it does not mandate the appointment of a receiver, and nothing in the statute suggests that this right cannot be waived contractually. The Plaintiffs' arguments to the contrary are unconvincing.

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[30] 120 A. 852 (Del. Ch. 1923).

[31] This delay constitutes a waiver. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). I address the contention regardless for the sake of completeness and because I find no prejudice to the Defendants in disposing of a meritless argument.

[32] *See* 8 *Del. C.* § 291 ("Whenever a corporation shall be insolvent, the Court of Chancery, on the application of any creditor or stockholder thereof, may, at any time, appoint 1 or more persons to be receivers of and for the corporation . . . .").

After I dismissed the Plaintiffs' receivership claim from the bench and indicated that I would issue an opinion expanding on my reasoning therefor within a week, Plaintiffs' counsel moved for immediate reargument, which I allowed. On reargument, the Plaintiffs contended that my ruling effectively established a rule that note holders subject to an indenture containing a sufficiently broad no-action clause would have no recourse in the face of wrongdoing, in contravention of this Court's "pronouncement" in *Cypress Associates, LLC v. Sunnyside Cogeneration Associates Project*[33] that "no-action clauses . . . do not present an insuperable barrier to all suits not brought in strict conformity with their terms," but rather serve as "an important, but surmountable, barrier to suits."[34] Assuming that the Plaintiffs' reading of *Cypress* as prohibiting "insurmountable" no-action clauses as a matter of law is correct,[35] the argument nonetheless collapses under its own

[33] 2006 WL 668441 (Del. Ch. Mar. 8, 2006).
[34] *Id.* at *7.
[35] The Plaintiffs cited this language without reference to the remainder of its paragraph in *Cypress*, which found that exempting note holders from the limitations of the no-action clause where demand on the trustee would be futile overcame this "insuperability." *See id.* ("[No-actions clauses] may be overcome when it is plain that procession under the suit would be futile, a line of reasoning that draws on the law of derivative suits."). In taking the *Cypress* language out of its context, the Plaintiffs seemingly were attempting to establish a principal that no-action clauses can never "totally" bar a suit. Nothing cited in the briefing or at oral argument suggests that this is the law in Delaware. As a matter of logic, if a no-action clause is to serve any purpose at all, it must at least in some cases bar the relief sought by the plaintiff. Indeed, I find that the NAC does so here. To be clear, my decision rests on my findings that the NAC covers statutory receivership actions and that no Event of Default has occurred. I therefore do not reach the issue, raised by the Plaintiffs, of whether demand would have been futile on account of trustee USBNA's alleged conflict. If the Plaintiffs had satisfied the other requirements of the NAC, then certainly the existence of a conflicted trustee, if sufficiently alleged, would excuse demand.

weight. The Plaintiffs offered a hypothetical at oral argument to illustrate their point: a company and an indenture trustee wire a substantial portion of the company's remaining cash to Brazil, but do not miss any payments on the notes, therefore avoiding an event of default, and a no-action clause like the one here prohibits the note holders from seeking the appointment of a receiver over the company, which, according to the Plaintiffs, would be "the most effective remedy . . . and the quickest way to stop a wire."[36] This example fails to make the Plaintiffs' point on several counts. In the first instance, it strikes me that filing a receivership action would be an ineffective response to imminent misappropriation and jurisdictional flight. While this Court attempts to meet exigency with alacrity, it is doubtful that even our most expedited receivership procedures can outpace the speed of electrons traveling by wire. In any event, a more advisable response might be to seek a TRO. The latter brings me to my second point: the Plaintiffs sought a TRO in this action, alleging multiple breaches of fiduciary duty on the part of Savient's board members. That TRO was denied, not because the terms of the NAC barred such a proceeding, but because the Plaintiffs failed to allege colorable claims. The Plaintiffs' later contention—on reargument—that my dismissal of their

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Thus, the NAC is "insuperable" here only because the Plaintiffs have failed to comply with a single one of its terms.

[36] *See* Pretrial Mots. Oral Arg. Tr. 69:9–70:11 (July 23, 2012).

receivership claim would deprive them and note holders everywhere of all recourse, even in the Brazilian wire transfer nightmare scenario, was misplaced.

B. The Filing of an Action Prohibited by the Indenture Did Not Trigger an Event of Default Under the Indenture

Because I find that the NAC applies to the Plaintiffs' statutory receivership claim, the Plaintiffs were required to satisfy certain requirements before bringing this action. One of those requirements is that an Event of Default must have occurred.[37] The Plaintiffs argue that such an event has occurred by the terms of Section 6.01(j) of the Indenture, which, as discussed above, provides that a receivership action left undismissed and unstayed for a period of 30 days triggers an Event of Default. The Plaintiffs concede that no Event of Default had occurred when they initiated this action, but they contend that the subsequent pendency for 30 days of their receivership claim triggered a Default and conferred standing. The Defendants argue, in so many words, that such bootstrapping contravenes the contractual intent of the parties and, if blessed by the Court, would allow the Plaintiffs to benefit from failing to comply with the terms of the Indenture. The Defendants are right on both counts.

[37] Even if, as the Plaintiffs allege, USBNA was conflicted, an Event of Default remained a perquisite to this action. Because I find that no Event of Default occurred, I do not reach the issue of whether USBNA's dual obligations to Savient's secured and unsecured creditors rendered it conflicted for purposes of demand futility under the NAC.

Read in isolation, Section 6.01(j) indeed provides that an Event of Default occurs if a party brings a receivership action against the Company and that action or proceeding remains undismissed and unstayed for a period of 30 consecutive days.[38] Contracts must be read as a whole, however.[39] Section 6.01(j) must therefore be interpreted, to the extent possible, in a way that harmonizes with the other terms of the Indenture,[40] particularly Section 6.06, which I have already decided precludes the very receivership claim brought here. To read those sections as the Plaintiffs do would be to allow a Note holder to avoid the standing requirements of the NAC by violating those very requirements. This outcome would eviscerate Section 6.06, and in so doing would defeat the parties' clear intent to subject the Note holders to the broad restrictions of the NAC.[41] Such a result would be a "commercial absurdity."[42]

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[38] I assume for purposes of this Opinion only that the requisite 30-day period has lapsed and that the Plaintiffs are not estopped from asserting an Event of Default after initially basing their right to sue notwithstanding the NAC on the *lack* of a Default.

[39] *See Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355, at *22 (Aug. 8, 2011) ("Like Delaware law, New York law is clear that contracts must be read as a whole and in a manner that gives effect to every provision." (footnote removed) (citing *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010); *Beal Savings Bank v. Sommer*, 865 N.E.2d 1210, 1213–14 (N.Y. 2007))).

[40] *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 2783101, at *13 (Del. July 10, 2012) (invoking the canon of construction that "requires all contract provisions to be harmonized and given effect where possible"); *GRT*, 2012 WL 2356489, at *4 ("[A] court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage.").

[41] *See Castle Creek Tech. Partners, LLC v. CellPoint Inc.*, 2002 WL 31958696, at *7 (S.D.N.Y. Dec. 9, 2002) ("When a party to a contract has breached the agreement, however, either by acting in bad faith or by violating an express covenant within the agreement, it may not later rely on that breach to its advantage." (citing *Kirke La Shelle Co. v. The Paul Armstrong Co.*, 188 N.E.

Stated another way, by bringing an action which they were not entitled to bring, the Plaintiffs cannot put themselves in a better position than they would have been had they complied with the terms of the Indenture. The Plaintiffs accepted the terms of the Indenture when they purchased the Notes and failed to honor those terms when they filed this action without an Event of Default. They cannot now rely on that nonconforming action as the basis for asking this Court to find an Event of Default favorable to them.

IV. CONCLUSION

The Plaintiffs chose to purchase unsecured notes in Savient under an indenture that prevented them from seeking the appointment of a receiver absent an Event of Default. Presumably, both the unsecured nature of the Notes and the NAC had an effect on the price and rate of the Notes. In any event, the Plaintiffs,

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163, 167–68 (N.Y. 1933) (holding that party that had breached one provision within a contract could not rely on that breach to avoid its obligations under a different provision); *Indovision Enters, Inc. v. Cardinal Export Corp.*, 354 N.Y.S.2d 113, 115 (N.Y. App. Div. 1974) ("A provision that allows either party by his own breach to excuse his own performance is a commercial absurdity.")). The Plaintiffs argue that they are not bound by these general principles on the basis that they are not, strictly speaking, signatories or parties to the Indenture, but rather third-party beneficiaries thereof. This argument is unsound. In purchasing the Notes, the Plaintiffs consented to restrictions on their rights arising out of their statuses as Note holders, restrictions delineated by the Indenture and inclusive of the NAC's limitations on Note holders' abilities to enforce their rights against the Company through litigation. *See RBC Capital Markets, LLC v. Education Loan Trust IV*, 2011 WL 6152282, at *5 (Del. Ch. Dec. 6, 2011) ("No-action clauses . . . are a standard feature of indenture agreements which require compliance by bondholders to prevent dismissal of their suit." (internal quotation marks removed)); *id.* at *2 (discussing the important gate-keeping role of no-action clauses). Under the same principle that prohibits a party to a contract from benefitting itself by violating a provision of that contract, the Note holders may not procure rights under one section of the Indenture by violating their obligations under another.

[42] *See Indovision*, 354 N.Y.S.2d at 115.

sophisticated commercial entities, elected to become Note holders subject to the restrictions of the Indenture.

No Event of Default has occurred, and Savient has met all its payment obligations under the Indenture. What the Plaintiffs truly seek is relief from the bargain they entered when they purchased the Notes. Such relief is unavailable here.

For the foregoing reasons, the Defendants' motion to dismiss the Plaintiffs' receivership claim for lack of standing is GRANTED, and the Defendants' motion for summary judgment seeking a declaration that an Event of Default has not occurred is GRANTED. Accordingly, the Plaintiffs' motion for summary judgment on Count VII of the Second Amended Complaint and Count I of the Savient Complaint is DENIED.

IT IS SO ORDERED.

Because I have dismissed the receivership claim, it is my understanding that Count I of the Second Amended Complaint, seeking a declaration of Savient's insolvency, is moot. The remaining claims are thus the Plaintiffs' breach of fiduciary duty claims, their request that USBNA be removed as trustee, and Savient's claim for tortious interference against Tang. These claims are subject to outstanding motions to dismiss on which no briefing has been completed. The

parties should confer and inform the Court whether and on what schedule they intend to go forward on the outstanding dispositive motions.