15-cv-2366

In the United States Court of Appeals for the Second Circuit

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

BRIEF FOR DEFENDANT-APPELLEE

ROY T. ENGLERT, JR.
MARK T. STANCIL
JEREMY C. BARON
DANIELLE B. ROSENTHAL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Counsel for Defendant-Appellee
The Bank of New York Mellon Trust Company, N.A.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee The Bank of New York Mellon Trust Company, N.A. ("BNYM") states that the following is a parent corporation or publicly held corporation holding ten percent or more of the stock of BNYM:

The Bank of New York Mellon Corporation.

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PRELIMINARY STATEMENT

This breach-of-contract case is making its second trip to this Court. Previously, this Court held that an indenture governing bonds issued by Appellant Chesapeake Energy Corporation unambiguously defined two redemption periods: (1) a "par" redemption period ending on March 15, 2013, and (2) a more expensive "make-whole" redemption period thereafter. This Court therefore reversed the district court, which had issued a declaratory judgment holding that the par redemption period continued through May 14, 2013.

While that appeal was pending, however, Chesapeake made a choice. It went ahead with a redemption on May 13 and paid only the par price. The question on remand, then, was whether Chesapeake was somehow immune from paying the contractually specified make-whole amount for its May 13 redemption because the district court's declaratory judgment had not yet been reversed when Chesapeake redeemed.

The answer is no, as the district court correctly held in ordering Chesapeake to pay the make-whole amount. Multiple cases hold that a party relies on a declaratory judgment at its peril if the judgment remains subject to appeal. And no one made Chesapeake do anything. Chesapeake chose to redeem the bonds; indeed, it did so despite the district court's warnings that it would face the make-whole amount in the event of reversal.

Chesapeake calls its theory the "federal law of restitution after reversal." Br. 27. But this is a breach-of-contract suit. New York law unquestionably requires enforcement of the contract, and so does federal law. The restitutionary principle Chesapeake tries to invoke exists to protect successful *appellants* from being left without a means by which to recoup money paid under a later-reversed judgment; Chesapeake would contort that principle into a tool to *prevent* successful appellants from enforcing their contractual rights.

As this Court previously recognized, the contract states explicitly that a redemption after March 15 requires payment of the make-whole amount. Chesapeake unquestionably redeemed the notes on May 13. So it owes the make-whole amount. Respectfully, this case is that simple.

ISSUE PRESENTED

Whether the district court correctly required Chesapeake to pay the bondholders the make-whole amount under a contract that, as this Court has already held, unambiguously requires payment of the make-whole amount for a redemption on May 13, 2013.

STATEMENT OF THE CASE

Because Chesapeake's central argument is that the events preceding its decision to redeem should excuse it from complying with the contract's unambiguous terms, we recount those events in some detail.

A. The 2019 Notes.

Chesapeake is a publicly traded oil-and-gas company. In February 2012, it issued $1.3 billion in 6.775% Senior Notes due 2019 (the "2019 Notes"). The notes paid an interest rate ("coupon rate") of 6.775% and were to mature on March 15, 2019. Appellee The Bank of New York Mellon Trust Company, N.A., served as Trustee for the notes and is defending this appeal on behalf of the former noteholders. Chesapeake issued the bonds under a 2010 Base Indenture (A627–700) and the Ninth Supplemental Indenture (the "supplemental indenture") (A563–84), which governs only the 2019 Notes.

Section 1.7 of the supplemental indenture directly addresses redemption of the 2019 Notes. That section sets two time periods for redemption, each with a specific redemption price:

- From November 15, 2012, to March 15, 2013, Chesapeake could redeem the bonds at "par"—*i.e.*, principal plus accrued and unpaid interest. This was called the Special Early Redemption Period.
- Any time after March 15, 2013, Chesapeake could still redeem the bonds, but only by paying the "make-whole price"—*i.e.*, par *plus* an additional "make-whole amount" reflecting the future interest payments Chesapeake would have otherwise made to maturity. Those future payments were

discounted to present value at a contractually specified rate tied to U.S. Treasury bills.

The relevant text of Section 1.7 is as follows:

> (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.

A567. The base indenture further required Chesapeake to give between 30 and 60 days' notice before redeeming the bonds. A656–57 (§ 3.04). Thus, February 13, 2013, was the deadline for Chesapeake to give notice of a par redemption, and March 15 was the deadline for effecting a par redemption.

Chesapeake, however, ultimately took the view that March 15 was a *notice* deadline, not a *redemption* deadline. In January 2013, Credit Suisse wrote to

Chesapeake, observing that the March 15 par redemption deadline was fast approaching and offering to help Chesapeake refinance its bonds. A733–34. A Chesapeake employee (Caleb Morgret) suggested internally that Credit Suisse was mistaken, and that the par redemption deadline was actually April 15. A730. Elliot Chambers, a vice president at Chesapeake, responded, "Are you sure about that? I thought we had to provide notice by Feb 15th and the window closes on March 15th." *Id.* Chesapeake then satisfied itself otherwise.

B. Chesapeake Sues, And The Court Warns Chesapeake About The Risk Of Appellate Review.

1. Chesapeake Files A Declaratory Judgment Action.

The deadline for a notice of par redemption—February 13—came and went. On February 20, Chesapeake informed an employee of the Trustee that Chesapeake planned to issue by March 15 a notice of par redemption to take place on May 13. On February 22, the Trustee responded that the deadline to send a notice of par redemption had passed. A761.

On March 8, Chesapeake filed a declaratory judgment action in the district court. Its complaint included two claims. Claim I sought a declaration

> that the Notice of Special Early Redemption, upon being mailed on or prior to March 15, 2013 in accordance with the Base Indenture and the Supplemental Indenture, is timely and effective to redeem the 2019 Notes at 100% of principal amount plus accrued and unpaid interest to, but not including, the redemption date of May 13, 2013.

A39. Claim II sought to hedge against the risk that, if Chesapeake sent a notice of redemption, the notice would be deemed irrevocable and would require Chesapeake to redeem on May 13 at the make-whole price even if the district court did not rule in its favor before May 13. Claim II thus sought a declaration

> that the Notice of Special Early Redemption is effective solely for a redemption of the 2019 Notes at 100% of principal amount plus accrued and unpaid interest to, but not including, the redemption date of May 13, 2013 pursuant to Section 1.7(b) of the Supplemental Indenture, and in the event that either (i) such notice is determined not to be timely for that purpose, or (ii) this Court has not issued a decision with respect to the declaratory relief sought in Claim I set forth above 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.

Id.

Chesapeake attached a proposed conditional notice of par redemption to its complaint, stating:

> 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.
>
> If this Notice is effective pursuant to *a ruling of the District Court rendered prior to the Redemption Date*, the Special Early Redemption Payment will become due and payable upon each Note to be redeemed on the Redemption Date.

A42 (emphasis added).

Before trial, Chesapeake sought a preliminary injunction on Claim II. It hoped to receive the preliminary injunction by March 15, so that it could send its notice without committing itself to a redemption in the event the district court had not ruled by May 13 or had ruled against it.

The district court denied a preliminary injunction in a March 14 oral ruling. The court suggested, however, that it was sympathetic to Chesapeake on the merits of Claim II. To that end, the court said (among other things) that "the chances that Chesapeake will ever be forced to pay the $400 million as part of an involuntary Make-Whole redemption are remote." A234. The district court thus intended to allay Chesapeake's concern that, merely by issuing the notice of redemption, it might be forced to redeem, even in the absence of a favorable ruling from the *district court* before May 13. *See* A213 (describing Claim II as posing the question whether "Chesapeake's notice, if held untimely, must be treated as a notice of Make-Whole Redemption, and trigger those terms, effectively obliging Chesapeake to pay out $400 million *in the coming two months*") (emphasis added); A899–900.

On March 15, Chesapeake voluntarily issued a notice of redemption materially identical to the proposed notice that it attached to its complaint. A767.

2. The District Court Warns Chesapeake About The Prospect Of Appellate Review.

The district court held a status conference on March 19. The court and the parties discussed the risks posed by potential appellate review:

> THE COURT: . . . Let's suppose I rule in favor of Chesapeake [on Claim I]. There's no stay. On May 13th Chesapeake redeems the note at par. And then two months later, [the Trustee has] appealed—it's not moot—the Court of Appeals in an expedited way overturns it. What does that mean? . . .
>
> MR. BIERMAN [counsel for the Trustee]: It's a good question, your Honor . . . . *[I]f anything the burden is on Chesapeake to think about the consequences of a possible reversal*.
>
> . . .
>
> MR. BIERMAN: . . . I think it may be that the consequences are somebody has the damages.
>
> THE COURT: Some?
>
> MR. BIERMAN: Somebody has a claim for money at that point.
>
> . . .
>
> THE COURT: Let me ask you, Mr. Ziegler [counsel for Chesapeake] . . . hypothetically you win but there's an immediate appeal that you know Mr. Bierman was going to throw to you if it isn't in some way moot. Is he right that basically the remedy at that point was not . . . to seek the reinstatement of the [notes] but in effect to claim . . . the present 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.

A299–301 (emphasis added). The court then suggested that, whether or not "the make-whole provision would itself be triggered," the remedy could still "wind[] up looking very much like the make-whole remedy." A303.

The colloquy on this issue ended on this final note:

> 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 the scenario.

A303–04.

During discovery, the parties submitted a joint letter to the district court. Among other things, the letter stated that, "*with respect to Claim II*," the Trustee would "not treat the March 15, 2013 notice from Plaintiff as requiring a make whole redemption in the event that the Court determines the March 15, 2013 notice to be untimely for a par redemption." A323 n.2 (emphasis added). The Trustee "otherwise reserve[d] all rights and defenses." *Id.*

Chesapeake moved for judgment on the pleadings on Claim II. The parties debated whether the Trustee's stated position on Claim II rendered it moot. Neither party suggested that Claim II would remain relevant after May 13 or after redemption. The district court reserved judgment.

3. The District Court Rules In Chesapeake's Favor On Claim I And Dismisses Claim II As Moot.

After an expedited bench trial, the district court issued a declaratory judgment in Chesapeake's favor on Claim I. A757–848 (*Chesapeake I*). The court dismissed Claim II as moot, since "[n]either contingency posited by Chesapeake's second claim [had] occurred." A844.

On May 11, the Trustee filed a notice of appeal. The Trustee also wrote counsel for Chesapeake to warn Chesapeake about the consequences of choosing to redeem in the face of the pending appeal:

> In the event that Chesapeake Energy nevertheless chooses to redeem the notes at issue in this matter, the Trustee reserves any and all rights, including but not limited to the right to seek damages and all other available relief if and when the U.S. Court of Appeals for the Second Circuit or another court of competent jurisdiction reverses, vacates, modifies, or amends the District Court's Judgment.

A850.

Chesapeake did not cross-appeal the dismissal of Claim II.

C. Chesapeake Redeems the 2019 Notes.

Chesapeake redeemed the 2019 Notes on May 13. It deposited the par price with the Trustee (slightly more than $1.3 billion, comprising principal plus accrued and unpaid interest) and directed the Trustee to distribute those funds to noteholders. It also notified the Securities and Exchange Commission that it intended to remove the 2019 Notes from the New York Stock Exchange by May

24. *See* Chesapeake Energy Corporation, Notification of the Removal From Listing and Registration of the Stated Securities (Form 25-NSE) (May 13, 2013). The redemption thus obligated the noteholders to surrender their notes.

D. This Court Holds That March 15 Was The Unambiguous Deadline For Par Redemption.

This Court reversed and remanded. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 773 F.3d 110 (2d Cir. 2014) ("*Chesapeake II*"). The Court held that the contract unambiguously established March 15 as the last day on which Chesapeake could redeem at par.

The Court explained that the supplemental indenture "allowed Chesapeake two elective options for early redemption. Pursuant to § 1.7(b), Chesapeake could elect early redemption of Notes at the Special Price [*i.e.*, at par] 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.'" 773 F.3d at 112. However, the "terms of § 1.7 unambiguously terminated Chesapeake's right to redeem the Notes at the Special Price on March 15, 2013." *Id.* at 113. As a result, the May 13, 2013, date on which Chesapeake redeemed the bonds was outside the Special Early Redemption Period set by the indenture.

This Court accordingly reversed the district court's judgment. It 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." *Id.* at 117.

This Court denied rehearing on February 6, 2015.

E. The District Court Requires Chesapeake To Pay The Make-Whole Amount.

1. <u>The Trustee Demands Payment Of The Make-Whole Amount.</u>

The Trustee promptly filed a motion for further relief under 28 U.S.C. § 2202 in the district court. As the Trustee explained, the Court's holding required the following conclusions:

- Judgment was to be entered in the Trustee's favor on Claim I, because this Court had held that Chesapeake could not redeem at par after March 15, 2013.
- Because Chesapeake had in fact redeemed the bonds on May 13, 2013, it owed the make-whole amount under the contract's express terms.
- Claim II remained moot, because it addressed only what would have happened if the district court had not initially ruled in Chesapeake's favor before May 13, 2013.

In setting a status conference, the district court "remind[ed] Chesapeake" that on March 19, 2013, the court had "specifically alerted Chesapeake to the risk that has now materialized"—that, if the court were to issue Chesapeake a declaratory judgment on Claim I, Chesapeake were to redeem, and the Second

Circuit were to reverse, the noteholders would "claim a right to immediate monetary relief either under, or as measured by, the Make-Whole provision." A856 n.1.

At the status conference, the court again reminded Chesapeake that Chesapeake had "been on notice that a day like this was coming." A867. But Chesapeake asserted for the first time that, because it had redeemed the notes in purported reliance on the district court's (reversed) judgment, it should not be required to pay the make-whole amount. Under that view, Chesapeake could be required to pay only "restitution" to the noteholders, which it contended would be approximately $100 million.

The district court expressed surprise at Chesapeake's position: Chesapeake "understood perfectly well that [it] crossed a rubicon . . . when [it] actually redeemed" (A880), and that the district court was only "a pit stop on the way to the Second Circuit" (A887–88). The Trustee had made "clear all along," the court continued, "that in the event that there was a redemption held after the fact to be belated, that they would be treating this as make-whole." A899; *see also* A880–82, 888, 900–01.

The court directed the parties to brief several questions, including whether Chesapeake owed the make-whole amount or instead—as Chesapeake contended—some "restitution" amount. The court resolved to answer that legal question first and then, if necessary, resolve the various questions surrounding calculation of Chesapeake's "restitution" remedy.

On March 20, Chesapeake filed a "cross-motion for an order of restitution." Dkt. 183. Chesapeake sought a restitution award against itself and opposed enforcement of the make-whole provision.

At the May 1 oral argument, the court posed a hypothetical question to Chesapeake's counsel: What if Chesapeake had not filed a declaratory judgment action and had simply issued its notice of par redemption on April 1 (or on March 16)? Even under Chesapeake's rejected position, the Court noted, the indenture unambiguously precluded a notice of par redemption after March 15. Counsel for Chesapeake conceded that Chesapeake would owe the make-whole amount in that circumstance, because there could be no basis for Chesapeake to believe it could issue a proper notice on those dates. *See* A972–73 ("THE COURT: But you've conceded to me that . . . if Chesapeake had issued the very same notice on April 1 [and had redeemed at par, the Trustee's damages] would still be valued at the make-whole because it was out of time. . . . MR. ZIEGLER: Yes. I have conceded at some point it is too late."); *see also* A958–61, 968, 993–94; SPA22–23. The district court then noted that, as established by this Court's decision, the indenture likewise unambiguously precluded a notice of par redemption after February 13. Counsel for Chesapeake nonetheless insisted that Chesapeake's actions in violation of *that* unambiguous limitation could *not* require the contractual make-whole remedy. *See* A969–70.

2. The District Court's Decision.

The district court issued its opinion on July 10. It held that Claim II remained moot, since it was predicated on one of two contingencies occurring by May 13, 2013, neither of which had occurred. SPA9–10. The court also held that 28 U.S.C. § 2202 was a proper procedural device to resolve the noteholders' entitlement to contract damages. SPA11–13. Neither conclusion remains in dispute.

Turning to the central question, the court held that Chesapeake owed the make-whole amount. That conclusion was compelled, the court explained, by black-letter contract law: The stated terms of the parties' bargain should be enforced, and the existence of a valid contractual remedy generally precludes the award of quasi-contractual relief like restitution. SPA14–18. The court accordingly rejected Chesapeake's preemptive-restitution theory, for four primary reasons.

First, Section 1.7 of the supplemental indenture was "*comprehensive*" (SPA21) as to the subject of the parties' dispute—"the precise money due to the Noteholders depending on the date of [the] redemption" of the 2019 Notes (SPA20)—and the contract required payment of the make-whole amount for a redemption on May 13, 2013. Chesapeake's theory, the court explained, required the court to invent a new, non-contractual type of redemption, based on Chesapeake's claimed state of mind on May 13. But "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." SPA21.

Second, Section 1.7 set an unambiguous March 15 deadline for par redemption. Chesapeake conceded that, if it had sent a notice of par redemption on March 16, it would owe the bondholders the make-whole amount because, even under Chesapeake's (rejected) position, a March 16 par redemption notice would be improper. But that logic applied equally to the present dispute, the court held, because this Court's decision established that the indenture unambiguously set March 15 as a *redemption* deadline, not a *notice* deadline. SPA22–23.

Third, based on the unambiguous terms of the indenture, "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": The bonds would remain outstanding to maturity or would be redeemed at the make-whole amount. SPA23. To ignore the bondholders' legitimate expectations "would introduce uncertainty into, and unhelpfully complicate, future indentures." SPA25.

Fourth, even if Chesapeake's subjective expectations were relevant, "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." SPA25. The court took pains in 2013 to "explicitly remind[] Chesapeake" that, if the present scenario ever came to pass, Chesapeake might owe the noteholders "a lump sum measured by the Make-Whole Amount, even though Chesapeake had never intended to trigger a § 1.7(c) redemption." SPA26. In light of those warnings, Chesapeake had no credible argument that it redeemed with the belief that it would never owe the make-whole amount.

The district court then rejected Chesapeake's theory that, despite a clear contractual remedy, only "restitution" could be awarded. It explained that, although a party might *seek* restitution after being "*compelled* by a court" to take certain action, Chesapeake "controlled its choices and ran a known risk" when it went through with the redemption on its own volition. SPA29–30. In any event, the law does not "limit the right of a party on remand to a restitutionary remedy"—instead, the Trustee was free to choose the form of relief it wanted from among the available options, including enforcing its contract rights. SPA30.

Finally, the court awarded prejudgment interest at the supplemental indenture's 6.775% coupon rate, rejecting Chesapeake's contention that it should set a lower rate. SPA36. That issue, too, has not been raised on appeal.

The parties stipulated to the resulting calculations. The district court entered an amended judgment on July 17, awarding the Trustee $379,650,133.21 as the make-whole amount plus $59,067,428.46 in prejudgment interest, for a total of $438,717,561.67. SPA41.

SUMMARY OF ARGUMENT

I. Because the supplemental indenture expressly requires payment of the make-whole amount for a May 13 redemption, the Trustee brought a breach-of-contract claim under New York law for that amount, and the district court awarded damages in that amount. But, counterintuitively, Chesapeake says New York law "has no bearing" on this diversity action. Br. 27.

Instead, Chesapeake invokes a purported *federal* principle—the so-called "federal law of restitution after reversal" (Br. 27)—that a party may act in reliance on an appealed district court declaratory judgment, "secure in the knowledge that" it will not face contractual liability (Br. 19–20). But the rule is just the opposite: "[E]very litigant is painfully aware . . . that a favorable judgment of a trial court may be reversed on appeal." *Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J., concurring). And the district court and the Trustee took equal pains to warn Chesapeake about that possibility.

Every premise and every conclusion of Chesapeake's theory is wrong. New York law applies to this dispute. Under that law (and the law everywhere else, for that matter), express contract rights take precedence over quasi-contract remedies like restitution. Even when the principle of restitution that Chesapeake invokes *is* applicable, it is (a) available to parties who pay a district court judgment but then prevail on appeal, and (b) an optional—not exclusive—remedy. Chesapeake attempts to twist that doctrine into a shield for losing appellees to limit successful appellants' recoveries. Even if "federal restitution" principles applied, the result would be the same: Not a single shred of case law supports Chesapeake's theory.

II. Chesapeake breached the supplemental indenture when it redeemed on May 13 but failed to pay the contractually specified make-whole amount for a redemption on that date. Accordingly, the noteholders were damaged in the amount of Chesapeake's underpayment—the make-whole amount.

Chesapeake says that the contract nonetheless does not require payment of the make-whole amount because Section 1.7(c) does not apply "clearly and unambiguously" (Br. 20) to Chesapeake's May 13 redemption. Chesapeake wrongly attempts to import that inapplicable standard from bankruptcy law. Besides, the indenture is as clear as can be. As this Court has already held, the supplemental indenture unambiguously defines Section 1.7(c) and sets a clear price for a May 13 redemption: the make-whole amount.

Chesapeake did not *want* to pay the make-whole amount, but that is irrelevant. Indeed, Chesapeake was warned that it might owe the make-whole amount if it redeemed the notes and the Trustee won its appeal.

III. Chesapeake suggests that the make-whole amount represents an unfair "windfall" to bondholders (Br. 2, 8), and claims that its proposed alternative theory would be "simple" in application (Br. 56). Chesapeake is wrong on both counts. Make-whole provisions are important contract terms that provide bargained-for (and carefully measured) flexibility to issuers and certainty to noteholders; the significant costs they sometimes impose are integral to their proper functioning. Chesapeake's restitution theory, by contrast, would require a massive and complicated inquiry into what hypothetical alternative securities would have been worth, and would not account for myriad other factors that Chesapeake simply ignores.

ARGUMENT

I. CHESAPEAKE'S "PREEMPTIVE RESTITUTION" THEORY CANNOT DISPLACE THE TRUSTEE'S CONTRACT RIGHTS.

Chesapeake spends the bulk of this argument expounding on something it calls "the governing federal law of restitution after reversal." Br. 27. According to Chesapeake, federal law applies to the Trustee's claim, and federal law blocks the Trustee from enforcing the terms of Section 1.7(c). But *New York law*, not federal law, governs the Trustee's state-law breach-of-contract claim. Under New York law, Section 1.7(c)—not some ill-defined restitution analysis—dictates the price Chesapeake owes for a May 13 redemption. In any event, the restitutionary principle Chesapeake contorts is intended to *protect* successful appellants, not to *limit* their recoveries. Even if some free-floating federal common law of contracts applied, the answer is the same.

A. New York Law, Not Federal Law, Governs The Trustee's Contract Claim.

1. State Law Applies.

According to Chesapeake, "state law has no bearing" on this dispute. Br. 27. That statement is wrong. "[F]ederal courts sitting in diversity apply state substantive law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). From all angles, this case poses substantive questions of New York law. Those questions include:

- What rights and duties does Section 1.7(c) prescribe? It is settled law that "the interpretation of the contract and the rights thereunder depend on state law." *Baldt Corp. v. Tabet Mfg. Co.*, 412 F. Supp. 249, 254 (S.D.N.Y. 1974).
- Did Chesapeake breach the indenture when it redeemed the notes on May 13 but failed to pay the make-whole amount? Whether a contract has been breached is a quintessentially substantive question. *See Terwilliger v. Terwilliger*, 206 F.3d 240, 245–47 (2d Cir. 2000) (holding that "a

breach of contract claim under New York law" requires proof of a "breach by the other party," and resolving, under New York law, whether breach occurred).

- Does Chesapeake owe the make-whole amount as contract damages, or may it instead pay only restitution? Whether to enforce contractually specified rights is a substantive question. *See Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 262 (2d Cir. 1999) (applying New York law and holding that a party with an "enforceable contract . . . [can]not seek to recover under *quantum meruit*").
- Does Chesapeake have a defense to the Trustee's breach-of-contract action based on its (purported) reliance on the district court's declaratory judgment? Such defenses are substantive questions. *See Lazard Frères & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1541 (2d Cir. 1997) ("New York law controls the entirety of this breach of contract claim, including the [defendant's] affirmative defense.")

In sum, "New York substantive law governs this diversity suit." *Reilly*, 181 F.3d at 262.[1]

[1] In addition, both the base indenture (§ 13.08) (A695) and the supplemental indenture (§ 2.2) (A567) choose New York law as the governing law.

Chesapeake cites only one case for the counterintuitive proposition that federal law displaces the parties' state-law contract rights when a court decides whether Section 1.7(c) should be enforced: *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981) (Br. 22). In that diversity case, the Court *rejected* an argument that the district court's recall order was forbidden under state law. *Id.* at 806. The Court suggested in dicta that the district court could award broader relief than the forum state's courts, but it reiterated that "state law supplies the rule of decision." *Id.* Thus, *Perfect Fit* reaffirms that state law supplies the rule of decision in a diversity case—it does not hold that federal law displaces contract rights in a state-law breach-of-contract action. *See* John T. Cross, *The Erie Doctrine in Equity*, 60 La. L. Rev. 173, 182 (1999) ("[W]hether a contract provision [is] enforced [is] clearly a matter of right."); *id.* at 217 ("[B]ecause a suit seeking damages for breach of contract [cannot be] heard in [equity], a federal court has no discretion to ignore state law governing damages.").

The issue in this case is whether Chesapeake is liable for breach of contract, and whether the district court's initial declaratory judgment provides Chesapeake with a defense to contract liability. Those are substantive questions, even though Chesapeake tries to paint them with a procedural brush. *See Gasperini,* 518 U.S. at 430. New York law thus dictates their outcome.

2. The District Court's Declaratory Judgment Did Not Extinguish The Noteholders' Contract Rights.

The district court's issuance of a declaratory judgment did not change the governing law or the rule of decision on the noteholders' contract claims.

a. Suppose Chesapeake had redeemed the 2019 Notes on May 13 at par without first obtaining a district-court declaratory judgment—either because Chesapeake did not file suit, or because the district court had not ruled by May 13. In that event, even Chesapeake would concede that New York law would apply. Chesapeake's position, then, is that the district court's intervening declaratory judgment somehow triggered the displacement of state law and the application of federal law, which in turn extinguished the noteholders' contract rights. But an overturned declaratory judgment cannot *change* the parties' underlying contract rights or insulate a party from future contract liability.

"One purpose of the federal declaratory judgment statute is to permit . . . an individual to test the legality of" certain proposed conduct. *Edgar*, 457 U.S. at 651 (Stevens, J., concurring). That a lower court "has entered a declaration" approving of the proposed conduct, however, does not mean that "an individual may act with absolute assurance that he may not be punished for his contemplated activity. . . . [E]very litigant is painfully aware . . . that a favorable judgment of a trial court may be reversed on appeal." *Id.*

Numerous courts have echoed Justice Stevens's observation. In *YWCA v. Kugler*, 463 F.2d 203 (3d Cir. 1972) (per curiam), the district court had issued a declaratory judgment holding a criminal statute unconstitutional. The Third Circuit explained that if the plaintiffs "violate[d] the statute during the pendency of the appeal [notwithstanding the district-court judgment] . . . they w[ould] be acting at their peril. If the judgment should be reversed they may be prosecuted for such violations in the future." *Id.* at 204. Similarly, in *MacPhail v. Sagner*, 293 A.2d 257 (Md. 1972), the court rejected a restitution defense posed by unsuccessful appellees, holding that the appellees' action "was illegal and was not made lawful by" the later-overturned declaratory judgment. *Id.* at 262. Instead, the appellees had "gambled that" the declaratory judgment "was correct" and had "lost their bet" when the judgment was reversed. *Id.*; *cf. id.* at 266. Likewise, Chesapeake "gambled" at its own "peril" that the district court "was correct" in the first instance. It "lost [its] bet," and it has incurred contractual liability as a result.

Chesapeake complains that recognizing the Trustee's breach-of-contract claim would "make the [district court's] original judgment essentially meaningless." Br. 26. But the sometimes-tenuous nature of district-court decisions follows from the right of appellate review. "Where levels of review are provided, decisions may be reversed. A prevailing party at trial acts at its peril if it proceeds before the appeal is concluded." *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d

1254, 1256 (9th Cir. 1984) (en banc). Under this Court's prior holding, Chesapeake redeemed on a date when it was required to pay the make-whole amount. *Chesapeake II*, 773 F.3d at 117. As Chesapeake would have it, however, the district court's declaratory judgment eliminated the requirement to pay the make-whole amount. That would eradicate the very contract right that, this Court held, unambiguously exists.

Chesapeake has not identified a single case—state or federal—holding that a lower-court judgment has such a transformative effect on contract rights. Indeed, Chesapeake mentions only one case where a party asserted such a novel defense, and the court rejected it for reasons that are directly on point.

In *Muñoz v. MacMillan*, 195 Cal. App. 4th 648 (Cal. Ct. App. 2011), a landlord had evicted a tenant (Muñoz) in reliance on a later-reversed judgment. On remand, the landlord argued that Muñoz could seek only restitution and could not pursue contract damages. The 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[] under the lease . . . . *The entry of an appealable judgment in the underlying [eviction] action was not sufficient to extinguish the lease as a matter of law*.

Id. at 659–60 (emphasis added). As the court went on to observe:

> [W]e 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. . . . *[T]he existence of [a restitution remedy] did not eliminate Munoz's right to seek damages for breach of contract*.

Id. at 661–62 (emphasis added).

So too here. The noteholders' contract rights were never relinquished (*see* A850), and the district court's entry of an erroneous declaratory judgment did not—and could not—extinguish them. Tellingly, all Chesapeake can say about *Muñoz* is that it involves a landlord-tenant dispute (Br. 26)—Chesapeake cannot challenge the court's logic.

b. Chesapeake asserts a new federal substantive common-law rule that (purported) reliance on an appealed declaratory judgment eliminates state contract rights. But instances where federal courts supplant state law with "special federal rule[s]" are "'few and restricted.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). In the absence of a governing federal statute or regulatory scheme, courts require "a 'significant conflict between some federal policy or interest and the use of state law'" as a "precondition" for crafting new federal rules of decision. *Id.* As explained above, there is no conflict here, because there is no "federal policy" that district-court declaratory judgments insulate litigants from contract liability.

Were there any doubt, the Supreme Court rejected just such an argument in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983). There, the district court voided the seniority provisions in a company's collective bargaining agreement because the company and the government had agreed that the provisions violated Title VII. While the union's appeal was pending, the company fired a number of employees who were protected by those provisions. The Fifth Circuit reversed based on intervening Supreme Court precedent, the provisions were restored, and the employees were reinstated. The employees then filed grievances seeking back pay. An arbitrator awarded back pay to one of the employees, over the company's protests that it had fired the employee in "good faith." *Id.* at 763. The company sued in federal court, arguing that the award violated the "important public policy" of "obedience to judicial orders" by imposing contractual liability for acts it took in reliance on the district court's judgment. *Id.* at 766.

The Supreme Court disagreed. By firing the employees "before the legal rights were finally determined" on appeal, the employer had taken its chances. 461 U.S. at 767. It had thereby "dishonored its contract" and "incurred liability for breach of contract." *Id.* "Given the Company's desire to reduce its workforce, it [was] undeniable that the Company was faced with a dilemma" after the district court ruled: It could fire employees protected by the contract, or it could fire employees protected by Title VII. *Id.* But that dilemma "was of the Company's own making," *id.*, and the district court's order had not compelled the company to fire anyone, *id.* at 768 n.12. As a result, "[n]o public policy [was] violated by holding the Company to [its contractual] obligations." *Id.* at 770.

Chesapeake suggests that, as a matter of federal policy, a district-court declaratory judgment extinguishes a party's contractual liability for future acts taken in reliance on that judgment. But, as *Grace* held, no federal rule excuses a party from the contractual liabilities it incurs while a favorable judgment is on appeal. Chesapeake "'expresses a sense of unfairness'" as a result of this situation, "'[b]ut the essence of judicial decisionmaking necessarily involves some peril to individual expectations.'" *Pauma Band of Luiseno Mission Indians v. California*, __ F.3d __, 2015 WL 9245245, at *5 (9th Cir. Dec. 18, 2015). That is particularly so when a party, like Chesapeake, creates its own dilemma through litigation and makes a voluntary choice after the district court rules. *See Grace*, 461 U.S. at 767.

At bottom, Chesapeake's "reliance" defense is a mirage: No such rule exists. Even if it did, the district court warned Chesapeake that appellate reversal would expose it to the make-whole amount. *See supra* at 8–9; 12–13; 17; SPA 25–26. Chesapeake now disputes the district court's characterizations of those warnings, but the transcript speaks for itself (and, if interpretation were needed, the district court would be a more reliable interpreter than this Court or either party). What Chesapeake believes, then, is that it was entitled to rely on the declaratory judgment—thereby extinguishing noteholders' rights under Section 1.7(c)—*despite* the district court's warnings. That remarkable proposition has no support.

B. New York Law, Which Mirrors The Rule Everywhere, Requires That The Contract Be Enforced.

Under New York law, the Trustee's contract rights take precedence over Chesapeake's request for restitution—not vice versa. As Chesapeake recognizes, it is a "truism" of New York law (Br. 27) that "'the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract'"—such as restitution—"'for events arising out of the same subject matter.'" *Adelaide Prods., Inc. v. BKN Int'l AG*, 834 N.Y.S.2d 3, 7 (N.Y. App. 1st Dep't 2007) (quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26, 34–35 (N.Y. 2005)); *see also 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 . . . 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."); *accord Anwar v. Fairfield Greenwich Ltd.*, 831 F. Supp. 2d 787, 797 (S.D.N.Y. 2011) (SPA17).[2]

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[2] The rule is the same throughout other States. *See* SPA15–16 n.10 (collecting dozens of cases applying the law of dozens of other States).

The supplemental indenture is a valid contract, and it governs the subject matter at issue here—the price Chesapeake owes in exchange for a May 13 redemption. Because Section 1.7(c) covers this dispute, New York law requires enforcement of Section 1.7(c)—not a restitution award.

Chesapeake argues that this New York principle does not apply because New York has rules of civil practice that "authoriz[e]" restitution after reversal. Br. 28 (citing N.Y. C.P.L.R. §§ 5523, 5015(d)). But those provisions—which Chesapeake does not quote—provide only that an appellate court (§ 5523) or a trial court (§ 5015(d)) "may" order restitution after reversal on appeal. They accordingly reflect only a general rule that restitution may be available after reversal, not that restitution is an exclusive remedy or supersedes enforcement of contract provisions.

Chesapeake's unexplained citation of *Bedell Co. v. Harris*, 240 N.Y.S. 550, 557 (N.Y. App. 1st Dep't 1930), fares no better. That case allowed a landlord to pursue restitution against a tenant who had stayed in the premises under a later-reversed district-court order. Restitution was appropriate because the appellate court held that the lease had expired—thus, there was no specified contract remedy for continued possession. *Cf. infra* at 36–39 (describing similar cases). Neither *Bedell* nor any other case (New York or otherwise) holds that a later-reversed trial court ruling precludes a successful appellant from enforcing rights specifically set forth in a contract.

The *Restatement (Third) of Restitution and Unjust Enrichment*, on which Chesapeake repeatedly relies, confirms that the New York rule giving precedence to contract claims is the rule throughout the country. The Restatement explains 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) (2011). As a comment to that section elaborates:

> 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[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. cmt. c. That principle applies with full force here.

Chesapeake instead focuses on a different Restatement provision not specific to contracts—Section 18—which provides 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." *Restatement*, *supra*, § 18. Section 18 addresses the situation where a party pays a judgment that is then reversed on appeal, and it "permits the judgment debtor to recover" amounts paid under the erroneous judgment. *Id.* cmt. b. Thus, a *successful appellant* is not left without a means of recovering what was lost under the erroneous judgment. But that section does not provide a *losing appellee* the power to limit the successful appellant's recovery; Chesapeake's convoluted reading thus turns that provision on its head. In any event, no judgment was "paid" here, and the district court's order did not compel Chesapeake to do anything; rather, Chesapeake chose to redeem and assumed the risk of appeal.

Moreover, Section 18 in no way suggests that a restitutionary remedy is *exclusive*. Nor does it purport to displace the clear statement in Section 2(2) that a specified contract remedy trumps a restitutionary remedy.

Chesapeake contends that Section 2(2) is a "general" provision, whereas Section 18 is a "specific" one and overrides Section 2(2). Br. 28. Even if the Restatement should be parsed with canons of statutory interpretation, Chesapeake has it backward. For starters, there is no conflict between these provisions. Section 2(2) says contract remedies prevail over restitutionary remedies; Section 18 does not claim that restitution is the exclusive remedy available after reversal of *any* judgment, much less in a contract case. Thus, Sections 2(2) and 18 co-exist in harmony. Even if there were conflict, Section 2(2)—which is identified as a "Limiting Principle[]"—is the more specific provision: It directly addresses contract claims, whereas Section 18 contains no subject-matter limitation.

Moreover, the commentary to Section 2(2) notes that it "is subject to a *limited* exception in cases of profitable and opportunistic breach of contract," *Restatement*, *supra*, § 2(2) cmt. c (emphasis added)—cases where the non-breaching party stands to gain *more* by seeking restitution than by seeking contract damages. There is no mention of a similar exception for Section 18, or for other cases where the non-breaching party would gain *less* by seeking restitution. At bottom, Chesapeake would read Section 18 to declare that, notwithstanding the rule that restitution does not displace contract remedies, restitution is the *exclusive* remedy when a judgment in a contract case is reversed on appeal. It does not say that.

Finally, Chesapeake suggests that, even if contract remedies are usually available, "transfers that are not voluntary *do* give rise to claims for restitution." Br. 28–29 (citing *Restatement*, *supra*, § 2(2) cmt. c). Chesapeake further claims that "the operative 'transfer' in the redemption at par was from [the Trustee] to Chesapeake," which it calls "involuntary" because it was "coerc[ed]" by the district court's declaratory judgment. Br. 29. Chesapeake again reads Section 2(2) backward. The commentary explains that "[c]ontract is superior to restitution as a means of regulating voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation," and therefore declares that the "the parties' own definition of their respective obligations . . . take[s] precedence over the obligations that the law would impose in the absence of agreement." The term "voluntary transfers" thus refers to the allocation of benefits and burdens under the contract, and the rule says those duties should be enforced.

It would turn that rule upside down to hold that the Trustee's participation (under protest) in the May 13 redemption somehow *precludes* enforcement of the contract remedy for a May 13 redemption. Even if the May 13 redemption had to be "voluntary" in some sense to trigger the rule that contract remedies prevail, Chesapeake's decision to redeem *was* voluntary. Indeed, Chesapeake redeemed over the Trustee's objection and reservation of rights (A850), and despite the district court's warnings about the prospect of appellate reversal.

C. Even If Federal Common Law Somehow Applies, The Contract Still Must Be Enforced.

Even if federal law provided the rule of decision, it would make no difference: No authority Chesapeake has cited holds that a federal restitution rule displaces a successful appellant's ability to enforce its contract. The cases Chesapeake lists as "[i]nvolving [c]ontracts" or "where the dispute concerned a contract" (Br. 25) come nowhere close to establishing the rule Chesapeake seeks.

And there is no reason to think that federal law would adopt a rule, in conflict with the rule everywhere, that restitution claims preclude contract claims.

First, a careful reading of the complicated analysis in *United States v. Bedford Associates*, 713 F.2d 895 (2d Cir. 1983) (Br. 25), shows how little support it gives to Chesapeake. In that case, the district court held that the government tenant and the landlord had not renewed their lease. Under the district court's order, the government had to pay future rent to the landlord that matched the current fair market value of the premises—which exceeded the rent specified in the (supposedly invalid) renewed lease. On appeal, this Court reversed and held that there was, in fact, a renewed lease, but it refused to award specific performance (based on the government's bad-faith negotiations). On remand, the government asked for restitution of the excess rent it had paid under the district court's reversed order. This Court affirmed (and increased) an award of restitution to the government for that amount. *Id.* at 903.

Thus, in *Bedford*, the district court's initial order incorrectly required the government to pay extra funds that it need not have paid under the contract. But the landlord did not breach the contract by *receiving* those funds—the government had merely paid excess amounts. In those circumstances, restitution may be an appropriate remedy. However, *Bedford* does not suggest that a district court's initial erroneous judgment blocks enforcement of the contract, notwithstanding an appellate reversal.

Likewise, *National Union Fire Insurance Co. v. Seagate Technology, Inc.*, No. C 04-01593, 2013 WL 1282971 (N.D. Cal. Mar. 27, 2013)—an unpublished district-court case applying California insurance law—cannot bear the weight Chesapeake requires. There, an insurer received a declaratory judgment that it had no duty to defend, so it stopped advancing attorney's fees to its insured. That judgment was reversed on appeal. *The insurer accordingly paid the overdue fees under the contract*, subject to a cap set by a California insurance statute. The insured sought *higher* fees, arguing that the insurer had "wrongfully" disclaimed coverage and thus could not rely on the statutory cap. The court held that the insurer did not act "wrongfully" in disclaiming coverage based on the district court's (later-reversed) judgment. *Id.* at *2; *see also Auto-Owners Ins. Co. v. Potter*, 242 F. App'x 94, 99 (4th Cir. 2007) (insurer was not "unjustified" in withdrawing defense after receiving district-court judgment that it lacked duty to defend, even though judgment was later reversed on appeal).

Nonetheless, it was beyond dispute in *Seagate* that the insured was "entitled to the benefit of its own bargain," and the insurer's "contractual responsibilities" had been "reinstated retroactively" at the normal California rates. 2013 WL 1282971, at *3. Thus, if anything, *Seagate* recognizes that an unsuccessful appellee remains bound by a contract post-reversal. The existence of a later-reversed district-court judgment may be relevant where a statute puts an insurer's state of mind at issue, but it is black-letter contract law that a breaching party's state of mind does not shield it from enforcement of the contract. *See Koufakis v. Carvel*, 425 F.2d 892, 906 (2d Cir. 1970) ("A breach is a breach; it is of marginal relevance what motivations led to it."); *see infra* at 52–53.[3]

The remaining "contract" cases Chesapeake cites (Br. 25) are even further afield. Those cases involve variations on the *Bedford* theme, where a successful appellant seeks restitution for funds the district court wrongly ordered it to pay under a contract. In none of those cases did an unsuccessful appellee breach the contract by receiving the funds. *See Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891) (awarding restitution where district court lacked jurisdiction over breach-of-contract action); *Agric. Servs. & Invs., Inc. v. Baggett Bros. Farm, Inc.*, 335 F. App'x 818, 820 (11th Cir. 2009) (per curiam) (approving restitution of $450,000 judgment previously recovered by plaintiff because, after reversal, plaintiff owed $2.5 million to defendants); *Mohamed v. Kerr*, 91 F.3d 1124, 1125 (8th Cir. 1996)

[3] Even if decisions regarding an insurer's "wrongful" breach of policy obligations are relevant, a number of opinions are contrary to *Seagate*. *See, e.g.*, *Royal Ins. Co. of Am. v. Kirksville Coll. of Osteopathic Med., Inc.*, 304 F.3d 804, 806 (8th Cir. 2002); *id.* at 809 (Bye, J., concurring in relevant part); *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1, 6 (Wis. 1993).

(approving restitution of contingency fee paid to attorney out of subsequently reversed judgment); *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 743 F. Supp. 2d 1136, 1140 (C.D. Cal. 2010) (ordering restitution after contract was held to be non-binding); *Gerald M. Moore & Son v. Drewry & Assocs.*, 945 F. Supp. 117, 119 (E.D. Va. 1996) (awarding restitution after reversal of negligent-performance-of-contract tort judgment); *Winnett v. Caterpillar Inc.*, Nos. 3:06-cv-0235, 3:06-cv-1113, 2011 WL 2910726, at *1–2 (M.D. Tenn. June 24, 2011) (denying restitution of funds paid by defendant under subsequently reversed judgment).

Thus, Chesapeake's cases involving restitution "where the dispute concerned a contract" (Br. 25) do not even begin to establish that restitution eviscerates contract rights—much less to benefit an unsuccessful appellee at the expense of a successful appellant.

Chesapeake also contends that restitution has been awarded after appellate reversal "in a myriad of circumstances" and claims that it has been "adopted as the standard in at least six Supreme Court decisions [and] many decisions of this Court." Br. 23. None of those cases—literally, not one—holds that restitution displaces a contract right. And, as the district court correctly explained (SPA30), the main Supreme Court cases cited by Chesapeake (Br. 23 n.1) are regulatory rate-setting cases. None addresses—much less purports to displace—a contract remedy.[4]

Bedford notwithstanding, the Second Circuit cases Chesapeake cites (Br. 23 n.2) likewise have nothing to do with contracts. The Second Circuit case Chesapeake featured most prominently below, *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999), and cites again here, involved a claim by the Internal Revenue Service to proceeds derived from a race horse where the district court had incorrectly invalidated the government's tax lien. It has no bearing on a contract claim, and the rest of Chesapeake's string-cited cases are likewise inapposite.[5]

In the absence of any case law to support its position, Chesapeake is asking this Court to adopt a new, unprecedented rule of federal common law that allows a

[4] Chesapeake argues that "restitution after reversal" can "displace rights under state law" (Br. 29) and, to that end, devotes substantial space to *Atlantic Coast Line Railroad v. Florida*, 295 U.S. 301 (1935). But, far from "mak[ing] clear that restitution after reversal occupies the entire field" of post-reversal remedies (Br. 31), that decision holds only that a court may decline to award restitution if a party chooses to sue for restitution instead of suing under state law. The Court did not hold that restitution claims *preempt* state-law claims and remedies following declaratory judgment actions filed in federal court, much less that restitutionary remedies preempt specific *contract* rights.

[5] Chesapeake cites a host of non-contract cases at the start of its argument (Br. 21–24) and elsewhere (*e.g.*, Br. 39–40, 42 n.2). Even a cursory review of these opinions reveals that they are irrelevant to the question whether an overturned federal district-court declaratory judgment overrides state-law contract rights. Indeed, these cases primarily involve a successful appellant requesting restitution for itself, *not* an unsuccessful appellee (like Chesapeake) attempting to use its reliance on a reversed declaratory judgment as a defense to a state-law claim.

restitution remedy to extinguish a contract right. But every scrap of common law holds that, when a valid contract governs a dispute, the contract—not restitution—dictates the parties' rights and remedies. And the principle of restitution Chesapeake invokes is intended only to protect successful appellants, not as a means to prevent them from obtaining full relief. The district court appropriately rejected Chesapeake's theory.

II. THE CONTRACT UNAMBIGUOUSLY REQUIRES CHESAPEAKE TO PAY THE MAKE-WHOLE AMOUNT.

Chesapeake argues in the alternative that, even if the contract applies, it does not require payment of the make-whole amount. That is not a serious argument. Chesapeake redeemed the bonds on May 13. The supplemental indenture sets the price for a May 13 redemption: the make-whole amount. Chesapeake must therefore pay the make-whole amount. Chesapeake's efforts to avoid the clear terms of the contract are unavailing.

A. Chesapeake Breached The Indenture By Failing To Pay The Contractually Specified Make-Whole Amount For A May 13 Redemption.

As this Court held, Section 1.7 provided only "two elective options for early redemption." *Chesapeake II*, 773 F.3d at 112. Section 1.7(b) provided the first option: "early redemption of Notes at the [par price] during the Special Early Redemption Period," which ended on March 15. *Id*. Section 1.7(c) provided the second option: "early redemption of Notes after the Special Early Redemption

Period"—after March 15—"at a substantially higher 'Make-Whole Price.'" *Id*. As the district court explained, the contract was "*comprehensive* as to the two types of redemptions that may occur," covering the entire "universe" of redemption dates. SPA21.

There is no dispute that Chesapeake redeemed the 2019 Notes on May 13. And there is no dispute that May 13 falls within the time period unambiguously defined by Section 1.7(c). The indenture therefore just as unambiguously requires that Chesapeake pay the make-whole amount. Because Chesapeake should have paid the make-whole amount but only paid par, Chesapeake breached the contract and owes the contractually prescribed amount. *See Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir. 2007) (describing claim "to recover money that the breaching party agreed to pay under the contract" as claim for general contract damages under New York law); *Vedder v. Leamon*, 70 A.D. 252, 254 (N.Y. App. 3d Dep't 1902) ("[T]he contract price . . . must determine the amount to be recovered."). That is, the indenture provides for only two means of redemption. Given that par redemption was not available when Chesapeake redeemed, the make-whole provision must apply. There is simply no "third option."

Black-letter contract principles confirm this conclusion. *First*, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002). The supplemental indenture fits that bill. Section 1.7(c) is complete, clear, and unambiguous about the consequence of a May 13, 2013, redemption.

Second, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties." *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010). But Chesapeake's argument for an extra-contractual remedy—that is, a redemption price found nowhere in the contract—would do just that, adding a new contract term good for this redemption and this redemption only.

Third, the "underlying" theory of contract damages is "to make good or replace the loss caused by the breach of contract." *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C.*, 692 N.E.2d 551, 553 (N.Y. 1998). Chesapeake's May 13 breach was not the redemption—which was authorized—but the failure to pay the prescribed make-whole amount. As the district court recognized, "[a]n investor could realistically not have anticipated [a] 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." SPA24. The district court's award of contract damages compensates the bondholders for the loss they experienced on May 13. These circumstances are no different than if Chesapeake simply redeemed one day, one month, or one year after the March 15 deadline.

Fourth, after a breach of contract, it is the *non-breaching* party (not the *breaching* party) that gets to choose whether to continue performing under the contract or whether instead to cancel the contract and sue for damages. *See Marvel Entm't Grp., Inc. v. ARP Films, Inc.*, 684 F. Supp. 818, 819 (S.D.N.Y. 1988). Chesapeake gets that rule backward. By Chesapeake's own admission, its alternative remedy involves "[r]eturning the note holders to the economic equivalent of holding the Notes." Br. 38. But contract law gives that choice to the *non-breaching* party. *See Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 667–68 (S.D.N.Y. 1996) ("The non-breaching party faces two options: it may either continue to perform under the contract or it may terminate the contract."); *cf. Zigman v. Rosen*, 519 N.Y.S.2d 393, 395 (N.Y. App. 2d Dep't 1987) (party cannot rescind a choice between two elective methods of performance).

In short, Chesapeake promised the noteholders in the supplemental indenture that it would pay the make-whole amount following a May 13 redemption. Chesapeake failed to do so. Basic contract law requires Chesapeake to keep its promise.

B. Chesapeake's Voluntary Redemption Of The 2019 Notes Was Not An "Unauthorized Prepayment" And Was "At Its Option."

In a bid to avoid the plain terms of the contract, Chesapeake characterizes its May 13 redemption as an "unauthorized prepayment" of the bonds, and says that a court can apply a make-whole provision to an "unauthorized prepayment" only if an indenture is "clear and unambiguous." Br. 45. Chesapeake then argues that the supplemental indenture does not pass the "clear and unambiguous" test because the indenture only allows Chesapeake to redeem "at its option." Br. 52. Chesapeake is wrong at every turn.

1. <u>Chesapeake's "Unauthorized Prepayment" Construct Is A Fiction.</u>

Chesapeake hopes to avoid the contractually specified consequences of its decision to redeem by recasting that decision as an "unauthorized prepayment." That is false. There was nothing "unauthorized" about Chesapeake's decision to redeem. As explained at length above, the contract unquestionably permitted redemption on May 13, and Chesapeake unquestionably chose to redeem the bonds. Indeed, Chesapeake voluntarily redeemed in the face of the Trustee's appeal and the district court's warning that the make-whole amount might be due if Chesapeake went forward with the redemption and the Trustee's appeal succeeded. Chesapeake voluntarily redeemed the 2019 Notes, plain and simple.

2. <u>No "Clear And Unambiguous" Standard Applies To Chesapeake's Voluntary Redemption.</u>

According to Chesapeake, "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 under the relevant circumstances." Br. 50 (emphasis added). This argument fails, for two independent reasons.

First, New York law does not apply a "clear and unambiguous" standard to make-whole provisions in the context of voluntary redemptions. To claim otherwise, Chesapeake cherry-picks terms of art from *bankruptcy* law.

The ordinary rule governing redemptions is simple. If a borrower wants to prepay a loan, "the prepayment provision provides the purchase price for the borrower's option." *U.S. Bank Nat'l Ass'n v. S. Side House, LLC*, No. 11-cv-4135, 2012 WL 273119, at *4 (E.D.N.Y. Jan. 30, 2012). But, if a borrower enters bankruptcy and the lender accelerates the debt (or the debt accelerates automatically), the "lender forfeits the right to a prepayment consideration by accelerating the balance of the loan." *Id.*; *see also Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831, 834 (N.Y. Sup. Ct. 2006) (declining to enforce mortgage prepayment penalty in foreclosure). "The rationale commonly cited for this rule is that acceleration of the debt advances the maturity date of the loan, and any subsequent payment by definition cannot be a prepayment." *S. Side House*, 2012 WL 273119, at *4. In that circumstance, the *lender*, not the *borrower*, has exercised an option to accelerate the debt, and the lender thereby forfeits a prepayment premium.

There is an *exception* to that rule where the "clear and unambiguous" language of the indenture applies a prepayment premium even *after* acceleration. 2012 WL 273119, at *4; *see also In re MPM Silicones*, No. 14-22503, 2014 WL 4436335, at *15 (Bankr. S.D.N.Y. Sept. 9, 2014) (stating that a make-whole clause "must be specific if the parties want it to apply even after acceleration of the debt"); *In re Sch. Specialty, Inc.*, No. 13-10125, 2013 WL 1838513, at *1 (Bankr. D. Del. Apr. 22, 2013) (awarding make-whole payment despite acceleration). In that event, the lender may accelerate the borrower's debt *and* demand a make-whole payment.

Chesapeake treats this "clear and unambiguous" exception as if it applied to all redemptions. It does not. It is an exception to a rule that might have applied if "Chesapeake [had] declared or been forced into bankruptcy" and the Trustee had chosen to accelerate the notes. Br. 54. But the undisputed fact is that Chesapeake *voluntarily redeemed* those notes.

To argue otherwise, Chesapeake relies on *In re Premier Entertainment Biloxi LLC*, 445 B.R. 582, 590 (Bankr. S.D. Miss. 2010) (Br. 48–49). That is a bankruptcy decision, and distinguishable on that basis alone for the reasons stated above. In any event, the decision does not advance Chesapeake's position. There, the borrowers' reorganization plan (which repaid the noteholders) constituted a breach of a no-call provision in the indenture. The noteholders suggested that damages should be based on the amount the borrowers would have paid had they exercised a contractual right to "defeasance" (*i.e.*, replacing the notes with low-risk government securities). The court declined to apply that measure because the borrowers had not, in fact, attempted to defease the bonds—nor *could* they have, because the indenture *prohibited* the borrowers from exercising defeasance in the event of default. *Id.* at 642. The court therefore applied a different measure of damages.

Thus, *Biloxi* rejected the argument that damages for the breach of the no-call provision should be measured as if the debtors had breached a *different* provision that the debtors lacked the power to invoke. Here, Chesapeake did, in fact, redeem the bonds on May 13, and Section 1.7(c) sets forth the price for a May 13 redemption. *Biloxi* offers no support for ignoring a directly applicable contract remedy.

Second, even if a "clear and unambiguous" standard applied, Section 1.7(c) is clear as can be that redemption on May 13 requires payment of the make-whole amount: "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." A567. Chesapeake nonetheless claims that "[n]either BNYM nor the district court has identified any contractual provision as providing for payment of the Make-Whole Price upon a breach of contract." Br. 53. But the question is not whether the contract demands payment of the make-whole amount upon *any* breach of contract; the question is whether the contract requires payment of the make-whole amount for a redemption on May 13. It plainly does. *See Chesapeake II*, 773 F.3d at 117.

3. Chesapeake Exercised Its Option To Redeem On May 13.

Chesapeake also urges an atextual reading of the supplemental indenture. Because Sections 1.7(b) and (c) state that Chesapeake may redeem the bonds "at its option," Chesapeake claims, it has the "option" to declare *the price* at which it is willing to redeem. Br. 52. Not so.

The words "at its option" immediately precede—and plainly refer to—the words "may redeem." Accordingly, the "option" granted to Chesapeake in Sections 1.7(b) and (c) is whether to *redeem* the bonds; the *price* that Chesapeake must pay for a redemption on a particular date is mandatory, not "optional." SPA27–28. Under Chesapeake's convoluted reading, however, an issuer could redeem a bond on any date, declare the price it chooses to pay, sue the trustee over the right redemption price, and (in effect) cancel the redemption if it lost. That ignores the plain meaning of the contract, defies common sense, and would invite strategic behavior by issuers.

Chesapeake's argument is further foreclosed by *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982). In that case, the bond issuer (UV) adopted a plan to liquidate its assets. After pawning off various assets to various buyers, UV sold what little remained of itself to Sharon Steel. Sharon Steel argued that it was a valid "successor obligor" under the indenture and therefore the bonds would remain outstanding, rather than require payment of a redemption premium that would have been due upon the liquidation of UV. This Court held that Sharon Steel had not become a proper "successor obligor."

On the question of remedy, UV argued that the failure to satisfy the successor obligor clause meant that UV was in default under the indenture, for which the remedy was "acceleration rather than a redemption premium." 691 F.2d at 1053. This Court rejected that argument: "The acceleration provisions of the indentures are explicitly permissive and not exclusive of other remedies." *Id.* The liquidation plan *also* rendered the notes "due and payable," which required payment of the redemption premium. *Id.* UV's conduct therefore triggered both potential remedies—acceleration and payment of the redemption premium—and the Court "s[aw] no bar . . . to the Indenture Trustees seeking specific performance of the redemption provisions where the debtor causes the debentures to become due and payable by its voluntary actions." *Id.* In other words, the available remedies are defined by the breaching party's conduct, and the non-breaching party gets to choose among them.

Moreover, *Sharon Steel* recognized that "[t]he purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity." 691 F.2d at 1053. Here, there is no question that Chesapeake voluntarily satisfied the debt by redeeming the bonds on May 13; it therefore owes the price required by the applicable redemption provision, Section 1.7(c). *Sharon Steel* also held that it would "undermine[] the plain purpose of the redemption provisions to allow a liquidating debtor to avoid their terms simply by failing to take the steps necessary to redeem the debentures, thereby creating a default." *Id.* Here, it would vitiate the purpose of the redemption provisions to allow Chesapeake to avoid Section 1.7(c) by redeeming the bonds on a date covered by that provision but "failing to take the steps necessary" to call it a redemption under Section 1.7(c). Indeed, in *Sharon Steel* the debtor did not formally redeem the notes, but nonetheless was required to pay the redemption premium because it took steps *tantamount* to redeeming the notes. Here, Chesapeake indisputably redeemed the notes. It cannot avoid the contract's redemption premium by saying that it wanted to redeem the notes only in a certain *way*.

Chesapeake has but one response to *Sharon Steel*, and it is no answer at all. Chesapeake argues that the case applies only if a "debtor *intentionally* breached a contract for the purpose of evading the pre-payment premium" in "bad faith." Br. 50, 52. Not only does *Sharon Steel* contain no such limitation; it actually says otherwise. The *Sharon Steel* noteholders, in addition to seeking the redemption premium, asked the district court to disgorge any profits Sharon Steel had made as a result of investing the money that was rightfully the bondholders'. This Court rejected that request because Sharon Steel's and UV's arguments were not "wholly frivolous," and their actions were "not such an abuse of process as to call for" that remedy. 691 F.2d at 1053. This Court's decision to award the redemption premium thus could not have turned on the supposed bad faith of either party.

Sharon Steel's rule reflects a key tenet of contract law, namely that "'[c]ontract liability is strict liability.'" *Restatement (Second) of Contracts* ch. 11, introductory note at 309 (1981); *see BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 396 (S.D.N.Y. 2011). It does not matter if a party *understands* that it is breaching a contract—or whether it claims to be breaching one provision of a contract instead of another. What matters in determining whether there was a breach are the party's *objective* actions, not the party's motives. *Koufakis*, 425 F.2d at 906 ("A breach is a breach; it is of marginal relevance what motivations led to it."). The question here does not turn on whether

Chesapeake intended to evade Section 1.7(c), or whether the district court had issued a declaratory judgment on that point. The question turns on what Chesapeake *did*. And what it did was redeem the 2019 Notes on a day when the contract required payment of the make-whole amount.

Were it otherwise, contract law—and this case in particular—would be a morass. Chesapeake claims that it redeemed the 2019 Notes based on its good-faith reliance on the district court's judgment. But the district court made no factual finding as to Chesapeake's good faith. How would Chesapeake prove its state of mind? Would such an inquiry require a waiver of Chesapeake's attorney-client privilege to determine whether Chesapeake truly believed that it had no risk of paying the make-whole amount or whether it simply thought redemption was worth the risk of reversal on appeal? Contract law does not concern itself with such inscrutable questions, and the existence of a reversed declaratory judgment is no reason to change course.

Finally and in any event, the record forecloses Chesapeake's assertion that it acted in good-faith reliance on the district court's judgment. The district court warned Chesapeake *not* to rely on its ruling, discussing at length the problem that might arise if Chesapeake won in the district court but the Trustee won on appeal. A299–304; *see also* SPA25–28; A856 n.1; A881–82. And the Trustee wrote to Chesapeake after the appeal was filed but before Chesapeake chose to redeem, warning Chesapeake that the Trustee would pursue damages if the company redeemed and the Trustee's appeal succeeded. A850. Chesapeake redeemed the notes anyway. With eyes open, Chesapeake gambled that this Court would affirm. It cannot now escape the consequences.

III. CHESAPEAKE'S "PREEMPTIVE RESTITUTION" REMEDY WOULD EVISCERATE THE PURPOSE OF MAKE-WHOLE PROVISIONS.

Chesapeake repeatedly invites this Court to second-guess the appropriateness of awarding the make-whole amount, claiming that it somehow represents a "windfall" to noteholders. Br. 2, 8. All of this invective is legally irrelevant: The parties agreed that the make-whole amount would be due for a May 13 redemption, and Chesapeake cannot now complain that it is too favorable to noteholders. In any event, Chesapeake's criticism is misplaced. Make-whole provisions are used throughout the bond industry for a number of important reasons. Indeed, Chesapeake's proposed remedy illustrates why parties contract for specific redemption prices or formulas, rather than the wide-ranging analysis of alternative-investment possibilities that Chesapeake urges (and vastly oversimplifies).

A. Make-Whole Provisions Are Bargained-For Terms Providing Measured Flexibility And Certainty.

Make-whole provisions are a "ubiquitous" feature of bond indentures and are "the call feature of choice for corporate bonds." Eric A. Powers & Scott

Brown, *The Life Cycle of Make-Whole Call Provisions* (Midwest Finance Association 2013 Annual Meeting Paper) May 8, 2012, at 1, *available at* http://bit.ly/1SzwbzZ; Frank J. Fabozzi, *The Handbook of Fixed Income Securities* 273 (8th ed. 2012). Chesapeake acknowledges that these provisions are "typical" of bond indentures. Br. 7. They are typical for a reason. They play a crucial role for both issuers and bondholders.

Issuers demand make-whole provisions "to improve [their] financial flexibility." Powers & Brown, *supra*, at 16. If the issuer wants to exit an indenture containing an unattractive contractual restriction, or needs to extinguish debt for some corporate purpose (such as a merger), or otherwise wants to retire a bond series, a make-whole provision provides a clear path to accomplish those objectives. *See* Fabozzi, *supra*, at 270–73. This optionality is valuable to corporate borrowers.

For their part, bondholders rely on make-whole provisions to protect the stability of their investments. If bonds are subject to call at a low cost to issuers, bondholders face losing a fixed schedule of income at the whim of the issuer. Calls impose significant transaction costs on bondholders, which have to evaluate how to reinvest the prematurely returned principal. Make-whole provisions also protect a bondholder's right to hold the bond and realize value from changes in the issuer's credit quality—as the issuer's credit improves, the price of the bond goes up. Make-whole provisions ensure that a bondholder is not deprived of that investment opportunity without acceptable, bargained-for compensation.

Make-whole provisions thus do not produce "windfalls" in the pejorative sense in which Chesapeake uses that term. Rather, they are *designed* to grant some measure of optionality to borrowers and some measure of certainty to bondholders. When the borrower exercises that optionality, the contractually defined compensation is due to the bondholders. In that fundamental sense, it is no different from any other contract provision that sets a price for the exercise of a particular right.

B. Chesapeake's Alternative Theory Is A Morass.

Chesapeake's proposed remedy, by contrast, would replace that bargained-for certainty with a sprawling and highly variable inquiry. According to Chesapeake, the district court should have awarded some amount that approximates "the present value of the [noteholders'] lost interest [under the 2019 Notes] offset by the lower interest they would have earned from entering into similar transactions at the time of the [redemption]." Br. 54–55. Chesapeake claims that "[i]t is not difficult to" conduct its damages analysis (Br. 54), but then makes a series of concessions that belie that assertion.

First, Chesapeake says the noteholders' award should depend on a hypothetical "yield at which Chesapeake could have refinanced" the 2019 Notes *or* at which "the note holders could have reinvested" on the redemption date. Br. 56. Which is it? Is it the former—*i.e.*, the benefit Chesapeake received on May 13 by hypothetically issuing new debt at an interest rate less than 6.775% and paying off the 2019 Notes at the par price with those proceeds? Is it the latter—*i.e.*, the interest the noteholders lost when their payments ended six years early and they had to arrange for an alternative investment with a lower payout? Chesapeake cannot decide. And that's just the tip of the iceberg.

What is the relevant date? Chesapeake suggests looking to "March 2013" (Br. 56), when Chesapeake issued three new series of bonds. But shouldn't the relevant date be the redemption date, May 13? Or should the date instead be some number of days *after* May 13, to account for the noteholders' inability to reinvest immediately? Chesapeake does not say.

Assuming those questions can be answered, how does one calculate this hypothetical yield? Chesapeake suggests a large spread of "about 4% to more than 5%" (Br. 9) and estimates that it owes some amount upward of $100 million "based on the assumption" that 5% is the right number (Br. 16). But is that the right assumption?

To answer that, Chesapeake suggests looking at alternative bond issues, of which "[t]here are several available options." Br. 56. Of course, that is the problem.

Consider, for example, the three series of bonds totaling $1.8 billion that "Chesapeake issued in March 2013 to refinance the 2019 Notes in anticipation of the redemption." Br. 56–57. The bondholders could not *actually* have reinvested the proceeds of the 2019 Notes in those series as Chesapeake hypothesizes—how does one account for the fact that, if the noteholders had tried to purchase $1.3 billion of those $1.8 billion in bonds, it would have driven the price of those bonds through the roof?

And how does one take account of the differences between those March 2013 bonds and the 2019 Notes? The bonds issued in March 2013 featured maturity dates—March 2016, June 2021, and March 2023, respectively—that were materially different from the 2019 Notes. And maturity is a huge factor in the value of a bond (*see* Fabozzi, *supra*, at 4), particularly in the volatile oil-and-gas industry (*see* Chesapeake Energy Corporation, Annual Report (Form 10-K), at 23 (Feb. 27, 2015)). Those March 2013 bonds also had different redemption provisions: Two contained fixed-price redemption provisions, and one contained a make-whole provision like the 2019 Notes. Finally, those March 2013 bonds had widely different coupon rates: 3.25%, 5.375%, and 5.75%, compared to the 6.775% coupon on the 2019 Notes. How does one account for these differences? Chesapeake gives no answer.

Were this exercise not complicated enough, Chesapeake also suggests that "[o]ther outstanding Chesapeake bonds as well as bonds issued by similarly situated energy companies could also provide a useful comparison." Br. 57. Which "outstanding Chesapeake bonds"? Which "similarly situated energy companies"? Exxon Mobil? BP? Chevron? Royal Dutch Shell? Devon Energy? What maturity dates did those bonds have? What coupon rates did they have? Did they have identical call provisions and covenants, or did those differ in material ways? Chesapeake is silent on these points.

What about the fact that the noteholders lost their ability to capitalize on the upside in Chesapeake's credit profile? When an investor purchases a company's high-yield debt, the investor is making a bet that the company's fortunes will improve, thus causing the company's already-issued debt to trade at a higher price. Had the 2019 Notes not been redeemed, this opportunity could have paid off handsomely for the noteholders. When Chesapeake issued the 2019 Notes, the market demanded a high coupon rate from Chesapeake because it was in an over-leveraged position. But, by June 2014, Chesapeake was executing a turnaround plan, and its cost of capital had dropped. At that point, the noteholders would have been able to sell their bonds and realize a total potential profit above par ($325 million) that approaches the make-whole amount. Chesapeake says that using a hypothetical "yield" instead of an interest rate will capture this consideration (Br. 56 n.12), but it does not explain how that could be so.

Similarly, if Chesapeake had attempted to repurchase the entire bond series on the open market—as opposed to the mandatory redemption it effected—the price of the 2019 Notes would have skyrocketed. In that scenario, Chesapeake might have paid a premium approaching the make-whole amount in order to retire this debt. But Chesapeake does not suggest how its analysis could take this into account.

These considerations, and many others, expose Chesapeake's proposed damages analysis as a morass.[6] It is precisely to avoid difficult and complicated inquiries that lenders and borrowers negotiate redemption prices for bonds in advance. Indeed, the market could not function without such certainty. Bonds trade hands thousands of times per day, based on clearly stated and reliably enforced financial terms. Chesapeake's rule is anathema to the predictability on

[6] Chesapeake cites *TIAA v. Ormesa Geothermal*, 791 F. Supp. 401 (S.D.N.Y. 1991), and *TIAA v. Coaxial Communications*, 799 F. Supp. 16 (S.D.N.Y. 1992), as evidence that its proposed analysis is "not difficult" (Br. 54). But those cases involved private term loans—a much simpler instrument than a high-yield, liquid corporate bond. Moreover, in the *TIAA* cases, the prospective borrowers breached a commitment letter before the loan was funded, and thus before a contractual make-whole provision was in force. 799 F. Supp. at 18.

which the bond market depends, and it illustrates why make-whole provisions exist and must be enforced according to their terms.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: February 8, 2016

Respectfully submitted,

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

ROY T. ENGLERT, JR.
MARK T. STANCIL
JEREMY C. BARON
DANIELLE B. ROSENTHAL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, DC 20006
(202) 775-4500

Counsel for Defendant-Appellee
The Bank of New York Mellon Trust Company, N.A.

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I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,983 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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Dated: February 8, 2016

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

CERTIFICATE OF SERVICE

I hereby certify that, on February 8, 2016, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF.

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