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Case Number 338,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

QUADRANT STRUCTURED PRODUCTS CO., LTD., Individually and Derivatively on behalf of Athilon Capital Corp.,	§	No. 338, 2012
Plaintiff Below, Appellant,	§	Court Below: Court of Chancery of the State of Delaware
v.	§	C.A. No. 6990 VCL
VINCENT VERTIN, MICHAEL SULLIVAN, PATRICK B. GONZALEZ, BRANDON JUNDT, J. ERIC WAGONER, ATHILON CAPITAL CORP., ATHILON STRUCTURED INVESTMENT ADVISORS LLC, EBF & ASSOCIATES, LP,	§	
Defendants Below, Appellees.	§	

Submitted: February 5, 2013
Decided: February 12, 2013

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

O R D E R

This 12th day of February 2013, upon consideration of the briefs of the parties, and their contentions in oral argument, it appears to the Court that:

1. Quadrant Structured Products Co., Ltd., the plaintiff-below ("Quadrant"), appeals from a Court of Chancery order granting a motion to dismiss

by the defendants, who are Athilon Capital Corp. ("Athilon"), Athilon's officers and directors, EBF & Associates, LP ("EBF"), and Athilon Structured Investment Advisors LLC ("ASIA") (collectively, "defendants"). We conclude that the current record is insufficient for appellate review. Accordingly, the case must be remanded to the Court of Chancery to issue an opinion stating its reasons for concluding that Quadrant's claims are barred by the no-action clause in the indenture governing the Athilon securities that Quadrant holds.

2. In October 2011, Quadrant, a holder of Athilon debt securities, brought this action asserting claims against Athilon and its officers and directors, and against EBF (a partnership that indirectly controls Athilon) and ASIA (an EBF affiliate that manages Athilon on a day-to-day basis). On June 5, 2012, based solely on the parties' briefs, the Court of Chancery granted the defendants' motion to dismiss Quadrant's Amended Complaint.[1]

3. The order dismissing the Amended Complaint consists of two short paragraphs which conclude that dismissal was warranted "in light of the plaintiff's failure to comply with the no-action clauses in the indentures governing the debt instruments that the plaintiff holds."[2] The order cited, as "directly on point,"[3] two

[1] *Quadrant v. Vertin*, C.A. 6990-VCL, slip op. (Del. Ch. June 5, 2012) (Laster, V.C.).

[2] *Id.*

[3] *Id.*

Court of Chancery opinions decided under New York law, *Lange v. Citibank, N.A.*[4] and *Feldbaum v. McCrory Corp.*[5] No reasons were stated to support the conclusion that those cases were directly on point. This appeal followed.

4. This Court reviews *de novo* a trial court's grant of a motion to dismiss.[6] On appeal, Quadrant claims that *Lange* and *Feldbaum* are not controlling, because the no-action indenture clause in those cases were critically different from the no-action clause in the Athilon indenture at issue here ("Athilon Indenture"). Therefore, Quadrant argues, by concluding that the Athilon no-action clause barred this lawsuit, the Court of Chancery erred as a matter of law.

5. In *Feldbaum*, the Court of Chancery, applying New York law, held that a no-action clause in an indenture constituted a waiver by the bondholder-plaintiffs of their right to prosecute an action against the debtor-defendants without first satisfying the conditions prescribed by the no-action clause.[7] The *Feldbaum* indenture provided that "[a] Securityholder may not pursue any remedy with respect to this Indenture *or the Securities*" unless certain conditions were first satisfied.[8] Because the bondholder-plaintiffs had not complied with those

[4] 2002 Del. Ch. LEXIS 101, 2002 WL 2005728 (Del. Ch. Aug. 13, 2002).

[5] 1992 Del. Ch. LEXIS 113, 1992 WL 119095 (Del. Ch. June 1, 1992).

[6] *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001).

[7] *Feldbaum*, 1992 WL 119095, at *5, *7-8.

[8] *Id.* (italics added).

conditions, the court dismissed the claims covered by the indenture's no-action clause.[9]

6. In *Lange*, the Court of Chancery granted the defendants' motion for judgment on the pleadings, similarly because the plaintiffs, a group of debenture holders, had failed to comply with a no-action clause in the applicable indenture, which also was governed by New York law.[10] The no-action clause, which contained language identical to that in *Feldbaum*, provided that "[a] Securityholder may not pursue a remedy with respect to this Indenture *or the Securities*" unless the debenture holder first satisfied certain conditions.[11]

7. In this case, the Athilon Indenture, which is also governed by New York law, is worded differently from the indentures at issue in *Lange* and *Feldbaum*. The Athilon Indenture provides that "[n]o holder of any Security shall have any right by virtue 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*," unless certain conditions are first satisfied.[12] Unlike the no-action clauses in *Lange* and *Feldbaum*, the no-action

[9] *Id.* at *3.

[10] 2002 WL 2005728, at *6.

[11] *Id.* at *5-6 (italics added).

[12] App. to Appellant's Op. Br. at A-229 (emphasis added) (§ 7.06 of the Indenture).

clause in the Athilon Indenture does not contain the phrase "or the Securities."[13] The absence of that phrase, Quadrant argues, critically distinguishes *Lange* and *Feldbaum* and renders them noncontrolling. That argument presents a litigable issue that merits analysis by the Court of Chancery in the first instance.

8. The Court of Chancery order of dismissal did not address the differences between the respective no-action clauses in the *Lange* and *Feldbaum* indentures and the Athilon Indenture. Presumably the court found those differences to be not legally significant, but the order does not explain why. Nor does the order cite to, or discuss, applicable New York case law that would support the court's implicit view that the New York courts would find those differences legally insignificant.[14] For these reasons, and at this juncture, the record does not adequately lend itself to informed appellate review.

9. Accordingly, we remand this action to the Court of Chancery to issue an opinion analyzing the significance (if any) under New York law of the differences between the no-action clauses in the *Lange* and *Feldbaum* indentures and the Athilon Indenture. The analysis should include a discussion of decisions

[13] *Id.*

[14] Both *Lange* and *Feldbaum* cited federal and New York cases concerning the interpretation of no-action clauses in contracts and indentures governed by New York law. In this case, the Court of Chancery order did not cite, or discuss the applicability of those decisions or any other New York cases decided after *Feldbaum* and *Lange*.

by New York courts, and other courts applying New York law, that bear on the issue presented here.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **REMANDED** for further proceedings in accordance with this Order. Jurisdiction is retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice