13-cv-1893

In the United States Court of Appeals for the Second Circuit

CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellee,

v.

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,

Defendant-Appellant,

INTERVENOR AD HOC NOTEHOLDER GROUP

Intervenor-Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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BNYM's position is unambiguously correct because it gives meaning to both sentences of Section 1.7(b), gives Section 1.7(c) its plain meaning, and construes "redeem" consistently throughout the contract. Chesapeake, by contrast, admits that under its position "[t]he second sentence must . . . *prevail over* the first." Opp. 38 (emphasis added). Contracts are not construed that way, and Chesapeake's other arguments construing the text likewise lack merit.

Indeed, Chesapeake prefers not to discuss contractual text, instead emphasizing extrinsic evidence from the outset of its brief. But the extrinsic evidence that is legitimately considered—mountains of evidence that for a year Chesapeake and others interpreted the contract the way BNYM does—supports BNYM. Undisclosed negotiations between BAML (a non-party) and Chesapeake are legally irrelevant. If any ambiguity remains, the doctrine of *contra proferentem* requires that the contract be construed against Chesapeake.

ARGUMENT

I. ONLY BNYM REASONABLY AND HARMONIOUSLY INTERPRETS THE INDENTURE'S PLAIN LANGUAGE

Chesapeake's efforts to read Section 1.7(b) to permit redemption *after* the Special Early Redemption Period fail at every turn. Chesapeake assumes that the first and second sentences are in conflict, but a court's first duty is to *reconcile* them (as BNYM's reading does). Chesapeake concedes that its reading defies the standard meaning of "redeem," but no such departure was made explicit.

Chesapeake does not dispute that its reading would create overlapping par and make-whole redemption periods. Chesapeake does not deny that it would give the word "redeem" different meanings throughout the indenture, within the rest of Section 1.7, and even within Section 1.7(b). And Chesapeake complains that BNYM's reading shortens the front end of the par redemption period, but its own reading has an identical effect and has the more egregious effect of *extending* the period by two months and allowing par redemption on a date mentioned *nowhere* in the agreement.

A. Chesapeake Pits One Sentence Against The Rest Of The Indenture, Whereas BNYM Reads The Whole Contract Harmoniously

1. Chesapeake does not seriously dispute that "redeem" usually means to exchange bonds for cash, not to give notice of intent to redeem. Opp. 36. Chesapeake also acknowledges that the first sentence of Section 1.7(b), which defines the Special Early Redemption Period, uses "the clearest and most unambiguous words imaginable: 'November 15, 2012 to and including March 15, 2013.'" Opp. 43 (quoting SPA-29). And Chesapeake admits that, under Section 1.7(c), "after March 15, 2013, Chesapeake had the right to redeem the notes at a defined 'make-whole price.'" Opp. 12; *see also id.* at 30.

Chesapeake makes no attempt to read the second sentence consistently with those concessions. Instead, Chesapeake assumes that the second sentence must be

read to authorize par redemption *after* March 15, *see* Opp. 30, 36, and is therefore "to the contrary," in "conflict," in "tension," and "inconsistent" with the first sentences of 1.7(b) and (c). Opp. 36-37 & n.4, 40-42. Chesapeake then asserts that the second sentence is "specific," while the first is "general," and that the former must therefore "prevail." Opp. 37, 38. But asserting that one provision *prevails* over the other ignores a court's duty to *reconcile* provisions whenever possible. In contrast, BNYM's reading reconciles all provisions and requires none to "prevail" over another.

The first sentence of Section 1.7(b) defines the SERP as November 15 to March 15. The second sentence addresses when Chesapeake was required to give notice of par redemption. BNYM therefore logically reads the second sentence—*in harmony with the first*—as merely restricting when Chesapeake could give notice of par redemption (*i.e.*, within the SERP).

Chesapeake strains to avoid this harmonious reading. Instead, it manufactures a conflict by declaring that the second sentence "explicitly" changed when Chesapeake could redeem at par. Opp. 36. But that argument assumes its conclusion: The *question* is whether the second sentence supersedes the first. Instead of trying to avoid conflict, Chesapeake proclaims that there is "tension between the redeem sentence and the notice sentence of Section 1.7(b)" (Opp. 34) and that one must "prevail" (Opp. 37).

Chesapeake is wrong. "General canons of contract construction *require* that 'where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.'" *Seabury Constr. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63, 69 (2d Cir. 2002) (emphasis added) (quoting *Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A.*, 760 F.2d 390, 395-96 (2d Cir. 1985)). Courts may not interpret one clause first and then interpret the rest of the contract based on that reading. Rather, courts "should read the integrated contract 'as a whole to ensure that undue emphasis is not placed upon particular words and phrases.'" *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) (quoting *Bailey v. Fish & Neave*, 868 N.E.2d 956, 959 (N.Y. 2007)); *accord Seabury*, 289 F.3d at 68-69; *Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 246 N.E.2d 351, 354 (N.Y. 1969).

This Court confronted a similar situation in *Bank of N.Y. Trust Co. v. Franklin Advisers, Inc.*, 726 F.3d 269, 277-78 (2d Cir. 2013), upon which Chesapeake relies heavily (but mistakenly, *infra* p. 18) for another proposition. In that case, a portfolio manager claimed a contingent performance fee after certain notes were redeemed under an optional redemption provision. The portfolio's shareholders (who did not want to pay the fee) read the optional redemption provision to conflict with the indenture's other payment provision (which authorized a contingent fee for achieving a specified return), because the former

specified an order of payment but did not mention the contingent fee. *Id*. at 277. Indeed, the shareholders observed that the other payment provision was expressly made "subject to" the optional redemption provision. *Ibid*. This Court rejected that effort to *create* conflict, because the optional redemption provision was "read most naturally as *supplementing* [the other payment provision], not *supplanting* it." *Ibid*. (emphasis added).

The obligation to reconcile potential conflict applies even if a clause could have more than one meaning. "[W]here consideration of the contract as a whole will remove the ambiguity created by a particular clause, there is no ambiguity." *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 300 (2d Cir. 1996). And Chesapeake tacitly admits that the second sentence need not be read to supersede the first sentence—the most Chesapeake can say is that "the phrase 'so long as' is not *necessarily* restrictive and *can* be used to clarify or even expand what precedes it." Opp. 42 (emphasis added). Thus, even if Chesapeake's isolated reading of the second sentence were plausible in the context of the entire agreement (and it is not, *see* Aplt. Br. 37-40; *infra* 12-13), courts still must seek a reading of the second sentence that can be harmonized with the first.

BNYM's reading does exactly that. The second sentence imposes an additional condition on the par redemption right: giving notice within the SERP. As we have explained (Aplt. Br. 41), several other provisions within Section 1.7(b)

operate the same way, placing restrictions on the par redemption right announced in the first sentence. Only BNYM's reading allows "'all provisions of [the] contract [to] be read together as a harmonious whole.'" *Seabury*, 289 F.3d at 69 (quoting *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 100 (2d Cir. 1997)). BNYM's reading is therefore unambiguously correct.

2. Chesapeake errs in relying on the "specific vs. general" canon to resolve supposed tension between the sentences. Even under Chesapeake's erroneous reading of the second sentence, it is not more "specific" than the first sentence. Chesapeake says the second sentence authorizes par redemption outside the SERP, but Chesapeake concedes that the first sentence declares, in "the clearest and most unambiguous words imaginable," that par redemption is authorized from "'November 15, 2012 to and including March 15, 2013.'" Opp. 43 (quoting SPA-29). That is, the first sentence limits par redemption *to* the SERP more "specifically" than the notice sentence supposedly authorizes par redemption *outside* the SERP. The canon that the specific governs the general thus does not help to resolve this case, at least not in Chesapeake's favor.

BNYM does not contend that the "specific controls the general only when the specific provision expressly includes the word 'notwithstanding.'" Opp. 37. Rather, we argue that if one provision *conflicts* with the rest of the contract—as Chesapeake admits that its reading of the notice sentence does—courts expect

"notwithstanding" or similar language showing intent to contradict other provisions. Aplt. Br. 30; *accord Bank of Am. Nat'l Ass'n v. AIG Fin. Prods. Corp.*, 509 F. App'x 24, 26 (2d Cir. 2013); *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 917 (2d Cir. 2010); *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 90-91 (2d Cir. 2002); *L & B 57th Street, Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 92-93 (2d Cir. 1998). Chesapeake simply ignores this argument.

Similarly, Chesapeake misrepresents BNYM as arguing that first clauses must control when they conflict with second clauses. Opp. 39-40. Again, Cheseapeake assumes that Section 1.7's clauses conflict, which they do not. Moreover, Chesapeake does not answer BNYM's real point: Courts must give provisions their "natural" reading, *Transperfect Translations Int'l, Inc. v. Merrill Corp.*, 159 F. App'x 313, 314 (2d Cir. 2005), and therefore should read the contract top to bottom as a cohesive whole. Aplt. Br. 31-32. The first sentence defines the par redemption period. The second sentence defines a rule that Chesapeake must follow to redeem the bonds at par within that period. Like the district court, however, Chesapeake *begins* with the second sentence and then molds the rest of the contract to serve that "isolat[ed]" (SPA-23) starting point.

B. Chesapeake's Reading Defies Industry-Standard Meaning And Operation

1. There is no dispute how readers "'cognizant of the customs, practices, usages and terminology'" in the bond industry understand the word "redeem."

Law Debenture Trust, 595 F.3d at 467 (quoting *Int'l Multifoods Corp.*, 309 F.3d at 83). It means "the act of paying a noteholder in exchange for his or her note. It does not ordinarily or customarily refer to the act of giving *notice* of a redemption or to the overall redemption process." SPA-23. Chesapeake concedes that its reading contradicts that customary understanding. Opp. 36, 38.[1] Moreover, Chesapeake does not dispute that any attempt to deviate from an industry-standard meaning must be clear. *See* Aplt. Br. 36 (citing *Croce v. Kurnit*, 737 F.2d 229, 238 (2d Cir. 1984); *Howe v. Bank of N.Y. Mellon*, 783 F. Supp. 2d 466, 480 (S.D.N.Y. 2011)).

Chesapeake asserts that the second sentence of Section 1.7(b) "plainly depart[s] from industry custom." Opp. 39. But Chesapeake never explains *how* the sentence does that, instead simply declaring that the second sentence must be read to supersede the first and therefore "plainly" displaces the settled meaning of the critical industry term "redeem." That is circular reasoning.

[1] Citing an unpublished district court opinion, Chesapeake briefly suggests that "redeem" could be thought of as "a 'multi-step process' that begins with notice and ends with the exchange of the notes for cash." Opp. 41 (quoting *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, No 04-cv-10014(PKL), 2005 WL 1950116, at *5 (S.D.N.Y. Aug. 12, 2005)). Chesapeake's own expert confirmed, however, that BNYM's reading of "redeem" was customary (A-217), and the district court acknowledged that Chesapeake's reading "would be unsustainable" unless "redeem" were given an "*uncommon* construction" (SPA-24 (emphasis added)).

The second sentence itself relies on the customary definition of "redeem" and "redemption." It reads: "The Company shall be permitted to exercise its option to *redeem* the Notes pursuant to this Section 1.7 so long as it gives the notice of *redemption* pursuant to Section 3.04 of the Base Indenture during the Special Early Redemption Period." A-730 (emphasis added). Even under Chesapeake's reading, "redeem" and "redemption" here must mean exchanging notes for payment. Chesapeake cannot contend that the second sentence authorized it merely to "commence" the redemption process; Chesapeake relied on this sentence to authorize the *actual* redemption it effected on May 13, 2013. Similarly, the remainder of the second sentence would become gobbledygook without the industry-standard meaning of "redemption," as it would require Chesapeake to "give[] the notice of *notice of future* redemption during the [SERP]." The second sentence *uses* the industry-standard meaning of "redeem"; it cannot *supersede* that meaning in the first sentence.

Chesapeake contends that the second sentence of Section 1.7(b) was not boilerplate but "negotiated." Opp. 39. But there is no interpretive principle that, if one sentence within a provision is not pure "boilerplate," then no term should be given its standard meaning. Chesapeake's assertion begs the questions whether the second sentence "clearly" adopts a non-standard reading of the term *and* whether it supersedes the standard meaning of the term elsewhere in Section 1.7(b) (and

throughout the agreement, see *infra* 12-13). Chesapeake offers nothing but *ipse dixit* to indicate that the text accomplishes either feat.[2]

We do not contend that *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), "require[s] courts to interpret all bond indenture provisions uniformly even if they plainly depart from industry custom." Opp. 39. Rather, we argue that the second sentence of Section 1.7(b) does not "plainly depart" from anything. Nor do we "[i]gnor[e]" (*ibid.*) this Court's *Franklin Advisers* decision. That case did not change the principles in *Sharon Steel* on which BNYM relied; it merely rejected extending *Sharon Steel* in ways BNYM has never advocated.[3]

2. Chesapeake's reading deviates from industry standards in another important respect: As our opening brief explained (at 35), when an indenture

[2] Each of the *eight* prior bond series Chesapeake issued under the Base Indenture gave "redeem" its industry-standard meaning, as did the bonds Chesapeake issued days after initiating this lawsuit. (Chesapeake's complaint notwithstanding (Opp. 41 n.8), this Court may take judicial notice of Chesapeake's SEC filings. *See Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003).) It is unreasonable to think that Chesapeake abandoned that meaning in Section 1.7(b).

[3] Chesapeake's attempt to distinguish *Howe*—which rejected a non-customary meaning of "default" in the absence of a provision making that a defined term—is circular: Chesapeake simply declares that "the second sentence [of Section 1.7(b)] specifically addresses the dispute at issue and provides the clarity missing in *Howe*." Opp. 38 n.6. As in *Howe*, if "redeem" were to carry the "uncommon construction" essential to Chesapeake's reading (SPA-24), the agreement would have made it a defined term.

contains different redemption options, those periods customarily do not overlap. Thus, the indenture allowed par redemption up to March 15, 2013, and make-whole redemption afterward.

Chesapeake concedes that its reading creates overlapping, conflicting redemption periods: Between April 15 and May 14, it could redeem at par *or* at the make-whole price. Opp. 44-45. And Chesapeake does not dispute that "one day, one price" is the industry redemption standard—its own expert so agreed with BNYM's experts. *See* A-1178-80, 1191; *accord* A-1039, 1048. Chesapeake nonetheless insists that its reading is not "unreasonable." Opp. 45. But Chesapeake gives just *one* example of an indenture it claims authorized overlapping redemption rights, Opp. 45 n.11, even though its expert scoured "all publicly available bond indentures for bonds issued in the U.S. bond market since January 1, 2002." A-1184.

Chesapeake claims that "BNYM's reading also results in overlapping periods as it would permit the issuer to notice a redemption at either par or the make-whole price between January 15 and February 13." Opp. 45. This is sleight-of-hand—Chesapeake conflates overlapping *notice* periods with overlapping *redemption* periods. The former exist *anytime* an indenture provides (as is common) that notice may be given over a range of days. Here, a 30-day notice could have issued as late as February 13 for par redemption on March 15, and a 60-

day notice could have issued as early as January 15 for make-whole redemption on March 16. *But that is not the same thing as saying that the notes could be redeemed at either price on a given day*, which Chesapeake's reading would allow and which defies industry custom.

C. Chesapeake Would Require "Redeem" To Carry Different Meanings Throughout The Agreement

Chesapeake does not dispute that "[t]erms in a document, especially terms of art, normally have the same meaning throughout the document in the absence of a clear indication that different meanings were intended." *Maryland Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997); *accord* 2 WILLISTON ON CONTRACTS § 32:6 (4th ed. 2007). Yet Chesapeake's definition of "redeem" in the first sentence of Section 1.7(b) cannot be the meaning of "redeem" or "redemption" in numerous provisions of the Ninth Supplemental Indenture and Base Indenture—or even in the remainder of Section 1.7(b) itself. *See* Aplt. Br. 37-40. Chesapeake does not address those conflicts.

We have explained that "redeem" cannot carry Chesapeake's meaning in Section 1.7(c), which authorizes make-whole redemption "[a]t any time after March 15, 2013 to the Maturity Date." A-730; Aplt. Br. 33. Otherwise, Chesapeake could "commence the redemption process" until "the Maturity Date" and—nonsensically—effect a make-whole redemption *after* maturity. In response, Chesapeake mischaracterizes our argument as concerning *par* redemption, stating

irrelevantly that par redemption "ended in 2013 but the notes would not otherwise mature until 2019." Opp. 41 n.9. And Chesapeake's argument depends on reading "redeem" in Section 1.7(c) to mean "commence the redemption process," because otherwise that provision explicitly allows only make-whole redemption "[a]t any time after March 15, 2013." Thus, Chesapeake's attempt to avoid one problem just creates another, for which Chesapeake has no answer.

D. BNYM's Reading Is Neither "Incoherent" Nor "Commercially Unreasonable"

Chesapeake contends that BNYM's reading "would splinter the defined four-month Special Early Redemption Period into two overlapping three-month periods, neither of which appears in the contract," which Chesapeake claims would "render[] 'incoherent or inaccurate' both the first and second sentences of Section 1.7(b)." Opp. 43 (quoting SPA-28). That is wrong. As our opening brief explained, *both* BNYM's reading *and* Chesapeake's reading forbid redemption until 30 days into the SERP, just like the redemption provisions in every bond that is immediately callable by the issuer (including the bonds Chesapeake issued in March 2013). Aplt. Br. 40-41 & n.5. Under BNYM's reading, par redemption could occur during the three-month period from December 15, 2012, to March 15, 2013. Under Chesapeake's reading, par redemption could occur during the five-month period from December 15, 2012, to May 14, 2013. Given the interaction of the first and second sentences of Section 1.7(b), *neither* party construes the

available redemption period in practice to be four months (or any period that "appears in the contract," Opp. 43). The only supposed virtue of Chesapeake's interpretation is that it gives *some* meaning to the four-month period identified in the first sentence of Section 1.7(b), but it does so by redefining the Special Early *Redemption* Period as a Special Early *Notice*-of-Redemption Period.

Chesapeake contends that BNYM's reading is "commercially unreasonable" because the indenture could have defined the SERP to run from December 15 to March 15 and dropped the notice sentence. Opp. 44. But that reasoning cuts more deeply *against* Chesapake. As the district court acknowledged,

> Chesapeake could have replaced the phrase "may redeem" in § 1.7(b) and § 1.7(c) with "may give notice of a redemption" or "may commence the redemption process." Or it could have added clarifying language . . . specif[ying] that the last date for a redemption was May 14, 2013, or stat[ing] generally that redemptions after March 15, 2013 are permitted if noticed by or on that date.

SPA-25. If the possibility of an alternate means to an end makes a reading unreasonable, Chesapeake's reading would fail many times over.

* * *

Only BNYM's reading harmonizes the redemption and notice provisions in Section 1.7(b), respects the industry-standard meaning of crucial terms and operations of the indenture, and avoids violence to numerous other provisions of the agreement. This case should end there.

II. IF THE AGREEMENT IS AMBIGUOUS, EVERY SHRED OF ADMISSIBLE EVIDENCE SUPPORTS BNYM'S READING

If Section 1.7 is ambiguous, Chesapeake has a problem: The extrinsic evidence that is crucial to its position—weekend conversations between Chesapeake and its underwriter (BAML)—was never disclosed to the other party to the indenture (BNYM), let alone to bondholders. For reasons that this case illustrates, one "party's uncommunicated subjective intent cannot supply the ultimate meaning of an ambiguous contract." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006).

Chesapeake claims that one party's uncommunicated subjective intent is nevertheless admissible if it is conveyed to a drafting partner, but a contract turns on the mutual intent of the *parties*, not the "drafters." Chesapeake also contends that its underwriter (BAML) was a legally acceptable substitute for BNYM and ultimately the bondholders, but that is contrary to law. In any event, Chesapeake's contention runs headlong into the fact that BAML was acting merely on a "best-efforts" basis.

Switching horses, Chesapeake claims that "some" negotiations were disclosed to BNYM (Opp. 51), including the draft indenture containing Michael Telle's proposed "clarifying language" and the next draft omitting it. But BNYM was not privy to *either* the weekend phone conversations in which the "drafters" agreed to extend par redemption beyond the SERP *or* Cravath's reason for

rejecting Telle's proposal. Without those missing links, BNYM and the bondholders were left to read 1.7(b) as written, and to infer that Telle's change was rejected because it was *inconsistent* with the prospectus and the language already in the indenture. No other conclusion is plausible in the face of a year of public statements by Chesapeake that par redemption ended on March 15. If doubt remains, the doctrine of *contra proferentem* is available precisely for this situation.

A. Evidence Of What Issuers And Underwriters Did Not Tell Trustees Cannot Resolve Ambiguous Terms

Chesapeake urges that what it and its underwriter *meant* to say clearly in the agreement—but didn't—should prevail, even though that intent was never disclosed to the other party, BNYM. Chesapeake is wrong.[4]

1. The doctrine of uncommunicated subjective intent prevents exactly this situation, where one party tries to elevate its "actual expectations" and "subjective intent" over "the 'reasonable expectations' of [both] parties." *SR Int'l*, 467 F.3d at 125 (quoting *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 361

[4] Chesapeake erroneously claims that the abuse-of-discretion standard governs. Opp. 3, 47, 53. Determining what kinds of extrinsic evidence can prove an ambiguous contract's meaning is a legal question reviewed de novo. *Klos v. Lotnicze*, 133 F.3d 164, 167 (2d Cir. 1997) (whether subjective-intent evidence could be considered was "an issue of law"); *Borawick v. Shay*, 68 F.3d 597, 601 (2d Cir. 1995) ("Our review must be de novo on the question whether, in exercising its discretion to admit evidence, the district court applied the proper legal test.").

N.E.2d 999, 1001 (N.Y. 1977)). Chesapeake responds that it did disclose this interpretation—to its underwriter, BAML. Opp. 47. But it cites no authority supporting the assertion that one party's disclosure to a non-party drafting partner—who is that party's highly compensated agent—binds a counterparty who was never informed of that interpretation.

That rule would "turn contract law on its head." Opp. 2. A contract requires a meeting of the minds of contracting *parties*—here, Chesapeake and BNYM. *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 372 (2d Cir. 2003). Whether Chesapeake and its agent, *BAML*, reached a common understanding about the meaning of a contract between Chesapeake and *BNYM* is legally irrelevant.

Two leading cases have applied this rule to reject extrinsic evidence of an issuer's "intent" that was not disclosed to investors. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392 (Del. 1996); *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539 (Del. 2013). Chesapeake notes that *Commerzbank* involved "affiliates" (Opp. 52) but does not explain why that makes a difference—BAML was Chesapeake's *agent* and was being paid millions of dollars to complete this transaction to Chesapeake's satisfaction. Chesapeake claims that *Kaiser* is limited to boilerplate provisions. *Ibid.* *Kaiser*, however, addressed a provision that bore "a striking resemblance"—but only "in certain respects"—to a standard provision. 681 A.2d at 396. In any event, Chesapeake

does not dispute that *Commerzbank* applied *Kaiser* to non-boilerplate terms. *See* Aplt. Br. 51; *see also Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 853 (Del. 1998) ("ambiguity attributable to the corporate drafter . . . must be construed in favor of the reasonable expectation of the investor and against the drafter").

The cases Chesapeake claims are contrary (Opp. 48) do not address, let alone reject, the principles upheld in *Kaiser* and *Commerzbank*. Chesapeake's selective quotation of *Franklin Advisers* is misleading: This Court approved the general proposition that extrinsic evidence may be considered to ascertain the meaning intended by the parties (we have never suggested otherwise) but was not presented with an argument that uncommunicated subjective intent should be excluded. 726 F.3d at 276 n.9, 281. The Seventh Circuit in *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (1994), held that an indenture was *unambiguous* but noted—in dicta—that evidence of the drafters' intent might be more appropriate extrinsic evidence than treatises. *In re Bank of New England Corp.*, 426 B.R. 1 (D. Mass. 2010), did not address the distinction Chesapeake urges here between "drafters" and "parties," much less afford dispositive significance to a non-party drafter's undisclosed intent. Rather, after noting that "[t]estimony by '[t]wo attorneys peripherally involved in the drafting process'" was "'hardly helpful,'" it looked to background legal principles as "evidence concerning what . . . the *parties*

to the Junior Indentures" would have intended. *Id.* at 4 (emphasis added) (quoting *In re Bank of New England Corp.*, 404 B.R. 17, 19, 28 (Bankr. D. Mass. 2009)).

2. Chesapeake claims that its undisclosed discussions with non-party BAML are dispositive because they had a "genuinely adversarial negotiation." Opp. 49. Even if that were true (it's not), contracts are agreements between *parties*. A contracting party may hire a consultant—*e.g.*, lawyers, technical experts, or underwriters—to help draft an agreement. Those undisclosed discussions do not become legally relevant if the agent disagrees (even vigorously) with its principal.

Chesapeake suggests that underwriters are different because they keep bondholders' interests "in mind" (Opp. 49, 59) and are at "arm's length" to issuers (*id.* at 15, 49-51). Nonsense. Issuers pay underwriters to help them market bonds. Samuel N. Allen, *A Lawyer's Guide to the Operation of Underwriting Syndicates*, 26 NEW ENG. L. REV. 319, 320 (1991). Underwriters, in turn, advise issuers as to what investors are likely to purchase. *See* Martin Riger, *The Trust Indenture as Bargained Contract: the Persistence of Myth*, 16 J. CORP. L. 211, 216 (1991).

Underwriters, as BAML did here, sometimes counsel issuers that certain terms will not sell at a particular price. But that does not make the underwriter adverse to the issuer—the underwriter is *helping* the issuer achieve its business objective. Similarly, lawyers who advise their clients that a counterparty will not

accept a particular contract term do not become their clients' arm's-length adversaries. Nor do agents' "reputational" interests (Opp. 26, 50) change this fundamental relationship. Indenture terms "balanc[e] the issuer's and the underwriter's respective self-serving ends," which may sometimes overlap with, but do not actually match, the bondholders'. Riger, *supra*, 16 J. CORP. L. at 216. BAML's counsel confirmed that "the underwriter[] . . . is trying to find a balance of serving the issuer and helping them . . . find a set of terms that they think . . . will clear the market." A-210. "I view myself as representing the underwriters. Definitely not the noteholders." *Ibid*. "[M]y client, obviously, is the underwriter, and I focused on trying to make sure that disclosure is adequate for *their* protection." *Ibid*. (emphasis added).[5]

That is no "abstract economic structure." Opp. 49. It is a cold, hard fact—particularly in this case. Telle suggested including in Section 1.7(b) language authorizing par redemption "even if such notice is received by Holders, or such redemption occurs, following the Early Redemption Period." A-671, 676. That language would have made the supposed intent evident to BNYM and the bondholders. Counsel for BAML—which Chesapeake claims was looking out for

[5] BNYM does not take Burns's testimony "out of context." Opp. 50 n.12. Burns could not have been clearer, and the Court may judge the "context" for itself.

bondholders' interests—rejected it. *See* Aplt. Br. 52. Chesapeake insists that Cravath was merely following policy (Opp. 13-14), but Chesapeake cannot deny *why* Cravath had that policy: to protect *BAML and Chesapeake* from securities-fraud suits *by bondholders*. *See* Aplt. Br. 52. BAML was looking out for Chesapeake's and its own interests, which were adverse to those of the bondholders.[6]

3. This is especially true because BAML was acting as merely a best-efforts underwriter. *See* Aplt. Br. 48-50. Chesapeake claims that BAML was only "loosely described" as a best-efforts underwriter (Opp. 50), but the district court made no such finding (*see* SPA-38-39). BAML's management explicitly authorized BAML's participation only on a best-efforts basis, and Chesapeake and BAML employees' testimony was uniformly in agreement. A-222, 227, 230, 238, 434-58.

Chesapeake misleadingly suggests that BAML "actually purchased the notes." Opp. 49. But "'best efforts' . . . *includes* . . . offerings through purchases

[6] If the disputed language means what Chesapeake claims, the proper way to have avoided misleading investors would have been to clarify *both* the supplemental indenture and the prospectus. Since the offering had already been fully subscribed on the basis of the prospectus, it could not have been corrected without risking that investors would find the redemption provisions as so clarified unacceptable. It is telling that Chesapeake and BAML were not willing to run that risk, choosing instead to keep their secret conversations secret and to modify *neither* the supplemental indenture nor the prospectus.

and resales by a dealer firm acting as principal but without any commitment to buy more than it can resell." *Demarco v. Edens*, 390 F.2d 836, 844 (2d Cir. 1968) (emphasis added) (quoting 1 L. Loss, SECURITIES REGULATION 172 n.24 (2d ed. 1961)). The key feature of a best-efforts underwriting is that, as here, "the underwriters only commit to buy those securities they have been able to presell through the use of their best efforts." Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements*, 61 N.Y.U. L. REV. 223, 226 n.15 (1986).[7] Indeed, BAML did not sign this supposedly "firm" underwriting agreement until *after* the notes were sold to investors and oversubscribed by $300 million. A-948-49. BAML never held legal title to the notes, which were issued directly to the clearing agent (not BAML) when the deal closed. A-650. Chesapeake does not dispute that BAML had binding, enforceable commitments from investors. The hypothetical "risk" of settling trades was not risk in any relevant sense, and certainly not genuine underwriting risk.

[7] BAML was not paid, as Chesapeake misleadingly implies, as a firm-commitment underwriter. Opp. 49-50. Firm-commitment underwriters buy the bonds and then keep the profits or *suffer the loss*. *See Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S 207, 217 n.17, 218 n.18 (1984). *After* the bonds were sold, Chesapeake let BAML keep a portion of the purchase price it collected on Chesapeake's behalf. A-650. *See* Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability under Section 11 of the Securities Act of 1933*, 1996 WIS. L. REV. 217, 218 n.5 (1996).

4. Chesapeake claims the district court's extrinsic-evidence ruling rested on an "alternative factual ground" that BNYM received drafts of the prospectus and indenture "proving" Chesapeake's interpretation. Opp. 32. The district court never decided on such "alternative" grounds. *See* SPA-51-53, 55-56.

Nor could it have. BNYM received (1) draft prospectuses containing the disputed language, (2) a draft indenture containing Telle's modifying language stating that Chesapeake could redeem at par after March 15, 2013, (3) a revised draft deleting that proposed modification, and (4) a final indenture omitting the proposed language. A-465, 676, 697, 730. There is not a shred of evidence that BNYM participated in (or was invited to) the weekend phone calls that are crucial to Chesapeake's theory. Nor was BNYM privy to Cravath's purported explanation for rejecting Telle's change. BNYM was left to infer that Telle's change was rejected because it *was inconsistent with the prospectus and would have modified* the intended meaning of Section 1.7(b). That is particularly true because Section 1.7(b) *did* contain language slightly different from the corresponding provisions in the prospectus supplement. *Compare* A-570, 593 *with* A-730. So BNYM could assume that changes in phrasing that did not affect the substance of the agreement were permitted, which in turn confirmed that Telle's change was rejected because extending par redemption beyond the SERP was not intended.

5. Finally, Chesapeake complains that, if its uncommunicated subjective intent is not admissible, the bond market would be upended. Opp. 48. Chesapeake has it backward. Chesapeake is right that, under "established industry practice," indenture trustees do not negotiate bond terms, and "[i]t would make little sense for issuers and underwriters to involve the trustee in every discussion about the deal's terms." Opp. 51-52. But, if those undisclosed discussions govern indentures' meaning, then trustees would be implicitly expected to *defy* established industry practice, assuming such unrealistic and unprecedented tasks as monitoring and recording negotiations—including weekend phone calls—and ensuring that they are properly reflected in the prospectus and indenture.

B. Chesapeake Cannot Ignore Evidence That, For A Year, It Consistently Declared That Par Redemption Ended On March 15

Chesapeake does not dispute that "every shred of disclosed extrinsic evidence," including "every statement Chesapeake made to investors, the SEC," Bloomberg, "and the ratings agencies for a full year"; Chesapeake's and BAML's recorded investor conference call to market the offering; BAML's "marketing outline for its sales force"; and "Chesapeake's investor-relations website and internal treasury report" all "confirmed that March 15, 2013, not May 14, was the last day the notes could be redeemed at par." Opp. 53-54; Aplt. Br. 2-3, 8-11, 55-59. Chesapeake instead dismisses all that evidence as not "probative." Opp. 54.

But Chesapeake cites nothing for the remarkable proposition that a securities issuer's repeated public statements about an offering's terms are irrelevant. Indeed, such a rule would set a dangerous precedent. Even under Chesapeake's hypertechnical view of what qualifies under the practical-construction doctrine, Chesapeake's public statements are directly relevant. For example, Section 4.02 of the Base Indenture requires Chesapeake to "comply with the provisions of [the Trust Indenture Act] Section 314(a)" (A-341), which in turn requires issuers to "file with the indenture trustee copies of the annual reports and of the information, documents, and other reports . . . which such obligor is required to file with the [SEC]," 15 U.S.C. § 77nnn(a)(1). Thus, providing materially accurate public filings to BNYM *was* "an affirmative act that amounted to a performance under the contract." Opp. 55. When Chesapeake's second-quarter 10-Q and 2012 10-K reported that Chesapeake could redeem at par until March 15, 2013, BNYM was entitled to rely on those representations as Chesapeake's construction of the contract.

Tellingly, Chesapeake has not identified one market participant that independently concluded that March 15 was a notice deadline. Chesapeake notes that two publications concluded that March 15 was a notice deadline (Opp. 57), but those articles were published *after* Chesapeake announced in February 2013 that it could redeem at par until May. A-1225-33. In 2012, one of those publications

concluded that the bonds could be "redeem[ed] . . . at par at any time from and including November 15, 2012 through and including March 25 [*sic*], 2013," and "through a make-whole provision" "[a]fter March 15, 2013." A-1252.

Chesapeake did not inform the market that it could supposedly redeem at par in May until February 20, 2013—a year after the offering. Aplt. Br. 13-14. As described above, it repeatedly and uniformly reaffirmed March 15 as the par redemption deadline in numerous public statements. Chesapeake dismisses this evidence as "equivocal," summary, or "shorthand." Opp. 17-18, 55. It even claims that the district court reached a "very different conclusion" about what these statements and documents conveyed. *Id*. at 27. To the contrary, that court acknowledged that Chesapeake's public statements and documents "[a]t best" were "imprecise" and "at worst" could "be seen as contradicting Chesapeake's position." SPA-69; *see id*. at 66-78. Nor can those statements be discarded as "summaries" (Opp. 17) that left open when par redemption ended. They explicitly stated the par-redemption deadline as March 15. Once Chesapeake changed its position, its summaries had no difficulty making that clear. *E.g.*, A-877-82.

Chesapeake insists that statements made directly by Chesapeake do not matter unless uttered by certain "drafters" of the second sentence of Section 1.7(b). Opp. 54. Not so. Chesapeake cites two district court opinions that do not establish such an extreme rule. In *Alternative Thinking Systems, Inc. v. Simon & Schuster*,

Inc., 853 F. Supp. 791, 798 (S.D.N.Y. 1994), the court merely refused to grant summary judgment because the parties, insisting that a contract was unambiguous, offered too little extrinsic evidence of an ambiguous term's meaning. In *Adasar Group, Inc. v. NetCom Solutions International, Inc.*, No. 01 Civ. 0279(WHP), 2003 WL 1107670, at *8 (S.D.N.Y. Mar. 13, 2003), the trial court chose, in its post-trial findings of fact and without legal citation, to credit testimony from employees who helped draft a provision over those who did not.

Chesapeake does not explain how its "drafters-only" rule could work in the real world. *See* Aplt. Br. 60-61. Moreover, in the string of cases Chesapeake cites as acceptable examples of the practical-construction doctrine (Opp. 55), there was no indication that a party's construction could be ignored unless uttered by the individual who personally "drafted" the provision.

In any event, the deal team was larger than Telle, Dell'Osso, Burns, and Maultsby, and some "drafters" did not understand March 15 to be a notice deadline. Elliot Chambers—a key member of the deal team—understood for a year that March 15 was a redemption deadline. SPA-72-73. He and Susan Seymore, also on the deal team (SPA-67), regularly reviewed and approved documents identifying March 15 as a *redemption* deadline (*e.g.*, A-540, 794, 799, 845, 846, 849).

Dominic Dell'Osso, Chesapeake's CFO, told the market that March 15 was the par-redemption deadline and signed Chesapeake's 10-Q and 10-K, which said the same thing. *See* SPA-69, A-821, 940-41. During a recorded August 2012 investor call, Dell'Osso told investors that the company could "call the notes at par between November 15 of this year and March 15 of 2013." A-839.[8] Furthermore, Dell'Osso led Chesapeake's treasury department, which issued numerous statements declaring that par redemption ended on March 15. *See* SPA-66-78.

Chesapeake blithely suggests that these people simply "did not focus" on the indenture's redemption provisions. Opp. 17, 19. But the pile of Chesapeake documents and budgets declaring a March 15 par redemption deadline says otherwise. And it is audacious for Chesapeake to contend that public investors must understand what Chesapeake's own employees—who structured the deal, publicly verified its terms, and were responsible for managing Chesapeake's treasury—did not.

C. *Contra Proferentem* Fits This Case Perfectly

Aside from saying that "the extrinsic evidence unanimously supports Chesapeake's interpretation" (Opp. 58)—a rehash of the arguments addressed

[8] The district court concluded that the words "callable" and "called" sometimes refer to notice. SPA-78-79. It did not conclude that Dell'Osso meant—let alone that investors understood—that March 15 was a notice deadline, as Chesapeake implies. Opp. 18 n.2.

above—Chesapeake argues that "courts apply *contra proferentem*" only when "the bargaining power between the parties is so unequal that *one* party can be considered the *sole* drafter of the document." Opp. 58. But Chesapeake does not address cases such as *Sass v. New Yorker Towers, Ltd.*, 258 N.Y.S.2d 765, 768 (1st Dep't 1965), which held that "ambiguity in or between the [bond] documents . . . will be construed against the issuing corporation which created or bears responsibility for such ambiguity" (citation omitted). *See* Aplt. Br. 62. Nor does Chesapeake answer *Kaiser*'s explanation that issuers are "better able to clarify unclear bond contract terms in advance so as to avoid future disputes and therefore should bear the drafting burden that the *contra proferentem* principle would impose upon [them]." 681 A.2d at 398-99 (internal quotation marks omitted); *see* Aplt. Br. 61-62.

Even under Chesapeake's cramped definition of *contra proferentem*, the canon applies here. Only one *party*—Chesapeake—participated in drafting the indenture. As Chesapeake agrees is customary (Opp. 15, 48), the "important parties in interest—the holders of the securities—[are] neither consulted about, nor involved in the drafting of," the governing agreement. *Commerzbank*, 65 A.3d at 551. It makes no difference that "Chesapeake and *BAML* were represented by sophisticated counsel and," Chesapeake inaccurately claims, "actually negotiated the disputed terms." Opp. 58 (emphasis added); *but see supra* 19-21 (explaining

why agents don't "negotiate" at "arm's length" with their principals). *Contra proferentem* is intended to protect contract *parties* who do not participate in drafting an ambiguous agreement.[9]

That is the only fair and practical way to treat investors. "[W]hen faced with an ambiguous provision . . . , the Court must construe the document to adhere to the reasonable expectations of the investor who purchased the security and thereby subjected themselves to the terms of the contract." *Kaiser*, 681 A.2d at 399. Any ambiguity in the indenture was the fault of Chesapeake and its agent BAML, and cannot be held against the noteholders.

CONCLUSION

The Court should reverse the district court and enter judgment for BNYM.

[9] Chesapeake claims several out-of-circuit or district court cases are contrary. Opp. 58-60 & n.16. But none adopts Chesapeake's extreme view of *contra proferentem*. None involved an ambiguous term inserted by the issuer itself, and none turned on critical "evidence" of the issuer's intent never disclosed to the trustee or investors. *See also* Aplt. Br. 50.

Dated: November 8, 2013

Respectfully submitted,

By: /s/ Roy T. Englert, Jr.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,983 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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Dated: November 8, 2013

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2013, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by e-mail.

/s/ Roy T. Englert, Jr.
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