EFiled: Sep 30 2019 04:48PM EDT
Filing ID 64254153
Case Number 300,2019

IN THE

Supreme Court of the State of Delaware

AG ONCON, LLC, AG OFCON, LTD, and OPTI OPPORTUNITY MASTER FUND, Appellants/Plaintiffs-Below, v. LIGAND PHARMACEUTICALS, INC., Appellee/Defendant-Below.	**No. 300,2019** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2018-0556-JTL

APPELLEE'S ANSWERING BRIEF

ROSS ARONSTAM & MORITZ LLP

David E. Ross (Bar No. 5228)
R. Garrett Rice (Bar No. 6242)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Appellee/Defendant-Below, Ligand Pharmaceuticals Inc.

Of Counsel:

Blair Connelly
Zachary L. Rowen
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022
(212) 906-1200

September 30, 2019

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Regulations

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

This appeal presents a straightforward question of contract interpretation under New York law, with an equally straightforward answer. An indenture for a series of convertible notes provided that it could be amended, without the consent of the holders, to conform its terms to those in the offering memorandum. The issuer and the indenture trustee executed a supplemental indenture that amended the original indenture to conform to the terms set forth in the offering memorandum. Specifically, they amended a defined term in a formula in the indenture to conform to the defined term in that formula in the offering memorandum. Plaintiffs are noteholders, who contend that this could not be done without their consent.

Unlike in most contract cases, Plaintiffs do not allege that the indenture formula was actually negotiated, that the negotiating parties intended to change the formula, or that Plaintiffs relied on the original indenture formula when they purchased the notes. Nor do they claim that the market was somehow misled. Plaintiffs do not (and cannot) dispute that the indenture formula would lead to a number of truly absurd results. And they do not dispute that the supplemental indenture ensured that the holders would receive exactly the amount due to them under the conversion rate in the indenture and on the face of the notes. Yet

Plaintiffs filed suit, seeking to recover approximately four billion dollars on this $245 million notes offering.

Plaintiffs have little to say about the indenture provision that allows conforming amendments without noteholder consent. They argue instead that other provisions of the indenture prohibit exactly what the conforming amendment provision permits, and that New York's Uniform Commercial Code (the "N.Y. U.C.C.") prohibits conforming amendment provisions altogether. Plaintiffs are wrong. Their interpretation renders the conforming amendment provision superfluous. And their reading of New York law and the Trust Indenture Act (the "TIA" or the "Act") is flawed several times over. The conforming amendment provision is enforceable, applicable, and dispositive. The Court of Chancery properly dismissed the complaint, and the judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Section 9.01(b) of the Indenture permitted Ligand and the trustee to execute the Supplemental Indenture without the prior consent of the noteholders. Although other provisions in Section 9.01 limited amendments to those that do not adversely affect the interests of noteholders, Section 9.01(b) did not. The only requirement for amendment under Section 9.01(b) was that the amendment conform to the Offering Memorandum's Description of the Notes. The Supplemental Indenture does just that.

Plaintiffs' arguments to the contrary fail. Plaintiffs' interpretation of Section 6.07 would render Section 9.01(b) (and other Indenture provisions) a nullity. And Plaintiffs have not shown that the Supplemental Indenture violated the TIA or the N.Y. U.C.C. Plaintiffs also have not established any ambiguity.

2. Denied. Nothing in the Court of Chancery's analysis depended on anything outside the proper scope of a motion to dismiss record. The Court relied exclusively on the Indenture, the Supplemental Indenture, and the Offering Memorandum—all of which were attached and integral to the pleadings—not on any factual determinations.

STATEMENT OF FACTS

A. The Parties

Ligand is a biopharmaceutical company focused on developing technologies that facilitate the discovery and development of medicines. (B155.)[1] Ligand's stock trades on the NASDAQ exchange.

Plaintiffs are investment funds controlled by sophisticated managers who hold themselves out as experts in convertible debt. (*See* B016-021; B070-078.) Plaintiffs' managers control anywhere from $200 million to over $290 billion in assets. (*See* B029-030; B526.)

B. Ligand Announces A Convertible Notes Offering

On August 11, 2014, Ligand announced that it intended to offer a series of convertible notes ("the Notes"), the terms of which would "be determined by negotiations between Ligand and the initial purchasers," *i.e.*, the underwriting banks. (A267.) The Notes were "priced" the following day. (B362.)

The pricing announcement stated that the Notes would pay a 0.75% interest rate, and have a "conversion rate" of 13.3251 shares per $1,000 principal amount—meaning that when the holder elects to convert, it will receive the value

---

[1] Plaintiffs' Appendix and Ligand's Appendix (reflected in record citations prefaced with "A" and "B," respectively) include (a) documents that are attached or incorporated into the Complaint and thus a part of the pleadings, and (b) public filings and other judicially noticeable, publicly-available information that may be considered on a motion to dismiss. *See Stafford v. State*, 59 A.3d 1223, 1226 n.3 (Del. 2012).

equivalent to 13.3251 shares of Ligand stock for every $1,000 in principal amount of Notes converted. The press release explained that this was "equivalent to an initial conversion price of approximately $75.05 per share of common stock." (B362) In other words, $75.05 was the dollar figure at which the value of 13.3251 shares of Ligand stock would exceed the $1,000 face value of the Note, at which point the Notes would be "in the money."

C. Ligand And The Underwriters Issue An Offering Memorandum Setting Forth The Terms Of The Notes Offer

On August 12, 2014, Ligand and the underwriters issued an Offering Memorandum for the Notes (the "Offering Memorandum"). (A178-261.) It explained that the "initial purchasers" (the underwriters) planned to re-sell the Notes "in transactions not requiring registration under the Securities Act or applicable state securities laws," including private placements under Securities and Exchange Commission Rule 144A. (A247.) As such, the Notes would be sold only to "qualified institutional buyers," *i.e.*, sophisticated investors with substantial assets invested or under management. *See id.*; 17 C.F.R. § 230.144A(a). The Offering Memorandum further stated that the Notes "have not been registered under the Securities Act or any state securities laws," and that Ligand "do[es] not currently intend to seek" qualification of the Indenture under the TIA. (*See id.*; A231.)

The Offering Memorandum contained a section titled "Description of the Notes." (A205-235.) Consistent with Ligand's pricing announcement, it states that the "conversion rate will initially equal 13.3251 shares of our common stock per $1,000 principal amount of Notes," which is only "subject to adjustment upon the occurrence of certain events." (A208.) Those "events" are all either dilutive changes to Ligand's capital structure, such as the issuance of new stock or share splits, or fundamental corporate changes such as mergers. (*See* A214-230.) The general effect for each event is to ensure that the relative consideration will remain equivalent to the value of 13.3251 shares under the capital structure existing at the time the Notes were issued. (*See id.*)

The Description of the Notes also explains that the Notes would be "net share settled," meaning that once a Note is "in the money," the noteholder could convert Ligand Notes with a face value of $1,000 into (a) $1,000 in cash, plus (b) an amount of cash and/or Ligand stock (at Ligand's choosing), equal in value to the "in the money" portion. (*See* A208-210; A213-214.) The total value of each Note when converted—*i.e.*, the $1,000 face value plus the "in the money" portion—would always equal 13.3251 shares per $1,000 of Notes. (*See* A208-209; A213-214.)

The Description of the Notes then explains the mechanism for calculating how that obligation will be "settled" upon conversion. To protect the noteholder

against stock price volatility, the Description of the Notes provides for a 50-day observation period. (*See* A208-209; A213-214.) Thus, the "stock price" that is used in applying the conversion rate is a volume-weighted average price ("VWAP") for each of those 50 days, rather than on the day the noteholder exercises its conversion rights. To account for this, the formula takes the conversion value of 13.3251 shares, and spreads it over 50 separate days' VWAP to determine the per-day conversion value, which is defined as the "daily settlement amount." (*See* A213.)

Because the notes are net share settled, there are two elements of this per-day payment: (i) the cash payment for the principal, and (ii) the share-equivalent payment for the "in the money" value of the Note. (*See id*.) Thus, the formula set forth in the Description of the Notes provides that the noteholder will receive, "for each of the 50 consecutive VWAP trading days in the observation period":

> • an **amount of cash** equal to the lesser of (i) one-fiftieth (1/50th) of $1,000 and (ii) the daily conversion value for such VWAP trading day (such minimum, the "**daily principal portion**"); and
>
> • to the extent the daily conversion value for such VWAP trading day exceeds the daily principal portion for such VWAP trading day, **a number of shares** equal to (i) the excess of the daily conversion value for such VWAP trading day over the daily principal portion for such VWAP trading day, divided by (ii) the daily VWAP for such VWAP trading day (the "**daily share amount**").

(A213 (emphases added).)

The first bullet addresses the $1,000 principal amount of each Note, which is to be paid in cash. The formula simply takes the $1,000 face amount and divides it over the 50-day observation period. Because this element provides for the "lesser" of $20 (1/50th of $1,000) or the "daily conversion value" (1/50th of the value of 13.3251 Ligand shares), a rational noteholder will exercise his conversion right only when the daily conversion value exceeds the daily principal portion—that is, when the Notes are "in the money." Under these circumstances, the "daily principal amount" will be a fixed value of $20.00.

The second bullet reflects the "in the money" portion of the Note, which is to be paid in stock or its cash equivalent. The Description of the Notes refers to this component as the "daily share amount," and calculates it by determining the amount by which the Note was "in the money" on each "VWAP trading day," and then dividing that amount by "the daily VWAP for such VWAP trading day." This converts the "in the money" value from a cash value to an appropriate "number of shares" for each day over the observation period. This overall calculation is referred to hereinafter as the "Description of the Notes Formula."

Importantly, the Description of the Notes Formula ensures that, regardless of the stock price during the observation period, a noteholder that converts $1,000 in face value of "in the money" Notes will always receive the equivalent of 13.3251 shares of Ligand stock, in accordance with the conversion rate. (*See* A213.)

D. Ligand And The Trustee Execute The Original Indenture

As is typical, the economic terms of the Notes were determined, and the underwriters had agreed to purchase them, before an indenture was in place. (*See* A247.) That occurred four days later, when Ligand closed the transaction by executing the original indenture with Wilmington Trust, N.A. as the Trustee. (A065–165 ("Original Indenture").)

The Original Indenture indicates that it was intended to implement the terms set forth in the Description of the Notes. Section 9.01(b) provides that Ligand and the Trustee may amend or supplement the Indenture, without the consent of the holders, to "conform the terms of [the] Indenture or the Notes to the 'Description of the Notes' section of the Offering Memorandum." (A116.)

And in almost all respects, the Original Indenture *did* implement those terms. The Original Indenture reflects the same conversion rate (13.3251 shares per $1,000 principal amount of Notes) set forth in the Description of the Notes. (A119.) It reflects the same limited circumstances in which the conversion rate may be adjusted—*i.e.*, upon certain dilutive changes to Ligand's capital structure, or fundamental changes such as mergers. (A126-140.) And it includes the same assurance that noteholders will always receive the equivalent of 13.3251 shares per $1,000 in Notes despite any such changes. (*See id*.)

Section 10.03 of the Original Indenture specifies the mechanics for settling the amount due upon conversion and, for the most part, it too is entirely consistent with the Description of the Notes. Like the Description of the Notes, Section 10.03 provides for a 50-day observation period. (A123-124.) Like the Description of the Notes, Section 10.03 separates the per-day amount into (i) a "Daily Principal Portion" to account for the face value portion of the Note, and (ii) a "Daily Share Amount" to account for the "in the money" portion of the Note. (*See id*.)

But the Original Indenture radically departs from the Description of the Notes in one critical respect: its calculation of the "Daily Share Amount." The formula in the Original Indenture divides the "in the money" portion by the "Daily Principal Portion," rather than the "daily VWAP" (the "Erroneous Formula"). (A071.) The two formulas are otherwise identical:

"Daily Share Amount" (Description of the Notes)	**"Daily Share Amount" (Original Indenture)**
"a number of shares equal to (i) the excess of the daily conversion value for such VWAP trading day over the daily principal portion for such VWAP trading day, divided by (ii) the **daily VWAP** for such VWAP trading day (the 'daily share amount')." (A213.)	"'a number of shares equal to (i) the excess of the Daily Conversion Value for such VWAP Trading Day over the Daily Principal Portion for such VWAP Trading Day, divided by (ii) the **Daily Principal Portion** for such Trading Day." (A071.)

Because the Daily Principal Portion is a fixed number ($20), its placement in the denominator means that the "Daily Share Amount" does not calculate the "number of shares" per day that represents the "in the money" portion of the

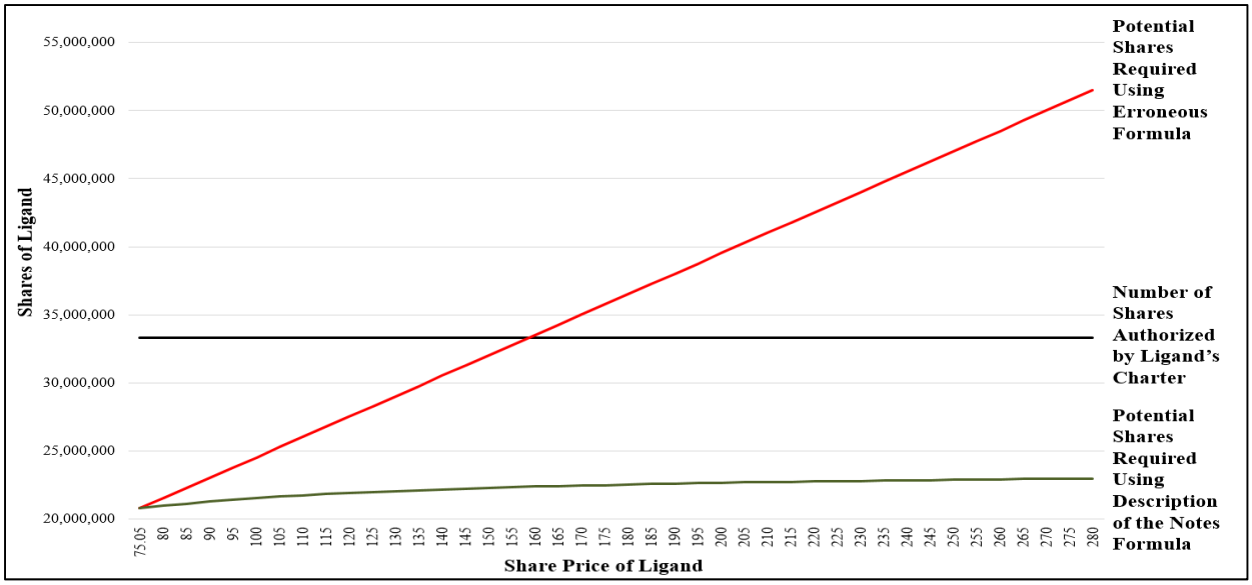
conversion value. Instead of dividing the "in the money" portion "for such VWAP trading day" by "the daily VWAP for such VWAP trading day," the formula instead divides by a fixed number that is not tied to the trading price of Ligand's stock. As a result, this formula produces a number that will significantly increase as Ligand's stock price (and, in turn, the "in the money" portion of the Note) rises. And, critically, the formula will not adhere to the mandatory 13.3251 conversion rate under nearly any circumstance.[2]

The Erroneous Formula produces other anomalous results. If Ligand elected to pay in shares, the formula would generally require Ligand to provide more shares upon conversion than are authorized by Ligand's charter, in violation of Section 10.04 of the Original Indenture. (*See* A126 (requiring Ligand to reserve out of its authorized but unissued shares sufficient shares to pay consideration due upon conversion); Br. Ex. A ("Op.") 8).[3]

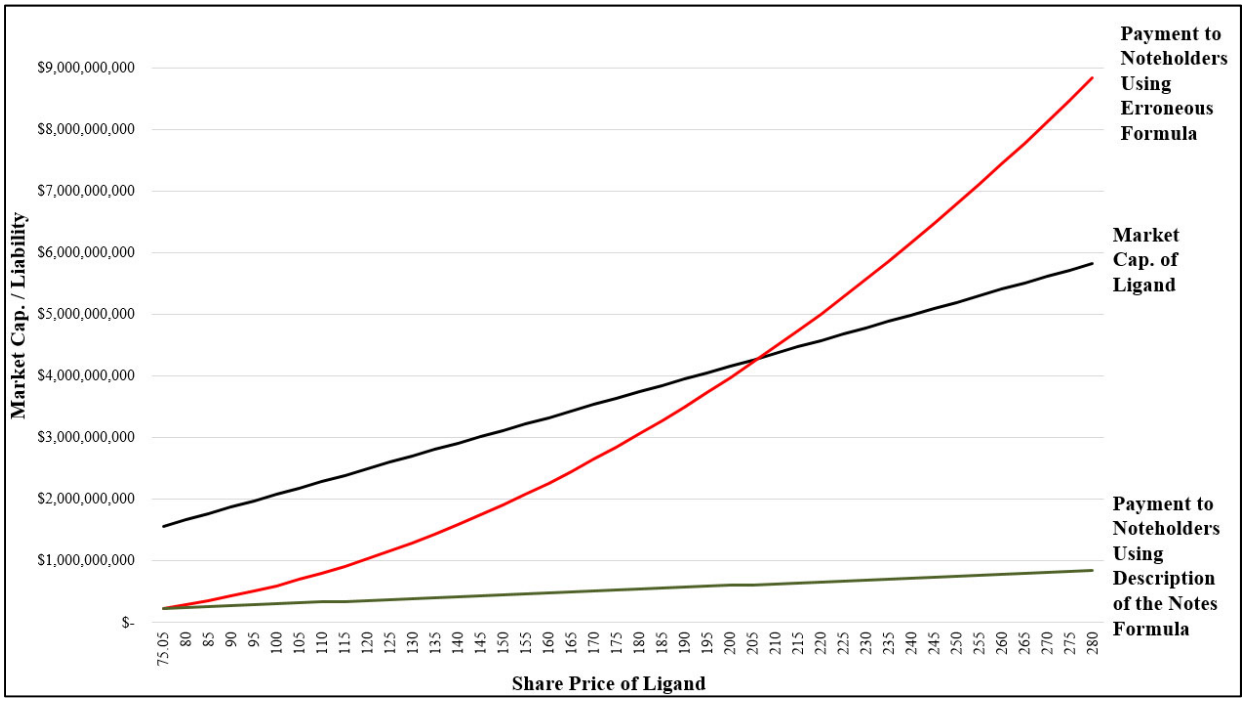
---

[2] For example, applying the Erroneous Formula with a constant share price of $207.17 during the observation period (Ligand's approximate average share price in the 50 days before Plaintiffs filed suit) would result in over 92 shares owed to noteholders per $1,000 of Notes—nearly seven times the number due under the conversion rate (and the Description of the Notes Formula). (Op. 5-6.)

[3] At the time of the Original Indenture, Ligand's charter authorized it to issue 33,333,333 million shares; it had already issued 20,780,756. (A203; B149; B351.)



Likewise, because the Erroneous Formula has a fixed value in the denominator, the amount due in cash under that formula would rapidly exceed the company's market capitalization:



The Erroneous Formula would also deprive noteholders of important protections. Under Section 10.05(a), when a stock split occurs, the conversion rate is automatically adjusted by the same ratio. (*See* A126-127.) But because the Erroneous Formula has the share price as a variable in the numerator, but a fixed value in the denominator, a 100-to-1 stock split would divide the numerator, but not the denominator, by 100—vastly *decreasing* the consideration due upon conversion. (*See id*.)

E. The Global Note Reflects The Terms Of The Description of The Notes

The Original Indenture included a form of Global Note, which contained the text to be included on the face of the Notes. (A148-158.) Like Section 9.01(b), the Global Note provides that the Indenture or the Notes can be amended "without the consent of any Holder," to "conform the terms of the Indenture or the Notes to the 'Description of the Notes' section of the Offering Memorandum." (A154-155.) And like the Description of the Notes and the Original Indenture, the Global Note states that the Conversion Rate was equal to "13.3251 shares of Common Stock per $1,000," which could be adjusted only as the Indenture permits. (A154.) The Global Note does not contain either formula. (A148-158.)

F. The Notes Traded At Values Consistent With The Description Of Notes Formula, Not The Erroneous Formula

Ligand issued an 8-K announcing the closing of the transaction, which made no reference to any change in the formula. (A271-272.) In every subsequent

public description of the Original Indenture after the transaction closed, Ligand described the Notes in a manner consistent with the Description of the Notes Formula. (*See* B377; B383; B389; B394; B400; B405; B410; B417; B423; B430; B435; B440; B444; B013; B450.)

The Notes have at all times traded at values consistent with the Description of the Notes Formula, not the Erroneous Formula. (B453-492.) Likewise, the Plaintiffs who made Form 13F filings with the SEC reported a fair market value of the Notes consistent with the Description of the Notes Formula. (*See, e.g.*, B053; B059; B067; B121; B126; B131; B136; B141; B146; B504; B509; B514; B519; B524; B529; B534; B539; B544 (collectively, "13F Filings").)

G. Ligand And The Trustee Execute The Supplemental Indenture To Conform The Original Indenture To The Description Of The Notes

Ligand and one of the underwriters eventually learned that the "Daily Share Amount" definition in the Indenture did not match the definition in the Description of the Notes. (A281.) On February 20, 2018, Ligand and the Trustee executed a Supplemental Indenture "pursuant to Section 9.01(b)." (A172-174.) The Supplemental Indenture conforms the Erroneous Formula to the Description of the Notes Formula by replacing the term "Daily Principal Portion" in the denominator with "Daily VWAP." (A172.) This change ensured that each holder would receive exactly what was due under the conversion rate, and protected noteholders

from any adverse effects in the event of a stock split or similar event. Under Section 9.05, the Supplemental Indenture was effective upon execution and binding on all noteholders. (*See* A118.)

On March 8, 2018, Ligand gave notice of the Supplemental Indenture through the Trustee, in accordance with the Indenture.[4] (*See* A141-142.) The notice included the complete text of the Supplemental Indenture. (*See id.*)

H. Plaintiffs Buy Up Notes And Threaten Suit

After Ligand gave notice of the Supplemental Indenture, Plaintiffs went on a buying spree. Each of Plaintiffs' managers that are required to file Form 13F reports with the SEC purchased additional Notes during or immediately after the quarter that the Supplemental Indenture was issued. (*See* 13F Filings.) All told, Plaintiffs alleged that they owned 95% of the issued and outstanding Notes. (A287.)

On June 1, 2018, Ligand received a letter from Plaintiffs' counsel, asserting that the Supplemental Indenture did not apply and that, based on the Erroneous Formula, Ligand's liability to the noteholders he represented amounted to 14,858,017 shares of Ligand stock—or over $3 billion in cash. (*See* A278.) At the time, Ligand's market capitalization was slightly over $4.5 billion. Plaintiffs'

---

[4] The Complaint concedes that Ligand caused the Trustee to deliver a copy of the Supplemental Indenture to the Depository Trust Company, which Section 12.02 permits. (A040; A141-142.) In any event, Section 9.04 provides that defects in notice do not affect the validity of any supplement. (A118.)

attorney demanded to discuss how Ligand "can and will satisfy its obligations under the [Original] indenture in light of . . . [Ligand's] cash-on-hand." (*Id.*)

In response, Ligand explained that Section 9.01(b) expressly authorized it to issue the Supplemental Indenture to conform to the Description of the Notes. (*See* A281.) Plaintiffs' counsel, in turn, threatened to "file suit seeking damages under the [Original] Indenture in excess of $3 billion," and asserted that such a damage award "would trigger an event of default" under Ligand's debt obligations. (B497-499.)

I. Plaintiffs File Suit And The Court of Chancery Grants Defendants' Motion To Dismiss

On July 27, 2018, Plaintiffs filed suit. (A018.) Five of the Plaintiffs converted just one Note each before suing. (*See* A042-043.)

On October 1, 2018, Ligand filed a motion to dismiss. (A359-418.) Plaintiffs opted to file an opposition rather than amend the complaint. (A419-476.) On May 24, 2019, the Court of Chancery dismissed Plaintiffs' complaint with prejudice. (Op.; B590-592.)

After crediting the Complaint's allegations and examining the attached exhibits (including the Indentures and the Offering Memorandum), the Court held that the Supplemental Indenture "conformed the terms of the conversion formula in the Indenture to the terms set out in the Description of the Notes" as permitted by

Section 9.01(b). (Op. 10.) The Court then considered, and rejected, Plaintiffs' arguments as to why the Supplemental Indenture was nonetheless invalid.

First, the Court rejected Plaintiffs' assertion that Ligand could not "rely on the Offering Memorandum" because "the Indenture represented the complete and final agreement governing the notes." (*Id*. at 11.) The Court explained that "because the Indenture itself contains the Conforming Amendment Provision," Ligand did not have to rely on the Offering Memorandum at all, and that "[a]t all times and for all purposes, Ligand has relied on the terms of the Indenture, not the Offering Memorandum." (*Id*. at 12-13.) Similarly, the Court rejected Plaintiffs' argument that Section 8-202(a) of the N.Y. U.C.C. barred the Supplemental Indenture because the Global Note referenced only the Indenture. The Court explained that because the certificate "refers to the Indenture," which contains Section 9.01, Ligand's reliance on that provision "is thus consistent with the terms stated on the certificate." (*Id.* at 13.)

Second, the Court rejected Plaintiffs' argument that Sections 6.07 and 9.02(d) precluded Ligand from relying upon Section 9.01(b) because, Plaintiffs argued, those provisions did not allow changes that adversely affect the noteholders' rights. The Court explained that "reading the Indenture as a whole," as required by the governing New York law, makes clear that the Indenture "authorizes any amendments necessary to conform the Indenture to [the] baseline

terms" in the Offering Memorandum, whereas the other provisions "restrict amendments that would depart from the baseline terms." (*Id*. at 15.) The Court explained that "when the drafters wanted to limit the power to amend, they did so expressly," that "nothing in Section 9.02(d) suggests that it trumps" Section 9.01(b), and nothing in Section 9.01(b) "makes it subject to Section 9.02(d) or limits its operation to amendments that do not impair or adversely affect the noteholders' conversion rights." (*Id*. at 17.) The Court further held that the plain language of Section 6.07 only "protects the right to bring suit" and "does not apply to a change in the conversion formula." (*Id*. at 19.)

Third, the Court held that the Supplemental Indenture did not violate Section 316(b) of the TIA, for two independent reasons. Section 316(b), the Court held, "does not apply to the Indenture" because the Notes were issued in a private placement. (*Id*. at 20-23.) The Court further explained that the Indenture "incorporate[d] only specific provisions of the [TIA]," in some cases with modifications, but did not incorporate Section 316(b). (*Id*. at 23-24.) These specific incorporations would have made no sense if the Indenture was intended to incorporate the Act in its entirety—as Plaintiffs argued. (*Id*. at 25.) But the Court also found that Section 316(b) would not prohibit the amendment, even if it applied, because "[t]he plain language of Section 316(b) does not extend to consideration received under a conversion right." (*Id*. at 25.)

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT PLAINTIFFS FAILED TO STATE A CLAIM.

A. Question Presented

Was the Court of Chancery correct in holding that Section 9.01(b) of the Indenture, which expressly allows Ligand and the Trustee to conform the terms of the Indenture to the Description of the Notes section of the Offering Memorandum "without the consent of any Holder," permitted Ligand and the Trustee to enter into a Supplemental Indenture that conformed the terms of the Indenture to the Description of the Notes section of the Offering Memorandum?

B. Standard Of Review

This Court reviews de novo "the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Allen v. Encore*, 72 A.3d 93, 100 (Del. 2013).

C. Merits Of The Argument

Section 9.01(b) of the Indenture gives Ligand and the Trustee the express right to conform the Indenture's terms to the Description of the Notes in the Offering Memorandum. That is exactly what Ligand and the Trustee did when they replaced the definition of a term in the Indenture with the definition of that term in the Description of the Notes. Plaintiffs' arguments on appeal do not alter that straightforward conclusion.

1. Section 9.01(b) Expressly Permits Ligand And The Trustee To Conform The Indenture's Terms To The Description Of The Notes Without The Holders' Consent

The Indenture is governed by New York law. (A143.) In New York, the "[i]nterpretation of indenture provisions is a matter of basic contract law." *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1049 (2d Cir. 1982). And "the essence of proper contract interpretation…is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract." *Reiss v. Fin. Performance Corp.*, 279 A.D.2d 13, 19 (N.Y. App. Div. 1st Dep't 2000). When interpreting a contract, "a Court must consider the entire contract to avoid adopting an interpretation that would result in an inconsistency between provisions or that would render a particular provision superfluous." *Glob. Funding Grp., LLC v. 133 Cmty. Rd., Ltd.,* 251 F. Supp. 3d 527, 531 (E.D.N.Y. 2017) (citation and internal quotation marks omitted). In doing so, "[t]he court should . . . consider the relation of the parties and the circumstances under which it was executed." *William C. Atwater & Co., Inc. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (1927). "Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties as manifested thereby." *Id.*; *accord Kass v. Kass*, 91 N.Y.2d 554, 566 (1998).

a. *Section 9.01(b) Allows Conforming Amendments And The Supplemental Indenture Conformed The Indenture To The Description Of The Notes.*

Article 9 of the Indenture is titled "Amendments." (A116-119.) Section 9.01, titled "Without Consent of Holders," lists twelve types of amendments or supplements that Ligand and the Trustee may execute "without the consent of any Holder." (A116-117.)

Some provisions in Section 9.01 are qualified by the interests of the noteholders. For example, Section 9.01(a) allows amendments or supplements to cure an "ambiguity, omission, defect or inconsistency," but only "in a manner that does not adversely affect the rights of any Holder in any material respect." Similarly, Section 9.01(h) permits Ligand and the Trustee to "make any change" to the Indenture, so long as it "does not adversely affect the rights of any Holder." (A117.)

Section 9.01(b) contains no such limitation. When qualifying language is found in some provisions but omitted in others, "the inescapable conclusion is that the parties intended the omission." *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014); *see also Int'l Fid. Ins. Co. v. Cty. of Rockland*, 98 F. Supp. 2d 400, 413 (S.D.N.Y. 2000) (drafters "must have acted intentionally" when they "used different words and sentence structures"). The "inescapable conclusion" here is that the drafters intended to permit Ligand and the Trustee to

amend or supplement the Indenture to conform to the Description of the Notes, without regard to whether doing so would adversely affect the rights of any noteholder. As the Court of Chancery explained, "[b]y not introducing these qualifiers, the drafters of the Indenture indicated that [Section 9.01(b)] would operate independently and on its own terms." (Op. 17.) This plain language must be given force. *See Metro. Life Ins. Co. v. RJR Nabisco, Inc*., 906 F.2d 884, 889 (2d Cir. 1990) ("The parties' rights under an unambiguous contract should be fathomed from the terms expressed in the instrument . . . .").

This construction makes perfect sense. *See Joseph v. Creek & Pines, Ltd*., 217 A.D.2d 534, 535 (N.Y. App. Div. 2d Dep't 1995) (court should "give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized"). The Notes were priced and sold to the underwriters before the Indenture even existed, based on the Description of the Notes. Both Ligand and the underwriters would want to ensure that any Notes sold to third parties would adhere to those terms—which is precisely why Section 9.01(b) provides unqualified authority to conform the Indenture to the Description of the Notes.

This construction is also consistent with the structure of the amendment provisions. As the Court of Chancery observed, the other amendment provisions in Article 9 "restrict amendments that would depart from the baseline terms" in the

Offering Memorandum, absent the consent of the noteholders. (A116-117.) In contrast, Section 9.01(b) "authorizes any amendments necessary to conform the Indenture to those baseline terms." (A116.) An amendment under Section 9.01(b) "does not amend the deal at all. It maintains the original deal by conforming the terms of the Indenture to the original terms." (Op. 18.)

Ligand and the Trustee did exactly what Section 9.01(b) permits: they conformed "[t]he definition of 'Daily Share Amount,' as set forth in Section 1.01 of the Indenture" to the definition of that term as set forth in the Description of the Notes. (A071.)[5]

b. *Plaintiffs' Strained Reading Of Section 9.01(b) Is Waived And Without Merit*

Even though this appeal turns on the meaning of Section 9.01(b), Plaintiffs do not address it until page 32 of their opening brief. In the Court of Chancery, Plaintiffs offered no alternative reading that would give Section 9.01(b) *any* independent meaning. Plaintiffs now claim, for the first time, that the word "conform" in Section 9.01(b) limits Ligand and the Trustee to incorporating only terms from the Description of the Notes that do not conflict with the Original Indenture. (Br. 35-37.) In other words, Plaintiffs read Section 9.01(b) as

[5] Although Plaintiffs refer to the Supplemental Indenture as a "Unilateral Amendment," that is inaccurate; the Trustee also executed the Supplemental Indenture. (A109-112.)

permitting conforming amendments to the Indenture, so long as they do not change what is already there.

As an initial matter, because Plaintiffs did not raise this argument below, it has been waived. *See Roofers, Inc. v. Del. Dep't of Labor*, 2014 WL 7010733, at *1 (Del. Nov. 24, 2014) (an argument that "has not been properly raised below . . . may not be raised on appeal"); *Martin v. Nat'l Gen. Assur. Co.*, 2014 WL 3408674, at *3 (Del. July 9, 2014) ("Martin's failure to raise this argument below constitutes a waiver of this claim on appeal.").

Preservation aside, Plaintiffs' new argument defies logic. The drafters would not have (1) specifically permitted amendments that "conform" the Indenture to the Description of the Notes, (2) specifically provided that such amendments can be made "without the consent of any Holder," and (3) specifically omitted any qualification based on how the amendments affect the rights of any noteholder, simply to allow for amendments that have no substantive impact. *See Creek & Pines, Ltd.*, 217 A.D.2d at 535 ("A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect . . . ."); *Patsis v. Nicolia*, 120 A.D.3d 1326, 1328 (N.Y. App. Div. 2d Dep't 2014) (defendant's construction "improperly render[ed]" the contract's terms "meaningless"). Indeed, Plaintiffs' interpretation would effectively re-write Section 9.01(b) to include the very qualifying language the drafters omitted.

Plaintiffs' interpretation would also render Section 9.01(b) superfluous. Section 9.01(h) already permits Ligand and the Trustee to make "*any* change" to the Indenture "that does not adversely affect the rights of any Holder." ((A117) (emphasis added).) Under Plaintiffs' construction, Section 9.01(b) affords no rights beyond what Section 9.01(h) already provides. An interpretation "that would render a particular provision superfluous" cannot be accepted. *See Glob. Funding Grp., LLC*, 251 F. Supp. 3d at 531 (citation and internal quotation marks omitted).

Plaintiffs' "plain meaning" argument is also contrary to the very definition on which they rely. Plaintiffs cite Merriam-Webster's dictionary for the proposition that "conform" means "bring[ing] into harmony or accord." (Br. 35.) But Plaintiffs do not explain how the Supplemental Indenture did anything other than bring the Indenture "into harmony or accord" with the Description of the Notes. Plaintiffs also omit the immediately preceding language from that definition, which states: "to give the same shape, outline, or contour to [or] bring into harmony or accord."[6] That is exactly what the Supplemental Indenture does.

---

[6] "Conform," Merriam-Webster's Dictionary (2019), https://www.merriam-webster.com/dictionary/conform.

And Plaintiffs' reliance on language in the Offering Memorandum is entirely circular. Plaintiffs argue that "[h]armonizing or 'conforming'" the Indenture "was impossible" because the Offering Memorandum states that it "is subject to, and is qualified by reference to" the Indenture, which "define[s] your rights as a holder of the note." (Br. 36.) As the Court of Chancery recognized, "[t]he problem with this argument is that the Indenture itself contained" Section 9.01(b). (Op. 11.) That gave Ligand and the Trustee the right to conform its terms to the Description of the Notes, and "[o]nce amended, those terms became part of the Indenture." (*Id.* at 12.)

2. The Supplemental Indenture Did Not Breach Any Other Provision Of The Indenture

Unable to overcome the plain language of Section 9.01(b), Plaintiffs argue that Sections 6.07 and 9.06 of the Indenture prohibit exactly what it permits. Those arguments also fail.

a. *Section 6.07 Did Not Prohibit The Supplemental Indenture*

Plaintiffs claim that by conforming the Indenture under Section 9.01(b), Ligand and the Trustee simultaneously breached Section 6.07. (*See* Br. 18-23.) That provision is found in Article 6, titled "Defaults and Remedies." Article 6 provides, *inter alia*, that the noteholders of a majority of the principal may "direct the time, method and place of conducting any proceeding for any remedy

available" to the Trustee. (A107.) But regardless of what that majority decides, an individual noteholder's right to sue for payment cannot be impaired. Section 6.07 states in full:

> Notwithstanding any other provision of the Indenture, the right of any Holder ***to bring suit for the enforcement of*** payment of principal, accrued and unpaid interest (including Additional Interest and Special Interest), if any, ***or*** payment of the Fundamental Change Purchase Price on or after the respective due dates, ***or*** the right to receive consideration due upon conversion of Notes in accordance with Article 10, shall not be impaired or affected without the consent of such Holder . . . .

(A108 (emphases added).) As the Court of Chancery explained, this provision "protects the right to bring suit," not the underlying economic right. (Op. 19.)

(1) *Section 6.07 Does Not Cover "Two Separate And Independent Rights"*

Plaintiffs contend that Section 6.07 "covers two separate and independent rights," namely: (i) "the right to bring suit to enforce the non-payment [sic] of principal, interest, or the Fundamental Change Purchase Price"; and (ii) the right to receive "conversion payments free from impairment or affect" by any party. (Br. 19.) In other words, Plaintiffs claim that "to bring suit for the enforcement of" modifies the first two clauses, but not the third. That interpretation fails for several reasons.

First, the structure and grammar of Section 6.07 make clear that the third clause is to be treated the same as the first two. The provision protects each

noteholder's right to sue for each of the three forms of payment it may be owed. Each item is set off by a comma and the word "or," indicating that each relates back to the phrase "bring suit for the enforcement of." *See* Series-Qualifier Canon, Black's Law Dictionary (10th ed. 2014) ("The presumption that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally *applies to the entire series*.") (emphasis added).

Second, Plaintiffs' interpretation collapses under the provision's plain language. Plaintiffs interpret the provision to omit the phrase "to bring suit for the enforcement of" and instead read:

> Notwithstanding any other provision of this Indenture, ~~the right of any Holder to bring suit for the enforcement of payment of principal, accrued and unpaid interest (including Additional Interest and Special Interest), if any, or payment of the Fundamental Change Purchase Price on or after the respective due dates, or~~ the right to receive consideration due upon conversion of Notes in accordance with Article 10, shall not be impaired or affected without the consent of *such Holder* and shall not be subject to the requirements of Section 6.06.

(*See* Br. 19 (emphasis added).) That interpretation makes little sense because it construes the provision to reference "the consent of such Holder," without any prior mention of who "such Holder" might be. In contrast, Ligand's interpretation prohibits impairment of the right of "any Holder" to sue to enforce the right to

receive consideration due in accordance with Article 10 "without the consent of such Holder."

Third, Plaintiffs' reading inexplicably protects a Holder's "right to enforce" the right to payment of principal and interest, but *not* its "right to enforce" the right to receive consideration due upon conversion.

In contrast, Ligand's (and the Court of Chancery's) interpretation makes perfect sense:

> Notwithstanding any other provision of this Indenture, *the right of any Holder to bring suit for the enforcement of* . . . the right to receive consideration due upon conversion of Notes in accordance with Article 10, shall not be impaired or affected without the consent of such Holder and shall not be subject to the requirements of Section 6.06.

That reading is logical, consistent with the text and grammar used, and protects a Holder's right "to bring suit for" all three forms of payment that may be owed. This interpretation also reads Section 6.07 in harmony with the other provisions of the Indenture, including Section 9.01(b), as the Court of Chancery explained.[7] (Op. 15-16, 18-20 (noting that other provisions in Article 9 "protect against changes to the amount of principal, interest, and conversion consideration," subject

[7] Plaintiffs make much of the fact that Section 6.07 begins with the word "[n]otwithstanding," arguing that it therefore "trumps" the right enumerated in Section 9.01(b). (Br. 18-23.) That is a red herring: Section 6.07 can "trump" only provisions with which it conflicts. And there is no conflict between Section 6.07 and Section 9.01(b). Section 6.07 protects only the right to sue—and nothing in the Description of the Notes purports to disturb that right.

to Section 9.01(b))); *See Glob. Funding Grp., LLC*, 251 F. Supp. 3d at 531; *Century Sur. Co. v. Marzec*, 2013 WL 3919383, at *4 (S.D.N.Y. July 30, 2013) (stating courts should adopt an interpretation of a contract that "harmonize[s] all of the terms" of the contract, and not an interpretation that undermines the "logical cohesiveness among the various terms").

(2) *The ABA Model Indenture Supports Ligand's Reading*

Ligand's reading of Section 6.07 is also supported by the Commentaries to the Revised Model Simplified Indenture, which state that Section 6.07 is designed to ensure that "each Securityholder's right to sue to enforce the conversion privilege may not be impaired or affected without such holder's consent." (Op. 19); *see In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 139-40 (2d Cir. 2005) (Commentaries are "[h]elpful guidance").

Again, Plaintiffs disagree. They argue that the ABA's Model Indenture supports their interpretation because the model contains "additional prefacing language . . . addressing the right to convert that Ligand chose not to adopt here." (Br. 22-23.) But that additional language is fully consistent with the Court of Chancery's interpretation and actually undermines Plaintiffs' position. The ABA Model Indenture states:

> Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to receive payment of Principal and interest on the Security, on or after the respective due dates expressed in the Security, or to bring

> suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of the Holder. Notwithstanding any other provision of this Indenture, the right of any Holder of a Security to bring suit for the enforcement of the right to convert the Security shall not be impaired or affected without the consent of the Holder.

(*Id.* (quoting Am. Bar Ass'n, Revised Model Simplified Indenture, 55 Bus. Law. 1115, 1215 (2000) (emphasis in Plaintiffs' brief).) The only difference between the model provision and Section 6.07 of the Indenture is that the latter adapts the underlined clause to apply to all three of the noteholders' potential payment rights. Notably, Ligand did *not* use the language in the model provision that protects the holder's right to "receive payment" independent of the holder's right to "bring suit for the enforcement of any such payment."

(3) *The Offering Memorandum Does Not Help Plaintiffs*

Plaintiffs next identify language in the Offering Memorandum stating that each holder will have a "right to receive payment" of "consideration due upon conversion," and argue that the Court should read that right into Section 6.07. (Br. 21 (quoting A229).) But as Plaintiffs have vigorously argued elsewhere, the Offering Memorandum does not have independent force. (Br. 36, 43.) The Offering Memorandum is "subject to, and is qualified by . . . all of the provisions of the notes and the indenture," which "define [the noteholders'] rights[.]" (A205.) Section 6.07, as executed, is clear and unambiguous on its face. Resort to extrinsic

evidence is neither necessary nor appropriate. *See Tavoulareas v. Bell*, 292 A.D.2d 256, 257 (N.Y. App. Div. 1st Dep't 2002) (stating there is "no occasion to consider extrinsic evidence" when contract is "clear and unambiguous").

b. *Section 9.06 Did Not Prohibit The Supplemental Indenture*

(1) *Section 316(b) Of The TIA Does Not Apply To The Supplemental Indenture*

The Court of Chancery correctly ruled—and Plaintiffs now concede—that Section 316(b) of the TIA does not apply to the Notes of its own force. As the Court explained, "[a] transaction not involving a public offering is not subject to qualification [under the TIA]. Ligand's issuance did not involve a public offering, so it was exempt" from the provisions regarding qualified indentures.[8] (Op. 21-23.) As a result, the Indenture was "not subject to Section 316(b)." (*Id*. at 23); *see Abbate v. Wells Fargo Bank, N.A.*, 2011 WL 13128742, at *4 (C.D. Cal. Apr. 25, 2011) ("the TIA does not govern private placements like the Notes at issue here").

Plaintiffs are thus left to argue that the Indenture nevertheless incorporates *all* provisions of the TIA (at least for supplemental indentures) because Section 9.06 requires every supplemental indenture to "comply with the [TIA]." (A118.) That argument fails for several reasons.

---

[8] Plaintiffs mistakenly describe the Notes as "publicly issued." (Br. 5.) But the Original Indenture states that the Notes were to be offered only as private placements. (A081.) And Plaintiffs do not allege that Ligand ever sought or obtained qualification of the Indenture. (*See* Op. 21; *see also* A231.)

First, Section 9.06 requires supplemental indentures to "comply" with the statute. "Compliance" does not require meeting standards that the statute does not impose. The Supplemental Indenture "complied" with every applicable provision of the TIA. Section 316(b) did not apply.

Second, as the Court of Chancery noted, Plaintiffs' expansive reading creates "inconsistencies with other references in the Indenture to specific sections of the [TIA]." (Op. 25.) As the Court observed, Section 1.03 explains that "[w]henever this Indenture refers to a *provision* of the [TIA], the *provision* is incorporated by reference in and made a part of this Indenture." (Op. 24 (emphasis added).) And certain provisions in the Indenture do indeed refer to and incorporate specific provisions of the TIA—in some cases, with modifications. (*See, e.g.,* A100; A113.) But under Plaintiffs' interpretation, all of these detailed provisions were unnecessary because Section 9.06 incorporates the entire TIA. And the fact that Section 9.06 applies only to Supplemental Indentures does not help; the drafters would not have carefully identified and modified the applicable TIA provisions for the Original Indenture, and then just swung the door open upon any amendment.

Third, Plaintiffs do not confront the absurdity of arguing that Ligand decided to voluntarily subject itself to all of the otherwise inapplicable requirements of the TIA. Plaintiffs' reading would, for example, require Ligand to register with the

SEC securities that were never sold in a public offering (or registered), and which are statutorily exempt from any such requirement. 15 U.S.C. § 77ddd(b). It would subject Ligand to the requirement that Ligand obtain a legal opinion that the assets underlying the securities were validly recorded—a provision that applies only to certain securities backed by land. *See* 15 U.S.C. § 77nnn(b)(1). And so forth with other plainly inapplicable provisions. The (il)logic of Plaintiffs' position proves why it is wrong.

(2) *In Any Event, The Supplemental Indenture Complies with Section 316(b)*

Regardless of TIA Section 316(b)'s applicability, Ligand's Supplemental Indenture is consistent with that provision. Section 316(b) limits only the impairment of noteholders' rights "to receive payment of the *principal and interest*" on an indenture security when due, "or to institute suit for the enforcement of any such payment" when due. 15 U.S.C. § 77ppp(b) (emphasis added). It says nothing about conversion rights. *See RBC Capital Mkts., LLC*, 2011 WL 6152282, at *6 n.36 (Del. Ch. Dec. 6, 2011) (noting that "[a]n exception to no-action clauses for the enforcement of conversion rights, unlike the exception for enforcement of principal and interest payments, is not mandated by the [TIA.]").

The Supplemental Indenture does not impair Plaintiffs' right to receive the principal related to unconverted Notes at maturity, or to any interest payments

when due. Nor does it impair their right to sue for enforcement of those rights. So Plaintiffs re-write Section 316(b) to cover not just "principal and interest," but also the settlement due upon conversion (if the securities at issue happen to be convertible notes). But nothing in that provision or the rest of the statute supports Plaintiffs' argument. The Act does not even contain the terms "convert" or "conversion." *See* 15 U.S.C. § 77aaa, *et seq*.

Plaintiffs do not cite a single case suggesting that Section 316(b) encompasses conversion rights. Plaintiffs' precedent merely confirms that 316(b) protects the payment of the specific face value and interest payments for the notes at issue. Indeed, Plaintiffs' own authority specifies that the "core payment terms" protected by Section 316(b) are principal, interest, and the due date of each. *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1, 7 (2d Cir. 2017) (explaining that Section 316(b) "prohibits non-consensual amendments of core payment terms (that is, the amount of principal and interest owed, and the date of maturity)").

Plaintiffs' remaining cases stand for the unremarkable proposition that the phrase "when due" in Section 316(b) does not necessarily mean the maturity date specified in the indenture, but can also encompass the date when noteholders exercise repurchase options. *See UPIC & Co. v. Kinder-Care Learning Ctrs. Inc.*, 793 F. Supp. 448, 456 (S.D.N.Y. 1992); *YRC Worldwide Inc. v. Deutsche Bank Tr.*

Co. Ams., 2010 WL 2680336, at *4 (D. Kan. July 1, 2010); *see also Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1324, 1325 n.8 (10th Cir. 2008) (debt holder had right to sue under Section 316(b) for principal accruing on the stated date of maturity even though the debt became due earlier under an acceleration provision).

Plaintiffs contend that "Congress could have, but did not exclude conversion rights, or for that matter convertible notes." (Br. 30-31.) That *argumentum ex silentio* begs the question of whether Congress intended conversion rights to be included in the first place—a proposition the statutory text does not support, and for which Plaintiffs offer no authority.

Finding no support in the statutory text or case law, Plaintiffs argue that the Court of Chancery's ruling would have negative policy implications. But Plaintiffs point to nothing in the record that supports their speculation. And there are certainly no "negative ramifications" in this case. (Br. 31.) The Notes at all times traded in a manner consistent with the Description of the Notes Formula, rather than the Erroneous Formula. (*See* B453-492; *see also* B545-550 (article by market commentator describing the Complaint and noting that Plaintiffs are sophisticated investors who "know very well that convertible bonds don't work [the] way Plaintiffs allege").) And only the Description of the Notes Formula was consistent with the Conversation Rate that appeared in the Indenture and on the face of the Notes.

But if the Court is inclined to consider extra-record policy arguments, Plaintiffs' interpretation would create far more uncertainty. Their reading would prohibit conforming amendments to correct even *typographical errors*, if doing so adversely affected the noteholders. And, in any event, indentures still do (or can) limit how conversion mechanics can be changed. In the case of the Indenture, for example, conversion rights can only be conformed to match the terms in the Offering Memorandum. Investors are free to reject any bonds governed by indentures that do not contain such limiting principles. And if those contractual protections prove insufficient (and, again, Plaintiffs point to no evidence that they have), Congress can decide whether to extend the protections of the TIA to encompass conversion rights.

3. The N.Y. U.C.C. Does Not Apply And Does Not Prohibit Amending The Indenture Pursuant To Section 9.01(b)

Unable to show that the Indenture prohibited the Supplemental Indenture, Plaintiffs argue that it violated Section 8-202(a) of the N.Y. U.C.C., which states that "the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another [document] . . . to the extent the terms referred to do not conflict with terms stated on the certificate." N.Y. U.C.C. § 8-202(a). The Note refers to itself as a "certificate," and qualifies as a "certificated security" under the N.Y. U.C.C. (*See* A148; N.Y. U.C.C. § 8-102(a)(4).) Plaintiffs claim that Ligand was therefore

prohibited from "mak[ing] the note subject to the terms from the [Offering Memorandum] which conflicted with terms in the Note itself." (Br. 33.) Plaintiffs are wrong for at least three reasons.

First, executing the Supplemental Indenture did not conflict with the terms of the Note at all. The Note itself states that "[t]he Company and the Trustee may [ ] amend or supplement the Indenture or the Notes without the consent of any Holder to: . . . (B) conform the terms of the Indenture or the Notes to the 'Description of the Notes' section of the Offering Memorandum." (A154-155.) The Note also provides that the "[t]he terms of the Notes include those stated in the Indenture," which necessarily includes Section 9.01(b). (A153.)

Second, while Plaintiffs claim they had a right to rely solely on the "Conversion Terms set forth in the Note," the formula at issue was *not* "set forth in the Note." That formula is only in the Indenture—which also contains Section 9.01(b). The only "Conversion Term set forth in the Note" provides that "[t]he Conversion Rate shall initially equal 13.3251 shares of Common Stock per $1,000 and is subject to adjustment as described in the Indenture." (A153.) The Supplemental Indenture ensures that the noteholders will receive exactly that amount.

Third, Plaintiffs' interpretation of Section 8-202 would result in unintended consequences. The purpose of Section 8-202 is to allow an issuer to incorporate

lengthy documents such as the Indenture into the Note, as long as the incorporated document does not conflict with the terms stated on the face of the Note. *See* N.Y. U.C.C. Law § 8-202 (McKinney) (noting the approval of this "standard practice"); *Kurtz v. Am. Exp. Indus., Inc*., 370 N.Y.S.2d 599, 599 (1975) (analyzing face of certificate to assess compliance with N.Y. U.C.C. § 8-202), *aff'd*, 39 N.Y.2d 738 (1976). But Plaintiffs' reading nullifies provisions like Section 9.01(b) entirely, making issuers strictly liable for even *typographical errors* in the Indenture—an untenable result that is not contemplated by Section 8-202.

4. The Court Of Chancery Correctly Dismissed The Complaint With Prejudice

Plaintiffs finally argue that the Court "erred in dismissing the Complaint with prejudice and refusing Plaintiffs an opportunity to obtain extrinsic evidence from Ligand." (Br. 37.) That argument also fails.

Under Court of Chancery Rule 15(aaa), when a party elects to respond to a motion to dismiss rather than amend, any subsequent dismissal "shall be with prejudice" unless the Court, "for good cause shown," finds that dismissal with prejudice "would not be just under all the circumstances." Del. Ch. R. 15(aaa). Plaintiffs made no such showing below, and do not even address this issue in their opening brief. Plaintiffs have waived any effort to show "good cause."

In any event, Plaintiffs' belated attempt to establish ambiguity fails on its own terms. As this Court has explained, "[u]nder New York law . . . [a] contract

[is] ambiguous only when the terms of the contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person," in "the context of the entire integrated agreement[,] who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine Partners 2006, L.P.*, 93 A.3d 1203, 1205–06. "As a matter of public policy, New York courts endeavor to give commercial contracts that use standard language a consistent meaning." *Id.* at 1206. Further, "in considering whether a contract, such as an indenture, is ambiguous, courts may consider commercial usage and sources such as model contracts" like the ABA Model Indenture. *Id*. For the reasons discussed above, the Court of Chancery correctly applied the governing principles, interpreted the Indenture as a whole, gave effect to each clause in light of the contract's purpose, and correctly found no ambiguity.

II. THE COURT OF CHANCERY DID NOT RELY ON ANYTHING OUTSIDE THE PROPER SCOPE OF A MOTION TO DISMISS.

A. Question Presented

Did the Court of Chancery properly rely on the Complaint and the documents attached to it in dismissing Plaintiffs' claims?

B. Standard Of Review

This Court reviews de novo "the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Encore*, 72 A.3d at 100.

C. Merits Of The Argument

The Court of Chancery did not rely on anything improper in granting Ligand's motion to dismiss. Plaintiffs do not point to a single "factual inference" that had any bearing on the Court's legal reasoning. And the "facts" Plaintiffs fault the Court for allegedly considering were all contained in either the Complaint itself or in the documents attached to it.

Although a trial court must "accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the plaintiff's favor," it is not "required to accept as true conclusory allegations 'without specific supporting factual allegations,'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006), or "every strained interpretation of the allegations proposed by the plaintiff," *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001). The Court may consider both "the well pleaded allegations of the … complaint and the exhibits

thereto." *James Cable, LLC v. Millennium Digital Media Sys., L.L.C.*, 2009 WL 1638634, at *1 n.3 (Del. Ch. June 11, 2009); *see also Malpiede*, 780 A.2d at 1083; *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 n.1 (Del. 1999).

The Court of Chancery's decision was based on (i) the Original Indenture; (ii) the Offering Memorandum; and (iii) the Supplemental Indenture—which were all attached to the Complaint and could properly be considered. (*See* A065-165, A171-174, A178-261); *James Cable LLC*, 2009 WL 1638634, at *1. The Court referred to only these three documents to conclude that the Supplemental Indenture "conformed the formula in the Indenture" to the Description of the Notes. (See Op. 9, 19-20.) And while the Court *could* have properly relied on other documents in the record that are judicially noticeable, such as SEC filings, *see, e.g.*, *Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000), the Court did not—and did not need to—to reach its decision.

Ignoring the Court's actual analysis, Plaintiffs attempt to paint various snippets from other parts of the decision as improper factual conclusions. But those efforts are based on mischaracterization and hyperbole. For example:

- Plaintiffs claim that the Court "concluded as fact" that "[u]sing the Daily Principal Portion as the denominator for the Daily Share Amount ***radically changed the conversion calculation***." (Br. 41.) But that "conclusion" reflected nothing more than simple math, and the Complaint itself states that the Supplemental Indenture would "significantly reduce the value of the Daily Share Amount . . . upon conversion." (A037.)

- Plaintiffs complain that the decision included a chart from Ligand's brief, "purporting to illustrate" the number of shares Ligand would have to issue using the formula in the Offering Memorandum compared to the number of shares authorized by Ligand's Charter. (Br. 42.) But Ligand's number of authorized shares is a judicially noticeable fact that is not in dispute. *See Stafford*, 59 A.3d at 1226 n.3. And the same information is contained in the Offering Memorandum, which is attached to the Complaint. (A237.)

- Plaintiffs claim that the Court "conclude[d] as fact that the Indenture contains an error by describing the 'potential shares required using [the] ***erroneous formula***'" (Br. 42). But that word appears only in the legend to a chart the Court incorporated from Ligand's brief—which the Court referenced only because it "illustrates the total number of shares" that Ligand would need to issue under each of the two formulas. (Op. 8.) Notably, Plaintiffs did not dispute the accuracy of the chart, either on appeal or below.

In any event, none of these "facts" played any role in the Court's interpretation of the Indenture.

Similarly, Plaintiffs' assertion that the Court drew inferences about the parties' subjective intent based on its shorthand reference to the "original deal" falls flat. (Br. 42.) The Court simply explained why Section 9.01(b) made sense when "reading the Indenture as a whole," given the structure of the other amendment provisions. (Op. 15-16.) The Court properly interpreted the words, used "not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties as manifested thereby." *William C. Atwater & Co.*,

159 N.E. at 419; (*see* Op. 14-15, 17 (noting that "when the drafters wanted to limit the power to amend, they did so expressly").) The Court did not make any factual determinations in doing so.

CONCLUSION

For the foregoing reasons, the Court of Chancery properly dismissed Plaintiffs' Complaint for failure to state a claim upon which relief can be granted.

ROSS ARONSTAM & MORITZ LLP

/s/ David E. Ross
David E. Ross (Bar No. 5228)
R. Garrett Rice (Bar No. 6242)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Appellee/Defendant-Below, Ligand Pharmaceuticals Inc.

Of Counsel:

Blair Connelly
Zachary L. Rowen
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022
(212) 906-1200

September 30, 2019