13-cv-1893

In the United States Court of Appeals for the Second Circuit

CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

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

BRIEF FOR APPELLANT

ROY T. ENGLERT, JR.
MARK T. STANCIL
ERIN C. BLONDEL
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-Appellant
The Bank of New York Mellon Trust Company, N.A.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant 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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

PRELIMINARY STATEMENT

When Appellee Chesapeake Energy Corporation marketed a $1.3 billion note offering in February 2012, and for a year thereafter, it repeatedly and consistently told investors what to expect: The indenture stated that the notes could be redeemed at their par value (a price favorable to the company) only during a defined period, suitably titled the "Special Early Redemption Period," that ended on March 15, 2013. Redemptions after that period could be made only at the "make-whole price," which was designed to compensate noteholders for the loss of future interest. Chesapeake was required to give bondholders 30-60 days' advance notice of any redemption, so February 13, 2013, was the last day to notify bondholders of a par redemption on March 15.

By February 13, 2013, the cash Chesapeake had hoped to use to retire the debt hadn't fully materialized, and Chesapeake hoped to delay refinancing the notes. So Chesapeake changed its tune. Well after the February 13 notice deadline had passed, Chesapeake announced that the March 15 *redemption* deadline was merely a *notice* deadline and that the company therefore could redeem at par on May 14, 2013, by giving a 60-day notice on March 15.

The district court held that Chesapeake's reinterpretation of the indenture was *unambiguously* correct. Yet the court conceded that reaching that conclusion required that the word "redeem" not be given its ordinary meaning, not be

interpreted consistently with industry usage, not be interpreted consistently throughout the indenture, and not even be interpreted consistently within the same indenture provision. Settled principles of contract interpretation compel the opposite result: The indenture unambiguously *forbade* at-par redemption after March 15.

The district court held in the alternative that the extrinsic evidence resolved any ambiguity in Chesapeake's favor. This ruling rested entirely on testimony regarding secret, undocumented phone calls between Chesapeake and its underwriter, Bank of America Merrill Lynch (BAML). The district court concluded that BAML was somehow a proxy, such that those undisclosed phone calls were binding on investors. But underwriters work *for* issuers and get paid handsomely *by* issuers to market their securities to investors. That is particularly true here: The underwriter marketed the notes only on a "best efforts" basis and had no obligation to purchase the notes if investor demand was insufficient. Investors cannot know what an issuer and an underwriter might discuss in late-night phone calls. Such evidence cannot be legally relevant to—let alone control—the meaning of the indenture to which the underwriter is not a party.

Aside from self-serving testimony and recollections about secret phone calls, literally every shred of disclosed extrinsic evidence—every statement Chesapeake made to investors, the SEC, and the rating agencies for a full year; the

underwriter's audio-recorded investor conference call; the underwriter's marketing outline for its sales force; even Chesapeake's investor-relations website and internal treasury reports—confirmed that March 15, 2013, not May 14, was the last day the notes could be redeemed at par.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331(a) and entered a final judgment on May 8, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the parties' supplemental indenture—which defined a Special Early Redemption Period during which Chesapeake "may redeem" bonds at par—unambiguously allow Chesapeake to redeem its bonds at par only during that defined period, or did the indenture require Chesapeake merely to give *notice* of a planned redemption during the defined period and thereby allow at-par redemption after the Special Early Redemption Period ended?

2. If the supplemental indenture is ambiguous, did the district court err by considering extrinsic evidence of what Chesapeake and a nonparty believed the indenture meant but did not communicate to the other party, Appellant The Bank of New York Mellon Trust Company, N.A. (BNYM), or to the investors who purchased the bonds—and which contradicted its SEC filings and other public

statements—with the result that any ambiguity must be resolved through course-of-performance evidence, which overwhelmingly refutes Chesapeake's interpretation, or through the *contra proferentem* canon of construction?

STATEMENT OF THE CASE

On February 20, 2013, Chesapeake asked BNYM whether the notes were still callable at par. BNYM responded that Chesapeake's proposed at-par redemption would be untimely because the Special Early Redemption Period ended on March 15, the supplemental indenture required notice at least 30 days before redemption, and thus notice had to have been given by February 13. On March 8, 2013, Chesapeake filed suit seeking a declaratory judgment that it was required only to give *notice* of redemption (not redeem) within the Special Early Redemption Period.

On March 14, 2013, the district court (Engelmayer, J.) refused a preliminary injunction. The next day, Chesapeake issued a notice of at-par redemption, setting May 13 as the redemption date. The court conducted a three-day bench trial. On May 8, the court entered a declaratory judgment that Chesapeake's planned redemption was timely under the supplemental indenture. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, No. 13 Civ. 1582 (PAE), 2013 WL 1890278 (S.D.N.Y. May 8, 2013). BNYM filed a notice of appeal on May 11, and Chesapeake purported to redeem the bonds at par on May 13.

STATEMENT OF FACTS

A. Chesapeake Issued Bonds It Could Redeem At Par Until March 15, 2013.

Chesapeake is a publicly traded oil-and-gas corporation. In early 2012, it badly needed cash. A-521, 1125. Chesapeake hoped to generate cash by selling assets during 2012, but those sales were expected to take many months. A-930, 1125.

To ease its cash crunch, in February 2012 Chesapeake issued $1.3 billion in notes, due in 2019. Since Chesapeake hoped to generate significant cash from asset sales during 2012, the notes gave Chesapeake a defined period that ended on March 15, 2013, to redeem the notes at par (the principal amount) plus accrued interest. A-1125-29. After that window closed, Chesapeake could redeem the bonds only at a make-whole price (par plus the present value of the lost future interest payments to maturity) plus accrued interest. A-1126.

The bonds were governed by a 2010 Base Indenture, under which Chesapeake had issued several bond series, and the Ninth Supplemental Indenture, drafted for this issuance. Both agreements were between Chesapeake as issuer and BNYM as indenture trustee. BAML, the lead underwriter marketing the bonds, was never a party to either agreement.

This case turns on the meaning of Section 1.7 of the Ninth Supplemental Indenture, which governed redemption of the bonds and provided, in relevant part:

> (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.

A-730 (emphasis added).

Specifically, this case concerns the at-par redemption window established by Section 1.7(b). The first part of the first sentence of that subsection—the only sentence purporting to state an at-par redemption period—provided that "[a]t any time from and including November 15, 2012 to and including March 15, 2013 (the 'Special Early Redemption Period')," Chesapeake "may redeem the Notes" at par "plus accrued and unpaid interest" as of "the date of redemption." *Ibid.* The rest of Section 1.7(b) further restricted when and how Chesapeake could redeem at par. The remainder of the first sentence required "that, immediately following any redemption of the Notes in part (and not in whole)," Chesapeake must leave at

least $250 million in principal outstanding. *Ibid.* The next sentence did not cross-reference or otherwise purport to alter the meaning of the first sentence but did dictate when Chesapeake had to give notice of a planned at-par 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 during the Special Early Redemption Period." *Ibid.* Section 3.04 (and other incorporated sections) of the Base Indenture required Chesapeake to give notice 30-60 days before a redemption. A-338-39, 730.

Section 1.7(c) picked up where 1.7(b) left off—with redemptions occurring "[a]t any time after March 15, 2013." After that date, the notes could be redeemed only at "the Make-Whole Price plus accrued and unpaid interest to the date of redemption." A-730.

B. The Issuance

Chesapeake issued the bonds on Monday, February 13, 2012, in the total face amount of $1.3 billion. The bonds offered a 6.775% coupon and matured on March 15, 2019. BAML, the lead underwriter responsible for marketing the bonds, acted on a best-efforts basis, which meant that it did not promise to

purchase the notes if investors did not buy them.[1] Rather, Chesapeake secured binding purchase commitments from investors before the notes were issued. A-947. BNYM was the indenture trustee.

Chesapeake and BAML launched the notes in a one-day "drive-by" offering, A-226, announced in Chesapeake press releases and Bloomberg news reports, A-947-48, 988. The Bloomberg reports described the at-par redemption feature, explaining that the notes were "[c]allable" at par from "November 15, 2012, through March 15, 2013." A-991-92. BAML produced a sales-force memo outlining the issuance. That memo explained 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." A-506.[2] Other sections of the memo reiterated that the bonds were callable at par until March 15, 2013. A-505. And the memo calculated rates of return for assumed at-par redemptions on November 15, 2012, and March 15, 2013; there was no such calculation for at-par redemption in April or May 2013. A-507. BAML internal e-mails similarly informed employees that the issuance

[1] A "best-efforts" underwriter contrasts with a "firm commitment" underwriter, which agrees to buy the bonds and bear the risk of loss on them if there is insufficient investor demand for the offering. *See infra* Part II.A.2.

[2] "T+50" defined how to calculate the present value of future interest payments in a make-whole redemption.

could be redeemed at par until March 15 and at the make-whole price thereafter. A-472-73.

On the morning of issuance, a Bloomberg "blast" told investors that Chesapeake would conduct an investor call about the bonds, referred to as a "Road Show," at 11 a.m. The blast reported that the notes were "callable" at par "11/15/12 – 3/15/13" and redeemable at the make-whole price "3/16/13 and thereafter." A-994.

The Road Show was led by Lex Maultsby, BAML's lead banker on the transaction, and Domenic Dell'Osso, Chesapeake's CFO. Maultsby opened by describing the bonds' terms, especially the at-par redemption window. "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 . . . ." A-537, 1261. BAML also provided potential investors on the call with a PowerPoint deck that described the redemption periods as: "11/15/2012 to 3/15/2013 – Callable at Par ('Special Early Redemption')" and "3/16/2013 and thereafter – Callable at Make-Whole Premium (T + 50)." A-513.

The offering was oversubscribed. SPA-39. By 3 p.m., BAML and Chesapeake had commitments to buy $1.6 billion of notes—well above the $1 billion the company had originally planned. A-226, 948-49. Later that day—*after*

investors had committed to purchase the entire issuance—BAML executed its underwriting agreement with Chesapeake. SPA-39.

BAML announced the successful offering in an internal e-mail and to Bloomberg. Those announcements stated that the bonds were callable at par "11/15/12 – 3/15/13" and redeemable at make-whole cost "3/16/13 and thereafter." A-547-53, 557-58. Bloomberg entered that information into its terminal system, accessible by 300,000+ subscribers. A-261-62. Through February 19, 2013, Bloomberg terminals continued to report that par redemption had to be completed by March 15, 2013. A-262.

Ratings agencies also publicized the issuance. Standard & Poor's issued reports—reviewed and approved by Chesapeake's treasury staff—stating that the "notes could be redeemed at par prior to mid-March, 2013." A-509-11, 538-41; *see also* A-1002.

No document or statement mentioned par redemption in May 2013—or any time after March 15. No document or statement indicated that March 15 was a notice deadline rather than a redemption deadline. For a full year after the issuance, Chesapeake's website, public SEC filings (including its 10-K filed March 1, 2013), and public statements during investor calls stated that that the bonds could be redeemed at par "to and including March 15, 2013." A-793-94, 821, 839, 940-41. Its internal treasury reports, manuals, and e-mails said likewise. A-795-

802, 841-53, 863-64. One report even clarified, "The make-whole optional redemption terms . . . take effect after 3/15/2013." A-864. Chesapeake's financial projections similarly relied on the "working assumption" that Chesapeake would redeem at par by March 15, 2013. A-76-77, 80-84, 91-96, 854-62.

C. Chesapeake's Controversy And Lagging Asset Sales

When it issued the notes, Chesapeake was gearing up an ambitious plan to sell up to $14 billion in assets. A-837, 1008. Chesapeake's plan did not go smoothly. Natural gas prices remained low, impairing the company's liquidity. A-1132. The company also became mired in public controversies, lawsuits, and investigations involving its founder and CEO, Aubrey McClendon. A-827, 831-32, 920-24, 937-39. McClendon ultimately announced his retirement in January 2013. A-927.

The planned asset sales were proceeding more slowly—and less lucratively—than anticipated. For example, Chesapeake had projected that it would sell its Permian Basin assets and part of its Mississippi Lime assets for a combined $6-8 billion by September 2012. A-1008. The company sold only a portion of its Permian Basin stake for about $3 billion in September and October 2012. A-930. The company announced the Mississippi Lime sale on February 25, 2013, and was to receive just $1.02 billion in the second quarter of 2013—well after the SERP closed. A-929. As 2012 ended, Chesapeake had far less cash than

it had planned when it issued the notes with the hope of redeeming them during the at-par window.

D. Chesapeake's Deliberately Delayed Notice Of Redemption

Short on cash, Chesapeake hoped to refinance the notes by issuing new bonds at "the end of the Special Early Redemption Period." Dell'Osso Decl. ¶ 4, Mar. 11, 2013, Dkt. 5. But Chesapeake wanted to wait to issue the at-par redemption notice until after it announced the Mississippi Lime sale on February 25 and issued its annual report on March 1. *Ibid.* The company believed that delaying notice and redemption would "lower[] the interest rate at which our refinancing would be priced in the market" and "make that process simpler and more efficient." *Ibid.*

Chesapeake's need to refinance was no secret, but outside observers recognized March 15 as the at-par redemption deadline. On January 8, Credit Suisse e-mailed Chesapeake personnel to propose refinancing given that "the special call provision in your 2019 notes is set to expire on March 15, 2013," and it appeared that Chesapeake would not be able to redeem at par by then. A-869-70. As treasury employees internally debated the proposal, one employee, Caleb Morgret, for the first time suggested that the company could merely give *notice* by March 15 and *redeem* later. A-866. Elliot Chambers, Morgret's supervisor and a key member of the deal team for the note offering, disagreed: "Are you sure about

that? I thought we had to provide notice by Feb 15th and the window closes on March 15th." A-247, 862. Chesapeake contacted Michael Telle, a partner at Bracewell & Giuliani who had represented Chesapeake in connection with the issuance. A-865. Telle asked a second-year associate, Erica Hogan, to respond to Chesapeake's inquiry; Hogan answered that the company was required only to give notice within the SERP. A-865-66.

Until then, Chambers and many of his colleagues understood that Chesapeake could redeem at par only until March 15. A-76, 98-99, 120-25. But a few days later, Chambers asserted, "what might not be clear, is that the March 15 date is a notice date. . . . This means that we can realistically assume that the notes can be called up to approximately May 14th of this year." A-874.

Chesapeake then revised its financial planning. In late January, treasury employees changed an internal draft shelf indenture to report, for the first time, that the notes included a "[p]ar call *notification* window 11/15/12 – 3/15/13." A-876-82 (emphasis added). On February 17, Treasurer Jennifer Grigsby sent a draft board presentation outlining refinancing options, reporting that par "[c]all notice can be given now through 3/15/13 with actual repayment 30 to 60 days afterwards." A-891-92.

Market observers—unaware of Chesapeake's internal reinterpretation of the redemption provision—continued to understand that Chesapeake's at-par

redemption window closed on March 15 and that the company therefore had to give notice of at-par redemption by February 13. On February 5, Barclays sent Chesapeake a refinancing proposal observing that "the end of the special redemption period for the 2019 Notes is fast approaching (ends March 15, 2013)" and that Chesapeake would "need to issue a call notice by February 13, 2013, in order for the redemption to settle within the special call period." A-885. Trading prices for the 2019 notes showed on February 20 that the market understood that the deadline for noticing par redemption had passed. A-86-87, 897. That day, a Bank Julius Baer employee asked Chambers to confirm as much; Chambers responded with Chesapeake's new position that March 15 was the *notice* deadline. A-893-94.

Also on February 20, Chesapeake notified BNYM for the first time that it planned to redeem at par *after* March 15. A BNYM employee initially told Chambers that she accepted Chesapeake's position, but after consulting with counsel BNYM explained that at-par redemption after March 15 would be untimely. SPA-5; A-32.

E. The Lawsuit

On March 8, Chesapeake sued BNYM, seeking a declaration that Chesapeake's par redemption would be timely. A-35. Chesapeake argued that the second sentence of Section 1.7(b) permitted Chesapeake to give *notice* of an at-par

redemption by March 15 and to redeem up to 60 days later. A-44-45. BNYM countered that the first sentence of 1.7(b) set March 15 as the at-par *redemption* deadline and 1.7(c) required redemption at the make-whole price after March 15. A-45-47.

The district court denied a preliminary injunction, in part because Chesapeake had not demonstrated a likelihood of success on the merits. A-51, 73. The court held that, although it saw some merit in Chesapeake's interpretation of the notice sentence in 1.7(b), it recognized that BNYM "fairly" and "reasonably" read the first sentences of Sections 1.7(b) and (c) to authorize at-par redemption up to March 15 and only make-whole redemptions thereafter. A-45-46.

On March 15, 2013, Chesapeake issued a notice of redemption at par, setting May 13 as the redemption date. SPA-11. Following expedited discovery, the district court held a three-day bench trial.

Chesapeake relied principally on the testimony of four witnesses who had participated in the issuance of the notes:

- Domenic Dell'Osso, Chesapeake's CFO;
- Michael Telle, the Bracewell & Giuliani partner who represented Chesapeake;
- Stephen L. Burns, a Cravath, Swaine & Moore partner who represented BAML; and
- Lex Maultsby, BAML's lead banker on the transaction.

A-1122, 1135-36, 1149, 1152, 1164-65. Elliot Chambers, Chesapeake's assistant treasurer and another deal-team member, also testified.

Dell'Osso and Maultsby testified that on February 8, 2012, BAML approached Chesapeake with a proposal to reduce the company's short-term cash crunch by issuing bonds that could be redeemed early at par if Chesapeake raised sufficient cash in time. SPA-44-45; A-1125, 1164-65. BAML's initial proposal suggested November 15, 2012, to December 31, 2012, as the par-redemption window. SPA-45; A-383-91. Dell'Osso proposed extending the par call period to a year, but BAML observed that the market might not buy notes on those terms. SPA-46; A-1129-30.

On Friday, February 10, and over the weekend, Chesapeake and BAML drafted the prospectus supplement, which defined the terms of the issuance and was provided to potential investors. Chesapeake and BAML then drafted the supplemental indenture after the launch and sale of the notes. A-1138, 1150-51. As is customary in the bond industry, BNYM (the indenture trustee) did not participate in drafting the prospectus supplement or the supplemental indenture. A-1138-39.

Bracewell & Giuliani sent Chesapeake and BAML a draft of the prospectus supplement on February 10. A-396-408. The cover page—which sets forth the essential terms of a bond issuance—provided that Chesapeake could redeem at par

"[b]etween November 15, 2012 and March 31, 2013" and could redeem at make-whole cost "[a]t any time after March 31, 2013." A-398. BAML's counsel moved the end date from March 31 to March 15 to match the bonds' interest-payment dates, as is customary for cut-off dates between one redemption period and another—a rationale inconsistent with the May 14 redemption date now advocated by Chesapeake. A-409-10, 1154.

At trial, Chesapeake's witnesses sought to explain how the SERP—defined as November 15 to March 15—became (in Chesapeake's view) a mere notice period. Recollections varied. According to Telle, on Saturday, February 11, he spoke to Dell'Osso and others at Chesapeake about making the early-redemption period a notice period. A-1141-42. Dell'Osso did not recall *any* conversations about the notice concept but nonetheless recalled agreeing that Chesapeake could give notice until the end of the redemption period. A-1129-31. Chambers did not recall *any* conversations about making the SERP a notice period. A-104.

Telle also testified to the "themes" of two other conversations. A-195. He said that he mentioned the notice concept to Burns on February 11, but did not otherwise recall the substance of the conversation. A-1142-43. Burns vaguely recalled a call sometime after 8 p.m. on Saturday involving at least one unidentified BAML employee and Dell'Osso. He could not remember whether a Bracewell & Giuliani attorney participated. A-1155-56. Burns's "best

recollection" was that Dell'Osso suggested that Chesapeake could give notice until March 15. *Ibid.* He finished the call with the "understanding" that the callers had agreed Chesapeake could give notice of a par redemption until March 15. *Ibid.*

At 11:31 p.m. on February 11, Bracewell sent a revised draft of the prospectus supplement. Bracewell had added the following statement: "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." A-424-33. Cravath later added that sentence to a "box" summary on page S-8 of the prospectus supplement. A-463-70. Burns and Telle testified that they regarded the proposed notice sentence as implementing the oral understanding that the notes would specify a par-notice period rather than a par-redemption period. A-1142, 1156-57.

Telle recalled that during a call on Sunday evening, February 12, Dell'Osso "said something along the lines of, 'I can redeem by giving notice until March 15th, right?,'" and an unidentified person at "[o]ne of the banks" agreed. A-1143. Maultsby testified only that, during the drafting process, the March 15 deadline was discussed and that he "understood the final language to mean that Chesapeake could issue a notice to redeem the notes at par until that date." A-1166.

BNYM did not participate in any of these weekend conversations. A-192-93, 207. Chesapeake employees did not speak to BNYM about the issuance until Monday. A-140-41.

The final prospectus supplement included the notice sentence in the box and toward the end of the document. A-570, 593. The cover page continued to tell investors, "At any time from and including November 15, 2012 to and including March 15, 2013, we may redeem" the notes at par; "[a]t any time after March 15, 2013," the company could redeem only at the make-whole price. The cover page contained no reference to the notice language. A-561. The prospectus supplement continued to refer to November 15 to March 15 as the Early *Redemption* Period.

After the February 13 launch and sale, Chesapeake, BAML, and their respective counsel drafted the supplemental indenture. On February 14, Bracewell & Giuliani circulated a draft of Section 1.7(b) that read, "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." A-671-76. Telle testified that he proposed adding that language to give "'belt and suspenders' clarity" to an "unusual" notice provision "that could benefit from additional clarity." A-1146. Cravath rejected the new

language, and the parties agreed on the final text—quoted above at page 6—that mirrored the terms disclosed to the market during the February 13 offering. A-694-99.

None of this—the purported conversations between Chesapeake and BAML over the weekend of February 10, Chesapeake's belief that the SERP was a mere notice period, and Telle's view that Section 1.7(b) "could benefit from additional clarity"—was disclosed to investors upon initial purchase or reflected in Chesapeake's subsequent SEC filings.

F. The District Court Decision

On May 8, the district court ruled, agreeing with Chesapeake that the Ninth Supplemental Indenture permitted at-par redemption as late as May 14, 2013, if notice was given by March 15. The court concluded that the text of Section 1.7(b) unambiguously required Chesapeake's construction. Conceptualizing the question as whether Chesapeake's notice of redemption was timely, rather than whether the redemption itself was timely, the court determined that the textual analysis of Section 1.7(b) "properly begins with its second sentence." SPA-22. The court quoted that sentence, observed that it "is the only part of § 1.7 to address the subject of notice," and concluded that "when read in isolation" that sentence "is decisive" as to when notice may be given. SPA-22-23.

The court acknowledged, however, that "[t]he cleanliness of this reading favoring Chesapeake is tarnished . . . when the focus broadens to consider other text within § 1.7(b) and § 1.7(c)." SPA-23. The first sentences of Sections 1.7(b) and 1.7(c) state that Chesapeake "*may redeem*" at par up to March 15 and "*may redeem*" at the make-whole price after March 15. *Ibid.* The court acknowledged that the bond industry understands "redeem" to "refer[] 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." *Ibid.* "[T]he Base Indenture and the earlier supplemental indentures," the court recognized, likewise adhered to the customary meaning of "redeem." SPA-24.

Accordingly, the district court conceded that Chesapeake's reading required rewriting the terms of Section 1.7. "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.'" *Ibid.* "Without this uncommon construction of that phrase," the court acknowledged, "Chesapeake's overall interpretation would be unsustainable." *Ibid.* That is, "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." *Ibid.* But the court determined that the "isolat[ed]" meaning of the second

sentence of § 1.7(b) overcame all other problems with Chesapeake's admittedly "flawed" construction. *See* SPA-25-28.

The district court criticized BNYM's interpretation as "incoherent" and "impractical." SPA-28-29. BNYM explained that the first sentences of Sections 1.7(b) and 1.7(c) unmistakably allowed Chesapeake to "redeem" at par no later than March 15. Section 1.7(b)'s second sentence, BNYM explained, limited that redemption right by requiring Chesapeake to give notice of an at-par redemption within the SERP. As a result, Chesapeake could give notice of at-par redemption as early as November 15 (when the SERP began) and could first redeem 30 days later on December 15; the latest Chesapeake could give notice of at-par redemption was on February 13, 2013, allowing redemption on March 15 (the last day of the SERP). *See ibid.*

The district court called BNYM's reading "a bizarrely backhanded, indirect way of conveying such a simple concept"—if redemption was meant to begin in December, the court stated, Chesapeake could have defined the SERP dates differently. SPA-29. The court also acknowledged, however, that Chesapeake could have "replaced the phrase 'may redeem' in § 1.7(b) and § 1.7(c) with 'may give a notice of redemption' or 'may commence the redemption process'" to give effect to Chesapeake's reading. SPA-25. The court said BNYM's interpretation was "commercially unreasonable" because "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." SPA-30-31. The court therefore concluded that "no other reasonable constructions of § 1.7(b)" existed and held that the agreement unambiguously allowed Chesapeake to give notice of at-par redemption by March 15 and redeem later. SPA-31.

The district court held in the alternative that, even if the indenture was ambiguous and extrinsic evidence could be considered, the drafters intended Chesapeake's construction. The court credited the testimony of Dell'Osso, Burns, Telle, and Maultsby and concluded, in effect, that their assorted recollections of phone calls over the weekend of February 10, 2012, ended the matter. SPA-43-65.

The court denied BNYM's motion *in limine* to exclude such evidence of what Chesapeake and BAML had supposedly said while drafting the agreement but had never communicated to BNYM or bond purchasers. That evidence was legally irrelevant, BNYM contended, because BNYM—not BAML—was a party to the agreement with Chesapeake. SPA-32-43. The district court, however, held that BAML stood in BNYM's and the bondholders' shoes, reasoning that BAML had sufficient incentive to bargain adversely to Chesapeake (its client). The court acknowledged that BAML was only a "best efforts" underwriter on the deal, and that it had received—before issuance—a surplus of commitments to purchase the bonds. SPA-36-40.

Turning to BNYM's evidence, the district court conceded that all of Chesapeake's public statements declared that the at-par-redemption window closed on March 15. Chesapeake's investor website and second-quarter 2012 10-Q had reported that the bonds' par-redemption window ended on March 15 and had not mentioned a notice period. "An objective reader" of Chesapeake's website, the court acknowledged, "could easily conclude that that four-month period ending March 15, 2013 reflects . . . the period for redemptions at par." SPA-67. And the 10-Q "[a]t best" was "imprecise" and "at worst" could "be seen as contradicting Chesapeake's position." SPA-69.

The court acknowledged that Chesapeake's internal communications also contradicted Chesapeake's position. A Chesapeake treasury report "[sat] uneasily alongside Chesapeake's construction" because it failed to mention notice and "impl[ied] that a redemption after March 15, 2013, would be at the Make-Whole Price, not par." SPA-70. A Chesapeake treasury manual likewise stated that par redemption ended on March 15 and specified that notice had to be given 30-60 days before the "redemption date." SPA-71-72. Those statements were "inconsistent with Chesapeake's construction." *Ibid.* Treasury employees, including Elliot Chambers (an active member of the note deal team), believed that March 15 was the redemption deadline, as reflected in Chesapeake documents and

ratings agency reports, approved by Chambers and his staff, declaring a March 15 par-redemption deadline. SPA-72-76.

Finally, the court found that "the marketplace widely failed to identify March 15, 2013 as a notice deadline. . . . [U]ntil 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." SPA-79. The court listed BNYM's "impressively catalogued evidence that various market participants and the financial media regarded March 15, 2013 as the deadline for redemption at par." *Ibid.*

The district court thus acknowledged that Chesapeake had repeatedly stated—internally and externally—that at-par redemption must occur no later than March 15, and the market believed it. But the court dismissed that evidence as a "post-agreement misconception" that could not "be reliably traced back to the drafters of § 1.7(b)." SPA-76. Chesapeake's "errors in reporting the redemption deadline, however regrettable, [did] not" prove what "the personnel at Chesapeake, BAML, Bracewell, and Cravath who together negotiated the provision" intended. SPA-77. And "the perceptions of market participants" were "unrevealing as to the negotiating parties' shared intent." SPA-84.

Chesapeake redeemed the bonds at par on May 13.[3]

STANDARD OF REVIEW

This court reviews the district court's interpretation of bond indentures, including whether any provision is ambiguous, de novo. *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010). This court reviews the district court's factual findings for clear error but its legal conclusions de novo. *Bessemer Trust Co., N.A. v. Branin*, 675 F.3d 130, 135 (2d Cir. 2012).

SUMMARY OF ARGUMENT

I. There is only one reasonable reading of Section 1.7: The notes could be redeemed at par no later than March 15, 2013 (the end of the SERP), and only if advance notice was given during the SERP; after March 15, the notes could be redeemed only at the make-whole price. That is what the provision literally says. Only that interpretation gives each word and each provision its ordinary meaning

[3] Chesapeake financed the redemption with proceeds from new bonds it issued on March 18, 2013. As it had hoped, Chesapeake obtained favorable terms by delaying redemption of the 2019 notes. The new notes were issued in three tranches: $500 million at 3.250%, due 2016; $700 million at 5.375%, due 2021; and $1.1 billion at 5.750%, due 2023. The weighted average coupon for this issuance was approximately 5.1%—substantially below the 6.775% coupon the 2019 notes would have paid to maturity. Chesapeake Energy Corp., Supplement to Prospectus Dated August 3, 2010 (Form 424B2) (Mar. 18, 2013), at S-4 [hereinafter "Chesapeake Prospectus Supplement (Mar. 18, 2013)"], *available at* http://www.sec.gov/Archives/edgar/data/895126/000119312513114552/d499840d424b2.htm.

in light of settled industry custom. Only that interpretation reads words and phrases consistently throughout Section 1.7 and across the Ninth Supplemental and Base Indentures. And only that interpretation yields reasonable results.

The district court's contrary conclusion followed from a fatally flawed premise. The court first assumed that Section 1.7(b)'s at-par *notice* provision defines when Chesapeake was authorized to *redeem*, and then bent the rest of Section 1.7 to that conclusion. In turn, the court conceded that its reading necessitated rewriting "may redeem" as "may commence the redemption process," and that doing so deprived this pivotal term of its customary industry meaning. Those gyrations were unnecessary: Section 1.7 meant what it said and said what it meant. This case can and should end with the plain text of the agreement.

II. Even if this Court holds that Section 1.7 is ambiguous, BNYM's reading must prevail as a matter of law. The district court's analysis of the extrinsic evidence rested entirely on legally irrelevant testimony: purported understandings by one party (Chesapeake) that indisputably were never communicated to the other party (BNYM), much less to investors who ultimately purchased the notes. A contract requires a meeting of the (relevant) minds, not unilateral, unexpressed intention.

It changes nothing that BAML claimed to share Chesapeake's recollection. BAML was acting as Chesapeake's highly compensated agent, not its adversary;

BAML bore no risk in the transaction and sought only to benefit Chesapeake by ensuring that the bonds were sold. Accordingly, there is no legal basis to assume—and unmistakable evidence refutes—that BAML stood in the shoes of BNYM and the bondholders.

Stripped of Chesapeake's self-serving testimony, the extrinsic evidence overwhelmingly supported BNYM's interpretation. For a year, Chesapeake's practical interpretation of Section 1.7 matched BNYM's. Every public statement that Chesapeake (and BAML) made confirmed that the at-par redemption period ended on March 15, 2013. It was not until early 2013 that Chesapeake, facing lagging asset sales and hoping to delay refinancing, pondered reinterpreting Section 1.7(b), and not until February 20—after the real notice deadline had passed—that Chesapeake first revealed that reinterpretation to BNYM or any other outsider.

To the extent any ambiguity remains after consideration of the relevant extrinsic evidence, the doctrine of *contra proferentem* requires construing the supplemental indenture against its drafter, Chesapeake. This case illustrates why that doctrine exists: When deciding to purchase this offering, investors had no practical way of knowing about undocumented weekend phone calls discussing at-par redemption after the SERP. There is no basis to leave investors holding the bag for a mess of Chesapeake's own making.

ARGUMENT

I. THE SUPPLEMENTAL INDENTURE UNAMBIGUOUSLY AUTHORIZED CHESAPEAKE TO REDEEM AT PAR NO LATER THAN MARCH 15, 2013.

BNYM offers the only interpretation of the supplemental indenture that gives terms their plain meaning and makes sense of the entire contract. To reach the contrary interpretation, Chesapeake and the district court were forced to *rewrite* essential terms of Section 1.7, contradict settled industry understanding, interpret language inconsistently across the agreements, and ignore how bond markets work.

A. BNYM's Interpretation Reads Section 1.7 Harmoniously And Gives Words And Clauses Their Plain And Ordinary Meaning.

In contract interpretation, "'[w]ords and phrases are given their plain meaning.'" *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) (quoting *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (1st Dep't 1990)) (alteration in original). Courts must read all contractual provisions "'together as a harmonious whole.'" *Seabury Constr. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63, 69 (2d Cir. 2002) (quoting *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 100 (2d Cir. 1997)). Only BNYM's reading of Section 1.7 adheres to those precepts.

BNYM gives the first sentence of Section 1.7(b) its settled meaning. It provides, "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" at par. A-730. As the district court conceded, "redeem" "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." SPA-23. Thus, the first sentence of Section 1.7(b) straightforwardly specifies March 15 as the last day Chesapeake could exchange the notes for cash at par.

The second sentence of Section 1.7(b) does not supersede the first sentence. Rather, it limits Chesapeake's rights by requiring it to give notice of at-par redemption within the SERP: "The Company shall be permitted to exercise its option to redeem the Notes pursuant to this Section 1.7 so long as it gives the notice of redemption pursuant to Section 3.04 of the Base Indenture during the Special Early Redemption Period." A-730. Thus, that provision imposes a condition—giving notice within the SERP—on the "option to redeem the Notes" defined in the preceding sentence. Critically, the notice sentence does not say that Chesapeake may *redeem* at par after the SERP—it says nothing about the timing of redemption. It simply specifies when Chesapeake *may give notice* of an at-par redemption.

Had Chesapeake wanted to override the clear command that it "may redeem" at par until March 15, it easily could have introduced the second sentence with "notwithstanding" or something similar to make its intent "unequivocal."

Morse/Diesel, Inc. v. Trinity Indus., Inc., 67 F.3d 435, 438-39 (2d Cir. 1995). Indeed, another clause does just that. After providing that Chesapeake may make a *partial* redemption at par, Section 1.7(b) states: "provided, however, that" Chesapeake must leave at least $250 million in principal outstanding. A-730. The notice provision contains no such acknowledgment of conflict with the express March 15 end date for par redemption.

Section 1.7(c)—which governs make-whole redemptions—confirms BNYM's reading. It provides that "[a]t any time after March 15, 2013 to the Maturity Date, the Company, at its option, may redeem the Notes" at the make-whole price. *Ibid.* Section 1.7 thus creates a clear dividing line—March 15—between Chesapeake's par and make-whole redemption periods. This straight-forward understanding gives literal meaning to each sentence and coherent meaning to the entire Section 1.7.

The district court reached the contrary conclusion, starting from a flawed premise and then rewriting essential terms to give them concededly "uncommon" meanings. The court's first mistake was to announce that its "review of the text of § 1.7(b) . . . properly begins with its *second* sentence" and to read that snippet "in isolation" before considering the rest of the provision. SPA-22 (emphasis added). Proper textual analysis does not begin halfway down the page; "English-speaking courts all follow the rule that the written page should be read from top to bottom

and left to right." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1040 n.2 (8th Cir. 2000); *cf. Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010) (statute requires a "linear," "top-to-bottom" reading). Similarly, by declaring that the "the issue in this case [is] the deadline for a *notice* of redemption"—rather than whether par *redemption* was authorized after March 15—the district court *assumed* that the notice provision trumped the indenture's precise definition of the redemption period. SPA-22 (emphasis added).

The court then was forced to rewrite the surrounding provisions of Section 1.7. It acknowledged that "may redeem" in both Section 1.7(b) and Section 1.7(c) could not be given its ordinary meaning. Rather, it must instead "mean 'may *commence* the redemption process.'" SPA-24 (emphasis added). "Without this uncommon construction of ['may redeem']," the court conceded, "Chesapeake's overall interpretation would be unsustainable." *Ibid.*

Altering the terms of other provisions to give surpassing significance to the notice sentence defies the most elementary canon of contract interpretation: "[T]he court must be careful not to alter the terms of the agreement. 'The parties having agreed upon their own terms and conditions, the courts cannot change them and must not permit them to be violated or disregarded.'" *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990). This Court has reiterated that

point often. *E.g.*, *Law Debenture Trust*, 595 F.3d at 468 ("[T]he '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 under the guise of interpreting the writing.'" (quoting *Bailey v. Fish & Neave*, 868 N.E.2d 956, 959 (N.Y. 2007))); *accord 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 125 (2d Cir. 2010); *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 139 (2d Cir. 2000); *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992).

Moreover, the district court's rewriting makes no sense. Section 1.7(c) provides that Chesapeake "may redeem" at the make-whole price "[a]t any time after March 15, 2013 *to the Maturity Date*." A-730 (emphasis added). According to the district court, that sentence really means that Chesapeake "may commence the [make-whole] redemption process" from March 15 until the maturity date. But Chesapeake must give at least 30 days' notice before any kind of redemption. A-338-39. By the district court's reasoning, then, Chesapeake could "commence the redemption process" until the maturity date and redeem notes *after* maturity. Such an "absurd result[]" is "forbidden by canons of construction." *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005).

Even if the district court believed (incorrectly) that the notice sentence and the definition of the SERP were somehow in tension, that was not a reason to deprive "redeem" of its ordinary meaning. "General canons of contract

construction require that 'where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.'" *Seabury Constr. Corp.*, 289 F.3d at 69 (quoting *Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A.*, 760 F.2d 390, 395-96 (2d Cir. 1985)). Only BNYM's reading of Sections 1.7(b) and 1.7(c) gives both provisions effect without rewriting them.

B. Only BNYM's Reading Conforms To Undisputed Industry Custom.

Contract words and provisions must be read in light of industry custom and usage, *Law Debenture Trust*, 595 F.3d at 466-67, particularly when those terms appear repeatedly in bond documents and therefore demand uniform interpretation, *see Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982). Only BNYM's reading gives words and clauses in Section 1.7 their long-established industry meaning, preventing confusion in bond markets and respecting investors' reasonable expectations.

The bond industry uniformly understands "redeem," "may redeem," and "redemption" to have their plain, ordinary meaning—exchanging bonds for cash—not giving notice or "commencing the redemption process." A-1038-39, 1048. And the first sentences of Sections 1.7(b) and (c)—which define when Chesapeake "may redeem" at par and at make-whole cost, respectively—are commonly used

clauses (used, for example, in model provisions issued by the American Bar Association). A-1039.

Accordingly, the "Special Early Redemption Period" must set the outer limits of the period within which Chesapeake *redeems* the notes at par—not when it gives notice of an upcoming redemption. The first sentence of Section 1.7(c) likewise sets the time period in which Chesapeake may *redeem* at the make-whole price. A-953-54, 1038. That is indisputably how a reasonable investor in the industry would have read these terms, and courts must respect that settled understanding. *Law Debenture Trust*, 595 F.3d at 466.

Moreover, only BNYM's reading respects the customary structure of redemption provisions. As BNYM established at trial—and Chesapeake did not dispute—it is standard in the bond industry to authorize redemption at a single price on any particular day. A-1048. Reflecting this one-day-one-price practice, indentures customarily structure redemption periods sequentially based on redemption dates. A-1039. BNYM's reading respects that practice: Par redemption ended on March 15 (1.7(b)) and make-whole redemption began the next day (1.7(c)).

Chesapeake's reading, by contrast, would create overlapping redemption periods. Because redemption can occur 30-60 days after notice, Chesapeake could redeem at par as late as May 14. But Chesapeake also could redeem at the make-

whole price as early as April 15 if it gave 30 days' notice of a make-whole redemption on March 16. Between April 15 and May 14, then, Chesapeake could redeem either at par or at make-whole cost.[4] That contradicts settled industry practice.

The district court observed that parties can choose to depart from industry custom. To be sure, "evidence 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." *Croce v. Kurnit*, 737 F.2d 229, 238 (2d Cir. 1984) (emphasis added); *see also* SPA-26. But the text of the supplemental indenture hardly makes any departure from industry custom clear. The district court conceded that Chesapeake's interpretation required *rewriting* the essential term "redeem" to mean "may commence the redemption process." That is the antithesis of a clear departure from industry practice. *See Howe v. Bank of N.Y. Mellon*, 783 F. Supp. 2d 466, 480 (S.D.N.Y. 2011) (if parties to indenture had intended term "defaulted" to have non-standard meaning "about to default," they would have made it a defined, capitalized term).

In the fast-paced bond market, "[a] large degree of uniformity in the language of debenture indentures is essential to the effective functioning of the

[4] Indeed, Chesapeake's interpretation would allow the company to redeem at different prices on the same day, because Section 1.7 permits multiple partial redemptions. A-730.

financial markets." *Sharon Steel*, 691 F.2d at 1048 (quoting *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 943 (5th Cir. 1981)). Issuers use standard terms because investors cannot spend weeks analyzing idiosyncratic documents: "[U]niformity of the indentures that govern competing debenture issues is what makes it possible meaningfully to compare one debenture issue with another, focusing only on the business provisions of the issue." *Ibid.* If issuers can tacitly redefine "redeem" to mean "may commence the redemption process," the market suffers. Introducing such uncertainty would "vastly increase the risks and, therefore, the cost of borrowing." *Ibid.*

Thus, respecting industry standards is essential. "[A] 'contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.'" *Greenwich Capital Fin. Prods., Inc. v. Negrin*, 903 N.Y.S.2d 346, 348 (1st Dep't 2010) (quoting *In re Lipper Holdings, LLC*, 766 N.Y.S.2d 561, 562 (1st Dep't 2003)). BNYM's reading respects these principles; Chesapeake's does not.

C. Only BNYM Reads Every Word In The Governing Agreements Consistently.

"'[T]he entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency.'" *Morse/Diesel*, 67 F.3d at 439 (quoting *Cruden*, 957 F.2d at 976). Yet Chesapeake's selective reinterpretation of

"redeem" and "redemption" would create confusing, impermissible inconsistencies.

Under Chesapeake's reading, the same words would have different meanings within the first clause of Section 1.7(b). That clause states that during the "Special Early Redemption Period" Chesapeake "may redeem the Notes" at par. But the clause further requires *payment* of "accrued and unpaid interest on the Notes *to be redeemed to the date of redemption*." A-730 (emphasis added). There, "redeemed" and "redemption" must mean exchanging bonds for cash. Otherwise, the indenture purports to address how interest would be *calculated and paid* on notes for which the "redemption process" has merely "commenced." There is no dispute that interest is calculated and paid as of the date when Chesapeake pays the bondholders, not when it gives notice. *See* A-954.

The problem persists in the next clause of the same sentence, which provides that, "*immediately* following any *redemption* of" some but not all notes, Chesapeake must leave at least $250 million in principal outstanding. A-730 (emphasis added). It would make no sense to discuss the quantity of notes that must remain outstanding when Chesapeake has given notice but not yet retired any notes. That is, under Chesapeake's definition of "redemption," this sentence would provide that "immediately following [*commencement of the redemption process*]" Chesapeake must leave at least $250 million outstanding. But all of the bonds

remain outstanding upon mere *notice* of redemption, so it would be unnecessary to require a $250 million minimum. "Redemption" again must have its ordinary meaning.

Similar inconsistencies continue in the rest of the Base Indenture and the Ninth Supplemental Indenture. The district court conceded (SPA-24-25) that the Base Indenture—and every other supplemental indenture Chesapeake has issued—used "redeem" and "redemption" to mean exchanging bonds for cash, not merely giving notice. For example, Section 3.02 of the Base Indenture states that, if the company "elects to redeem" the notes, it must so notify the trustee 45-60 days "before the redemption date." A-338. Section 3.04 requires the Company to give the noteholders a "notice of redemption" 30-60 days "before the redemption date." *Ibid.* Section 3.05 provides that "[o]nce notice of redemption is mailed" the notes "called for redemption become due and payable on the redemption date at the redemption price, plus accrued and unpaid interest to . . . the redemption date." A-339. Section 3.06 requires Chesapeake to "deposit . . . funds available on the redemption date sufficient to pay the redemption price of, and accrued and unpaid interest to, but not including, the redemption date on, the Securities to be redeemed on that date." *Ibid.* It would be nonsensical to read "redeem" and "redemption" in those provisions as signifying notice. Against this consistent, ubiquitous use of those terms in the base indenture, it is implausible that the same terms would

suddenly and silently take on a completely different meaning in the *ninth* supplemental indenture—let alone oscillate between the new and old meanings within the same paragraph.[5]

D. The District Court's Objection To BNYM's Reading Is Mistaken.

The district court's basic objection to BNYM's reading was that Chesapeake "may *not* redeem the 2019 Notes at par until December 15, 2012." SPA-28. That is, Chesapeake was required to give at least 30 days' notice and could not do so before November 15 when the SERP began, making the earliest possible redemption date December 15. The court believed this fact rendered BNYM's reading "incoherent" because drafters who intended that result would have listed December 15 as the first day of the SERP. SPA-28-29. The court's concern is entirely misplaced.

First and foremost, *Chesapeake's reading yields precisely the same result*. No one disputes that the provision requiring Chesapeake to give notice of at-par redemption within the SERP meant that Chesapeake could not give notice until November 15 and therefore could not redeem until December 15. Thus, even Chesapeake's reading has the effect of prohibiting at-par redemption until 30 days

[5] Chesapeake resumed giving "redeem" its ordinary meaning even as it was pursuing this lawsuit: The notes Chesapeake issued in March 2013 expressly distinguish "redeem" from "Notice of Redemption." *See* Chesapeake Prospectus Supplement (Mar. 18, 2013), at S-33, S-34.

into the SERP. A result common to both sides' interpretations cannot be held against only BNYM. In fact, bonds Chesapeake issued in March 2013 (*see supra* n.3) function similarly. They authorize redemption *immediately* upon issuance, but Chesapeake must give at least 30 days' notice—thus, the immediate right of redemption is effectively delayed by the notice requirement. *See* Chesapeake Prospectus Supplement (Mar. 18, 2013), at S-33, S-34 (defining "Optional Redemption" periods and "Notice of redemption" requirements).

Moreover, it is not true—as the district court supposed—that prohibiting at-par redemption for the first 30 days of the SERP is "internal[ly] inconsisten[t]" with affording the term "may redeem" its ordinary meaning. SPA-28. As explained above, the first sentence defines the SERP, during which Chesapeake "may redeem" at par. But it does not foreclose *other* contractual limitations on the exercise of that right. Section 1.7(b)'s requirement that Chesapeake give notice within the SERP is one such limitation; the requirement that such notice be given 30-60 days in advance is another; the requirement that redemption includes payment of "accrued and unpaid interest" is another; the requirement that any partial redemption leave at least $250 million outstanding is yet another. The at-

par redemption right is limited in many ways, but it does not follow that "may redeem" means anything but exchanging the notes for money.[6]

What *cannot* be reconciled with the agreement's text is *extending* at-par redemption for 60 days beyond the explicitly defined end of the SERP. Section 1.7(b) states that Chesapeake "may redeem" at par until March 15, but Chesapeake's reading allows at-par redemption until May 14. The complaint that BNYM's reading could have been accomplished by listing December 15 as the beginning of the SERP goes double for Chesapeake's reading: The drafters could have easily listed May 14 as the end date of the SERP (or including a "notwithstanding" clause in the second sentence). At least BNYM's reading ensures that at-par redemption will actually occur *within* the Special Early *Redemption* Period; Chesapeake's allows at-par redemption to occur *outside* it, on a date (May 14) mentioned *nowhere* in the agreement.

* * *

[6] For the same reason, the district court mistakenly complained that BNYM's reading of "the four-month period identified in § 1.7(b) would not define any process or act." SPA-29. That simply *assumes* that the agreement cannot state a general right of redemption and separately state limitations (temporal or otherwise) on that right—*i.e.*, the court's assertion that the SERP establishes an absolute four-month period for doing something rests on the belief that a prescribed time period cannot be restricted by other provisions. As explained above, that premise is demonstrably false. Accordingly, there is nothing wrong with the fact that BNYM's reading results in a three-month window for at-par redemption.

It is Chesapeake's reading that requires a "process of excruciating contortion"—rewriting terms, flouting industry custom, interpreting the same words differently within the same document and even the same paragraph, and making May 14 a deadline for at-par redemption when that date appears nowhere. SPA-31. On their face, Sections 1.7(b) and (c) unambiguously set a clear deadline for Chesapeake to redeem at par: March 15, 2013. This Court should give those terms their plain meaning.

II. IF THE AGREEMENT IS AMBIGUOUS, THE ONLY LEGALLY RELEVANT EXTRINSIC EVIDENCE PROVES THAT BNYM'S READING IS CORRECT.

If this Court concludes that Section 1.7 is ambiguous, the decision below still must be reversed. The district court's analysis of the extrinsic evidence turned on the testimony of a few Chesapeake and BAML witnesses who claimed to have had phone calls over the weekend of February 10 in which Chesapeake's reading of the agreement was confirmed. Even if that is true, it is undisputed that none of it was *ever* communicated to the other party to the indenture (BNYM), or to the investing public. Unilateral, unexpressed recollections are not competent extrinsic evidence of the *parties'* intent, and the district court erred in denying BNYM's motion to exclude that evidence.

The district court reasoned that BAML stood in BNYM's and the bondholders' shoes when drafting the agreement. But, as numerous courts have

held, underwriters—particularly those acting (as BAML did here) only on a best-efforts basis—are *agents* of issuers, not their *adversaries*. Indeed, far from protecting investors' interests, BAML rejected a proposal to include language in the supplemental indenture that would have clarified the notice provision's operation.

When undisclosed issuer-underwriter evidence is stripped away, the evidence overwhelmingly confirms BNYM's reading. For more than a year after entering into the supplemental indenture, Chesapeake acted as though it could redeem at par only until March 15. That should have been dispositive. Even if ambiguity remained, the district court should have construed Section 1.7 against its drafter—Chesapeake—to prevent bondholders from paying for Chesapeake's poor drafting.

A. What Chesapeake And BAML Privately Discussed Was Not Relevant To Prove The Parties' Agreement.

The district court's erroneous holding that extrinsic evidence showed that Chesapeake could redeem at par after March 15 relied on what four people from Chesapeake and BAML (and their counsel)—not even the entire deal team—purportedly "understood" from private, late-night phone calls the weekend before the offering launched. *See* SPA-57-65. What one party—Chesapeake—thought an indenture meant but did not tell the other party—BNYM—cannot prove an

indenture's meaning. And BAML, *Chesapeake's* agent, did not act as an arm's-length proxy for BNYM and the bondholders.

1. Only Extrinsic Evidence Of What The *Parties* To The Supplemental Indenture—Chesapeake And BNYM—Mutually Understood Is Relevant.

When contract language is ambiguous, "extrinsic evidence may be considered to determine the *parties'* intent." *Gary Friedrich Enters. LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 313-14 (2d Cir. 2013) (emphasis added). That intent must be mutual. One "party's uncommunicated subjective intent cannot supply the ultimate meaning of an ambiguous contract." *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006); *see also, e.g.*, *Padovano v. Vivian*, 629 N.Y.S.2d 844, 846 (3d Dep't 1995) (holding that "[e]xtrinsic evidence of plaintiffs' uncommunicated subjective intent is irrelevant"). Accordingly, only extrinsic evidence of what Chesapeake *and BNYM* understood was relevant to prove the parties' mutual intent. What Chesapeake discussed with a nonparty, BAML, but did not communicate to BNYM cannot prove Section 1.7's meaning.

The fact that BNYM did not help draft the supplemental indenture does not make Chesapeake's undisclosed discussions with nonparty BAML relevant. It means only that extrinsic evidence of the drafting process becomes irrelevant. "[W]here one party has only slight participation in the process by which the

agreement is drafted, the court may decline to consider extrinsic evidence." *Oakgrove Constr. Inc. v. Genesee Valley Nurseries, Inc.*, No. 2002/3675, 2005 WL 3240283, at *5 (N.Y. Sup. Ct. Aug. 1, 2005) (quotation marks omitted); *see also, e.g.*, *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697 (2d Cir. 1998) (refusing to credit evidence of what the drafter of a standard insurance provision intended because the relevant question was the intent of both parties to the particular contract); *Dimino v. Dimino*, 459 N.Y.S.2d 164, 165 (4th Dep't 1983) (affirming exclusion of extrinsic evidence of what the drafter believed because no evidence suggested it was communicated to the other party); *accord* 22 N.Y. Jur. 2d *Contracts* § 157.

These principles are particularly apt when interpreting bond indentures, which "'are . . . not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture.'" *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996) (quoting *Sharon Steel*, 691 F.2d at 1048). To the contrary, the "important parties in interest—the holders of the securities—[are] neither consulted about, nor involved in the drafting of," the governing agreement. *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551 (Del. 2013) (applying *Kaiser* to preferred securities).

"[A]n inquiry into what the parties intended would serve no useful purpose," therefore, "because it would yield information about the views and positions of only one side of the dispute." *Ibid.*; *accord Kaiser*, 681 A.2d at 397 (relying on extrinsic evidence was "not appropriate" because doing so "would reveal information about the thoughts and positions of, at most, the issuer and the underwriter"). Here, the contents of phone calls in which BNYM did not participate—undisclosed until this lawsuit—do not "reflect the 'meeting of minds' of the two parties" to the supplemental indenture, Chesapeake and BNYM. *Kenavan v. Empire Blue Cross & Blue Shield*, 677 N.Y.S.2d 560, 563 (1st Dep't 1998).

2. BAML Cannot Substitute For BNYM And The Bondholders.

The district court described BNYM's argument as "provocative" but concluded that the relevant doctrine is "inapplicable here" because BAML, as underwriter, effectively represented BNYM's and bondholders' interests. "Chesapeake (as issuer) and BAML (as lead underwriter) indeed negotiated the terms of § 1.7(b)," the district court reasoned, and "the negotiations . . . were sufficiently adversarial and arm's-length to guard against the concerns about collusion and unfair surprise that animate the doctrine." SPA-33-34. That conclusion rests on faulty assumptions and contradicts settled authority.

a. The district court fundamentally misunderstood BAML's role as a best-efforts underwriter on this transaction. A best-efforts underwriter acts as a marketing "agent for the issuer." *Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 207, 217 n.17 (1984) (citing 1 L. LOSS, SECURITIES REGULATIONS 172 (2d ed. 1961)). In stark contrast to a firm-commitment underwriting—in which "the underwriter agrees to purchase an agreed upon percentage of the offering irrespective of whether the securities can be sold in the public market," *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 701 (2d Cir. 1994)—a best-efforts underwriter does not agree to buy the bonds in advance. Rather, a best-efforts underwriter agrees only to *try* to sell the bonds for the issuer. 1 L. LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION § 2-A-2, at 110 (6th ed. 2011). Thus, "[a] 'best efforts' distribution is not technically an underwriting." *Sec. Indus. Ass'n*, 468 U.S. at 217 n.17. "[I]t is simply merchandising." LOSS ET AL., *supra* § 2-A-2, at 110. The best-efforts underwriter's compensation reflects that difference: The issuer pays it "an agent's commission rather than a merchant's or dealer's profit." *Ibid.*

This fact fundamentally alters the allocation of risk. Best-efforts underwriters "avoid[] the risk of loss of capital." *Id.* at 110 n.45; *see also, e.g.*, *Jackson Nat'l Life Ins. Co.*, 32 F.3d at 701; *Walk-In Med. Ctrs. Inc. v. Breuer Capital Corp.*, No. 84 Civ. 730, 1987 WL 5769, at *6 n.3 (S.D.N.Y. Jan. 21,

1987). Whereas a firm-commitment "underwriter bears the risk if the offering is undersubscribed," *Jackson Nat'l Life Ins. Co.*, 32 F.3d at 701-02, a best-efforts underwriter does not.

The district court acknowledged that BAML was acting only on a best-efforts basis and that BNYM "is correct that" in "a typical 'best efforts' offering . . . the underwriter does not buy the notes but simply markets them as the issuer's agent." SPA-38. The district court also recognized that Chesapeake's offering "was already oversubscribed with orders from investors seeking to purchase the 2019 Notes" *before* BAML even signed the underwriting agreement. SPA-39. The court nonetheless held that BAML "was exposed to at least *some* degree of economic risk" because "[t]here remained at least the possibility that purchasers would back out" and "BAML had its reputational interest to protect." SPA-38-39.

Not so. It was undisputed that BAML had legally binding orders to purchase the 2019 Notes. If a purchaser "back[ed] out" of its commitment, BAML would sue—and win—under long-settled New York law. N.Y. U.C.C. § 8-113; N.Y. Gen. Obl. L. § 5-701(b); see *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 595 (2001). If that is "risk," what isn't? So too with BAML's "reputational" interest. A car salesman might want to be known for negotiating square deals, but that hardly means that he adequately represents the buyer's interests over the dealership's. If anything, BAML valued its reputation with

Chesapeake, which was paying it more than $3 million for this transaction and, as a frequent bond issuer, had hired BAML on more than 20 recent transactions (and therefore paid it many millions more in fees). A-436-37; *see also* A-421-23.

Tellingly, the district court did not cite any authority holding that best-efforts underwriters negotiate at arm's length with the issuers that hire them. Rather, it cited only two decades-old district court decisions involving *firm-commitment* underwriters and a more recent state case likewise involving a firm-commitment underwriter and addressing whether such an underwriter owes a fiduciary duty *to the issuer*. SPA-37 (citing *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1509 (S.D.N.Y. 1989); *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1541 (S.D.N.Y. 1983); *EBC I, Inc. v. Goldman Sachs & Co.*, 936 N.Y.S.2d 92, 94-95 (1st Dep't 2011)). In none of those cases did the court rely on private discussions between an issuer and underwriter as probative extrinsic evidence of an indenture's meaning. Nor does that authority support the district court's conclusion here that a best-efforts underwriter bears real risk, negotiates at arm's length with an issuer, and therefore stands in the shoes of the indenture trustee and bondholders.

The district court acknowledged that the Delaware Supreme Court in *Kaiser* rejected reliance on extrinsic evidence of internal discussions between a bond issuer and its underwriter. SPA-41 n.27. The district court did not dispute

Kaiser's logic; instead, it tried (unsuccessfully) to distinguish its facts. The district court noted that *Kaiser* involved an ambiguous contract. *Ibid.*; *see Kaiser*, 681 A.2d at 397-98. But Chesapeake's conversations with BAML are at issue *only* if Section 1.7 is ambiguous. The district court said that the *Kaiser* court "was motivated in part by the fact that the ambiguous provision was boilerplate." SPA-41 n.27. But most aspects of Sections 1.7(b) and (c) indisputably *are* standard terms. In any event, *Kaiser* never limited its holding, and the Delaware Supreme Court applies *Kaiser* to non-boilerplate terms. *See Commerzbank Capital Funding Trust II*, 65 A.3d at 543-44.

The fact that BAML supposedly "negotiated" with Chesapeake over certain terms is beside the point. BAML's interest was solely to advise Chesapeake to adopt terms that would get the notes sold and accomplish *Chesapeake's* business objectives. Indeed, this case illustrates why BAML was *not* negotiating on BNYM's or the bondholders' behalf: If the second sentence of Section 1.7(b) is an ambiguous attempt to extend the at-par redemption period beyond the SERP, why didn't BAML seek to clarify it? As explained below, BAML did the opposite, reassuring investors that at-par redemption ended on March 15. Indeed, BAML's counsel put it best: "I view myself as representing the underwriters. Definitely not the noteholders." A-210.

More telling still, BAML's lawyer *rejected* a suggestion to include language that would have clearly expressed Chesapeake's reading. Believing that the supplemental indenture would "benefit from some additional language" explaining the "Special Early Redemption section," Chesapeake's outside counsel suggested adding a statement that giving notice of at-par redemption as late as March 15 would be permissible "'even if such notice is received by Holders or such redemption occurs, following' the Special Early Redemption Period." A-1146. *BAML's lawyer deleted the proposed language.* He explained (to Chesapeake, but not to BNYM) "that from a securities law standpoint" it was better that the supplemental indenture mirror the prospectus supplement that BAML and Chesapeake had issued in connection with the notes' sale. A-1147.

That explanation fundamentally contradicts Chesapeake's position in this dispute: BAML would have had no securities-law concern unless (as was indeed the case) the indenture language it rejected—which would have clearly expressed the interpretation Chesapeake now advocates—would have been materially at odds with how the notes were marketed. Rather than draft the indenture clearly, BAML and Chesapeake chose to sweep the issue under the rug and hope never to be held to account. Surely such calculated conduct precludes any argument that BAML acted on behalf of investors and should be permitted to bind them to an interpretation it chose to obfuscate.

b. If BAML *had* assumed economic risk in this transaction, it still would not have adequately represented bondholders' interests. Even in firm-commitment underwritings, "[t]he lead underwriter's primary concern is maintaining its client relationship with the issuer by accommodating the issuer's desire for minimal restrictions while still providing a product that is marketable by the underwriting group." Martin Riger, *The Trust Indenture as Bargained Contract: the Persistence of Myth*, 16 J. CORP. L. 211, 216 (1991).

As explained above, contracts are objective manifestations of the *contracting parties'* mutual assent. 1 WILLISTON ON CONTRACTS § 4.1, at 322-36 (4th ed. 2007). "[S]ecret, subjective intent is immaterial" precisely because "mutual assent is to be judged only by overt acts and words" between the parties. *Id.* at 325. Even if a firm-commitment underwriter may be adverse in some respects to an issuer when drafting a bond indenture, the underwriter cannot assent for the other party—the indenture trustee. *See Kaiser*, 681 A.2d at 397. Likewise, cases in which the intent of *both original parties* binds third parties miss the mark. *See* SPA-41-42 (citing *BKCAP, LLC v. Captec Franchise Trust 2000-1*, No. 3:07-cv-637, 2011 WL 3022441, at *1-5, *7 (N.D. Ind. July 12, 2011), *aff'd*, 688 F.3d 810 (7th Cir. 2012); *MBL Contracting Corp. v. King World Prods., Inc.*, 98 F. Supp. 2d 492, 497 (S.D.N.Y. 2000)). The fact remains that BAML was never a party to the Ninth Supplemental Indenture.

3. Considering Extrinsic Evidence Of What The Issuer And Its Agent Privately Intended Would Be Unworkable.

The district court suggested that excluding uncommunicated evidence of Chesapeake's and BAML's intent would "reshape the way bond indentures are negotiated." SPA-34. To the contrary, the district court's rule leaves bondholders in an impossible position. They cannot participate in internal discussions between issuers and underwriters. Nor can they demand before investing that issuers and their underwriters summarize the negotiating history of any potentially ambiguous terms lurking in the agreement.

This case vividly illustrates the perils of the district court's rule: How could bond purchasers have known that Chesapeake and BAML had a series of undocumented phone conversations in which they agreed that the notice provision extended the at-par redemption date beyond March 15? Excluding evidence of intent expressed only to a best-efforts underwriter would not change the bond industry, but saddling investors with an unknowable risk surely would.

Moreover, the ability to rely on private conversations with underwriters is a double-edged sword for issuers. If such information is material to the value of a bond issuance, then issuers face securities-law liability for failing to disclose it to the market. Here, Chesapeake relied on undisclosed, undocumented conversations that deprived investors of hundreds of millions of dollars. Such tactics may be in Chesapeake's interest in this case, but most issuers will be far better off if the

adequacy of their financial disclosures is not determined by *post hoc* recollections of conversations with underwriters that were never communicated to the market.

B. Permissible Extrinsic Evidence Overwhelmingly Proved That Chesapeake Had To Redeem By March 15, 2013.

Without evidence of what Chesapeake alone thought, the extrinsic evidence overwhelmingly supported BNYM's reading. Chesapeake's practical construction uniformly confirmed that it was authorized to redeem at par no later than March 15 and could redeem only at the make-whole price thereafter. Investors took Chesapeake at its oft-repeated word.

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done." *IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994) (quoting *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877)). Statements by a party or its employees can prove that a party's practical interpretation was not a mistake but "reflected [its] conscious contemporaneous interpretation of its contractual obligation." *Croce*, 737 F.2d at 235.

From the moment Chesapeake issued the notes, Chesapeake and BAML repeatedly told investors that they could be redeemed at par until March 15 and only at the make-whole price thereafter. Indeed, special attention was paid to this

redemption provision, with no hint of Chesapeake's current reading. Investors were told in the Road Show call that "[t]here'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 . . . ." A-537, 1261. Investors likewise saw a PowerPoint presentation that explained, "11/15/2012 to 3/15/2013 – Callable at Par ('Special Early Redemption')" and "3/16/2013 and thereafter – Callable at Make-Whole Premium (T + 50)." A-513.

BAML issued a memo to its sales force stating 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." A-506. That memo also calculated rates of return assuming at-par redemption on November 15 or March 15.[7] BAML internal e-mails said the same thing, A-471-73, 547-52, and Bloomberg quoted the head of BAML's high-yield group discussing the notes' return profile assuming that par

[7] Tellingly, the notes' pricing was such that investors would have received an annualized yield of 8.00% in the event of a par redemption on March 15, 2013, and 7.00% if held to maturity. A-951. In contrast to these conspicuously round figures, the yield was an odd 7.83% to May 14, 2013, the date Chesapeake now claims was the last possible par redemption date.

redemption would occur in March 2013, A-790. None of those sources said anything about redeeming at par after March 15.

Bloomberg, other media outlets, and ratings agencies also consistently reported that Chesapeake could redeem at par only until March 15. A-538-41, 555-56, 991-94, 1011-33. Chesapeake and BAML were the *sources* of what they claimed at trial were inaccurate or incomplete reports: BAML supplied Bloomberg with the par-redemption descriptions that appeared for more than a year in 300,000+ Bloomberg terminals, A-261-62, 547; ratings agencies invited Chesapeake to correct any factual errors in its draft reports, and Chesapeake approved them without changes. A-509-11, 538-41.

Likewise, Chesapeake's own website, public filings, and public statements never hinted that the company could redeem at par after March 15. On its web page summarizing the company's debt, Chesapeake stated that it could redeem these notes at par "from and including 11/15/12 to and including 03/15/13" and at the make-whole price "at any time after 3/15/13 to maturity." A-793-94. Its second-quarter 10-Q and 2012 10-K both reported that it could redeem at par until March 15, 2013, and said nothing about that being a notice period. A-821, 940-41. Dell'Osso, in an August 2012 investor call, described the par-redemption period the same way. A-839.

Those statements were not accidents. Elliot Chambers—Chesapeake's assistant treasurer and a member of the original deal team—understood that Chesapeake could redeem at par no later than March 15. A-248-49. BAML and Chesapeake approved the issuance based on documents stating that par redemption ended on March 15, without mention of any possibility of redemption in May. A-434-60, 806-13. And BAML's approval memorandum certified that it contained "all material information." A-434. Chesapeake put that understanding into practice: Its internal budgets and forecasts presumed the company would retire the notes in March 2013. A-76-77, 80-84, 91-96, 244-45, 854-62. The company literally banked on BNYM's interpretation.

Chesapeake's internal e-mails and documents tell the same story. Until January 2013, every Chesapeake document said that the company could redeem at par until March 15 and at the make-whole price thereafter. Not one document said anything about redemption after March 15.[8] Chesapeake documents were revised only after Chesapeake confronted slower-than-expected asset sales and wanted to delay refinancing, and a junior associate at Bracewell & Giuliani told Morgret, in

[8] What internal documents said affected what Chesapeake did. Chesapeake's employee, Elliot Chambers, admitted that the company relied on the redemption deadlines in its internal quarterly reports and the financial summary on its website to calculate when it had to give notice. A-243.

January 2013, that Chesapeake was required merely to give notice of par redemption by March 15. *E.g.*, A-876-82.

Thus, Chesapeake's practical construction of the bonds for a full year after the offering told everyone that the company could redeem at par no later than March 15. No public document or public statement issued before February 20, 2013, suggested that Chesapeake could redeem at par as late as May 14. A-188. "Based on the information that" Chesapeake and BAML "provided to the market," "no reasonable investor would have thought that the 2019 Notes could be redeemed at par on any day after March 15, 2013." A-955-56.

And they didn't. "[T]he marketplace widely failed to identify March 15, 2013, as a notice deadline." SPA-79. Investment professionals—Barclays, Credit Suisse, Bank Julius Baer—all understood that the company had to redeem at par by March 15. A-869-70, 885, 893-94. Trading prices for the 2019 notes on February 20 showed that the broader market likewise believed that Chesapeake's deadline for noticing a par redemption had passed. A-86-87, 897. Virtually all of those understandings traced back to Chesapeake's own public statements.

The district court rejected this evidence, however, because Chesapeake's statements and actions could not be directly tied to the four people the court

determined had drafted Section 1.7 (Telle, Burns, Dell'Osso, and Maultsby). SPA-76-77, 84. But that inquiry is too narrow.[9]

Under New York law, "the *parties'* course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention *of the parties*.'" *Fed. Ins. Co. v. Americas Ins. Co.*, 691 N.Y.S.2d 508, 512 (1st Dep't 1999) (quoting *Webster's Red Seal Publ'ns v. Gilberton World-Wide Publ'ns*, 415 N.Y.S.2d 229, 230 (1st Dep't 1979)) (emphasis added). When corporations are contracting parties, courts examine the *company's* conduct and statements, whether or not the particular employees who drafted the agreement were involved. For example, in a paradigmatic practical-construction case, this Court interpreted an ambiguous contract term against a company that had accepted shipments without objection, even though there was no suggestion that whoever accepted the shipments drafted the contract. *See Hyosung Am. Inc. v. Sumagh Textile Co. Ltd.*, 137 F.3d 75, 80 (2d Cir. 1998).

Any other approach would be unworkable. Businesses—particularly large, bond-issuing companies like Chesapeake—have many employees; some negotiate contracts, while others interpret and perform those agreements and reflect their

[9] It is also contradicted by the record. In Chesapeake's second-quarter 2012 earnings call, Dell'Osso himself said that the notes could be called "at par between November 15 of this year and March 15 of 2013" and said nothing about redemption in May. A-839.

terms in SEC filings and investor communications. If companies could practically interpret and publicly present agreements one way for months or years but later disclaim that interpretation by insisting that those actions cannot be directly linked to the agreement's drafters, the doctrine of practical construction would be toothless.

Here, the parties to the supplemental indenture are BNYM and Chesapeake. *All* of Chesapeake's (and its underwriter's) public conduct and statements before the February 13 notice deadline prove conclusively that it could redeem at par no later than March 15.

C. Any Remaining Ambiguity In Section 1.7 Must Be Construed Against The Drafter, Chesapeake.

The district court refused to apply the *contra proferentem* doctrine, which holds that, "[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985). That rule exists because "the language is presumptively within the control of the party drafting the agreement." 2 WILLISTON ON CONTRACTS, *supra*, § 32:12, at 777. The doctrine has particular force when applied to bond indentures. Because the "ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights," issuers are "'better able to clarify unclear bond contract terms in advance so as to avoid future disputes and

therefore should bear the drafting burden that the *contra proferentem* principle would impose upon [them].'" *Kaiser*, 681 A.2d at 398-99 (quoting Dale B. Tauke, *Should Bonds Have More Fun? A Reexamination of the Debate Over Corporate Bondholder Rights*, 1989 COLUM. BUS. L. REV. 1, 89); *see also Sass v. New Yorker Towers, Ltd.*, 258 N.Y.S.2d 765, 768 (1st Dep't 1965) ("[I]f there is an ambiguity in or between the [bond] documents it will be construed against the issuing corporation which created or bears responsibility for such ambiguity." (citation omitted)).

The district court declined to apply the doctrine, concluding that Chesapeake's and BAML's undisclosed discussions on the weekend of February 10 resolved any ambiguity. *See* SPA-84 n.53. As explained above, *relevant* extrinsic evidence proved that Chesapeake practically interpreted Section 1.7 to require it to redeem at par by March 15. That evidence was dispositive in favor of BNYM; to the extent any ambiguity remains, Section 1.7 must be interpreted against Chesapeake. *See, e.g., Kenavan*, 677 N.Y.S.2d at 563; *Dimino*, 459 N.Y.S.2d at 165.

Even if what Chesapeake and BAML discussed on the weekend of February 10 were legally relevant, the most that could be said in the face of Chesapeake's contrary public statements is that the agreement is ambiguous. When contract "terms are ambiguous and there is some extrinsic evidence suggesting an

interpretation contrary to that of the drafter," *contra proferentem* comes into play. *I.V. Servs. of Am., Inc. v. Trustees of Am. Consulting Eng'rs Council Ins. Trust Fund*, 136 F.3d 114, 121 n.8 (2d Cir. 1998). Here BNYM presented more than "some extrinsic evidence" against Chesapeake's interpretation. The district court should have applied *contra proferentem* against Chesapeake and held that Chesapeake could redeem at par no later than March 15, 2013.

CONCLUSION

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

Dated: August 19, 2013

Respectfully submitted,

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

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

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

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,976 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

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: August 19, 2013

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

CERTIFICATE OF SERVICE

I hereby certify that, on August 19, 2013, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by e-mail.

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