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.	)	
GS MEZZANINE PARTNERS 2006, L.P., and GS MEZZANINE PARTNERS V, L.P.,	)	Court Below: Court of Chancery of the State of Delaware
Defendants Below, Appellees.	)	C.A. No. 5941-VCL

OPENING 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

Neal J. Levitsky (No. 2092)
Carl D. Neff (No. 4895)
Citizens Bank Center, Suite 1300
919 N. Market Street
Wilmington, DE 19801
Tel: (302) 654-7444

Attorneys for Plaintiffs Below, Appellants

Of counsel:
Daniel P. Goldberg, Esquire
Holwell Shuster & Goldberg, LLP
125 Broad Street, 39th Floor
New York, NY 10004
(646) 837-5151

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NATURE OF THE PROCEEDINGS

Plaintiffs-Appellants, Caspian Alpha Long Credit Fund, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Capital Partners, L.P. and Mariner LDC (collectively, "Caspian"), filed a complaint on October 29, 2010 in the Court of Chancery seeking injunctive and declaratory relief against, *inter alia*, Defendants-Appellees, GS Mezzanine Partners 2006, L.P. and GS Mezzanine Partners V, L.P. (collectively, "Goldman Sachs") as well as against Marsico Parent Superholdco, LLC and Marsico Superholdco Notes Corp. (collectively, the "Issuer") under an Indenture dated December 14, 2007 (the "Indenture"). The complaint sought to prevent the proposed restructuring of the debt and bonds issued under the Indenture (the "Exchange Transactions"). The Court of Chancery denied Caspian's preliminary injunction motion on November 8, 2010, and the Exchange Transactions closed November 10, 2010. On June 13, 2011, Caspian filed an amended complaint (the "Amended Complaint"). On July 22 and 26, 2011, the Issuer and Goldman Sachs, respectively, filed motions to dismiss the Amended Complaint. As relevant here, on January 11, 2012, the Court of Chancery dismissed Caspian's claim that Goldman Sachs breached the Indenture by forcing through the Exchange Transactions. (See Order, p.1; A0001436) Caspian now appeals. The Order appealed from and transcribed Court rationale are attached as Exhibit A. An August 14, 2013 Stipulation of Dismissal is attached as Exhibit B.

SUMMARY OF ARGUMENT

This appeal arises from the restructuring of a debt offering that was subject to the Indenture. Goldman Sachs was the largest holder of such debt and, in fact, was the investment bank that both orchestrated the initial offering and the restructuring now at issue. The protections afforded to noteholders under the Indenture, however, actually precluded the restructuring. So, in order to effect that transaction, which benefitted only Goldman Sachs and the Issuer, those parties modified the Indenture so as to strip out the very provisions designed to protect noteholders from this exact type of scenario – a transaction eviscerating holders' rights. Caspian is one of the noteholders adversely affected by the restructuring. Caspian objected to the restructuring; however, its objections were disregarded, its preliminary injunction motion was denied, and the restructuring closed.

The focus of this appeal is that the Indenture has a provision Redacted prohibiting any holder, such as Goldman Sachs, from using the Indenture to prejudice the rights of any other holder. Goldman Sachs plainly used the Indenture to modify the rights of holders by removing such rights entirely so as to allow the Exchange Transactions to close. For instance, and by way of example only, the Indenture required an "Offer to Repurchase" in certain circumstances, such as those present here. An "Offer to Repurchase" effectively means that any nonparticipating holders must be paid in full on the bonds they hold upon the occurrence of certain events, which would have been triggered by the Exchange Transactions. By deleting the "Offer to Repurchase" provision from the Indenture as part of the Exchange Transactions, Caspian was prejudiced, as its right to be paid in full upon the occurrence of the restructuring was removed from the Indenture. Goldman Sachs caused those amendments to be made and, by doing so, it used the Indenture to prejudice Caspian's rights. Being the architect of the deal and the largest holder (a majority, in fact), Goldman Sachs had an interest in effecting the Exchange Transactions not shared by other holders, such as Caspian.

The Court of Chancery, however, dismissed Caspian's claim from the bench on a pre-answer motion to dismiss, reasoning that a provision similar to, but different from, the one relied upon by Caspian appears in an early model indenture, and that the different provision has been interpreted to have a very limited and irrelevant meaning. The Court of Chancery erred in its finding for several reasons. First among them is that the Indenture has an express provision, not found in any model indenture, stating in no uncertain terms that the document must be interpreted based on its four corners, that no other indenture is to be used to interpret this Indenture, and that this Indenture is not to be used to interpret any other indenture. Thus, this Indenture is clear that the Court should not apply model indentures, or rely on the interpretation of any other indenture or language and, instead, this Indenture should be interpreted solely in accordance with the plain meaning of the words these parties chose to use in this particular document. It is noteworthy that the Indenture was created by the most sophisticated of players in the financial markets, and drafted by the most sophisticated of counsel for such matters. By disregarding the plain language of the Indenture, the interpretation imposed below did violence to the parties' agreement and should be reversed.

Moreover, even if it were proper for the Court of Chancery to review and rely upon model indentures, the Court here relied on commentary to the wrong model. The Indenture language at issue is virtually identical to that found in the 1983/2000 model, but the Court of Chancery relied on the 1965 model and its commentary, which has different language. The Court erroneously ruled that the changes between the models do not alter any meaning and, therefore, are to be disregarded. It is a basic tenet of contract construction that the words on the page need to be given meaning, and when parties choose to use different provisions in their contracts, that choice must be respected. No judicial interest is furthered by disregarding actual contract language simply because applying the contract as written may lead to what some might believe to be the unusual result that noteholders have obligations to each other.

The Trial Court Erred By Holding That Redacted Of The Indenture Should Not Be Applied In Accordance With Its Actual And Plain Terms

1. Goldman Sachs argued that in interpreting the second paragraph of Redacted, the Court of Chancery should not focus on a strict textual analysis, but rather should give due deference to commentaries on other provisions found in model indentures and in several indentures from other deals that have no bearing on the disputed transaction, as well as the heading of Redacted Redacted Therefore, posited Goldman Sachs, the entirety of Redacted Redact ed is nothing more than a "no-action clause." It further argued that under New York law, noteholders cannot be liable to other noteholders for breach of an indenture, and that the Court should consider the impact that a decision interpreting Redacted could have on the capital markets and on other deals if this provision was found to impose obligations on noteholders.

2. Caspian argued that Goldman Sachs' position is incorrect for a number of reasons. First, there is no case and no commentary discussing the actual language at issue here – the second paragraph of Redacted as found in the Indenture here. Thus, any commentary addressing differently-worded provisions is meaningless to the current dispute, particularly on a pre-answer motion to dismiss. Second, in order to dismiss, the Court would (wrongly) need to disregard several provisions of the Indenture in order to read the applicable language out of the

contract, which effectively is what Goldman Sachs sought to do. That is, the Indenture is express that interpretations of other indentures are not to be used to interpret this Indenture, and headings are to be ignored for purposes of construing the text of a provision. <u>Third</u>, even to the extent that it was permissible to look outside the four corners of the Indenture and consult the commentaries of the model indentures, the Court of Chancery needed to consider the different provisions used in the different model indentures, and it would be improper to conclude that all the different provisions mean the same thing, rendering it completely irrelevant which model parties choose to employ. Likewise, though noteholders generally do not owe each other duties absent an agreement stating otherwise, here, there is in fact an agreement stating otherwise – Redacted

3. The Court of Chancery incorrectly dismissed Caspian's claim against Goldman Sachs, holding that it 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 it believed "that the intent here was to keep the same meaning as in those prior provisions and simplify the language." (A0001436)

STATEMENT OF FACTS

A. The Underlying Loan Transaction

Redacted

Redacted (A000155-57)

Redacted

(A000155) Redacted

Redacted

Redacted (A000157-58)

B. Relevant Provisions Of The Indenture

1. Redacted

In a stand-alone paragraph in Redacted of the Indenture, it is agreed that:

> Redacted
>
> Redacted (A000444)

Interpretation of the second stand-alone paragraph of this provision is at the heart of this appeal. The Court of Chancery interpreted the provision to mean only that a noteholder cannot sue on the Indenture in its own name. That interpretation had been given to a differently-worded provision based on an earlier model indenture, but there is no such prior interpretation of the clause at issue in this case.

2. Redacted

The crux of Goldman Sachs' argument below, and the Court of Chancery's ruling, is that the "uniform interpretation" rule requires Redacted to be read in light of how other indentures have been interpreted. As addressed fully below, this interpretation is contrary to the plain language of the Indenture, but of paramount significance is that the parties here agreed expressly in Redacted that no such outside sources will be used to interpret this Indenture:

> Redacted

(A000459)

3. Redacted

While most amendments, supplements or waivers of the terms of the Indenture can be effectuated by the consent of a majority of its noteholders, certain of them require the consent of each affected noteholder. Most critically, under Redacted the consent of each affected noteholder is required for any amendments, supplements or waivers that Redacted

Redacted

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1 Redacted (A000403)

(A000454) Accordingly, Redacted ensured that a noteholder such as Caspian cannot be stripped of its fundamental right to payment or to sue to enforce payment without its consent.

This concept is reiterated in Redacted, which provides that

Redacted

Redacted (See A000444)

4. Redacted

Among the provisions protecting a noteholder's right to payment is Redacted Redacted of the Indenture, which provides that the Issuer is required to make an offer to each noteholder to repurchase all of the outstanding Superholdco Notes at a purchase price in cash equal to 101% of the principal amount of their notes upon the occurrence of a "Change of Control," classified as the transfer of all or substantially all of the assets held by the Issuer and its subsidiaries. (A000389; A000436) In other words, this provision granted noteholders such as Caspian the right to "cash out" immediately upon a substantial asset transfer. It is undisputed that the Exchange Transactions would have triggered Redacted.

The removal of this provision as part of the Exchange Transactions is significant here because the parties easily could have accomplished the restructuring without prejudicing objecting noteholders by agreeing to comply with Redacted as part of the Exchange Transactions and paying them out. Goldman Sachs' orchestration of the removal of Redacted is a stark example of how it used the Indenture to prejudice the rights of Caspian, an act prohibited by Redacted

Another protective provision is Redacted which provides that a transfer of all or substantially all of the assets of the Issuer can occur only if, among other things, the transferee of the assets Redacted

Redacted under the Indenture and the notes issued thereunder. (A000440) This covenant ensured that the noteholders retained the credit support of the transferred assets even after they have been transferred outside of the Issuer's ownership chain (which was a particularly critical right because the Issuer here was not permitted to engage in business or hold any other assets).

C. The Exchange Offer And Exchange Transactions

Redacted

Redacted

Redacted (A000148-49; A000155; A000167; A000220)

Redacted

Redacted (A000167-70) Redacted

Redacted

Redacted (A000169)

Redacted

Redacted (A000169) Redacted

Redacted

Redacted (A000169) Redacted

2 Redacted

Redacted

Redacted (A000155)

Redacted

Redacted (A000169; A000911)

Redacted

Redacted thus, under Redacted (which entirely prohibits Superholdco from owning any assets or engaging in any business other than owning the Asset Companies that were transferred as part of the Exchange Transactions), no right or ability to generate revenue to repay its debt. (A000169-70) While it is true that Redacted of the Indenture also was altered as part of the Exchange Transactions, that change is meaningless because Superholdco had been prohibited right up until that point from engaging in any business other than holding the Superholdco Notes. Thus, as a practical matter, the Exchange Transactions left noteholders such as Caspian holding debt from a shell entity that had no assets, and had no business at all. It is little solace for Goldman Sachs to suggest that, after the Exchange Transactions, Superholdco (with no assets, employees or business) was free to reinvent itself and create some new business from whole cloth just so that it could repay the loans it took.

Redacted

Redacted (A000151; A000173) The form of supplemental indenture, annexed to the Exchange Offer as EXHIBIT A-III, provided the following amendments to the Indenture:

Redacted

(A000787)

D. The Preliminary Injunction Motion

Faced with the choice of trading in its Superholdco Notes for nothing of value, or watching its right to repayment from Superholdco fundamentally deconstructed, Caspian instead sought to enjoin the Exchange Transactions. On November 8, 2010, the Court of Chancery denied the preliminary injunction motion because, among others, it found that Caspian had an adequate monetary remedy should it prove that the Exchange Transactions violated the Indenture. (A000125-26)

E. Effect Of The Exchange Transactions

Following Court of Chancery's denial of the preliminary injunction, Redacted

Redacted

Redacted (A000151; A000173-74) Redacted

Redacted

Redacted (A000173-77) Redacted

Redacted

F. The Amended Complaint

Caspian amended its complaint on June 13, 2011. As relevant here, the Amended Complaint alleged that Redacted

Redacted

Redacted

Redacted (A000173-77)

Likewise, the Amended Complaint alleged that, Redacted

Redacted

Redacted Id. Redacted

Redacted

Redacted Id. Redacted

Redacted

Redacted Id. Redacted

Redacted Id.

Goldman Sachs moved to dismiss, which was granted on January 11, 2012.

ARGUMENT

The Court Of Chancery Erred By Interpreting Redacted In A Manner That Read An Entire Paragraph Out Of The Contract

A. Question Presented

Whether the Court of Chancery committed error by dismissing claims against Goldman Sachs on a pre-answer motion to dismiss, where express contractual language imposes obligations on noteholders not to prejudice each other, which is alleged to have happened here as a factual matter, but the Court of Chancery construed the provision in light of cases and commentaries addressing different provisions in different indentures?

Pursuant to Delaware Supreme Court Rule 14, this question was presented to the Court of Chancery in the briefing on Goldman Sachs' motion to dismiss, and at the January 11, 2012 hearing. (A000934-40; A000965-77; A0001260-71; A0001436) The briefs and hearing transcript are part of the record on this appeal.

B. Scope Of Review

The Court of Chancery's dismissal of the claim against Goldman Sachs based on its interpretation of Redacted of the Indenture is subject to *de novo* review. See Kuhn Constr., Inc. v. Diamond State Port Corp., 990 A.2d 393, 396 (Del. 2010) ("We review the dismissal of a complaint pursuant to Court of Chancery Rule 12(b)(6) *de novo*. When reviewing the [grant or] denial of a motion to dismiss, we must view the complaint in the light most favorable to the plaintiff. A trial judge should dismiss a complaint if the defendants' interpretation is the *only* reasonable construction as a matter of law. We review all other questions of law including contract interpretation *de novo*.") (emphasis in original)[3]; Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 535 (Del. 2011) ("We review trial court rulings granting motions to dismiss *de novo*. We also review *de novo* the Court of Chancery's interpretation of written agreements.") (emphasis in original).

C. Merits Of Argument

This appeal focuses on Caspian's claim that Goldman Sachs breached its obligation under Redacted of the Indenture – a provision that precluded Goldman Sachs from using its powers under the Indenture to prejudice the rights of other noteholders, such as Caspian. More specifically, the second paragraph of Redacted states that Redacted

Redacted

Redacted (A000444)

[3] Throughout this brief, all emphasis is added, and all internal quotation marks, citations, and alterations in quotation marks are omitted unless otherwise indicated.

Here, Caspian alleged that Redacted Redacted Redacted More directly, Caspian had a right under Redacted of the Indenture to be paid in full on its notes in the event of a transaction such as the Exchange Transactions. Redacted Redacted Redacted Redacted.[4]

Goldman Sachs did not seriously contest that it is bound by such provision. (A000914) ("The only provision of the Indenture that the GSM Noteholders supposedly breached that is even arguably directed to noteholders ... is Redacted Redacted). Instead, Goldman Sachs argued that (i) the provision should not be construed in accordance with its express terms because it finds the results unusual,

[4] If there ever was a scenario where the provision would apply, this is it, as it is alleged that powerful noteholders conspired with the Issuer and insiders at the expense of minority holders.

and (ii) it did not breach the provision as a factual matter.[5] (A000934-40) Notwithstanding the provision's clear language, Goldman Sachs argued below that Redacted only precludes a rogue noteholder from suing the Issuer and is designed to protect the Issuer, even though the words "issuer" as well as "lawsuit," "litigation," "action," "suit" or similar words appear nowhere in the text of Redacted Redacted Id. Goldman Sachs based its argument on commentaries and cases interpreting a different provision in a 1965 form indenture, but the provision at issue here is not based on that form and, indeed, the operative language of the actual provision that was chosen in this particular Indenture does not remotely address with even a single syllable a noteholder suing the Issuer. Rather, the "no prejudice" provision in the second paragraph of Redacted addresses the relations of one noteholder to another, and its prohibition is against Redacted not against filing lawsuits.

The Court of Chancery, however, adopted Goldman Sachs' view, stating that it was "going to read that provision in light of its evolution through the 1965 model indenture, the 1983 model indenture, [and] the 2000 model indenture," and that it

5 Although the parties may dispute whether, as a factual matter, majority action resulted in prejudice, this does not present a situation different from any other where parties dispute whether a contractual provision was breached. That there could be such factual disputes over whether a contractual provision was breached is not cause to ignore the provision entirely.

believed "that the intent here was to keep the same meaning as in those prior provisions and simplify the language." (A0001436) This was error and, for the reasons discussed more fully below, Redacted should be applied according to its actual language, not the language Goldman Sachs wishes had been used.

1. The Court Of Chancery Erred When It Ignored The Indenture's Express Rules-Of-Construction Provisions

The linchpin of the Court of Chancery's decision, and Goldman Sachs' arguments, is that Redacted should be considered a generic "no-action clause," which should be limited in its application to precluding a rogue noteholder from suing the Issuer against the will of the majority of holders. The fallacy of that reasoning and conclusion is that, among other things, it requires a court to ignore the Indenture's mandates on how the document is to be interpreted.

a. The Court Of Chancery Erred When It Ignored Redacted By Relying On Model Indentures And The Interpretations Of Other Indentures

The Court of Chancery's decision "to read Redacted in light of its evolution through the 1965 model indenture, the 1983 model indenture, [and] the 2000 model indenture" because it believed "that the intent here was to keep the same meaning as in those prior provisions and simplify the language" (A0001436) was error for the simple reason that the Indenture expressly provides that outside sources such as other indentures are not to be used to construe the contract.

Redacted of the Indenture provides:

Redacted

(A000459)

Thus, the Indenture expressly forbids the use of other indentures for the purpose of interpreting its provisions. In doing so, it conveys to noteholders like Caspian that they do not have to analyze and harmonize a multiplicity of transaction documents, they do not need to hire lawyers to research the history of indentures generally, and they need not undertake a host of other costly and time-consuming activities before deciding whether to invest in these bonds. Rather, Redacted gives comfort to noteholders that everything they need to know about their contractual rights is contained in the Indenture.

Critically, Redacted is not boilerplate, and it is not a provision that was borrowed from any model indenture. No provision even remotely resembling Redacted can be found in any of the 1965, 1983 or 2000 model indentures. Rather, Redacted is specific to the Indenture at issue here. That the drafters of the Indenture included a provision that is not present in any of the forms, and that mandates interpretation of the document without regard to anything outside its four corners, must have some meaning. See Sharon Steel Corp. v. Chase Manhattan

Bank, N.A., 691 F.2d 1039, 1048 (2d Cir. 1982) (boilerplate provisions "found in virtually all indentures ... must be distinguished from contractual provisions which are peculiar to a particular indenture").

The Court of Chancery erred when it construed the Indenture based on models and commentaries out of a concern about the impact on the capital markets if it enforced Redacted in a manner supposedly contrary to the models (as discussed below, the premise that Caspian seeks an interpretation at odds with the model indentures is faulty and provides an additional ground for reversal). This is a contract case where the most sophisticated of parties represented by the most sophisticated of counsel went out of their way to deviate from the models, crafted a non-boilerplate provision, and thereby indicated that they were not concerned with what the norm might be or what impact this Indenture might have on any other deal.[6] Interpreting Redacted with a view to the models and colored by a concern about the hypothetical reaction of the capital markets does violence to Redacted

6 Below, Defendants initially argued that the Indenture is a contract like any other, and "[t]hus, only the language of the contract is at issue." (A000212) It was only after their realization that Redacted does not work for them that they shifted gears and argued for the first time on reply that the express language cannot be read on its own, and instead the Court should consider the "context and long understood commercial purpose" of the section. (A0001226)

Redacted, and there is no cause or policy consideration that permits a court to disregard the parties' contract for the sole purpose of dismissing claims at the pre-answer stage.

b. Redacted Makes The Title Of Section 6.06 Irrelevant

Goldman Sachs heavily argued below that, given the title of Redacted Redacted, the entirety of the section, including its second paragraph, needed to be interpreted solely as a no-action clause that limits only a noteholder's ability to sue the Issuer. The heading of Redacted is of no import because Redacted of the Indenture makes clear:

> Redacted

(A000459)

Thus, the title of Redacted is an irrelevancy in interpreting the meaning of the second paragraph (i.e., the "no prejudice" provision at issue here). In order to conclude that the entirety of Redacted is nothing more than a no-action clause, a court would need to ignore the plain meaning of not just Redacted but also Redacted. Ignoring the plain language of multiple contractual provisions at the pre-answer stage simply does not make for good policy or sound jurisprudence.

2. Even If Reliance On Model Indentures Was Appropriate, The Court Of Chancery Erred In Relying On The 1965 Model Commentaries, When Later Models Are More Relevant

a. Redacted Resembles The 2000 Model, Not The 1965 Model

As set forth *supra* at pp. 20-23, the Court of Chancery's reliance on anything outside the four corners of the Indenture was in error. However, even if Redacted Redacted did not exist and it was permissible to consult other documents, including the model indentures and commentaries thereto, the Court of Chancery erroneously relied on the commentaries to the wrong model. A simple comparison of the pertinent language shows that, if anything, Redacted was modeled after the 1983/2000 form,[7] not the 1965 form, and commentaries to the 1965 model therefore are irrelevant:

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7 The language of section 6.06 in the 1983 model is virtually identical to the 2000 model, with the main difference being that the 2000 form eliminated the provision requiring a noteholder to offer indemnity satisfactory to the trustee. (A0001169) That difference is not relevant here; so, as a practical matter, to the extent the models are relevant, the distinction is as between the 1965 model, and the 1983/2000 model.

1965 Model Indenture	2000 Model Indenture
Section 507. Limitation on Suits. No Holder of any Debenture or coupon shall have any *right to institute any proceeding, judicial or otherwise*, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless (1) such Holder has previously given written notice to the Trustee of a continuing Event of Default; (2) the Holders of not less than 25% in principal amount of the Outstanding Debentures shall have made written request to the Trustee *to institute proceedings* in respect of such Event of Default in its own name as Trustee hereunder; (3) such Holder or Holders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request; (4) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity has failed to *institute any such proceeding*; and (5) no direction inconsistent with such written request has been given to the Trustee during such 60 day period by the Holders of a majority in principal amount of the Outstanding Debentures; *it being understood and intended that no one or more Holders of Debentures or coupons shall have any right in any manner whatsoever by virtue of, or by availing of, any provision of this*	**Section 6.06. Limitation on Suits.** A Securityholder may pursue a *remedy* with respect to this Indenture or the Securities only if: (1) the Holder gives to the Trustee notice of a continuing Event of Default; (2) the Holders of at least 25% in Principal amount of the Securities make a request to the Trustee to pursue the remedy; (3) the Trustee either (i) gives to such Holders notice it will not comply with the request, or (ii) does not comply with the request within [15 or 30] days after receipt of the request; and (4) the Holders of a majority in Principal amount of the Securities do not give the Trustee a direction inconsistent with the request prior to the earlier of the date, if ever, on which the Trustee delivers a notice under Section 6.06(3)(i) or the expiration of the period described in Section 6.06(3)(ii). *A Securityholder may not use this Indenture to prejudice the rights of another Securityholder or to obtain a preference or priority over another Securityholder.*

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

(A0001052-53; A0001107-08)

The distinction between the two models is material, and commentaries from one do not translate to the other. Specifically, the "no prejudice" provision in section 6.06 of the 2000 model (Redacted departs from the 1965 model considerably.

First, the 1965 model suggests it is targeted only to litigation: it refers multiple times in multiple subsections to holders "institut[ing] any proceeding, judicial or otherwise," and seeking "the appointment of a receiver or trustee." By contrast, there is no reference to "proceeding," "judicial," or anything similar in the 2000 model indenture (or Redacted of the present Indenture). The applicable language of the "no prejudice" provision of section 6.06 talks simply of "us[ing] this Indenture," without any suggestion that such use is limited to litigation. To import such a meaning (in addition to being improper contract construction), necessarily would be to conclude that the provision is ambiguous, which would present a question of fact as to the meaning of the clause, and that inquiry should not have been determined on a pre-answer motion to dismiss.

Second, whereas the "no prejudice" provision in the 2000 model (and the Indenture) is in a standalone and discreet paragraph, there is no such separate paragraph in the 1965 model. Instead, the closest thing to analogous language appears in part of the same sentence addressing a noteholder's ability to "institute any proceeding, judicial or otherwise."

Third, and critically, the language relied upon by the Court of Chancery (to ensure the equal and ratable treatment of all noteholders)[8] appears only in the 1965 model and is completely absent from the 2000 model (and the Indenture at issue).

The two model provisions simply are not the same. Such differences are the product of conscious drafting and differentiation and should not have been disregarded, particularly on a pre-answer motion. As the First Circuit recently held, it would be "illogical" and "not credible" to suppose that the differences in wording used by the different model indentures are "meaningless" and without legal significance. In re Bank of New England Corp., 646 F.3d 90, 98-99 (1st Cir.

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8 (A0001337) ("I mean, most of us seem to concede that at least one thing that would be improper under this Redacted would be a suit by a noteholder where, somehow, they ended up with more than their equitable and ratable share.").

2011) ("[The expert witness] analyzed forty-six indentures ... and found three versions of subordination provisions [based on different model indentures] .... He testified that, despite the different language used in these sample indentures, each guaranteed that senior noteholders were entitled to collect post-petition interest before junior noteholders received any payment. The bankruptcy court found this testimony 'not credible' because it required the illogical conclusion that variances in language within indenture agreements were meaningless.").

Additionally, the 1983 and 2000 models are not merely updated versions of the 1965 model.[9] On the contrary, the 1965 model still is widely used. See, e.g., In re Cendant Corp. Sec. Litig., No. 98-CV-1664 (WHW), 2005 WL 3500037, at *1 & n.1 (D. N.J. Dec. 21, 2005) (1996 indenture follows 1965 model); Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., 86 F. Supp. 2d 244, 246, 256 (S.D.N.Y. 2000) (1998 indenture based on 1965 model). Had the drafters of the Indenture wanted to base its terms on the 1965 model, they were free to do so. Instead, they framed Redacted, including the "no prejudice" provision, in line with the 1983/2000 model, and that choice should have been given effect by the Court of Chancery (or at minimum, not disregarded at the pre-answer stage).

9 As the introduction to the 1983 model indicates, it did not merely move to a plain-English form, but also addressed substantive changes in the field. (A0001161-63)

Moreover, even a provision that tracks the 1965 model has been applied outside of the litigation context to protect noteholders from actions taken by other noteholders in at least one recent decision by a Delaware bankruptcy court. In In re Electroglas, Inc., No. 09-12416 (PJW), 2009 WL 8503455 (Bankr. D. Del. Sept. 23, 2009), a case focused on language stating that the indenture should be enforced for the equal and ratable benefit of all noteholders (i.e., language that was expressly excised from the new model form used in this case), the court relied on a provision based on the 1965 model to invalidate a "credit bid" auction because it would not be for the benefit of all noteholders. Id. at *1 ("[The provision] alone makes it impossible for Noteholders to credit bid only their portion of the Notes. In doing so, a group of Noteholders would act in violation of the overarching prescription [at the very end of the 1965 model indenture provision] that all actions taken as to the Notes be taken for the equal benefit of all Noteholders."). There is no authority whatsoever for concluding that either the 2000 model provision Redacted or the closest thing to an analogue from the 1965 model are limited solely to precluding actual lawsuits by individual noteholders against the issuer.

b. The Uniform Interpretation Doctrine Has No Application Here

To the extent the Court of Chancery relied on the "uniform interpretation doctrine" to interpret Redacted in accordance with the commentaries to the 1965 model, as urged by Goldman Sachs below, it erred. Under the uniform interpretation doctrine, "[c]ourts endeavor to apply the plain terms of [boilerplate] provisions in a uniform manner to promote market stability," and "[t]herefore, in interpreting boilerplate indenture provisions, courts will not look to the intent of the parties, but rather the accepted common purpose of such provisions." Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp., 29 A.3d 225, 241 (Del. 2011). Liberty Media was the centerpiece case relied on below by Goldman Sachs in arguing that the "uniform interpretation" rule is designed to construe provisions consistently that are substantially identical across multiple indentures. The uniform interpretation doctrine, however, is inapplicable here for three reasons:

First, Redacted forbids its application because the parties here expressly exempted the Indenture from the "uniform interpretation" or "accepted common purpose" rule of construction by precluding the use of any other indenture to interpret this one. Here, the parties deliberately inserted a separate, non-boilerplate provision to that effect – *exactly* what this Court instructed parties to do if they want to avoid the uniform interpretation rule. See Liberty Media, 29 A.3d at 242 (if parties want to deviate from the meaning of a boilerplate provision, "it [is] incumbent upon them to include it in a separate, negotiated covenant").

Second, the "uniform interpretation" rule does not apply because there is in fact no prior "interpretation" of the language actually at issue. There simply is no authority whatsoever addressing the second paragraph of Redacted, and this cannot be stressed enough – there can be no "uniform interpretation" of a provision that has not previously been interpreted.

Third, the "uniform interpretation" doctrine does not remotely suggest that courts interpret different contract provisions all to have the same meaning. The language of Redacted differs materially from that contained in the 1965 model; so, authorities interpreting that model do not shed light on the meaning of the second paragraph of Redacted Given the choice to use the 1965 model or the 2000 model for Redacted the parties chose the 2000 model. Having done so, it was improper for the Court of Chancery to conclude that all of the different words used in the vastly different model provisions all mean the same thing.

3. The Court Of Chancery Erred In Disregarding Plain Language On A Pre-Answer Motion To Dismiss

The Court of Chancery concluded that, in light of history, the text of the Indenture does not mean what it actually says and, instead, attributed to it the meaning of different language from section 507 of the 1965 form indenture, accepting Goldman Sachs' line of argument. This was error.

Initially, Redacted is unambiguous and should be interpreted in accordance with the terms actually used. Under New York law, which governs the Indenture, contractual provisions are to be read according to their plain meaning. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002) ("a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"); Brooke Group Ltd. v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996) ("words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning").

To the extent the Court of Chancery found – based on the differing interpretations offered by Caspian and Goldman Sachs – that there was some ambiguity as to what the second paragraph of Redacted meant, it was improper to resolve such ambiguity on a pre-answer motion to dismiss. This Court has confirmed on several occasions that dismissal of a complaint is proper only where a defendant's contractual interpretation is the sole reasonable construction:

> On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents. Ambiguity exists when the provisions in controversy are reasonably or fairly susceptible of different interpretations. Dismissal is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.

Vanderbilt Income and Growth Assocs., LLC v. Arvida/JMB Managers, Inc., 691 A.2d 609, 613 (Del. 1996) (emphasis in original); see Appriva S'holder Litig. Co.

v. EV3, Inc., 937 A.2d 1275, 1289 (Del. 2007) (If "the provisions in controversy are reasonably susceptible to different interpretations, ambiguity exists and dismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law."); VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 615 (Del. 2003) ("[T]he trial court cannot choose between two differing reasonable interpretations of ambiguous provisions. Dismissal ... is proper only if the defendants' interpretation is the *only* reasonable construction.").

The Court of Chancery routinely acknowledges this standard as well. See, e.g., QVT Fund LP v. Eurohypo Capital Funding LLC I, No. 5881-VCP, 2011 WL 2672092, at *6 (Del. Ch. July 8, 2011) (Courts "must not choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss ... Unless the moving party's interpretation is the only reasonable construction as a matter of law, the moving party is not entitled to dismissal."); Microstrategy Inc. v. Acacia Research Corp., No. 5735-VCP, 2010 WL 5550455, at *5 (Del. Ch. Dec. 30, 2010) ("[T]o succeed on their motions [to dismiss], Defendants must demonstrate that their construction of the Settlement Agreement is the only reasonable interpretation."); Narrowstep, Inc. v. Onstream Media Corp., No. 5114-VCP, 2010 WL 5422405, at *7 (Del. Ch. Dec. 22, 2010).

Here, the only way to conclude that the second paragraph of Redacted does not mean what it actually says is to conclude that the provision somehow is ambiguous, either because of the context or the history of such provisions (if one were to disregard Redacted. Such a conclusion, however, necessarily precludes dismissal at the pre-answer stage. Stated another way, there was no way for the Court of Chancery to conclude, reasonably, that the plain language of the second paragraph of Redacted applies only to limit a rogue noteholder from suing the Issuer, which is what it found.[10]

[10] Indeed Redacted to the extent there is any ambiguity as to the meaning of Redacted it should be resolved against Redacted Redacted the drafter. (A000157-58). Jacobson v. Sassower, 66 N.Y.2d 991, 993 (1985) ("In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language."); Norton v. K-Sea Transp. Partners, L.P., 67 A.3d 354, 360 (Del. 2013) ("If the contractual language at issue is ambiguous ... we apply the *contra proferentem* principle and construe the ambiguous terms against the drafter.") (emphasis in original).

CONCLUSION

For all the foregoing reasons, the Court of Chancery's dismissal of Caspian's claim against Goldman Sachs should be reversed.

Date: November 7, 2013

FOX ROTHSCHILD LLP

/s/ Carl D. Neff

Neal J. Levitsky, Esquire (No. 2092)
Seth A. Niederman, Esquire (No. 4588)
Carl D. Neff, Esquire (No. 4895)
Citizens Bank Center, Suite 1300
919 N. Market Street
Wilmington, DE 19801
(302) 654-7444
nlevitsky@foxrothschild.com
sniederman@foxrothschild.com
cneff@foxrothschild.com

Attorneys for Plaintiffs Below, Appellants, Caspian Alpha Long Credit Fund, L.P., Caspian Select Credit Master Fund, Ltd., Caspian Capital Partners, L.P. and Mariner LDC

Of counsel:
Daniel P. Goldberg, Esquire
Holwell Shuster & Goldberg, LLP
125 Broad Street, 39th Floor
New York, NY 10004
(646) 837-5151

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EXHIBIT A

DENIED IN PART
EFiled: Jan 11 2012 1:08PM EST
Transaction ID 41809985
~~Case No. 5941-VCL~~

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CASPIAN ALPHA LONG CREDIT FUND, L.P., CASPIAN SELECT CREDIT MASTER FUND, LTD., CASPIAN CAPITAL PARTNERS, L.P., and MARINER LDC, Plaintiffs, v. MARSICO PARENT SUPERHOLDCO, LLC, MARSICO SUPERHOLDCO NOTES CORP., MARSICO GROUP, LLC, MARSICO HOLDINGS, LLC, MARSICO SUBCO, LLC, GS MEZZANINE PARTNERS 2006, L.P., GS MEZZANINE PARTNERS V, L.P., MARSICO CAPITAL MANAGEMENT, LLC, MARSICO FUND ADVISORS, LLC, THOMAS F. MARSICO, CHRISTOPHER MARSICO, JOHN DOE TRUST, and JANE DOE TRUST, Defendants.	C.A. No. 5941:VCL

ORDER DENYING DEFENDANTS' MOTIONS
<u>TO DISMISS THE FIRST AMENDED VERIFIED COMPLAINT</u>

Upon consideration of all papers submitted in support of and in opposition to Defendants' Motions to Dismiss the First Amended Verified Complaint; it is hereby

ORDERED that the Marsico Defendants' Motion to Dismiss is DENIED, and it is further

ORDERED that the GSM Noteholders Motion to Dismiss the First Amended Verified Complaint is DENIED.

Dated: ________________, 2011

____
Vice Chancellor Laster

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	J Travis Laster
File & Serve Transaction ID:	39871737
Current Date:	Jan 11, 2012
Case Number:	5941-VCL
Case Name:	CONF ORD Caspian Alpha Long Credit Fund LP vs Marsico Parent Superholdco LLC

Court Authorizer Comments:

The motions to dismiss are granted in part and denied in part for the reasons stated during today's hearing.

/s/ Judge J Travis Laster

not, but they weren't driving the bus. It's Marsico and Goldman who were doing this deal.

That's what I have, Your Honor. Thank you so much for your time.

THE COURT: All right. I'd like everybody to stick around for about 15 minutes, and I will either give you some thoughts today or I'll let you know that I need to write. So we'll stand in recess until 25 of.

(Recess taken.)

THE COURT: Please be seated. Thanks for coming back.

I am going to go ahead and give you thoughts now. I will preface this by saying that just as at the preliminary injunction stage, I find the provisions of this indenture, some of them, not to be terribly clear, and that influences my ruling today. I also want to note that we're here at a motion to dismiss stage and, therefore, some of the external factors and inferences that I was able to take into account at the summary judgment stage I don't think I am going to be able to take into account today.

I am granting the motion to dismiss in part and denying it in part. I am going to go through these issues on an issue-by-issue basis. I tried, in looking at this last night and again today, to think how this translated into the counts of the complaint but particularly the first three of the counts, it's difficult to parse out what theories are being talked about in each one. So people may have to think about how this works, but I think I'll leave you with a good sense of what really survives.

The first issue I believe that the parties have come to grips with is does the complaint sufficiently allege that the indenture was not validly amended to strip out the protective covenants. Under the terms of the exchange transaction, upon consummation of the exchange offer, the indenture was amended by deleting Sections 4.08, 4.09, 4.10, 4.11, 4.12, 4.15, 4.17 and 5.01, among others.

First of all, I am not crediting the timing-based argument about consummation of the exchange offer. I think to the extent this happened upon closing, that is acceptable from a process standpoint. And so even if I credit that that happened, it doesn't state a claim.

As far as the stripping issue, though, the default rule in Section 9.02 is majority consent to amend the indenture. I reject the plaintiff's argument about the meaning of "amend." I think even under this indenture, the plain meaning of "amend" includes removing or deleting. I think the concepts of supplementing, i.e., adding a supplemental indenture, and waiver are sufficiently different that it doesn't create any inference as to a more constrained meaning of "amend."

At the same time, however, Section 6.07 requires the consent of each noteholder to any change that would impair the right to receive principal and interest on a due date or institute suit to enforce those rights. This creates circularity with the first sentence of Section 9.02, which specifically provides that "Superholdco ... and the Trustee may amend or supplement ... (including, without limitation, Section[s] 3.09, 3.10, 4.10 and 4.15." This is also picked up in Section 9.02(2) which provides that the consent of each effective Holder is required to "reduce the principal of or change the fixed maturity of any Note or alter or waive any of the provision with respect to the redemption of the Notes (except as provided above with respect to Sections 3.09, 3.10, 4.10 and 4.15

hereof)."

This is really odd because Section 4.15 and 4.10 are both payment rights. And the specific here seems to be saying in 9.02 that you can amend these payment rights. The problem is Section 6.07 starts out with the introductory language "notwithstanding any other provision," which causes me or requires me to ignore or at least suggests that it trumps what's in Section 9.02.

On a motion to dismiss, I have to treat these provisions in a way that would give the inference to the plaintiff. So as to the argument that the payment right provisions were stripped, and by that, I'm thinking about Section 4.10 and 4.15, both of which contain payment rights, I think that the plaintiffs have sufficiently pled a claim that those were not validly amended under 6.07.

The other sections, and I could be wrong about the numbers, but in particular, 5.01, are not payment rights. I didn't find anything else in there that struck me as a payment right. I remember and I still have the view that Mr. Lockwood was right during our discussion at the preliminary injunction phase about the meaning of Section 5.1 and whether that was a payment right.

The second big issue, does the complaint state a claim that Goldman was prohibited from voting by Section 2.09 because it controlled Superholdco? I don't think that that has been adequately pled.

The third big issue, does the complaint state a claim based on this idea of some type of constructive payment to Goldman for consent? I don't believe that this states a claim under the last section of 6.06. Notwithstanding Mr. Goldberg's argument, I am going to read that provision in light of its evolution through the 1965 model indenture, the 1983 model indenture, the 2000 model indenture.

This is an example, I think much like CML v. Bax, where moving to plain meaning actually obfuscated the meaning. I do think that the intent here was to keep the same meaning as in those prior provisions and simplify the language. That said, I think 4.17, which addresses any payment, direct, indirect, et cetera, and potentially the implied covenant of good faith and fair dealing, could be read to bar some type of constructive side payment for consent based on the type of multi-tier structure that we have here.

I need to be very explicit in my view on this because defense counsel kept suggesting that this would apply to any consent given by anybody. What I'm resting on here is the idea that Goldman controlled the vote and was able to deliver the vote of multiple tranches; that's point one. They had a greater percentage, greater economic interest in the higher tranches; that's point two. And three, there are allegations in the complaint suggesting that Goldman was involved in deal structuring and had a relationship with the company.

Putting all this together, I am going to decline to dismiss the complaint to the extent it alleges some constructive payment for consent on the part of Goldman.

Now, let's clean out some of the other aspects of the case. Counts 5 through 7 all address fraudulent transfer theories. The transfers here all took place at the subsidiary level. There aren't sufficient facts for piercing or reverse-piercing. Count 9 is a chase-the-assets claim based on a fraudulent transfer theory. So I am dismissing all those causes of action, all those counts, because of the locus at which the transfers took place, namely, they didn't take place at the Superholdco level.

In terms of the claims against folks other than the issuer, I'm going to dismiss those people without prejudice. I think that something that would need to be pled here is along the lines of the type of implicit or explicit agreement that I've talked about. It may well be that Goldman gets brought in on that theory. It may be that the evidence shows that it's better on a tortious interference theory. I don't know.

4.17 only speaks of the issuer, so for present purposes, I'm going to let the case go forward against the issuer. Again, depending on what the record shows and discovery shows, if Goldman needs to be brought back in for some remedial purpose, they can be.

Finally, in terms of Count 10, the declaratory judgment, I am denying the motion to dismiss that, even though I think it's redundant of the other claims.

To the extent that there's requests for a constructive trust or attachment, I'm viewing those as remedies, not causes of action and, ultimately, if there is some basis to impose a remedy here, we'll figure out what the remedy needs to be.

Now, I think that leaves some part of Counts 1, 2 and 3 alive. It leaves Counts 1, 2 and 3 alive on the first theory that it's reasonably conceivable that one could not amend the payment rights under 6.07. And by "the payment rights," I'm focused on 4.10 and 4.15. It also leaves these counts in the case as far as the constructive side payment, constructive payment for consent, the Goldman concept. Then the last claim that remain in the case, I think, is Count 8, which addresses the implied covenant.

Now, that's how I read the counts based on my substantive rulings. You all may need to go think about how that maps onto what the plaintiffs believe they're actually alleging. And if there's other things that can be gotten rid of, that's fine with me.

Questions from your side, Mr. Goldberg?

MR. GOLDBERG: Just to be clear, the notion of Goldman getting the side payment, conceptually, that's in, but Goldman as a party is out? Is that correct?

THE COURT: Yes, because I am not clear at this point how I hold them in the case. So you all can pursue third-party discovery against them. You can get discovery from the issuer. As you pointed out in your brief, if these guys are right, they're not a party, maybe they come in as a tortious interference issue. Maybe it becomes an unjust enrichment recovery.

If they got some side payment and if that is your chosen remedy, one could think about some type of disgorgement avenue. If the remedy that you talked about is actually acceleration and a 101 percent claim against the issuer, I don't understand why they're there.

MR. GOLDBERG: Without saying whether I agree or disagree, the concern I have is the statute of limitations, if it takes us a year and a half to get through discovery. I haven't gone and calculated what law would apply to what claims could exist as to Goldman. So I have that concern as to whether --

THE COURT: I understand what you're saying. Look, you tried to sue. We could discuss tolling at some point. Why don't you talk about that with your friends. They may not care about being dismissed without prejudice. They may be happy to stay in. They're going to be subject to discovery anyway. But I am not comfortable with how I keep them in the case at this point, given that your rights run to the issuers, and given that 4.17 focuses on the issuer, and given that I've rejected your argument under 6.06.

Again, if they got a side payment, if they got a payment for consent, there are restrictions on these folks. Everybody concedes that there are restrictions. Defendants concede there are restrictions. It's implausible to me that you could agree you have restrictions and then say there is no possible remedy if you've violated the restrictions. If you got a payment in violation of those restrictions, there has to be some way to chase that payment.

What I don't have right now, because I'm not agreeing with your reading of 6.06, is a theory as to how to keep Goldman in the case. But to the extent it proves out, you would just have to plead it in some way to get them back in. That's the problem that I'm having right now, and that's why I'm finessing it by saying I'm dismissing Goldman without prejudice because I'm not convinced on 6.06. But if you come up with evidence of some side agreement and side payment, I think they can be brought back.

MR. GOLDBERG: Okay. Very well. Thank you.

THE COURT: Mr. Lockwood and Mr. Warren, I know that you disagree vehemently with where I've come out. Leaving aside your questions about my sanity and interpretation of the law, what other questions about implementing my ruling do you have?

MR. LOCKWOOD: Your Honor, with respect to the clients that I represent, the Marsico entities and Thomas Marsico and Christopher Marsico, other than the two issuers, I take it those parties are dismissed.

THE COURT: The same analysis would apply as to them because they were in here only under the use of the indenture under 6.06, and that is not something that I find to have stated a claim.

MR. LOCKWOOD: And are they dismissed with or without prejudice?

THE COURT: Without, under the same theory as I articulated before.

MR. LOCKWOOD: Understood, Your Honor.

THE COURT: Mr. Warren?

MR. WARREN: No. I take the clarification that we've been dismissed without prejudice, which is all I would have asked for.

THE COURT: All right. Thank you very much for your presentations on this. I continue to view this indenture as muddy and, hence, that's why we are where we are.

We stand in recess.

(Court adjourned at 1:00 p.m.)

EXHIBIT B

EFiled: Aug 14 2013 04:53PM EDT
Transaction ID 53736044
Case No. 5941-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CASPIAN ALPHA LONG CREDIT FUND, L.P., CASPIAN SELECT CREDIT MASTER FUND, LTD., CASPIAN CAPITAL PARTNERS, L.P., and MARINER LDC, Plaintiffs, v. MARSICO PARENT SUPERHOLDCO, LLC, MARSICO SUPERHOLDCO NOTES CORP., Defendants.	C.A. No. 5941-VCL

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by all parties hereto, through their respective undersigned counsel, pursuant to Rule 41(a)(1)(ii) of the Rules of the Court of Chancery that this action is hereby dismissed with prejudice. Each party shall bear its own costs, fees and expenses.

FOX ROTHSCHILD LLP		SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
By:	*<u>/s/ Carl D. Neff</u>*	By: *<u>/s/ Paul J. Lockwood</u>*

Carl D. Neff (ID No. 4895)
Citizen Bank Center
919 N. Market Street, Suite 1300
P.O. Bo. 2323
Wilmington, DE 19899-2323
(302) 654-7444

Attorneys for Plaintiffs Caspian Alpha Long Credit Fund, L.P., Caspian Select Credit Master Fund, Ltd. Caspian Capital Partners, L.P. and Mariner LDC

Paul J. Lockwood (ID No. 3369)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19801
(302) 651-3000

Attorneys for Defendants Marsico Parent Superholdco, LLC and Marsico Superholdco Notes Corp.

Dated: August 14, 2013