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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,	)	**PUBLIC VERSION**
Plaintiffs Below, Appellants,	)	No. 472, 2013
v.	)	Court Below:
GS MEZZANINE PARTNERS 2006, L.P., and GS MEZZANINE PARTNERS V, L.P.,	)	Court of Chancery of the State of Delaware
Defendants Below, Appellees.	)	C.A. No. 5941-VCL

REPLY BRIEF OF PLAINTIFFS BELOW, APPELLANTS CASPIAN ALPHA LONG CREDIT FUND, L.P., CASPIAN SELECT CREDIT MASTER FUND, LTD., CASPIAN CAPITAL PARTNERS, L.P., AND MARINER LDC

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PRELIMINARY STATEMENT[1]

Goldman Sachs wrongfully portrays this as a case of one noteholder pressing unprecedented claims against another noteholder because the latter voted in favor of an amendment to an indenture that the former opposed. In reality, however, this case is about a noteholder abusing its voting power to cheat its fellow noteholder out of the contractual protections afforded to it, and the fact that the indenture under which the notes were issued imposes liability on a noteholder for such conduct. Goldman Sachs goes to great lengths to erroneously and flamboyantly paint the parade of horribles that would flow from the courts of this State following the most basic tenet of Delaware contract law: unambiguous contract language negotiated between sophisticated parties should be interpreted in accordance with the terms of that language. That is the crux of this case. Here, Goldman Sachs used the Indenture to harm a fellow noteholder, Caspian, which is explicitly prohibited by the Indenture under [redacted]. It did so to advance its financial position elsewhere in the issuer's capital structure. It was not simply another noteholder voting its position – not in the least. Yet, the Court of Chancery refused to give the Indenture provision at issue its plain meaning because it was concerned about the broader policy implications of holding one noteholder liable to another. This was error, and Caspian's claims against Goldman Sachs should not have been dismissed.

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[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Caspian's Opening Brief.

ARGUMENT

A. Goldman Sachs' And The Court Of Chancery's Interpretation Of [redacted] Does Violence To The Indenture's Rules-Of-Construction Provisions

1. The Court Of Chancery's Reliance On Model Indentures, And The Commentaries And Explanatory Notes Thereto, Was Inappropriate

a. [redacted] Prohibits Reliance On Any Type Of Indenture, Not Just "Real World" Indentures

In an effort to downplay the importance of [redacted] of the Indenture, Goldman Sachs argues that it does not prohibit reliance on the model indentures, the commentaries or the explanatory notes thereto, because the provision "speaks only to reliance on other actual, 'real world' indentures." (Goldman Sachs' Answering Brief dated December 20, 2013 ("AB") at 23) [redacted] says nothing about "real world" indentures, and the argument seeks to import words which simply do not exist in the Indenture. [redacted] prohibits the use of the "indenture, loan or debt agreement … of *any other Person*" (emphasis added) in interpreting the provisions of the Superholdco Indenture (A000459), and the term "Person" is broadly defined (see A000403) to include anyone in the world, as a practical matter. Regardless, Goldman Sachs misses the point of Caspian's argument, which is not so much that secondary legal sources cannot be consulted for legal principles. Rather, Caspian contends that, based on [redacted], when a court construes this particular Indenture, it should not color its interpretation based on any potential impact such interpretation might have on other deals, indentures, or the capital markets as a

whole. In other words, Caspian's main point on this issue is that by its own terms ([redacted]), the Indenture here is not subject to the "uniform interpretation" rule on which Goldman Sachs places so much reliance. Moreover, as discussed below, this is a case of first impression. There simply is no prior interpretation of the actual language at issue (last paragraph of [redacted]), whether in the commentaries or elsewhere, so the uniform interpretation rule cannot apply because there is no prior interpretation for the Court to consider.

Ironically, all of the sample form indentures Goldman Sachs relies on in arguing that [redacted] is not unique (AB at 23 n.35) are substantively different from [redacted] because they limit the "no adverse interpretation rule" to very specific and identified indentures of the issuers in those particular transactions, which is a limitation not found in [redacted].[2] This is yet another example of how the drafters of the Superholdco Indenture deviated from model and sample indentures to craft a non-boilerplate provision, and thereby indicated that they were not concerned with what the norm might be or what impact the Superholdco Indenture might have on any other deal.

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[2] See FLETCHER CORPORATION FORMS ANNOTATED § 2853.10 Simplified form – Trust Indenture ("This indenture may not be used to interpret another indenture, loan or debt agreement *of the company or any subsidiaries*...") (emphasis added); NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 50:800 Trust Indenture (same); ARIZONA LEGAL FORMS BUSINESS ORGANIZATIONS--CORPORATIONS § 6.14 (same); AB Compendium Tabs 1, 2 and 4).

b. Even If Reliance On Anything Outside The Indenture Were Permitted, The Court Of Chancery Relied On The Wrong Secondary Sources

As an alternative argument, Goldman Sachs dedicates several pages to arguing that the use of the commentaries and explanatory notes to interpret the provision at issue here did not violate [redacted] because (a) the commentaries and explanatory notes to the model indentures do not constitute extrinsic evidence, (b) under the uniform interpretation rule, courts are required to interpret indentures uniformly to promote market stability, and (c) even if the commentaries and explanatory notes to the model indentures constituted extrinsic evidence, it was still appropriate for the Court of Chancery to consider such evidence to confirm that the language at issue is unambiguous. (AB at 20-22) All of the cases Goldman Sachs cites in support of each proposition, however, are distinguishable from the case at bar because *none* of them involved an indenture that contained an express and non-boilerplate "No Adverse Interpretation of Other Agreements" provision.[3]

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[3] Several of the cases Goldman Sachs relies on also are distinguishable or inapposite on other grounds. Bank of N.Y. v. First Millennium, Inc., 598 F. Supp.2d 550 (SDNY 2009) involved interpretation of a boilerplate provision that was "mandatory in a qualified indenture by reason of the [Trust Indenture Act]." Id. at 565. In Sharon Steel Corp. v. Chase Manhattan Bank, 691 F.2d 1039 (2d. Cir. 1982), the court consulted the commentaries because the successor obligor clause at issue was "boilerplate" and "standard." Id. at 1048. Indeed, the court noted that "[s]uch boilerplate *must be distinguished from contractual provisions which are peculiar to a particular indenture*." Id. (emphasis added). In Morgan Stanley & Co. v. Archer Daniels Midland Co., 570 F. Supp. 1529 (S.D.N.Y. 1983), the court consulted a model indenture only after determining that the redemption provision was "boilerplate language" "apparently taken verbatim" from that model. Id. 1535. Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp., 29 A.3d 225 (Del. 2011) involved construction of a successor obligor provision in an indenture governed by New York law that both parties conceded was boilerplate. Id. at 241. U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C., 864 A.2d 930 (Del. Ch.

Regardless, even to the extent that it would have been appropriate for the Court of Chancery to consider such sources, the Court of Chancery relied on commentary to the wrong model, namely the American Bar Foundation's 1971 Commentaries to the 1965 model, which has different language than that at issue here. Importantly, Goldman Sachs does not dispute that there is no case or commentary whatsoever discussing the actual language at issue here -- the second paragraph of [redacted] as found in the Indenture -- and there certainly is nothing in the 1971 Commentaries talking about that language.

c. The Differences Between The Model Indentures Are Substantive And Not Stylistic

Goldman Sachs argues that there are no substantive differences between the Limitation on Suits provision of the 1965 model and the 2000 model (AB at 25), and that "[t]he 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

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2004), a case Goldman Sachs relies on in support of its uniform interpretation argument, is actually silent on the issue of whether courts interpret indentures uniformly to promote market stability. Fox v. Paine, 2009 WL 147813 (Del. Ch. Jan. 22, 2009) merely involved interpretation of a settlement agreement under Delaware law by reference to Black's Law Dictionary, and does not address the issues in dispute on this appeal. *Id.* at *5. In Gibraltar Private Bank & Trust Co. v. Bos. Private Fin. Holdings, Inc., 2011 WL 6000792 (Del. Ch. Nov. 30, 2011), the court refused to consider extrinsic evidence on a Rule 12(c) motion for judgment on the pleadings in interpreting a provision of a Stock Purchase Agreement the court found to be ambiguous, holding that it would be appropriate to consider such evidence at that stage of the proceedings only if the court had otherwise concluded that the provision was unambiguous and only to confirm such conclusion. Id. at *7-8.

period and a hard return, when it 'simplified' the 1965 model in 1983." AB 19 n.23 (emphasis in original). The suggestion is untenable that the only change from the 1965 model (the model on which Goldman Sachs and the Court of Chancery relied) to the 1983 model (which contains language virtually identical to that found in the Indenture) is punctuation. Indeed, the introduction to the 2000 Model states expressly that indentures are subject to substantive change to reflect and accommodate the ever-changing needs and commercial realities of their times:

> Indentures are one of the most ancient of legal forms, and one of the secrets of their pervasiveness and continued utility is the ability of the form to change and adapt to new issues and areas of concern. Although new indenture technology since 1983 has focused primarily on covenants, there have been enormous changes as well in other areas, particularly in subordination and trustee provisions. The 1999 Model Simplified Indenture (the Model Simplified Indenture) generally updates the 1983 MSI, with particular attention to those articles. (A0001096; internal citations omitted)

As shown in the comparison provided in Exhibit A hereto, the entirety of the last paragraph of [redacted] changed. This is critical considering that the language relied upon by the Court of Chancery (to ensure the equal and ratable treatment of all noteholders, see A0001337)) appears only in the 1965 model and is completely absent from the 1983 and 2000 models (and the Indenture at issue). See Exhibit A. Moreover, the formatting, and specifically, the indentation seen in the 2000 model as well as the Indenture at issue here, which lines up the first and the second paragraph of [redacted], show that the second paragraph is equal in

hierarchy to the first and that contrary to Goldman Sachs' argument (see *infra* at 8-9), it is not a continuation of the first paragraph and its subparagraphs but rather a separate and distinct provision addressing different issues -- the first paragraph addresses seeking "[redacted]," and the second addresses using the Indenture to prejudice the rights of other noteholders. See Exhibit A.

Goldman Sachs argues that the introduction to the 1983 model directs users to consult the 1971 Commentaries to the 1965 model, and that both the 1983 and 2000 models contain "explanatory notes" that treat [redacted] as a "no action" clause. (AB at 26-27) No doubt, [redacted] limits the ability of noteholders to take various actions, including bringing suit, and Caspian never has argued otherwise. The relevant point Goldman Sachs is unable to refute, however, is that there is no authority – absolutely none – addressing the second stand-alone paragraph of [redacted], and Goldman Sachs' interpretation effectively would read that paragraph out of the Indenture entirely, or at minimum radically circumscribe its applicability with nary a syllable of support in the actual text. That is, Goldman Sachs seeks to limit [redacted]'s application to a noteholder's filing of litigation against the issuer, when that limitation appears nowhere in the paragraph at issue. If that is a limitation Goldman Sachs wanted in this deal, particularly considering that it was the architect of the transaction, and model

indentures existed at the time of the transaction that accomplished as much, it should have inserted express language to that effect.

Similarly, Goldman Sachs' relies on commentary and cases applying provisions similar to the *first* paragraph of [redacted], but not addressing at all the *second* paragraph, which is the provision at issue here. These commentaries and cases simply are not relevant to this appeal.

2. There Can Be No Doubt That The Court Of Chancery Erroneously Relied On The Heading Of [redacted] In Interpreting The Provision

Goldman Sachs states that "nothing in the [Court of Chancery]'s opinion even implicitly suggests that it relied on the heading of [redacted]," and that therefore, Caspian's arguments with respect to [redacted] of the Indenture are irrelevant. (AB at 17) However, the Court of Chancery viewed [redacted] as a whole to be a "no action" clause, as Goldman Sachs admits (see AB at 3), and did not parse the specific language of [redacted], so when the heading of that section is "[redacted]" it intrinsically suggests that the Court of Chancery was, at least in part, persuaded by the provision's heading.

3. The Only Way To Accept The Court of Chancery's Interpretation Is To Read Into The Second Paragraph Of [redacted] Language That Does Not Exist

Goldman Sachs' view of the second stand-alone paragraph of [redacted] is that it limits only the circumstances in which a noteholder who has followed the procedures set out in the first paragraph may pursue a remedy. That is, "even if a

Noteholder follows these procedures," it still "may not 'use th[e] Indenture to prejudice the right of another Holder of a Note....'" (AB at 13) However, interpreting the second stand-alone paragraph of [redacted] this way requires the reader to insert language that simply does not exist. This is a case where the most sophisticated of parties represented by the most sophisticated of counsel went out of their way to craft an indenture that deviates from the models. Surely, had the drafters intended for the second stand-alone paragraph to have the meaning Goldman Sachs now finds desirable, they could have included language such as "[redacted] or "[redacted]." It cannot be ignored, particularly at the pre-answer stage, that the drafters used language in the second paragraph that was distinct from the first paragraph (i.e., a Noteholder "[redacted]" (first paragraph) versus "[redacted]" (second paragraph)) and did not use language indicating that the pursuit of remedies under the first paragraph was conditioned upon compliance with the second. Goldman Sachs' proffer of evidence as to the commonly-understood meaning of the term "[redacted]" (see AB at 15-16), even if accepted for argument's sake, does not change anything because the term "[redacted]" appears nowhere in the second paragraph at issue on this

appeal, and in fact actually highlights the problem with its position -- in order to prevail it must rely on the meaning of words that are not in the paragraph at issue.

It also is beside the point that the exercise of voting rights is "not the pursuit of a remedy" in the sense of a judicial proceeding. (AB at 16) First, the second paragraph of [redacted] does not speak to the pursuit of a remedy. More importantly, however, the allegations in this case are not that Goldman Sachs merely voted its interests in response to someone else calling a vote, or some other benign act. Rather, the gravamen of the allegations are that [redacted]

(Amended Complaint, ¶¶2, 5, 7, 9, 69, 142, A000150, 151, 152, 174, 187) On a pre-answer motion to dismiss, it is error to disregard the nature of those allegations and recast them merely as complaining about the way Goldman Sachs voted.[4]

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[4] For the same reason, Goldman Sachs is off the mark when it argues that Caspian's interpretation "would penalize GSM (and other Noteholders) for exercising their voting rights." (AB at 4) It is significant that the Exchange Transactions easily could have been accomplished without prejudicing objecting noteholders, simply by agreeing to comply with [redacted] as part of the Exchange Transactions and paying them out. In other words, it was not necessary to remove [redacted] as part of the Exchange Transactions. True, the Exchange Transactions might have been more expensive for Marsico and Goldman Sachs to consummate, but "lower profits" is not a basis to abrogate minority holders' contractual rights. The removal of [redacted] is a stark example of how the Indenture was used to prejudice the rights of Caspian, an act prohibited by [redacted].

B. The Indenture Imposes Obligations On Noteholders Such As Goldman Sachs That Render Them Liable To Other Noteholders

Goldman Sachs argues that "even if [redacted] were violated by the amendments here, the only appropriate remedy for Caspian's claims would be against Superholdco because "[redacted] does not provide any basis to hold [Goldman Sachs], a non-signatory, third-party, beneficiary of the Indenture, liable to Caspian for breach of the Indenture."[5] (AB at 29-30) Goldman Sachs' argument is that it is not subject to the terms of the Indenture because it was not a signatory to the contract is incorrect for at least three reasons.

First, Goldman Sachs agreed to be bound by the terms of the Indenture in the very text of the Superholdco Notes themselves:

[redacted]

[5] Goldman Sachs states that "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." (AB at 3, 11) This overstates what the Court of Chancery held. Indeed, without issuing a memorandum opinion providing a detailed analysis, the Vice Chancellor stated only that he was "going to read that provision [[redacted]] in light of its evolution through the 1965 model indenture, the 1983 model indenture, [and] the 2000 model indenture," and that he believed "that the intent here was to keep the same meaning as in those prior provisions and simplify the language." (A0001436) To the contrary of what Goldman Sachs argues here, the Court of Chancery stated expressly on the record that it disagreed with the notion that a noteholder cannot have obligations under the Indenture and actually ruled that in certain factual scenarios one noteholder could be liable to another noteholder under the Indenture in this very case (A0001339-40 ("I think what I'm struggling with now is the idea expressed strongly by both you [Marsico] and [Goldman Sachs] that a noteholder can never have exposure."). Frankly, Goldman Sachs did not cross-appeal, so arguably it is precluded from challenging that finding on this appeal.

[redacted] (Form of Note, A-4; A000464)

This language is clear that holders accept the Superholdco Notes subject to the terms of the Indenture, and they cannot now avoid the Indenture's strictures merely by claiming they were not parties to it.[6] The single and only case cited in the lower court by Goldman Sachs' fellow defendants, the Marsico noteholders, addressing whether noteholders are bound by an indenture (and cited for the generic proposition that indentures generally are between the issuer and trustee for the benefit of noteholders) actually supports Caspian's position. That case expressly holds that noteholders are bound when the notes (or in that case, bonds) reference the terms of the indenture, which is exactly the situation here:

> In cases where the bonds refer to the indenture agreement, bondholders are bound by the terms of the indenture.

Haberman v. Wash. Pub. Power Supply Sys., 744 P.2d 1032, 1062 (Wash. 1987).

Second, in the lower court, Goldman Sachs effectively conceded that it is bound by [redacted]. In its opening brief in support of its motion to dismiss, Goldman Sachs stated that "[t]he only provision of the Indenture that the GSM

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[6] See In re Smurfit-Stone Container Corp., 444 B.R. 111, 126 (Bankr. D. Del. 2011) ("[T]he Notes specifically state that '[t]he terms of the Note include those stated in the Indenture … [and] [t]he Notes are subject to all such terms. … The Noteholders agreed to the terms of the Notes and the Indenture when purchasing the Notes, thereby agreeing to the limitations of their rights contained in the no recourse provisions of both documents."); Lorenz v. CSX Corp., 736 F. Supp. 650, 656 (W.D. Pa. 1990) ("Although [noteholders] argue that [] a disclaimer is ineffective because not included on the face of the debentures, we note that the debentures of course specifically incorporate and direct debenture holders to the Indenture for an understanding of the rights and duties of the Indenture Trustee.").

Noteholders supposedly breached that is even arguably directed to noteholders ... is [redacted]...." (A000914) Instead, Goldman Sachs argued that (i) the applicable provision of the Indenture should not be construed in accordance with its express terms because it finds the results unusual (i.e., noteholders having obligations to other noteholders), and (ii) it did not breach either provision as a factual matter. (See A000925-26) Neither argument should have been viable on a pre-answer motion to dismiss. Now Goldman Sachs attempts to retract its previous admission, arguing it meant only that [redacted] binds noteholders "only by directing the steps they must take to seek remedies to enforce rights under the Indenture." (AB at 30) There was never an allegation that Goldman Sachs did not follow the procedures set out in the first paragraph of [redacted], nor a factual scenario under which that would be relevant to the present action, and Goldman Sachs is floating this interpretation now for the first time on this appeal.

Finally, Goldman Sachs acted to amend the Indenture purportedly pursuant to its terms so as to take advantage of the benefits of the Indenture. "One may not retain that part of an agreement which is beneficial and repudiate that which is disadvantageous." National Bank & Trust Co. v. Woods, 493 N.Y.S.2d 76, 78 (N.Y. Sup. Ct. 1985) (quoting Dodds v. McColgan 222 A.D. 126, 225 N.Y.S. 609 (1st Dep't. 1927)); "New York's 'election of remedies' doctrine provides that 'one may not both affirm and disaffirm a contract ... or take a benefit under an

instrument and repudiate it.'" Sofi Classic S.A. de C.V. v. Hurowitz, 444 F. Supp. 2d 231, 238 (S.D.N.Y. 2006) (quoting Lumber Mut. Casualty Ins. Co. of N.Y. v. Friedman, 28 N.Y.S.2d 506, 506 (N.Y.Sup.Ct.1941)). The cases Goldman Sachs relies on for the unremarkable proposition that "[i]t is well settled, under New York law, that one who is not a party to an agreement cannot be bound by it" (AB 30) do not involve indentures or their corresponding promissory notes.[7]

Goldman Sachs argues that even if it were a party to the Indenture and could be held liable, the provisions wrongfully removed from the Indenture do not implicate any noteholder obligations. (AB 32-33) This argument misconstrues Caspian's claims. By way of example, Caspian never has suggested that [redacted] (the provision requiring an offer of 101% of the principal amount of notes to

[7] In the key case on which Goldman Sachs relies (AB 30, 31, 32), MBIA Ins. Corp. v. Royal Bank of Canada, 2010 WL 3294302 (N.Y. Sup. Ct. Aug. 19, 2010), MBIA sued RBC for fraud and breach of contract arising out of credit default swaps RBC purchased from MBIA, and the issue before the court was whether affiliates of the bank's holding company (the signatory to the swap deal) could be held accountable for breaching the agreement based on their course of conduct. Id. at *4, 24-26. The analysis there -- whether the RBC affiliates manifested an intent to be bound -- has no bearing upon the applicability of an indenture's terms to its noteholders when incorporated into the notes. The other cases cited by Goldman Sachs (AB 30 n.53) offer no more support: Black Car and Livery Ins., Inc. v. H&W Brokerage, Inc., 28 A.D.3d 595 (N.Y. App. Div. 2006) (claims against directors arising out of corporation's agreement to purchase assets); HDR, Inc. v. Int'l Aircraft Parts, Inc., 257 A.D.2d 603 (N.Y. App. Div. 1999) (no indication that contract was indenture or related notes, and no relevant analysis provided); Bellino Schwartz Padob Advertising Inc. v. Solaris Marketing Group, Inc., 222 A.D.2d 313 (N.Y. App. Div. 1995) (same). Goldman Sachs cites Howe v. Bank of New York Mellon, 2011 WL 781940 (S.D.N.Y. March 4, 2011), for the bare proposition that noteholders are beneficiaries of Indentures (AB at 30), however, that case says nothing about whether the terms of an indenture incorporated by reference in a promissory note bind the noteholder, and the brief cites a portion of the opinion analyzing a breach of fiduciary duty claim (not asserted here) proffered "separate and apart from the terms of the Indenture," see id., at *12.

dissenting holders upon a "Change of Control") requires noteholders to make that offer, and Caspian is not seeking to have fellow noteholders, rather than the Issuer, repay Caspian's loan to Superholdco. Rather, Caspian alleges that Goldman Sachs breached, among others, [redacted] by removing provisions of the Indenture (i.e., "[redacted]" it) in a manner that prejudiced Caspian. If Caspian is correct, for example, that the deletion of [redacted] so as to effect the Exchange Transactions without having to pay non-consenting holders constituted a violation of [redacted], then Caspian is entitled to damages that flow from that act. With [redacted] in the Indenture, Caspian would have been entitled to be bought out of its position for 101% of its holdings upon the "Change of Control" brought about by the Exchange Transactions; with [redacted] deleted, Caspian was not so entitled. Therefore, the measure of Caspian's damages for Goldman Sachs' breach of [redacted] is the amount of money it would have been entitled to had [redacted] not been deleted -- which happens to be the equivalent of 101% of the principal amount of Caspian's Superholdco Notes, plus interest. See Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 N.Y.2d 256, 261 (N.Y. 1998) ("Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed."). This is not the same as imposing Issuer

obligations on a noteholder, even if the dollar amounts happen to be the same in this instance.

C. The Breaches At Issue Here Implicate Noteholder Rights, Not Just Economic Interest

Goldman Sachs argues that even if [redacted] precludes a noteholder from prejudicing another noteholder's "rights," no such prejudice of contractual "rights" has occurred and that Caspian only had its "financial interests or desires" or "economic interests" impaired. (See AB at 2-3, 9) But Caspian's invocation of [redacted] rests on the denial of its rights under the Indenture, particularly its rights to payment under [redacted] and [redacted]. Goldman Sachs does not explain why such contractual rights are not "rights" in the context of [redacted]. There can be no doubt that the action at the heart of this appeal, namely, the removal of several provisions of the Indenture providing protections to minority holders, in fact altered the rights of such minority holders, such as Caspian. Nowhere does Goldman Sachs provide a viable explanation as to why the deletion of, for instance, [redacted] constitutes a mere interest or desire rather than a contractual right. Goldman Sachs misses the point when it suggests that Caspian had no right to be outvoted by its fellow noteholders. (AB 3, 14) Again, Caspian's claim is not merely that some random noteholder voted in a way Caspian did not like. Rather, the claim is that Goldman Sachs, the majority noteholder, orchestrator of the entire transaction, both initially and for the Exchange Transactions, the proverbial "800 pound gorilla"

in the context of this transaction, agreed contractually that it would not use the powers it had under the Indenture to prejudice the rights of its fellow and necessarily minority holders, and yet did that very thing -- used its vast powers under the Indenture to strip out minority holder protections so that a restructuring could be effected.

D. Goldman Sachs' Justifications Of Its Conduct Are Unsupported And In Any Event Irrelevant To This Appeal

1. The Exchange Transactions Materially Changed The Terms Of The Superholdco Notes

Goldman Sachs' assertion that the terms of the Superholdco Notes remained unchanged by the Exchange Transactions is wrong and removed from reality. (AB at 7, 13) As mentioned *supra* at 12, the Superholdco Notes are subject to the terms of the Indenture. It is alleged (and in any event undisputed) that [redacted] and, at the same time, the deletion of [redacted] of the Indenture, the provision affording noteholders the right to "cash out" immediately upon the occurrence of such a substantial asset sale. Indeed, the "cash out" right under [redacted] is so crucial that it is specifically reiterated in the Notes themselves. (See Ex. A to the Indenture, Form of Note, ¶7; A00464-65) If the removal of such right is not an ultimate change of terms, it is unclear what could be. By stripping out [redacted] from the Indenture and the Superholdco Notes,

Goldman Sachs severely prejudiced Caspian's contractual rights, leaving Caspian in a lose-lose situation: It either could trade in its Superholdco Notes for nothing of value or watch its right to repayment from Superholdco be fundamentally deconstructed. Whatever may be said about [redacted], there can be no doubt that Goldman Sachs' action resulted in a severe impairment of Caspian's rights, or at bare minimum, and frankly all that should be relevant on this appeal from the decision on a pre-answer motion, such severe impairment has been alleged. (See Amended Complaint ¶¶7, 68, 78, 79, A000151, 173-74, 177)

2. The Exchange Transactions Materially Changed The Value Of The Superholdco Notes

Goldman Sachs suggests repeatedly (AB at 1, 2, 6, 8, 9) that the Exchange Transactions left Caspian no worse off than it would have been because Caspian purchased the Superholdco Notes in the secondary market at a steep discount, it knew how risky and speculative its investment was and that it may ultimately not be able to collect on the Notes, and the Notes were so heavily subordinated that the Exchange Transactions did not alter Superholdo's ability to pay. First, there is no record support for these factual assertions (i.e., the price Caspian paid, what Caspian knew about the risks), and thus they are improper on this appeal.[8]

[8] See Sup. Ct. Rule 8 ("Only questions fairly presented to the trial court may be presented for review"); Sup. Ct. Rule 9 ("An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal."). See also Stayton v. Clairant Corp., 2014 WL 28726, at *3 (Del. Dec. 5, 2013) (refusing to consider plaintiff's spoliation argument under Rule 8 because the issue was not raised to trial court); Ogden v. Collins, 70 A.3d 206 (Del. 2010)

Moreover, even if these extra-record factual assertions were true, they miss the point. Caspian had certain rights under the Indenture, including the right under [redacted] to redeem its Superholdco Notes in the event of a substantial asset sale. It is no answer for Goldman Sachs to argue that because Caspian did not pay that much for its notes and so would not lose that much money (effectively the import of Goldman Sachs' assertion), its contractual rights are not that important. Whether Caspian engaged in a risky investment when it purchased the Notes has no bearing whatever on the contractual rights of these very sophisticated players (most notably, Goldman Sachs itself, the seminal distressed debt trader).

Similarly flawed is Goldman Sachs' assertion that "Caspian has not alleged that GSM received anything other than its pro rata share of the restructuring consideration offered to consenting noteholders at each level of the debt structure," again a subject beyond the scope of this appeal. (AB 33) The Amended Complaint set out [redacted]. Goldman Sachs [redacted] (Amended Complaint ¶¶ 9, 59; A000152, 169) Goldman Sachs does not, nor could it, explain how this subversion of the Indenture

(documents not presented to the trial court were "clearly inappropriate for consideration, because they are not part of the record on appeal.") (citing Rule 9) (citation omitted).

to deprive some noteholders of the assets to be used to repay the loan while benefitting certain other noteholders is not a "[redacted]" that Goldman Sachs used for its own financial gain. But more fundamentally, if Goldman Sachs breached then it must pay the appropriate damages, and it is no defense that it might not have made money from its breach (this is not an unjust enrichment claim).

CONCLUSION

For all the foregoing reasons and the reasons stated in Caspian's Opening Brief, Caspian respectfully requests that the Court of Chancery's dismissal of Caspian's claim against Goldman Sachs be reversed.

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