EFiled: Jan 06 2014 11:01PM EST
Filing ID 54796806
Case Number 472,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CASPIAN ALPHA LONG CREDIT FUND, L.P., CASPIAN SELECT CREDIT MASTER FUND, LTD., CASPIAN CAPITAL PARTNERS, L.P., and MARINER LDC, Plaintiffs Below, Appellants, v. GS MEZZANINE PARTNERS 2006, L.P., and GS MEZZANINE PARTNERS V, L.P., Defendants Below, Appellees.	No. 472, 2013 Court Below: Court of Chancery of The State of Delaware C.A. No. 5941 - VCL PUBLIC VERSION FILED JANUARY 6, 2014

ANSWERING BRIEF OF DEFENDANTS BELOW, APPELLEES GS MEZZANINE PARTNERS 2006, L.P. AND GS MEZZANINE PARTNERS V, L.P.

Of Counsel:

Irwin H. Warren
Lauren B. Hoelzer (#4874)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000

Christine T. Di Guglielmo (#4848)
WEIL, GOTSHAL & MANGES LLP
1201 North Market Street, Suite 1402
Wilmington, DE 19801-1147
(302) 656-6600

Kevin G. Abrams (#2375)
Derrick Farrell (#5747)
ABRAMS & BAYLISS LLP
20 Montchanin Road
Wilmington, DE 19807
Tel: (302) 778-1000

Attorneys for GS Mezzanine Partners 2006, L.P., and GS Mezzanine Partners V, L.P.

Dated: December 20, 2013

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

Caspian,[1] an after-market vulture fund, seeks to reap a windfall (101% of the face value of notes that it purchased at a steep discount) from its highly speculative investment in Superholdco's distressed debt securities (the "Notes") by imposing that expense on noteholders who consented to a restructuring.[2] Having failed to extract satisfactory value from the issuers, Caspian now presses unprecedented claims against those other noteholders, who are third-party beneficiaries of, and not parties to or obligors under, the Note indenture (the "Indenture" or "SI"). In so doing, Caspian asks this Court to reject the Court of Chancery's sound reading of the Indenture's unambiguous language; to abrogate the settled commercial meaning of a boilerplate provision derived from a model indenture; and to be the first court to hold that noteholders, merely by voting for amendments as authorized by specific indenture provisions, can become liable to dissenting noteholders for obligations that the indenture ascribes solely to the issuers.

Caspian and GSM both owned unsecured, non-guaranteed, deeply subordinated Notes issued in 2007 pursuant to the terms of the Indenture executed solely by Superholdco and Marsico Notes Corp. (collectively, the

---

[1] Appellant investment funds Caspian Alpha Long Credit Fund, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Capital Partners, L.P. and Mariner LDC collectively are referred to herein as "Caspian." Appellee investment funds GS Mezzanine Partners 2006, L.P. and GS Mezzanine Partners V, L.P. collectively are referred to herein as "GSM."

[2] Marsico Parent Superholdco, LLC ("Superholdco") is the ultimate parent of the Marsico companies (collectively, "Marsico"). The capital structure is described more fully *infra* at 6.

"Issuers") and the Indenture trustee. GSM purchased its Notes in the initial offering. Caspian acquired its Notes sometime after their issuance, when the markets severely discounted these speculative debt instruments.

[redacted]

Having lost that gambit, Caspian amended its complaint, for the first time claiming that GSM violated [redacted] of the Indenture, which states, in part, that a Noteholder [redacted]

[redacted]

Based on the plain meaning of the Indenture terms, settled case law, and authoritative commentaries and explanatory notes to the model indentures from which [redacted] is drawn, the Court of Chancery held that [redacted] is a "no action" clause that limits Noteholders' rights to pursue legal remedies, but does not provide a basis for holding one Noteholder liable to another for voting in favor of expressly authorized amendments. Caspian, which had no "right" not to be outvoted, nonetheless asks this Court to (i) adopt an unprecedented reading of the Indenture's standard "no action" provision that runs counter to the well-established judicial and commercial understanding thereof, and thereby (ii) drastically alter the relationships among the parties to the Indenture (the Issuers and Indenture trustee) and the third-party beneficiaries of the Indenture (the Noteholders) by holding that one Noteholder (GSM) may incur liability to another (Caspian) merely by exercising voting rights [redacted] Caspian's proposed interpretation would allow any noteholder that is outvoted to use a boilerplate "no action" clause to obtain a windfall recovery from any noteholder that voted in the majority. The Court should reject Caspian's unprecedented interpretation and affirm the sound decision of the Court of Chancery.

SUMMARY OF ARGUMENT

1. Denied. The plain language of [redacted], and a reading of the Indenture as a whole, confirm that the Court of Chancery appropriately dismissed GSM. First, nothing in [redacted] or any other provision of the Indenture provides that Noteholders may be liable to other Noteholders, or that the Issuers' obligations may be imposed on Noteholders. Moreover, Caspian's interpretation of [redacted] guts the explicit provision of the Indenture [redacted] and would penalize GSM (and other Noteholders) for exercising their voting rights, while rendering superfluous those Indenture provisions [redacted] Second, [redacted] is an unambiguous "no action" clause that is designed to protect the Issuers and other Noteholders from burdensome or discriminatory litigation by limiting Noteholders' ability to pursue individual legal remedies. Finally, GSM cannot be liable to Caspian because GSM was neither a signatory to nor a guarantor under the Indenture. Indentures are contracts entered into between an issuer and a trustee for the benefit of the noteholders, and governing New York contract law precludes Caspian from recovering damages from GSM, a third-party beneficiary.

2. Denied. [redacted] does not give Caspian a claim against other Noteholders for voting for amendments as [redacted] First, it is clear from the plain language that [redacted] is a standard "no action"

[redacted] Second, case law, the American Bar Foundation *Commentaries*, and the explanatory notes concerning the model indenture language on which [redacted] was based all confirm such interpretation of [redacted] Third, the Court of Chancery did not erroneously disregard other provisions of the Indenture or rely on the section headings in the Indenture or the text of any other indenture. In contrast, Caspian's proffered interpretation would have [redacted] general provisions *sub silentio* override specific provisions of the Indenture, including [redacted]

3. Denied. The Court of Chancery correctly read [redacted] "in light of its evolution through the 1965 model indenture, the 1983 model indenture, [and] the 2000 model indenture," and correctly held that "the intent here was to keep the same meaning as in those prior provisions and simplify the language." A0001436. Courts routinely consult the American Bar Foundation's 1971 *Commentaries* (the "*Commentaries*") to the 1965 model indenture to interpret indentures based on the 1983 and 2000 model language; and neither [redacted] nor any other provision of the Indenture bars such consideration. Though reliance on the *Commentaries* is not necessary to GSM's argument, the *Commentaries* confirm that [redacted] is simply a standard "no action" clause.

STATEMENT OF FACTS

I. CAPITAL STRUCTURE AND INDENTURE TERMS

In 2007, the Issuers and their affiliates, Superholdco's wholly owned subsidiary, Marsico Parent Holdco, LLC ("Holdco") and Holdco's wholly owned subsidiary, Marsico Parent Company, LLC ("Opco," and, collectively with Superholdco, Holdco, and affiliated operating entities, "Marsico"),[3] issued three levels of public debt. [redacted] (*see* [redacted] (A000458)), [redacted] A000638, A000590.

GSM (which Caspian incorrectly conflates with "Goldman Sachs")[4] purchased approximately [redacted] of the Notes in the initial offering in 2007. A000157 at ¶ 35. Caspian is a collection of sophisticated after-market "vulture" investment funds specializing in risky debt. A000118-19; A000207; A000220-21. Unlike GSM, Caspian purchased its Notes after their issuance, at a steep discount, when the markets recognized the speculative nature of the deeply subordinated securities of a company [redacted] A00094; A000118-19. The

[3] The [redacted], as defined in [redacted] of the Indenture, owns 100% of Superholdco. COB at 11. GSM never had any Superholdco voting equity or board or management positions.

[4] In fact, GSM are investment funds managed by an affiliate of Goldman, Sachs & Co.

Noteholders are non-signatory, third-party beneficiaries of the Indenture. SI at 1 (A000383).

II. THE EXCHANGE OFFER

[redacted] A000593; A000605-06; A000595. [redacted] A000590. [redacted] (A000544) [redacted]

[5] In relevant part, [redacted] (A000436).

[redacted] *See* A000119-20.

[redacted] of the Indenture provides, in relevant part, for [redacted]

[redacted]

A000453-54. Thus, the Noteholders [redacted]

III. CASPIAN'S ATTEMPT TO HOLD UP THE EXCHANGE OFFER

In an attempt to wring some value out of its speculative, distressed investment, on [redacted]—three weeks after the announcement of the Exchange Offer and just ten days before the offer was to expire—Caspian filed this

action, initially seeking to enjoin the Noteholder vote and the closing of the Exchange Offer. Caspian did not plead or argue any violation of [redacted] at that time. The Court of Chancery denied Caspian's motion, holding that Caspian was unlikely to succeed on the merits, and, in any event, monetary remedies were available. A000123-26 (also recognizing that the Notes were so deeply subordinated that the transactions did not alter Superholdco's ability to pay). Caspian did not appeal.

In [redacted], pursuant to [redacted], holders of [redacted] A000547-49; A000207 at n. 1; A000151 at ¶ 4. Like other participating Noteholders, GSM received only its pro rata share of the restructuring consideration. A000217; A0001440-42.

IV. THE COURT OF CHANCERY DISMISSES GSM FROM THE SUIT

Approximately seven months after the Exchange Transactions closed, Caspian filed an Amended Complaint alleging, for the first time, breach of contract claims against other Noteholders (including GSM) and new claims for breach of the implied covenant of good faith and fair dealing. A000183-88 at ¶¶ 111-37. Specifically, Caspian alleged that Noteholders who voted in favor of the Exchange Transactions violated [redacted] by consenting to amend certain sections of the Indenture in a way that potentially prejudices Caspian's economic interests.

[redacted]

A000443-44.

There is a striking overlap between [redacted] and section 6.06 of the 2000 Model, which provides:

> A Securityholder may pursue a remedy with respect to this Indenture or the Securities only if:
>
> (1) the Holder gives to the Trustee notice of a continuing Event of Default;
>
> (2) the Holders of at least 25% in Principal amount of the Securities make a request to the Trustee to pursue the remedy;

> (3) the Trustee either (i) gives to such Holders notice it will not comply with the request, or (ii) does not comply with the request within [15 or 30] days after receipt of the request; and
>
> (4) the Holders of a majority in Principal amount of the Securities do not give the Trustee a direction inconsistent with the request prior to the earlier of the date, if ever, on which the Trustee delivers a notice under Section 6.06(3)(i) or the expiration of the period described in Section 6.06(3)(ii).
>
> A Securityholder may not use this Indenture to prejudice the rights of another Securityholder or to obtain a preference or priority over another Securityholder.

A0001107-08.

All defendants moved to dismiss Caspian's Amended Complaint. The Court of Chancery dismissed the claims against GSM, holding that the facts pled did not state any claim against it and that [redacted] is a standard "no action" clause. A0001436; A0001438; A0001441-42. At the same time, the court allowed certain claims to proceed against the Issuers. A0001435-40. Notably, the court also stated that Caspian would have the right to pursue discovery, including from Marsico and GSM, and to amend its complaint to bring GSM back into the action, should discovery reveal facts to support a claim against it. A0001440-42. Caspian took discovery, but did not amend its claims. On August 14, 2013, Caspian and the remaining Marsico defendants stipulated to the dismissal of the remaining claims, with prejudice. Caspian now appeals the Court of Chancery's decision dismissing GSM from the suit.

ARGUMENT

I. QUESTION PRESENTED

Does a boilerplate "no action" clause, which mirrors the 2000 Model and, as noted in the *Commentaries*, is commonly understood to "deter individual debenture-holders from bringing independent lawsuits for unworthy and unjustifiable reasons," (i) *sub silentio* both override the Indenture's express term [redacted] and expand the provisions as to which each Noteholder must consent; and (ii) permit a Noteholder who opposed the amendments to extract damages from another non-signatory Noteholder that voted with the majority, when New York law does not recognize any cause of action against a non-signatory or third-party beneficiary for breach of contract or the implied covenant of good faith and fair dealing?

II. STANDARD OF REVIEW

The parties agree the standard of review is *de novo*. In evaluating a Rule 12(b)(6) motion to dismiss, however, the Court need not "accept every strained interpretation of the allegations proposed by the plaintiff."[6] Rather, this Court accepts only those "reasonable inferences that logically flow from the face of the complaint" and will affirm dismissal unless the complaint states a reasonably

[6] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citation omitted).

conceivable basis for recovery.[7]

III. MERITS OF ARGUMENT

A. The Court Of Chancery Correctly Held That Caspian Failed To State A Claim For Breach Of Section 6.06 Of The Indenture

1. [redacted] Is A Clear and Unambiguous "No Action" Clause With Universal Meaning That Does Not Impose Liability On Noteholders

The plain language of [redacted] sets forth the [redacted] circumstances in which a [redacted] It establishes [redacted] Its final sentence [redacted]

Caspian urges the Court to read the final sentence of [redacted] in isolation and to sever the [redacted] language from the [redacted] language that precedes it. If, however, Caspian's interpretation is correct, the procedures by which a Noteholder may [redacted] pursue a remedy are irrelevant and any Noteholder may face liability any time its acts pursuant to another provision of the Indenture prejudice the rights—or, here, even the subjective interests (for the amendments did not change the [redacted] Caspian's Notes)—of some

[7] *Id.*

other Noteholder. [redacted] says no such thing. No provision of the Indenture imposes liability for voting.

It is well established that "[m]eaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph."[8] Analyzed in context, [redacted] language clearly refers to a Noteholder's [redacted] contrary to the way another Noteholder would prefer.

Ignoring that context, Caspian cites decisions, none of which analyzes an indenture,[9] for the unremarkable proposition that dismissal is inappropriate if the Court finds there is an ambiguity. COB 32-33. But [redacted] is not ambiguous;[10] and "[t]he mere assertion of an ambiguity does not suffice to make an issue of fact."[11] "Where the parties dispute the meaning of particular contract

---

[8] RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (1981). *See also Empire Props. Corp. v. Mfrs. Trust Co.*, 43 N.E.2d 25, 28 (N.Y. 1942) ("The meaning of a writing may be distorted where undue force is given to single words or phrases. We read the writing as a whole. We seek to give to each clause its intended purpose . . . ."); *Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 367 N.Y.S.2d 492, 495 (App. Div. 1975) ("'Noscitur a sociis' is an old fundamental maxim . . . whereby the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it.").

[9] *See* COB at 32-33 (citing cases).

[10] Under New York law, "whether a contract is ambiguous is a question of law for the court." *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010).

[11] *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 2013 WL 1890278, at *9

clauses, the task of the court 'is to determine whether such clauses are ambiguous *when read in the context of the entire agreement*.'"[12] "An ambiguity exists where the terms of the contract 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'"[13]

Caspian argues that the "clear language" of [redacted] does not "address with even a single syllable [redacted] and does not [redacted] . . . . Rather, the [redacted]' provision . . . addresses the [redacted] COB at 5, 19, 26. But Caspian ignores the opening language of [redacted] that [redacted] By definition, a judicial proceeding is how one pursues a remedy.[14] The section's text thus plainly refers to

---

(S.D.N.Y. May 8, 2013) (citation omitted) (applying New York law).

[12] *Id.* at *8 (emphasis added) (citation omitted).

[13] *Law Debenture Trust Co.*, 595 F.3d at 466 (citation omitted) (holding that the terms of an indenture governing notes were not ambiguous).

[14] Black's defines the noun "remedy" as: "1. *The means of enforcing a right* or preventing or redressing a wrong; *legal or equitable relief*. – Also termed *civil remedy*. 2. REMEDIAL ACTION. Cf. RELIEF. – Also termed (in both senses) *law of remedy*." BLACK'S LAW DICTIONARY 1407 (9th ed. 2009) (emphasis added). "Relief" is defined as "[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), *that a party asks of a court*. *Also termed remedy*. Cf. REMEDY." *Id.* at 1404 (emphasis added). *See also* 1965 MODEL DEBENTURE INDENTURE ("1965 Model") ("No holder of any Debenture or coupon shall have any

[redacted] In contrast, a Noteholder's voting to amend a contract involves the exercise of an express contractual right—not the pursuit of a remedy.

Caspian incorrectly contends that the bankruptcy court in *In re Electroglas, Inc.*[15] "applied [a section 6.06 "no action" provision] outside of the litigation context to protect noteholders from actions taken by other noteholders." COB at 29. But *Electroglas* did not involve a section 6.06 provision trumping a noteholder vote at all. Rather, the court held that certain noteholders would violate an indenture provision based on the "no action" clause of the 1965 Model by "credit bidding," ***in a judicial proceeding in bankruptcy***, only a portion of the issuer's notes (i.e., the ones that they owned) to purchase the debtor-issuer's assets in a bankruptcy proceeding.[16] A court order approving that credit bid would have meant that only the credit-bidding noteholders would have the remedy of receiving payment (by obtaining the issuer's assets), but other noteholders would not.[17] The court held that pursuing such a *remedy in a judicial bankruptcy proceeding* would violate "the overarching prescription [under a section 6.06 provision] that all actions taken as to the Notes be taken for the equal benefit of all Noteholders."[18]

---

right to institute any proceeding, judicial or otherwise, with respect to this Indenture, *or for any other remedy* hereunder, unless . . .") A0001052.

[15] 2009 WL 8503455, at *2 (Bankr. D. Del. Sept. 23, 2009).

[16] *Id.* at *1-2.

[17] *Id.*

[18] *Id.* at *1. *See also id.* ("Credit bidding is a right specifically provided for by the Bankruptcy

Electroglas thus makes clear that "no action" clauses like [redacted] apply only to how a Holder may pursue a remedy in a judicial proceeding: the case has nothing to do with GSM's voting [redacted] to amend the Indenture. Hence, even Caspian's key case supports GSM's interpretation that [redacted] can mean only that, even when a Noteholder technically has complied with the requirements of [redacted] and made a proper demand upon the Trustee, that Noteholder still cannot seek a remedy that would prejudice the rights of other Noteholders or provide a priority to it over other Noteholders.[19]

Finally, Caspian asserts that [redacted] precludes the Court from considering the Indenture's section headings. COB at 23. However, nothing in the court's opinion even implicitly suggests that it relied on the heading of [redacted] and, for the reasons stated herein, there is no need to consider [redacted] heading to understand that it is an unambiguous, standard "no action" clause.

2. Caspian's Interpretation Would Place [redacted] In Conflict With [redacted] Of The Indenture

Caspian's contention that [redacted] makes GSM liable for voting to approve amendments to the Indenture puts [redacted] squarely in conflict with [redacted], which [redacted]

Code [that] only arises in the context of a bankruptcy proceeding . . . .").

[19] For example, a noteholder, even if it went through the process set forth in Section 6.06, could not use a lawsuit to restrain another noteholder from suing to enforce a payment right. Similarly, in the case of secured notes, a noteholder could not seek a remedy allowing it to obtain collateral for its notes only, and thereby leave other holders of secured notes without recourse.

[redacted]

[redacted] Under New York law, an "interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation."[20] Moreover, general provisions may not be read to trump specific provisions of a contract.[21] [redacted] does not mention or purport to override the [redacted] *See* [redacted] (A000443-44). Further, [redacted] twice says it is [redacted] but does ***not*** mention [redacted] (A000453-54))—thus, New York's doctrine of *inclusio unius est exclusio alterius*[22] prevents Caspian from including [redacted] among the sections to which [redacted] is subject. Indeed, under Caspian's reading, [redacted] further express provisions [redacted] (A000454)) would be superfluous, as well: [redacted]

[20] *Acme Supply Co. v. City of N.Y.*, 834 N.Y.S.2d 142, 143 (App. Div. 1st Dep't 2007) (citation omitted).

[21] *See Aguirre v. City of N.Y.*, 625 N.Y.S.2d 597, 598 (App. Div. 2d Dep't 1995) (citing *Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956)); *see also Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 387 (Del. Ch. 2010).

[22] *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 472 N.E.2d 315, 318-19 (N.Y. 1984) (applying the doctrine of *inclusio unius est exclusio alterius* to note that the specification of certain items in a contract suggests the exclusion of unspecified items); *RM 14 FK Corp. v. Bank One Trust Co.*, 831 N.Y.S.2d 120, 123 (App. Div. 1st Dep't 2007) ("[T]here is no basis 'to interpret an agreement as impliedly stating something which the parties have neglected to specifically include . . . .'") (citation omitted).

[redacted]. Because [redacted] are not subject to [redacted] GSM cannot be liable for voting with nearly all other Noteholders to amend the Indenture in a manner opposed by Caspian.

3. [redacted] Is A Boilerplate "No Action" Provision From A Model Indenture

The "no prejudice" language in [redacted] is a non-negotiated, boilerplate provision that tracks section 6.06 of the 2000 Model.[23] Caspian admits that the language of [redacted] is "virtually identical to that found in [section 6.06 of] the 1983/2000 model."[24] COB at 4.

Both before and after publication of the 1965 Model, provisions like [redacted] have been universally recognized as "no action" clauses.[25] The 1971 *Commentaries* state: "The major purpose of this Section is to deter individual debentureholders from bringing independent law suits for unworthy or

---

[23] *See supra* at 10-11; A0001107-08. Caspian asserts that the [redacted] is separate from the rest of the "no action" clause (and therefore has a different purpose) because it is a "stand-alone paragraph." COB at 7, 27. Yet, as quoted above, the 2000 Model's "no prejudice" sentence also is a stand-alone paragraph. A0001108. The 2000 Model's structure was the result of a change—to which the explanatory notes give *no* meaning at all, much less significance—by which the American Bar Foundation ("ABF") replaced a semicolon after clause (5) with a period and a hard return, when it "simplified" the 1965 model in 1983. *See* COB at 25-26; A0001140.

[24] The "provision, not found in any model indenture" to which Caspian refers (COB at 4) is [redacted], not [redacted]. *See also* COB at 22 (also referring to [redacted] not [redacted]).

[25] *See Quadrant Structured Prods. Co. v. Vertin*, 2013 WL 3233130, at *14 (Del. Ch. June 20, 2013) (Report Pursuant to Del. Sup. Ct. R. 19(c)) (discussing history of "no action" clauses).

unjustifiable reasons, causing expense to the Company and diminishing its assets."[26] New York and Delaware courts have echoed this interpretation.[27] And Caspian's failure to assert [redacted] claims in its original complaint or its preliminary injunction motion—even while asserting that it had complied with [redacted] in bringing its suit (AC ¶¶ 86-88 (A000179); A000061-65)—shows that even Caspian recognized that [redacted] was a "no action" clause and not the basis for a claim against GSM or anybody else.[28]

4. The *Commentaries* And Explanatory Notes To The Model Indentures Confirm That [redacted] Is A No Action Clause That Should Be Interpreted Uniformly With Other Such Indenture Provisions

The Court of Chancery appropriately considered the 1965, 1983, and 2000 Models, as well as the accompanying *Commentaries* and explanatory notes, when

---

[26] AMERICAN BAR FOUNDATION, *COMMENTARIES* ON MODEL DEBENTURE INDENTURE PROVISIONS 1965, § 5.7, at 232 (1971) (the "*COMMENTARIES*"); B00003.

[27] *Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *6 (Del. Ch. Jun. 02, 1992) (relying on *Commentaries* to determine applicability under New York law of "no action" clause on motion to dismiss: "The major purpose of ["no action" clauses] is to deter individual debentureholders from bringing independent lawsuits for unworthy or unjustifiable reasons . . . . An additional purpose is the expression of the principle of law that would otherwise be implied that all rights and remedies of the indenture are for the equal and ratable benefit of all holders. . . . They protect against the exercise of poor judgment by a single bondholder . . . who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest."); *Birn v. Childs Co.*, 37 N.Y.S.2d 689, 696 (N.Y. Sup. Ct. 1942) ("Restrictive or no-action clauses have been inserted in . . . trust indentures for years. In so far as they prevent individual holders from getting special advantages for themselves and protect the rights and security of all holders as a class, and also in so far as they afford the trustee notice and an opportunity for examination, they serve a highly useful purpose and have been uniformity [sic] sustained . . . .").

[28] *See Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956) (finding against a defendant where its course of conduct contradicted its proffered interpretation of a contract).

interpreting the unambiguous language of [redacted].[29] Indeed, courts applying New York law do not consider these sources to be extrinsic evidence at all. To the contrary, the court in *Bank of New York v. First Millennium, Inc.* rejected the argument that the *Commentaries* are extrinsic parol evidence, stating:

> The Second Circuit . . . has on several occasions looked to the American Bar Foundation's *Commentaries* on Indentures for guidance when analyzing boilerplate indenture provisions. Reliance upon such commentary is consistent with the Second Circuit's approach of analyzing contracts, under New York law, "as viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[30]

While "New York law directs that indenture provisions be interpreted using standard principles of contract interpretation, '[c]ourts strive to give indenture provisions a consistent and uniform meaning because uniformity in interpretation is important to the efficiency of capital markets.'"[31] Thus, in order to "enhance

---

[29] A0001436 (reading [redacted] "in light of its evolution through the 1965 model indenture, the 1983 model indenture [and] the 2000 model indenture"); *see also* A0001354-55 ("If you read the commentaries, where this language came from is pretty clear. We have broader language because there was a plain English meaning.").

[30] *Bank of N.Y. v. First Millennium, Inc.*, 598 F. Supp. 2d 550, 564-65 (S.D.N.Y. 2009), *aff'd*, 607 F.3d 905 (2d Cir. 2010) (internal citations omitted); *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039, 1048 (2d. Cir. 1982) (relying on *Commentaries* to analyze indenture); *see also Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1535-36 (S.D.N.Y. 1983)); *Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225, 242-43 (Del. 2011). *Accord* COMMENTARIES, at 3 (B00002).

[31] *Quadrant*, 2013 WL 3233130, at *5, *14 (Report Pursuant to Del. Sup. Ct. R. 19(c)) (quoting *Concord Real Estate CDO 2006–1, Ltd. v. Bank of Am. N.A.*, 996 A.2d 324, 331 (Del. Ch. 2010) (construing New York law), *aff'd*, 15 A.3d 216 (Del. 2011) (table; text at 2011 WL 743405), and citing *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 2004 WL 1699057, at

stability and uniformity" when analyzing indenture provisions, courts "look[] to the multi-decade efforts of leading practitioners to develop model indenture provisions."[32] "The *Commentaries* 'provide powerful evidence of the established commercial expectations of practitioners and market participants.' 'Where a standard term is the product of an explicit standard-setting process such as the model bond indenture or the model simplified indenture, commentaries of the standard-setting organization should be accorded authoritative weight.'"[33] Furthermore, even if the *Commentaries* were extrinsic evidence, the Court may "consult extrinsic evidence secondarily to confirm the 'conclusion that the contract language is unambiguous, evidencing . . . the shared intent of the parties' at the time of [sic] they entered the contract."[34]

---

*2 (Del. Ch. July 29, 2004)).

[32] *Concord Real Estate*, 996 A.2d at 331. *See also Quadrant*, 2013 WL 3233130, at *14 ("These efforts began with the *Commentaries* in 1971 and continued with subsequent updates.") (citing *Revised Model Simplified Indenture*, 55 BUS. LAW. 1115 (2000) (the "2000 Model") (A0001096-159); *Model Simplified Indenture*, 38 BUS. LAW. 741 (1983) (the "1983 Model") (A0001161-204)).

[33] *Quadrant*, 2013 WL 3233130, at *14 (quoting Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 765 (1997)); *Liberty Media Corp.*, 29 A.3d at 241; *see also Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at *11 (Del. Ch. July 29, 2011); *Feldbaum*, 1992 WL 119095, at *5 (using the *Commentaries* to construe indenture provisions at motion to dismiss stage); *Drage v. Santa Fe Pac. Corp.*, 1995 WL 396370, at *5 (Ohio Ct. App. July 3, 1995) (same).

[34] *Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009) (quoting *Supermex Trading Co. v. Strategic Solutions Grp., Inc.*, 1998 WL 229530, at *3 (Del. Ch. May 1, 1998)), *aff'd*, 981 A.2d 1172 (Del. 2009); *see also Gibraltar Private Bank & Trust Co. v. Bos. Private Fin. Holdings, Inc.*, 2011 WL 6000792, at *7 (Del. Ch. Nov. 30, 2011) (same).

(1) [redacted] Does Not Prevent The Court From Considering The *Commentaries*, Explanatory Notes, Or Model Indentures

Caspian incorrectly argues that [redacted] of the Indenture precludes the Court from considering the model provisions upon which [redacted] was based and the *Commentaries* and explanatory notes thereto. COB at 3, 21. [redacted] provides only that [redacted] (A000459) (emphasis added).[35] This language speaks only to reliance on [redacted]—which the Court of Chancery did not consider—but not model indentures, commentaries, or explanatory notes.[36] Indeed, Caspian conceded during oral argument before the Court of Chancery that [redacted] does not preclude the Court from considering the *Commentaries*. A0001430 (responding to a statement by the Vice Chancellor that Marsico's

[35] Contrary to Caspian's assertion (COB at 20-23), [redacted] is not unique. *See* FLETCHER CORPORATION FORMS ANNOTATED § 2853.10 Simplified form – Trust Indenture (containing sample provision titled "No Adverse Interpretation of Other Agreements" that provides: "This indenture may not be used to interpret another indenture, loan or debt agreement of the company or any subsidiaries. Any such indenture, loan or debt agreement may not be used to interpret this indenture."); NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 50:800 Trust Indenture (same); ARIZONA LEGAL FORMS BUSINESS ORGANIZATIONS--CORPORATIONS § 6.14 (same).

[36] Contrary to Caspian's assertion: GSM did not urge the trial court to rely on any other indenture to interpret [redacted]; and that court considered only the *Commentaries* and explanatory notes to the model indentures. *Compare* COB at 20, *with* A0001436.

counsel had argued that [redacted] did not preclude the court from considering the *Commentaries* by stating, "I agree with that").

(2) The Evolution Of The Model Indenture Simplified The Language Of [redacted] But Did Not Change Its Meaning

Caspian argues that the Court of Chancery's determination "to read [redacted] in light of its evolution through the 1965 model indenture, the 1983 model indenture, [and] the 2000 model indenture" was erroneous, as was the court's conclusion "that the intent here was to keep the same meaning as in those prior provisions and simplify the language." COB at 6 (citing A0001436). Both the text of and the *Commentaries* and explanatory notes to those versions of the model indenture belie Caspian's contention. As shown in the chart created by Caspian (COB at 25-26), the first and last paragraphs were modified as follows:

1965 Model, First Paragraph: "No holder of any Debenture or coupon shall have any right to institute any proceeding, judicial or otherwise, with respect to this Indenture, or for any other remedy hereunder, unless . . ."	2000 Model, First Paragraph: "A Holder may pursue a remedy with respect to this Indenture or the Notes only if . . ."
1965 Model, Last Paragraph: ". . . it being understood that no one or more Holders of Debentures or coupons shall have any right in any manner whatsoever by virtue of, or by availing of, any provision of this Indenture, to	2000 Model, Last Paragraph: "A Securityholder may not use this Indenture to *prejudice the rights* of another Securityholder or to obtain a preference or priority over another Securityholder."[37]

[37] *Compare* 1965 MODEL DEBENTURE INDENTURE § 507, at 232-34 (the "1965 Model")

affect, disturb or *prejudice the rights* of any other Holders of Debentures or coupons, or to obtain or to seek to obtain priority or preference over any other Holders or to enforce any right under this Indenture, except in the manner herein provided and for the equal and ratable benefit of all of the Holders of Debentures and coupons."	

In fact, there are no substantive differences between the 1965 Model and the 2000 Model of the "no action" clause. For example, the first clause in the 1965 Model—i.e., "any right to institute any proceeding, judicial or otherwise . . . *or for any other remedy*"—was simplified by replacing it in the 2000 Model with the single comprehensive word "remedy." *See supra* note 14. Courts then continued to interpret the 2000 Model as a standard "no action" clause applying only to the pursuit of remedies in legal proceedings.[38] Caspian's contention that [redacted] is not limited to pursuit of legal proceedings because the words [redacted] thus fails. *See* COB at 19. Caspian also argues that the removal from the 2000 Model of the

(A0001052-53), *with* 2000 Model §6.06 (A0001107-08) (emphasis added). The first and last paragraphs of the 1983 version and the 2000 version are identical. *Accord* COB n.7.

[38] *See, e.g.*, *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930, 941 n.31 (Del. Ch. 2004) (recognizing a 1983/2000 version of section 6.06, including the final sentence of section 6.06, as a "no action" clause), *vacated on other grounds*, 875 A.2d 632 (Del. 2005). *Accord Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1288 (11th Cir. 2012) (describing provision identical to section 6.06 as a "standard 'no-action clause'" (language of clause quoted in full in *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 770 F. Supp. 2d 1315, 1325 (N.D. Ga. 2011), *rev'd*, 677 F.3d 1286 (11th Cir. 2012)).

"equal and ratable" language that appeared in the "no action" clause of the 1965 Model demands a different reading of the simplified 2000 Model on which [redacted] here is based. *See* COB at 27. But (i) Caspian cites no authority for such proposition; (ii) the [redacted][39] and (iii) [redacted] language of Section 6.06 standing alone enshrines the [redacted] concept.[40] *See* [redacted] (A000443-44). Thus, there is no basis to divine some new meaning from the revisions to the "no prejudice" language of the two "no action" clauses, much less a new meaning that the drafters of the Models failed to mention.

(3) The Court Of Chancery Appropriately Relied On The 1971 *Commentaries* To The 1965 Model Indenture

Caspian argues that the Court of Chancery should not have relied on the 1971 *Commentaries* to the 1965 Model because the Indenture is based on the 2000 Model. *See* COB at 4, 24. Caspian is wrong. The Introduction to the 1983 Model (which Caspian admits is virtually identical to the 2000 Model, COB n.7) expressly directs users to consult the 1971 *Commentaries* to the 1965 Model.[41] Moreover, courts routinely rely on those *Commentaries*—and not just the

[39] [redacted]

[40] *See supra* notes 15-19 and accompanying text (discussing *Electroglas*).

[41] 1983 Model, at 743 (A0001192).

1983/2000 explanatory notes—to interpret "no action" clauses that are based on the 1983/2000 Model language.[42]

Even if it were somehow inappropriate to consider the 1971 *Commentaries*, the 1983 and 2000 Models themselves support the Court of Chancery's reading of [redacted]. The "no action" clause of the 1965 Model was first modified in the 1983 Model, and the 2000 Model modified the text again, very slightly. None of those modifications, however, changed the meaning of the clause. Both the 1983 and 2000 Models contain "explanatory notes" that treat section 6.06 as a standard "no action" clause.[43] Conspicuously absent from the explanatory notes to the 2000 Model is any indication that the last sentence (formerly, the last clause) of section 6.06 suddenly conveys (or ever conveyed) any right to recover damages from a fellow noteholder (or overrides majority-voting provisions of [redacted]).[44]

To the contrary, the introduction to the 1983 Model made clear that the changes to section 6.06 were not meant to alter the meaning of the 1965 Model and

---

[42] *See Feldbaum*, 1992 WL 119095, at *5-6 (relying on 1971 *Commentaries* to interpret no-action clause based on 1983 Model); *Drage*, 1995 WL 396370, at *3-5 (same); *Upic & Co. v. Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 455 (S.D.N.Y. 1992) (same). *See also Quadrant*, 2013 WL 3233130, at *14-15 (considering 2000 Revised Model Simplified Indenture and *Commentaries* to interpret "no action" clause based on 1965 Model and citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 396-97 (Del. 1996), as "relying on *Commentaries* and subsequent versions of the model indenture").

[43] *See* 2000 Model, at 1191-92 (A0001139-40) (explaining various aspects of "no-action" provisions in practice); 1983 Model, at 794 (A0001192) (explaining that such "No Action" clauses are routinely upheld by courts as barring suits by aggrieved debt holders).

[44] *See* 2000 Model, at 1191-92 (A0001139-40).

instead were driven by "a desire *for wider and easier comprehension of indenture provisions* . . . It has, for example, been recommended that trustee's counsel prepare an "English translation" of the normal form of indenture. *The Model Simplified Indenture is addressed to that desire* . . . .[45] Specifically as to section 6.06, the 1983 and 2000 Model explanatory notes state that in order to "*aid the enforceability of this Section* [6.06], paragraph 14 of the form of Security discloses the limitation on Securityholders' *rights to sue*."[46] Those notes then expressly cite the same 1971 *Commentaries* that confirm the "no action" objective of section 6.06.[47] That the *Commentaries* to the 1983 and 2000 Models affirmatively cite the 1971 *Commentaries*, and do not contradict, distinguish, or criticize it, confirms that the changes merely simplified the language of the clause.[48]

---

[45] 1983 Model, at 742 (A0001162) (emphasis added, citation omitted); *see also* 2000 Model, at 1116 (A0001097). The "Notes to the Model Simplified Indenture . . . tried to highlight particular areas of change between the 1983 MSI and this Model Simplified Indenture." A0001097. No change to [redacted] was identified.

[46] 1983 Model, at 749 (A0001192) (emphasis added); 2000 Model, at 1192 (A0001140) (same).

[47] *See* 1983 Model, at 749 (directing the reader to *COMMENTARIES* at 232-35 (B00003-06)) (A0001192); 2000 Model, at 1192 (A0001140) (same); *Accord* 2000 Model, at 2 (A0001097) ("Obviously, the seminal works for any lawyer attempting to understand the meaning and origin of particular provisions include the American Bar Foundation's *Commentaries on Indentures*, and the basic background afforded by that work is not repeated in this draft.").

[48] Stylistic or simplifying changes are not uncommon. *See, e.g.*, the 2007 amendments to restyle the Federal Rules of Civil Procedure. As in the introduction to the 1983 model indenture, the *Commentaries* to the 2007 amendments state: "[t]hese changes are intended to be stylistic only." *See* FED. R. CIV. P., Advisory Committee Notes, 2007 Amendments (every rule).

Caspian cites *In re Bank of New England Corp.*[49] for the proposition that differences between indentures "are the product of conscious drafting and differentiation and should not have been disregarded." COB at 27. But *Bank of New England* involved different provisions in different indentures that had nothing to do with section 6.06 or the differences between the 1965, 1983, or 2000 Models. In any event, the Court of Chancery did not disregard the Models' drafting differences: it examined them and determined that [redacted] remained a "no action" clause. A0001436. Moreover, when this Court remanded *Quadrant Structured Products Co. v. Vertin* to the Court of Chancery to consider differences between the "no action" clause in *Quadrant* and those in *Feldbaum*/*Lange*, which clauses (as here) "applied not only to rights under its indenture, but also to any remedy with respect to . . . 'the Securities,'" the Court inherently recognized that the three "no action" clauses shared the common purpose of limiting the legal recourse that a noteholder could pursue.[50]

B. GSM Cannot Be Liable For Any Payment Under The Indenture

The Court also should affirm dismissal because even if [redacted] were violated by the amendments here, the only appropriate remedy for Caspian's

[49] 646 F.3d 90, 98-99 (1st Cir. 2011).

[50] *Quadrant Structured Prods. Co. v. Vertin*, 2013 Del. LEXIS 380, at ¶¶ 6-7 (Del. Feb. 12, 2013) (remanding to determine whether scope of legal proceedings subject to "no action" clause in *Quadrant* was more limited than those subject to the clauses (like the one here) in *Feldbaum* and *Lange v. Citibank, N.A.*, 2002 WL 2005728 (Del. Ch. Aug. 13, 2002)).

claims would be against Superholdco (per the pre-amendment Indenture terms). [redacted] does not provide any basis to hold GSM, a [redacted] [redacted] of the Indenture, liable to Caspian for breach of the Indenture.

1. GSM Is Not A Party To The Indenture

[redacted] (A000383). [redacted] the Noteholders are merely beneficiaries under the Indenture.[52] "It is well settled, under New York law, that one who is not a party to an agreement cannot be bound by it."[53] As GSM is

---

[51] Caspian claims GSM "did not seriously contest that it is bound by [redacted] because the GSM Opening Brief in Support of Its Motion to Dismiss stated that [redacted] was "arguably directed to noteholders." *See* COB at 18 (citing A000914). [redacted], indeed, [redacted] Nowhere did the GSM Noteholders concede—rather, they expressly denied (A000925)—that they could be liable for damages, whether for a breach of [redacted], or otherwise.

[52] *See Howe v. Bank of N.Y. Mellon*, 783 F. Supp. 2d 466, 484 (S.D.N.Y. 2011) ("Plaintiff, as a noteholder of the PreTSL XX Income Notes, is a beneficiary of the Indenture, and BNYM, as Indenture Trustee, owed pre-default duties to Plaintiff to avoid conflicts of interest.").

[53] *MBIA Ins. Corp. v. Royal Bank of Can.*, 2010 WL 3294302, at *24 (N.Y. Sup. Ct. Aug. 19, 2010). *See also Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc.*, 813 N.Y.S.2d 751, 752 (App. Div. 2d Dep't 2007) (affirming dismissal of breach of contract claim because defendant "was not a party to the agreement in question"); *HDR, Inc. v. Int'l Aircraft Parts, Inc.*, 257 A.D.2d 603, 604 (N.Y. App. Div. 1st Dep't 1999) (overruling denial of defendants' motion for summary judgment on breach of contract claim: where defendants were not parties to the allegedly breached contract "they cannot be bound by the contract"); *Bellino Schwarz Padob Adver. Inc. v. Solaris Mktg. Grp., Inc.*, 635 N.Y.S.2d 587 (App. Div. 1st Dep't 1995) (affirming dismissal of breach of contract claim where defendant was not signatory to contract).

not a signatory to the Indenture, the Court of Chancery properly dismissed Caspian's claims against GSM.

Similarly, under New York law, GSM cannot be liable for breach of the implied covenant of good faith and fair dealing. First, "a non-signatory cannot be held liable for breach of the implied covenant of good faith and fair dealing, because there is no contract between the two parties under which to find such an implied term."[54] Second, Caspian's claim for breach of the implied covenant fails because it is premised on the same conduct that gives rise to the breach of contract claim itself (i.e., an alleged impermissible amendment) and thus is "intrinsically tied to the damages allegedly resulting from a breach of the contract."[55]

There are limited circumstances in which a non-signatory potentially may be liable for breach of contract under New York law. Specifically, there must be a wholly separate basis for holding the non-party liable under the contract.[56] But no

---

[54] *Atari, Inc. v. Games, Inc.*, 2005 WL 447503, at *2 (S.D.N.Y. Feb. 24, 2005), *aff'd*, 164 F. App'x 183 (2d Cir. 2006).

[55] *Hawthorne Grp., LLC v. RRE Ventures*, 776 N.Y.S.2d 273, 276 (App. Div. 1st Dep't 2004) (quoting *Canstar v. J.A. Jones Constr. Co.*, 622 N.Y.S.2d 730, 730 (App. Div. 1995)). *Accord Quadrant*, 2013 WL 3233130, at *34. Caspian, a sophisticated investor, knew that GSM was, like Caspian, a beneficiary of the Indenture and not a party who could be liable for any failure to make payment under it. "No matter how convoluted or intricate the deal was," Caspian was "or should have been, well aware of who the other party to the contracts was." *MBIA*, 2010 WL 3294302, at *24-26 (rejecting attempt to hold non-signatory liable under contracts that (unlike here) its affiliate had signed).

[56] *MBIA*, 2010 WL 3294302, at *24; *see also Horsehead Indus., Inc. v. Metallgesellschaft, AG*, 657 N.Y.S.2d 632, 633 (App. Div. 1st Dep't 1997) (parent company could be liable for breach of a contract signed by a subsidiary "if the parent's conduct manifests an intent to be bound by the contract, which intent is inferable from the parent's participation in the negotiation of the

such basis is pled, present, or even argued by Caspian (where [redacted]. Indeed, as a matter of New York law, the claim fails even if one credits the allegations that GSM was involved in "syndicat[ion of] the Superholdco Notes" and had a "significant active role in structuring the Exchange Transactions . . . ." A000157-58 ¶ 35.[57]

2. The Obligations Under The Amended Provisions At Issue Apply Only To [redacted]

Even if GSM were a party to the Indenture, it still could not be liable for the breaches alleged because [redacted] Putting aside that there was no breach at all: [redacted]

---

contract, or if the subsidiary is a dummy for the parent, or if the subsidiary is controlled by the parent for the parent's own purposes"); *Phys. Mut. Ins. Co. v. Greystone Servicing Corp.*, 2009 WL 855648, at *3 (S.D.N.Y. Mar. 25, 2009) ("[A] plaintiff may state a claim for breach of contract against a non-signatory where the plaintiff adequately alleges that the non-signatory was the 'alter ego' of one or more of the signatories to the contract.").

[57] *See MBIA*, 2010 WL 3294302, at *25 (under New York law, allegation that non-signatories should be liable for contract breach because they (i) acted as arranger and collateral manager for swap agreement signed by their affiliate and (ii) "conducted the negotiations" of the contracts, "falls short of showing that [the non-signatories] intended to be bound by the contracts.").

[58] Caspian's damage claim arises under [redacted], which provides that [redacted] (A000436). [redacted]

[redacted].

3. Caspian Did Not Plead Facts Alleging Any Damages Caused By GSM

Caspian did not plead facts sufficient to show that any conduct or omission of GSM caused harm to Caspian. First, Caspian has not pled—nor could it—that

[59] Even a majority stockholder who may have fiduciary duties can vote in its own interests, regardless of the minority's interests. *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987). So, too, may a creditor. *See Katz v. Oak Indus. Inc.*, 508 A.2d 873, 881 (Del. Ch. 1986). The Indenture imposes no liabilities or special duties on a majority Noteholder.

the amendments would not have passed if GSM's votes were not counted [redacted] or for any other reason). Second, the Exchange Transactions neither impaired Caspian's *right* to [redacted] nor affected any of Caspian's rights or [redacted] under the Indenture: if Caspian still owns its Notes (which it did as of the filing of this appeal), it has the right to [redacted]; if Caspian is not [redacted] then, it will be free to pursue a claim against [redacted] for default. Finally, the Exchange Transactions did not even affect [redacted] The Notes, [redacted] *See* A000125-26; A000107; A0001363; A000595. Caspian held [redacted] A0001331-32. Common sense compels the conclusion that Caspian has pressed its unprecedented claims against GSM, a fellow Noteholder, precisely because, as [redacted] (A000595, A000605-06), [redacted] and

[60] This fact explains why [redacted] *See Katz*, 508 A.2d at 881 (noting that a large percentage of debtholders' tendering their securities and consenting to a transaction supports an inference that the offer was not in any way coercive).

Caspian views GSM as a convenient deep pocket. If Caspian is dissatisfied with what it obtained from the Issuers in discontinuing its suit as against them, it cannot expect GSM to rescue it. But Caspian has not pled any facts, and cannot, that GSM caused any damage to Caspian by voting in favor of the Exchange Transactions.

CONCLUSION

For the foregoing reasons, GSM respectfully requests that the Court affirm the Court of Chancery's dismissal of the Amended Complaint, with prejudice and without leave to amend.

/s/ Kevin G. Abrams
Kevin G. Abrams (#2375)
Derrick B. Farrell (#5747)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807
Tel: (302) 778-1000

Of Counsel:

Irwin H. Warren
Lauren B. Hoelzer (#4874)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000

Christine T. Di Guglielmo (#4848)
WEIL, GOTSHAL & MANGES LLP
1201 N. Market Street, Suite 1402
Wilmington, DE 19801
Tel: (302) 656-6600

Attorneys for GS Mezzanine Partners 2006, L.P., and GS Mezzanine Partners V, L.P.

Dated: December 20, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2014, my firm served a true and correct copy of the foregoing *Public Version of the Answering Brief of Defendants Below, Appellees GS Mezzanine Partners 2006, L.P. and GS Mezzanine Partners V, L.P.*, via File & Serve*Xpress* on the following counsel of record:

Neal J. Levetsky, Esq.
Carl D. Neff, Esq.
FOX ROTHSCHILD LLP
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, Delaware 19801

Thomas J. Allingham II, Esq.
Anthony W. Clark, Esq.
Paul J. Lockwood, Esq.
Douglas D. Herrmann, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899

/s/ Kevin G. Abrams
Kevin G. Abrams (#2375)