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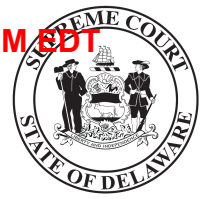

IN THE SUPREME COURT OF THE STATE OF DELAWARE

QUADRANT STRUCTURED PRODUCTS COMPANY, LTD., Individually and Derivatively on behalf of Athilon Capital Corp., Plaintiff Below/Appellant v. VINCENT VERTIN, MICHAEL SULLIVAN, PATRICK B. GONZALEZ, BRANDON JUNDT, J. ERIC WAGONER, ATHILON CAPITAL CORP., ATHILON STRUCTURED INVESTMENT ADVISORS LLC, EBF & ASSOCIATES, LP, Defendants Below/Appellees	No. 338, 2012 Case Below: Court of Chancery CIVIL ACTION NO. 6990-VCL

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PRELIMINARY STATEMENT

Since 2012, the parties have briefed extensively, in two courts, the question whether a no-action clause in the relevant trust indenture bars noteholders from pursuing all rights of action against or on behalf of the obligor. After briefing in the Court of Chancery on the motion to dismiss of Defendants Below/Appellees, the issue was fully briefed in this Court in 2012. After oral argument on this appeal, this Court issued a limited remand to the Court of Chancery, directing it "to issue an opinion analyzing the significance (if any) under New York law of the differences between the no-action clauses in the *Lange*[1] and *Feldbaum*[2] indentures and the Athilon Indenture." Order ¶ 9. The Court observed that the no-action clause in Athilon's Indenture is "worded differently" from the no-action clauses in *Feldbaum* and *Lange* -- the Athilon Indenture omits the phrase 'or the Securities' -- and concluded that this distinction "presents a litigable issue that merits analysis by the Court of Chancery in the first instance." *Id.* ¶¶ 7, 9.

On limited remand, the parties submitted a full round of supplemental briefing to the Vice Chancellor prior to oral argument on March 22. After a two hour hearing, the Vice Chancellor ordered further post-argument briefing, which the parties submitted on April 24.

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[1] *Lange v. Citibank, N.A.*, 2002 WL 2005728 (Del. Ch. Aug. 13, 2002).

[2] *Feldbaum v. McCrory Corp.*, 1992 WL 119095 (Del. Ch. June 2, 1992).

On June 20, 2013, the Vice Chancellor issued a scholarly opinion in response to this Court's Order (the "Report"), which was, in effect, a split decision. The Vice Chancellor recommended that his earlier dismissal should be sustained as to two counts, and a portion of a third, and denied as to the balance of the amended complaint brought by Plaintiff Below/Appellant Quadrant Structured Products Company, Ltd. ("Quadrant"). He reached this conclusion after a careful examination of (1) the plain language of the no-action clauses at issue, (2) the substantial early body of New York case law construing no-action clauses, (3) the relevant modern New York and Delaware cases, and (4) application of the Athilon Clause to Quadrant's claims in light of New York law.

The Court of Chancery's Dismissal Order was in error, but the Report correctly analyzes the issue, and strikes the right balance. For the reasons discussed in the Report and herein,[3] this Court should reverse the Dismissal Order as to Counts I through VI, IX, and X (to the extent Count X seeks to impose liability on secondary actors for violations of Counts I through VI and IX) of the Amended Complaint, affirm the Dismissal Order as to Counts VII, VIII, and X (to

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[3] Quadrant refers the Court throughout this brief to the arguments made in its supplemental briefs submitted to the Vice Chancellor on remand, and for the Court's convenience provides those briefs in a Supplemental Appendix. Because the supplemental briefs so thoroughly present the arguments that support the conclusion reached by the Vice Chancellor in his Report, Quadrant only briefly recaps them here.

the extent Count X seeks to impose liability on secondary actors for violations of Counts VII and VIII), and remand this case to the Court of Chancery for discovery and trial.

ARGUMENT

I. THE REPORT ISSUED ON REMAND PROPERLY CONCLUDES THAT AS A MATTER OF PLAIN LANGUAGE, THE DIFFERENCES BETWEEN THE ATHILON CLAUSE AND THE *FELDBAUM/LANGE* CLAUSE ARE SIGNIFICANT.

The analysis of indenture provisions is a matter of basic contract law, and must begin with the plain language. *See* Report at 10. To understand why *Feldbaum* and *Lange* do not apply, the Court should thus begin with the crucial text of the Athilon indenture. The text is best understood by sentence diagram, as set forth by the court below:

> No holder of any Security
>
> 1.0 shall have any right by virtue or by availing of any provision of this Indenture
>
> 2.0 to institute any action or proceeding at law or in equity or in bankruptcy or otherwise
>
> 3.0 upon or under or with respect to this Indenture, or
>
> 4.0 for the appointment of a trustee, receiver, liquidator, custodian or other similar official or for any other remedy hereunder, unless [the holder complies with specified conditions].

Report at 11; Supplemental Appendix ("SA") 6-9 (Plaintiff's Opening Brief On Remand from Delaware Supreme Court ("Pl's Opening Br. On Remand") at 1-4); SA24-25 (Plaintiff's Reply Brief On Remand from Delaware Supreme Court ("Pl's Reply Br. On Remand") at 1-2).

The clauses in *Feldbaum* and *Lange*, by contrast, provided: "A

Securityholder may not pursue any remedy with respect to this Indenture *or the Securities* unless [the Securityholder complies with specified conditions]." *Feldbaum*, 1992 WL 119095, at *5; *Lange* 2002 WL 2005728, at *5 (emphasis added). The Athilon clause is in several respects narrower than the *Feldbaum/Lange* clause. Report at 11-14. *See also* SA6-12 (Pl's Opening Br. On Remand at 1-7); SA24-27 (Pl's Reply Br. On Remand at 1-4). The Vice Chancellor also closely examined authoritative commentary on no-action clauses, which "confirms that the Athilon Clause should receive a narrow reading." Report at 35; *see also* thorough discussion of experienced commentators at 33-35.

The Athilon Clause thus does *not* bar what the *Lange* and *Feldbaum* clauses *did* bar: a right of action arising from or by virtue of "the Securities:" *i.e.,* one that arises by operation of law from the plaintiff's status as a holder of Securities, such as a right of action conferred by Delaware statute (such as DUFTA), or by federal statute, or by common law. Report at 11-12; SA7-9 (Pl's Opening Br. On Remand at 2-4). "Indenture" and "Securities" are defined terms in this contract, and neither definition refers to the other. A86, A91 (Ex. A § 1.01).[4] The Indenture uses these

[4] A canon of construction requires that courts give effect to separate contract terms where grammatically possible. *See, e.g., Suffolk Cnty. Water Auth. v. Village of Greenport*, 21 A.D.3d 947, 948 (N.Y. App. Div. 2005) ("an interpretation which renders language in the contract superfluous is unsupportable"); *Helmsley-Spear, Inc. v. N.Y. Blood Ctr., Inc.*, 257 A.D.2d 64, 69 (N.Y. App. Div. 1999) ("[c]ourts should construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract");

terms to refer to different things. For example, section 7.01(c) refers to a "failure on the part of the Issuer duly to observe or perform any other of the covenants or agreement on the part of the Issuer in the *Securities* of such series or in this *Indenture* . . . ." A126 (Ex. A § 7.01(c)). Where one section of the contract refers to both defined terms, and another refers only to one, the two terms cannot mean the same thing. The *Feldbaum* and *Lange* clauses, on the other hand, reached all rights, no matter their source, so long as the remedy pursued was "with respect to this Indenture or the Securities." Report at 11-12.

Comparing the plain language of the clauses shows other differences. The Athilon Clause applies narrowly to rights "by virtue or by availing of any provision of this Indenture" (1.0) and only to an "action or proceeding" (2.0) in which the securityholder brings a claim "upon or under or with respect to this Indenture," (3.0) for particular types of remedies (4.0). The *Feldbaum/Lange* clause more broadly covers any action or proceeding where the plaintiff pursues "any remedy with respect to this Indenture or the Securities." Report at 11-14.

Application of the cardinal rule that courts parse contract language by their plain meaning illustrates just how different the Athilon Clause and the *Feldbaum/Lange* clauses are.

Kuhn Constr., Inc. v. Diamond State Port Corp., 990 A.2d 393, 396-97 (Del. 2010). This canon applies with particular force to terms that a contract separately defines.

II. CASES APPLYING NEW YORK LAW SHOW THAT BY ITS PLAIN LANGUAGE, THE ATHILON CLAUSE DOES NOT BAR QUADRANT'S CLAIMS.

A. New York's Long History of Interpreting No-Action Clauses Confirms that the Athilon Clause Does Not Apply.

New York courts long ago rejected the defense -- invoked by the defendants here -- that the reference in a no-action clause to the "Indenture" bars all suits on the bonds. Early cases held that no-action clauses barring actions arising under the "Indenture" did not reach actions on the underlying notes. *See* Report at 18-20; SA45-47 (Plaintiff's Supplemental Brief on the Origin of No-Action Clauses ("Pl's Second Supp. Br." at 7-9). Where the drafters expressly extended the clause to claims under or on the "notes" or the "bonds," courts were inclined to bar claims brought to enforce one of their terms. *See* Report at 20; SA48-49 (Pl's Second Supp. Br. at 10-11).

The early path of the law explains the provenance of the phrase considered in *Feldbaum* and *Lange* but absent from the Indentures here: "or the securities." Prior to the enactment of the Trust Indenture Act,[5] a no-action clause that did not expressly refer to the securities themselves would not suffice to bar discrete bondholder actions *on the debt*. Including the phrase, then, was designed to bring within the clause's reach actions on the notes, first for mere nonpayment, and then,

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[5] *See* Report at 15 & n.3.

by extension, for breach of an express covenant contained in the note. *See* Report at 15-20; SA48-49 (Pl's Second Supp. Br.).

Strict construction was a hallmark of early case law. An entire body of early twentieth century case law emphasizes the difference between rights arising from an indenture and those arising from a bond. SA45-52 (Pl's Second Supp. Br. at 7-14). This history makes even plainer that the Athilon Clause channels through the trustee only those claims that necessarily arise from the Indenture, and does not bar those that arise by virtue of a noteholder's creditor status. The history teaches that if the issuer meant to bar Quadrant's claims, it needed to include in Section 7.06 plain and unequivocal language. The language is not there.

B. Modern New York Cases Confirm that the Athilon Clause Does Not Apply.

One federal judge in New York has concluded that a no-action clause barring claims "by virtue of or by availing himself of any provision this Indenture" does *not* bar fraud and RICO claims brought outside the contract. *Cruden v. Bank of New York*, 1990 WL 131350, at *12 (S.D.N.Y. Sept. 4, 1990), *aff'd in part, rev'd in part*, 957 F.2d 961 (2d Cir. 1992). The district court then dismissed the fraud and RICO claims under statutes of limitations. *Id.* at *16, *18. The Second Circuit reversed the dismissal of RICO claims, remanding for trial -- an order fully consistent with the district court's ruling that the no-action clause did not bar the

fraud and RICO claims. *Cruden v. Bank of New York*, 957 F.2d 961, 974, 978 (2d Cir. 1992).

Another federal judge in New York (construing New York law) determined, in reviewing the *Cruden* ruling, that the phrase "or the Securities" is dispositive. In *Victor v. Riklis*, 1992 WL 122911 (S.D.N.Y. May 15, 1992), Judge Freeh concluded that the phrase, "with respect to the Indenture or the Securities" broadens the scope of the clause. 1992 WL 122911, at *6 n.7. *See also* Report at 21-23 (discussing *Cruden* and *Victor*); Appellant's Opening Brief at 19 (same).

C. The *Walnut Place* and *Greenwich Financial* Decisions are Inapposite.

In their motion requesting further briefing, filed with this Court on June 21, 2013, defendants suggest that the Vice Chancellor misread two recent New York decisions. *See* Report at 26-27. He did not; the decisions are easily distinguished. *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 948 N.Y.S.2d 580 (N.Y. App. Div. 2012), *aff'g* 2012 WL 1138863 (N.Y. Supr. Mar. 28, 2012), and *Greenwich Financial Services Distressed Mortgage Fund 3, LLC v. Countrywide Financial Corp.*, No. 650474/2008 (N.Y. Supr. Oct. 7, 2010), involve neither corporations nor the rights of their creditors, nor note indentures, nor statutory creditor remedies, and the claims at issue arise not from common or statutory law, but from provisions of the contract. Each case concerns the law of *trusts*, and

specifically the rights of beneficiaries to a common-law trust to supplant the trustee in prosecuting trustee rights. In each, the trust's assets consisted of mortgage loans. Pooling and Servicing Agreements ("PSAs") constituted the effective trust instruments, governing both the warranties of the originator to the trustee as to the quality of loans, and, in turn, the trustee's obligations to beneficiaries to administer the trust. No-action clauses in these instruments limited the beneficiaries' litigation rights to suits against the trustee (and not the originator) for mismanagement of the loans in the trust and to suits for breaches by loan servicers. *See Walnut Place*, 2012 WL 1138863, at *3-5 (trial court opinion).

Walnut Place involved a claim that quite clearly *did* fall within the language of the no-action clause at issue. The claim "avail[ed] of a provision of" the PSAs, specifically, the defaults caused by breach of representations and warranties contained in the PSAs. *See id.* In *Walnut Place*, the defendant owed only contractual duties, as defined by the PSAs. Plaintiffs alleged no right arising by New York statute, or under New York case law. *Walnut Place* never addresses the question presented here, which is whether the no-action language bars *non*-contractual remedies that a plaintiff otherwise would have under state law.

In *Greenwich Financial*, the claim underlying plaintiffs' declaratory judgment action arose from a provision of the PSA requiring Countrywide to

repurchase mortgage loans under certain circumstances. *Greenwich Fin. Servs.*, No. 650474/2008. To assert the claim at all, plaintiffs expressly "avail[ed] of a provision of" the PSA. As the Vice Chancellor aptly summarized, "Neither decision addressed an attempt by certificate holders to invoke rights that did not depend on the PSAs. Both cases are comparable to an attempt by noteholders to assert a claim for breach of the indenture, which is a claim to which a no-action clause necessarily applies." Report at 27. The Vice Chancellor properly concluded that "[n]either *Walnut Place* nor *Greenwich Financial* sheds light on the extent to which a New York court would apply the Athilon Clause to bar a claim that did not invoke a provision of the Indenture." *Id.*

Those cases are particularly inapt here for another reason. In *Walnut Place*, the trustee had the right to declare the originator in default, and vigorously pursued that right by negotiating a settlement. 2012 WL 1138863, at *2. In this case, there is no default the Indenture Trustee might pursue, and the Indenture Trustee's duties under the Indenture are largely administrative, except upon an Event of Default. *See* Appellant's Opening Br. at 14-15. *See also Lorenz v. CSX Corp.*, 1 F.3d 1406, 1416 (3d Cir. 1993) (the duties of an indenture trustee, unlike those of a typical trustee, are defined exclusively by the terms of the indenture); *Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) ("[S]o long as

the trustee fulfills its obligations under the express terms of the indenture, it owes the debenture holders no additional, implicit pre-default duties or obligations."); *AMBAC Indem. Corp. v. Bankers Trust Co.*, 573 N.Y.S.2d 204, 206 (N.Y. Supr. Ct. 1991) (indenture trustee does not owe the broad fiduciary duties of an ordinary trustee prior to an event of default).

III. THE REPORT ISSUED ON REMAND PROPERLY CONCLUDES THAT KEY DELAWARE CASES INDICATE THAT THE ATHILON CLAUSE DOES NOT EXTEND TO CLAIMS THAT RELY ON OTHER SOURCES OF LAW.

A. The *Feldbaum* and *Lange* Decisions Construe More Restrictive Clauses, and are Therefore Inapposite.

In *Feldbaum* and *Lange*, the Court of Chancery "interpreted *expansive* no-action clauses that were governed by New York law." Report at 27 (emphasis added). The *Feldbaum/Lange* distinctions have been briefed extensively for the Court, *see* Appellant's Opening Brief at 16-21, and Appellant's Reply Brief at 4-8, and need not be repeated here.

In his Report, the Vice Chancellor analyzed both cases in detail. Report at 23-25. He concluded that the reading given the clauses in *Feldbaum* and *Lange* was appropriate given their breadth. *See* Report at 24-25. This Court need not reach that proposition to conclude, as he did, that the indentures in *Feldbaum* and *Lange* are more restrictive than the Indenture at issue here. The Indenture in this case controls, and the court below properly determined that all but two (and a

portion of a third) of Quadrant's claims arises not from the Indenture, but from Quadrant's status as a holder of securities.

B. Other Delaware Cases Suggest that the Court Below Reached the Right Decision on Remand.

Delaware judges have found persuasive the conclusion that no-action language similar to the Athilon Clause does *not* bar claims brought outside the contract. In *Continental Illinois National Bank & Trust Co. of Chicago v. Hunt International Resources Corp.*, then-Vice Chancellor Jacobs held that a similar "no recourse" clause did not bar plaintiff from maintaining an action for fraud. 1987 WL 55826, at *6 (Del. Ch. Feb. 27, 1987). He relied on two Delaware Supreme Court decisions. *Harff v. Kerkorian*, 347 A.2d 133 (Del. 1975), involved a no-action clause nearly identical to the Athilon clause ("No holder of any Debenture shall have any right by virtue of or by availing of any provision of this Indenture . . . ."). The Supreme Court reversed the dismissal of plaintiffs' fraud claim, convinced that plaintiffs had sufficiently alleged fraud. *Id.* at 133-34. "By recognizing that the debenture holders were entitled to proceed on a claim of fraud independent of the terms and limitations of the Indenture," the Vice Chancellor reasoned, "the Supreme Court in *Harff* implicitly ruled that the no-action clause of the indenture would not bar an action for fraud." *Cont'l Illinois*, 1987 WL 55826, at *5. *See also* Report at 30 ("*Harff II* implies that the Delaware Supreme Court

believed a no-action clause with same scope as the Athilon Clause would not bar the noteholders' individual claims for damages under a theory of fraud."); SA13-14 (Pl's Opening Br. On Remand at 8-9).

The Court of Chancery also drew on *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. 1986), observing that "the Supreme Court again recognized the right of a debenture holder to maintain a claim for common law fraud independent of the terms and limitations of the indenture." *Cont'l Illinois*, 1987 WL 55826, at *5. In *Mann*, the Supreme Court ruled that noteholder plaintiffs should have been permitted to take discovery on common law fraud claims, a ruling inconsistent with an argument that the no-action clause barred the relief. 517 A.2d at 1060-61, 1063. *See also* Report at 31; SA13-14 (Pl's Opening Br. On Remand at 8-9).

Then-Vice Chancellor Berger adopted the rationale of *Continental Illinois* in considering a no-action clause in *Mabon, Nugent & Co. v. Texas American Energy Corp.*, 1988 WL 5492, at *2 (Del. Ch. Jan. 27, 1988). Like the clauses in *Cruden*, *Harff*, *Mann*, and the Indenture, the clause in *Mabon* did not refer to "the Securities." The court determined that the clause did not reach non-contract claims. *Id.* at *3 ("Plaintiffs' remaining claims are not contractual and, therefore, the restrictions in the Indenture do not apply."). *See also* Report at 31-32; SA13-14 (Pl's Opening Br. On Remand at 8-9).

Harff, *Continental Illinois*, *Mann*, and *Mabon*, read together, "indicate that the Athilon Clause applies only to claims under the Indenture and does not extend to claims that rely on other sources of law." Report at 32. In construing narrow no-action clauses like the Athilon Clause, these Delaware cases are consistent with the authorities that expressly apply New York law. *Id.* at 32-33; SA13-14 (Pl's Opening Br. On Remand at 8-9).

IV. THE REPORT ISSUED ON REMAND PROPERLY CONCLUDES THAT *TANG* IS NOT INSTRUCTIVE.

Quadrant understands that the Court may now consider this case in tandem with the plaintiff's appeal of the decision in *Tang Capital Partners, LP v. Norton*, 2012 WL 3072347 (Del. Ch. July 27, 2012), at the suggestion of Vice Chancellor Glasscock. Before this Court and in the Court of Chancery, Quadrant argued that *Tang* was incorrectly decided.

Tang involved a no-action clause *nearly* identical to the one here. Plaintiff noteholders sought the appointment of a receiver for a drug manufacturer not in default, whose initial sales of an FDA-approved product were disappointing. *Id.* at *1-2. They later contended that the mere pendency of their initial complaint for receivership constituted an event of default, a contention the Vice Chancellor rejected. *See* SA26-27 (Pl's Reply Br. On Remand at 3-4). The *Tang* defendants argued that the no-action clause barred the statutory receivership claim because,

though it did not arise from a provision of the indenture, the clause barred claims arising by virtue of plaintiff's status as a noteholder. Agreeing, the Vice Chancellor construed the phrase, "by virtue of or by availing of any provision of this Indenture," and concluded that "virtue" modified "of this Indenture," that is, that the clause should be read, "by virtue of[,] or by availing of any provision of[,] [the] Indenture." *Tang*, 2012 WL 3072347, at *5 (alterations in original). The Vice Chancellor then concluded that "by virtue of the Indenture" covered claims arising by virtue of plaintiff's noteholder status. This was an ungrammatical reading. To reach it, the Vice Chancellor had to insert commas not found in the text. *See* SA26-27 (Pl's Reply Br. On Remand at 3-4).

This reading also failed to account for the absence of the phrase, "or the Securities." Leaving that phrase superfluous, *Tang* contradicted the canon of construction that courts give effect to separate contract terms,[6] and thus departs from *Cruden*, *Victor*, and the older body of New York cases discussed herein and in the Report. Vice Chancellor Laster agreed that this reading is incorrect. He concluded, "[t]he *Tang* approach eliminates any distinction between the two usages [i.e., clauses referring to claims under "the Indenture" versus those that refer to claims under "the Indenture or the Securities/Notes"] by transforming a no-action

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[6] *See supra* n.4.

clause like the Athilon Clause into the functional equivalent of . . . by virtue of or by availing of any provision of this Indenture *or the Notes* . . . ." Report at 45 (emphasis in original).

By letter opinion issued on July 12, Vice Chancellor Glasscock granted plaintiff's motion for partial final judgment, concluding that Vice Chancellor Laster's Report "certainly calls the legal reasoning underlying my Memorandum Opinion into question." *Tang Capital Partners, LP v. Norton*, C.A. No. 7476-VCG, at 6 (Del. Ch. July 12, 2013). "[I]t is appropriate," he said, "that the Plaintiffs be given the opportunity to put this matter before the Supreme Court contemporaneously with the appeal in *Quadrant*." *Id.* at 1.

Whatever the ultimate result in *Tang*, the parties in this case should not have to abide a *Tang* ruling in order to obtain this Court's approval of the Report and reinstatement of the case in the Court of Chancery. Unlike Quadrant, plaintiff in *Tang* sought a receiver, and the case involved a particular history of conduct by the parties to which the Vice Chancellor adverted in his underlying decision. These factors may play into a decision on review of *Tang*, and have not been briefed or even considered before in this Court. The Court should affirm Vice Chancellor Laster's well-reasoned conclusion, even if longer and closer scrutiny of *Tang* is warranted in the context of that appeal.

V. THE REPORT ISSUED ON REMAND PROPERLY CONCLUDES THAT THE ATHILON CLAUSE DOES NOT BAR COUNTS I, II, III, IV, V, VI, IX AND X.

For the reasons identified above, the Report should be adopted. The Court should conclude that the Athilon Clause "only extends to actions or proceedings where a noteholder claims a right 'by virtue or by availing of any provision of this Indenture.'" Report at 47. As for Counts I, II, III, IV, V, VI, IX and X, Quadrant asserts no rights under any provision of the Indenture. It brings suit on the basis of its *status* as a holder of the Securities. Derivatively, it asserts claims belonging to the insolvent Athilon. *See* Report at 47-49; A45-48 (Am. Compl. Counts I-III). It asserts direct counts as well, but not for any remedy under the Indenture. *See* Report at 49-50, 52-54; A48-51, A55-57 (Am. Compl. Counts IV-VI, IX-X).[7]

The provisions of the Athilon Indenture, not those of the *Feldbaum/Lange* indentures, control this case. Because none of the claims brought by Counts I, II, III, IV, V, VI, IX and X arises by virtue or by availing of any provision of the Athilon Indenture, none is subject to the clause.

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[7] Quadrant does not challenge the Vice Chancellor's conclusion that the Athilon Clause applies to Counts VII and VIII, and to Count X to the extent it alleges a conspiracy to engage in the wrongs alleged in Counts VII and VIII.

CONCLUSION

For the reasons set out in the Vice Chancellor's carefully-reasoned Report Issued Pursuant to Delaware Supreme Court Rule 19(c), this Court should reverse the Order Granting Motion to Dismiss as to Counts I through VI, IX, and X (to the extent Count X seeks to impose liability on secondary actors for violations of Counts I through VI and IX) of the Amended Complaint, affirm as to Counts VII, VIII, and X (to the extent Count X seeks to impose liability on secondary actors for violations of Counts VII and VIII), and remand for discovery and trial.

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