No. ______

In the
Supreme Court of the United States

CHESAPEAKE ENERGY CORPORATION,

Petitioner,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
KEVIN M. NEYLAN, JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 2, 2017

QUESTION PRESENTED

In 2013, Petitioner Chesapeake Energy Corp. was in a heated contract dispute with Respondent (BNYM). Chesapeake believed it had the right to take certain important and time-sensitive actions, but BNYM disagreed, threatening Chesapeake with massive contractual penalties if it took those steps. Unwilling to act under such uncertainty and risk such penalties, Chesapeake sought (and won) a declaratory judgment in federal district court holding that its proposed course of action was valid and penalty-free under the contract. BNYM did not seek a stay of that judgment pending appeal. Relying on the unstayed judgment, Chesapeake then exercised the rights the district court held it possessed.

Eighteen months later the Second Circuit reversed, holding that Chesapeake's actions were not authorized by the contract after all. Chesapeake proposed to make restitution as necessary to put the parties back in the positions they would have occupied had it not won and relied on the district court's unstayed judgment. But, instead, the district court and the Second Circuit held that Chesapeake had committed a full-blown breach of contract—and was therefore liable for $438 million in contractual damages—just as if it had gambled on its view of the law without obtaining a declaratory judgment.

The question presented is: When a party wins a declaratory judgment from a district court, and the judgment is not stayed pending appeal, may that party nonetheless be penalized for actions taken in reliance on the judgment in the event it is later reversed?

CORPORATE DISCLOSURE STATEMENT

Chesapeake Energy Corporation has no parent corporation and no publicly held corporation holds 10% or more of Chesapeake's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 4
JURISDICTION 4
STATUTORY PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 4
A. Chesapeake's Dilemma Concerning Early Redemption of the Notes 4
B. Chesapeake Obtains a Declaratory Judgment Finding its Early Redemption Timely 7
C. The Second Circuit's Reversal and Proceedings on Remand 9
D. The Decision Below 12
REASONS FOR GRANTING THE PETITION 13
I. The Second Circuit's Decision Conflicts With The Declaratory Judgment Act And Well-Established Equitable Principles 16
A. The Decision Below Cannot Be Squared With The Text Of The Declaratory Judgment Act 16
B. The Second Circuit's Decision Thwarts A Declaratory Judgment's Essential Purpose 19
C. The Decision Below Conflicts With This Court's Precedents 22

D. The Decision Below Improperly Eliminates The Federal Restitution-After-Reversal Rule In Declaratory Judgment Actions 26

II. The Decision Below Contributes To Widespread Disagreement Among The Lower Courts 31

III. At A Minimum, The Court Should Hold This Petition Pending Its Resolution Of *Nelson v. Colorado* 34

CONCLUSION 35

APPENDIX

Appendix A

Opinion, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 15-2366-cv (Sept. 15, 2016)................... App-1

Appendix B

Order Denying Rehearing, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 15-2366-cv (Nov. 4, 2016) App-14

Appendix C

Opinion & Order, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 10, 2015).................. App-16

Appendix D

Judgment, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 13, 2015) App-64

Appendix E

Amended Judgment, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 17, 2015) App-66

Appendix F

Opinion, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-1893-cv (Nov. 25, 2014) App-68

Appendix G

Order Denying Rehearing, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-1893-cv (Feb. 6, 2015) App-95

Appendix H

Opinion & Order, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (May 8, 2013) App-97

Appendix I

Relevant Statutory Provisions App-217

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967).. 14

Arkadelphia Milling v. St. Louis Sw. Ry.,
249 U.S. 134 (1919)... 27, 35

Atl. Coast Line R.R. v. Fla.,
295 U.S. 301 (1935).. 27

Auto-Owners Ins. Co. v. Potter,
242 F. App'x 94 (4th Cir. 2007) 25, 31

Badger Catholic, Inc. v. Walsh,
620 F.3d 775 (7th Cir. 2010).................................. 32

Baltimore & Ohio R.R. Co. v. United States,
279 U.S. 781 (1929)... 27, 35

Bank of the U.S. v. Bank of Wash.,
31 U.S. (6 Pet.) 8 (1832).. 30

Bonaparte v. Camden & A.R. Co.,
3 F. Cas. 821 (C.C.D.N.J. 1830) (No. 1,617) 19

Bowers v. Hardwick,
478 U.S. 186 (1986).. 20

Buckley v. Valeo,
424 U.S. 1 (1976).. 20, 25

California v. Grace Brethren Church,
457 U.S. 393 (1982).. 21

*Chesapeake Energy Corp.
v. Bank of N.Y. Mellon Trust Co., N.A.*,
837 F.3d 146 (2d Cir. 2016) 4

Clarke v. United States,
915 F.2d 699 (D.C. Cir. 1990)................................ 31

Coleman v. Tollefson,
135 S. Ct. 1759 (2015).. 17

Comm. on Judiciary of U.S. House of Representatives v. Miers,
542 F.3d 909 (D.C. Cir. 2008).......................... 25, 29

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975).. *passim*

Douglas v. City of Jeannette,
319 U.S. 157 (1943).. 29

Edgar v. MITE Corp.,
457 U.S. 624 (1982).. 11, 12

Ex parte Young,
209 U.S. 123 (1908).. 22

Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs.,
780 F. Supp. 2d 1307 (N.D. Fla. 2011).................. 32

Gay Lesbian Bisexual All. v. Sessions,
917 F. Supp. 1558 (M.D. Ala. 1996) 26

Great Lakes Dredge & Dock Co. v. Huffman,
319 U.S. 293 (1943)................................... 23, 24, 25

Heartland By-Prod., Inc. v. United States,
568 F.3d 1360 (Fed. Cir. 2009).............................. 33

Hebert v. Exxon Corp.,
953 F.2d 936 (5th Cir. 1992).................................. 26

Hovey v. McDonald,
109 U.S. 150 (1883).. 17, 18

Lawson Envtl. Servs., LLC v. United States,
128 Fed. Cl. 14 (2016).. 26

Legalization Assistance Project v. INS,
976 F.2d 1198 (9th Cir. 1992)................................ 26

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)................................... 15, 19, 34

Nat'l Union Fire Ins. Co. v. Seagate Tech., Inc.,
No. C 04-01593 WHA, 2013 WL 1282971
(N.D. Cal. Mar. 27, 2013) 32

Nw. Fuel Co. v. Brock,
139 U.S. 216 (1891).. 27, 35

Oklahoma Operating Co. v. Love,
252 U.S. 331 (1920).. 23, 25

Poe v. Gerstein,
417 U.S. 281 (1974).. 29

Pub. Citizen v. Carlin,
2 F. Supp. 2d 18 (D.D.C. 1998).............................. 32

Pub. Serv. Comm'n of Utah v. Wycoff Co.,
344 U.S. 237 (1952).. 21

Roe v. Wade,
410 U.S. 113 (1973).. 20

Steffel v. Thompson,
415 U.S. 452 (1974).. 21

United States v. Albertini,
830 F.2d 985 (9th Cir. 1987).................................. 33

United States v. Mancuso,
139 F.2d 90 (3d Cir. 1943) 32

United States v. Morgan,
307 U.S. 183 (1939).. 27

United States v. Qualls,
172 F.3d 1136 (9th Cir. 1999)................................ 33

Wadley S. Ry. Co. v. Georgia,
235 U.S. 651 (1915).. 22

Statutes

28 U.S.C. §1254 4

28 U.S.C. §2201 .... *passim*

28 U.S.C. §2202 4

35 U.S.C. §284 14

Model Penal Code §2.04
(Am. Law Inst. 1985) 19

Treatises

Restatement (First) of Restitution (1937) 19, 27

Restatement (First) of Torts (1934) 19

Other Authorities

H.R. Rep. No. 73-1264 (1934) 21

Steven V. Mann & Eric A. Powers,
Indexing a Bond's Call Price:
An Analysis of Make-Whole Call Provisions,
9 J. Corp. Fin. 535 (2003) 6

Nelson v. Colorado,
No. 15-1256 (argued Jan. 9, 2017) 16, 34, 35

Elizabeth Roy Stanton, *Calling All Bonds*,
The Street (July 21, 2000),
http://bit.ly/2kdmfCw 6

PETITION FOR WRIT OF CERTIORARI

This half-billion-dollar dispute turns on a federal question of immense importance that goes to the heart of the utility of the Declaratory Judgment Act: whether a party that wins a declaratory judgment and acts in reliance on it can be penalized if that judgment is later reversed on appeal.

In 2013 Petitioner Chesapeake Energy faced a high-stakes and time-sensitive decision: whether to redeem certain Notes that it had issued several years earlier. Chesapeake was willing to redeem the Notes *if and only if* it could redeem at the favorable "At-Par Price" rather than the punitive and much higher "Make-Whole Price." But Respondent Bank of New York Mellon ("BNYM"), the indenture trustee, argued that Chesapeake had waited too long to exercise its contractual rights such that any redemption at the At-Par Price would be untimely and bondholders would be entitled to the Make-Whole Price.

Unwilling to risk taking action that could trigger the need to pay the Make-Whole Price, Chesapeake sought a declaratory judgment in federal court to determine whether its proposed redemption would be timely. After a bench trial, the district court issued a final judgment holding that Chesapeake could still redeem at the At-Par Price. BNYM did not seek a stay of that judgment but appealed it in the ordinary course. Chesapeake then redeemed the Notes at the At-Par Price, as was its right under the valid unstayed judgment.

Several years later, however, Chesapeake now finds itself in the precise situation that it went to

court to avoid. Having first reversed the district court on the merits of the dispute, the Second Circuit has now held that Chesapeake—which had made absolutely clear from day one that it had no interest in redeeming the Notes if doing so triggered the Make-Whole Price—is nevertheless legally obligated *to pay the Make-Whole Price*.

The Second Circuit concluded that Chesapeake's valid, unstayed declaratory judgment had *zero* protective effect until all appeals had finished, and that Chesapeake may thus be saddled with massive contractual liability for actions that it never would have taken had it not possessed a valid and binding declaratory judgment. In other words, the Second Circuit treated Chesapeake just as it would have if Chesapeake had never sought and obtained a declaratory judgment and had simply rolled the dice without involving the courts. The fact that Chesapeake acted only after procuring a valid, unstayed judgment had no effect on its liability. Indeed, as a result of the decision below, Chesapeake is now in a far worse position (to the tune of hundreds of millions of dollars) than it would have been in had it initially *lost* in the district court, in which case it simply would not have redeemed the Notes.

The Second Circuit's decision is profoundly wrong, and will have widespread negative consequences far beyond this particular dispute, in any case in which a litigant prudently seeks a declaration of her rights before acting. The text and basic purposes of the Declaratory Judgment Act, as well as a body of this Court's decisions, make clear

that a party is entitled to rely on a valid, unstayed declaratory judgment even while it is being appealed. And, if the favorable judgment is later reversed on appeal, that party is subject only to a restitutionary remedy designed to restore the status quo *ante*.

A declaratory judgment defendant can always seek additional protection via a stay pending appeal. But the Second Circuit rule eviscerates the value of the Declaratory Judgment Act entirely in an important class of cases. Parties needing legal clarity to act quickly would be powerless to get legal certainty if they face the full measure of liability if they ultimately do not prevail after an appellate process that can take years. There is no reason to eliminate the utility of the Declaratory Judgment Act in an important category of cases that are ready-made for resolution via declaratory judgment. But that is precisely what the Second Circuit rule accomplishes.

The decision below also deepens pervasive confusion in the lower courts about the protection a declaratory judgment affords litigants while it is pending on appeal. At least three courts of appeals have correctly recognized that a party who obtains a declaratory judgment and acts in compliance with it cannot be penalized for acts taken while such a judgment is in effect. But other courts, like the Second Circuit and the district court here, have held that a party in possession of a valid, unstayed declaratory judgment acts at its peril until all appeals have run their course. Such confusion over the effect of a binding court decree (in both the civil and criminal contexts) is intolerable because it vastly

weakens, and in many cases entirely eliminates, the protections declaratory relief can afford to litigants whose rights are shrouded in uncertainty. Certiorari on this important issue is plainly warranted.

OPINIONS BELOW

The Second Circuit's opinion is reported at 837 F.3d 146 and reproduced at App.1-13. The district court's opinion is not reported. It is reproduced at App.16-63.

JURISDICTION

The Second Circuit issued its opinion on September 15, 2016 and denied Chesapeake's timely petition for rehearing on November 4, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Declaratory Judgment Act, 28 U.S.C. §§2201-02, is reproduced at App.217.

STATEMENT OF THE CASE

A. Chesapeake's Dilemma Concerning Early Redemption of the Notes

1. Chesapeake is a publicly traded oil and gas corporation. App.99. As part of an effort to raise funds, in February 2012 Chesapeake marketed a $1.3 billion Note offering. App.154-155. The Notes were governed by two Indentures, a Base Indenture and a Supplemental Indenture, both of which named the Bank of New York Mellon Trust Co. as their trustee. App.99-100.

The Notes were due in 2019. App.99. But, expecting to gain additional liquidity soon after issuing the Notes, Chesapeake included in the

offering a provision that allowed it to redeem the Notes early at a favorable price. App.155. Specifically, section 1.7 of the Supplemental Indenture gave Chesapeake a right until March 15, 2013, to redeem the Notes in exchange for their par value—that is, by repaying the $1.3 billion in principal plus interest accrued to the redemption date. App.100-101, 155.[1] The Indentures required Chesapeake to give noteholders 30 to 60 days' notice before an early, at-par redemption could be effective.

Chesapeake's window of opportunity was called the "Special Early Redemption Period." App.100. After the Special Early Redemption Period closed, Chesapeake could still redeem the Notes before their maturity date, but only by paying a much higher, and highly punitive, amount designed to deter such redemptions from taking place. App.102-03. That amount, called the Make-Whole Price, would represent the Notes' par value *plus* the present value

---

[1] Section 1.7(b) declared that "[a]t any time from and including November 15, 2012 to and including March 15, 2013 (the 'Special Early Redemption Period'), [Chesapeake], at its option, may redeem the Notes … for a price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption…. [Chesapeake] shall be permitted to exercise [this] option … so long as it gives the notice of redemption pursuant to Section 3.04 of the Base Indenture [*i.e.*, '[a]t least 30 days but not more than 60 days before a redemption date'] during the Special Early Redemption Period." CA2 JA.567, 656.

Section 1.7(c) then declared that "[a]t any time after March 15, 2013 to the Maturity Date, [Chesapeake], at its option, may redeem the Notes … for an amount equal to the Make-Whole Price plus accrued and unpaid interest to the date of redemption." CA2 JA.567.

of interest payments Chesapeake would otherwise have been required to pay through 2019, adjusted using a discount rate highly favorable to the noteholders. App.19-20.[2]

2. By early 2013, Chesapeake's liquidity position had substantially improved. Chesapeake therefore began to consider redeeming the Notes early. At that point, Chesapeake's right to redeem at par was especially valuable given Chesapeake's improved ability to raise capital, allowing Chesapeake to save approximately $100 million in interest compared to holding the Notes to maturity. App.105.

In mid-February, Chesapeake found itself at odds with BNYM over how to interpret the special early redemption period in section 1.7 of the Supplemental Indenture. App.103. If Chesapeake wanted to redeem at par, did it have until March 15 to give notice, with an at-par redemption to follow 30 to 60 days later, that is, by May 14? App.102. Or was the window to complete an at-par redemption narrower, obliging Chesapeake to give notice at least 30 days before March 15, or in other words, by

---

[2] "Make-Whole Price" is somewhat of a misnomer, as such clauses are designed to deter issuers from redeeming early by requiring them to pay investors substantially more than the interest payments investors would lose upon redemption. Only under extraordinary circumstances would it make sense for an issuer to exercise a Make-Whole option. *See, e.g.*, Elizabeth Roy Stanton, *Calling All Bonds*, The Street (July 21, 2000), http://bit.ly/2kdmfCw (last visited Jan. 30, 2017) ("The corporate or high-yield make-whole call is a windfall for the investor."); Steven V. Mann & Eric A. Powers, *Indexing a Bond's Call Price: An Analysis of Make-Whole Call Provisions*, 9 J. Corp. Fin. 535, 536 (2003).

February 13? App.102. Because February 13 had already passed, the answer to that question of contract interpretation would determine whether Chesapeake still had the right to redeem the Notes at par, or instead only at the Make-Whole Price. By that time, the Make-Whole Price exceeded the Notes' par value by some $400 million. App.104.

Chesapeake made crystal clear from the start that *under no circumstances* would it redeem the Notes at the highly punitive Make-Whole Price. App.105. But, at the same time, neither did Chesapeake want to abandon what it believed to be its legitimate (and highly valuable) early at-par redemption right. And the clock was ticking: Chesapeake's right to redeem at par would disappear after May 14 even under its own interpretation of the contract. App.104.

B. Chesapeake Obtains a Declaratory Judgment Finding its Early Redemption Timely

Given this dilemma, Chesapeake did not want to forge ahead with the redemption and risk having to pay the punitive Make-Whole Price if its interpretation of the contract was ultimately rejected in court. Instead, Chesapeake took the more risk-averse option of filing suit in federal court under the Declaratory Judgment Act to obtain a clarification of its contractual rights *before* deciding whether to redeem the Notes early. App.104-105. Indeed, the Declaratory Judgment Act is tailor-made to provide just such an option to parties facing such dilemmas.

Chesapeake filed its suit in the Southern District of New York on March 8, 2013. App.104.

Chesapeake was sufficiently motivated to protect itself against the risk of triggering an obligation to pay the Make-Whole Price that, in addition to seeking a declaratory judgment as to the contract's proper meaning, Chesapeake filed a separate claim (Claim 2) requesting a preliminary injunction that if it gave *notice* of an at-par redemption, such notice would be deemed void—and therefore would not require Chesapeake to complete the redemption—if Chesapeake's interpretation of the contract were rejected, or even if the district court failed to issue a definitive ruling by May 14. App.105. The district court denied the preliminary injunction but assured Chesapeake that it could give notice of an at-par redemption at any time through March 15, without risk; doing so would lock in Chesapeake's right to complete an at-par redemption within 60 days if it were held timely, while allowing Chesapeake to walk away from the redemption under all other circumstances. App.108-111.

With that assurance, Chesapeake issued the Notice on March 15. On May 8—less than 60 days later, and after a whirlwind bench trial—Judge Engelmayer issued a 92-page decision siding with Chesapeake, holding that section 1.7 unambiguously supported Chesapeake's position, and that extrinsic evidence further confirmed that Chesapeake's interpretation of the contract was correct. App.122; App.137-138. The district court thus held that Chesapeake could redeem the Notes at any time up to and including May 14, without incurring an obligation to pay the highly punitive Make-Whole Price. In other words, the district court declared that Chesapeake would be fully within its contractual

rights to redeem the Notes in exchange for their par value and entered a judgment to that effect. App.215-216.

BNYM did not seek a stay of the district court's judgment, even though it had the option to do so. Instead, BNYM filed an ordinary notice of appeal on May 11. App.22. On May 13, while in possession of a valid, unstayed final judgment holding that an early redemption at par would be timely, Chesapeake exercised the rights the district court held it possessed and redeemed the Notes at par. App.22.

C. The Second Circuit's Reversal and Proceedings on Remand

1. Eighteen months later a divided panel of the Second Circuit reversed. App.68-69. The panel majority concluded that, under the Indenture, Chesapeake was required to *complete* an at-par redemption by March 15, and that Chesapeake therefore had to give notice of its intention to do so by February 13. App.74. The panel thus concluded that Chesapeake's March 15 notice had not been effective to complete an at-par redemption. App.74. The panel remanded to the district court to determine the appropriate remedy. App.83.

2. In response to the Second Circuit's decision, Chesapeake conceded an obligation to make restitution to BNYM. Given that it undeniably would not have redeemed the Notes absent its unstayed district court victory, Chesapeake offered to pay enough money to put the parties back in the positions they would have occupied had Chesapeake continued holding the Notes, a figure Chesapeake estimated at around $100 million. App.23-25 & n.3.

But BNYM wanted more. According to BNYM, Chesapeake's decision to seek and obtain a judicial declaration of its rights before acting was *entirely irrelevant*. BNYM therefore rejected restitution and insisted that Chesapeake be forced to pay the highly punitive Make-Whole Price, *i.e.*, the very result Chesapeake went to court to avoid. App.23. Under that theory, Chesapeake would be treated the same as if it had never gone to court *and won*—and, indeed, would be left in a far worse position than if it had gone to district court *and lost* (in which case it would not have redeemed at all).

The parties' disagreement about the proper remedy reflected a more fundamental disagreement about whether the district court's declaratory judgment had any legal effect on Chesapeake's exposure to liability. Both sides understood the dispositive question to be whether Chesapeake's actions—taken under cover of a judgment declaring those actions to be lawful—subjected Chesapeake to the same penalties it would have incurred had it taken those same actions *without* such a judgment. *E.g.*, Dist.Dkt.188 at 1 (BNYM: "When [Chesapeake] redeemed but paid only par, it breached the terms of the Indenture, and must now pay the Make-Whole Price. It's that simple…. 'The Court made me do it' is not an exception to the law of contracts."); Dist.Dkt.184 at 1, 4 (Chesapeake: It is "well-settled in over a century of unbroken precedent" that "[a]n action taken in reliance on a valid district court judgment does not retroactively become a 'breach' of contract if that judgment is reversed.").

Chesapeake further argued that under this Court's longstanding precedents, where a party relies on a district court judgment, an appellate reversal empowers the district court to order *restitution* as needed to restore the parties to their prior positions, but does not permit more than that. Chesapeake urged that this rule of restitution-after-reversal was fully applicable to cases involving declaratory judgments. *E.g.*, Dist.Dkt.189 at 9.

3. The district court sided with BNYM, basing its holding on the sweeping proposition that "every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal." App.50 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J., concurring in part and concurring in the judgment)); *see also* CA2 JA.887-88 (district court describing itself as a mere "pit stop on the way to the Second Circuit," whose initial decision could have only "persuasive value"). The court cited only one authority for the proposition that Chesapeake's favorable declaratory judgment provided zero protection to Chesapeake while it was being appealed: Justice Stevens' solo opinion in *MITE Corp.*, which espoused the same theory in a case involving a statute providing for civil and criminal penalties. App.50; *see MITE Corp.*, 457 U.S. at 630 n.5 (majority opinion).[3]

In response to Chesapeake's argument that after an appellate reversal, federal equitable rules limit a

[3] Justice Stevens' opinion was not joined by any other Justice and was repudiated by three. *See MITE Corp.*, 457 U.S. at 656-61 (Marshall, J., dissenting); *id.* at 646 (Powell, J., concurring in part).

district court to awarding restitution to restore the parties to the status quo *ante*, the district court held that this rule "does not assist Chesapeake," because it applies only to "(1) a losing-defendant-turned-victorious-appellant who (2) *lost* something under *compulsion* of a court order." App.52.

In sum, the district court held that Chesapeake's favorable declaratory judgment had no effect whatsoever on its exposure to liability for actions taken in reliance on that judgment. The district court thus concluded that Chesapeake was little more than an ordinary contract-breacher that should be treated the same as if it had gambled on its reading of section 1.7 by redeeming the Notes without ever having gone to court. The court therefore held that Chesapeake was required to pay the highly punitive Make-Whole Price for its early redemption, and entered judgment against Chesapeake for $438 million. App.66-67.

D. The Decision Below

The Second Circuit affirmed in a short, per curiam opinion "substantially for the reasons set forth in the District Court's … opinion." App.3. Like the district court and BNYM, the Second Circuit treated Chesapeake as a simple contract-breacher, holding that Chesapeake's possession of a favorable, unstayed declaratory judgment at the time of the redemption had no effect on its exposure to liability. It concluded that, "[b]ecause Chesapeake completed its redemption on May 13, 2013, it owed the Noteholders the Make-Whole Price … and it breached the Supplemental Indenture by paying only the At-Par Price." App.10. The Second Circuit

nowhere mentioned the undisputed fact that Chesapeake never would have redeemed the Notes absent the district court's declaratory judgment. Nor did the court acknowledge that, under its holding, Chesapeake was left in a far worse position than it would have been in had it lost in the district court (or had it simply forgone the time and expense of litigation altogether).

Chesapeake filed a timely petition for panel rehearing and rehearing en banc, which the Second Circuit denied on November 4, 2016. App.14-15. Chesapeake then filed a timely motion to stay the mandate pending the filing and resolution of this certiorari petition, which the Second Circuit granted (over BNYM's opposition) on November 17, 2016. CA2.Dkt.120.

REASONS FOR GRANTING THE PETITION

This Court's intervention is needed to dispel pervasive uncertainty about the scope and efficacy of the Declaratory Judgment Act: namely, whether federal equitable principles protect a party that wins a valid, unstayed declaratory judgment from being penalized for taking actions in reliance on that judgment if it is later reversed. Here, faced with uncertainty about whether to redeem its Notes, Chesapeake prudently opted to seek a declaratory judgment before it acted, and it won. At the time Chesapeake redeemed the Notes, it was in possession of a valid, unstayed final judgment from a federal court stating that its conduct did not breach the contract. Yet, according to the Second Circuit, that victory in the end was meaningless and Chesapeake must now pay $438 million in contractual damages

for actions that, absent the judgment, it *never would have taken*. That result treats a declaratory judgment winner no different from a lawbreaker and is as illogical as it is inequitable.

The dilemma Chesapeake confronted in February 2013 was hardly unique. Countless parties assert the right to engage in some form of conduct that another party contends will trigger liability, a state of affairs that puts the purported rights-holder to a choice. He can either abandon the rights he thinks he has, or he can take a gamble: to exercise those rights and risk the consequences if a court later rejects his view of the law. Those consequences can be severe, ranging from the highly punitive contract damages at issue here, to treble damages in the case of an alleged patent infringer, *see* 35 U.S.C. §284, to agency-imposed civil and criminal sanctions, *e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 151-52 (1967), to criminal prosecution and imprisonment, *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 925 (1975).

Like Chesapeake, many parties caught in such a dilemma would refrain from acting altogether unless they can first obtain confirmation from a federal court that the law is on their side. The Declaratory Judgment Act was designed precisely for cases like this and provides a solution to such dilemmas. As this Court recently explained (in a case involving a threatened suit for breach of contract), the Act's very purpose is to ensure that a party unsure of its rights need not "destroy a large building, bet the farm, or … risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights." *MedImmune, Inc. v.*

Genentech, Inc., 549 U.S. 118, 134 (2007). Yet, the decision below would render the Act largely useless for that purpose—at least, for litigants unable to wait for the entire appellate process to run its course before they act—allowing the imposition of undiminished liability on *anyone* who acts in reliance on a district court's final judgment that is later reversed. For all such parties, the decision below would render declaratory relief incapable of mitigating the risks of acting during the only time period that matters.

The decision below is especially misguided because it ignores that the losing party in district court always has the option to seek a stay of the declaratory judgment pending appeal. By removing any obligation to do so, the Second Circuit's decision deprives the winning party of any mechanism to ensure that its favorable judgment provides real protection, save to wait and hope for an appellate victory after the other side has finished pursuing every opportunity for additional review (all of which can take years, as this case well illustrates).

That counterintuitive conclusion is in deep tension with the Declaratory Judgment Act's text and most basic purposes, as well as with more than a century of this Court's precedents. That alone would warrant certiorari. But this Court's intervention is all the more imperative because there has been persistent division in the lower courts on the appropriate answer to this high-stakes question. This Court should grant certiorari to resolve this confusion and settle once and for all whether a district court's declaratory judgment really does have

"the force and effect of a final judgment or decree," as the Declaratory Judgment Act promises. 28 U.S.C. §2201(a).

At a minimum, however, the Court should hold this case pending its disposition of *Nelson v. Colorado*, No. 15-1256 (argued Jan. 9, 2017). Like this case, *Nelson* addresses the proper remedy in the wake of an appellate reversal. Indeed, the petitioner in *Nelson* cited many of the same cases that Chesapeake addressed extensively in its briefing below (and in this petition). Although the best course would be to grant certiorari here outright, the Court should at the very least hold this petition until it decides *Nelson* given the significant overlap between the issues in both cases.

I. The Second Circuit's Decision Conflicts With The Declaratory Judgment Act And Well-Established Equitable Principles.

A. The Decision Below Cannot Be Squared With The Text Of The Declaratory Judgment Act.

The text of the Declaratory Judgment Act makes clear that an unstayed declaratory judgment is fully valid and binding while it is being appealed. The Act provides that a declaratory judgment serves to "declare the rights and other legal relations" of the parties before the court, and that "[a]ny such declaration shall have the force and effect of a *final judgment or decree* and *shall be reviewable as such*." 28 U.S.C. §2201(a) (emphasis added). Declaratory judgments therefore have the same force and effect as permanent injunctions and other remedies attached to final judgments. And by making

declaratory judgments "reviewable as such," the Act forecloses any suggestion that such decrees lack full legal effect until all appeals have run their course.

Neither BNYM nor either court below has ever identified another type of unstayed final judgment or decree that is effectively meaningless until all appeals have been resolved. To the contrary, this Court explained long ago that "according to the principles and usages of a court of equity, …. an appeal from a decree granting, refusing, or dissolving an injunction *does not disturb its operative effect*." *Hovey v. McDonald*, 109 U.S. 150, 160-61 (1883) (emphasis added). Although a court "undoubtedly" has the power to "suspend[] … the injunction, during the pendency of the appeal," if the court "fail[s] to do" so, "the force of the decree [is] not affected by the appeal." *Id.* at 161-62. Those principles remain equally true today. As this Court recently explained, "the way in which the law ordinarily treats trial court judgments" requires that "[u]nless a court issues a stay, a trial court's judgment … normally takes effect despite a pending appeal. And a judgment's preclusive effect is generally immediate, notwithstanding any appeal." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015) (citation omitted).

Because those principles govern declaratory judgments just as much as they govern all other judgments and decrees (as the Act's text requires), and because BNYM never even sought (much less obtained) a stay of the district court's declaratory judgment pending appeal, the district court's judgment was a fully valid and binding decree at the time Chesapeake acted in reliance on it. The text of

the Declaratory Judgment Act thus forecloses BNYM's theory, fully endorsed by the Second Circuit, that such judgments are merely "tenuous" due to the losing side's "right of appellate review," BNYM Br. at 25, and that "a party relies on a declaratory judgment at its peril if the judgment remains subject to appeal," BNYM Br. at 1.[4]

Because an unstayed declaratory judgment remains in force while it is being appealed, a party cannot be penalized for reliance on such a decree. As this Court held in *Hovey*, if a party acts pursuant to an unstayed decree while it is being appealed, "there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded." 109 U.S. at 159. The ultimately prevailing party cannot recover more than restitution because a decree that "issues erroneously" is "the act of a court, not of the party who prays for it." *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617) (Baldwin, Circuit J.). That is, "[a] person who takes advantage of a judgment in his favor is not in any

---

[4] Indeed, under the reasoning of the decision below—which treats a reversed declaratory judgment as though it had never been entered at all—it becomes difficult to distinguish a declaratory judgment from a forbidden advisory opinion. *See, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (declaratory judgment would be an unconstitutional advisory opinion because it would not have "coercive impact on the legal rights or obligations of either party"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242-43 (1937) (declaratory judgment complies with Article III only insofar as it represents "an adjudication of present right" that is "final and conclusive as to the matters thus determined").

sense a wrongdoer …, and he should not be penalized because of a mistake made by the court." Restatement (First) of Restitution §74, Reporter's Notes (1937).

This basic principle is recognized throughout the law. *See, e.g.*, Restatement (First) of Torts §§210, 266, 276(1), 277 (1934) (providing immunity to one who interferes with another's rights in chattel or land pursuant to a writ, decree, or other court order later deemed erroneous); Model Penal Code §2.04(3)(b)(ii) (Am. Law Inst. 1985) (recognizing defense to prosecution for defendant who relies on "a judicial decision, opinion or judgment" that is "afterward determined to be invalid or erroneous").

B. The Second Circuit's Decision Thwarts A Declaratory Judgment's Essential Purpose.

Congress' purpose in enacting the Declaratory Judgment Act further underscores the profound flaws with the Second Circuit's decision. The Act is designed to give parties an opportunity to clarify their rights and obligations *before* acting, to dispel the uncertainty that would otherwise deter them from acting for fear of incurring liability if a court later disagrees. *See, e.g.*, *MedImmune*, 549 U.S. at 134 (under Declaratory Judgment Act, a party need not "destroy a large building, bet the farm, or … risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights").

Like Chesapeake, most parties that seek declaratory relief *would not act at all* absent a judicial decision holding that their proposed conduct

would not subject them to liability. And, also like Chesapeake, many declaratory judgment plaintiffs assert rights that are time-sensitive, whose value is likely to diminish or disappear if not acted on until every avenue for appellate review has been exhausted. Examples from this Court's precedents abound: the plaintiff businesses in *Doran*, who would "suffer a substantial loss of business and perhaps even bankruptcy" if forced to close until their suit finished wending its way through the courts, 422 U.S. at 932; the plaintiff in *Roe v. Wade*, who was awarded purely declaratory relief by the district court two-and-a-half years before the Supreme Court affirmed, 410 U.S. 113, 166 (1973); the plaintiffs in *Bowers v. Hardwick*, who sought only declaratory relief, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring); and the parties in *Buckley v. Valeo*, whose declaratory judgment action sought to vindicate their right to political speech and full participation in upcoming elections, 424 U.S. 1, 6-9 (1976) (per curiam).

The Declaratory Judgment Act could not possibly achieve its objectives if it gave zero protection to victorious parties until their case finished traversing all tiers of the federal judiciary. If the Second Circuit's approach were correct, declaratory relief in such cases would "serve[] no useful purpose as a final determination of rights." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). It would inevitably vitiate "the substantial effect" which "Congress recognized … declaratory relief would have on legal disputes," and would thwart Congress' goal of "permit[ting] the federal courts 'the power to exercise in some instances preventive relief.'"

California v. Grace Brethren Church, 457 U.S. 393, 408 n.21 (1982) (quoting H.R. Rep. No. 73-1264, at 2 (1934)).

Indeed, as BNYM fully recognized, the Second Circuit's reasoning is not limited to contract disputes or disputes between private citizens. Dist.Dkt.188 at 6-7. Rather, if the decision below is correct, it must apply with equal force to *any* party holding a declaratory judgment in *any* domain, making reliance on declaratory relief perilous across the board. The effect would be to severely diminish the Act's capacity to provide guidance to many a "hapless plaintiff" who is stuck "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). Under the panel's reasoning, a party that relies on a declaratory judgment *is* flouting state law—notwithstanding his possession of a valid, unstayed judgment to the contrary—and is to be treated as nothing more than a lawbreaker if the judgment is later reversed. A judicial decree that affords no meaningful protection until all appeals have run their course is not worth the paper it is printed on, especially where (as here) a party seeks clarification of its rights on a highly time-sensitive issue.

This Court has long sought to avoid the precise dilemma presented here. In *Ex parte Young*, for instance, this Court recognized that when the scope of a party's rights "is a proper subject of judicial investigation," it would effectively "close up all approaches to the courts," if such party could obtain a

definitive resolution of his rights "only upon the condition that" he must first exercise them and, if a court rejects his view, "suffer imprisonment and pay fines." 209 U.S. 123, 147-48 (1908). Yet that is exactly the effect the Second Circuit's decision will have in cases like this one, where time pressures will inevitably force a party either to abandon his rights or to exercise them before the judicial investigation can reach a determinate conclusion. *See also, e.g.*, *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 668 (1915) (need to preserve meaningful access to courts requires that, in most cases, "penalties [for violating state-prescribed rates] could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a court of equity").

C. The Decision Below Conflicts With This Court's Precedents.

This Court's precedents reinforce the common-sense rule that a party cannot be made *worse* off for having won and relied on a valid, unstayed district court judgment. That is, if a party obtains a final judgment holding that a contemplated act will not subject it to a specified form of liability—and that judgment is not stayed pending appeal—the party may take the contemplated act, secure in the knowledge that an appellate reversal will not trigger the very liability the district court held it would not incur.

For example, in *Oklahoma Operating Co. v. Love*, Justice Brandeis' opinion for a unanimous Court affirmed the award of a preliminary injunction against allegedly confiscatory rate regulation, and—

crucially—went on to hold that, "[i]f upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue *to restrain enforcement of penalties accrued pendente lite*." 252 U.S. 331, 338 (1920) (emphasis added). In other words, the parties obtained a reversible decree holding that they would not incur penalties if they charged rates higher than those prescribed by state law. And it necessarily followed that if they acted pursuant to their judicially determined rights and the decree were later vacated or reversed, they would not be treated as though they had taken the same actions without first obtaining a favorable decree. That rule is directly contrary to the decision below. Indeed, if a preliminary injunction—which is not even a *final* judgment—has sufficient force to insulate a party who relies on it from incurring the liability that would be imposed on a party who behaved identically but without first going to court, then it follows *a fortiori* that a final declaratory judgment must have such effect as well.

Similarly, in *Great Lakes Dredge & Dock Co. v. Huffman*, this Court held that the federal policy against interfering with state taxes forbade federal courts from issuing not only injunctions, but also declaratory judgments. 319 U.S. 293, 299 (1943). The Court reasoned that a declaratory judgment, although "used only to procure a determination of the rights of the parties," "may in every practical sense operate to suspend collection of the state taxes *until the litigation is ended*." *Id.* (emphasis added). That reasoning makes sense only if the party who wins a declaratory judgment in the district court, and withholds taxes pending appeal, may not then be

subject to civil or criminal liability should the declaratory judgment later be reversed. Such a party could surely be ordered to pay back taxes, as that would merely unwind the effects of the litigation, just like the restitutionary remedy that Chesapeake believes is appropriate here. But the proper remedy would *not* be the Second Circuit's, which would subject the party to daily accruing penalties (or worse) racked up during the pending appeal, just as if he had withheld his taxes without first procuring a declaratory judgment.

The same principle was an indispensable part of this Court's holding in *Doran*, a case involving two topless bars that violated a local anti-nudity ordinance in reliance on a district court's grant of a preliminary injunction. 422 U.S. at 925. This Court unanimously affirmed the district court's preliminary decree, reasoning that "absent preliminary relief [the bars] would suffer a substantial loss of business and perhaps even bankruptcy," which could render "a favorable final judgment … useless." *Id.* at 932. But the Court explained that "[a]t the conclusion of a successful federal challenge …, *a district court* can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Id.* at 931 (emphasis added).

The cases just discussed make clear that a party who wins declaratory relief in the district court is expected and entitled to rely on it, which is exactly what Chesapeake did here. Absent the relevant decree, Chesapeake would not have redeemed its Notes, just as the taxpayers discussed in *Great Lakes*

would not withhold their taxes, the bars in *Doran* would not carry on with their nude dancing, and the businesses in *Oklahoma Operating Co.* would not charge rates higher than state law allowed. And yet this Court was confident that all those parties would exercise their still-contested rights with only a reversible decree in hand. It is difficult to imagine how those cases would make sense except on the premise that the initially prevailing party may not be made *worse off* for having won and relied on its initial judgment.

Indeed, if BNYM believed that Chesapeake should *not* have been entitled to rely on the district court's declaratory judgment until after appellate review had been completed, it had a straightforward remedy: seek a stay of the declaratory judgment pending appeal. Or the district court could have stayed the judgment on its own. Either way, there is no question that district courts (and courts of appeals) have authority to stay declaratory relief pending appeal. *See, e.g.*, *Buckley*, 424 U.S. at 142-44 (staying declaratory judgment for 30 days); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (granting stay of declaratory judgment pending appeal); *Auto-Owners Ins. Co. v. Potter*, 242 F. App'x 94, 101-03 (4th Cir. 2007) ("Federal declaratory judgments have the force and effect of a final judgment" and "parties may seek a stay of the judgment pending appeal.").[5]

[5] *See also, e.g.*, *Legalization Assistance Project v. INS*, 976 F.2d 1198, 1202 (9th Cir. 1992), *vacated sub nom.* 510 U.S. 1007 (1993) ("The district court granted both declaratory and injunctive relief.... The district court also granted the

Absent such a stay, a declaratory judgment remains final, valid, and binding on all parties, and this Court's precedents demonstrate that the prevailing party is entitled to rely on that decree. The Second Circuit seriously departed from those precedents by treating Chesapeake the same as an ordinary lawbreaker who took no steps to clarify its rights before acting.

D. The Decision Below Improperly Eliminates The Federal Restitution-After-Reversal Rule In Declaratory Judgment Actions.

As Chesapeake has maintained from the start, this Court has also made clear that when a party appeals an adverse judgment and wins a reversal, it is entitled at most to restitution to restore the status quo *ante*. That rule—which protects both the initially prevailing party and the party that wins in the end—follows naturally from the principles discussed above, namely, that "[a] person who takes advantage of a judgment in his favor is not in any sense a wrongdoer …, and he should not be penalized because of a mistake made by the court."

---

government's motion for a stay of all relief pending appeal to this court."); *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992) (declaratory nature of judgment does not affect availability of stay pending appeal); *Lawson Envtl. Servs., LLC v. United States*, 128 Fed. Cl. 14, 16-17 (2016) ("Rule 62(c) is the proper procedural vehicle" for party to obtain a stay of district court judgment pending appeal, even when action involves "only declaratory relief"); *Gay Lesbian Bisexual All. v. Sessions*, 917 F. Supp. 1558, 1563 (M.D. Ala. 1996) (considering but denying motion to stay, pending appeal, declaratory judgment that state statute is unconstitutional).

Restatement (First) of Restitution §74, Reporter's Notes (1937).

This Court has long held that a trial court whose judgment is reversed should "correct that which has been wrongfully done by virtue of its process," *Arkadelphia Milling v. St. Louis Sw. Ry.*, 249 U.S. 134, 146 (1919), and "restore, so far as possible, the parties to their former position," *Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891). A court's power to undo an erroneous judgment and return the parties to the status quo *ante* is so fundamental that it resides in the equitable powers "inherent in every court of justice." *Arkadelphia*, 249 U.S. at 146. Indeed, the rule that restitution is the appropriate remedy following an appellate reversal was already "long established and of general application" nearly a century ago. *Id.* at 145; *see also id.* (rule was "recognized in the practice of the courts of common law from an early period"). This Court has applied the rule of restitution-after-reversal many times, in a wide variety of contexts. *See, e.g.*, *Nw. Fuel Co.*, 139 U.S. at 219; *Arkadelphia*, 249 U.S. at 146; *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 786 (1929); *Atl. Coast Line R.R. v. Fla.*, 295 U.S. 301, 309 (1935); *United States v. Morgan*, 307 U.S. 183, 197 (1939).

Here, however, the district court (whose reasoning was adopted by the Second Circuit) held that the rule of restitution-after-reversal "does not assist Chesapeake," because it applies only to "(1) a losing-defendant-turned-victorious-appellant who (2) *lost* something under *compulsion* of a court order."

App.52. Those limitations on the doctrine have no basis in this Court's precedents.

First, the distinction between initially-prevailing defendants and plaintiffs makes little sense in the context of a declaratory judgment action. The whole purpose of a declaratory judgment suit is to allow a party to initiate litigation *as a plaintiff* to obtain an early adjudication of its rights that would otherwise be determined in a suit brought by the counterparty against the declaratory-judgment-plaintiff *as a defendant*. In placing talismanic significance on whether the initially prevailing party was a plaintiff or defendant, the district court and the Second Circuit apparently overlooked the fact that the seminal restitution-after-reversal cases mostly pre-dated the enactment of the Declaratory Judgment Act in 1934. But that in no way justifies placing an artificial and counterproductive limitation on the doctrine.

Second, as explained above, the text of the Declaratory Judgment Act requires that declaratory judgments be reviewed in the same manner as other final decrees. 28 U.S.C. §2201(a). The Act thus makes clear that the restitution-after-reversal doctrine applies with full force regardless of whether the underlying relief is declaratory or injunctive in nature.

For the same reasons, the district court was flatly wrong to assert that the rule is inapposite because Chesapeake "was not *compelled* by a court to do (or refrain from doing) anything." App.53. That reasoning proves far too much, for it is always true that a declaratory judgment does not literally compel

either party to do anything. But this hardly suggests that a prevailing party exposes itself to liability beyond restitution if it relies on the court's judgment. Indeed, litigants are *expected* to rely on declaratory judgments. *E.g.*, *Poe v. Gerstein*, 417 U.S. 281, 282 (1974) (per curiam) (affirming district court's denial of injunction—even though it had entered a declaratory judgment—because Court was confident defendants would "acquiesce in the decision" (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 165 (1943))); *Miers*, 542 F.3d at 911 (courts "have long presumed" that parties to a declaratory action "will adhere to the law as declared by the court," such that a "declaratory judgment is the functional equivalent of an injunction").

Moreover, the courts below got things backwards by fixating on whether *Chesapeake* was the party that was compelled to do something. In none of this Court's restitution-after-reversal cases was the party who *won* a subsequently reversed judgment forced to do something. Rather, the point is that the party who *lost* was forced to do something when the victorious party executed its judgment, which of course it was under no obligation to do. Here, BNYM is the party that was compelled to hand over the Notes in exchange for the at-par price when Chesapeake exercised what the district court held to be its contractual right of redemption. That is why BNYM is now entitled to restitution (but nothing more).

Thus, for example, in *Bank of the United States v. Bank of Washington*, two men won a money judgment against the Bank of Washington, which

they then executed, compelling the Bank to pay $881.18. 31 U.S. (6 Pet.) 8, 15 (1832). The judgment was subsequently reversed, and the men had to make restitution to the Bank under the rule that "upon an erroneous judgment, *if there be a regular execution*," the party "who has received the benefit of the erroneous judgment" bears an "obligation … to make restitution to the other party for what he has lost." *Id.* at 15-17 (emphasis added). The men who won the erroneous judgment were not *compelled* to take advantage of it, any more than Chesapeake was compelled to redeem at par. But their free will in no way exposed them to liability *beyond* simple restitution, nor is BNYM entitled to such a windfall here.

In sum, although the district court's later-reversed grant of declaratory relief enables BNYM to recover in restitution as necessary to restore the economic status quo *ante*, BNYM may not receive contract damages in excess of that amount. The Second Circuit's holding to the contrary gives BNYM a wholly unwarranted, nine-figure windfall and improperly punishes Chesapeake for being cautious and diligent in obtaining a declaration of its rights before proceeding with the redemption. That result cannot be squared with this Court's precedents or common sense, and it will leave future litigants to act at their peril even when they seek a clarification of their rights from a federal court.

II. The Decision Below Contributes To Widespread Disagreement Among The Lower Courts.

For years, there has been pervasive confusion in the lower courts about whether a party that wins a declaratory judgment may rely on it while it remains subject to appeal. Some courts, like the Second Circuit in this case, have held that a party that relies on such a judgment does so at its peril—and will be treated as though it had never secured a favorable judgment should that judgment later be reversed. Other courts have held the opposite.

On one side of this divide are courts holding that a party who obtains a declaratory judgment, and acts in compliance with it, cannot be penalized for acts taken while it is in effect. As the Fourth Circuit has reasoned, "[f]ederal declaratory judgments have the force and effect of a final judgment—while parties may seek a stay of the judgment pending appeal, no stay was sought in this case," and thus the party in question "did not breach its contract" by relying on a later-reversed declaratory judgment. *Auto-Owners Ins. Co.*, 242 F. App'x at 101-03. The D.C. Circuit has similarly described it as "obvious" that "a federal judgment"—including a district court's declaratory judgment—"later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect." *Clarke v. United States*, 915 F.2d 699, 701-02 (D.C. Cir. 1990).

The Third Circuit has reached the same conclusion, holding that just as a party enjoys "immunity [if he] delivers a chattel or enters land in obedience to a court order fair on its face even though

that order is erroneous," so, too, "[i]f [a] litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties for that act or omission." *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943); *see also id.* ("[U]ntil the [district court's] order … was vacated, … it stood and the litigant can hardly be asked to determine at his peril the correctness of the court's decision."). In the event the initial unstayed decision is reversed, the most a court can do is to put "the matter *where it was before this litigation began*." *Id.* (emphasis added). The Seventh Circuit, too, has properly recognized that "a declaratory judgment [entered by a district court] is a real judgment, not just a bit of friendly advice," precisely because "it has the same effect as an injunction in fixing the parties' legal entitlements." *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010).[6]

---

[6] A number of district courts have reached the same conclusion. *See, e.g.*, *Nat'l Union Fire Ins. Co. v. Seagate Tech., Inc.*, No. C 04-01593 WHA, 2013 WL 1282971, at *1 (N.D. Cal. Mar. 27, 2013) ("[T]here was no breach" when party acted "in reliance on the district court judgment that was subsequently reversed."); *Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1316 (N.D. Fla. 2011) ("[T]o suggest that a declaratory judgment will only be effective and binding on the parties after the appeals process has fully run its course is manifestly incorrect and inconsistent with well established statutory and case law."); *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998) ("The government's decision to appeal this Court's ruling does not affect the validity of the declaratory judgment unless and until the judgment is reversed on appeal or the government seeks and is granted a stay pending appeal.").

Other courts, like the Second Circuit, have taken a contrary view, and those cases underscore that the Second Circuit's reasoning is by no means limited to the context of a civil contract suit. For example, the Ninth Circuit has held (as a matter of due process) that a person may be criminally prosecuted if he relies on a district court or court of appeals decision holding his conduct lawful, if that judgment is later reversed. *United States v. Qualls*, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999). *Qualls* overturned *United States v. Albertini*, which had held that where a party "obtained a declaratory judgment from this court that the actions in which he engaged were lawful," he "should be able to depend on that ruling to protect like activities from criminal conviction until that opinion is reversed." 830 F.2d 985, 989 (9th Cir. 1987); *see also Heartland By-Prod., Inc. v. United States*, 568 F.3d 1360, 1367 (Fed. Cir. 2009) ("[T]he government's failure to abide by the *Heartland I* declaratory judgment pending appeal appears not to have been unlawful.").

The decision below contributes to and deepens this uncertainty about the consequences of relying on a later-reversed declaratory judgment. There is simply no viable way to distinguish the Second Circuit's decision from the Third, Fourth, and D.C. Circuit cases cited above. If Chesapeake had no protection for the exercise of its judicially determined contract rights while its favorable judgment was being appealed, the same must be true for a litigant that obtains a favorable determination of its constitutional rights. Indeed, as this Court recently confirmed—in a declaratory judgment action involving a threatened breach-of-contract suit—the

"dilemma" a person faces when he is "put[] … to the choice between abandoning his rights or risking prosecution … is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate,'" and it makes no difference whether he "is coerced by threatened enforcement action of *a private party* rather than the government." *MedImmune*, 549 U.S. at 129-30; *see also id.* at 134 n.12 (in suits for declaratory relief there is "no principled reason" to treat a "threatened *government* enforcement action" differently from a "threatened *private* enforcement action").

In sum, the decision below illustrates and deepens the confusion among the lower courts about the nature and effect of an unstayed declaratory judgment while it remains subject to appeal. Given the fundamental nature of the question and the high stakes involved, this Court's intervention is plainly warranted.

III. At A Minimum, The Court Should Hold This Petition Pending Its Resolution Of *Nelson v. Colorado*.

For all the reasons set forth above, this case warrants certiorari in its own right. At a minimum, however, the Court should hold this petition pending its disposition of *Nelson v. Colorado*, No. 15-1256 (argued Jan. 9, 2017). *Nelson* will address whether a criminal defendant is entitled to a refund of monetary penalties when a conviction is subsequently reversed. Although *Nelson* is a criminal case whereas this case arises in the civil context, both address the basic question of the proper remedy when an initial judgment is later reversed.

Indeed, underscoring the close connection between the two cases, the Petitioner in *Nelson* has cited many of the very same cases that Chesapeake has cited in urging application of the restitution-after-reversal rule. *Compare* Br. for Petitioner, No. 15-1256 (filed Nov. 14, 2016) (citing cases such as *Arkadelphia*, *Nw. Fuel*, and *Baltimore & Ohio R.R. Co.*), *with supra* 27-31 (citing same cases).

Given that this Court's decision and reasoning in *Nelson* may significantly affect the disposition of this case, the Court should hold this petition pending its disposition of *Nelson* if it does not grant certiorari outright.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
KEVIN M. NEYLAN, JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 2, 2017

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 15-2366-cv (Sept. 15, 2016) App-1

Appendix B

Order Denying Rehearing, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 15-2366-cv (Nov. 4, 2016) App-14

Appendix C

Opinion & Order, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 10, 2015) App-16

Appendix D

Judgment, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 13, 2015) App-64

Appendix E

Amended Judgment, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (July 17, 2015) App-66

Appendix F

Opinion, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-1893-cv (Nov. 25, 2014) App-68

Appendix G

Order Denying Rehearing, United States Court of Appeals for the Second Circuit, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-1893-cv (Feb. 6, 2015) App-95

Appendix H

Opinion & Order, United States District Court for the Southern District of New York, *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, No. 13-cv-1582 (May 8, 2013) App-97

Appendix I

Relevant Statutory Provisions App-217

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-2366-cv

CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

Argued: June 13, 2016
Decided: September 15, 2016

Before: Cabranes, Lohier, and Carney,
Circuit Judges.

OPINION

On appeal from a July 17, 2015 judgment of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *Judge*), awarding damages to Noteholders represented by defendant-appellee Bank of New York Mellon Trust Company, N.A., as the Indenture Trustee, in the

amount of $438,717,561.67. The District Court's damages award represented the difference between the "At-Par Price" paid to the Noteholders by plaintiff-appellant Chesapeake Energy Corporation for its early redemption of Notes in May 2013 and the "Make-Whole Price" it should have paid for that redemption consistent with the Supplemental Indenture, plus prejudgment interest.

Plaintiff principally contends on appeal that the District Court erred by awarding the Noteholders damages in the amount of the difference between the "At-Par Price" and the "Make-Whole Price." Plaintiff insists that the only reason it exercised its early-redemption right was because it had relied on the District Court's declaratory ruling that the price of its redemption would be "At Par"—a ruling that this Court later reversed on appeal after the redemption was complete. Plaintiff therefore argues that, on remand, the District Court should have awarded restitution to the Noteholders, rather than the higher quantum of contract-based damages predicated on the "Make-Whole Price."

We disagree. Substantially for the reasons set forth in the District Court's thorough July 10, 2015 opinion, we AFFIRM the judgment of the District Court.

PER CURIAM:

The principal question presented is whether the District Court correctly determined the measure of compensation due to Noteholders, represented by defendant-appellee Bank of New York Mellon Trust Company, N.A. ("BNY Mellon"), arising from the underpayment to the Noteholders by plaintiff-

appellant Chesapeake Energy Corporation ("Chesapeake") in connection with Chesapeake's early redemption of the Notes on May 13, 2013. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co.* (*Chesapeake III*), No. 13 Civ. 1582 (PAE), 2015 WL 4191419 (S.D.N.Y. July 10, 2015). We conclude that it did.

Accordingly, substantially for the reasons set forth in the District Court's thorough July 10, 2015 opinion, we AFFIRM the judgment of the District Court.

BACKGROUND

At the outset, we note that a thorough account of the facts and procedural history of the case—which are entwined—can be found in the past opinions by our Court and the District Court in this case. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co.* (*Chesapeake II*), 773 F.3d 110 (2d Cir. 2014); *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co.* (*Chesapeake I*), 957 F. Supp. 2d 316 (S.D.N.Y. 2013), *rev'd*, *Chesapeake II*, 773 F.3d at 112; *see also Chesapeake III*, 2015 WL 4191419. We therefore assume the readers' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. Nevertheless, we pause to briefly recount the key facts and procedural history necessary to explain our decision to affirm.

In February 2012, Chesapeake, a publicly traded oil-and-natural-gas producer, issued $1.3 billion in senior notes due March 15, 2019, bearing an interest rate of 6.775 percent (the "Notes"). The Notes were governed by a Base Indenture as well as a Supplemental Indenture, the latter of which is

especially relevant to this appeal. Indeed, the Supplemental Indenture established two types of early redemption rights, exercisable at Chesapeake's option, that have been central to this case.

Section 1.7(b) of the Supplemental Indenture provided in pertinent part that

> At any time from and including November 15, 2012 to and including March 15, 2013 (the "Special Early Redemption Period"), . . . [Chesapeake], at its option, may redeem the Notes . . . for a price equal to 100% of the principal amount . . . plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption [the "At-Par Price"] . . . [Chesapeake] shall be permitted to exercise its option . . . so long as it gives the notice of redemption pursuant to Section 3.04 of the Base Indenture during the Special Early Redemption Period.

J.A. 567.[1] In turn, Section 3.04 of the Base Indenture required that Chesapeake give the notice of redemption at least 30 days but not more than 60 days before the date of redemption. J.A. 656.

Separately, Section 1.7(c) of the Supplemental Indenture provided in pertinent part that "[a]t any time after March 15, 2013 to the Maturity Date, [Chesapeake], at its option, may redeem the Notes . . . for an amount equal to the Make-Whole Price plus accrued and unpaid interest to the date of redemption . . . ." J.A. 567. The Make-Whole Price was defined to mean the sum of the present value of

[1] "J.A." refers to the Joint Appendix.

the principal of the Notes and remaining interest payments. J.A. 574.

On February 20, 2013, Chesapeake announced that it planned to exercise its right of redemption pursuant to Section 1.7(b) of the Supplemental Indenture—for the At-Par Price. BNY Mellon notified Chesapeake, however, that, in its view, the notice deadline for a redemption under Section 1.7(b) had already passed. In the view of BNY Mellon, Chesapeake was required to give at least 30 days' notice before March 15, 2013 to redeem "At Par" under Section 1.7(b). BNY Mellon further warned Chesapeake that it might, as indenture trustee, treat a prospective redemption as requiring payment of the Make-Whole Price under Section 1.7(c), due to the redemption's tardiness under Section 1.7(b). On March 8, 2013, Chesapeake filed an action against BNY Mellon in the District Court seeking a declaratory judgment on two counts: that (1) its Notice of Redemption attached to its complaint would be timely under Section 1.7(b) to redeem "At Par" if mailed by March 15, 2013, and would be effective on May 13, 2013; and (2) in the event that the Notice is determined not to be timely, or if the District Court has not ruled by the May 13 redemption date, the Notice shall be deemed null and void (rather than deemed to trigger redemption at the Make-Whole Price). Chesapeake issued its Notice of Redemption on March 15, 2013.

On May 8, 2013, following a bench trial, the District Court ruled that the Notice of Redemption was timely under Section 1.7(b), and the District Court therefore entered judgment in favor of

Chesapeake on its first count. *See Chesapeake I*, 957 F. Supp. 2d at 374. As a result of that decision, the District Court ruled that Chesapeake's second count was moot. *Id.* BNY Mellon filed a notice of appeal on May 11, 2013. Two days later, on May 13, 2013, Chesapeake proceeded with its early redemption, paying the Noteholders approximately $1.3 billion pursuant to Section 1.7(b) of the Supplemental Indenture. The completion of this redemption, however, did not conclude this litigation.

On November 25, 2014, this Court reversed the District Court's May 8, 2013 judgment in favor of Chesapeake on its first count, holding that Chesapeake's Notice of Redemption was untimely to effect an "At Par" redemption under Section 1.7(b) of the Supplemental Indenture. *See Chesapeake II*, 773 F.3d at 117. We remanded the cause to the District Court for consideration of Chesapeake's second count, however, which had requested a declaratory judgment that Chesapeake had not noticed a redemption at the Make-Whole Price. *See id.*

The subject of the instant appeal is the District Court's July 10, 2015 decision on remand from this Court. First, the District Court determined that the second count of Chesapeake's complaint remained moot insofar as it sought nullification only of Chesapeake's *notice* of redemption, but had no bearing on the redemption itself, which had already been completed.[2] *See Chesapeake III*, 2015 WL 4191419, at *5-6. Second, the District Court, after receiving briefing from the parties, awarded the

---

[2] Chesapeake does not challenge this ruling on appeal.

Noteholders contract-based damages in the amount of the difference between the At-Par Price that Chesapeake had already paid to the Noteholders for the redemption and the Make-Whole Price that Chesapeake should have paid, equal to $379,650,133.21, plus prejudgment interest, for a total of $438,717,561.67. *Id.* at *18.[3] The District Court entered judgment on July 13, 2015, and entered an amended judgment on July 17, 2015. This appeal followed.

DISCUSSION

On appeal, Chesapeake principally contends that the District Court erred by awarding contract-based damages—calculated based on the difference between the At-Par Price and the Make-Whole Price—and that the District Court should instead have awarded restitution to the Noteholders for Chesapeake's underpayment. Chesapeake argues that "federal law is clear that the remedy for actions taken in reliance on a judgment that is later reversed is restitution putting the note holders back in the same economic position they occupied before the redemption, not a claim for breach of contract." Pl. Br. 2; *see id.* at 21-43. Chesapeake refers to this principle as "the long-

---

[3] The District Court exercised its authority under 28 U.S.C. § 2202 of the Declaratory Judgment Act to grant "[f]urther necessary or proper relief based on [its] declaratory judgment . . . against any adverse party whose rights [had] been determined by such judgment." 28 U.S.C. § 2202. Chesapeake, which had originally filed the action for declaratory judgment, but against whom the relief was granted, does not argue on appeal that the District Court erred in holding that § 2202 was the proper procedural mechanism for awarding compensation to the Noteholders.

established doctrine of restitution after reversal." *Id.* at 3. Chesapeake further argues that, "even applying a contract-based analysis, the district court should have ended up at the same place because under New York law it was flatly improper to treat the Make-Whole Price as the measure of contract damages." *Id.* at 2; *see id.* at 43-58. We disagree in both respects.

Substantially for the reasons set forth in the District Court's thorough July 10, 2015 opinion, *see generally Chesapeake III*, 2015 WL 4191419, at *7-17*,* we conclude that the District Court correctly determined the measure of compensation due to the Noteholders in the circumstances presented. We summarize those reasons as follows.

Under New York law, as the District Court explained, an indenture like the one at issue here is a form of contract. *See, e.g.*, *Bank of N.Y. Tr. Co. v. Franklin Advisers, Inc.*, 726 F.3d 269, 276 (2d Cir. 2013); *Quadrant Structured Prods., Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014). And where a valid and enforceable contract governs the relevant subject matter of the parties' dispute, the contract—rather than principles of restitution—should determine the measure of a party's recovery for events arising from that subject matter. *See, e.g.*, *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 964 (2d Cir. 1998) (observing that, under "well-settled principles of New York law . . . . the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract . . . for events arising out of the same subject matter" (internal quotation marks omitted)); *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d

382, 389 (1987) ("It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.").[4] The cases relied upon by Chesapeake do not hold otherwise.[5]

---

[4] Section 2(2) of the Restatement (Third) of Restitution and Unjust Enrichment observes that "[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 2(2) (Am. Law Inst. 2011). Contract-based remedies are superior to restitution, the Restatement explains, because a contract "eliminates, or minimizes, the fundamental difficulty of valuation. . . . [T]he parties' own definition of their respective obligations . . . take[s] precedence over the obligations that the law would impose in the absence of agreement. Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach." *Id.* § 2, cmt. c.

[5] For example, the principal case involving a contract that Chesapeake relies upon is *Northwestern Fuel Co. v. Brock*, where the Supreme Court upheld an award of restitution to defendants who had paid breach-of-contract damages to a plaintiff pursuant to a judgment that the trial court had no jurisdiction to enter. 139 U.S. 216 (1891). The Court reasoned that the trial court had the power "to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, so far as possible, the parties to their former position." *Id.* at 219. But *Brock* did *not* hold that restitution should displace the parties' contract rights and obligations. And whereas restitution was necessary in *Brock* to "undo" the trial court's erroneous judgment, restitution is unnecessary and inappropriate here, where the Supplemental Indenture determined the price of the redemption. *Cf.* Restatement (Second) of Contracts § 373(2) (Am. Law Inst.

Here, applying New York law, Section 1.7 of the Supplemental Indenture—a contract Chesapeake does not contend was invalid or unenforceable—dictates the Noteholders' recovery arising from Chesapeake's underpayment for its May 13, 2013 redemption. Indeed, properly framed, the relevant subject matter of the parties' dispute is the measure and amount of compensation Chesapeake should have paid the Noteholders for its early redemption. Section 1.7 governed this subject matter, specifying the price Chesapeake was required to pay the Noteholders for an early redemption, which in turn depended on the date of the redemption. *See* J.A. 567. Whereas Section 1.7(b)'s At-Par Price applied to redemptions on or before March 15, 2013, Section 1.7(c)'s Make-Whole Price applied to redemptions after March 15, 2013. *See id.* Because Chesapeake completed its redemption on May 13, 2013, it owed the Noteholders the Make-Whole Price for that redemption, pursuant to Section 1.7(c), *see id.*, and it breached the Supplemental Indenture by paying only the At-Par Price. The correct damages award, then, was the difference between the At-Par Price and the Make-Whole Price, plus prejudgment interest.[6]

1981) ("The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.").

[6] Although not explicitly contested by the parties on appeal, the District Court's calculation of prejudgment interest correctly used the 6.775 percent rate applicable to overdue payments under the Base and Supplemental Indentures. *See Chesapeake III*, 2015 WL 4191419, at *18.

To hold otherwise would frustrate the Noteholders' legitimate expectations regarding their rights under the Supplemental Indenture. As the District Court explained, "[f]or the Court to fashion what amounts to a new type of redemption, with its pricing terms to be set *post hoc* by a Court with reference to equitable principles, would confound investors' valid expectations." *Chesapeake III*, 2015 WL 4191419, at *12. Indeed, "[a]n investor could realistically not have anticipated the third scenario in which—if Chesapeake missed the deadline for a Special Early Redemption but redeemed in a good faith belief that it had met the deadline—Noteholders would receive an early-redemption lump-sum payout materially smaller than the Make-Whole Amount." *Id.* It follows, therefore, that "[t]he interest in respecting investors' legitimate expectations . . . supports a payout keyed to the indenture's treatment of redemptions after March 15, 2013." *Id.* at *13.

Chesapeake was similarly on notice at all relevant times that the District Court could require it to pay the Make-Whole Price for its May 13, 2013 redemption. Under the terms of the Supplemental Indenture, which we have previously held to be unambiguous and to have "a definite and precise meaning," Chesapeake's March 15, 2013 notice calling for a redemption on May 13, 2013 "was untimely and ineffective to redeem" at the At-Par Price. *Chesapeake II*, 773 F.3d at 117. Moreover, Chesapeake knew that this had been BNY Mellon's litigation position since the outset and had been confronted with the possibility that a holding by this Court that the redemption was untimely to effect a

Special Early Redemption could trigger Chesapeake's obligation to pay the Make-Whole Price on remand.[7]

Finally, we reject Chesapeake's contention that, even if the District Court properly awarded breach-of-contract damages, it erred by awarding compensation that allowed the Noteholders to recoup in excess of the value of the Notes before the redemption, which Chesapeake argues is equal to "the present value of the lost interest [on the Notes] offset by the lower interest they would have earned from entering into similar transactions" on the date of the redemption. Pl. Br. 55. By analogy to bankruptcy cases where borrowers were forced to prepay loans, Chesapeake argues that, "under New York law, the relevant inquiry is not whether a contractual provision sets forth an amount to be paid for prepayment on a certain date, but whether the relevant contractual provisions clearly and unambiguously provide that the prepayment premium is payable for an unauthorized prepayment

---

[7] For example, during a March 19, 2013 conference, the District Court asked counsel for Chesapeake what would happen if the District Court ruled that Chesapeake's redemption was timely to effectuate a Special Early Redemption but the ruling was later reversed on appeal. The District Court queried whether "the only way to make [the Noteholders] whole [would be] to in effect pay them what amounts to the present value . . . in effect giving [them] the make-whole value through the backdoor." J.A. 301. Counsel for Chesapeake responded, "[C]ertainly I don't think the Court will give the noteholders the make-whole value through the backdoor," to which the Court replied, "Well, you don't think that. But I'm asking you to assume that the Court of Appeals disagrees with a ruling I make in your favor on timeliness and now wants to fashion a remedy. What is that remedy?" J.A. 301-02.

under the relevant circumstances." *Id.* at 50. But this syllogism relies on a false premise: Chesapeake did not involuntarily exercise its right of redemption. Instead, Chesapeake opted to redeem early, albeit with the anticipation that it would pay only the At-Par Price. The cases relied upon by Chesapeake are thus inapposite.

In sum, we conclude, substantially for the reasons set forth in the District Court's July 10, 2015 opinion, which we have summarized here, that the District Court did not err in awarding the Noteholders the difference between the At-Par Price Chesapeake had already paid for its redemption and the Make-Whole Price it should have paid, plus prejudgment interest.

CONCLUSION

For the foregoing reasons, we AFFIRM the July 17, 2015 judgment of the District Court.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 15-2366-cv

CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

---

Filed: November 4, 2016

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of November, two thousand sixteen.

* * *

Appellant Chesapeake Energy Corporation, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel

rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[handwritten: signature]

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13-cv-1582

CHESAPEAKE ENERGY CORPORATION,
Plaintiff,

v.

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

Filed: July 10, 2015

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

On May 8, 2013, this Court entered a declaratory judgment that plaintiff Chesapeake Energy Corporation ("Chesapeake") had timely issued a notice of "Special Early Redemption," and was therefore entitled, under a Supplemental Indenture, to redeem at par a series of senior notes it had issued in 2012, which were to mature in 2019. On May 13, 2013, Chesapeake redeemed those notes at par. However, on November 25, 2014, the Second Circuit overturned this Court's decision. It held that Chesapeake had missed the deadline for a Special Early Redemption, and thus could not lawfully redeem at par.

This decision resolves issues that the parties agree are properly resolved on remand. Most significant, the Court decides the compensation that the Noteholders are due. Agreeing with indenture trustee (and defendant) Bank of New York Mellon Trust Company, N.A. ("BNY Mellon"), the Court holds that the Noteholders were entitled to be paid the "Make-Whole" Price which, under the Supplemental Indenture as construed by the Second Circuit, was due upon redemption of the notes if Chesapeake redeemed after March 15, 2013. Accordingly, Chesapeake must pay the Noteholders compensation consistent with their entitlement to the Make-Whole Price. The Court therefore grants BNY Mellon's motion for further relief, and denies Chesapeake's cross-motion for an order of restitution.

I. Background

The Court assumes familiarity with the facts of this case. These are chronicled in detail in the Court's May 8, 2013 decision and the Second Circuit's decision. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 957 F. Supp. 2d 316 (S.D.N.Y. 2013), *rev'd and remanded*, 773 F.3d 110 (2d Cir. 2014). The Court recites here only the most central facts.

A. Chesapeake's May 2013 Redemption

In February 2012, Chesapeake issued $1.3 billion in senior notes due on March 15, 2019, bearing an interest rate of 6.775% ("the 2019 Notes" or "the Notes"). The 2019 Notes were governed by a Base Indenture applicable to several series of notes, and a Supplemental Indenture specific to the 2019 Notes.

Section 1.7 of the Supplemental Indenture set out the terms under which Chesapeake could redeem the 2019 Notes before the due date. Entitled "Redemption," Section 1.7 provided, in its entirety:

> (a) The Company shall have no obligation to redeem, purchase or repay the Notes pursuant to any mandatory redemption, sinking fund or analogous provisions or at the option of a Holder thereof.
>
> (b) At any time from and including November 15, 2012 to and including March 15, 2013 (the "Special Early Redemption Period"), the Company, at its option, may redeem the Notes in whole or from time to time in part for a price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption; provided, however, that, immediately following any redemption of the Notes in part (and not in whole) pursuant to this Section 1.7(b), at least $250 million aggregate principal amount of the Notes remains outstanding. 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. Any redemption pursuant to this Section 1.7(b) shall be conducted, to the extent applicable, pursuant

> to the provisions of Sections 3.02 through 3.07 of the Base Indenture.
>
> (c) At any time after March 15, 2013 to the Maturity Date, the Company, at its option, may redeem the Notes in whole or from time to time in part for an amount equal to the Make-Whole Price plus accrued and unpaid interest to the date of redemption in accordance with the Form of Note.

Dkt. 1, Ex. B, at 6. Section 1.7(b) thereby referenced § 3.04 of the Base Indenture, which provided, *inter alia*, that a notice of redemption must be made between 30 and 60 days before the redemption itself:

> At least 30 days but not more than 60 days before a redemption date, [Chesapeake] shall mail a notice of redemption by first-class mail to each Holder of Securities to be redeemed at such Holder's registered address.

Dkt. 185 ("Baron Decl."), Ex. I.

Section 1.7(c), in referring to the "Make-Whole Price" applicable to redemptions after the Special Early Redemption Period, referenced a term defined elsewhere in the Supplemental Indenture as "the sum of the outstanding principal amount of the Notes to be redeemed plus the Make-Whole Amount of such Notes." *See* Dkt. 1, Ex. B (Supplemental Indenture, Form of Note ("Form of Note")) ¶ 5, at A-4. The "'Make-Whole Amount' with respect to a Note" is, in turn, defined as "an amount equal to the excess, if any, of (i) the present value of the remaining principal, premium, if any, and interest payments due on such Note (excluding any portion of such

payments of interest accrued as of the redemption date) as if such Note were redeemed on the Maturity Date, computed using a discount rate equal to the Treasury Rate plus 50 basis points, over (ii) the outstanding principal amount of such Note." *Id.*

On February 20, 2013, Chesapeake announced that it planned to redeem the 2019 Notes at the Special Early Redemption price of 100% of the notes' principal amount (*i.e.*, par), plus interest accrued to the date of redemption (the "Special Price"). In Chesapeake's view, under § 1.7(b), March 15, 2013 was the deadline to give a notice of a Special Early Redemption, not the deadline for such a redemption itself.

BNY Mellon, however, notified Chesapeake that, in its view, the time to give notice of a redemption at the Special Price had expired. BNY Mellon's view, supported by various holders of the 2019 Notes ("the 2019 Noteholders" or "the Noteholders"), was that the deadline under § 1.7(b) for a Special Early Redemption was March 15, 2013; it was therefore no longer possible to meet that deadline while giving the required 30 days' notice. Further, in an apparent effort to deter Chesapeake from attempting such a redemption, BNY Mellon warned Chesapeake that any such attempt could backfire: If Chesapeake issued a notice of Special Early Redemption that a court held untimely such that no such redemption went forward, BNY Mellon stated that it might, as indenture trustee, seek to treat such a notice as triggering a redemption under § 1.7(c), requiring Chesapeake to pay the Make-Whole Price rather than holding the Notes to maturity.

On March 8, 2013, Chesapeake filed this action against BNY Mellon, bringing two claims. Dkt. 1 ("Compl."). Claim One sought a declaratory judgment that a notice of Special Early Redemption at the Special Price, if issued on March 15, 2013 and providing for a redemption on May 13, 2013, would be timely. Claim Two sought a declaratory judgment that such a notice, if held untimely by this Court to effect a Special Early Redemption such that no redemption occurred, would not trigger redemption at the Make-Whole Price under § 1.7(c), but rather would be void. Chesapeake's Complaint appended the notice it proposed to issue on March 15, 2013 ("the Notice"). *See id.* Ex. D. The Notice stated that (1) redemption at the Special Price would occur on May 13, 2013, if this Court by then had ruled the Notice timely to effect a Special Early Redemption, but (2) if the Court had not so ruled by that date, the Notice would be null and void and would not trigger a redemption at the Make-Whole Price.

Chesapeake contemporaneously moved for emergency relief along the lines of Claim Two. It sought an order that, if Chesapeake issued the Notice for a Special Early Redemption but this Court held it untimely to effect such a redemption, the notice would not bring about a Make-Whole Redemption. On March 14, 2013, the Court denied Chesapeake's motion, finding that the standards for emergency relief had not been met. *See* Dkt. 43 ("3/14/13 Tr."). But the Court stated in strong terms its initial view, agreeing with Chesapeake, that, were the Court to hold the Notice untimely to effect a Special Early Redemption such that no redemption went forward,

the Notice would be void, and would not trigger a Make-Whole redemption under § 1.7(c).

On March 15, 2013, Chesapeake issued the Notice.

In late April 2013, after expedited discovery, the Court held a bench trial.

On May 8, 2013, the Court issued a decision finding the Notice timely, and thus finding for Chesapeake on Count One, on two grounds. Dkt. 115. First, the text of § 1.7(b) permitted a Special Early Redemption so long as the notice of such a redemption had issued during the Special Early Redemption Period (*i.e.*, by March 15, 2013). Second, even if the indenture text was ambiguous, the extrinsic evidence demonstrated that the parties who negotiated the Supplemental Indenture had intended March 15, 2013 as the deadline for a notice of redemption, not for the redemption itself. The Court therefore entered judgment for Chesapeake on Claim One. Claim Two, the Court held, was moot.

On May 11, 2013, BNY Mellon filed a notice of appeal. Dkt. 117.

On May 13, 2013, Chesapeake proceeded with the redemption, paying the Noteholders approximately $1.3 billion, calculated pursuant to the Special Early Redemption provision. *See* Dkt. 178 ("2/24/15 Tr."), 26-27.

B. The Second Circuit's Ruling

On November 25, 2014, the Second Circuit reversed. It held that the Supplemental Indenture authorized Chesapeake to redeem the 2019 Notes at par only if the *redemption* occurred within the

Special Early Redemption Period, *i.e.*, no later than March 15, 2013, with notice of 30 to 60 days also given during that period. Judgment was therefore to be entered for BNY Mellon on Claim One. In remanding, the Second Circuit directed the Court to consider Chesapeake's Claim Two. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, 773 F.3d 110, 117 (2d Cir. 2014).

C. Proceedings on Remand

On February 24, 2015, after the Second Circuit's mandate had issued, the Court held a conference to identify issues to be resolved on remand. Discussion at the conference centered on the measure of compensation due to the Noteholders. Chesapeake and BNY Mellon agreed that, given the Second Circuit's holding that Chesapeake's redemption did not qualify as a Special Early Redemption, the 2019 Noteholders are entitled to be paid additional money by Chesapeake beyond the Special Price that Chesapeake had paid. However, they disagreed as to the amount of such payment.

BNY Mellon argued that under § 1.7(c) of the Supplemental Indenture, the Make-Whole Price applies to all redemptions after March 15, 2013. Thus, it argued, the 2019 Noteholders are entitled to be paid the difference between (a) the Special Price and (b) the Make-Whole Price.

Chesapeake argued that compensation should be calculated on the premise that, but for this Court's ruling that Chesapeake's notice had been timely, Chesapeake would never have redeemed at all, and the 2019 Notes would have been held to maturity. Therefore, Chesapeake argued, the Noteholders are

entitled to the difference between (a) the Special Price and (b) the present value of Chesapeake's payouts to maturity. Chesapeake termed this the "restitutionary" measure of damages. This measure, Chesapeake stated, yields a smaller payout than the Make- Whole Price because the Make-Whole Price is calculated using a defined formula—including a discount rate 50 basis points above the yield then offered on comparable securities—that awards the Noteholders a sum more than the present value of the payouts to maturity.[1]

Including this dispute over the measure of compensation, the Court identified four issues to be resolved on remand: (1) What is the proper resolution of Claim Two: Is that claim still moot in light of the appellate reversal?; (2) What is the procedural vehicle by which the Noteholders' claim for compensation is to be resolved: Must they (or BNY Mellon on their behalf) file a separate lawsuit seeking damages, or is there a mechanism by which the Court, on remand, can resolve that claim?; (3) What is the proper measure of compensation due to the Noteholders?; and (4) What rate of prejudgment interest applies to such an award? *See* 2/24/15 Tr.

The parties thereafter briefed these issues. *See* Dkt. 182 ("BNY Br."), 184 ("Chesapeake Br."), 188

---

[1] Chesapeake states that this formula was chosen to discourage Chesapeake from redeeming the Notes after the period for a Special Early Redemption had passed.

(“BNY Reply Br.”), 189 (“Chesapeake Reply Br.”).[2] At the Court’s request, the parties also attempted to quantify the compensation due under the two alternatives—the “Make Whole” measure advocated by BNY Mellon and the “restitutionary” measure urged by Chesapeake.[3] On May 1, 2015, the Court heard argument. Dkt. 190 (“5/1/15 Tr.”).

II. Discussion

The major question before the Court is the measure of compensation due the 2019 Noteholders given the Second Circuit’s ruling that Chesapeake redeemed too late to effectuate a Special Early Redemption. The Court addresses that issue after

---

[2] The parties had previously addressed some of these issues in submissions made before the February 24, 2015 conference. *See* Dkt. 160-62.

[3] The parties agree that, had they received the Make-Whole Amount, the Noteholders would have received an additional $379.65 million on May 13, 2013. *See* BNY Br. 2; Chesapeake Br. 8 n.5. The parties do not agree as to the calculation of restitutionary damages, and Chesapeake, the proponent of this approach, states that additional fact-finding would be needed to determine a precise number. *See, e.g.*, Chesapeake Br. 8; Chesapeake Reply Br. 18-21. The Court would have to determine, *inter alia*, the interest rate on securities available to the Noteholders on May 13, 2013. *See* Chesapeake Br. 1-2. Inputting this variable, the Court would have to determine the difference between the present values of (1) investing the par proceeds that the Noteholders received on May 13, 2013 and (2) holding the bonds to maturity. *Id.* Chesapeake estimates that a restitutionary damages award would be approximately $100 million—about $280 million less than an award based on the Make-Whole amount. *Id.* at 7-8. BNY Mellon appears to estimate that a restitutionary damages award would be some $325 million—”not that far off the Make- Whole Price.” BNY Br. 28 n.8. These figures are prior to prejudgment interest.

resolving two related procedural questions—the proper disposition of Chesapeake's Claim Two and the proper procedural vehicle for deciding the issue of the Noteholders' damages. Last, the Court addresses prejudgment interest.

A. Proper Resolution of Chesapeake's Claim Two

In dismissing Claim Two as moot, this Court reasoned:

> Chesapeake . . . seeks a declaratory judgment that "in the event that either (i) [the Notice of Special Early Redemption] is determined not to be timely for [a redemption at par], or (ii) this Court has not issued a decision with respect to the declaratory relief sought in Claim I . . . prior to the May 13, 2013 redemption date, then the Notice of Special Early Redemption shall be deemed null and void and shall not be effective to redeem the 2019 Notes." Compl. ¶ 28. BNY Mellon opposed that motion. Dkt. 83-84.
>
> Neither contingency posited by Chesapeake's second claim has occurred. The Court has held Chesapeake's Notice timely, and has issued its decision prior to the May 13, 2013 redemption date. Accordingly, Claim Two is moot. On that ground, the Court denies Chesapeake's request for a declaratory judgment on Claim Two.

Chesapeake Energy Corp., 957 F. Supp. 2d at 372 (alterations in original). The Second Circuit, after finding Chesapeake's Notice untimely, remanded "for

consideration of Chesapeake's second claim for declaratory judgment that the redemption notice given by Chesapeake on March 15, 2013 should not be deemed to have noticed redemption at the Make-Whole Price." *Chesapeake Energy Corp.*, 773 F.3d at 117.

Claim Two remains moot. Claim Two was directed solely to the effect of Chesapeake's *notice* of a Special Early Redemption in the event such a redemption did *not* go forward. The purpose of Claim Two was to assure that, if this Court either held the notice untimely to effect such a redemption or had not ruled by the March 13, 2013 redemption date, the notice itself would not be treated as triggering a different sort of redemption altogether—a Make-Whole Redemption under § 1.7(c). Claim Two thereby sought to defuse BNY Mellon's attempt in February and March 2013 to deter Chesapeake from even attempting an at-par redemption, by threatening to treat a notice that was held untimely as triggering a Make-Whole Redemption. *See* Compl. ¶ 5 ("[T]he proposed relief will preserve the status quo by permitting Chesapeake to begin the redemption process without prejudicing either BNY Mellon or the noteholders."). In the end, of course, Chesapeake was undeterred. It issued the notice, reassured, no doubt, by the Court's statement in addressing the application for emergency relief that if the Court held such a notice untimely and no redemption occurred, it would almost certainly then find the notice void, as opposed to triggering redemption on different terms.

And the redemption *did* go forward. Therefore, neither contingency posited by Claim Two occurred:

This Court held Chesapeake's notice timely and so ruled before the May 13, 2013 redemption date. Presumably appreciating this, neither side appealed (or cross-appealed) the Court's finding that, in light of the Court's ruling, Claim Two was moot. Nor does either side now seek to alter the Court's judgment on Claim Two.[4]

Moreover, Chesapeake's later act of redemption made Claim Two doubly moot. That consequential act made academic the issue of what the effect of an untimely notice alone—*i.e.*, one *not* followed by a redemption—would have been. *See Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991) (declaratory judgment action involving effect of publication of book rendered moot by publication).

In remanding with instructions to consider Claim Two, the Second Circuit—recognizing that its decision meant that Chesapeake's par redemption left the 2019 Noteholders insufficiently compensated—may have viewed Claim Two as a possible vehicle for resolving the measure of

---

[4] At the February 24, 2015 conference, Chesapeake briefly argued that Claim Two was not moot, *see* 2/24/15 Tr., 21, but later appeared to retreat from that contention, *id.* at 23, recognizing that, regardless how Claim Two was resolved, the Court would still need to decide the measure of compensation due the 2019 Noteholders. On that issue, Chesapeake stated, "the effect of the redemption that occurred is integrally tied to th[e] notice" it issued on March 15, 2013, *id.*, so as to favor the lesser measure of compensation that Chesapeake endorsed. The Court addresses that separate argument *infra*. Notably, Chesapeake's briefs after the February 24, 2015 conference did not address Claim Two or dispute that Claim Two was moot. *See* Dkt. 184, 189.

compensation due to the Noteholders. That issue indeed must be resolved, as all agree. But Claim Two ill fits that task, as it was not addressed to the circumstance in which a finding of timeliness by this Court was followed by a redemption and then an appellate reversal. And, as follows, a satisfactory alternative procedural vehicle *has* been identified that will allow the entry of a declaration as to the compensation due to the Noteholders. The Court, accordingly, leaves undisturbed the judgment that Claim Two is moot.

B. Procedural Mechanism for Resolving the Noteholders' Compensation

Before the February 24, 2015 conference, the Court solicited counsel's views as to the proper procedural vehicle by which to resolve the compensation due to the Noteholders as a result of the ruling that Chesapeake was not entitled to redeem at par. Dkt. 175. At that conference, and later in the briefs, the parties addressed that question. Significantly, although the parties identify different mechanisms, they agree it is appropriate and within the power of this Court on remand to resolve this issue by means of a declaration, and that it is unnecessary for BNY Mellon or the Noteholders to institute a separate lawsuit.

BNY Mellon argues that the Declaratory Judgment Act, 28 U.S.C. § 2202, supplies the proper procedure. *See* BNY Br. 7 ("Section 2202 provides the appropriate way to decide the legal remedy for Chesapeake's May 13, 2013, breach."). Section 2202 provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be

granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Section 2202 applies here, BNY Mellon argues, because the Second Circuit's mandate requires that declaratory judgment be entered in its favor on Claim One, because that judgment affects both parties' rights, and because BNY Mellon's motion for further relief seeks "necessary [and] proper relief based on" that declaratory judgment.[5] BNY Br. 7-8.

Chesapeake, in contrast, urges the Court not to rely on § 2202, which it claims has not been used in this precise factual scenario. Chesapeake instead situates the power to remedy the Noteholders' injury in a court's "inherent equitable power to fashion the appropriate relief." Chesapeake Br. 34; *see also id.* at 33 ("The Court's inherent authority is sufficient to order the requested relief."). Chesapeake's argument accords with its broader application that the remedy that the Court fashion on remand is informed by equitable principles of restitution, not contractually by the terms of the Supplemental Indenture.[6]

---

[5] On February 13, 2015—the day the Second Circuit's mandate issued, Dkt. 151—BNY moved "for further relief pursuant to 28 U.S.C. § 2202, and for such other and further relief that the Court deems just and proper," Dkt. 160, and filed a supporting memorandum of law, Dkt. 161, as well as a declaration, Dkt. 162.

[6] Chesapeake, however, explicitly acknowledged that it does not dispute the Court's power to resolve this dispute. *See* 2/24/15 Tr., 36 ("THE COURT: I want to make sure that before we figure out the math, and the right way to measure damages, that there isn't any dispute between the parties that the right people are convened here and that I have the power ultimately

The Court's judgment is that while both procedural mechanisms could properly be used as the basis for furnishing relief here, § 2202 is the more natural fit. Second Circuit precedent solidly supports that § 2202 is an appropriate mechanism for resolving damages. The Circuit has held that § 2202 permits a court to award relief to a defendant who prevails in a declaratory judgment action, as BNY Mellon has here. *See Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 298 (2d Cir. 1999) (courts have invoked § 2202 to award relief to parties "who have won a declaratory judgment from the court to enforce that judgment through injunction, damages and other relief") (citing *Vt. Structural Slate Co. v. Tatko Bros. Slate Co.*, 253 F.2d 29, 29-30 (2d Cir. 1958)). Further, relief under § 2202 may take the form of equitable or legal relief, and may include monetary damages. *See, e.g.*, *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998) ("A district court may grant further relief, including monetary damages, whether or not it 'ha[d] been demanded, or even proved, in the original action for declaratory relief.'") (quoting *Edward B. Marks Music Corp. v. Charles K. Harris Music Publ'g, Co.*, 255 F.2d 518, 522 (2d Cir. 1958)) (alteration in *Fred Ahlert Music*); *Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 399-400 (2d Cir. 1975) ("further relief" under § 2202 includes damages). Other circuits agree that § 2202

---

to issue what appears from your point of view to be a declaration that, regardless of the number blank that's filled in, gives noteholders monetary relief. You [*i.e.*, counsel for Chesapeake] and Mr. Robbins [*i.e.*, counsel for BNY Mellon], through somewhat different routes, appear to be saying I have that power. MR. ZIEGLER: Yes.").

may be used to award monetary damages. *See Ins. Servs. of Beaufort, Inc. v. Aetna Cas. & Sur. Co.*, 966 F.2d 847, 851-52 (4th Cir. 1992); *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548-49 (D.C. Cir. 1988); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986); *Sec. Ins. Co. of New Haven v. White*, 236 F.2d 215, 220 (10th Cir. 1956). Section 2202 is properly utilized here, and Chesapeake, while attempting to distinguish this case factually, has not pointed to any contrary authority.[7]

C. The Compensation Due to the 2019 Noteholders

The parties take different approaches to the compensation due to the Noteholders. BNY Mellon emphasizes that the Supplemental Indenture is a contract, and that it provides for only two types of redemptions: Special Early Redemptions at par, which must occur by March 15, 2013; and redemptions after that date, which require Chesapeake to pay at the Make-Whole Price. Because Chesapeake redeemed after March 15, 2013, BNY Mellon argues, it must pay the Make-Whole Amount. In contrast, Chesapeake contends that damages

[7] Were § 2202 unavailable, the Court could use its inherent authority to issue a declaration as to the compensation due. But § 2202 fits better here because this case is a declaratory judgment action, and the need to award monetary relief to the Noteholders arises from the overturning of a declaratory judgment. Contrary to Chesapeake's evident premise in opposing the use of § 2202, the choice of that procedural mechanism does not carry substantive implications as to damages because § 2202 empowers the Court to issue both equitable and legal relief. *See Fred Ahlert Music*, 155 F.3d at 25.

should be determined based on equitable principles, not based on the indenture's text or breach-of-contract principles. Emphasizing that it never intended to effect a Make-Whole redemption, Chesapeake argues that a restitutionary remedy—measuring damages by the present value of the payouts the Noteholders would have received had there been no redemption and they held the Notes to maturity—is just.

i. Applicable Legal Standards

The Second Circuit has addressed the circumstances in which, under New York law,[8] a party's recovery is to be set pursuant to a contract as opposed to under equitable principles. Where a valid, enforceable contract governs the relevant subject matter, the Circuit has stated, the contract ordinarily precludes recovery in quasi-contract (*i.e.*, restitution). As the Second Circuit put the point in *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*: "[W]ell-settled principles of New York law would ordinarily preclude [plaintiff] MacDraw from pursuing an unjust enrichment claim against [defendant] CIT under the circumstances presented here . . . . '[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract [*i.e.*, unjust enrichment] for events arising out of the same subject matter.'" 157 F.3d 956, 964 (2d Cir. 1998) (quoting *U.S. E. Telecomms., Inc. v. U.S. W. Comm'cns Servs., Inc.*, 38 F.3d 1289, 1296 (2d Cir.

[8] The indenture is expressly governed by New York law. *See* Base Indenture, § 13.08; Ninth Supplemental Indenture, § 2.2.

1994)); *accord Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 587 (2d Cir. 2006) ("It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.") (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388-89 (1987)); *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 262-63 (2d Cir. 1999) ("Under New York law, the existence of an express contract governing a particular subject matter ordinarily precludes recovery in *quantum meruit* for events arising out of the same subject matter.").[9]

This Second Circuit authority, in turn, draws upon a line of decisions by the New York courts to the same effect. In the landmark case of *Clark-Fitzpatrick*, *supra*, the New York Court of Appeals explained: "A 'quasi-contract' only applies in the absence of an express agreement . . . . [A] quasi-contractual obligation is one imposed by law *where there has been no agreement or expression of assent, by word or act, on the part of either party involved.* The law creates it, regardless of the intention of the parties, to assure a just and equitable result." 70 N.Y.2d at 388-89 (emphasis in original) (citations and

---

[9] *Cf. US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1546-47 (2013) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.") (quoting Restatement (Third) of Restitution and Unjust Enrichment § 2(2) (2010)).

internal quotation marks omitted). The law of other states is in accord.[10]

The reason for deriving the measure of recovery from the parties' agreement is explained well in an

---

[10] *See, e.g.*, *Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 210-11 (2009) ("[U]njust enrichment shall not supplant the terms of an agreement. . . . It is a well-established principle that the court ordinarily cannot allow recovery under a theory of unjust enrichment where there is a valid, express contract covering the subject matter at hand."); *Tolliver v. Christina Sch. Dist.*, 564 F. Supp. 2d 312, 315 (D. Del. 2008) ("[T]he existence of an express, enforceable contract that controls the parties' relationship will defeat an unjust enrichment claim[]."); *Trs. ex rel. Teamsters Benefit Tr. v. Doctors Med. Ctr. of Modesto, Inc.*, 286 F. Supp. 2d 1234, 1239-40 (N.D. Cal. 2003) ("Plaintiff's alleged overpayment for medical services in this case was not simply the result of a clerical mistake, but arises from a dispute over the parties' interpretation of the contract. Even under the broader view of equitable restitution to remedy unjust enrichment, a claim of unjust enrichment lies only where the defendant has no legal claim to the overpayment.") (footnote omitted); *Meaney v. Conn. Hosp. Ass'n, Inc.*, 250 Conn. 500, 517 (1999) ("[A]n express contract between the parties precludes recognition of an implied-in-law contract governing the same subject matter.") (quoting 1 E. Farnsworth, Contracts (2d ed. 1998) § 2.20); *accord DBSI/TRI V v. Bender*, 130 Idaho 796, 805 (1997); *Washa v. Miller*, 249 Neb. 941, 950 (1996); *Bright v. QSP, Inc.*, 20 F.3d 1300, 1306 (4th Cir. 1994) (applying West Virginia law); *Zuger v. N. Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D. 1992); *Lord Jeff Knitting Co. v. Lacy*, 195 Ga. App. 287, 287 (Ga. Ct. App. 1990); *S & M Constructors, Inc. v. City of Columbus*, 70 Ohio St. 2d 69, 71 (1982); *Maxted v. Barrett*, 198 Mont. 81, 87 (1982); *Kramer v. Fallert*, 628 S.W.2d 671, 675 (Mo. Ct. App. 1981); *La Throp v. Bell Fed. Sav. & Loan Ass'n*, 68 Ill. 2d 375, 391 (1977); *Brooks v. Valley Nat'l Bank*, 113 Ariz. 169, 174 (1976); *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. 952, 959 (1971); *Paschall's, Inc. v. Dozier*, 219 Tenn. 45, 55 (1966).

oft-cited comment to the Restatement (Third) of Restitution and Unjust Enrichment:

> Contract is superior to restitution as a means of regulating voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation. Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible, and that the parties' own definition of their respective obligations—assuming the validity of their agreement by all pertinent tests—take precedence over the obligations that the law would impose in the absence of agreement. Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach.

Restatement (Third) of Restitution and Unjust Enrichment [hereinafter "Rest. (Third) of Restitution"], § 2, cmt. c; *see, e.g.*, *Anwar v. Fairfield Greenwich Ltd.*, 831 F. Supp. 2d 787, 797 (S.D.N.Y. 2011) (citing this comment), *aff'd sub nom. Pujals v. Standard Chartered Bank*, 533 F. App'x 7 (2d Cir. 2013) (summary order). Put differently, the law favors contractual guideposts because a contract makes the parties the masters of their destiny. Where the parties have set out, *ex ante*, their respective rights and obligations, using contractual guideposts to allocate loss or damages will generally result in more voluntary, predictable, efficient, and

fair outcomes than the *ex post* application of common-law principles of equity. *See* Rest. (Third) of Restitution § 2, cmt. c.

Significantly here, under this doctrine, for a written agreement to guide the terms of recovery, it is not necessary that the agreement speak to the precise factual circumstances of the dispute at hand. Instead, it is generally sufficient that the contract speak to the *subject matter* at issue. *See, e.g.*, *Reilly*, 181 F.3d at 262-63; *MacDraw*, 157 F.3d at 964; *U.S. E. Telecomms., Inc.*, 38 F.3d at 1296; *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388; *cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959).

A recent case usefully—indeed dramatically—illustrates this point. In *Anwar v. Fairfield Greenwich Ltd.*, *supra*, investors brought suit against intermediary banks, seeking to recover the fees that the banks had charged them for managing investments in a hedge fund that had invested its assets with Bernard Madoff. 831 F. Supp. 2d at 789-90. The plaintiffs brought claims for breach of contract and unjust enrichment. *Id.* The district court dismissed both claims because a form contract governed the service fees charged for managing investments, and that contract precluded recovery in restitution. The court stated: "[T]he silence of the Form Contract with regard to such an extreme contingency does not open the door for a quasi-contract remedy. Although it is indeed unfair—and even unjust—that Plaintiffs paid fees on assets that were, in actuality, worthless, 'the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment.'"

Id. at 796-97 (quoting Rest. (Third) of Restitution § 1, cmt. b). The Second Circuit summarily affirmed. *See Pujals*, 533 F. App'x at 11 ("Plaintiffs' claims are thus covered by an express contract, and their unjust enrichment claim was properly dismissed.").[11]

Salient here, to both the district court and the Second Circuit in *Anwar*, it was of no consequence that the contracting parties had never contemplated, let alone specifically addressed, the "extreme contingency" that, improbably, had occurred—their contract still controlled. *See, e.g.*, *Valley Juice Ltd., Inc. v. Evian Waters of France, Inc.*, 87 F.3d 604, 610 (2d Cir. 1996) (invalidating supplier's unjust enrichment claim against distributor where relationship between these parties was governed by contract, despite fact that alleged misdeeds by distributor either predated contract or involved conduct not specifically anticipated by agreement); *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982) (overturning equitable award of interest earned on funds held in escrow during litigation to aggrieved noteholders in dispute with issuer that had strategically defaulted, because no "contractual provision" supported

---

[11] *Anwar* involved the application of Florida law, but that is of no consequence because Florida law is substantively identical to New York law as to whether contract law or restitution governs. *See, e.g.*, *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1337 (S.D. Fla. 2002) ("An unjust enrichment claim can exist only if the subject matter of that claim is not covered by a valid and enforceable contract."); *cf. Singer v. AT & T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998) ("[B]reach of contract and unjust enrichment . . . are universally recognized causes of action that are materially the same throughout the United States.").

payment of interest to noteholders on such sums, and district court's application of equitable principles was barred by existence of contract).

To be sure, principles of restitution can sometimes come into play in cases involving a contract. But as the Restatement (Third) of Restitution reflects, they are relevant only in unusual and "margin[al]" circumstances—such as where "performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties' obligations." Rest. (Third) of Restitution § 2, cmt. c. As the Restatement explains, "[r]estitution is the law of nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms. Both subjects deal with the consequences of transactions in which the parties have not specified for themselves what the consequences of their interaction should be." *Id.* § 1, cmt. d; *see also, e.g.*, *Porter v. Hu*, 116 Haw. 42, 55-56 (Haw. Ct. App. 2007) (permitting unjust enrichment claim where contract between insurance agency and independent agent simply did not address at all scenario in which agency fired agent and subverted their contractual relationship in order to retain independent agent's books of business).

The equitable principle of restitution, championed by Chesapeake, is far more commonly utilized in circumstances where the parties' relationship is not defined by contract. For example, a party disadvantaged by a lower court's ruling (*e.g.*, an order to pay damages, or to refrain from certain conduct) is typically entitled to be restored to its

previous position after a higher court has reversed that ruling. A court thus may issue a restitutionary award to protect the losing party below which, against its will, was obliged to heed that court's order before it was overturned on appeal. *See, e.g.*, *Atl. Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 309 (1935) ("Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error."); *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established."); *Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 145 (1919) ("[A] party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby."); *Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219-20 (1891) (higher court's reversal of lower court's judgment, due to lower court's lack of jurisdiction, did not deprive lower court of right, on remand, to order restitution to the successful appellants in the amount collected on the judgment pending the appeal).

Even when restitution might be awarded, however, it "is not of mere right"; it is a discretionary remedy. *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999) (quoting *Atl. Coast*, 295 U.S. at 310). As the Second Circuit has explained: "'[A] court will not order [a restitutionary remedy] where the justice of the case does not call for it.' . . . '[T]he simple but

comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.' The essence of equity jurisdiction has been its flexibility to tailor each decree to the necessities of the specific case." *Id.* at 120-21 (quoting *Atl. Coast*, 295 U.S. at 310).

ii. Application

Both parties have ably litigated the remedy issue presented by the unusual series of events here. However, when viewed in light of the above principles, BNY Mellon's argument for recovery measured by Make-Whole damages as defined by § 1.7(c) of the Supplemental Indenture is substantially the more persuasive. For four reasons, each ultimately relating to the law's preference for contract-based remedies where a valid contract governs the parties' relationship, Chesapeake's approach, under which § 1.7(c) is irrelevant to damages, is problematic.

1. *The indenture covers the relevant subject matter*: As reviewed above, where a valid contract governs a particular subject matter, the contract ordinarily precludes recovery in quasicontract (*i.e.*, restitution) for disputes concerning that subject matter, and courts have looked to the contract to provide the measure of recovery. Such is the case here. The subject matter of § 1.7 is the early redemption of the 2019 Notes, including the precise money due to the Noteholders depending on the date of that redemption. This case thus naturally invites the application of the principle that where the parties have set out their respective rights and obligations as

to a particular subject matter in a valid, enforceable agreement, a court setting remedies will be guided by that agreement.

Although it may be appropriate to fix remedies with reference to equitable principles in non-contract cases or in rare contract cases where the injury giving rise to a need for remediation is wholly unaddressed by the parties' agreement, such is not the case here, at all. Rather, as in *Anwar*, the parties' agreement is capacious enough to cover the events at hand. (Indeed, the unexpected circumstance in *Anwar*—that the assets on which bank fees were being charged were phantom, as a result of the Madoff Ponzi scheme—was far harder to anticipate than that at issue here.) The Supplemental Indenture is *comprehensive* as to the two types of redemptions that may occur with respect to the 2019 Notes. And it defines them by date: Redemptions on or before March 15, 2013 are Special Early Redemptions, *see* § 1.7(b); redemptions after that date are Make-Whole Redemptions, *see* § 1.7(c). These provisions together cover the universe of dates on which a redemption can occur.

Chesapeake's approach, however, asks the Court effectively to recognize a third type of redemption, unmentioned in the Supplemental Indenture. This redemption would be defined not by its date, but by Chesapeake's state of mind at the time of the redemption. For Chesapeake's argument is that, because it acted in good faith when it attempted a Special Early Redemption on May 13, 2013 believing such still to be timely, it is entitled to pay its

Noteholders less than had it otherwise redeemed (*i.e.*, under § 1.7(c)) the same day.

An indenture, however, is a form of contract. *See, e.g.*, *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014) ("A trust indenture is a contract, and under New York law '[i]nterpretation of indenture provisions is a matter of basic contract law.'") (quoting *Sharon Steel*, 691 F.2d at 1049, and collecting cases); *Bank of N.Y. Tr. Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 276 (2d Cir. 2013) ("It is a well-established rule in this Circuit that the 'interpretation of Indenture provisions is a matter of basic contract law.'") (quoting *Jamie Sec. Co. v. The Ltd., Inc.*, 880 F.2d 1572, 1576 (2d Cir. 1989)). And it would be at odds with basic principles of contract law to effectively impute a new type of redemption into a contract that, by its terms, listed two and only two types of redemptions and them by date. *See, e.g.*, *Vertin*, 23 N.Y.3d at 559-60 ("In construing a contract we look to its language, for 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'") (quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002)); *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) (applying New York law) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.") (quoting *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007)); *id.* ("[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the

contract to reflect its personal notions of fairness and equity.") (quoting *Greenfield*, 98 N.Y.2d at 569-70); *Fiore v. Fiore*, 46 N.Y.2d 971, 973 (1979) ("The courts may not rewrite a term of a contract by 'interpretation' when it is clear and unambiguous on its face."). Because the contract here covers the subject matter at issue—the payouts due for redemptions on particular dates—it is appropriate to award the Noteholders the recovery due under the indenture for redemptions after March 15, 2013.

2. *Implications of the holding that § 1.7 is unambiguous*: Chesapeake's proposal is also in tension with the Second Circuit's holding that § 1.7 is textually unambiguous. At argument on remand, the Court asked counsel whether Chesapeake believed that restitutionary damages would be appropriate if (1) Chesapeake had issued a notice of a Special Early Redemption on March *16*, 2013, and redeemed 30-60 days thereafter, but (2) an appellate court later held the notice untimely to effect such a redemption. Chesapeake's counsel conceded that Chesapeake would then have to pay Make-Whole damages because § 1.7 clearly cannot reasonably be read to permit notice of a Special Early Redemption after March 15, 2013.

In light of the Second Circuit's ruling that the indenture text was clear, that logic applies as well to a notice of redemption issued on March 15, 2013. For the Second Circuit held that § 1.7(b) *unambiguously* made March 15, 2013 the deadline for a Special Early Redemption itself, and therefore made February 13, 2013 the deadline for noticing such a redemption. *See Chesapeake Energy Corp.*, 773 F.3d at 116-17. To be

sure, this Court at all times took a different view—it initially viewed that provision as ambiguous, and later, in granting declaratory relief, held for Chesapeake that March 15, 2013 was the deadline for notice. But the Second Circuit's decision, not this Court's overturned ruling, is authoritative as to the construction of the indenture. And so is the Circuit's basis for reaching that construction—a finding that the indenture text was clear (as opposed to, for example, a finding of textual ambiguity, construed to favor the Noteholders). *See Chesapeake Energy Corp.*, 773 F.3d at 116-17. With the Second Circuit having held that February 13, 2013 was at all times *unambiguously* the deadline for giving notice of a Special Early Redemption, Chesapeake's March 15, 2013 redemption notice is not nearly as comfortably distinguished from the hypothetical of an unreasonable March 16, 2013 redemption notice as once might have appeared.

3. *Respect due for investors' expectations*: For the Court to fashion what amounts to a new type of redemption, with its pricing terms to be set *post hoc* by a Court with reference to equitable principles, would confound investors' valid expectations. Based on the Supplemental Indenture's text as construed by the Second Circuit, an investor who bought—or held—2019 Notes would have believed, after March 15, 2013, that there were only two possible dispositions for his investment: (1) If Chesapeake did not redeem early such that Noteholders held to maturity, Noteholders would receive a 6.775% annual income stream until March 15, 2019, and recoup their principal. Or (2) if Chesapeake

redeemed, Noteholders would be paid, in a lump sum, the Make-Whole Amount, pursuant to § 1.7(c).

It is reasonable to assume that some investors decided to buy or hold the Notes because they believed that, after March 15, 2013, only these two outcomes were possible. An investor could realistically not have anticipated the third scenario in which—if Chesapeake missed the deadline for a Special Early Redemption but redeemed in a good faith belief that it had met that deadline—Noteholders would receive an early-redemption lump-sum payout materially smaller than the Make-Whole Amount. That is not to say that Chesapeake's notion of a "restitutionary" payout is normatively unreasonable. It is not: As Chesapeake explains, it is anchored in familiar equitable principles that calculate restitutionary damages as a present value (here, of payments to maturity). But the investors who decided to buy (or hold) the 2019 Notes were beneficiaries of a contract. It can safely be said that they did not have a restitutionary scenario in mind. They presumably chose to buy or hold based on the comprehensive text of the indenture, which presented binomial outcomes. Such investors may have chosen the Notes because they preferred a steady payout over time to a lump sum, unless the lump-sum formula was defined (like the Make-Whole Amount under § 1.7(c)) to include a premium over the present value of that payout.

The interest in respecting investors' legitimate expectations therefore supports a payout keyed to the indenture's treatment of redemptions after March 15, 2013. *See, e.g.*, *Metro. Life Ins. Co. v. RJR Nabisco,*

Inc., 716 F. Supp. 1504, 1520 (S.D.N.Y. 1989) (applying New York law) ("The sort of unbounded and one-sided elasticity urged by plaintiffs would interfere with and destabilize the market. And this Court, like the parties to these contracts, cannot ignore or disavow the marketplace in which the contract is performed. Nor can it ignore the expectations of that market—expectations, for instance, that the terms of an indenture will be upheld, and that a court will not, *sua sponte*, add new substantive terms to that indenture as it sees fit.") (citing, *inter alia*, *Sharon Steel*, 691 F.2d at 1048 ("[U]niformity in interpretation is important to the efficiency of capital markets. . . . [T]he creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets.")). There is also a prospective dimension to this point. A judicial ruling supervening an indenture's comprehensive terms so as to excuse an issuer (based on a good-faith misapplication) from a duty it would otherwise have would introduce uncertainty into, and unhelpfully complicate, future indentures.

4. *Chesapeake's awareness that its redemption might be held to trigger a § 1.7(c) payout*: Chesapeake was on notice at all relevant times that the present scenario, involving the need on remand to resolve damages arising from a Special Early Redemption held untimely, might arise. From early on, Chesapeake knew that (1) the timeliness of its proposed Special Early Redemption was hotly contested, and (2) if held untimely on appeal, its

redemption might be held to trigger a duty to pay the Make-Whole payment.

As to the first point, beginning February 20, 2013, BNY Mellon notified Chesapeake that it believed that the deadline for noticing a Special Early Redemption had passed on February 13, 2013. And beginning March 8, 2013, this deadline was a principal subject of Chesapeake's litigation in this Court, including its application for emergency relief. Indeed, in denying that relief, this Court stated that the indenture's notice deadline appeared ambiguous, meaning Chesapeake's construction might ultimately be rejected. *See* 3/14/13 Tr., 17 ("As counsel have ably demonstrated, both of the competing positions find textual support within the indentures."). The next day, Chesapeake gave notice of the redemption, binding itself to redeem if this Court held its notice timely.

As to the latter point, BNY Mellon and the Noteholders took the position, in communications with Chesapeake and before this Court, that a Special Early Redemption notice alone, if held untimely by this Court such that no redemption occurred, could trigger a redemption under § 1.7(c). Although this Court disdained that position, it explicitly reminded Chesapeake, as all parties assuredly appreciated, that if Chesapeake redeemed the notes in reliance on a decision that its notice had been timely, and the Second Circuit reversed, Chesapeake could then be ordered to pay the Noteholders in a lump sum measured by the Make-Whole Amount, even though Chesapeake had never intended to trigger a § 1.7(c) redemption. *See* 3/19/13

Tr., 52-59.[12] All parties further appreciated that, were Chesapeake to prevail at trial, BNY Mellon and the Noteholders would appeal, but an appeal could not realistically be completed until long after the deadline for Chesapeake to redeem (60 days after its

---

[12] At the March 19, 2013 hearing, the Court addressed the various outcomes of the upcoming trial with counsel, and engaged in the following colloquy with Chesapeake's counsel (Richard Ziegler, Esq.):

THE COURT: . . . [N]ow hypothetically you win but there's an immediate appeal. . . . Is [BNY Mellon] right that basically the remedy at that point was not . . . to seek the reinstatement of the notices on the 2019 agreement schedule but in effect to claim Judge Engelmayer got it wrong and the only way to make my clients whole is to in effect pay them what amounts to the present value -- the 2019 value -- in effect giving him the make-whole value through the backdoor?

MR. ZIEGLER: And certainly I don't think the Court will give the noteholders the make-whole value through the backdoor.

THE COURT: Well, you don't think that. But I'm asking you to assume that the Court of Appeals disagrees with a ruling I make in your favor on timeliness and now wants to fashion a remedy. What is that remedy?

* * *

THE COURT: The notion would be that, in effect, on appeal the victorious noteholder would either get, as you say, the resuscitated new note, or, if you had to monetize it into a chunk of money to pay now, it winds up looking very much like the make-whole remedy.

MR. ZIEGLER: I just think the make-whole remedies in either case are sufficiently unusual that the equitable mootness doctrine may apply.

THE COURT: You're a creative lawyer, but it feels to me like there are money damages available on th[at] scenario. . . .

3/19/13 Tr., 56-59.

notice) had passed. *See id.* at 48-59. Chesapeake thus knew that in committing to redeem based on a finding of timeliness by a lower court only, it ran the risk of appellate reversal. *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J., concurring) ("[E]very litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal.").

The unhappy situation in which Chesapeake finds itself was thus a front-and-center, and real, possibility at all times. All parties, and the Court, recognized this. In waiting until after February 13, 2013 to issue its notice of Special Early Redemption, and in committing to redeem if this Court held that notice timely, Chesapeake ran the known risk that this worst-case scenario would come to pass. It went forward in the face of this "known unknown." Chesapeake assuredly hoped for a better outcome—ideally, that all courts would sustain its Special Early Redemption; alternatively, that this Court would hold its notice untimely and thereby abort its bid pre-redemption. But in identifying potential branches of the decision tree, Chesapeake had to know that in one, it would redeem based on a ruling of timeliness which was later reversed, giving the Noteholders, under the indenture, a substantial claim for Make-Whole damages based on the date of the redemption.

For these reasons, the Court rejects Chesapeake's suggestion that its characterization of the redemption as other than a Make-Whole Redemption must be given significant weight. Section 1.7(c) indeed states, as Chesapeake notes, that

Chesapeake "*at its option*" may bring about a Make-Whole Redemption; on that basis, Chesapeake argues that it never "opt[ed]" to bring such a redemption about. But Chesapeake gains little mileage from that clause. That clause makes the decision Chesapeake's alone whether or not to redeem the Notes after March 15, 2013. But that clause did not permit Chesapeake, by labeling a redemption a "Special Early Redemption," to decide the payout required under such a redemption if held later to have occurred within the period when only Make-Whole redemptions were authorized.

Nor, under the present circumstances, can Chesapeake carry the day by noting that it consistently characterized the May 13, 2013 redemption as other than a Make-Whole redemption—including in the March 15, 2013 Notice of redemption itself. *See, e.g.*, 2/24/15 Tr., 23 (argument of Chesapeake's counsel that "the effect of the redemption that occurred is integrally tied to th[e] notice" Chesapeake issued). Lewis Carroll notwithstanding, what Chesapeake has said repeatedly is not necessarily so. *See* Lewis Carroll, The Hunting of the Snark 3 (1876) ("I have said it thrice: What I tell you three times is true.") (quoted in *Parhat v. Gates*, 532 F.3d 834, 848-49 (D.C. Cir. 2008)). Chesapeake's characterization of the redemption as a Special Early Redemption, although an accurate reflection of its intentions, cannot preempt the Court from applying the principles above to determine the proper remedy due to the Noteholders given the Second Circuit's contrary holding.

iii. Cases relied on by Chesapeake

The Court has carefully considered the cases on which Chesapeake relies in advocating for a non-contractual remedy. This authority is inapposite for the reasons that follow.

Chesapeake first relies on Supreme Court cases awarding restitution on remand after an appellate reversal. These cases apply the principle that "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." *Atl. Coast*, 295 U.S. at 309; *see also Baltimore & Ohio R.R.*, 279 U.S. at 786 ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established."); *Arkadelphia*, 249 U.S. at 145 ("[A] party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby.").

This principle does not assist Chesapeake. In the cases which it cites, the Court applied this principle to award damages to (1) a losing-defendant-turned-victorious-appellant who (2) *lost* something under *compulsion* of a court order. The rationale is that "[o]bedience was owing" to the lower court's order (or the Interstate Commerce Commission's order) "while th[at] order was in effect." *Atl. Coast*, 295 U.S. at 309. In *Baltimore & Ohio Railroad*, for example, the "west side" railroads sought, and obtained from the Interstate Commerce Commission ("ICC"), an order that the "east side" railroads should bear the cost of trans-Mississippi River travel. The east side

railroads then brought suit in federal court, seeking to set aside the ICC's order; after the district court dismissed the suit for want of equity, the Supreme Court reversed. On remand, the district court set aside the ICC's order, but, while holding that the east side railroads had complied with the ICC's order while in effect, denied their bid for restitution. On appeal, the Supreme Court again reversed. 279 U.S. at 783-84. It held that the east side railroads were entitled to restitution because they had made payments "in compliance with the [ICC's] invalid order," and those payments "inured to the benefit of the west side roads just as if made directly to them." *Id.* at 785-86.

For a number of reasons, this case is a far cry from that scenario. Chesapeake is not a losing-defendant-turned-victorious-appellant; it is a winning-plaintiff-turned-unsuccessful-appellee. And Chesapeake was not *compelled* by a court to do (or refrain from doing) anything; it affirmatively *chose* to pursue a course leading to a redemption knowing that timeliness was contested and that it might be held on appeal to have missed the deadline for Special Early Redemption. Unlike the east side railroads, Chesapeake controlled its choices and ran a known risk.

Significantly, too, the relationship among the parties in the railroad-rate cases like *Baltimore & Ohio Railroad*, *Arkadelphia Milling*, and *Atlantic Coast* was not governed by contract; the litigation challenged regulatory rate-setting and court injunctions. These cases thus do not displace the principle, reviewed above, that where the parties'

relationship is defined by contract, courts should look to the contract in setting remedies.

Finally, these decisions do not limit the right of a party on remand to a restitutionary remedy. Later decisions have held that, in the situation where a contractual provision initially has been misinterpreted, the losing-defendant-turned-successful-appellant may, on remand, seek *either* a contractual or a restitutionary remedy.[13] Contrary to

---

[13] *Munoz v. MacMillan*, 195 Cal. App. 4th 648, 651 (Cal. Ct. App. 2011), supplies a good illustration. There, landlord MacMillan sued tenant Munoz for unlawful detainer. MacMillan prevailed in the trial court, and evicted Munoz. Munoz won on appeal. Munoz then sued for damages under the lease. MacMillan argued that he had evicted Munoz in reliance on the trial court and that restitution therefore was Munoz's only remedy. The appellate court disagreed:

> If Munoz has suffered damages as a result of the alleged breach, she can pursue applicable remedies for breach of contract. Were this not the rule, it would be difficult to explain doctrinally what happened to Munoz's contract rights. Munoz did not at any time voluntarily relinquish her right to possession under the lease for the term prescribed, either during the pendency of the unlawful detainer action or following the initial judgment. . . . MacMillan now contends the existence of a restitution remedy precludes a contract remedy. . . . But we are unaware of any authority for the proposition that the existence of a remedy in restitution precludes a plaintiff from suing on an express contract. It would be odd to say Munoz is required to seek restitution for the loss of her rights, but cannot seek recovery for breach of contract. It is the *lease* (an actual contract, not one implied by law) that entitled Munoz to possession of the premises. It is the *lease* that defines the rights Munoz lost when the initial judgment was enforced (the time period she

Chesapeake's claim, restitution on remand is neither mandatory nor exclusive, *see* Chesapeake Br. 14, and the cases Chesapeake cites do not support that proposition.[14]

> was entitled to possess the premises). There is no need in this case for Munoz to plead quasi-contract or quantum meruit—she has an actual contract.

Id. at 659-61 (footnote omitted).

[14] Some of these cases involved the calculation of a restitution award sought by a successful appellant; they do not speak to the situation where such an appellant seeks a different form of recovery. *See, e.g.*, *U.S. Indus., Inc. v. Gregg*, 457 F. Supp. 1293 (D. Del. 1978), *aff'd*, 605 F.2d 1199 (3d Cir. 1979); *see also In re Popkin & Stern*, 263 B.R. 885, 889 (8th Cir. B.A.P. 2001). Other cases examined the *motive* for a breach of contract only because a statute made it relevant whether the breach had been "wrongful" or "unjustified." *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Seagate Tech., Inc.*, No. 04 Civ. 01593 (WHA), 2013 WL 1282971, at *3 (N.D. Cal. Mar. 27, 2013), (addressing whether insurer's refusal to defend insured had been "wrongful" under California statute, and noting that insured was "entitled to the benefit of its own bargain"); *Auto-Owners Ins. Co. v. Potter*, 242 F. App'x 94, 97-98 (4th Cir. 2007) (unpublished) (addressing whether insurer's withdrawal of defense of insured had been "unjustified" under North Carolina statute). Finally, several cases are sufficiently far afield as to have no bearing here. *See, e.g.*, *Chafin v. Chafin*, 133 S. Ct. 1017, 1028 (2013) (in Hague Convention child custody dispute, district court ordered child repatriated to Scotland, appeals court held the appeal moot, and Supreme Court found the appeal *not* moot because district court could order the child to return to the U.S.); *In re Cathedral of Incarnation in Diocese of Long Island*, 90 F.3d 28, 35-36 (2d Cir. 1996) (holding that bankruptcy court should wait to see if later events confirmed that restitution was available); *Am. Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721 (E.D. Va. 1980) (at plaintiff's request, court granted rescission of a contract and awarded rescissory damages rather than return to the status quo).

Second, Chesapeake relies on a section (§ 18) of the Restatement (Third) of Restitution derived, in part, from the foregoing Supreme Court cases. It states that "[a] transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment." But § 18 does not avail Chesapeake. Chesapeake relies on the broadly worded clause, "in compliance with *or otherwise in consequence of a judgment* that is subsequently reversed or avoided," but it puts more weight on that clause than it fairly bears. There is no authority for viewing this clause as displacing the scores of cases (reviewed earlier), or for that matter § 2 of the Restatement, that give primacy to contractual remedies where available. *See* pp. 14-20, *supra*. The comments to § 18 confirm Chesapeake's overreach:

> This section addresses the restitution issues that arise when a transfer of the claimant's property results, directly or indirectly, from an *adverse* judgment in a judicial or administrative proceeding to which the claimant is a party, and that judgment is subsequently reversed or otherwise set aside. It is often possible to postpone *compliance* with an *adverse* judgment, by a bonding procedure or otherwise, pending a challenge by direct appeal or in collateral proceedings. If there has been no transfer in consequence of the judgment that is later set aside, there is naturally no issue of restitution. But a party is under no

> obligation to postpone *compliance* with a judgment that he seeks to *overturn*[], and postponement is not always feasible.

Rest. (Third) of Restitution § 18, cmt. a (emphases added). Section 18 is thus aimed at ensuring recovery by the originally losing party that had acted (or refrained from acting) in "compliance" with an "adverse" judgment. As noted, this case does not fit that paradigm.

Third, Chesapeake argues that awarding Noteholders the § 1.7(c) Make-Whole remedy would award a windfall that is barred by the case law. But Chesapeake does not identify any case inconsistent with using, to determine the amount of relief, a contractual provision that sets out the monies due the appellate victors upon the very action (a redemption on a given day) for which they seek recompense. The cases involving TIAA entities, on which Chesapeake relies, do not aid its cause. *See Teachers Ins. & Annuity Ass'n of Am. v. Coaxial Commc'ns of Cent. Ohio, Inc.*, 799 F. Supp. 16 (S.D.N.Y. 1992); *Teachers Ins. & Annuity Ass'n v. Ormesa Geothermal*, 791 F. Supp. 401 (S.D.N.Y. 1991). Chesapeake notes that that those cases rejected make-whole provisions and instead awarded damages equal to the discounted present value of the incremental interest income that the investors lost due to the breach. *See Coaxial Commc'ns*, 799 F. Supp. at 19; *Ormesa Geothermal*, 791 F. Supp. at 415-16. But the *TIAA* cases concerned a different type of agreement (a private term loan, not a registered corporate bond), which had not yet been funded, *see Coaxial Commc'ns*, 799 F. Supp. at 18;

Ormesa Geothermal, 791 F. Supp. at 416; thus, the make-whole provision was not yet in force when the breach occurred. The *TIAA* cases therefore did not reject an applicable make-whole provision in favor of restitution, so much as they declined to transport a make-whole provision to govern a time period with respect to which the parties had agreed it would not apply. And the court in *Coaxial Communications* emphasized the primacy of contractual remedies when available, stating that "absent a clear violation of public policy it is important to preserve the freedom of parties to contract. It is not for a fact-finder to second-guess the wisdom of their choices. Both parties elected to sign the commitment letter as written despite the risks, and defendant cannot now be heard to seek to avoid its contract because of regrets on its side about a strategic business decision." 799 F. Supp. at 18. These decisions thus accord with the Second Circuit's emphasis on upholding the "particularized intentions of the parties," so as to promote predictability and market efficiency. *Sharon Steel*, 691 F.2d at 1048.

The Court therefore agrees with BNY Mellon: With respect to the redemption on May 13, 2013 of the 2019 Notes, Chesapeake must pay compensation to the Noteholders consistent with their entitlement to Make-Whole relief for such a redemption under §1.7(c).

D. Prejudgment Interest

The parties next dispute the appropriate measure of the prejudgment interest due to the 2019 Noteholders.

The principles governing prejudgment interest under New York law are supplied by New York CPLR § 5001 *et seq*. Section 5001(a) provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." Under § 5001(a), in a breach of contract action, the prevailing party is entitled to prejudgment interest on its damages "as a matter of right." *See U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 936 F.2d 692, 698 (2d Cir. 1991). In a breach of contract action, CPLR § 5004 establishes a default prejudgment interest rate of 9% per year, subject to the right of the parties to agree, by contract, to a different rate. Thus, the "applicable rate of prejudgment interest [may] var[y] depending on the nature and terms of the contract." *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011); *see also id.* (explaining that CPLR § 5004 applies "[i]f the parties failed to include a provision in the contract addressing the interest rate that governs . . . in the event of a breach"). By contrast, in an equitable action, § 5001(a) gives the Court discretion to select a fair prejudgment interest rate. *See, e.g.*, *Franklin Advisers*, 726 F.3d at 282; *United States v. Con. Edison Co.*, 452 F. Supp. 638, 658-59 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1122 (2d Cir. 1978) (court has "broad discretion in fashioning an award of interest[,] if any," when "recovery is based upon equitable principles"). In either circumstance—an action based in contract or in equity—

prejudgment interest runs from "the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." N.Y. CPLR § 5001(b).

The parties' positions as to prejudgment interest echo their arguments as to the amount of money due. Chesapeake casts the issue as equitable, not contractual, and therefore argues that the prejudgment interest rate is left to the Court's discretion under § 5001. Chesapeake proposes an interest rate of 2.3% per year, which, it states, was its "borrowing rate for short-term loans" on May 13, 2013 and therefore the interest that a 2019 Noteholder could have obtained had it invested redemption proceeds that day. Chesapeake Reply Br. 24-25; *see also* Chesapeake Br. 33. By contrast, BNY Mellon argues that this damages inquiry in substance, if not form, sounds in breach of contract. Indeed, BNY Mellon notes, the 2019 Noteholders, rather than pursuing relief on remand in this litigation under § 2202, could have brought a breach of contract action, claiming that Chesapeake breached its indenture-based duty to them to pay the Make-Whole Amount upon the May 13, 2013 redemption. BNY Mellon therefore argues that prejudgment interest is as of right, not discretionary, and that the Court should set the prejudgment interest rate using the 6.775% annual rate applicable to the 2019 Notes under the Supplemental Indenture; consistent with this argument, BNY Mellon argues that this rate displaces the 9% default rate in contract cases under New York law. *See* BNY Br. 33-34. The parties agree that prejudgment

interest runs from the redemption date (May 13, 2013). *See* Chesapeake Br. 33; BNY Br. 33-34. BNY Mellon urges that this interest be calculated semi-annually, on March 15 and September 15, again, consistent with the Supplemental Indenture.[15]

The Court again agrees with BNY Mellon. That the prejudgment interest rate is to be determined contractually by reference to the indenture, if the indenture speaks to that point, logically follows from the Court's holding that the Noteholders' damages are contractual in nature, based on Chesapeake's breach of its duties upon redemption under the indenture. To be sure, the Supplemental Indenture does not set, *in haec verba*, a prejudgment interest rate. The 6.775% rate that appears in the indenture instead is used to measure the interest on the 2019 Notes to their maturity (*i.e.*, assuming no redemption). But although these contexts are distinct, there is good logic to binding Chesapeake to that same rate in the context of setting the interest rate upon breach. After all, Chesapeake, the driving force behind, and a drafter of, the indenture, agreed to pay such an interest rate on the Notes, over a seven-year period (2012 through 2019), to the same class of Noteholders. And § 3.06 of the Base Indenture appears to signal an intent that the 6.775% rate would apply to overdue redemption

---

[15] *See* Dkt. 1, Ex. B, at 12 (Ninth Supplemental Indenture, Reverse Side of Note, ¶ 1) ("Chesapeake Energy Corporation . . . promises to pay interest on the principal amount of this Note at the rate per annum shown above [6.775%]. The Company will pay interest semiannually on March 15 and September 15 of each year . . . .").

payments, a characterization that is fair as to the sums due here. It states: "If any Security called for redemption shall not be so paid upon redemption because of the failure of the Company to [deposit the required redemption price], interest will continue to be payable on the unpaid principal and any premium including from the redemption date until such principal and any premium is paid, and, to the extent lawful, on any interest not paid on such unpaid principal, in each case at the rate provided in the Securities and in Section 4.01 hereof." Baron Decl., Ex. I (Base Indenture, § 3.06). Moreover, given the Court's holding that the Noteholders' monetary entitlement is contractual in nature, a conclusion that that the 6.775% interest rate set in the indenture did not apply in the context of prejudgment interest would not benefit Chesapeake. The Court would then, pursuant to § 5004, impose the default prejudgment interest of 9% that applies in contract cases.[16]

The Court, accordingly, holds that the prejudgment interest rate here is 6.775%; that it runs from May 13, 2013; and that interest is to be calculated semi-annually (on March 15 and September 15).

---

[16] For avoidance of doubt, were the prejudgment interest rate left to the Court's discretion, as Chesapeake posits, the Court would still choose the 6.775% rate on which the parties to the indenture agreed. The Court finds this rate more appropriate under the circumstances than either the 2.3% borrowing rate for short-term loans available to Chesapeake on May 13, 2013, or the 9% default rate in breach of contract cases.

CONCLUSION

For the foregoing reasons, the Court grants BNY Mellon's motion for further relief, and denies Chesapeake's cross-motion for an order of restitution. Chesapeake shall pay the 2019 Noteholders $379,650,133.21, consistent with their entitlement to be paid the Make-Whole Amount for a redemption on May 13, 2013. Further, the Court holds that the prejudgment interest rate is 6.775%, that it runs from May 13, 2013, and that it is to be calculated semiannually (on March 15 and September 15).

The Clerk of Court is respectfully directed to terminate the motions pending at 160, 169, and 183, and to close this case.

SO ORDERED.

[handwritten: signature]
PAUL A. ENGELMAYER
United States District Judge

Dated: July 10, 2015
New York, New York

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13-cv-1582

CHESAPEAKE ENERGY CORPORATION,
Plaintiff,
v.
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
Defendant.

Filed: July 13, 2015

JUDGMENT

Whereas on May 8, 2013, this Court having entered a declaratory judgment the plaintiff Chesapeake Energy Corporation ("Chesapeake") had timely issued a notice of "Special Early Redemption," and was therefore entitled, under a Supplemental Indenture, to redeem at par a series of senior notes it had issued in 2012, which were to mature in 2019; on May 13, 2013, Chesapeake redeemed those notes at par; however, on November 25, 2014, the Second Circuit overturned this Court's decision, it held that Chesapeake had missed the deadline for a Special early Redemption, and thus could not lawfully redeem at par; the issues on remand having come before the Honorable Paul A. Engelmayer, United

States District Judge, and the Court, on July 10, 2015, having rendered its Opinion and Order the Court granting BNY Mellon's motion for further relief, denying Chesapeake's cross-motion for an order of restitution, that Chesapeake shall pay the 2019 Noteholders $379,650,133.21, consistent with their entitlement to be paid the Make-Whole Amount for a redemption on May 13, 2013, holding that the prejudgment interest rate is 6.775%, that it runs from May 13, 2013, and that it is to be calculated semi-annually (on March 15 and September 15), and directing the Clerk of the Court to close, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated July 10, 2015, BNY Mellon's motion for further relief is granted; Chesapeake's cross-motion for an order of restitution is denied; Chesapeake shall pay the 2019 Noteholders $379,650,133.21, consistent with their entitlement to be paid the Make-Whole Amount for a redemption on May 13, 2013, plus prejudgment interest at the rate of 6.775%, that runs from May 13, 2013 calculated semi-annually (on March 15 and September 15) till date of judgment in the amount of $59,200,132.24 for a total sum of $438,850,265.45; accordingly, the case is closed.

Dated: New York, New York
July 13, 2015

Ruby J. Krajick
Clerk of Court

BY: [handwritten: signature]
Deputy Clerk

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13-cv-1582

CHESAPEAKE ENERGY CORPORATION,
Plaintiff,
v.
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
Defendant.

Filed: July 17, 2015

AMENDED JUDGMENT

Whereas on May 8, 2013, this Court having entered a declaratory judgment the plaintiff Chesapeake Energy Corporation ("Chesapeake") had timely issued a notice of "Special Early Redemption," and was therefore entitled, under a Supplemental Indenture, to redeem at par a series of senior notes it had issued in 2012, which were to mature in 2019; on May 13, 2013, Chesapeake redeemed those notes at par; however, on November 25, 2014, the Second Circuit overturned this Court's decision, it held that Chesapeake had missed the deadline for a Special early Redemption, and thus could not lawfully redeem at par; the issues on remand having come before the Honorable Paul A. Engelmayer, United

States District Judge, and the Court, on July 10, 2015, having rendered its Opinion and Order the Court granting BNY Mellon's motion for further relief, denying Chesapeake's cross-motion for an order of restitution, that Chesapeake shall pay BNY Mellon, as indenture trustee, $379,650,133.21, consistent with the 2019 Noteholders' entitlement to be paid the Make-Whole Amount for a redemption on May 13, 2013, holding that the prejudgment interest rate is 6.775%, that it runs from May 13, 2013, and that it is to be calculated semi-annually (on March 15 and September 15), and directing the Clerk of the Court to close it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated July 10, 2015, BNY Mellon's motion for further relief is granted; Chesapeake's cross-motion for an order of restitution is denied; Chesapeake shall pay BNY Mellon, as indenture trustee, $379,650,133.21, consistent with the 2019 Noteholders' entitlement to be paid the Make-Whole Amount for a redemption on May 13, 2013, plus prejudgment interest at the rate of 6.775%, that runs from May 13, 2013 calculated semi-annually (on March 15 and September 15) till date of judgment in the amount of $59,067,428.46 for a total sum of $438,717,561.67; accordingly, the case is closed.

Dated: New York, New York
July 17, 2015

Ruby J. Krajick
Clerk of Court

BY: [handwritten: signature]
Deputy Clerk

Appendix F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 13-1893-cv

CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

AD HOC NOTEHOLDER GROUP,

Intervenor.

On Appeal from the United States District Court for the Southern District of New York

---

Argued: March 6, 2014
Decided: November 25, 2014

Before: LEVAL, CARNEY *Circuit Judges*, FAILLA, *District Judge.*[*]

OPINION

---

[*] The Honorable Katherine Polk Failla of the United States District Court for the Southern District of New York, sitting by designation.

Defendant Bank of New York Mellon Trust Company, N.A. appeals from the judgment of the United States District Court for the Southern District of New York (Engelmayer, *J.*) declaring that the March 15, 2013 notice of redemption issued by Plaintiff Chesapeake Energy Corporation was timely and effective to redeem certain senior notes on May 15, 2013 at the Special Price of 100% of the principal amount, plus accrued and unpaid interest to the date of redemption. The Court of Appeals (Leval, *J.*) concludes that, under the unambiguous terms of the indenture, the notice was not timely to redeem the Notes at the Special Price, as such a redemption needed to be concluded no later than March 15, 2013, with 30 to 60 days prior notice. The judgment of the district court is therefore REVERSED and the case REMANDED with instructions to consider whether the notice operates as a notice of redemption under another provision of the indenture.

Judge Failla dissents by separate opinion.

LEVAL, *Circuit Judge*:

Defendant Bank of New York Mellon Trust Company, N.A. ("BNY Mellon") appeals from the judgment of the United States District Court for the Southern District of New York (Engelmayer, *J.*) declaring that the Notice of Special Early Redemption issued by plaintiff Chesapeake Energy Corporation ("Chesapeake") on March 15, 2013 was timely and effective to redeem certain senior notes (the "Notes") at the "Special Price" of 100% of the principal amount, plus interest accrued to the date of redemption. Joint App'x ("JA") at 730, *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*,

No. 13-1893 (Aug. 23, 2013). BNY Mellon brings this appeal in its capacity as indenture trustee for the benefit of the noteholders.

After an expedited bench trial, the district court adopted Chesapeake's argument, construing the Ninth Supplemental Indenture (the "Supplemental Indenture"), which governed the Notes, as unambiguously authorizing Chesapeake to redeem the Notes at the Special Price by giving notice of redemption during the Special Early Redemption Period—between November 15, 2012 and March 15, 2013—and redeeming the Notes 30 to 60 days thereafter. BNY Mellon contends that the Supplemental Indenture authorized Chesapeake to redeem the Notes at the Special Price only if the redemption would be accomplished within the Special Early Redemption Period, i.e., no later than March 15, 2013, with notice of 30 to 60 days given during the Special Early Redemption Period. We agree with BNY Mellon. Accordingly, we reverse the judgment and remand for consideration of Chesapeake's second claim for declaratory relief.

BACKGROUND

A. Factual Background

In February 2012, Chesapeake issued $1.3 billion in senior notes due on March 15, 2019 bearing an interest rate of 6.775%. The Notes were issued under two indentures—a pre-existing Base Indenture, dated August 2, 2010, which applied to several series of notes, and the Supplemental Indenture, dated February 16, 2012, which specifically governed this series. JA at 309, 726.

This dispute centers on the meaning of § 1.7 of the Supplemental Indenture, which governs Chesapeake's option to make a Special Early Redemption of the Notes. This section provides:

> (a) The Company [Chesapeake] shall have no obligation to redeem, purchase or repay the Notes pursuant to any mandatory redemption, sinking fund or analogous provisions or at the option of a Holder thereof.
>
> (b) At any time from and including November 15, 2012 to and including March 15, 2013 (the "Special Early Redemption Period"), the Company, at its option, *may redeem the Notes in whole or from time to time in part for a price equal to 100% of the principal amount of the Notes to be redeemed*, plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption; provided, however, that, immediately following any redemption of the Notes in part (and not in whole) pursuant to this Section 1.7(b), at least $250 million aggregate principal amount of the Notes remains outstanding. 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*. Any redemption pursuant to this Section 1.7(b) shall be conducted, to the extent applicable, pursuant

> to the provisions of Sections 3.02 through 3.07 of the Base Indenture.
>
> (c) At any time after March 15, 2013 to the Maturity Date, the Company, at its option, may redeem the Notes in whole or from time to time in part for an amount equal to the Make-Whole Price plus accrued and unpaid interest to the date of redemption in accordance with the Form of Note.

JA at 730 (emphasis added).

Section 1.7(b) cross-references § 3.04 of the Base Indenture, which provides:

> (a) At least 30 days but not more than 60 days before a redemption date, [Chesapeake] shall mail a notice of redemption by first-class mail to each Holder of Securities to be redeemed at such Holder's registered address.

JA at 338.

These provisions allowed Chesapeake two elective options for early redemption. Pursuant to § 1.7(b), Chesapeake could elect early redemption of Notes at the Special Price during the Special Early Redemption Period. Pursuant to § 1.7(c), Chesapeake could elect early redemption of Notes after the Special Early Redemption Period at a substantially higher "Make-Whole Price."

On February 20, 2013, twenty-three days prior to the end of the Special Early Redemption Period, Chesapeake announced that it planned to redeem the Notes at the Special Price pursuant to § 1.7(b). Later that day, however, a hedge fund, which had

purchased a large amount of the Notes, protested that the time allowed for notice of redemption at the Special Price had expired because redemption at the Special Price was permitted solely within the Special Early Redemption Period and no less than 30 days following the giving of notice, which was no longer possible.

On February 22, 2013, BNY Mellon notified Chesapeake that it would not participate in the proposed redemption. On February 28, 2013, BNY Mellon told Chesapeake that if Chesapeake issued a notice of redemption, BNY Mellon might deem the notice as having triggered redemption at the Make-Whole Price pursuant to § 1.7(c). Chesapeake nonetheless issued a Notice of Special Early Redemption on March 15, 2013, calling for redemption at the Special Price on May 15, 2013.

B. The Trial and the District Court's Decision

On March 8, 2013, Chesapeake filed this action against BNY Mellon seeking declaratory judgment that its Notice of Special Early Redemption at the Special Price would be timely and effective if mailed by March 15, 2013. In the event the court ruled that the notice was not timely to effectuate early redemption at the Special Price, the complaint also sought a declaratory ruling that the notice would not trigger redemption at the Make-Whole Price.

The court held an expedited bench trial on April 23-25, 2013 with closing arguments on April 30, 2013. On May 8, 2013, only eight days later, and with the date noticed for redemption only one week away, the court issued a detailed 92-page decision, and entered judgment thereon, ruling that § 1.7(b) of the

Supplemental Indenture was unambiguous in setting March 15, 2013 as the deadline for notice of redemption at the Special Price, and in allowing actual redemption to occur 30 to 60 days thereafter. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, 957 F. Supp. 2d 316, 339-40 (S.D.N.Y. 2013). The court further ruled that, even if the indenture provisions were deemed ambiguous, "the extrinsic evidence convincingly establishes a meeting of the minds among the negotiating parties" that "these parties intended and agreed that March 15, 2013 would serve as the deadline for Chesapeake to give notice of redemption." *Id.* at 359.[1]

BNY Mellon appeals, arguing that § 1.7(b) authorized redemption at the Special Price only if accomplished no later than March 15, 2013, with notice given 30 to 60 days before, also during the Special Early Redemption Period.

DISCUSSION

We conclude that the terms of § 1.7 unambiguously terminated Chesapeake's right to redeem the Notes at the Special Price on March 15, 2013. Notice of such redemption needed to be given no later than February 13, 2013; the notice given by Chesapeake on March 15, 2013 of redemption to occur on May 15, 2013 was, therefore, untimely.

---

[1] The court also held that Chesapeake's notice was not defective, that Chesapeake's second claim for declaratory relief was moot in light of the court's holding, and that Chesapeake's claim was not barred by laches, equitable estoppel, or waiver. *Id.* at 372-74.

When interpreting a contract, our "primary objective . . . is to give effect to the intent of the parties as revealed by the language of their agreement." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 157 (2d Cir. 2000). "[T]he words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions." *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (internal quotation marks omitted).

Under New York law, a contract is ambiguous if its terms "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (internal quotation marks omitted). "No ambiguity exists where the contract language has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.* at 467 (internal quotation marks omitted). "[W]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract . . . ." *Howard v. Howard*, 740 N.Y.S.2d 71, 71 (2d Dep't 2002) (citations omitted).

The district court adopted Chesapeake's argument. It read § 1.7(b)'s Special Early Redemption Period as fixing the period during which Chesapeake could begin the redemption process by providing notice, and not requiring actual redemption within that period. Accordingly, it read the term "may redeem," in the first sentence of § 1.7(b) to mean "may commence the redemption process [by giving notice]." *Chesapeake Energy Corp.*, 957 F. Supp. 2d at 336. In the court's view, this interpretation was required in order to avoid what the court perceived to be an "irreconcilable conflict" in the indenture's terms. *Id.* at 337.

Because the first sentence of § 1.7(b) provides that Chesapeake "may redeem" the Notes at the Special Price "[a]t any time from and including November 15, 2012 to and including March 15, 2013," the court interpreted that sentence as guaranteeing Chesapeake four full months in which it could effectuate the redemption. However, the second sentence of § 1.7(b) (incorporating by reference § 3.04 of the Base Indenture) required Chesapeake to give 30 to 60 days notice, which notice was required to be given during the same four-month period. The notice obligation provided by the second sentence thus prevented Chesapeake from redeeming during the first 30 days of the specified Special Early Redemption Period. The effect of the second sentence was, thus, to allow three months during which Chesapeake could effectuate the redemption. In the court's view this created an irreconcilable conflict. *Id.* The court explained,

> Under BNY Mellon's reading of § 1.7(b), there is no four-month period for doing *anything*, including for giving notice or for a redemption. Rather, there is, implicitly, a three-month period for a notice of at-par redemption (November 15, 2012 through February 13, 2013) and a separate, implicit three-month period for redemption itself on such terms (December 15, 2012 through March 15, 2013) . . . .

Id. at 338.

While the court's observation (that Chesapeake did not have four months in which it could redeem) was correct, we respectfully disagree that this created an irreconcilable conflict. Chesapeake's interpretation is flawed in several respects.

The Supplemental Indenture does not purport to give Chesapeake four months in which to accomplish redemption at the Special Price, or four months in which to give notice of the redemption. Nor does the indenture purport to give Chesapeake the opportunity to redeem *at any time* between November 15, 2012 and March 15, 2013. The indenture was simply drafted using a "so long as" clause, in the nature of a proviso, which limited the scope of a prior provision.

It is true that the first sentence of § 1.7(b) of the Supplemental Indenture, if it were written in isolation, would give Chesapeake the right to redeem Notes at the Special Price "at any time from and including November 15, 2012 to and including March 15, 2013," defined as the "Special Early Redemption Period." But that first sentence does not appear in

isolation. The immediately following sentence makes clear that Chesapeake's right of redemption set forth in the first sentence is subjected to a limiting qualification. The second sentence states, "[Chesapeake] 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*." JA at 730 (emphasis added).

Reading the first and second sentences together makes clear that Chesapeake may exercise this right of early redemption only during the Special Early Redemption Period and only after giving the required notice of 30 to 60 days "*during the Special Early Redemption Period*." JA at 730 (emphasis added).

When a proposition is followed by a clause beginning with "so long as," the "so long as" clause typically serves as a proviso, introducing a condition that narrows the broader initial proposition. *See, e.g.*, *Burrage v. United States*, 571 U.S. __, 134 S.Ct. 881, 888 (2014) ("[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived."); *The Chicago Manual of Style* § 4.3 (16th ed. 2010) ("Whenever a book or article, poem or lecture, database or drama comes into the world, it is automatically covered by copyright so long as it is 'fixed' in some 'tangible' form and embodies original expression."). Section 1.7(b)'s "so long as" clause is not in conflict with the

first sentence; it is a proviso, which limits the scope of Chesapeake's right.

The use of such a proviso in a contract can indeed narrow the scope of a contract term, but it does so in a manner dictated by the contractual text. As employed in the Supplemental Indenture, this common linguistic device was used to set forth the different components of a set of rights and obligations in separate sentences. The contractual text required reading these different sentences in tandem. When read in tandem, these sentences communicated a clearly defined right, contingent on the performance of clearly specified obligations.

If instead of describing the Special Early Redemption process in two consecutive sentences, the indenture had stated in a single sentence, "At any time during the Special Early Redemption Period from November 15, 2012 to March 15, 2013, Chesapeake may redeem the Notes at the Special Price, so long as it gives notice pursuant to Section 3.04 of the Base Indenture during the Special Early Redemption Period," what Chesapeake calls an "irreconcilable conflict" would be equally present, and yet no one could fail to understand that both notice and redemption must occur during the Special Early Redemption Period. By spreading those provisions through two successive sentences, the indenture perhaps required more patience on the part of the reader, but it had the same unmistakable meaning.

A further flaw in Chesapeake's interpretation is that it introduces conflict and contradiction into the contractual text. This interpretation construes the words "may redeem" in the first sentence of § 1.7(b)

to mean "may commence the redemption process [by giving notice]." *Chesapeake Energy Corp.*, 957 F. Supp. 2d at 336. It attributes to the word "redeem" an unnatural meaning, substantially different from its normal meaning. Additionally, it causes the word to carry different meanings in different iterations within the same contractual provision, indeed within the same sentence.

"Redeem" (in the verb form) or "redemption" (in its noun form) refers to "[t]he reacquisition of a security by the issuer." *Black's Law Dictionary* 1390 (9th ed. 2009) (defining "redemption" as "[t]he reacquisition of a security by the issuer"); *Barron's Dictionary of Finance and Investment Terms* 587 (8th ed. 2010) (defining "redemption" as "repayment of a debt security or preferred stock issue, at or before maturity"); *Webster's New International Dictionary* 2085 (2d ed. 1934) (defining "redeem" as "[t]o regain possession of by payment of a stipulated price; to repurchase"). Chesapeake's interpretation gives the term a very different meaning—not "[t]he reacquisition of a security by the issuer," but the giving of notice by the issuer that it would reacquire the security.

Furthermore, Chesapeake's interpretation causes the term to mean different things in different instances of its appearance. "Redeem" (or "redemption") appears numerous times in § 1.7, and six times within the affected first sentence of § 1.7(b). For the first and second appearances of the term in that sentence—"Special Early *Redemption* Period" and "[Chesapeake], at its option may *redeem* the Notes"—Chesapeake's interpretation changes its

meaning so that instead of referring to the act of redemption, it refers to the giving of notice of a future redemption. For this sentence to make sense, however, "redeem" needs to retain its normal meaning in other appearances within the sentence. Unpaid interest to "the date of *redemption*" cannot reasonably refer to the date of the notice. It necessarily refers to the date on which Chesapeake pays the debt represented by the Notes (or otherwise reacquires them), as interest would continue to accrue so long as any part of the debt remains outstanding. Likewise, it is clear that in requiring that $250 million aggregate principal remain outstanding "immediately following any *redemption*," the sentence refers to actual redemption, not the date the redemption is noticed. The word "redemption" in the phrase "notice of redemption," which appears in the second sentence, necessarily refers to the reacquisition of the Notes and not the giving of notice. Finally, there would be no making sense of the provision requiring that notice be mailed to noteholders "[a]t least 30 days but not more than 60 days before a *redemption* date," JA at 338, unless "redemption" carries its customary meaning. Under Chesapeake's interpretation of the Supplemental Indenture, the indenture trustee, charged with the fiduciary duty to protect the rights of the noteholders, would be left to guess when the contractual term meant what it said, and when a different, artificial meaning was to be substituted.[2]

---

[2] Judge Failla argues that our reading of the indenture is defective because it renders untrue the statement implicit in the first sentence of § 1.7(b) that Chesapeake *may redeem the Notes*

The terms of the Supplemental Indenture had a definite and precise meaning. The contract made perfect sense with the term "redeem" carrying its normal meaning in each usage. The governing indenture unambiguously provided that, in order to exercise the right to early redemption at the Special Price, Chesapeake was obliged, as the indenture trustee has correctly insisted, to effectuate the redemption within the specified Special Early Redemption Period upon notice of 30 to 60 days also

---

between November 15 and December 14 at the Special Price. Under our reading, she contends, the term "Special Early Redemption Period" of November 15, 2012 to March 15, 2013 "would cease to have independent meaning." We respectfully disagree with both propositions. As Judge Failla earlier acknowledges, the term Special Early Redemption Period continues to have meaning under our reading. It is the period during which Chesapeake must do all actions necessary under the contract to effectuate redemption at the Special Price: the giving of notice and the redemption. And while it is correct that, if the first sentence of § 1.7(b) were to be read in isolation, its statement that Chesapeake "may redeem the Notes" at any time from November 15, 2012 to March 15, 2013, would prove untrue as to the first 30 days of the period, the first sentence is not to be read in isolation. It is immediately qualified by the next sentence, which explains that Chesapeake may "exercise its option to redeem the Notes . . . *so long as* it gives the notice of redemption . . . *during the Special Early Redemption Period*." As is commonplace, the proviso limits the scope of the statement to which it serves as a proviso.

Judge Failla further asserts that our reading is structurally incoherent and elevates form over substance. We do not see how that is the case. Our reading simply reads the word "redeem" to mean what it says. When the word is read to retain its meaning in each of its appearances, the provisions of § 1.7(b), although set forth in a complicated structure, have a clear, coherent, and understandable meaning.

given within that period. Chesapeake's option to make Special Early Redemption at the Special Price could therefore be exercised only by effectuating redemption no later than March 15, 2013, upon notice given no later than February 13, 2013. The notice Chesapeake gave on March 15, 2013, calling for redemption on May 15, 2013, was untimely and ineffective to redeem at the Special Price.[3]

CONCLUSION

For the reasons stated above, we REVERSE the district court's judgment and REMAND for consideration of Chesapeake's second claim for declaratory judgment that the redemption notice given by Chesapeake on March 15, 2013 should not be deemed to have noticed redemption at the Make-Whole Price.

[3] Because we find that the Supplemental Indenture is unambiguous, we have no need to rule on the district court's findings relating to extrinsic evidence. *See Howard*, 740 N.Y.S.2d at 71.

FAILLA, *District Judge*, dissenting:

Both the district court and the majority have it half-right: the majority is correct that Section 1.7(b) of the Supplemental Indenture cannot be read to unambiguously support Chesapeake's position, and the district court is correct that it cannot be read to unambiguously support BNY Mellon's position. The text is ambiguous, and the case should be remanded to the district court to reevaluate the extrinsic evidence with due regard for the principles of unmanifested subjective intent and course of performance discussed below. In evaluating the extrinsic evidence in the alternative, the district court should have accorded less weight to the negotiations between Chesapeake and its underwriter, and more weight to Chesapeake's post-drafting statements. Accordingly, I respectfully dissent.

DISCUSSION

A. The Text Is Ambiguous

The conflict between the first and second sentences of Section 1.7(b) is not susceptible to any single unambiguous resolution. "Contract language is unambiguous when it has 'a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000) (quoting *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989)). "Ambiguous language is language that is 'capable of more than one meaning when viewed

objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" *Id.* (quoting *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992)). Ambiguity is a question of law, and thus a district court's decision as to whether a contract is ambiguous is reviewed *de novo*. *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396-97 (2d Cir. 2009). While ambiguity is not found by counting noses, the simple fact that the judges of the court below and the majority—all, it can safely be said, "reasonably intelligent person[s]"—have arrived at opposite conclusions as to the meaning of the language suggests the presence of ambiguity.

Two principles of interpretation push against the majority's reading of the text. First, "court[s] should read the integrated contract 'as a whole to ensure that undue emphasis is not placed upon particular words and phrases,' and 'to safeguard against adopting an interpretation that would render any individual provision superfluous.'" *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 459, 468 (2d Cir. 2010) (quoting *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007); *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002)). This principle cautions against a reading of the second sentence of Section 1.7(b) of the Supplemental Indenture as simply excising the November 15-December 14 period from the "Special Early Redemption Period" identified in the first sentence. Admittedly, this is not a prototypical application of the canon against surplusage: in the

majority's reading of the text both sentences continue to have meaning, and the "Special Early Redemption Period" continues to have some effect in defining the limits of both notice and redemption. Yet insofar as the first sentence of Section 1.7(b) says, in part, that Chesapeake may redeem the Notes between November 15 and December 14, that portion has become entirely untrue under the majority's reading. The complete nullification of this portion distinguishes Section 1.7(b) from the examples of provisos offered by the majority, *see supra* at 8-9, where *all* portions of the sets identified in the first clause can be true under certain circumstances, so long as they meet the requirements of the proviso. Here, under the majority's reading, it is rendered misleading and unnecessary for the Supplemental Indenture ever to have identified November 15 to December 14 as part of the period in which Chesapeake could redeem the Notes.

Second, for largely the same reasons just identified, the reading offered by BNY Mellon and adopted by the majority is structurally incoherent, even if it does follow the precise wording of Section 1.7(b).[1] New York courts have repeatedly emphasized that "[f]orm should not prevail over substance and a sensible meaning of words should be sought." *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998) (quoting *William C. Atwater & Co. v. Pan. R.R. Co.*, 246 N.Y. 519, 524 (N.Y. 1927)). As the district court points out,

---

[1] While I agree that the Section 1.7(b) *could* have been written as a single, structurally coherent sentence, I do not believe that the sentence offered by the majority faithfully represents Section 1.7(b). *See supra* at 9.

under BNY Mellon's reading the "Special Early Redemption Period" not only ceases to be a "redemption period," it ceases to be any meaningful period at all. *See Chesapeake Energy Corp.*, 957 F. Supp. 2d at 338-39. The period in which the Notes can be redeemed would span December 15, 2012, to March 15, 2013, while the period in which notice must be given would span from November 15, 2012, to February 13, 2013; the "Special Early Redemption Period" of November 15, 2012, to March 15, 2013, would cease to have independent meaning. Even if this is the result suggested by a literal reading of the text, under New York law it cannot be stated that such a bizarre outcome is unambiguously that intended by the parties.

The district court, recognizing the implausible result reached by a strictly literal reading of the text, arrived at an interpretation that restores coherence to the contested clause: the phrase "may redeem" in the first sentence of Section 1.7(b) becomes "may give notice of redemption," and the "Special Early Redemption Period" becomes a single, four-month period in which Chesapeake may give notice of redemption. *See Chesapeake Energy Corp.*, 957 F. Supp. 2d at 335-36. Nevertheless, as found by the majority, the interpretation proffered by the district court is a bridge too far. The district court's reading would require the word "redeem" to take on multiple meanings within the Indentures, within Section 1.7(b), and even within the same sentence. While, as the district court notes, unusual constructions of a term can prevail where reasonable interpretation of the contract so requires, *id.* at 335-37, this principle does not extend so far as to allow two distinct

constructions of a single term to coexist within the same contractual clause. *Cf. Md. Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997), *as amended* (Nov. 18, 1997) ("Terms 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.").

Despite very thoughtful efforts by both the majority and the district court, the first and second sentences of Section 1.7(b) cannot be reconciled. Where two contractual clauses conflict, the Second Circuit has found ambiguity where there is not a compelling reason to favor one over the other. *See Seiden Assocs.*, 959 F.2d at 429-30 ("We see two possible readings—each of which denigrates the plain meaning of the other . . . . In sum, because the interrelationship of the two provisions in the letter agreement is susceptible to several reasonable interpretations, the contract is ambiguous. It cannot be definitely and precisely gleaned which reading was intended by the parties."); *cf. Collins v. Harrison-Bode*, 303 F.3d 429, 434 (2d Cir. 2002) ("The impossibility of sensibly reconciling the usage of the term 'Monet' throughout the contract with the definition set forth in the release clause leads to our conclusion that the Settlement Agreement is ambiguous.").[2] Section 1.7(b) is therefore ambiguous

---

[2] While "it is a fundamental rule of contract construction that 'specific terms and exact terms are given greater weight than general language,'" *Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir. 2001) (quoting *Restatement (Second) of Contracts* § 203(c) (1981)), I do not agree with the district court that the second sentence of the clause is more specific than the

due to the conflict between the two sentences, and the case should be remanded for reconsideration of the extrinsic evidence. *See FLLI Moretti Cereali S.p.A. v. Cont'l Grain Co.*, 563 F.2d 563, 566 (2d Cir. 1977) (finding that where a contract shows inconsistency between two provisions, "[t]he parties have a right to present extrinsic evidence to aid in interpreting the assignment" (citing, *inter alia*, *Hotel Credit Card Corp. v. Am. Express Co.*, 13 A.D.2d 189, 193 (1st Dep't 1961) ("The discernible purpose of an agreement and the circumstances surrounding its execution may properly serve as a guide to resolving apparent contradictions and defining obligations imperfectly expressed."))).

B. The Lower Court Should Reevaluate the Extrinsic Evidence

While the district court has already evaluated the extrinsic evidence as part of its finding in the alternative, it did not accord proper weight to certain aspects of that evidence. Specifically, the district court placed undue weight on testimony from and correspondence between the persons who drafted Section 1.7(b), *see Chesapeake Energy Corp.*, 957 F. Supp. 2d at 354-59, and too easily discounted the statements made by officers of Chesapeake who did not personally participate in the drafting, *see id.* at 359-70. In doing so, the district court concluded that

---

first, *see Chesapeake Energy Corp.*, 957 F. Supp. 2d at 336. This canon of interpretation is usually applied not to distinguish between consecutive sentences, as here, but to distinguish between vague clauses indicating contractual purposes and specific clauses indicating concrete obligations. *See, e.g.*, *Aramony*, 254 F.3d at 414.

the extrinsic evidence supported Chesapeake's interpretation that Section 1.7(b) allowed Chesapeake to give notice of redemption up to March 15, 2013, and to redeem up to 60 days after giving notice. *Id.* at 370. This conclusion should be reevaluated to ascribe less weight to subjective intent and more weight to what was successfully communicated to the purchasers of the bonds.

The common subjective understanding of an issuer and an underwriter, when uncommunicated to bondholders or an indenture trustee, should be ascribed minimal weight when evaluating extrinsic evidence. This doctrine of "unmanifested subjective intent" is not merely concerned with collusion or post hoc rationalization, but with the knowledge of the party to whom the subjective intent is not overtly communicated. *See Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 294 (S.D.N.Y. 1911) (Hand, J.) ("Yet the question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, *however truthful*, is material." (emphasis added)), *aff'd sub nom. Ernst v. Mechs.' & Metals Nat'l Bank of N.Y.C.*, 201 F. 664 (2d Cir. 1912); *cf. Webster v. N.Y. Life Ins. & Annuity Corp.*, 386 F. Supp. 2d 438, 442 n.2 (S.D.N.Y. 2005) ("It is not the real intent but the intent expressed or apparent in the writing which is sought; it is the objective, not the subjective, intent that controls." (quoting 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 31:4 (4th ed. 1993 & Supp. 1999) (hereinafter "*Williston on Contracts*"))). Because the parties to this contract are the issuer and the indenture trustee, negotiations

between the issuer and the underwriter—no matter how arm's-length or contentious—cannot be used to impose an interpretation on the indenture trustee of which it was not aware. *Cf. Zell v. Am. Seating Co.*, 138 F.2d 641, 646 (2d Cir. 1943) (stating that courts consider "only those manifestations of intention which are public ('open to the scrutiny and knowledge of the community') and not private" (footnote omitted)), *rev'd on other grounds*, 322 U.S. 709 (1944). While such communications are admissible and can provide some aid in interpreting the objective actions of a party, they are not to be accorded decisive weight in interpreting ambiguous contractual language. *See SR Int'l Bus. Ins. Co. v. World Trade Ctr. Properties, LLC*, 467 F.3d 107, 126 (2d Cir. 2006) ("[W]ith respect to a negotiated agreement, a party's subjective understanding, while not controlling, may shed light on the state of those negotiations and could bear on that party's objective actions."). Accordingly, the understanding arrived at by the four people who drafted Section 1.7(b)—consisting of Chesapeake's chief financial officer and executive vice president; a partner at Bracewell & Giuliani, Chesapeake's outside counsel; a managing director at Bank of America Merrill Lynch, Pierce, Fenner & Smith Inc., Chesapeake's underwriter; and a partner at Cravath, Swain & Moore, underwriter's counsel, *see Chesapeake Energy Corp.*, 957 F. Supp. 2d at 346-47—cannot, standing alone, control the meaning of Section 1.7(b). The district court should not have rested its analysis of the extrinsic evidence on this common understanding without a closer inquiry into the awareness of BNY Mellon and the bondholders.

Meanwhile, the district court should have given more weight to the statements made by Chesapeake and its officers after the contract's formation. The district court concluded that such statements were irrelevant, as only *conduct* could demonstrate Chesapeake's understanding of March 15, 2013, as the final deadline for redemption. *Chesapeake Energy Corp.*, 957 F. Supp. 2d at 366. Yet evidence of the "course of performance," as it is sometimes labeled, is not limited to actions, but encompasses statements as well. *See* 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.16 (Joseph M. Perillo ed., rev. ed. 1998) ("In the process of interpreting a contract, the court can receive great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. The practical interpretation of a contract may thus be evidenced by the parties' acts or by their words."); 11 *Williston on Contracts* § 32:14 ("Once it is determined in a particular jurisdiction that the underlying requirements have been met so as to permit evidence of the parties" conduct, their own interpretation may be shown by acts of the parties as well as precise words." (internal quotation marks omitted)). Courts in this Circuit have followed this rule, looking to post-drafting statements as well as actions of parties to a contract in interpreting ambiguous provisions. *See Ocean Transp. Line, Inc. v. Am. Philippine Fiber Indus., Inc.*, 743 F.2d 85, 90 (2d Cir. 1984) (looking to "a series of memoranda and correspondence exchanged" after the drafting of the contract, and stating that "the doctrine of practical construction is ordinarily limited to the acts *and statements* of the

contracting parties" (emphasis added)); *Pressed Steel Car Co. v. Union Pac. R. Co.*, 297 F. 788, 790 (2d Cir. 1924) ("[I]nterpretation may be given to a contract by the acts and/or declarations of the parties, done or made while the agreement is in process of fulfillment, and before any differences have arisen between them."); *Gestetner Holdings, PLC v. Nashua Corp.*, 784 F. Supp. 78, 82-83 (S.D.N.Y. 1992) (looking to the post-drafting statements of a corporate officer, and finding "these statements reflecting the parties' practical interpretation of the contract to be highly probative of the intended meaning").

Moreover, courts do not confine this inquiry to the statements of those personally involved in drafting a contested contractual provision, but look more broadly to statements that can be attributed to a party to the contract. *See Ocean Transp. Line*, 743 F.2d at 91 (looking to correspondence among corporate officers without any discussion of their personal participation in drafting); *Gestetner Holdings*, 784 F. Supp. at 83 (attributing to the defendant corporation the statements of its "vice-president of finance and chief financial officer," with no indication that he had personally participated in drafting the arbitration clause at issue); *Mobil Oil Corp. v. Fraser*, 55 A.D.2d 824, 825 (1st Dep't 1976) ("[T]he initial concurrence by Mobil's agents in defendants' interpretation of the now contested paragraph reflects the interpretation that the parties themselves placed on the agreement subsequent to its formation."). BNY Mellon and the bondholders were entitled to rely on the statements made by Chesapeake's officers without inquiring into their personal knowledge of the negotiations, and the

district court should accordingly factor these statements into its evaluation of the extrinsic evidence.[3]

CONCLUSION

Section 1.7(b)'s two sentences are facially in tension: Chesapeake's reading requires the word "redeem" to take on shifting meanings, and BNY Mellon"s attempt to harmonize them by making the latter a proviso to the former does excessive violence to the structural integrity of the clause, and in particular the nature of the "Special Early Redemption Period." The text of the Indentures is thus ambiguous. The extrinsic evidence, however, is not as universally favorable to Chesapeake as the district court indicated. Faithful application of the doctrine of unmanifested intent requires allocating little persuasive weight to the negotiations between Chesapeake and BAML, while a more complete view of course of performance evidence lends significant support to BNY Mellon. Accordingly, this case should be remanded for reevaluation of the extrinsic evidence.

---

[3] As the district court recognized, *see Chesapeake Energy Corp.*, 957 F. Supp. 2d at 332, if the meaning of Section 1.7 could not be ascertained even after consideration of extrinsic evidence, the court could apply the doctrine of *contra proferentem*.

Appendix G

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 13-1893-cv

CHESAPEAKE ENERGY CORPORATION,
Plaintiff-Appellee,
v.
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
Defendant-Appellant,
AD HOC NOTEHOLDER GROUP,
Intervenor.

On Appeal from the United States District Court for the Southern District of New York

---

Filed: February 6, 2015

ORDER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of February, two thousand fifteen.

* * *

Appellee has filed a petition for panel rehearing or, in the alternative, for rehearing *en banc*. The

panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is DENIED.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

[handwritten: signature]

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 13-cv-1582

CHESAPEAKE ENERGY CORPORATION,
Plaintiff,
v.
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
Defendant.

Filed: May 8, 2013

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This case is about whether a corporation made, or missed, the deadline to exercise its right to redeem its outstanding notes early, on highly favorable terms. On March 15, 2013, plaintiff Chesapeake Energy Corporation ("Chesapeake") issued a notice to redeem approximately $1.3 billion in notes due in 2019 that it had issued in 2012. Chesapeake's notice stated that it was redeeming these "2019 Notes" at par value plus interest. The notice called for the notes to be redeemed on May 13, 2013 (*i.e.*, next Monday). Chesapeake's view is that, under the Supplemental Indenture governing the notes, it had until March 15, 2013, to issue a notice of redemption

on these terms. However, defendant Bank of New York Mellon Trust Company, N.A. ("BNY Mellon"), the indenture trustee of those notes, representing the interests of the noteholders, takes a different view of the applicable deadline. BNY Mellon contends that, under the Supplemental Indenture, Chesapeake's deadline to issue a notice of early redemption was February 13, 2013. BNY Mellon therefore contends that Chesapeake's notice was untimely and ineffective.

To resolve the dispute, Chesapeake brought this declaratory judgment action. Between April 23 and 30, 2013, after expedited discovery, the Court held a bench trial. Trial was held on those dates to permit the Court to render decision before May 13, 2013—the redemption date that Chesapeake had set.

The following is the Court's decision. The Court holds, in favor of Chesapeake, that its March 15, 2013 notice of redemption was timely and effective to redeem the 2019 Notes at par value (*i.e.*, 100% of the principal amount) plus interest. The Court enters a declaratory judgment to that effect.

I. Background[1]

A. Overview: The 2019 Notes and § 1.7 of the Supplemental Indenture

Chesapeake is a publicly-traded Oklahoma corporation. It produces oil and natural gas.

In February 2012, Chesapeake completed a public offering of $1.3 billion in senior notes due in 2019 (the "Notes" or "2019 Notes"). The Notes pay at a rate of 6.775%. The 2019 Notes were issued

---

[1] The facts set out in this section are either undisputed, or are non-dispositive background facts that the Court finds. Chesapeake and BNY Mellon dispute other facts. These mainly involve the events surrounding the negotiation in February 2012 of § 1.7(b) of the Supplemental Indenture governing the 2019 Notes, and the collective intent of the parties who drafted that provision. The Court addresses those factual disputes, and has resolved them to the extent necessary, *infra*, in Part IV.

As used herein, "Compl." refers to Chesapeake's Complaint (Dkt. 1); "Tr." refers to the trial transcript; "PX" refers to exhibits introduced at trial by Chesapeake; "DX" refers to exhibits introduced by BNY Mellon; "[Witness] Decl." refers to the sworn declaration admitted at trial containing the direct testimony of the witness identified; "[Name] Rep." refers to the report of the named expert witness submitted as an attachment to his declaration; and "[Date] Hr'g Tr." refers to the transcript of a pretrial court conference on the date indicated. The parties also submitted legal memoranda in support of and in opposition to: Chesapeake's order to show cause (Dkt. 4, 16, 28); certain noteholders' motions to intervene and withdraw (Dkt. 14, 42); Chesapeake's motion for judgment on the pleadings as to Count Two (Dkt. 70, 83, 97); and BNY Mellon's motion *in limine* to exclude evidence of the negotiations in February 2012 between Chesapeake and its lead underwriter (Dkt. 95, 99). The parties also submitted pretrial briefs (Dkt. 91, 93) and post-trial briefs (Dkt. 110, 111), and BNY Mellon submitted a motion to admit certain deposition designations (Dkt. 109).

pursuant to two indentures. The first is a Base Indenture, dated August 2, 2010. PX 6 (the "Base Indenture"). It governs a series of notes issued by Chesapeake since that date. BNY Mellon is named in the Base Indenture as trustee. *Id.* BNY Mellon is a national banking association with its principal place of business in Los Angeles, California.

The second indenture is Chesapeake's Ninth Supplemental Indenture, dated February 16, 2012. PX 4 (the "Supplemental Indenture"). The Supplemental Indenture applies solely to the 2019 Notes. Both the Base Indenture and the Supplemental Indenture recite that they were entered into between Chesapeake as the issuer, certain Chesapeake subsidiaries as guarantors, and BNY Mellon as the indenture trustee. *See* Base Indenture, at BNY24, BNY94-97; Supplemental Indenture, at CHK368, CHK373-75.

This dispute centers on § 1.7 of the Supplemental Indenture. Entitled "Redemption," it provides in full:

> (a) The Company shall have no obligation to redeem, purchase or repay the Notes pursuant to any mandatory redemption, sinking fund or analogous provisions or at the option of a Holder thereof.
>
> (b) At any time from and including November 15, 2012 to and including March 15, 2013 (the "Special Early Redemption Period"), the Company, at its option, may redeem the Notes in whole or from time to time in part for a price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest

> on the Notes to be redeemed to the date of redemption; provided, however, that immediately following any redemption of the Notes in part (and not in whole) pursuant to this Section 1.7(b), at least $250 million aggregate principal amount of the Notes remains outstanding. 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. Any redemption pursuant to this Section 1.7(b) shall be conducted, to the extent applicable, pursuant to the provisions of Sections 3.02 through 3.07 of the Base Indenture.
>
> (c) At any time after March 15, 2013 to the Maturity Date, the Company, at its option, may redeem the Notes in whole or from time to time in part for an amount equal to the Make-Whole Price plus accrued and unpaid interest to the date of redemption in accordance with the Form of Note.

Supplemental Indenture § 1.7 (emphasis in original).

The critical issue in this case is what the deadline is under § 1.7(b) for Chesapeake to give notice of redemption of the 2019 Notes at par plus interest. Under a Base Indenture provision (§ 3.04) expressly incorporated by § 1.7(b), Chesapeake, after giving notice of a redemption, must wait between 30 and 60 days before redeeming the subject Notes. The period during which Chesapeake may give notice of a

special early redemption is, therefore, not coextensive with the period during which the redemption can be effectuated. Rather, the start of the notice period must precede the start of the redemption period by at least 30 days.

Chesapeake's position, based on the second sentence of § 1.7(b), is that the Special Early Redemption Period defined in § 1.7(b)—*i.e.*, November 15, 2012, to and including March 15, 2013—is a notice period. Chesapeake argues, therefore, that, under § 1.7(b), a redemption at par plus interest can occur as late as May 14, 2013 (*i.e.*, 60 days after March 15, 2013). Accordingly, it argues, the notice of a special early redemption that it gave on March 15, 2013, was timely. BNY Mellon's position is that the Special Early Redemption Period instead bounds the period during which the actual redemption of bonds pursuant to § 1.7(b) may occur. Because a minimum of 30 days' notice is required before redemption, BNY Mellon argues that Chesapeake's deadline to give notice of a special early redemption was February 13, 2013 (*i.e.*, 30 days before March 15, 2013).

Lots of money turns on this dispute. Because the 2019 Notes bear an attractive interest rate of 6.775%, redeeming them at par plus interest is, in today's low-interest-rate environment, far more advantageous to Chesapeake than its other contractual options. These are (1) paying the 6.775% rate out to the 2019 maturity date, or (2) redeeming the bonds before the maturity date, but after the opportunity to redeem at par plus interest has lapsed, which, under § 1.7(c), would oblige

Chesapeake to pay the noteholders the "Make-Whole Price," *i.e.*, the present value of the 6.775% interest rate payments to maturity. *See* PX 5, at BG2869-70. Conversely, a redemption by Chesapeake today at par plus interest deprives the holders of the 2019 Notes of an income stream not readily achievable elsewhere.

B. The Events of Late February and Early March 2013[2]

On February 20, 2013, Chesapeake notified Sharon McGrath, a BNY Mellon vice president, that it planned, by March 15, 2013, to redeem the 2019 Notes at par plus interest, pursuant to the special early redemption provision. McGrath did not initially object to that course. However, later that day, McGrath was contacted by James P. Seery, Jr., a partner in River Birch Capital LLC, a hedge fund, which had recently purchased a large volume of 2019 Notes. Seery notified McGrath that, in his view, the time period during which Chesapeake could redeem the 2019 Notes pursuant to the special early redemption provision had expired.

On February 22, 2013, McGrath, joined by counsel for BNY Mellon, notified Chesapeake that, in BNY Mellon's view, the time for Chesapeake to issue a notice of redemption pursuant to the special early redemption provision had passed. Six days later, in a call with Chesapeake's counsel, counsel for BNY

---

[2] The facts set forth in this subsection are those proffered by Chesapeake, BNY Mellon, and 2019 noteholder James P. Seery, Jr., in connection with Chesapeake's March 8, 2013 application for emergency relief. *See* Dkt. 1-7, 13-16, 27-28.

Mellon reiterated that position. BNY Mellon also stated that, if Chesapeake issued a notice of redemption and it was held untimely, BNY Mellon might treat that notice as functioning as a notice of redemption pursuant to § 1.7(c) of the Supplemental Indenture. A redemption pursuant to § 1.7(c) would require Chesapeake, within 30 to 60 days, to pay the noteholders the Make-Whole Price. That payment would exceed by approximately $400 million the amount required to redeem the 2019 Notes pursuant to the special early redemption provision.

In an attempt to resolve this problem, Chesapeake prepared a proposed notice of redemption. *See* Compl. Ex. D (the "Notice"). That Notice, entitled "Notice of Special Early Redemption," specified a redemption price, terms, and date (May 13, 2013) consistent with the special early redemption provision in § 1.7(b). Chesapeake's proposed Notice stated explicitly and prominently that, were a court to hold it untimely to effect a special early redemption, the Notice would be null and void. BNY Mellon objected to that approach. It notified Chesapeake that it viewed Chesapeake's proposed Notice as untimely; that such a "conditional notice" was improper; that Chesapeake's Notice, if issued, would be irrevocable; and that BNY Mellon would seek to have the Notice treated as a notice of an immediate Make-Whole Redemption pursuant to § 1.7(c).

C. Chesapeake's March 8, 2013 Complaint and Motion for Emergency Relief

On Friday, March 8, 2013, Chesapeake filed this diversity action against BNY Mellon. Dkt. 1. In its

first cause of action, Chesapeake sought a declaration that its Notice of Special Early Redemption, if mailed on or before March 15, 2013, would be timely and effective to redeem the 2019 Notes at par plus interest. Compl. ¶ 26. In its second cause of action, Chesapeake sought a declaration that, in the event its Notice were held untimely to effect such a redemption, the Notice would be null and void, and would not operate as a notice of redemption at the Make-Whole Price. *Id.* ¶ 28.

The same day, Chesapeake moved for a preliminary injunction. It sought two forms of emergency relief. First, Chesapeake sought an injunction prohibiting BNY Mellon from treating its Notice of Special Early Redemption as a notice of redemption requiring payment at the Make-Whole Price. Alternatively, Chesapeake sought an immediate declaration that, if the Notice were held untimely to achieve a redemption at par plus interest pursuant to § 1.7(b), then that Notice would be null and void, and ineffective to achieve *any* redemption. Chesapeake explained that it wished to invoke its right under § 1.7(b) to make an early redemption at par, which would save it approximately $100 million over the present value of letting the 2019 Notes run to maturity. However, Chesapeake asserted, without relief from the Court, it would be deterred from pursuing this right by BNY Mellon's threat to treat its Notice, if held untimely, as an unwitting notice of Make-Whole redemption under § 1.7(c), requiring it to redeem the 2019 Notes nearly immediately at the much higher Make-Whole Price.

Recognizing the urgent timetable, the Court, late on March 8, 2013, issued an order to show cause. The order (1) directed BNY Mellon to respond to Chesapeake's motion for a preliminary injunction by Tuesday morning, March 12, 2013; and (2) set a preliminary injunction hearing for that afternoon. Dkt. 2. On March 12, 2013, BNY Mellon filed its memorandum of law opposing Chesapeake's motion, and supporting materials. Dkt. 10-11, 28-29. The same day, the Court received a motion to intervene and opposition papers from a group calling itself the "Intervenor Ad Hoc Noteholder Group" (the "Intervenor Noteholders" or "Noteholders"). Dkt. 13-16.

On the evening of March 12, 2013, the Court held a preliminary injunction hearing. The Court granted the Intervenor Noteholders' motion to intervene as of right under Federal Rule of Civil Procedure 24(b).[3] The Court also heard extended argument from counsel for Chesapeake, BNY Mellon, and Intervenor Noteholders. Counsel for an individual noteholder, Whitebox Advisors LLC, entered an appearance, but did not argue.

D. The Court's March 14, 2013 Ruling on the Preliminary Injunction Motion

On March 14, 2013, the Court issued a lengthy oral ruling from the bench. It ultimately denied Chesapeake's motion for a preliminary injunction. *See* 3/14/13 Hr'g Tr.

[3] The Court later issued an order memorializing that decision. Dkt. 26.

The Court first held that the dispute between two parties to the Supplemental Indenture over its proper construction presented a justiciable controversy ripe for review. *Id.* at 10-12.

Turning to the merits of Chesapeake's motion for a preliminary injunction, the Court considered (1) the likelihood of success on the merits; (2) whether the balance of hardships tipped decidedly in Chesapeake's favor; and (3) whether Chesapeake would suffer irreparable harm. *See id.* at 13-14; *see also Pogliani v. U.S. Army Corps of Eng'rs*, 306 F.3d 1235, 1238-39 (2d Cir. 2002) (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)).

As to the likelihood of success, the Court addressed separately Chesapeake's two claims for declaratory relief. As to the first, for a declaration that a notice on March 15, 2013 of a special early redemption would be timely, the Court's preliminary assessment was that the parties' competing textual arguments based on the text of § 1.7(b) as to the deadline for such a notice appeared in rough equipoise. *See* 3/14/13 Hr'g Tr. 17-21; *id.* at 21 ("Neither party's interpretation accounts for or explains every feature of the short but difficult document that is the supplemental indenture."). Because the Court's initial assessment was that § 1.7(b) was ambiguous, it stated that consideration of extrinsic evidence might be warranted to discern the parties' intentions. *Id.* at 21.[4] However, the Court

[4] The only extrinsic evidence proffered at the preliminary hearing—two emails attaching drafts from February 2012, when the text of the Supplemental Indenture was being negotiated between Chesapeake and the underwriters of the

emphasized, its initial assessment that § 1.7(b) was ambiguous was preliminary, based on the limited time frame in which the parties had briefed and the Court had studied the issue. *Id.* Accordingly, the Court held, Chesapeake had not demonstrated a likelihood of success on the merits of its claim for a declaration as to the timeliness of its redemption notice. Chesapeake had, however, established a sufficiently serious question going to the merits to justify continued inquiry. *Id.* at 24.

As to Chesapeake's second claim, the Court stated that Chesapeake had an overwhelming likelihood of success. *Id.* at 25. There was no serious basis for treating, against Chesapeake's will, an untimely notice of a special early redemption pursuant to § 1.7(b) as instead a notice for a Make-Whole redemption under § 1.7(c). On the contrary, the Court noted, Chesapeake's Notice, if so treated, would fail various requirements for a valid notice under the Base Indenture, including that it accurately recite the date, price, and terms of the upcoming redemption. *Id.* at 25-27; *id.* at 29 (citing

---

note offering—appeared, the Court stated, to favor BNY Mellon's construction. 3/14/13 Hr'g Tr. 22-23. Those drafts indicated that 17 words proposed by Chesapeake's outside counsel that would have demonstrated conclusively that the Special Early Redemption Period was a notice period had been either deleted from § 1.7(b) or rejected. However, the Court noted, it was possible that other extrinsic evidence would support the opposite conclusion, *e.g.*, by showing that the 17 words excluded from the draft indenture had been viewed as cumulative and unnecessary. *Id.* The two emails in question were later admitted at trial as PX 41 and PX 43. They are discussed *infra*, at Parts IV.B-IV.C.

Base Indenture §§ 3.04-3.06). Chesapeake was, therefore, highly likely to prevail in seeking a declaration that its Notice, if held untimely, was null and void. *Id.* at 30-31.

Turning to the balance of hardships, the Court found that a preliminary injunction would not work cognizable harm on BNY Mellon or the Noteholders. *Id.* at 31-37. The Noteholders, the Court stated, did not have a protected right to deter Chesapeake from issuing a Notice by threatening to have that Notice, if held untimely, treated as a notice of Make-Whole redemption. *Id.* at 33. An injunction that declared that an untimely notice would be null and void would merely clarify the parties' rights with respect to such a Notice, and would not work any real prejudice on the Noteholders. And Noteholders such as River Birch, that had purchased Notes after February 13, 2013, had assumed the risk that a Court might hold a notice of redemption at par timely until March 15, 2013. *Id.* at 35-37. Chesapeake, on the other hand, faced a degree of harm without the protection of an injunction. That was because BNY Mellon and the Noteholders were using the threat to treat an untimely notice as triggering a redemption at the Make-Whole Price to coerce Chesapeake not to issue any notice. It was plausible that the risk of being forced imminently to pay out $400 million extra might deter Chesapeake from exercising its rights under § 1.7(b). For these reasons, the balance of hardships tipped somewhat, but not heavily, in favor of Chesapeake. *Id.* at 37-40.

For several reasons, however, the Court rejected Chesapeake's argument that, without an injunction,

it would suffer irreparable harm. First, Chesapeake retained the right to try to redeem its shares at the special early redemption price. The risk to Chesapeake that a Court would treat an untimely notice as requiring a redemption at the Make-Whole Price was inherent in doing business. And if Chesapeake were forced to pay out the money for a Make-Whole redemption on May 15, 2013, while it litigated whether its Notice had worked such a redemption, Chesapeake had a damages remedy: If its position prevailed, it could sue the Noteholders to recoup that money. *Id.* at 42-44. Second, if the time for a redemption at par had passed, Chesapeake was obliged, in 2019, to pay out a sum whose present value, by definition, matched the Make-Whole payment that the Noteholders threatened to demand. Thus, the dispute triggered by the Noteholders' Make-Whole demand involved only the timing, not the amount, of Chesapeake's payout. *Id.* at 39. And Chesapeake had not shown an inability to pay out the additional $400 million if required to do so. *Id.* Third, the assessment that the Court had given of Chesapeake's second claim for declaratory relief was relevant. Because the Court had opined that it was highly likely to treat an untimely Notice of Special Early Redemption as null and void, the Court stated that Chesapeake could issue the proposed Notice with little risk that it would be held to trigger a Make-Whole redemption. *Id.* at 39-40.

Because a showing of irreparable harm was necessary for Chesapeake to prevail, the Court denied the preliminary injunction. *Id.* at 45-46.[5]

The Court further stated that, if Chesapeake went ahead with its plan to issue a Notice of Special Early Redemption, the Court was prepared to hold an expedited trial to resolve Chesapeake's claims for declaratory relief. The Court stated that it would decide, before the May 13, 2013 redemption date, whether that Notice was timely. *Id.* at 46-47. The Court directed counsel that, if Chesapeake issued the Notice, they were to confer promptly to develop a proposed discovery and trial schedule. *Id.*

E. Chesapeake's Notice of Special Early Redemption, and Pretrial Proceedings

On March 15, 2013, Chesapeake issued a Notice of Special Early Redemption. It was identical to the proposed Notice appended to its Complaint. *See* Dkt. 30 Ex. A, at 14. On March 19, 2013, the Court met with counsel to set an expedited discovery and trial schedule.[6]

---

[5] On March 14, 2013, the Court issued an order memorializing this decision and incorporating by reference its lengthy oral ruling. Dkt. 29.

[6] At the conference, the Court inquired whether diversity jurisdiction was proper, given that one of the Intervenor Noteholders, like Chesapeake, resided in Oklahoma. *See* Dkt. 31. However, the Court stated, intervention by the Oklahoma Noteholder did not appear to destroy diversity, given cases holding that a non-necessary intervenor does not destroy diversity where it otherwise exists. 3/19/13 Hr'g Tr. 11-12; *see In re Olympic Mills Corp.*, 477 F.3d 1, 12 (1st Cir. 2007); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 179 (2d Cir. 2007) (assuming *arguendo* that *Olympic Mills* rule

On March 22, 2013, the Court issued a case management plan. The plan provided for expedited discovery, ending April 19, 2013. Dkt. 34.[7] The Court scheduled a bench trial[8] for April 23-25, 2013, with closing arguments on April 30, 2013. *Id.* The Court proposed, and the parties agreed, to forego intervening summary judgment motions. Instead, the Court stated, it would take up such contentions in the decision it would issue after trial. Finally, the Court requested pretrial briefing on Claim Two (the Make-Whole issue). *Id.*

On March 25, 2013, the Intervenor Noteholders moved to withdraw, and to permit their lead counsel, Sidley Austin LLP, to be retained by BNY Mellon as lead counsel in this matter. Dkt. 40-42. After letter briefing, *see* Dkt. 48, 55, the Court granted that motion. Dkt. 60. This left Chesapeake and BNY Mellon as the sole parties to the case.

On March 31, 2013, BNY Mellon notified the Court that it was abandoning its argument that Chesapeake's Notice, if held untimely, would work a redemption at the Make-Whole Price. *See* Dkt. 58, at

---

applied). This issue was mooted soon thereafter, when the Intervenor Noteholders withdrew from the case. *See* Dkt. 41-42, 60. This withdrawal assured complete diversity.

[7] The Court later extended that deadline to April 21, 2013. *See* 4/11/13 Hr'g Tr. 55-56; Dkt. 72.

[8] Section 13.15 of the Base Indenture provides that both Chesapeake and BNY Mellon "irrevocably waive . . . any and all right to trial by jury in any legal proceeding arising out of or relating to this indenture, the securities or the transaction contemplated hereby." Base Indenture § 13.15 (emphasis omitted).

3 n.2; 4/1/13 Hr'g Tr. 40. On that basis, BNY Mellon asked the Court to dismiss Chesapeake's second claim for declaratory relief. The parties, however, could not agree on the terms on which Chesapeake's Claim Two should be resolved: Chesapeake sought entry of judgment in its favor on Claim Two; BNY Mellon sought dismissal of that claim as moot. The Court reserved decision on that issue. *See* 4/1/13 Hr'g Tr. 38-48.

Between late March and April 21, 2013, the parties took extensive discovery, focused on the extrinsic evidence bearing on the intent of the drafters of § 1.7(b). At least 15 depositions were taken. These included of personnel from Chesapeake; Chesapeake's outside counsel (the law firm of Bracewell & Giuliani LLP ("Bracewell")) that assisted it in drafting the Supplemental Indenture; the 2019 Note offering's lead underwriter, Bank of America Merrill Lynch, Pierce, Fenner & Smith Inc. ("BAML"), which had negotiated with Chesapeake the language that ultimately appeared in § 1.7(b); and BAML's outside counsel in that process (the law firm of Cravath, Swaine & Moore LLP ("Cravath")). Depositions were also taken of each side's experts.

During the discovery process, the Court held several conferences with counsel to resolve discovery disputes and to adjust the pretrial schedule. *See* 3/19/13 Hr'g; 4/1/13 Hr'g; 4/11/13 Hr'g. These disputes included a disagreement relating to the temporal scope of Chesapeake's court-approved written waiver of its attorney-client privilege. That waiver was limited to Chesapeake's communications with counsel governing the drafting, meaning,

interpretation, and application of § 1.7 of the Supplemental Indenture, between February 8, 2012 (when Chesapeake first began the process that led it to issue the 2019 Notes) and February 21, 2013 (which Chesapeake represented had been the last day before its dispute with BNY Mellon first began to materialize). *See* Dkt. 51 (protective order concerning privilege waiver); *see also* 4/11/13 Hr'g Tr. 12-41. BNY Mellon asked the Court to expand the scope of that waiver until March 8, 2013, the date that Chesapeake brought this suit. On April 15, 2013, after a careful *in camera* review of privileged materials implicated by BNY Mellon's motion, the Court issued a written decision denying that motion. *See* Dkt. 77.

F. Trial

Trial commenced on April 23, 2013. The Court heard in-person testimony from 10 witnesses. As to eight, direct testimony was submitted by means of sworn declarations and cross-examination was live; as to the other two, direct and cross-examination were live.[9] With respect to six other witnesses, the Court received, in lieu of in-person testimony, deposition designations from each side.[10] The Court also received numerous exhibits. Each party submitted a pretrial (Dkt. 91, 93) and post-trial (Dkt. 110, 111)

---

[9] Four of the 10 trial witnesses were experts.

[10] The Court admitted deposition designations of six non-testifying witnesses: Susan Seymore, Jennifer Grigsby, Conrad Holub, Ross McLaughlin, Caleb Morgret, and Aubrey McClendon. The Court also admitted deposition designations as to three fact witnesses who did testify live: Elliot Chambers, Domenic Dell'Osso, and Michael S. Telle. *See* Tr. 488-89.

memorandum of law. Counsel's post-trial memoranda addressed, among other subjects, legal issues which the Court, after the close of evidence, asked counsel to address. *See* Tr. 480-83.

Closing arguments were held April 30, 2013. That day, the Court resolved various open evidentiary issues. *See* Tr. 487-91. However, the Court reserved ruling on a motion *in limine* BNY Mellon had submitted on the eve of trial. It sought to exclude extrinsic evidence of Chesapeake's negotiations with the offering's underwriters regarding § 1.7(b). The Court stated that it would resolve that motion in its decision. *See* Tr. 479, 489. The resolution of that motion is addressed *infra* at Part IV.A.

II. The Legal Framework Governing the Interpretation of § 1.7(b)

The central issue in this case is this: Under § 1.7(b), what is the deadline for giving notice of a special early redemption at par plus interest?[11] That issue turns on how § 1.7(b) of the Supplemental Indenture is interpreted. "Interpretation of indenture provisions is a matter of basic contract law." *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d

---

[11] Depending on the resolution of that question, there are subsidiary questions presented. BNY Mellon contends that, even if Chesapeake's Notice was timely, it is defective because it is "conditional" (*i.e.*, conditioned on a court's holding that it was timely). BNY Mellon also asserts several affirmative defenses. Chesapeake contends that, if its Notice is held untimely, the Court should reach its second claim and hold the Notice null and void, as opposed to operating as a notice of redemption at the Make-Whole Price.

1039, 1049 (2d Cir. 1982); *see Jamie Sec. Co. v. The Ltd., Inc.*, 880 F.2d 1572, 1576 (2d Cir. 1989); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 618 F. Supp. 2d 280, 291 (S.D.N.Y. 2009). Accordingly, the Court begins by reviewing the principles applicable to contract interpretation.[12]

A. The Language of the Parties' Agreement

"The primary objective of a court in interpreting a contract is to give effect to the intent of the parties as revealed by the language of their agreement." *Compagnie Financiere CIC L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 157 (2d Cir. 2000). "[T]he 'words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions.'" *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (second alteration in original) (quoting *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005)). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." *In re Coudert Bros.*, 487 B.R. 375, 389 (S.D.N.Y. 2013) (quoting *Acumen Re Mgmt. Corp. v. Gen. Sec. Nat'l Ins. Co.*, No. 09 Civ. 1796 (GBD), 2012 WL 3890128, at *5 (S.D.N.Y. Sept. 7, 2012)).

---

[12] Both the Base Indenture and the Supplemental Indenture are governed by New York law. *See* Base Indenture § 13.08; Supplemental Indenture § 22. The principles of interpretation reviewed by the Court are applied under New York law.

Judgment as a matter of law "is generally proper in a contract dispute only if the language of the contract is wholly unambiguous." *Compagnie Financiere*, 232 F.3d at 157; *see SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., LLC* (*World Trade Ctr. Props.*), 467 F.3d 107, 138 (2d Cir. 2006). "The question of 'whether the language of a contract is clear or ambiguous' is one of law, and therefore must be decided by the court." *Fed. Ins. Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 568 (2d Cir. 2011) (quoting *Compagnie Financiere*, 232 F.3d at 158).

"Where the parties dispute the meaning of particular contract clauses, the task of the court 'is to determine whether such clauses are ambiguous when read in the context of the entire agreement.'" *Law Debenture Trust Co. of N.Y. v. Maverick Tube Co.*, 595 F.3d 458, 467 (2d Cir. 2010) (quoting *Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993)).

Ambiguity is "defined in terms of whether a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way." *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008). "An ambiguity exists where the terms of the contract 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" *Law Debenture Trust*, 595 F.3d at 466 (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002)).

In contrast, "[n]o ambiguity exists where the contract language has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Law Debenture Trust*, 595 F.3d at 467 (second alteration in original) (quoting *Hunt Ltd. v. Lifschultz Fast Freight*, 889 F.2d 1274, 1277 (2d Cir. 1989)). "The mere assertion of an ambiguity does not suffice to make an issue of fact." *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006) (quoting *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990)); *see Sayers*, 7 F.3d at 1095 ("Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement."). "Thus, the court should not find the contract ambiguous where the interpretation urged by one party would 'strain[] the contract language beyond its reasonable and ordinary meaning.'" *Law Debenture Trust*, 595 F.3d at 467 (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459 (1957)). As the Second Circuit has put the point: "[N]o ambiguity exists where the alternative construction would be unreasonable." *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996); *accord Mycak v. Honeywell, Inc.*, 953 F.2d 798, 802 (2d Cir. 1992) (no ambiguity exists unless "the contractual language is susceptible of at least two fairly reasonable meanings" (citation omitted)).

That a text is complex or imperfect does not mean it is ambiguous. *See Aramony v. United Way of Am.*, 254 F.3d 403, 411 (2d Cir. 2001) (finding contract unambiguous and noting that "[t]he fact that we remanded to the district court for an initial

determination of the meaning of this complex contract in no way implies that we found it ambiguous as a matter of law"); *Carolina First Bank v. Banque Paribas*, No. 99 Civ. 9002 (NRB), 2000 WL 1597845, at *6 (S.D.N.Y. Oct. 26, 2000) (that a contract is not a "portrait of clarity" does not prevent a finding that it is unambiguous where the court finds only one reasonable interpretation); *cf. Lamie v. U.S. Trustee*, 540 U.S. 526, 535 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue.").

B. Consideration of Extrinsic Evidence

Where the language of a contract is held ambiguous, the factfinder—here, the Court—may properly consider "extrinsic evidence as to the parties' intent." *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009); *see also Collins v. Harrison-Bode*, 303 F.3d 429, 433-34 (2d Cir. 2002) ("[W]here . . . there are internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties' intent." (citation omitted)). "Where there is such extrinsic evidence, the meaning of the ambiguous contract is a question of fact for the factfinder." *JA Apparel Corp.*, 568 F.3d at 397; *accord Compagnie Financiere*, 232 F.3d at 158; *U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 875 F.2d 1044, 1048 (2d Cir. 1989) ("In determining the meaning of an ambiguous contract term, the finder of fact seeks to fathom the parties' intent. That intent may be proven by extrinsic evidence.").

Analysis of extrinsic evidence may entail review of "negotiations . . . made prior to or contemporaneous with the execution of a written

contract which may tend to vary or contradict its terms." *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 571 (2d Cir. 1991) (alteration omitted) (quoting *67 Wall St. Co. v. Franklin Nat'l Bank*, 37 N.Y.2d 245, 248-49 (1975)); *accord Shann v. Dunk*, 84 F.3d 73, 80 (2d Cir. 1996). The review of the surrounding facts and circumstances may also include consideration of industry custom and practice, *see U.S. Naval Inst.*, 875 F.2d at 1048-49, and any relevant course of performance or course of dealing, *see Hoyt v. Andreucci*, 433 F.3d 320, 332 (2d Cir. 2006).

C. The Doctrine of *Contra Proferentem*

Finally, if unable to determine the parties' intent based either on the text of an agreement or after evaluating admissible extrinsic evidence, the Court may, in some circumstances, apply the doctrine of *contra proferentem* to construe any ambiguity against the drafter of the contract.[13] *See M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 432 F.3d 127, 142 (2d Cir. 2005). This, however, is a matter of last resort. *See id.* ("[C]ourts should not resort to *contra proferentum* [*sic*] until after consideration of extrinsic evidence to determine the parties' intent." (citation omitted)); *Albany Sav. Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997) (New York applies the rule of *contra proferentem* "only as a matter of last

---

[13] This oft-mispelled doctrine derives from the Latin phrase meaning "against the one offering." The Court notes that the penultimate letter in "proferentem," often mistakenly written as a "u," is in fact an "e," because a present active participle takes on the endings of the third declension, and here "proferentem" must appear in its accusative singular form.

resort after all aids to construction have been employed without a satisfactory result" and "the rule does not preclude the admission of parol evidence" (citation omitted)); *see also U.S. Fire Ins.*, 949 F.2d at 574 ("Where . . . the justifications for applying [*contra proferentem*] seem to be lacking, and there exists ample extrinsic evidence, which, properly considered, clarifies the . . . ambiguity, we find that the district court erred in applying the doctrine of *contra proferentem*.").

III. Textual Analysis of Supplemental Indenture § 1.7(b)

Pursuant to this familiar analytic framework, the Court considers, first, the text of § 1.7(b)—viewed, of course, in conjunction with the surrounding language of the Supplemental Indenture and the terms of the Base Indenture. This Court has conducted this textual inquiry without regard to the extrinsic evidence of the parties' intent that was admitted at trial.

With equal certitude, Chesapeake and BNY Mellon each insist that its construction of § 1.7(b) based on its text is patently and obviously correct. A more detached assessment is that § 1.7(b) is a flawed and awkwardly drafted provision. As the Court recognized at the time that it addressed Chesapeake's motion for emergency relief, § 1.7 is a short but difficult document, and its text presents challenges for the construction advocated by each party.

However, the fact that the text of § 1.7(b) is challenging and imperfectly drafted does not necessarily mean that it is ambiguous. The test of

ambiguity, as explained above, is instead whether there is a reasonable construction of the contract language that affords a definite and precise meaning, and no other reasonable construction. *See, e.g.*, *Law Debenture Trust*, 595 F.3d at 467; *Readco*, 81 F.3d at 299; *Mycak*, 953 F.2d at 802.

At the time the Court first considered § 1.7(b), its preliminary assessment was that both parties had offered reasonable alternative constructions as to the deadline for giving a notice of special early redemption. On that premise, the Court stated that its initial assessment was that § 1.7(b) was ambiguous as to that point.

Guided now by the parties' far more extensive briefing on the issue, and with the benefit now of time to apply thoughtfully the canons of contractual interpretation to § 1.7(b), the Court has assessed anew whether each party's construction of that provision is indeed reasonable. The Court's considered conclusion is that Chesapeake's construction is reasonable as to the operative deadline for giving notice, and that BNY Mellon's construction is not reasonable. Indeed, when evaluated in light of these canons, BNY Mellon's construction is tortured and incoherent. Accordingly, presented with a reasonable interpretation that affords a definite and precise meaning as to the notice deadline, and an alternative construction that is unreasonable, the Court holds that § 1.7(b) is not ambiguous. Chesapeake's construction is correct.

In conducting this review, the Court has been guided by the following tenets of contractual interpretation, used under New York law. These

canons are commonly applied at this stage of the analysis:[14]

- *An agreement is to be considered as a whole.* "The rules of contract interpretation . . . do not contemplate considering any provision of the contract in isolation 'but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, No. 12-2047-cv, 2013 WL 1352537, at *3 (2d Cir. Apr. 5, 2013) (quoting *JA Apparel Corp.*, 568 F.3d at 397); *accord Kass v. Kass*, 91 N.Y.2d 554, 566 (1998).
- *Specific language controls general language.* "[C]ourts construing contracts must give specific terms and exact terms . . . greater weight than general language." *Cnty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) (citation omitted); *see also John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 n.8 (2d Cir. 1983) ("New York law recognizes that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary.").
- *Language is to be afforded its reasonable and ordinary meaning.* "[T]he 'words and phrases [in a contract] should be given their plain meaning.'" *Olin Corp.*, 704 F.3d at 99 (second alteration in

---

[14] *See, e.g.*, *JA Apparel Corp.*, 568 F.3d at 405 (Sack, J., concurring) (explaining that "[a]t least some principles of interpretation . . . ordinarily guide the inquiry into whether a contract term is ambiguous," and listing several rules commonly applied by New York courts).

original) (quoting *LaSalle Bank Nat'l Ass'n*, 424 F.3d at 206). No ambiguity exists "where the interpretation urged by one party would 'strain[] the contract language beyond its reasonable and ordinary meaning.'" *Law Debenture Trust*, 595 F.3d at 467 (quoting *Bethlehem Steel*, 2 N.Y.2d at 459).

- *A construction of a provision should not create internal inconsistencies*. In interpreting a contract, "[t]he entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency." *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) (citation omitted); *accord Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969) ("All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.").
- *The construction should be commercially reasonable and not absurd.* "Unless otherwise indicated, words should be given the meanings ordinarily ascribed to them and absurd results should be avoided." *Mastrovincenzo v. New York*, 435 F.3d 78, 104 (2d Cir. 2006) (citation omitted); *accord Bank Julius Baer & Co., Ltd. v. Waxfield Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005) ("absurd results" are "forbidden by canons of construction"). A court should not interpret a contract in a way that would be "commercially unreasonable, or contrary to the reasonable expectations of the parties." *Samba Enters., LLC v. iMesh, Inc.*, No. 06 Civ. 7660 (DLC), 2009 WL 705537, at *5 (S.D.N.Y. Mar. 19, 2009) (quoting *Lipper Holdings, LLC v. Trident Holdings, LLC*, 1

A.D.3d 170, 171 (1st Dep't 2003)), *aff'd*, 390 F. App'x 55 (2d Cir. 2010) (summary order); *see also Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) (contracts should be examined "in light of the business purposes sought to be achieved by the parties" (citation omitted)).

- *Language should not be rendered superfluous.* "An interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible." *LaSalle Bank Nat'l Ass'n*, 424 F.3d at 206 (citation omitted); *accord Lawyers' Fund for Client Prot. of State of N.Y. v. Bank Leumi Trust Co. of N.Y.*, 94 N.Y.2d 398, 404 (2000) (interpretation that would render contractual provision superfluous is "unsupportable under standard principles of contract interpretation").

The Court's review of the text of § 1.7(b) in light of these principles properly begins with its second sentence. It is the one sentence specifically addressed to the issue in this case: the deadline for a notice of 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.*

Supplemental Indenture § 1.7(b) (emphasis added). That sentence is the only part of § 1.7 to address the

subject of notice. The word "notice" does not otherwise appear in the Supplemental Indenture.

Viewed within its four corners, the second sentence of § 1.7(b) unequivocally supports Chesapeake's position that it had until March 15, 2013, to give a notice of special early redemption, with the actual redemption (pursuant to § 3.04 of the Base Indenture) occurring between 30 and 60 days afterwards. That is because the preceding sentence of § 1.7(b) defines the "Special Early Redemption Period" as "any time from and including November 15, 2012 to and including March 15, 2013." Thus, the one sentence in § 1.7 that is specific to the central issue here—the deadline for giving notice of a special early redemption at par—when read in isolation is decisive as to that issue.

The cleanliness of this reading favoring Chesapeake is tarnished, however, when the focus broadens to consider other text within § 1.7(b) and § 1.7(c). That is because the initial sentences of both § 1.7(b) and § 1.7(c) use the verb "redeem": Section 1.7(b) states that at any time during the Special Early Redemption Period, Chesapeake, "at its option, *may redeem* the Notes [at par]"; and § 1.7(c) states that "[a]t any time after March 15, 2013 to the Maturity Date, [Chesapeake], at its option, *may redeem* the Notes [at the Make-Whole Price]." Supplemental Indenture § 1.7 (emphases added). Neither of these sentences is couched in terms of *notice* to redeem. And, as BNY Mellon has persuasively shown, "to redeem," as defined in

dictionaries,[15] and as customarily used in the securities industry,[16] refers to an *act*. It ordinarily and customarily refers to 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.

Chesapeake's construction of § 1.7(b) thus necessarily requires one to construe the words "may redeem"—as used at the start of both § 1.7(b) and § 1.7(c)—to mean "may commence the redemption process." Without this uncommon construction of that phrase, Chesapeake's overall interpretation would be unsustainable. As to § 1.7(b), that is because, were "may redeem" assigned its customary meaning, the first sentence of § 1.7(b) would contemplate a redemption at par during the first 30 days of the Special Early Redemption Period, *i.e.*, November 15 through December 14, 2012. That, however, is an impossible result given (1) the second

---

[15] *See, e.g.*, Black's Law Dictionary 1390 (9th ed. 2009) (defining "redemption" as "[t]he reacquisition of a security by the issuer"); Barron's Dictionary of Finance and Investment Terms 587 (8th ed. 2010) (defining "redemption" as "repayment of a debt security or preferred stock issue, at or before maturity").

[16] The evidence at trial, including testimony from industry participants, uniformly was to this effect, *see, e.g.*, Landau Rep. ¶¶ 11-12; Mullin Rep. ¶ 33; Tuckman Rep. 14-15; Tr. 183-84, and Chesapeake does not dispute this point, *see, e.g.*, Chesapeake Post-trial Br. 26 ("The parties do not dispute that the term 'redeem' would mean 'to repay' if standing alone . . . ."); Tr. 14-15 ("There is no dispute about what the first sentence would mean in isolation.").

sentence's mandate that notice of such a redemption first be given during the Special Early Redemption Period and (2) the requirement of Base Indenture § 3.04 that there be at least 30 days notice before a redemption. Similarly, as to § 1.7(c), if "may redeem" were assigned its customary meaning, any redemption that occurred after March 15, 2013, pursuant to the terms of § 1.7(c), could not be at par. It would have to be at the Make-Whole Price. But that, in turn, would contravene the second sentence of § 1.7(b), which permits a notice of Special Early Redemption to be made up until March 15, 2013, with redemption on such terms to follow (pursuant to Base Indenture § 3.04) between 30 and 60 days later.

Chesapeake's construction of "redeem" as used in § 1.7 is also inconsistent with the use of that term in the Base Indenture and the earlier supplemental indentures. Those documents all use that term in its customary sense, albeit in the course of describing redemption mechanics in general (the Base Indenture) or timetables or terms different from those in the Supplemental Indenture.[17] Thus, Chesapeake's construction requires assigning the term "redeem" as used within § 1.7(b) a meaning ("commence the process of redemption") that it does not carry in any context other than the Ninth Supplemental Indenture.[18]

---

[17] *See, e.g.*, Base Indenture § 3.05; *see also* Tuckman Rep. 6-10 (canvassing redemption mechanics in three prior Chesapeake issuances).

[18] The word "redeem" does not appear in the Ninth Supplemental Indenture other than in § 1.7.

This regrettable circumstance was of course readily preventable. 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. Such language could have either specified that the last date for a redemption was May 14, 2013, or stated generally that redemptions after March 15, 2013 are permitted if noticed by or on that date.[19] Either of these correctives, at a single stroke, would have made Chesapeake's reading of § 1.7(b) ironclad and watertight.

But Chesapeake's failure to draft § 1.7(b) optimally or with perfect clarity does not make its construction unreasonable. A provision, even if clumsily drafted, may still be subject to a single reasonable interpretation. *See supra* p. 17. And Chesapeake's construction yields "a definite and precise meaning" in that March 15, 2013 marks a bright-line end to the notice period. *Law Debenture Trust*, 595 F.3d at 467 (citation omitted); *see also Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001) ("An omission or mistake in a contract does not constitute an ambiguity."). Given the specific, explicit, and crystal-clear command of the second sentence of § 1.7(b)—and given the canons that specific language controls general language and that language is not to be rendered superfluous—it is reasonable to construe the clauses "may redeem" in

[19] Although not relevant to the Court's textual analysis, Chesapeake's outside counsel sought, unsuccessfully, to add just such clarifying language at the 11th hour of the drafting process. *See infra* pp. 55-56.

§ 1.7(b) and § 1.7(c), in the singular context in which they appear, to mean "may commence the redemption process."[20] That construction brings all parts of § 1.7 into harmony.

Moreover, the two-word phrase "may redeem" is not a defined term carrying a fixed and determinate meaning. It therefore may be fairly read to mean "may commence the redemption process," and this reading, although in tension with the customary meaning of "redeem," does not create an irreconcilable conflict with any other provision of the Supplemental Indenture. *See Aramony*, 254 F.3d at 413-14 ("Even where there is no 'true conflict' between two provisions, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate." (citation omitted)). As the Second Circuit has emphasized, parties are free to use contractual terms in ways that differ from

---

[20] *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, No. 04 Civ. 10014 (PKL), 2005 WL 1950116 (S.D.N.Y. Aug. 12, 2005), is not to the contrary. There, the court interpreted the term "call" in an indenture to mean to "[t]o redeem (a bond) before maturity." *Id.* at *5 (alteration in original). It held that, viewed in context of that indenture, "call" must refer to the entire multi-step process of redemption, not simply giving notice of redemption, because "[t]his interpretation comports with other language in the Indenture." *Id.* But here the parties do not dispute the customary meaning of "redeem," so to the extent *Aristocrat Leisure* merely confirms that customary usage, it is of little moment. And in the context of *this* particular indenture, the non-customary interpretation of the phrase "may redeem" accords with the other language of, and brings overall coherence to, the Supplemental Indenture.

their ordinary meaning, and when they do, evidence of the customary meaning must yield to the terms of the contract. *See Croce v. Kurnit*, 737 F.2d 229, 238 (2d Cir. 1984) ("[E]vidence of industry practice may not be used to vary the terms of a contract that clearly sets forth the rights and obligations of the parties." (citing *In re W. Union Tel. Co.*, 299 N.Y. 177, 184-85 (1949)); *cf. Sharon Steel*, 691 F.2d at 1048-49 (affirming exclusion of custom and usage evidence where contractual language at issue was unique).[21]

If Chesapeake's construction of § 1.7(b) is flawed in this single respect, BNY Mellon's construction is veritably riddled with canonical and logical problems, and brings various provisions of the indenture into

---

[21] Although not necessary to its outcome, the Court received "custom and usage" evidence at trial that favors Chesapeake's construction. Chesapeake's expert, Dr. John Finnerty, testified that, in reviewing 10 years of bond redemption provisions, in every instance but one, the redemption provisions lacked any reference to a deadline for giving notice. Further, common to all those provisions was that a redemption by the issuer pursuant to the provision would not affect the present value of the note to the noteholder—it would merely convert an income stream into an immediate payout. Notably, the only contrary instance, in which a redemption deadline was couched in terms of notice, involved a "cliff" redemption like Chesapeake's, where an issuer's redemption would terminate a favorable income stream to the holder without providing a commensurate lump-sum payout. Finnerty Rep. ¶¶ 34, 45-46. Given the customary absence of language addressing notice dates in redemption provisions of indentures, it is fair to have expected a person "cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business," *Law Debenture Trust*, 595 F.3d at 466 (citation omitted), to alert to the unusual notice provision here and to understand that it was consequential.

irreconcilable conflict with each other. BNY Mellon's thesis is that the first sentence of § 1.7(b) permits the at-par redemptions themselves to take place during the Special Early Redemption Period (*i.e.*, between November 15, 2012 and March 15, 2013). BNY Mellon accounts for the pivotal second sentence of § 1.7(b), setting out the notice period for such special early redemptions, as limiting Chesapeake's right, at the front end (the first 30 days) of this period, to make such redemptions. The second sentence, BNY Mellon explains, requires Chesapeake to give notice of such a redemption during that same Special Early Redemption Period. Read in conjunction with the 30-day notice requirement of Base Indenture § 3.04, BNY Mellon asserts, this sentence serves to bar Chesapeake from exercising its option to effect an at-par redemption until the first 30 days of the period have run (*i.e.*, until December 15, 2012).

BNY Mellon's construction is at war, however, with basic canons of construction. To begin with, it is just that—a construct. In contrast to Chesapeake's construction, there is no specific sentence or provision within § 1.7(b) that cleanly—or even closely—articulates the reading urged by BNY Mellon. BNY Mellon's construction is instead aptly described as a valiant attempt to rationalize various components of § 1.7(b) so as, indirectly, to lend support to the claim that March 15, 2013 is the end date for actual redemption. The absence of an affirmative provision in § 1.7(b) that articulates the meaning that BNY Mellon assigns to § 1.7(b) is striking, particularly when contrasted to the clarity with which the second sentence of § 1.7(b) supports Chesapeake's reading. *See Cnty. of Suffolk*, 266 F.3d

at 139 (courts "must give specific terms and exact terms . . . greater weight than general language" (citation omitted)); *John Hancock Mut. Life Ins.*, 717 F.2d at 669 n.8 ("[W]here the parties have particularized the terms of a contract an apparently inconsistent general statement to a different effect must yield." (citation omitted)).

Further, BNY Mellon's construction renders several portions of § 1.7(b) incoherent or inaccurate. The first sentence of § 1.7(b) states, unequivocally, that Chesapeake "may redeem" the 2019 Notes at par beginning on November 15, 2012. Under BNY Mellon's construction, however, that statement is untrue: Because the second sentence of § 1.7(b) permits notice of such a redemption to first issue on November 15, 2012, Chesapeake in fact may *not* redeem the 2019 Notes at par until December 15, 2012. In effect, BNY Mellon reads the second sentence of § 1.7(b) to repudiate, *sub silentio*, the first sentence, as least insofar as the first sentence states (under BNY Mellon's construction of "may redeem") that redemptions themselves may occur during the first 30 days of the Special Early Redemption Period. An interpretation that creates such an internal inconsistency is disfavored. *See Morse/Diesel, Inc.*, 67 F.3d at 439; *Nat'l Conversion Corp.*, 23 N.Y.2d at 625.

Under BNY Mellon's reading, in fact, the second sentence of § 1.7(b) would not serve any other purpose than to partially repudiate the first sentence. But if the drafters' goal were to make December 15, 2012 the start date for redemption, there was no need to add the second sentence:

Replacing the word "November" with "December" in the first instance would do the deed. A formulation such as that of the second sentence is a bizarrely backhanded, indirect way of conveying such a simple concept. Indeed, the only way to read "may redeem" in the first sentence of § 1.7(b) to describe accurately the one action that BNY Mellon asserts may validly occur with respect to redemptions during the first 30 days of the Special Early Redemption Period would be to read it to refer to the act of giving notice of redemption. But that reading does not assist BNY Mellon. Quite the contrary: That is *Chesapeake's* reading of the provision.

BNY Mellon's construction also does violence to the second sentence of § 1.7(b). That sentence, within its four corners, squarely permits BNY Mellon to exercise its option to redeem the 2019 Notes at par so long as it gives notice during the Special Early Redemption Period. But under BNY Mellon's construction, that statement, too, is rendered untrue: A notice given during the last 30 days of that period (*i.e.*, after February 13, 2013) would be too late to achieve a redemption at par.

BNY Mellon's construction also gives a strained and impractical meaning to the term "Special Early Redemption Period," defined in § 1.7(b) as "November 15, 2012 to and including March 15, 2013." Under BNY Mellon's reading of § 1.7(b), there is no four-month period for doing *anything*, including for giving notice or for a redemption. Rather, there is, implicitly, a three-month period for a notice of at-par redemption (November 15, 2012 through February 13, 2013) and a separate, implicit, three-month

period for redemption itself on such terms (December 15, 2012 through March 15, 2013), with the period for redemption overlapping by two months with the period for notice. But the four-month period identified in § 1.7(b) would not define any process or act. At most, under BNY Mellon's reading, the Special Early Redemption Period can be said to bookend the span during which all steps in the redemption process (notice and redemption) must occur. Yet, on BNY Mellon's reading, that is inconsistent with how § 1.7(b) uses the term "Special Early Redemption Period": In the first sentence, it is used to describe the period for redemption (even though redemption cannot occur during the first 30 days of that period), and in the second sentence it is used to describe the period for notice (even though such notice would be ineffective during the last 30 days of that period).

In various ways, BNY Mellon's construction thus contravenes the basic canons that an interpretation of a provision of an agreement should not make other clauses meaningless, superfluous, unreasonable, or inaccurate. *See Morse-Diesel*, 67 F.3d at 439 (avoid inconsistencies); *Nat'l Conversion Corp.*, 23 N.Y.2d at 625 (same); *LaSalle Bank Nat'l Ass'n*, 424 F.3d at 206 (do not render clauses superfluous); *Lawyers' Fund*, 94 N.Y.2d at 404 (same).

For much the same reasons, BNY Mellon's construction is commercially unreasonable. Section 1.7(b) does not say anything about there being a three-month period for giving notice. Nor does it say anything about a three-month period for effecting a redemption. Yet those deadlines presumably are

highly consequential to holders and investors. They are the dates that sellers or potential buyers of the 2019 Notes would want to know, to guide their investment decisions.[22] That a market participant—the most important audience for the Supplemental Indenture—could arrive at the deadlines urged by BNY Mellon only by a process of excruciating contortion reinforces that BNY Mellon's construction is unreasonable. *See Samba Enters.*, 2009 WL 705537, at *5 (avoid commercially unreasonable interpretations); *Lipper Holdings*, 1 A.D.3d at 171 (same); *cf. Mastrovincenzo*, 435 F.3d at 104 (avoid absurd results); *Bank Julius Baer*, 424 F.3d at 283 (same).

The Court is, then, presented with a choice between two constructions offered of § 1.7(b). One (Chesapeake's) is imperfect but reasonable. The other

---

[22] To put the point acutely, the single fact that a potential buyer or seller of the 2019 Notes in early 2013 would most want to know is whether Chesapeake retained the ability to redeem those Notes at par—or whether it was instead obliged to either pay the Notes out until maturity at the rate of 6.775% or pay holders the present value of doing so. That is because a redemption at par would dramatically reduce the 2019 Notes' present value. And that fact turns on whether the deadline had passed for Chesapeake to give notice of a special early redemption. Chesapeake's construction of § 1.7(b) serves that need: It sets out explicitly the final date (March 15, 2013) for Chesapeake to give such notice. BNY Mellon's construction does not. It requires the market to disregard § 1.7(b)'s express March 15, 2013 deadline for notice; to intuit the end date for redemption through a process of reasoning irreconcilable with basic canons of construction; and only then to derive from Base Indenture § 3.04 (because this ostensible deadline nowhere appears in § 1.7(b)) the last date (February 13, 2013) on which Chesapeake can give timely notice.

(BNY Mellon's) is incoherent and unreasonable. There are no other reasonable constructions of § 1.7(b). Under the case law, where one construction is reasonable and affords a clear and definite meaning and all others are not reasonable, a contract is not ambiguous. *See Law Debenture Trust*, 595 F.3d at 467; *Readco*, 81 F.3d at 299; *see also Wards Co. v. Stamford Ridgeway Assocs.*, 761 F.2d 117, 120 (2d Cir. 1985) ("A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity, and words do not become ambiguous simply because lawyers or laymen contend for different meanings. Contorted semanticism must not be permitted to create an issue where none exists." (citation omitted)).

Chesapeake's reading of the deadline for issuing a notice of special early redemption under § 1.7(b), therefore, carries the day. That deadline was March 15, 2013. Chesapeake's Notice of Special Early Redemption that day was, accordingly, timely.

IV. Analysis of Extrinsic Evidence Bearing on § 1.7(b)

Although the Court has ruled based on the governing texts, it has also carefully evaluated the admissible extrinsic evidence of the February 2012 negotiations between Chesapeake and its underwriters that led to the text of § 1.7(b). The Court's determination is that this evidence convincingly shows that the parties intended—consistent with § 1.7(b)'s second sentence—that March 15, 2013 be the deadline for giving notice of a special early redemption, not the deadline for effecting such a redemption itself. Thus, even if the

text of § 1.7(b) were held ambiguous, Chesapeake's position as to the notice deadline would still prevail. In the interest of completeness, the Court sets out here its reasoning in so finding.

The extrinsic evidence received at trial consisted of (1) the testimony of participants in the negotiation and drafting of the "Prospectus Supplement" and the Supplemental Indenture governing the 2019 Notes (collectively, the "deal documents"); (2) drafts and executed versions of the deal documents; (3) emails exchanging comments upon and edits of the deal documents; and (4) expert testimony as to industry custom and usage, and investor expectations. The Court also received testimony about post-negotiation statements by Chesapeake and industry participants and publications as to the deadlines governing redemption of the 2019 Notes.

This analysis proceeds in three parts. First, the Court addresses and resolves BNY Mellon's motion *in limine* to exclude much of this evidence. Second, the Court sets forth its findings, based on the extrinsic evidence, as to the events of February 2012, including, centrally, the discussions that gave rise to the text of § 1.7(b). Third, the Court explains why the evidence demonstrates, and why the Court finds, that the negotiating parties uniformly intended and agreed that March 15, 2013 would be the deadline for a notice of special early redemption.

A. Admissibility of Extrinsic Evidence of the Chesapeake/BAML Negotiations

On April 22, 2013, the day before trial, BNY Mellon filed a motion *in limine* seeking to exclude evidence of the subjective intent of any witness from

Chesapeake, BAML, Bracewell, or Cravath, as to the meaning of § 1.7(b), except to the extent that the witness's views had been communicated to BNY Mellon at the time of the drafting and negotiation of the Prospectus Supplement and Supplemental Indenture. *See* Dkt. 95, at 9-11. Because of the expedited nature of this litigation, and because this was a bench trial, the Court reserved decision on the motion until after trial.[23]

BNY Mellon's motion is based on what the case law alternatively describes as the doctrine of "unmanifested intent" or "uncommunicated subjective intent." As explained further below, that doctrine may serve to preclude a party from offering evidence of its unexpressed, subjective intent as to the meaning of a contract's terms. Paradigmatically, the doctrine applies where the contracting parties disagree as to the meaning of the terms on which they agreed. This case, however, arises in a different context. Here, Chesapeake (as issuer) and BAML (as lead underwriter) indeed negotiated the terms of § 1.7(b) of the Supplemental Indenture, the operative agreement in this case. And as detailed *infra* in Parts IV.B-IV.C, there is compelling evidence that, in doing so, Chesapeake and BAML reached a common understanding as to the meaning of the agreed language that became § 1.7(b) of the Supplemental Indenture. BNY Mellon, the indenture trustee that stood to take on responsibilities under the Supplemental Indenture once complete, was not

[23] On April 24, 2013, Chesapeake filed a response to BNY Mellon's motion. *See* Dkt. 99. The parties also addressed the motion in their post-trial briefs. *See* Dkt. 110, 111.

party to those negotiations (save that its agents were copied on a small number of communications). However, the parties to the Supplemental Indenture are Chesapeake and BNY Mellon (as trustee), not Chesapeake and BAML.

BNY Mellon argues that the "unmanifested intent" doctrine applies here, because the relevant parties to the Supplemental Indenture are its *signatories*, not the parties who negotiated its terms and text. It argues that any evidence of the subjective intent of Chesapeake and BAML to which BNY Mellon was not privy is inadmissible, because such a shared intention was not manifested to BNY Mellon. Because the negotiations that resulted in § 1.7(b) were solely between Chesapeake and BAML, BNY Mellon's motion, if granted, would exclude virtually all evidence as to the evolution of § 1.7(b) and the meaning that the negotiators assigned to it.

Although BNY Mellon's argument is provocative, BNY Mellon does not point to any case law that squarely supports applying that doctrine in this context. The Court finds the doctrine inapplicable here. Principally, that is because the negotiations between Chesapeake and BAML were sufficiently adversarial and arm's-length to guard against the concerns about collusion and unfair surprise that animate the doctrine. In addition, in practice, BNY Mellon's argument would fundamentally reshape the way bond indentures are negotiated, by causing the issuer to actively involve a future indenture trustee in the process of negotiating the indenture's terms, lest the failure to do so hamstring the issuer in future litigation.

1. The Doctrine of Unmanifested Intent

The doctrine of unmanifested intent reflects the principle that the parties' objective manifestations of their intent—*i.e.*, their words to each other and their deeds—are most probative in contract formation and interpretation. *See Law Debenture Trust*, 595 F.3d at 467 ("[T]he objective of contract interpretation is to give effect to the *expressed* intentions of the parties." (emphasis in original) (citation omitted)); *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913). It seeks to prevent a party from concealing its understanding of the contract from a counterparty, only to reveal that understanding later or to invent a *post hoc* rationalization in aid of a litigation position. *See Mercury Partners LLC v. Pac. Med. Bldgs., LP*, No. 02 Civ. 6005 (HBP), 2007 WL 2197830, at *14 (S.D.N.Y. July 31, 2007) ("It is the parties' 'intention as it existed at the time the contract was executed which must control rather than any subsequent intention tailored to complement an individual's posture once an agreement has gone sour.'" (quoting *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 127 (S.D.N.Y. 1980))). In light of these concerns, when a party seeks to introduce statements of its subjective intent that it did not communicate to the other party at the time of the drafting and that concern the ultimate meaning of the contract, courts

typically do not consider, or assign little weight to, such evidence.[24]

---

[24] For instance, where a contract's terms are unambiguous, courts will not allow a party's unexpressed subjective intention to raise an ambiguity. *See, e.g.*, *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997); *Wells v. Shearson Lehman/Am. Express*, 72 N.Y.2d 11, 24 (1988); *First Montauk Sec. Corp. v. Menter*, 26 F. Supp. 2d 688, 689 (S.D.N.Y. 1998). Similarly, where a contract is ambiguous and one or both parties to the contract seek to introduce their own unexpressed subjective intentions, courts will not rely on such evidence to resolve that ambiguity. *See, e.g.*, *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1003 (2d Cir. 1974); *JA Apparel Corp. v. Abboud*, 682 F. Supp. 2d 294, 306 n.10 (S.D.N.Y. 2010); *Invista B.V. v. E.I. Du Pont De Nemours & Co.*, No. 07 Civ. 713 (WHP), 2008 WL 4865044, at *5 (S.D.N.Y. Nov. 5, 2008); *Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 378 (S.D.N.Y. 2006), *aff'd*, 284 F. App'x 822 (2d Cir. 2008) (summary order); *Westfield Family Physicians v. HealthNow N.Y., Inc.*, 59 A.D.3d 1014, 1017 (4th Dep't 2009); *Sally v. Sally*, 225 A.D.2d 816, 818 (3d Dep't 1996). *But cf. Nycal Corp. v. Inoco PLC*, 166 F.3d 1201, at *4 (2d Cir. 1998) (summary order) ("We note that the proposition of law . . . regarding the admissibility of evidence concerning subjective as opposed to objective intent in interpreting contracts, may not be as clearly settled in New York as the district court indicates."). By contrast, in the rare situation in which both parties in a contract dispute have a contemporaneous understanding that, although unexpressed, is harmonious, that understanding may inform the meaning of an ambiguous contract. *See, e.g.*, *In re Sept. 11 Litig.*, 640 F. Supp. 2d 323, 333 (S.D.N.Y. 2009), *aff'd in relevant part sub nom. Aegis Ins. Servs., Inc. v. Port Auth. of N.Y. & N.J.*, 435 F. App'x 18 (2d Cir. 2011) (summary order); *Baladevon, Inc. v. Abbott Labs., Inc.*, 871 F. Supp. 89, 98-99 (D. Mass. 1994) (applying Massachusetts law); *see also Pennzoil Co. v. FERC*, 645 F.2d 360, 392 (5th Cir. 1981); 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.9 (3d ed. 2004) ("Though it is generally safe to say that a party's 'secret intention' will not carry the day, this is not

That said, evidence of a party's uncommunicated subjective intent is not categorically inadmissible. Where an agreement is ambiguous, "the court may and should look to the prior negotiations to determine what was intended." *Rudman v. Cowles Commc'ns*, 30 N.Y.2d 1, 11 (1972); *accord U.S. Fire Ins.*, 949 F.2d at 571. The Second Circuit has explained that "[a]lthough a party's uncommunicated subjective intent cannot supply the ultimate meaning of an ambiguous contract, it is quite another thing to hold that such evidence is wholly irrelevant and inadmissible for other purposes." *World Trade Ctr. Props.*, 467 F.3d at 125. Because the parties' reasonable expectations of a contract's meaning are determined based on an objective understanding of the surrounding circumstances in which the agreement was made, "a party's subjective understanding, while not controlling, may shed light on the state of th[e] negotiations and could bear on that party's objective actions." *Id.* at 126; *see XL Specialty Ins. Co. v. Agoglia*, No. 08 Civ. 3821 (GEL), 2009 WL 1227485, at *17 (S.D.N.Y. Apr. 30, 2009), *aff'd*, 370 F. App'x 193 (2d Cir. 2010) (summary order); *Constellation Power Source, Inc. v. Select Energy, Inc.*, 467 F. Supp. 2d 187, 209 (D. Conn. 2006).

2. Application of the Doctrine Here

BNY Mellon's motion *in limine* is aimed at excluding the communications between Chesapeake and BAML when they negotiated the Prospectus

---

a safe assertion if it happens that both parties shared the same 'secret intention.'").

Supplement, the pertinent text of which was later imported into the Supplemental Indenture. BNY Mellon argues that negotiations between an issuer and an underwriter over the terms of an indenture—either in general or on the facts of this case—are not conducted at arm's length. BNY Mellon likens these to discussions among persons within one side of a business negotiation that are not manifested to the counterparty. It argues that testimony by Chesapeake or BAML as to their communications is irrelevant to the meaning of an indenture provision to which Chesapeake and BNY Mellon, but not BAML, were signatories.

The Court disagrees. BNY Mellon's premise is that the negotiations between an issuer and underwriter are collusive, and that admitting testimony as to such negotiations invites them to invent, after the fact, a different, unspoken understanding of their agreed terms that favors the issuer. Generally, however, courts have characterized the relationship between issuer and underwriter as arm's-length. *See, e.g.*, *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1509 (S.D.N.Y. 1989) ("[I]ndentures are often not the product of face-to-face negotiations between the ultimate holders and the issuing company. What remains equally true, however, is that underwriters ordinarily negotiate the terms of the indentures with the issuers. Since the underwriters must then sell or place the bonds, they necessarily negotiate in part with the interests of the buyers in mind."); *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1541 (S.D.N.Y. 1983) (declining to construe indenture against issuer where it was "negotiated by

sophisticated bond counsel" from issuer and underwriter and "[t]here is no suggestion of disparate bargaining power in the drafting of the Indenture, nor could there be"); *EBC I, Inc. v. Goldman Sachs & Co.*, 91 A.D.3d 211, 214-16 (1st Dep't 2011) (examining issuer/underwriter relationship and finding it to be adverse and arm's-length).[25]

Consistent with this, the trial record in this case revealed that the Prospectus Supplement in general, and the text of the provision that became § 1.7(b) in particular, were the subject of vigorous arm's-length negotiations between Chesapeake and lead underwriter BAML. This evidence reflected meaningful give and take, in which BAML negotiated with its own interests in mind. It also reflected a demonstrated ability by BAML to get its way and to influence terms of the 2019 Note offering. The parties' actual dealings demonstrate, in sum, that there was no disparity of bargaining power between the negotiating parties. *See, e.g.*, Telle Decl. ¶ 14 (BAML originally proposes window from November 15 to December 31); PX 10 (Chesapeake requests one-year redemption window); Dell'Osso Decl. ¶ 17 (BAML rejects Chesapeake's request for one-year

---

[25] *Cf. Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341, 370 (2d Cir. 1973) (describing the underwriter as the party "most heavily relied upon to verify published materials" because of its "incentive to do so," *i.e.*, that it "often has a financial stake in the issue" which gives it "special motive thoroughly to investigate the issuer's strengths and weaknesses"). *But see Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 397 (Del. 1996) (noting that whether issuer and underwriter "can legitimately be viewed as 'negotiating' indenture provisions is a subject of some dispute").

redemption window); PX 1 (redemption window ultimately becomes four months); PX 16 (bank changes redemption date from March 31 to March 15); Telle Decl. ¶ 16 (same); *see also* PX 42 (following completion of Prospectus Supplement and during drafting of Supplemental Indenture, BAML counsel Cravath rejects Chesapeake counsel Telle's proposed clarification to notice provision in § 1.7(b)); DX 20 (Chesapeake describing dissatisfaction with provision, which eventually was added, requiring that $250 million of Notes remain outstanding if any are redeemed).

BNY Mellon counters that even if there is no general ban on admitting evidence of issuer-underwriter negotiations, the negotiations here should nevertheless not be treated as at arm's length. That is because the 2019 Notes were purportedly offered on a "best efforts" basis, in which BAML never bore any economic risk in marketing the Notes.

BNY Mellon is correct that a typical "best efforts" offering, where the underwriter does not buy the notes but simply markets them as the issuer's agent, entails significantly less risk for the underwriter than a "bought" or "firm commitment" deal, where the underwriter commits upfront to purchase the notes being issued and then seeks to resell them. *See Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 207, 217 n.17 (1984); *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 701 (2d Cir. 1994); *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.*, 651 F. Supp. 1009, 1013 n.3 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 260 (2d Cir. 1987); Louis Loss, Fundamentals of Securities

Regulation 100, 110 & n.11 (6th ed. 2011); Mullin Rep. ¶ 16. However, the evidence here lends only partial support to BNY Mellon's claim that BAML's involvement with the 2019 Notes was riskless. It shows that BAML was exposed to at least *some* degree of economic risk. As James Alexander Maultsby, the BAML managing director, testified, BAML made a firm written commitment to Chesapeake to buy the notes on closing. Tr. 225. The Underwriting Agreement reflects such a commitment. *See* PX 3, at CHK338 (the "Underwriting Agreement").

To be sure, that written commitment was made at a point when BAML's exposure, in practice, was limited: As of February 13, 2012, when BAML signed the underwriting agreement, the issuance was already oversubscribed with orders from investors seeking to purchase the 2019 Notes. *See* Tr. 226; PX 39. Although this substantially reduced the risk that BAML would be left holding onto the 2019 Notes, it did not eliminate that risk entirely. There remained at least the possibility that purchasers would back out, obliging BAML to acquire the Notes earmarked for them. *See* Tr. 156-57 (BAML counsel Burns); Tr. 226-27 (Maultsby). In addition, BAML had its reputational interest to protect in negotiations. Its goals were to provide adequate disclosure and to fashion terms that would be attractive to purchasers and that would clear the market, thereby enhancing BAML's ability to secure underwriting roles on future agreements. *See* Tr. 152-57 (Burns); Tr. 227 (Maultsby).

Consistent with this, as noted, BAML succeeded in negotiating terms materially different from those initially proposed by Chesapeake. Because BAML exercised influence over the terms of the deal documents based on its own interests, which diverged from Chesapeake's, the Court comfortably concludes that the negotiations between these two parties were at arm's length, not one-sided or collusive.

In an alternative argument, BNY Mellon notes that Chesapeake and BAML's negotiations were directed towards the terms of the Prospectus Supplement, whereas the document at issue here is the later-prepared Supplemental Indenture. BAML is correct that the primary subject of Chesapeake and BAML's negotiations was the Prospectus Supplement, not the Supplemental Indenture. But that does not materially change the analysis, because the Supplemental Indenture is intended to conform to the Prospectus Supplement, *see* Burns Decl. ¶ 6; Tr. 136, such that parallel language regarding the Notes' material terms was, in short order, carried forward from the Prospectus Supplement to the Supplemental Indenture. *Compare* PX 1, at CHK284, *and* PX 2, at CHK359, *with* Supplemental Indenture § 1.7(b), *and* PX 5, at BG2869. Indeed, when counsel for Chesapeake proposed a clarifying change to the notice sentence of what became § 1.7(b), that change was rejected by BAML counsel Cravath, whose policy was to conform the indenture language to that of the Prospectus Supplement. *See* Burns Decl. ¶ 26; PX 41-43; *see also* Telle Decl. ¶¶ 35-38.[26]

---

[26] For the purpose of determining the contracting parties' intent, the Court has not admitted for the truth of the matter

Finally, BNY Mellon relies heavily on a Delaware case in which the court declined to consider extrinsic evidence of the subjective intent of the parties that negotiated an agreement, where doing so "would yield information about the views and position of only one side of the dispute," and would ignore the expectations of the holders of the securities governed by the agreement, who were not involved in its drafting. *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II* (*Commerzbank*), -- A.3d ---, 2013 WL 1136821, at *7 (Del. Mar. 19, 2013). This case is a far cry from *Commerzbank*. There, the agreement had been negotiated by Commerzbank and two affiliated entities that it had created. Thus, for all intents and purposes, the agreement had been negotiated unilaterally, and the three negotiating entities were each defendants in the litigation. In no sense did the participation of any of those entities benefit the future holders. The danger of collusion undergirding the unmanifested intent doctrine was, thus, very real. *See id.* ("This case does not fit the conventional model of contracts 'negotiated' by and among all the interested parties."); *see also Prop. Asset Mgmt., Inc.*

---

asserted the out-of-court statement to this effect by Cravath attorney Daniel O'Shea to Bracewell's Telle. *See infra* p. 64 & n.43 (addressing Telle Decl. ¶ 38). However, the Court is permitted to consider otherwise inadmissible hearsay for the purpose of resolving a motion *in limine*, *see* Fed. R. Evid. 104(a), 1101(d)(1); *cf. Bourjaily v. United States*, 483 U.S. 171, 178 (1987); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003), and the Court has done so here. The Court's analysis and outcome would be the same, however, even putting aside the statement in Telle's declaration attributed to O'Shea.

v. Chi. Title Ins. Co., 173 F.3d 84, 87 (2d Cir. 1999) (declining to recognize assignment based on testimony about subjective intentions, where purported assignment between sister corporations was never memorialized in writing).[27]

Here, by contrast, BAML negotiated the Indenture's terms with its own interests in mind. Because the parties were adverse yet conveyed to each other a shared understanding of the meaning of the important and unusual provision (§ 1.7(b)) that they together fashioned, there is little danger that the party adverse to Chesapeake now, BNY Mellon, will be the victim of *post hoc* collusion. In this vein, the Court found particularly valuable the testimony of BAML's representatives (Maultsby and outside counsel Burns) as to the parties' intentions in drafting the text that became § 1.7(b), because

---

[27] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392 (Del. 1996), on which BNY Mellon also relies, is inapposite. There, the court was faced with "a hopelessly ambiguous contract" and was "reluctan[t] to rely on extrinsic evidence" such as "the thoughts and positions of . . . the issuer and underwriter." *Id.* at 397-98. But the court's reluctance was motivated in part by the fact that the ambiguous provision was boilerplate, and a case-by-case evaluation of identical boilerplate terms, based on the parties' negotiations, would create "enduring uncertainties as to the meaning of boilerplate provisions [that] would decrease the value of all debenture issues and greatly impair the efficient working of capital markets." *Kaiser*, 681 A.D.2d at 398 (quoting *Sharon Steel*, 691 F.2d at 1048). That concern is not present here, because the all-important second sentence of § 1.7(b) is anything but boilerplate. *See, e.g.*, Finnerty Rep. ¶¶ 14, 43; Burns Decl. ¶ 16 (describing the notice provision as "a unique term in my experience that I had never seen in a prior deal"); PX 19 (email from Maultsby expressing pride in the deal's "unique structure").

BAML's personnel have little meaningful incentive to collude with Chesapeake in aid of litigation to which BAML is not a party. *See Baladevon*, 871 F. Supp. at 98 (finding testimony of original party to contract who had assigned its rights in the contract to be "highly credible" because it no longer had a stake in the outcome of the litigation); *see also BKCAP, LLC v. Captec Franchise Trust 2000-1*, No. 3:07-cv-637, 2011 WL 3022441, at *7 (N.D. Ind. July 21, 2011), *aff'd*, 688 F.3d 810 (7th Cir. 2012) (relying on testimony of parties that had negotiated terms of notes that were later assigned to a third party); *cf. MBL Contracting Corp. v. King World Prods., Inc.*, 98 F. Supp. 2d 492, 497 (S.D.N.Y. 2000) (holding that where two contracting parties have a common understanding of what is meant by an agreement, the understanding of a third-party beneficiary to that agreement does not control its meaning).

As a final observation, the Court notes the broad implications of BNY Mellon's bid to exclude issuer-underwriter communications to which an indenture trustee is not privy. That Chesapeake and BAML did not include BNY Mellon on all of their communications is not evidence of some neglect or collusion. It is standard industry practice: "[U]nderwriters ordinarily negotiate the terms of the indentures with the issuers." *Metro. Life Ins. Co.*, 716 F. Supp. at 1509; *see also* Robert I. Landau & Romano I. Peluso, Corporate Trust Administration and Management 117 (6th ed. 2008); Burns Decl. ¶ 5; Tr. 151-52. A rule under which communications during negotiations between an issuer and an underwriter to which the trustee was not party are inadmissible in later litigation over ambiguous

contract terms would upend this practice and yield a needlessly inefficient outcome: The issuer, in an abundance of caution, might feel compelled to include the trustee on calls and emails with the underwriter as to deal terms and text, even though the trustee has no stake in the economic terms of a note issuance and may have little value to add to such negotiations. Issuers and underwriters do not set out together to draft ambiguous indentures, but ambiguity happens. When it does, and the issuer and underwriter negotiated the indenture at arm's length, it is the evidence of *their* collective intentions, where accessible, that informs the indenture's meaning.

For these reasons, the Court holds that evidence of communications between Chesapeake and BAML bearing on their shared understanding of § 1.7(b) is admissible, regardless whether BNY Mellon was party to those communications. BNY Mellon's motion *in limine* to preclude such evidence is, therefore, denied.[28]

B. Findings of Fact as to the Events of February 2012

At trial, Chesapeake called four fact witnesses, each of whom played a key role in the process by which the 2019 Notes were conceived and their terms negotiated and memorialized in the deal documents: (1) Domenic Dell'Osso, Chesapeake's chief financial officer ("CFO") and executive vice president, *see*

[28] Notwithstanding the denial of this motion, the doctrine of unmanifested intent may nonetheless be relevant in this case where statements about a witness's private understanding of a provision, uncommunicated to the counterparty, are offered. The Court addresses that situation *infra* at pp. 64 n.42, 65 n.44.

Declaration of Domenic J. Dell'Osso ("Dell'Osso Decl.") ¶ 2; (2) Michael Telle, a partner at Bracewell, Chesapeake's outside counsel for equity and debt offerings since 2007, *see* Declaration of Michael S. Telle ("Telle Decl.") ¶¶ 2, 5; (3) James Alexander Maultsby, a managing director at BAML, which served as the lead underwriter for the Notes offering, *see* Declaration of James Alexander Maultsby ("Maultsby Decl.") ¶¶ 2, 4; and (4) Stephen Burns, a partner at Cravath, BAML's counsel for the Notes offering, *see* Declaration of Stephen L. Burns ("Burns Decl.") ¶¶ 1, 3. The Court found all four credible.[29]

BNY Mellon called two fact witnesses. Elliot Chambers, Chesapeake's assistant treasurer and vice president of finance, was part of Chesapeake's working group on the issuance of the 2019 Notes. The 2019 Notes are part of Chambers's current portfolio for reporting purposes. Tr. 248-49. Kyle Bork, a data analyst in the corporate bond and preferred debt department at Bloomberg LP, helped create the Bloomberg page describing the 2019 Notes. Tr. 358, 362. The Court also credited Chambers's and Bork's testimony, although, for the reasons that follow, found both of limited relevance to the issue at hand.[30]

---

[29] The Court addresses the credibility of these witnesses in greater detail *infra* in Part IV.C.

[30] As noted, four expert witnesses also testified—one called by Chesapeake and three by BNY Mellon. These witnesses offered testimony regarding industry custom and practice or opined on how a person in the industry might understand § 1.7(b). Dr. John D. Finnerty, called by Chesapeake, testified that, based on his research, both the special early redemption option in the 2019 Notes and the second sentence of § 1.7(b) setting forth a deadline for notice rather than for the completion of redemption

The facts found by the Court are as follows:

The 2019 Notes were conceived of, negotiated, and ultimately issued during a nine-day period in February 2012. Between February 8, 2012, and February 16, 2012, Dell'Osso, Telle, Maultsby, and Burns, and their respective deal teams, proposed, negotiated, and drafted the deal documents relating to the Notes. The compressed time frame in which these events transpired was due, at least in part, to the fact that Chesapeake was closing the books on its 2011 fiscal year and planned to issue an earnings release toward the end of February. In the days before that release issued, Chesapeake would be subject to a "blackout period" and unable to issue public securities. Dell'Osso Decl. ¶ 15.

---

are "unusual and almost unprecedented" in the bond industry. Finnerty Rep. ¶¶ 13-14. Robert I. Landau, called by BNY Mellon, testified that the language "may redeem" or the term "redemption" customarily refers in the securities industry to the endpoint of the process of redemption, not the date on which notice is given and the process of redemption is commenced. Landau Rep. ¶¶ 11-16. James A. Mullin, called by BNY Mellon, testified that BNY Mellon's interpretation of § 1.7(b), based on his knowledge of the market, accords with the expectation of a reasonable investor. Mullin Rep. ¶¶ 11, 38, 40. Finally, Dr. Bruce Tuckman, called by BNY Mellon, testified that the text of the Supplemental Indenture accords with custom and practice in the bond industry in that it provides a period during which redemption must occur; he opined that a redemption of the 2019 Notes after March 15, 2013 would be at the Make-Whole Price. Tuckman Rep. 10-13.

1. February 8-9, 2012: The Concept Emerges

As of the start of 2012, Chesapeake was in search of additional sources of short-term liquidity, after an unusually warm winter had caused a significant decline in the price of natural gas. Dell'Osso Decl. ¶ 9. On or around February 8, 2012, Dell'Osso was approached by Maultsby and Scott Van Bergh, both of BAML, with a proposal for a public debt offering. *Id.* ¶ 10. Maultsby and Van Bergh proposed that this offering contain an unusual feature: It would provide Chesapeake with the option to call the notes at par early in their lifetime. *Id.* Such a feature would give Chesapeake the liquidity it needed in the short term. However, it would also allow Chesapeake to repay the notes after certain planned asset sales—then in the works—had occurred, without paying a premium, unlike in the case of typical high-yield bonds. Dell'Osso expressed interest in the proposal. His assessment was that "BAML had done an excellent job of reading Chesapeake's financial situation." *Id.* Dell'Osso and Chambers contacted outside counsel Telle. They told Telle that Chesapeake was considering an offering in conjunction with BAML. Telle Decl. ¶ 7.

On February 9, 2012, at 10:31 a.m.,[31] Maultsby emailed Dell'Osso and others at Chesapeake with a written proposal entitled "Short-Term Callable Bond Opportunity." Dell'Osso Decl. ¶ 12; PX 8. Shortly thereafter, around 11:30 a.m., Maultsby, Dell'Osso,

---

[31] The times used in this section are all Eastern Standard Time.

and various Chesapeake officers spoke by phone, presumably to discuss BAML's proposal. Dell'Osso Decl. ¶ 12; PX 8. BAML proposed that Chesapeake issue five-year notes that could be called at par during a period that spanned the last six weeks of 2012. Dell'Osso Decl. ¶ 12. After that point, the bonds could only be called above par, at premiums that would first increase and then "step[]-down" to par as the bonds approached maturity. *Id.*

A few hours after that phone call, BAML sent another presentation to Dell'Osso. It contained several variations on the initial proposal, including a range of potential maturity dates. *Id.*; PX 9. At some point thereafter, Chesapeake decided that it would work with BAML to issue notes with the "early-call-at-par" feature and a seven-year maturity, which Chesapeake believed would integrate well into the maturity schedule of Chesapeake's then-existing debt. Dell'Osso Decl. ¶¶ 15-16. In an email sent on February 9, 2012, at 7:07 p.m., Dell'Osso confirmed that plan to the BAML group. PX 10. In that email—also sent to Telle and various individuals at Chesapeake—Dell'Osso expressed a desire to extend the "early-call-at-par" period to 12 months. *Id.*; Dell'Osso Decl. ¶ 17. Such a period would have given Chesapeake a year in which to decide whether to call the bonds early, flexibility that served Chesapeake's business needs because its planned asset sales were at that time not "close to completion." Dell'Osso Decl. ¶ 17; *see also* Dell'Osso Dep. 57.

BAML, however, responded that a 12-month period would be too long. Dell'Osso Decl. ¶ 17. Dell'Osso persisted, and at some point over the

course of the weekend, indicated to Maultsby a desire to make Chesapeake's optional redemption window as long as possible. *Id.*; *cf.* Maultsby Decl. ¶ 7. The evening of February 9, Dell'Osso and Telle exchanged a series of emails. These indicate that Telle and his colleagues at Bracewell had begun work on the deal. PX 12; *see* Dell'Osso Decl. ¶ 18; Telle Decl. ¶ 7.

Meanwhile, John Pantalena of BAML got in touch with Cravath's Burns, to inform him of Chesapeake's and BAML's intentions. Pantalena forwarded to Burns the email in which Dell'Osso had indicated his plan to ask BAML to set the "early-call-at-par" period at 12 months. PX 11; Burns Decl. ¶ 8. Late that night and the next morning, Burns staffed the deal with Cravath attorneys, including Daniel O'Shea, Brandon DeFrehn, Christopher Moore, and Casey McDonald, in anticipation of the tight time frame contemplated. Burns Decl. ¶ 9.

2. February 10-12, 2012: The Prospectus Supplement Takes Shape

On the morning of February 10, 2012, Burns and his team at Cravath began work on the project, including the required due diligence, and participated in both internal and external phone calls. Burns Decl. ¶ 10. Morgan Stanley also joined BAML as co-lead underwriter. *Id.*

Before Telle began to draft the Prospectus Supplement, he spoke with Dell'Osso and others at Chesapeake. Telle Decl. ¶ 14. They communicated to Telle Chesapeake's desire to lengthen the November 15-December 31, 2012 redemption period that had been proposed by BAML. *Id.* Chesapeake and its outside counsel decided to propose March 31, 2013,

as the end of the redemption period. *Id.* Telle and his colleagues at Bracewell then worked to draft the preliminary Prospectus Supplement for the deal. During the weekend, they circulated several drafts to other Bracewell attorneys, Cravath attorneys, the Chesapeake team, the BAML team, and the Morgan Stanley team. *Id.* ¶ 12; Dell'Osso Decl. ¶ 19.

Late Friday night, February 10, 2012, the first draft of the Prospectus Supplement was sent out, by Bracewell attorney Erica Hogan, to the teams at Chesapeake, Cravath, and BAML. PX 13; Telle Decl. ¶ 15; Burns Decl. ¶ 11. Hogan's draft contained a provision for a special early redemption that used the customary language for a conventional redemption time-period. Telle Decl. ¶ 15. The "Description of Notes" section of the draft stated:

> Special Redemption. Between November 15, 2012 and March 31, 2013, the Notes will be redeemable at our option at any time in whole, or from time to time in part, at a price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption.

PX 13, at CHK842. Hogan also attached to her email a redline version of the draft Prospectus Supplement, reflecting edits to a Prospectus Supplement that had been used in a note offering of Chesapeake's in February 2011. PX 13, at CHK906; Burns Decl. ¶ 11. As of that point, Chesapeake had not yet reviewed a draft of the Prospectus Supplement; Hogan's email indicated thus and also advised that further revisions needed to be made to the document. PX 13.

During the next day, Saturday, February 11, 2012, changes continued to be made to the draft of the Prospectus Supplement. Dell'Osso sent out his comments with tracked changes. PX 15; Dell'Osso Decl. ¶ 19. Later that morning, Cravath's DeFrehn sent an email to Telle and the Bracewell team, advising them that the banks preferred March 15, 2013 to serve as the end of the call period, rather than March 31, 2013. PX 16; Telle Decl. ¶ 16; *see* Burns Decl. ¶ 14. That email also asked that interest payment dates be set for every March 15 and September 15. PX 16; Burns Decl. ¶ 14.

Over the course of Friday and Saturday, Telle had discussions with his clients at Chesapeake to the effect that Chesapeake wanted as long a time period as possible to decide whether to call the bonds. Dell'Osso told Telle that he wanted as long a period as possible to redeem. Tr. 111-13.[32] Telle recognized that, with a March 15, 2013 redemption deadline, Chesapeake would have to give notice by February 13, 2013—30 days earlier. Telle Decl. ¶ 18. At that point, Telle developed the idea on which this lawsuit turns: to make the period of November 15, 2012, through March 15, 2013 the time frame within which Chesapeake merely had to give *notice* that it planned to exercise its call option, as opposed to the time frame within which redemptions would have to be completed. *Id.* ¶ 19. Telle realized that this change would move later in time the window within which Chesapeake had (1) to decide whether to exercise its

---

[32] Although Telle does not recall all the specifics of those conversations, he recalls this statement by Dell'Osso. *See* Tr. 95-97, 99-100.

option to redeem early at par, and (2) to raise the funds necessary for such a redemption. *Id.* ¶ 19. On Saturday, Telle discussed this idea with Dell'Osso and others. *Id.* ¶ 20.[33]

That weekend, representatives of Chesapeake discussed with representatives of BAML both (1) the time period within which Chesapeake would have to make its decision whether to pursue an early redemption at par, and (2) the concept of revising the language of the Prospectus Supplement so as now to focus on the time period within which Chesapeake could give notice of such a redemption. Based on the trial record, the Court cannot confidently determine how many such separate conversations (*i.e.*, involving representatives of both Chesapeake and BAML) along these lines occurred during that weekend. These conversations were all telephonic, and the witnesses who participated in them have limited recollections both as to who participated in which conversation, and as to the times of these conversations. The Court believes it most likely that at least two or three such conversations took place, and that they occurred on Saturday, February 11, 2012, including that evening. However, whether contained in one conversation or spread across two, three, or more, the Court finds that conversation(s) between representatives of Chesapeake and BAML were held on Saturday, February 11, 2012, and perhaps early on Sunday, February 12, 2012, during which the following three colloquies occurred:

---

[33] Although Dell'Osso does not specifically recall such a conversation with Telle, he does not dispute that such a conversation occurred. Dell'Osso Dep. 74-75.

1. *Dell'Osso/Maultsby*: In a call with at least Maultsby and apparently others from BAML, Dell'Osso discussed Chesapeake's deadline for making its decision as to redemption. Dell'Osso stated that Chesapeake desired as long a period as possible to decide whether to redeem early. Dell'Osso Decl. ¶ 17; Maultsby Decl. ¶ 7. Dell'Osso's focus in that conversation was "on the time the Company had to act, not on the date the payment would need to be made to the noteholders." Dell'Osso Decl. ¶ 17. Dell'Osso and Maultsby accordingly did not focus on the date when the actual redemption would occur. *Id.*; Maultsby Decl. ¶ 8. In discussing the date by which Chesapeake had to act, neither Dell'Osso nor Maultsby stated that that date was February 13, 2013 (which would be the last date for giving notice if March 15, 2013, were the outside date for a redemption).[34] Based on this conversation, Maultsby "understood the final language to mean that Chesapeake could issue a notice to redeem the notes at par" until March 15, 2013. Maultsby Decl. ¶¶ 8-9.

2. *Burns/Dell'Osso*: Sometime after 7:52 p.m. on Saturday, February 11, 2012, a call between Burns, Dell'Osso, and at least one banker from BAML took place. Burns Decl. ¶ 16. (This call can confidently be placed after that time, because Burns recollects that the call occurred after a 7:52 p.m. email in which Cravath's DeFrehn circulated Cravath's and the underwriters' comments on the Prospectus

---

[34] Nor did any party to those discussions over that weekend, or afterwards, suggest that that date (February 13, 2013) be the last date on which Chesapeake could act to effect a redemption. Maultsby Decl. ¶¶ 8-9.

Supplement. PX 18; Burns Decl. ¶ 15. The handwritten changes included a provision requiring that, in the case of partial early redemption at par, at least $250 million aggregate principal amount of the notes remain outstanding. PX 18, at BG842, BG852, BG864; Burns Decl. ¶ 15. During that call, the issue of the date when Chesapeake would have to give notice of its intention to exercise its redemption rights arose and was discussed. Burns. Decl. ¶ 16.[35] Dell'Osso raised the concept of March 15, 2013, functioning as the deadline for Chesapeake to give notice rather than as the deadline to complete the entire redemption process. *Id.* By the end of the call, Chesapeake and the underwriters had agreed with each other that Chesapeake "would be permitted to give notice of an early redemption at par until March 15, 2013 and, as long as they gave such notice by such date, redeem the bonds on a redemption date thereafter." *Id.* The effect of the agreement "was to change what had otherwise been a customary redemption mechanic." *Id.* The notice term to which the parties had agreed "was a unique term in [Burns'] experience that [he] had never seen in a prior deal." *Id.* Burns left the call with the understanding that Bracewell would incorporate the March 15, 2013 notice deadline into the Prospectus Supplement. *Id.* ¶ 17. Following the call, at 11:55 p.m. that evening, Maultsby emailed Dell'Osso, writing that BAML was "proud of the unique

---

[35] Although Burns did not specifically remember details of the call, "[t]he fact of the call, and its general substance, stuck in [Burns's] mind because . . . the topic[] was a somewhat unusual subject matter." *Id.*

structure” of the offering. PX 19. As of this point, the parties had agreed that March 15, 2013, would serve as the final date on which Chesapeake could give a notice of special early redemption.

3. *Telle/Burns*: On a call at some point on Saturday, February 11, 2012, Telle mentioned the idea to Burns of “changing the date in the Prospectus Supplement to provide that notice for a par redemption could be provided at any time during the early redemption period.” Telle Decl. ¶ 23. Telle did so to gauge Burns’ reaction to the concept; Burns “acknowledged the proposal and did not reject it.” *Id.*

Early the next morning, *i.e.*, on Sunday, February 12, 2012, at 12:31 a.m., Bracewell’s Hogan, carbon copying her colleagues at Bracewell, sent a revised draft of the Prospectus Supplement to Chesapeake, the underwriters, Cravath, and, this time, Bayard Chapin, an attorney for BNY Mellon, and Linda Garcia from BNY Mellon.[36] PX 20. That version of the draft included, in the “Description of Notes” section, the following sentence inserted by Telle, *see* Telle Decl. ¶ 21: “We may redeem the notes pursuant to the special early redemption provisions so long as the notice of redemption if [*sic*] given during the Early Redemption Period.” PX 20, at CHK8305; Burns Decl. ¶ 17. Burns read the draft. He recognized it as implementing the parties’ agreement on the call with Dell’Osso and at least one BAML banker from the night before. Burns Decl. ¶ 18.

---

[36] Linda Garcia is the signatory of both the Base Indenture and the Supplemental Indenture for BNY Mellon. *See* PX 4, 6.

Also on Sunday, February 12, 2012, during a 10 a.m. call with his team at Cravath, Burns stated that the new language regarding notice should also be included in the "box" summary that appears early in the Prospectus Supplement. *Id.* ¶ 19. At 4:12 p.m. that afternoon, Cravath, via DeFrehn, sent back to Bracewell and the underwriters a markup of the Prospectus Supplement draft. PX 23; Burns Decl. ¶ 19; Telle Decl. ¶ 23. That version accepted the new language regarding notice that Telle had proposed. PX 23; Burns Decl. ¶ 19; Telle Decl. ¶ 23. It made only cosmetic or grammatical changes to the document; it also attached a rider indicating, as Burns had proposed to his team, that the language regarding notice should be copied into the "box" summary. PX 23, at CSM14086, CSM14095; Burns Decl. ¶ 19; Telle Decl. ¶ 23.

On Sunday night, February 12, 2012, an approximately three-hour phone call was held, beginning at 9:56 p.m. and concluding at 12:53 a.m. the next morning, Monday, February 13, 2012. *See* PX 26. The participants were various representatives of Chesapeake, BAML, Morgan Stanley, and their attorneys—including Telle. *See* PX 26; Telle Decl. ¶ 24. During the call, Telle and his colleagues were finalizing the Prospectus Supplement at the financial printer. Telle Decl. ¶ 24. During the call, as the changes to the draft Prospectus Supplement were being discussed, the issue of the notice period came up. Dell'Osso asked "something along the lines of 'I can redeem by giving notice up to March 15th, right?" *Id.* "[O]ne of the banks respond[ed] affirmatively," saying "'That's right, that's the deal.'" *Id.*

At 10:20 p.m. on February 12, 2012, Bracewell sent a printer's proof of the Prospectus Supplement to Chesapeake, the underwriters, Cravath, and BNY. It incorporated the changes that had been made throughout that day, including the language regarding notice. PX 25, at BG1414, BG1438; Burns Decl. ¶ 19. At least two more rounds of editing took place that night and into the early hours of the next morning, including one sent by email from Cravath at 1:08 a.m. on Monday, February 13, with minor changes, *see* PX 28; Burns Decl. ¶ 20, and at least two more versions sent out by Bracewell, one at 3:13 a.m., *see* PX 30, and another at 7:35 a.m., *see* PX 32. Dell'Osso reviewed the final form of the Prospectus Supplement and "believed at the time of the notes offering, as well as today, that it accurately reflected the business deal I negotiated with BAML that afforded Chesapeake a four-month option period. . . . I understood that Chesapeake was permitted to . . . issu[e] its notice to redeem on any day during the four-month period, including on March 15." Dell'Osso Decl. ¶ 20.[37]

This preliminary Prospectus Supplement was distributed to prospective investors and filed publicly with the SEC. Telle Decl. ¶ 26; Maultsby Decl. ¶ 10;

[37] Dell'Osso "at no time . . . consider[ed] or discuss[ed] the possibility of a three-month period for our option, or a final date for us to act of mid-February, 2013," Dell'Osso Decl. ¶ 20, which is the length of the option period if one adopted BNY Mellon's reading of the Supplemental Indenture.

PX 32.[38] In final form, the relevant language in the Prospectus Supplement reads:

> Special Early Redemption. At any time from and including November 15, 2012 to and including March 15, 2013 (the "Early Redemption Period"), the Notes will be redeemable at our option in whole, or from time to time in part, at a price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest on the Notes to be redeemed to the date of redemption; provided that after any redemption of the notes in part (and not in whole) pursuant to this redemption provision, at least $250 million aggregate principal amount of the notes remains outstanding. We may redeem the Notes pursuant to the special early redemption provisions so long as the notice of redemption is given during the Early Redemption Period.

PX 32, at CHK5267.

3. February 13-16, 2012: The Deal

a. The Deal Launches

At 8:12 a.m. on Monday, February 13, 2012, the deal launched and marketing commenced. Burns Decl. ¶ 21. That morning, Maultsby took part in a conference call with investors that included a slide presentation (the "Net Roadshow"). Maultsby Decl. ¶ 10; Tr. 207-11; DX 49; *see also* PX 31. After that

[38] The final Prospectus Supplement was also later filed with the SEC. Telle Decl. ¶ 27.

call, the pricing terms were memorialized by Chesapeake and the underwriters in a Rule 433 pricing term sheet, which contained a provision stating: "The issuer may redeem the notes pursuant to the special early redemption provisions so long as the notice of redemption is given during the Early Redemption Period." PX 37, at CHK5912. That document was provided to investors who purchased the notes directly from the underwriters on February 13; it was also filed on EDGAR, the SEC's online document system. PX 2, 36; Maultsby Decl. ¶ 10; Tr. 227-28.

Over the course of the day, BAML allocated the 2019 Notes to a group of 166 institutional investors, *see* PX 39, who had been given, in addition to the pricing term sheet, the preliminary Prospectus Supplement, *see* Maultsby Decl. ¶ 10. That preliminary version was substantially identical to the final Prospectus Supplement. *Compare* PX 32, at CHK5267, *with* PX 1, at CHK284. It included the March 15, 2013 notice language quoted above. Maultsby Decl. ¶ 10; *see* Dell'Osso Decl. ¶ 21.

The Underwriting Agreement, prepared in the first instance by the Cravath attorneys, Telle Decl. ¶ 31; *see* Burns Decl. ¶¶ 22-23, was executed that afternoon. Burns Decl. ¶ 22. The executed Underwriting Agreement also contained the pricing term sheet with the identical notice language. PX 3, at CHK355; Burns Decl. ¶ 22; Maultsby Decl. ¶ 7. The signed, execution copy of the Underwriting Agreement was sent to the underwriters and Chesapeake at 6:55 p.m. on February 13. PX 37. The

Notes had begun trading on the secondary market that afternoon.

b. The Ninth Supplemental Indenture Is Drafted and the Deal Closes

The next step was to draft the Supplemental Indenture that would govern the 2019 Notes. Customarily, the process of drafting a supplemental indenture is largely a mechanical one, in which the text is primarily drawn from the description of notes section of the Prospectus Supplement. Telle Decl. ¶ 33; Burns Decl. ¶ 26; Maultsby Decl. ¶ 11; Dell'Osso Decl. ¶ 21; Tr. 123-24, 136. At the point at which a supplemental indenture is drafted, the substantive terms of a transaction are customarily not changed. Telle Decl. ¶¶ 33, 38; *see* Burns Decl. ¶ 23; Maultsby Decl. ¶ 11; Dell'Osso Decl. ¶ 21.

On Tuesday, February 14, 2012, at 6:44 p.m., Clay Brett, a Bracewell attorney, sent a draft of the Ninth Supplemental Indenture by email to Chesapeake, Cravath, BNY Mellon, and BNY Mellon's counsel at Emmet, Marvin, & Martin, LLP ("Emmet Marvin") inviting comments. PX 41. He attached a redline against Chesapeake's Fifth Supplemental Indenture, which the Bracewell team had used as a starting point in drafting the Ninth. Telle Decl. ¶ 34; PX 41; Burns Decl. ¶ 24. This draft of the indenture contained the following sentence, the last phrase of which had been inserted by Telle: "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 *prior to 5:00 p.m.*

(Central Time) on March 15, 2013, even if such notice is received by Holders, or such redemption occurs, following the Early Redemption Period." PX 41, at CHK2208 (emphasis added); Telle Decl. ¶ 35; Burns Decl. ¶ 24. Telle proposed adding this to the Supplemental Indenture, because he believed that the early redemption section of the Indenture "could benefit from some additional language" and "wanted to provide 'belt and suspenders' clarity." Telle Decl. ¶¶ 35-36.

On Wednesday, February 15, 2012, in a 3:24 p.m. email, Cravath's Casey McDonald responded to Bracewell, reporting Cravath's comments on the Supplemental Indenture. PX 42; Burns Decl. ¶ 25. In this version, Cravath excised the italicized phrase above, replacing it with the prepositional phrase "during the Early Redemption Period" and adding a new sentence that read, "Any redemption pursuant to this Section 1.7(b) shall be conducted, to the extent applicable, pursuant to the provisions of Sections 3.02 through 3.07 of the Base Indenture." PX 42, at BG2637; Burns Decl. ¶ 25; Telle Decl. ¶ 37. After receiving the redline deleting his proposed edit, Telle telephoned Daniel O'Shea, a Cravath senior attorney. Telle Decl. ¶ 38. O'Shea explained that Cravath had made the change to keep the language in the Supplemental Indenture consistent with the language of the Prospectus Supplement. *Id.* The existing language, O'Shea stated, was sufficiently

clear, and therefore Telle's additional language was not necessary. *Id.* Telle acquiesced to the edit. *Id.*[39]

At 6:01 p.m., Bracewell sent the Supplemental Indenture in execution form to Chesapeake, Cravath, BNY Mellon, and BNY Mellon's counsel at Emmet Marvin, inviting comments. PX 43; Burns Decl. ¶ 27.

On Thursday, February 16, 2012, the initial purchases of the Notes from the underwriters settled, Dell'Osso Decl. ¶ 21, and the offering closed, Burns Decl. ¶ 28.

C. Finding as to the Negotiating Parties' Intent

1. The Bases for the Court's Finding

Based on the trial evidence, the Court comfortably finds that the parties who negotiated the language of the Supplemental Indenture intended March 15, 2013 to serve as the last date for Chesapeake to give notice of redemption, not as the deadline for redemption itself. In so finding, the Court recognizes that the actual document before the parties at the time they negotiated was the Prospectus Supplement. Its terms, including as to the notice deadline, were the subject of extensive negotiations, between February 8 and 13, 2012, between the principals of and counsel for Chesapeake and lead underwriter BAML. However, the evidence conclusively showed that the terms and text of the Prospectus Supplement, including the language that became § 1.7(b), were—and were intended to be—imported into the Supplemental Indenture, whose

---

[39] Dell'Osso, for his part, does not believe he reviewed any drafts of the Supplemental Indenture; he does believe, however, that he reviewed it in final form. Dell'Osso Decl. ¶ 21.

text was not the subject of independent negotiations.[40] The negotiations leading to the Prospectus Supplement are thus properly considered in gauging the intent of the drafters of Supplemental Indenture § 1.7(b). *See also supra* pp. 39-40.

The core basis for the Court's finding is simple: As recapped immediately below, all four participants in the negotiations as to the operative deadlines governing the 2019 Notes who testified at trial (Burns, Dell'Osso, Telle, and Maultsby) testified that Chesapeake and the underwriters openly communicated, and agreed, with each other that the language that became § 1.7(b) set March 15, 2013 as the deadline for Chesapeake to give notice of redemption. And the documentary evidence received at trial, and the attendant circumstances, both addressed immediately following this recap, corroborate this testimony.

Burns, the Cravath lawyer representing BAML, testified that this subject was addressed on the February 11, 2012 call, on which he, Chesapeake CFO Dell'Osso, and others, including at least one underwriter, participated. Burns Decl. ¶ 16. Burns testified that Dell'Osso "raised the concept of being

---

[40] *See, e.g.*, Burns Decl. ¶ 6 ("The contractual terms of the supplemental indenture are intended to conform to those described in the prospectus supplement and pricing term sheet" and "are not viewed as subject to any further negotiation."); Maultsby Decl. ¶ 11; Tr. 136; *compare* PX 1, at CHK284 (Prospectus Supplement), *and* PX 2, at CHK359 (pricing term sheet), *with* PX 4, at CHK372 (Supplemental Indenture), *and* PX 5, at BG2869 (2019 Note).

able to redeem the notes so long as notice was given by March 15." *Id.* He added:

> When I got off the call, it was my understanding that the Company and the underwriters had agreed as a business matter that the Company would be permitted to give notice of an early redemption date at par until March 15, 2013 and, as long as they gave notice by such date, redeem the bonds on a redemption date thereafter. The effect of adding the notice concept was to change what had been a customary redemption mechanic.

Id. The following morning, Burns testified, he awoke to receive the draft Prospectus Supplement as Bracewell had revised it overnight. It included a sentence permitting redemption "pursuant to the special early redemption provisions so long as the notice of redemption if [*sic*] given during the Special Early Redemption Period." *Id.* ¶ 17; *see also* PX 20, at CHK8305. And, Burns testified: "In light of the telephone discussion that I had heard the night before," this language did not surprise him, because it "reflect[ed] what I understood was agreed and what Chesapeake wanted to include." *Id.* ¶ 18. The sentence added by Bracewell is functionally identical to the critical second sentence of § 1.7(b).

Dell'Osso, for his part, recalled participating in a phone call the same weekend, involving representatives of BAML. Dell'Osso Decl. ¶ 17. The call focused on "the time period in which Chesapeake could act to exercise its option," which, Dell'Osso testified, was what was important to him at the time.

Id. Although Dell'Osso did not "recall a specific conversation on that call about the notice concept," he did recall that his focus was "on the time that the Company had to act, not on the date the payment would need to be made to the noteholders." *Id.* That concept is consistent with setting out, in the deal documents, a deadline for Chesapeake to give notice. It less naturally describes a deadline for the completion of the redemption process. Consistent with this, Dell'Osso testified, when he reviewed the final form of the Prospectus Supplement, he believed that it "accurately reflected the business deal I negotiated with BAML that afforded Chesapeake a four-month option period" ending on March 15, 2013 to give notice to retire the notes at par. *Id.* ¶ 20.

Telle, in turn, testified that, to effectuate Chesapeake's goals, in the early morning hours of Sunday, February 12, 2012, he personally modified the draft Prospectus Supplement "to convert what would typically have been a period for completing any redemption into a period for giving notice of redemption." Telle Decl. ¶¶ 20-21. The sentence he added is the one which Burns testified accurately reflected the parties' agreement on the late evening phone call on February 11. *Compare id.* ¶ 21, *with* Burns Decl. ¶ 17. Consistent with this, Telle testified he recalled at least two conversations over the weekend of February 11 and 12, 2012, and exchanged drafts with Cravath, in a series of events that together signified the underwriters' agreement to the change. Telle Decl. ¶ 22. One conversation was with Cravath's Burns on Saturday, February 11, in which Burns acknowledged the proposal. *Id.* ¶ 23. The following day, Cravath sent comments on the

Prospectus Supplement back to Chesapeake, accepting the notice sentence that Telle had added. Cravath had added a rider copying the sentence into the Prospectus Supplement's prominent summary "box." PX 23. Telle understood these changes to reflect the underwriters' assent to the notice provision. Telle Decl. ¶ 23. Telle also recalled a conversation that evening, while at the printer, among BAML, another underwriter (Morgan Stanley), Chesapeake, and their lawyers, at which "the notice concept was specifically discussed as the group worked through various changes to the draft prospectus supplement." *Id.* ¶ 24. As noted above, Telle recalled Dell'Osso stating, in effect, "I can redeem by giving notice up to March 15th, correct?" and that one of the underwriters "respond[ed] affirmatively and sa[id], 'That's right, that's the deal.'" *Id.*

Finally, Maultsby, of BAML, testified that he spoke to Dell'Osso "about the time period in which Chesapeake would be able to decide whether to exercise its option to redeem the bonds at par." Maultsby Decl. ¶ 7. Although Maultsby did not recall the specifics of that conversation, he did recall they had agreed on the terms of the provision that became the second sentence of § 1.7(b). And, he testified that, at that time, he understood "that sentence to mean that Chesapeake could issue a notice to redeem the 2019 Notes at par as late as March 15, 2013." *Id.* ¶ 8.

This assembled testimony convincingly establishes that Chesapeake, BAML, and their respective counsel communicated to each other, and mutually understood, that the second sentence that

they inserted during the weekend of February 11-12 was a notice provision, with the deadline for Chesapeake to give notice of redemption being March 15, 2013. The Court has carefully considered whether there is a basis for discrediting any, let alone all, of these witnesses. There is none. Each projected as credible. Each supplied testimony, in writing and in person, that was nuanced and thoughtful. Each candidly acknowledged the limits to his recollections.

To be sure, none of Messrs. Burns, Dell'Osso, Telle, and Maultsby recalled the events of that weekend in precisely the same way, and BNY Mellon seeks to discredit their testimony on the grounds that the witnesses' recollections were vague and dissonant as to particulars. But the witnesses' deviations were as to collateral points, unlikely to be remembered more than a year after the fact—for example, which persons participated in which phone call during a corporate deal that unfolded quickly over a weekend. Such dissonances are natural and to be expected. If anything, they are hallmarks of credibility, in that they tend to refute that the witnesses coordinated their stories. It is, further, unsurprising that these witnesses would recall the substance of their negotiated agreement more acutely than logistical niceties. The Court accepts the thrust of each witness's testimony as truthful and accurate.[41]

[41] The Court recognizes that each of these witnesses, to varying degrees, had a reputational and/or business interest in validating Chesapeake's position in this litigation. The Court has considered whether these interests compromise the credibility of any of these witnesses. The Court, emphatically, concludes not.

The documentary evidence received at trial is consistent with these witnesses' testimony. It confirms that, in the early morning hours of Sunday, February 12, 2012, beginning with the draft circulated by Telle, drafts of the Prospectus Supplement began to be exchanged which, for the first time, included a sentence addressing Chesapeake's issuing notices of redemption. *See* PX 20. Even in its first incarnation, that sentence is an easily recognizable precursor to the eventual second sentence of § 1.7(b). And the undisputed testimony at trial, from lay and expert witnesses alike, was that it is quite unusual for a bond indenture to link a redemption window to the notice date. *See* Burns Decl. ¶ 16 ("This was a unique term in my experience that I had never seen in a prior deal."); Telle Decl. ¶ 20 ("unique conditions for redemption"); Finnerty Rep. ¶ 14 (indenture with "defined time period for the issuer to give notice" is "virtually unprecedented"); Tuckman Rep. 13 (concluding that § 1.7(b) "serves only to disallow notice of a par redemption before . . . November 15, 2012"); Tr. 397-98 (Tuckman describing § 1.7(b)'s inclusion of "during the Special Early Redemption Period" as "much less common" and testifying that he had not seen a similar provision before).

The question therefore naturally arises: For what reason was the idiosyncratic language that became that second sentence added that weekend to the future § 1.7(b)? Only one party, Chesapeake, offered evidence that credibly explained this noteworthy addition. Taken together, the testimony of the above four witnesses, and the surrounding documents, were convincing as to Chesapeake's

motivation for inserting such an unusual provision that weekend. This circumstantial evidence strongly supports Chesapeake's thesis that the second sentence of § 1.7(b) was added with the intention of pushing until later in time the four-month window within which Chesapeake could decide to act to trigger a redemption.

By contrast, the record is devoid of extrinsic evidence as to why any party at the table in February 2012 would have wanted to add language with the effect posited by BNY Mellon. BNY Mellon's claim, as noted, is that the second sentence of § 1.7(b) serves to limit the time span during which redemptions at par could occur by shortening, at the front end, what would otherwise be a four-month period for actual redemption, to the period between December 15, 2012 and March 15, 2013. Were this the case, one would expect to see some evidence in support: for example, testimony of a participant as to a business or legal reason that was articulated during the February negotiations for truncating the redemption period so as to bar redemptions between November 15, 2012 and December 14, 2012. Or, perhaps, emails or other contemporaneous records reflecting or suggesting a business or other motive to defer the start of the period for actual redemption. But no such evidence, of any kind, was offered, despite the ample documentary and deposition discovery taken in the case.

BNY Mellon's proposed construction of § 1.7(b) is, thus, completely ahistorical. Indeed, far from there being evidence that any person at the table during February 11-12, 2012 had any desire to trim

the redemption period further, the evidence at trial showed that Chesapeake CFO Dell'Osso had preferred a *longer* redemption period, of up to 12 months, *see* PX 10, but had, by February 10, at the underwriters' behest, agreed to scale that period back to four months. Dell'Osso Decl. ¶ 17; *see also* PX 13, at CHK811, CHK820. There was no evidence of any push afterwards to trim the redemption period at the front end. *See* Tr. 151 (Burns does not recall any conversation that weekend about the front end of the period).

Finally, although not necessary to the Court's determination as to the intent of the drafters of § 1.7(b), the extrinsic evidence surrounding Bracewell's attempt on February 14, 2012, to add a clause to § 1.7(b) tends to corroborate, and it certainly does not undermine, Chesapeake's claim as to the understanding of the negotiating parties. By that day, the Prospectus Supplement was complete and the 2019 Notes had been sold pursuant to it. Bracewell was drafting the Supplemental Indenture. Bracewell proposed to Cravath, as relevant here, that a clause be added to the text being imported from the Prospectus Supplement. That clause, in italics below, would clarify that March 15, 2013 was the deadline for notice, not for redemption:

> 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 prior to 5:00 p.m. (Central Time) on March 15, 2013, *even if such notice is received by Holders, or such*

> *redemption occurs, following the Early Redemption Period.*

PX 41, at CHK2199 (emphasis added). The following day, however, Cravath deleted the clause proposed by Bracewell, *see* PX 42, at BG2637, with the result that the second sentence of § 1.7(b) in the Supplemental Indenture is almost unchanged from the text of the final Prospectus Supplement. *Compare* PX 43, at CHK2249, *with* PX 1, at CHK261.

As the Court recognized at the time it denied Chesapeake's application for emergency relief, one possible inference is that the rejection of that language reflected that the parties did not intend to permit a redemption at par after March 15, 2013. *See* 3/14/13 Hr'g Tr. 22-23. BNY Mellon so argues here. However, as the Court noted, the clause proposed by Bracewell could have been excised for a reason other than a party's substantive disagreement with it. *Id.*

The evidence received at trial is consistent with the latter thesis. Telle testified that Bracewell was not seeking to change the terms of the Notes, but instead saw them as clarifying changes "consistent with converting the disclosure terms of the prospectus into contractual language." Telle Decl. ¶¶ 35-36.[42] After Cravath rejected this language, Telle testified, Cravath's O'Shea explained to him that the changes had been intended to keep the Indenture language consistent with the language in

---

[42] Because Telle did not communicate this view to the underwriters or their counsel, the Court does not consider this statement by Telle as bearing on the collective intent of the negotiating parties, but solely to explain Telle's conduct. *See World Trade Ctr. Props.*, 467 F.3d at 125.

the earlier disclosure documents and to conform the § 1.7(b) language to that in the Prospectus Supplement. *Id.* ¶ 38. Telle also testified that O'Shea explained to him that the language in the Prospectus Supplement already made it sufficiently clear that March 15, 2013 was the deadline for giving notice, and that additional language to that effect would be superfluous. *Id.* Even if not taken for the truth of the matters asserted,[43] this statement during negotiations to Telle by a counterparty regarding the meaning of the unamended text of § 1.7(b) bears on the parties' common understanding of that provision.

In any event, even if the exchange between Telle and O'Shea were not taken as assisting Chesapeake's cause, ample extrinsic evidence at trial undermines BNY Mellon's claim that the rejection of that language by Cravath was a repudiation of its substance. Consistent with the explanation articulated to Telle, Cravath partner Burns testified at trial that the language of the Supplemental Indenture essentially imported the language of the

[43] O'Shea's statement is admissible because it was made to Telle during negotiations between Chesapeake and BAML, and Telle was a firsthand witness to O'Shea's statement. (O'Shea did not testify at trial, and in deposition, a Rule 30(b)(6) witness testifying on behalf of Cravath stated that O'Shea, a former associate, does not recall offering comments on the Bracewell draft of the Supplemental Indenture. Tr. 125-26.) The Court, however, does not consider O'Shea's statement as related by Telle for the truth of the matters asserted by O'Shea, who is not a party opponent of Chesapeake's at trial. The Court instead considers O'Shea's statement for the limited fact that it was stated during contract negotiations and for its bearing on the state of mind, intent, and contract understanding of counterparty Telle.

Prospectus Supplement, and that associates who work for him "are under standing instructions in such situations to conform, closely if not exactly, the draft indenture to the applicable provision in the description of notes of the prospectus supplement." Burns Decl. ¶ 26; *see* Tr. 136. Telle, too, testified that he understood at the time that "[b]ecause the Prospectus Supplement sets forth the terms of the 2019 Notes, as agreed between the issuer and the underwriters, drafting the Supplemental Indenture is essentially a mechanical task." Telle Decl. ¶ 33. Maultsby's testimony was of a piece. *See* Maultsby Decl. ¶ 11 ("My understanding is that the Supplemental Indenture should reflect the business terms set out in the pricing term sheet and the Prospectus Supplement which disclosed the basis on which the 2019 Notes were sold to the initial investors . . . ."). Further, as of February 14, 2012, the Prospectus Supplement was final and the 2019 Notes were already trading in the market. *See* Telle Decl. ¶¶ 26-27; Burns Decl. ¶¶ 21, 23; Dell'Osso Decl. ¶ 21. On the basis of this testimony, the Court concludes that Cravath's rejection of the language proposed by Bracewell was not a substantive repudiation.

The Court, therefore, finds that—even if § 1.7(b) were held textually ambiguous—the extrinsic evidence convincingly establishes a meeting of the minds among the negotiating parties as to the deadlines governing redemption at par of the 2019 Notes. The Court finds that these parties intended and agreed that March 15, 2013 would serve as the

deadline for Chesapeake to give notice of redemption.[44]

2. The Extrinsic Evidence on Which BNY Mellon Relies

On the basis of evidence of how Chesapeake and others have characterized the terms governing the 2019 Notes, BNY Mellon argues that the extrinsic evidence supports its construction. This evidence falls into three categories. The Court discusses them in turn.

a. Chesapeake's Post-Negotiation Statements

Most significantly, BNY Mellon argues, various statements made by Chesapeake after the 2019 Notes were issued support that March 15, 2013 was the deadline for redemption, not notice. BNY Mellon argues that, during the period between mid-February

---

[44] In light of the ample evidence of bilateral communications between Chesapeake and the underwriters reflecting this shared intent, the Court need not rely on the testimony of the principals as to their personal understandings in February 2012 of the meaning of § 1.7(b). A party's private state of mind is generally not admissible to prove the negotiating parties' intent, *see World Trade Ctr. Props.*, 467 F.3d at 125, although where, as here, both parties to a negotiation have testified to a common, although unexpressed, subjective intent, such testimony has sometimes been admitted, *see supra* p. 35 n.24 (collecting cases). Were that testimony considered, it would reinforce Chesapeake's position: All four principals who testified at trial stated that they understood at the time of the negotiations that Chesapeake could exercise its right to redeem at par by issuing its notice to redeem up to March 15, 2013. Dell'Osso Decl. ¶ 20; Burns Decl. ¶ 29; Telle Decl. ¶¶ 21-22; Maultsby Decl. ¶¶ 8-9. No participant in the negotiations over the language of § 1.7(b) testified otherwise.

2012 and early 2013, "Chesapeake consistently described the dates November 15, 2012 through March 15, 2013 as 'redemption dates' and otherwise understood and represented the Special Early Redemption Period as just that—a period in which to redeem the Notes if it wished to do so at par." BNY Pretrial Br. 32. BNY Mellon argues that these statements reflect Chesapeake's "practical interpretation of [the] contract," which in turn merits "great, if not controlling, influence," *id.* at 35 (quoting *Sanchez v. Maher*, 560 F.2d 1105, 1108 (2d Cir. 1977) (quoting *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913))), over how § 1.7(b) is to be construed.

1. *The Debt Summary Schedule*: As BNY Mellon notes, shortly after the 2019 Notes were issued, Chesapeake posted on its website a "Debt Summary Schedule" reporting the Notes' key terms. DX 75, 79. The schedule's initial draft was prepared by Conrad Holub, a financial analyst in the Treasury Department, *see* Holub Dep. 48; later drafts were reviewed by Susan Seymore and Elliot Chambers, both of whom were members of Chesapeake's deal team for the 2019 Notes. *See* DX 75, 79; Chambers Dep. 62; Holub Dep. 65-66; Tr. 248-49. In a row reporting the 2019 Notes' "Optional Redemption Dates," the schedule states: "from and including 11/15/12 to and including 3/15/13 @ 100% of principal," and "make whole call @ T+50bps at any time after 3/15/13 to maturity." DX 79. At his deposition, Chambers testified that he believed that the information on the schedule as to the Notes' optional redemption dates was "correct." Chambers Dep. 63. At trial, however, Chambers testified that

he does not believe that the information on the website was "complete." Tr. 273.

BNY Mellon is fair to fault Chesapeake's website schedule. Unhelpfully, it says nothing about the possibility of a redemption at par after March 15, 2013. The schedule also does not state that Chesapeake regards the four-month period to which it refers as the period for giving *notice* of redemption. An objective reader of the schedule could easily conclude that that four-month period ending March 15, 2013 reflects instead the period for redemptions at par.

However, neither the schedule, nor Chambers's testimony that he regarded it as "correct," illuminates the intent of the parties (Dell'Osso and Telle) who on Chesapeake's behalf actively negotiated § 1.7(b) with the underwriters. There is no evidence that either played any role in preparing or approving the schedule, let alone that either reviewed it attentively. And Holub, who drafted the schedule, testified: "I didn't fully understand the notes when I was doing it. I kind of did it—I wouldn't say hastily, but I didn't review all of the prospectus. So I just found that part of the special redemption features and drafted it up at that time without fully understanding it." Holub Dep. 65. Further, by its nature, the schedule is a sparse shorthand summary comprised of pre-set categories (*e.g.*, "optional redemption date") in which there is limited room for explication. It does not purport to explain the terms of the 2019 Notes. And the schedule equally undermines BNY Mellon's construction of § 1.7(b): Under BNY Mellon's construction, redemption—

contrary to the schedule's implication—cannot occur between November 15 and December 14, 2012. Instead, BNY Mellon claims, it can occur only in the ensuing three months.

In sum, the schedule may fairly be viewed as incomplete or misleading, but this regrettable lapse—whether attributed to Chambers, Seymore, and/or Holub—does not shed light on the intent of the drafters of that provision.[45]

2. *The Form 10-Q*: BNY Mellon next cites the Form 10-Q that Chesapeake publicly filed in May 2012, three months after it issued the 2019 Notes. *See* DX 83. Drafts of the 10-Q were reviewed or commented on by, among others, Chambers, Seymore, Grigsby, and CFO Dell'Osso. DX 82; Tr. 275-76; Dell'Osso Dep. 202.[46] The final 10-Q that resulted states, in pertinent part:

---

[45] As discussed in greater detail *infra* at pp. 72-74, Chambers participated in the drafting of the Prospectus Supplement for the 2019 Notes. Chambers Dep. 26, 30-31; Tr. 248-50. However, there is no affirmative evidence that Chambers participated in the pivotal calls between representatives of Chesapeake and BAML on which the notice and deadline issues were discussed and resolved. It is possible that in February 2012, Chambers did not clearly understand what the March 15, 2013 deadline represented; it is possible that he understood it then but lost sight of it later; and it is possible that he was careless afterwards in his review of Chesapeake documents describing the 2019 Notes. Chambers's state of mind, and his characterizations of the terms of the 2019 Notes, reveal little or nothing about the drafters' shared intent at the time of the negotiations.

[46] In a May 5, 2012 email sent to Seymore and Mary Ann Sanders, an accounting manager at Chesapeake, Chambers stated, "I wanted to make sure the 6,775 notes par call option

> At any time from and including November 15, 2012, to and including March 15, 2013, we may redeem some or all of the notes at a redemption price equal to 100 percent of the principal amount of the notes plus accrued and unpaid interest, if any, to the redemption date, provided that upon any redemption of the notes in part (and not in whole) pursuant to this redemption provision, at least $250 million aggregate principal of the notes remains outstanding.

DX 83, at 13; *see* Tr. 279.

Like the debt summary schedule, the description of the 2019 Notes used in the 10-Q leaves much to be desired. The 10-Q says nothing about a possible redemption of the 2019 Notes at par after March 15, 2013.[47] At best, its statement as to the redemption dates is imprecise; at worst, it may be seen as contradicting Chesapeake's position that § 1.7(b) makes March 15, 2013 the deadline for notice, not redemption. As the Court has noted earlier, the phrase used in the 10-Q, "may redeem" ordinarily refers to the act of redemption. *See supra* pp. 23-25. Because the 10-Q is silent about notice, it could easily lead an investor, reading it in isolation, to assume that March 15, 2013 was the deadline for special early redemption.

---

for Nov 2012 to Mar 2013 is discussed. Didn't recall seeing that, but maybe I overlooked it." DX 82; TR. 276-77.

[47] At trial, Chambers testified that he believed the 10-Q "summarized the [2019 Notes] transaction sufficiently for this document." Tr. 279.

But the 10-Q does not assist BNY Mellon on the issue of contract interpretation before the Court. There was no evidence that the process of generating the 10-Q's description of the 2019 Notes involved any concerted focus on their redemption date. And although CFO Dell'Osso signed the 10-Q, *see* DX 83, at 102; Dell'Osso Dep. 202, there was no evidence that he focused on its one-sentence synopsis of the 2019 Notes, let alone the characterization of the at-par redemption period. That was an easy-to-overlook point in the context of the 102-page 10-Q. The 10-Q's description of the 2019 Notes is also high-level and very general. It omits several key features of the 2019 Notes, including the precise maturity date, the interest payment dates, and the make-whole provision itself, *see generally* DX 83, presumably because such terms, although material to a purchaser, may not be material for the purposes of a 10-Q. There is, therefore, no basis to conclude that the 10-Q's synopsis reflected anything other than inattention or sloppiness. And a party's errant *post hoc* description of an agreement does not unilaterally modify its terms or disturb the intent of the negotiating parties, who also included the underwriters.

Finally, the 10-Q equally defeats BNY Mellon's construction of § 1.7(b). Like the website schedule, the 10-Q posits a period for actual redemption (November 15, 2012 through March 15, 2013) that both parties agree cannot possibly be correct given the second sentence of § 1.7(b). The 10-Q thus may be inaccurate, but it says nothing about the intent of the drafters of § 1.7(b) or how to resolve the contractual

ambiguity that the Court (for present purposes) assumes.

3. *The Quarterly Treasury Report*: In December 2012, Chesapeake prepared a quarterly treasury report, DX 102, a 38-page internal document intended to "summarize . . . transactions and activity" and to "inform about the company's capital structure." Tr. 281. The report contains a chart resembling the one on the website schedule. In a column entitled "Optional Redemption," it lists the following information as to the 2019 Notes: "from and including 11/15/12 to and including 03/15/13 at 100 % principal" and then, in a box immediately below, "make whole call @ T+50bps at any time after 3/15/13 to maturity." DX 102, at CHK14869.

BNY Mellon is right to claim that this internal report, too, sits uneasily alongside Chesapeake's construction. It says nothing about a potential redemption at par after March 15, 2013. It is silent as to the deadline for Chesapeake to give notice of redemption. And the report contains a footnote that states, "[t]he make-whole optional redemption terms for the 6.775% Senior Notes due 2019 take effect after 3/15/2013," *id.*, at CHK14869 n.2, implying that a redemption after March 15, 2013, would be at the Make-Whole Price, not par.

The report does not, however, bear on the proper construction of § 1.7(b). There was no evidence at trial that traced authorship—or considered review—of the report to a primary drafter of § 1.7(b). And, like the website schedule, the chart used in the report consists of cramped, pre-fabricated categories that leave little space for amplification and elaboration.

Whether errant or merely inartfully phrased, the report does not shed light on the drafters' intent. And, like the debt summary schedule and the 10-Q, the report's range of "11/15/12 to and including 3/15/13" is inconsistent with BNY Mellon's construction of § 1.7(b), because BNY Mellon posits a three-month, not a four-month period for redemption.

4. *The Treasury Manual*: BNY Mellon argues that another internal document, Chesapeake's Treasury Manual (the "Manual"), DX 90, reveals that March 15, 2013 was the deadline for a redemption at par. Tr. 290-94. The 61-page Manual includes a column entitled "Optional Redemption." It identifies as the date range for 100% (par) redemptions November 15, 2012, through March 15, 2013. DX 90, at CHK10506; Tr. 294. Unlike the preceding three documents, the Manual addresses the concept of notice. In a section entitled "Redemption and Prepayment," it states:

> Redemption Notice to Holders: At least 30 but no more than 60 days before redemption date directly to Holders or at least 45 days before redemption date to the Trustee.

DX 90, at CHK10506.

The Manual seems inconsistent with Chesapeake's position as to the operative deadlines.[48] The Manual states that notice to the 2019

---

[48] In questioning Chambers at trial and at his deposition about the Manual, BNY Mellon focused on another provision in it, entitled "Security Redemption Notice to Trustee." Tr. 293-94; Chambers Dep. 73-74. Both provisions use the term "redemption" inconsistently. The analysis here therefore applies equally to both.

Noteholders must be given 30 to 60 days before the "redemption date." To make that provision sensible, the "redemption date" must mean the date cash changes hands—as Chambers acknowledged. Tr. 294; Chambers Dep. 73-74. But if so, then the redemption deadline of March 15, 2013 that the Manual lists presumably has the same meaning. Yet that is inconsistent with Chesapeake's construction of § 1.7(b).

That said, the Manual, however construed, is unrevealing as to the intent of the drafters of § 1.7(b). First, there is no evidence that Dell'Osso (or outside counsel Telle) had a hand in creating it or closely reviewed it. Second, although Chambers and Chesapeake treasurer Jennifer Grigsby received and may have reviewed the Manual, *see* Tr. 290; DX 90; *cf.* Chambers Dep. 72 (stating that Chambers "d[oes] not recall" if he reviewed the document), there is no evidence that either had participated in negotiating the terms or language of § 1.7(b). Any failure on their part to correct or augment the language of the Manual says little, if anything, about how the drafters understood § 1.7(b). Third, the evidence at trial did not establish how the language in the Manual came to be there. There is no basis to conclude that the language reflected a concerted judgment by Chesapeake that the dates set forth therein reflected the intent of the drafters of § 1.7(b). It may instead have been the result of inattention, or of carelessly replicating the language used to describe Chesapeake's conventionally-structured bond indentures without considering the unique redemption terms of the 2019 Notes. Fourth, the Manual, not unlike the website schedule and the

Treasury Report, presents data about the 2019 Notes in a restrictive columnar schedule that permits but does not invite elaboration. Fifth, even treating the date range recited in the Manual as the dates for redemption would not assist BNY Mellon, because that range (November 15, 2012, through March 15, 2013) is flatly inconsistent with BNY Mellon's construction of § 1.7(b).

5. *Chambers's* Post Hoc *Understanding*: Noting that Chambers was an active member of the deal team, BNY Mellon emphasizes his personal understanding during part of 2012 and early 2013 of the early redemption features of the 2019 Notes. Specifically, Chambers testified that, during "the latter part of 2012" leading up to midday on January 9, 2013, he had believed that March 15, 2013 was the deadline for completion of the redemption process, not notice. *See* DX 108, at CHK30853 (January 9, 2013, email to Caleb Morgret: "Are you sure about that? I thought we had to provide notice by Feb[.] 15th and the window closes on March 15th."); DX 101, at CHK18860; Chambers Dep. 87-90, 93, 248-49; Tr. 308, 311.

However, Chambers's post-negotiation perspective, notwithstanding his role on the deal team that developed the 2019 Notes, *see* Chambers Dep. 26, 30-31; Tr. 248-50, says little about the collective intent of the drafters of § 1.7(b). Chambers testified generically that he recalled that "there were conversations" during the drafting of the Prospectus Supplement about potential redemption provisions. Chambers Dep. 30-31. He could not, however, recall "specific conversations," nor did he mention the issue

of notice, in particular, as having arisen in them. *Id.* And, despite extensive discovery, there was no evidence that Chambers had participated in the critical conversations, chronicled above, in which the decision was made to insert the consequential second sentence into what became § 1.7(b). Further, as of the time on January 9, 2013 when Chambers emailed his direct report Morgret, a supervisor in the corporate finance department, and stated that he understood that the redemption "window closes on March 15th," DX 108, Chambers had not recently reviewed the deal documents. Chambers Dep. 249; Tr. 326.

Notably, the emails received at trial showed that, shortly after Chambers sent that January 9, 2013 email, Morgret responded. DX 108; Tr. 327; Chambers Dep. 92. Reporting that he had "[c]hecked with Paul [Ingram, Chesapeake's internal counsel]," Morgret corrected Chambers, explaining that Chesapeake had until March 15, 2013, to give notice. DX 108. Later that day, Morgret informed Chambers that the attorneys at Bracewell agreed that March 15, 2013 was the deadline for notice, not redemption at par. DX 108, at CHK30859; Tr. 328; Morgret Dep. 100. From that point forward, Chambers testified, his view, heeding the guidance of Chesapeake's counsel, was that March 15, 2013 was a notice, not a redemption, deadline. Chambers Dep. 107-08; Tr. 333-34. Chambers's change of perspective predated, by more than a month, the onset of the dispute that spawned this lawsuit. From this episode, it appears that there had been, until January 9, 2013, differing views between Chambers and Morgret as to what the March 15, 2013 date represented. That several employees took opposite views about a deadline

establishes confusion among mid-level employees as to that point. It does not disturb the uniform testimony of the persons who drafted and adopted § 1.7(b), as to what the March 15, 2013 deadline represented.

In sum, Chambers' post-negotiation perceptions as to the meaning of a contract term, during one stretch of time, do not, on the record before the Court, shed light on the intent of those who negotiated that term.

6. *Communications with Rating Agencies*: Finally, BNY Mellon relies on communications between Chambers and various rating agencies. Acting as lead liaison between Chesapeake and the rating agencies with respect to the company's bonds, *see* Tr. 258, Chambers sent the Prospectus Supplement to rating agencies, including Fitch, Moody's, and Standard & Poor's ("S&P"). Tr. 258-59; *see* DX 58 (Fitch), 197 (Moody's), 198 (S&P). S&P responded by sending a draft release to Chambers, with copies to Dell'Osso, Grigsby, and Seymore, and soliciting comments on the draft. DX 51; Tr. 261-64. S&P's draft release said nothing about a notice deadline or that Chesapeake could redeem at par after March 15, 2013. Instead, S&P stated, in the pertinent bullet-point, that "some of the notes could be redeemed at par prior to mid-March, 2013." DX 51, at CHK2068. None of the Chesapeake recipients acted to revise S&P's release. Tr. 265-67; *see* DX 201. For its part, Moody's draft release ignored the early redemption at par provision altogether. *See* DX 56. It, too, went uncorrected by Chesapeake, despite a request by Moody's to Chambers to review the

release for "factual errors." *Id.* at CHK6785. (The trial record does not reflect what, if anything, Fitch eventually published.)

BNY Mellon urges that a negative implication be drawn as to the meaning of § 1.7(b) from Chesapeake's failure to correct S&P's and Moody's inaccurate releases. But no such implication is merited. Whatever the causes may be of the fact that Chesapeake did not ask either rating agency to revise its representations as to the 2019 Notes, there was no evidence at trial on which the Court could find that the company's inaction reflected agreement by its negotiators and the underwriters, as of mid-February 2012, that March 15, 2013 was the deadline for redemption at par.[49] And to the extent that Chesapeake dropped the ball in not responding to S&P's and Moody's requests for comments, those lapses may have been attributable to Chambers (the rating agencies' point of contact) and/or his staff. Further, Seymore's statement to Jeff Mobley, who headed Chesapeake's investor relations group at the time, that there was "[n]ot much to the release so in the interest of time J[ennifer Grigsby] went ahead and approved it," DX 201, indicates, plausibly, that the releases received only cursory attention within Chesapeake.

In sum, the record lacks solid, non-speculative evidence favoring BNY Mellon's thesis that

---

[49] Notably, Chesapeake furnished the rating agencies with a copy of the Prospectus Supplement, which included the language that became § 1.7(b). Tr. 258; *see* DX 197, 198. The record is silent whether the rating agencies read, let alone thoroughly analyzed, that provision.

Chesapeake's negotiators and their BAML counterparts privately rejected Chesapeake's construction of § 1.7(b) and instead shared BNY Mellon's. The Court is left, therefore, to conclude that the various inaccurate, or incomplete, statements that BNY Mellon has unearthed reflected, at worst for Chesapeake, a misconception that took root within Chesapeake, particularly via Chambers, about the deadlines governing the 2019 Notes. Having taken root, this misperception appears to have replicated itself in the internal and external communications on which BNY Mellon seizes. If Chambers or his co-workers were incorrect or untutored as to the operation of the Supplemental Indenture's unusual redemption provision, it is easy to see how such a misconception could have taken root and spread.

It further appears that Chesapeake failed to appreciate the need to adapt its conventional structures for reporting redemption dates to the novel notice-based redemption terms of § 1.7(b). That § 1.7(b) did not set out a final redemption date, but set out only the final date for notice and left the reader to compute the final redemption date (May 14, 2013) by consulting Base Indenture § 3.04, also may have contributed to an internal misconception that the redemption date was March 15, 2013. That was, after all, the last date identified in the Supplemental Indenture. And because the redemption deadline was presumably relatively unimportant to investors until early 2013 when the notice and redemption deadlines began to loom, it is easy to see how this error could long go unspotted while it was reproduced in various Chesapeake communications.

But the job of the Court in this case is to interpret an indenture provision. It is to discern the intent of the drafters. It is not to tally the number of times that Chesapeake personnel characterized March 15, 2013 as a redemption deadline and contrast it to the number of times it was described as a notice deadline. It is not to trace the genealogy or viral spread of a post-agreement misconception within Chesapeake, except insofar as that conception can be reliably traced back to the drafters of § 1.7(b).

The Court, accordingly, rejects BNY Mellon's claim that Chesapeake's various errant statements rise to the level of representing the company's "practical application" of § 1.7(b). Rather, the evidence shows at worst that company officers or employees not involved in negotiating § 1.7(b), particularly Chambers, misunderstood and misstated the operative deadline for actual redemption. There is, however, no indication that Chesapeake engaged in *conduct* demonstrating its intention to treat February 13, 2013 as the final deadline for notice and March 15, 2013 as the final deadline for redemption. Such conduct would be required before Chesapeake's post-negotiation actions could be treated as revealing its "practical application" of § 1.7(b) so as to bear on the construction of that provision. *See Dar El-Bina Eng'g & Contracting Co., Ltd. v. Republic of Iraq*, 79 F. Supp. 2d 374, 384-85 (S.D.N.Y. 2000) ("There is a long line of New York case law endorsing the doctrine of practical construction and allowing courts to look to the parties' practical interpretations of a contract, *as demonstrated by their conduct*, in determining their intentions with regard to ambiguous contractual language." (emphasis added));

Nationwide Auction Co. v. Lynn, No. 90 Civ. 7643 (AGS)(THK), 1996 WL 148489, at *7 (S.D.N.Y. Apr. 1, 1996) (collecting cases, each of which deals with *actions* of the contracting parties); *CT Chems. (U.S.A.), Inc. v. Vinmar Impex, Inc.*, 81 N.Y.2d 174, 179 (1993) (doctrine applies "[w]here a contract involves *repeated occasions for performance* and opportunity for objection" (emphasis added)); *see also New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 31 (2d Cir. 1997) ("Typically, a course of dealings analysis focuses on the *actions* of the parties with respect to a specific issue that the parties may have encountered before." (emphasis added)).

On the trial record, Chesapeake's errors in reporting the redemption deadline, however regrettable, do not signify that the personnel at Chesapeake, BAML, Bracewell, and Cravath who together negotiated the provision containing that deadline had a different understanding of it than was reflected in the unusual sentence that they added to § 1.7(b) in February 2012, or in their credible, and corroborated, trial testimony.

b. BAML's Investor Call

BNY Mellon also relies on an informational conference call which Chesapeake and BAML held with investors on the morning of February 13, 2012. The call included a slide presentation that investors could access by computer during the call. Maultsby Decl. ¶ 10; DX 49; *see* PX 31. The bulk of the call focused on Chesapeake's financial situation. At the beginning of that call, however, Maultsby referred to the 2019 Notes, stating:

> There's been some confusion around the call schedule. It has a par call window this November 15th, 2012 through March 15th, 2013. Callable at par, that's what we call the special early redemption period. And thereafter, it will have a make whole premium consistent with the rest of the Chesapeake senior notes.

DX 49-T, at 2. As BNY Mellon notes, Maultsby said nothing, explicitly, about a notice window.

Properly understood, however, Maultsby's remarks do not undermine Chesapeake's construction or suggest that he, Maultsby, viewed March 15, 2013 as the redemption deadline. To the contrary, Maultsby squarely testified that he understood March 15, 2013 to be the *notice* deadline. Tr. 231. Maultsby testified, credibly, that, when he used the word "confusion" on the investor call, he was referring to a separate issue: a misconception by some investors that the Notes would be callable at par immediately. He credibly testified he was not addressing whether the period between November 15, 2012 and March 15, 2013 was a notice period or a redemption period. Tr. 223-25.

Further, the language Maultsby used on the call ("a par call window this November 15th, 2012 through March 15th, 2013") does not necessarily describe the window for redemption. It can equally be said to describe the window in which Chesapeake could act to give notice of redemption. The word "callable," used on the investor call, does not have a rigid meaning. Although BNY Mellon adduced expert testimony that "callable" has the same meaning as

"redeemable," *see* Mullin Rep. ¶ 33; Tuckman Rep. 14-15, the Base Indenture itself uses "called" to refer to the act of *notice*. *See* Base Indenture § 3.05 ("[o]nce notice of redemption is mailed in accordance with Section 3.04, Securities called for redemption become due and payable on the redemption date at the redemption price."); *id.* § 3.06 (describing default when "any Security called for redemption shall not be so paid upon redemption").[50] Maultsby's statement on the investor call does not, therefore, undermine Chesapeake's reading of § 1.7(b).

c. The Market's Misconceptions

BNY Mellon has also impressively catalogued evidence that various market participants and the financial media regarded March 15, 2013 as the deadline for redemption at par. This evidence indicates that the marketplace widely failed to identify March 15, 2013 as a notice deadline. It further reflects that, until this controversy arose in February 2013, Chesapeake's contrary view that it could issue a notice to redeem the 2019 Notes as late as March 15, 2013 was little recognized. BNY Mellon argues:

---

[50] Black's Law Dictionary provides alternative definitions for "call" as used in the bond context, depending on whether it is used as a noun, verb, or adjective. *Compare* call, n. ("4. A demand for the presentation of a security (esp. a bond) for redemption before the maturity date."), *with* call, vb. ("3. To redeem (a bond) before maturity."), *with* callable, adj. ("redeemable by the issuing corporation before maturity"). Black's Law Dictionary 232 (9th ed. 2009). *Cf. Aristocrat Leisure*, 2005 WL 1950116, at *5 (discussing different dictionary definitions of "call" and finding that that indenture used "call" as a verb).

> If the "window" from November to March was in fact a "notice" window and Chesapeake therefore had until May 14, 2013, to redeem the Notes, surely someone—Chesapeake, the underwriters, Bloomberg, Standard & Poor's, Moody's, Fitch, Debtwire, Covenant Review—would have publicly touted that during the marketing and sale process (or in any subsequent disclosures). No one did.

BNY Pretrial Br. 23.

In identifying a number of statements by market players stating or suggesting that the 2019 Notes were redeemable at par only until March 15, 2013, BNY Mellon makes two arguments. First, it argues, the Chesapeake and BAML negotiators could not have intended to impose deadlines contrary to those reflected in those statements. Second, it argues, Chesapeake failed to correct these misunderstandings, and the absence of a correction by Chesapeake or the underwriters reveals that they shared the market's view that February 13, 2013 was the final date on which Chesapeake could give notice of redemption at par. The Court reviews this evidence in turn.

1. *BAML's Sales Force Memo*: This memo, DX 187, circulated within BAML on February 13, 2012, at 1:57 p.m., after the Prospectus Supplement was in place but before the Supplemental Indenture was complete. In a section entitled "Summary of Terms," the memo states that "Opt. Redemption" is "11/15/2012 to 3/15/2013 – Callable at Par," and adds: "3/16/2013 and thereafter – MWC (T+50)." DX 187, at

CHK2664. In the "Transaction Overview" section, BAML's memo states that "[t]he Notes will be non callable until November 15, 2012 upon which time the Company can exercise a Special Redemption at par until March 15, 2013. After March 15, 2013, a make-whole at T+50 will apply." *Id.* The memo does not expressly refer to notice. It does, however, use throughout the ambiguous phrase "callable," a phrase which, as noted, can plausibly be read in the context of the Supplemental Indenture to refer to notice. *See supra* pp. 78-79 & n.50.

Importantly, there was no evidence that the sales force memo was created by anyone within BAML (*e.g.*, Maultsby) who actually negotiated the Prospectus Supplement. The sales force memo therefore does not speak to the contemporaneous perceptions of the drafters of § 1.7(b). By contrast, the pricing term sheet as to the 2019 Notes, *see* PX 37, at CHK 5912, which Maultsby and the drafters of the Prospectus Supplement *were* involved in preparing, and which was disseminated to potential investors, does reproduce the first two sentences of § 1.7(b)'s notice provision.

2. *Bloomberg's Description Sheet for the Notes*: Bork, the Bloomberg analyst whom BNY Mellon called at trial, testified that he created Bloomberg's description sheet for the Notes based on a term sheet received from BAML, DX 47, not the pricing term sheet which Maultsby helped prepare. Tr. 362-63. Consistent with that term sheet, Bork added the 2019 Notes to Bloomberg's database with the redemption terms as follows:

At any time prior to 11/15/12: non-callable

11/15/12 - 3/15/13: callable @ par

3/16/13 and thereafter: non-callable (MWC T+50 bps)

DX 47, at BB62. Bloomberg's summary of these terms was accessible on the more than 300,000 subscription-only Bloomberg terminals. Tr. 361.

Bork, however, did not testify that he had ever read any of the deal documents. And the term sheet on which he relied is not traceable to any person who participated in negotiating the terms or text of § 1.7(b). Further, as noted, the term "callable," does not unequivocally refer to a redemption date. *See supra* pp. 78-79 & n.50. Bloomberg's recap of the Notes thus does not avail BNY Mellon in pursuing its construction of the indenture.[51]

3. *Rating Agencies*: As noted, Chambers sent the Prospectus Supplement to rating agencies, including Fitch, Moody's, and S&P. Tr. 258-59; *see* DX 58 (Fitch), 197 (Moody's), 198 (S&P). S&P and Moody's published releases describing and rating the deal. DX 51, 56. The releases both provide an incomplete picture of the Notes. As noted, S&P's stated that the Notes "could be redeemed at par prior to mid-March, 2013." *See* DX 51, at CHK2068. Moody's, for its part, ignored the early redemption at par provision altogether. *See* DX 56.

These releases, however, do not shed light on the intentions of § 1.7(b)'s drafters. Nor do they cast meaningful doubt on how a discriminating,

[51] The date range used by Bloomberg (11/15/12 to 3/15/13) is also inconsistent with BNY Mellon's alternative construction of § 1.7(b). *See supra* pp. 28-29, 68, 70-72.

conscientious reader would understand § 1.7(b). As the evidence showed, the language of § 1.7(b) appears in full twice in the Prospectus Supplement (both in the summary "box" and in the "description of notes" section). *See* PX 32, at CHK5244, CHK5267. However, the cover page summary of the Prospectus Supplement uses only a shorthand description of the terms governing the 2019 Notes and does not refer to notice. *See* PX 32, at CHK5235 (referring to early redemption at par up to March 15, 2013, but not mentioning notice). Conceivably, the rating agencies, or other readers, who failed to read beyond the cover page may have construed the dates listed there (November 15, 2012 through March 15, 2013) as governing redemption, not notice. But that failure of third parties to conduct a diligent review of the deal documents cannot fairly be said to reflect upon the intentions of the framers of that provision.

4. *Emails From Banks*: Finally, Chesapeake received several emails from banks stating their views about the Notes' redemption deadline, usually in the context of refinancing proposals. For example, on January 8, 2013, Credit Suisse (an underwriter for the 2019 Notes) submitted a refinancing proposal to Chesapeake, via Dell'Osso, Grigsby, and Chambers. It stated: "We understand the special call provision in your 2019 notes is set to expire on March 15, 2013." *See* Tuckman Rep. Ex. F, at CHK7534. Similarly, on February 5, 2013, Barclays (another underwriter) submitted a refinancing proposal, via Dell'Osso and Chambers, that included a statement that "the end of the special redemption period for the 2019 Notes is fast approaching (ends March 15,

2013)." DX 119, at CHK6114. In a footnote, the proposal stated:

"*CHK will need to issue a call notice by February 13, 2013, in order for the redemption to settle within the special call period*." *Id.* n.2 (italics in original); *see also* Tr. 319-22. Barclays subsequently revised that assessment to reflect a March 15, 2013 notice deadline. *See* PX 50, at CHK7047.[52]

BNY Mellon's reliance on such market perceptions misses the mark. The issue before the Court is not how many market participants may have shared BNY Mellon's view that March 15, 2013 was the deadline for a redemption at par. The issue is instead one of contract interpretation. It is "to fathom the *parties'* intent." *U.S. Naval Inst.*, 875 F.2d at 1048 (emphasis added). Absent evidence that the market's understanding of the operative deadlines reflected the shared intent of the parties who actually negotiated § 1.7(b), the market's perceptions, however widespread, are not probative of the parties' intent. *Cf. Portside Growth & Opportunity Fund v. Gigabeam Corp., Inc.*, 557 F. Supp. 2d 427, 431 n.16 (S.D.N.Y. 2008). The parties' testimony as to their communications, however, is probative, and it uniformly favors Chesapeake's interpretation.

Further, there was no evidence at trial that any market participant whom BNY Mellon cites as having recited March 15, 2013 as the deadline for redemption had ever read § 1.7(b) or the nearly identical language in the Prospectus Supplement.

---

[52] Others in the market, in or around February 2013, also articulated Chesapeake's interpretation. *See* PX 105-B, 105-C.

Still less was there evidence that any such person had ever focused on the second sentence in § 1.7(b) that expressly stated that Chesapeake could give notice of redemption until March 15, 2013. Absent evidence that the market participants who opined on the deadlines governing redemption of the 2019 Notes had ever read the deal documents, the spare expressions by these persons as to their views of the operative deadlines cannot be fairly considered in construing § 1.7(b).

In finding the perceptions of market participants unrevealing as to the negotiating parties' shared intent, the Court does not express a view whether, or to what extent, Chesapeake, by virtue of its actions or inaction after mid-February 2012, bears responsibility for the market's misconceptions as to Chesapeake's deadlines to give a notice of redemption at par. Given the Court's limited charge in this case of determining the notice deadline set by § 1.7(b), the Court also has no occasion to consider whether a purchaser of 2019 Notes after February 13, 2013 could plausibly claim to have reasonably relied on Chesapeake's statements regarding those deadlines, or whether the language in the second sentence of § 1.7(b) effectively precludes such a claim. Such issues are beyond the scope of this action.

For the foregoing reasons, the Court finds that, even if the text of § 1.7(b) were held ambiguous as to the deadline to give a notice of redemption, the admissible extrinsic evidence convincingly establishes that the parties who negotiated that text

intended March 15, 2013 to be a deadline for notice, not for redemption.[53]

V. Other Issues

A. BNY Mellon's Argument Based on "Conditional Notice"

In an alternative argument, BNY Mellon contends that, even if Chesapeake's Notice is held timely, it is defective because it was conditional.

In pertinent part, Chesapeake's Notice stated, in bold capitalized letters, that Chesapeake was calling the notes for redemption "solely at a price equal to 100% of the principal amount of the notes plus accrued and unpaid interest" pursuant to § 1.7(b). Dkt. 30 Ex. A. The Notice then stated that (1) Chesapeake and BNY Mellon "have a disagreement concerning whether this Notice is timely to effect a special early redemption at par," and (2) Chesapeake is seeking declarations in this lawsuit that the Notice was timely for that purpose and that, if it is untimely, it is null and void. *Id.* The Notice then stated:

---

[53] The parties have vigorously disputed whether the doctrine of *contra proferentem* applies, either as a general matter to negotiations between an issuer and an underwriter as to the terms of an indenture, or based on facts specific to this case. In light of the Court's resolution of this dispute in Chesapeake's favor both on the basis of the text of § 1.7(b) and on the extrinsic evidence bearing on that provision, the Court has no occasion to reach the issue whether *contra proferentem* would apply in the context of the negotiations here. *See M. Fortunoff*, 432 F.3d at 142; *Albany Sav. Bank*, 117 F.3d at 674; *U.S. Fire Ins.*, 949 F.2d at 571; *see also supra* pp. 18-19.

> For the avoidance of doubt, notwithstanding anything in the Indenture to the contrary, this Notice of Special Early Redemption at Par will not be deemed to be made pursuant to Section 1.7(c) of the Supplemental Indenture or otherwise to require the Company to redeem the Notes at the Make-Whole Price.

Id. Accordingly, the Notice stated, if this Court were to hold the Notice timely by the redemption date, then the payment of par plus interest would be due. *Id.*

BNY Mellon argues that this language renders the Notice defective, because Base Indenture § 3.04, which sets out the requirements for a valid notice of redemption, does not provide for a conditional notice of redemption.

The Court disagrees. At the outset, BNY Mellon has not conclusively shown that a conditional notice of redemption is inherently impermissible. The Base Indenture appears to make a notice of redemption *irrevocable*. *See* Base Indenture § 3.05 ("Once notice of redemption is mailed in accordance with Section 3.04, Securities called for redemption become due and payable on the redemption date at the redemption price." (emphasis in original)). Therefore, after issuing a notice of redemption, Chesapeake could not change its mind and attempt to retract that notice. But there is no comparable provision of the Base Indenture that as clearly precludes Chesapeake from stating, in the notice itself, that a redemption will occur only upon the occurrence of a given event or circumstance before the redemption date (*e.g.*, that

Chesapeake's stock price be above a certain level as of an intervening date). BNY Mellon instead relies on § 3.04 of the Base Indenture, which identifies the information that must be included in a notice of redemption (*e.g.*, the redemption price, the redemption date, the aggregate principal amount of Notes being redeemed, and the name and address of the "Paying Agent" with whom Chesapeake is to deposit the funds available to pay the redemption price). BNY Mellon correctly notes that § 3.04 does not state that the notice must identify any condition precedent to redemption. It fairly argues that, from that omission, some negative implication may arise that a conditional notice of redemption was not contemplated by the parties who negotiated the Base Indenture. However, absent more substantial briefing than the parties have devoted to this point, the Court is not to prepared to hold that a conditional notice of redemption is necessarily prohibited under the Base Indenture.[54] The Court instead assumes the point *arguendo*.

---

[54] BNY Mellon argues that § 3.04(a)(6) and § 3.04(a)(7) of the Base Indenture permit conditional notices in discrete contexts, and therefore give rise to a negative implication that other conditions may not be attached to a notice of redemption. But that argument fails, because those two subsections do not describe conditional notices. Section 3.04(a)(6) provides that the notice of redemption must state that, except in the event of a default by Chesapeake in paying the redemption price plus interest (presumably to the Paying Agent), the Holder's sole right upon surrendering the Notes is to receive the redemption price plus interest. And Section 3.04(a)(7) provides that the notice must state that, where only a partial redemption is made, following that redemption, a new security will issue to a holder whose notes were only redeemed in part.

Even on that assumption, however, there was nothing defective about Chesapeake's Notice here. Chesapeake did not condition its Notice on an intervening circumstance or event. Chesapeake's Notice merely acknowledged the authority of this Court, given the pending lawsuit, to determine whether the Notice had been timely issued. And, given the noteholders' pending threat to treat the Notice, if held untimely, as a notice of Make-Whole redemption, the Notice reasonably stated that it was not intended to and would not operate as such, and that an untimely notice would be null and void. The Notice is thus not fairly described as a conditional notice. The words in the Notice on which BNY Mellon seizes in so arguing were words of clarification. They did not impose a condition. With or without those words, the legal effect of the Notice would have been the same.[55]

The decision in *Aristocrat Leisure*, on which BNY Mellon relies, is not at all to the contrary. The Court there held a notice issued by Aristocrat invalid because Aristocrat had failed, despite a requirement of the governing indenture, to "specif[y] the appropriate date on which the conversion right terminated." *Aristocrat Leisure*, 2005 WL 1950116, at *7. In other words, the notice there failed to state the redemption date, and had identified only the notice

---

[55] In his report, BNY Mellon's expert, Robert Landau, opines that Chesapeake's Notice is defective because it is "conditionally effective." Landau Rep. ¶¶ 17-18. For the reasons set out above, and because Landau's report as to this point is conclusory, the Court does not credit Landau's testimony that the Notice is defective.

date. *Id.* Chesapeake's notice, however, had no such deficiency. It contained all of the information that § 3.04 of the Base Indenture requires be set forth. *See* Base Indenture § 3.04.

Finally, the Court notes, the Notice in this case, to the extent it adverted to the lawsuit pending in this Court, served a constructive purpose. It helpfully explained to holders of the 2019 Notes that Chesapeake and the BNY Mellon disagreed about whether the Notice was timely. And it explained to those holders what the implications would be for them in the event the Court held, or did not hold, the Notice timely. As the Court stated when it ruled on Chesapeake's application for emergency relief: "There is nothing in the indenture that bars Chesapeake . . . from candidly acknowledging the good-faith disagreement that exists with regard to timeliness and making clear that the notice will be void if held untimely." 3/14/13 Hr'g Tr. 28; *see also id.* (describing Chesapeake's Notice as "a rational and permissible approach to dealing with the problem" with which it was confronted).

The Court therefore holds that Chesapeake's Notice was effective, not defective.

B. Chesapeake's Second Claim

On April 10, 2013, before trial, Chesapeake moved for judgment on the pleadings on its second claim. Dkt. 69-71. Chesapeake there seeks a declaratory judgment that "in the event that either (i) [the Notice of Special Early Redemption] is determined not to be timely for [a redemption at par], or (ii) this Court has not issued a decision with respect to the declaratory relief sought in Claim I . . .

prior to the May 13, 2013 redemption date, then the Notice of Special Early Redemption shall be deemed null and void and shall not be effective to redeem the 2019 Notes." Compl. ¶ 28. BNY Mellon opposed that motion. Dkt. 83-84.

Neither contingency posited by Chesapeake's second claim has occurred. The Court has held Chesapeake's Notice timely, and has issued its decision prior to the May 13, 2013 redemption date. Accordingly, Claim Two is moot. On that ground, the Court denies Chesapeake's request for a declaratory judgment on Claim Two.[56]

C. BNY Mellon's Affirmative Defenses

In its Answer, BNY Mellon raised several additional affirmative defenses. Dkt. 39. It was BNY Mellon's burden to establish such defenses. *See* Fed. R. Civ. P. 8(c); *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004). Although BNY Mellon did not vigorously pursue these defenses at trial and referred to them in only one paragraph of its post-trial brief, *see* BNY Post-trial Br. 52, the Court addresses here the affirmative defenses of laches, estoppel, and waiver, as to which some evidence was received.

Laches is "an equitable defense based on the . . . maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those

---

[56] As the Court stated in its ruling on Chesapeake's application for emergency relief, its view was that, were the Court to reach the merits, Chesapeake was overwhelmingly likely to prevail on its second claim. *See* 3/14/13 Hr'g Tr. 24-31. Nothing has occurred since to alter that view.

who sleep on their rights)." *Ivani Contracting Corp. v. City of N.Y.*, 103 F.3d 257, 259 (2d Cir. 1997) (quoting *Stone v. Williams*, 873 F.2d 620, 623 (2d Cir. 1989)). It "bars an equitable claim where the plaintiff has unreasonably and inexcusably delayed, resulting in prejudice to the defendant." *Allens Creek/Corbetts Glen Pres. Grp., Inc. v. West*, 2 F. App'x 162, 164 (2d Cir. 2001) (citations omitted). To prevail on a laches defense, BNY Mellon must show that Chesapeake "inexcusably delayed in taking action," and that BNY Mellon"was prejudiced by the delay." *Id.*

In considering a laches defense, the Court also considers the equities, because, "[w]here there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951). "Prejudice results when a delay 'makes it difficult to garner evidence,' or where a 'change in position' makes it inequitable to allow plaintiff's claim to proceed." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 829 F. Supp. 608, 615 (S.D.N.Y. 1993) (quoting *Robins Island Pres. Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 424 (2d Cir. 1992)).

Measured against these familiar standards, BNY Mellon's claim of laches fails. BNY Mellon has not identified any prejudice to it, or for that matter to the noteholders, that resulted from the passage of time. Further, there is no basis to argue that Chesapeake inexcusably slept on its rights. The trial record reflects that, in January 2013, Chesapeake confirmed with both its in-house and outside counsel that

March 15, 2013 was the deadline for it to give notice of a special early redemption. *See* PX 46. It further reflects that, on February 20, 2013, BNY Mellon informed Morgret at Chesapeake that it *concurred* with Chesapeake's analysis that notice on March 15, 2013 was timely for that purpose. *See* PX 49. There was no reason up until this point for Chesapeake to file this lawsuit; BNY Mellon had never indicated disagreement with Chesapeake as to the notice deadline. Two days later, however, on February 22, 2013, BNY Mellon alerted Chesapeake that it had changed its position and now regarded the notice deadline as having passed. *See* Chambers Dep. 195-99. Chesapeake filed this lawsuit just 14 days later. There is no basis to conclude that Chesapeake slept on its rights during that period. BNY Mellon's affirmative defense of laches, accordingly, lacks merit.

BNY Mellon also argues that Chesapeake's claims are barred under the doctrine of equitable estoppel. "Under New York law, the party asserting estoppel must show that the party alleged to be estopped (1) [engaged in] conduct which amounts to a false representation or concealment of material facts; (2) inten[ded] that such conduct [would] be acted upon by the other party; and (3) [knew] the real facts." *Readco*, 81 F.3d at 301 (alterations in original) (citation omitted). In addition, "the party alleging estoppel must also show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position." *Id.* at 301-02 (citation omitted).

Under these standards, BNY Mellon fails to establish estoppel, for several independent reasons. First, Chesapeake did not conceal any material facts from BNY Mellon. Quite the contrary: The Supplemental Indenture was available to the trustee and to the noteholders. Second, although some statements by Chesapeake bearing on the operative deadlines governing the 2019 Notes left much to be desired, the evidence did not establish that Chesapeake made false representations about the 2019 Notes, and there was no evidence that the statements by Chesapeake on which BNY Mellon has relied were made with the intent that they be acted upon by BNY Mellon or the noteholders. Third, there was no evidence adduced that BNY Mellon, or for that matter the noteholders, relied to their detriment on any such statement by Chesapeake, let alone that reliance was reasonable given the text of the Supplemental Indenture. BNY Mellon therefore fails to establish estoppel.

Finally, BNY Mellon argues that Chesapeake's claims are barred under the doctrine of waiver. Unlike the defense of estoppel, the defense of waiver does not require prejudice to the defendant and focuses instead on the actions of the plaintiff. *See Ventura Assocs., Inc. v. Int'l Outsourcing Servs., Inc.*, No. 04 Civ. 5962 (PKL), 2008 WL 2073628, at *5 (S.D.N.Y. May 14, 2008) (citing *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 (1982)). Under New York law, contractual rights may be waived only if they are "knowingly, voluntarily and intentionally abandoned." *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 104 (2006).

The evidence, however, fails to establish this affirmative defense, too. There was no evidence that at the time Chesapeake personnel approved any of the unhelpful or arguably misleading statements on which BNY Mellon has seized, it was voluntarily and intentionally relinquishing a known right. Absent proof of such abandonment, there is simply no waiver. *See Readco*, 81 F.3d at 303.

The Court has considered BNY Mellon's remaining affirmative defenses. They, too, lack merit.

CONCLUSION

For the reasons stated in the foregoing, the Court enters judgment in favor of Chesapeake on Claim One. The Court issues a declaratory judgment that Chesapeake's Notice of Special Early Redemption, issued on March 15, 2013, was timely and effective to redeem the 2019 Notes under the special early redemption terms set forth in § 1.7(b) of the Supplemental Indenture. The Court dismisses Claim Two as moot.

The Clerk of Court is directed to terminate the motions at docket numbers 69 and 94.

The Court directs counsel for Chesapeake and for BNY Mellon to meet and confer by Friday, May 17, 2013, as to whether there are any remaining issues in the case to be resolved. The Court directs counsel to submit, by Wednesday, May 22, 2013, a joint letter addressing that question.[57]

[57] The Court wishes to commend the lawyers-and the entire legal teams-for both sides in this hard-fought case for their professionalism, crisp organization, and all-around excellence. The caliber of advocacy was simply superb.

SO ORDERED.

[handwritten: signature]
PAUL A. ENGELMAYER
United States District Judge

Dated: May 8, 2013
New York, New York

Appendix I

Relevant Statutory Provisions Involved

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

28 U.S.C. § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.