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OF THE
STATE OF DELAWARE

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Re: Tang Capital Partners LP v. David Y. Norton, et al
Civil Action No. 7476-VCG

Dear Counsel:

This Letter Opinion contains my decision on the Plaintiffs' Motion for Entry of a Partial Final Judgment. Though I denied a similar motion on August 31, 2012, when I considered the law governing the case to be settled, a recent mandate and subsequent report in *Quadrant Structured Products Co., Ltd. v. Vertin*[1] have convinced me that it is appropriate that the Plaintiffs be given the opportunity to put this matter before the Supreme Court contemporaneously with the appeal in *Quadrant*. Therefore, the Plaintiff's Motion for Partial Final Judgment is granted.

[1] *Quadrant Structured Products Co., Ltd. v. Vertin*, 2013 WL 3233130 (Del. Ch. June 20, 2013) (Report Pursuant to Del. Sup. Ct. R. 19(c)).

A. Background Facts

The Plaintiffs are noteholders of Savient's 4.75% convertible senior notes due in 2018 (the "Notes"), which are unsecured and subject to the terms of an indenture (the "Indenture"). The Plaintiffs filed this action on April 30, 2012 seeking damages and injunctive relief to remedy breaches of fiduciary duty allegedly committed by the directors of Savient Pharmaceuticals, Inc. ("Savient"). The Plaintiffs also sought the appointment of a receiver to wind up Savient, since Savient was allegedly insolvent. Savient moved to dismiss the receivership claim on July 6, 2012. I heard oral argument on the motion to dismiss that claim, on July 23, 2012. Following oral argument, I orally granted the motion to dismiss, finding that the Plaintiffs had contracted away their right to seek receivership through a no-action clause in the Indenture. On July 27, 2012, I issued a Memorandum Opinion explaining my decision to grant the motion to dismiss the receivership claim.[2] The Plaintiffs then requested that my decision be considered a partial final judgment for the purposes of appealing my dismissal. I denied the Plaintiff's request for a partial final judgment on August 31, 2012 because the Plaintiffs had waited a month to ask for a partial final judgment, and therefore "the

[2] *Tang Capital P'rs, LP v. Norton*, 2012 WL 3072347, at *5-7 (Del. Ch. July 27, 2012). Alongside the motion to dismiss the receivership claim, I also decided a motion to dismiss a claim for declaratory judgment that an event of default had occurred under the Indenture. *Id.* at *8. Instead, I granted summary judgment on that Count for the Defendants. *Id.* The Plaintiffs have moved for partial final judgment only with respect to the receivership claim. *See* Pls.' Mot. Entry Part. Final J. 4 n.2.

Plaintiffs'' interest in an immediate appeal . . . no longer constitute[d] a compelling reason for piecemeal appellate review."[3]

Meanwhile, two months before I issued my Memorandum Opinion dismissing the Plaintiffs' receivership claim, Vice Chancellor Laster had decided a similar motion to dismiss in *Quadrant*. In that case, the plaintiff, a creditor of Athilon Capital Corp. ("Athilon"), sued the directors of Athilon for breach of fiduciary duty and waste. Athilon and its directors moved to dismiss the complaint as barred by a no-action clause in the indenture governing the plaintiff's notes. The Court dismissed the Complaint, without oral argument, finding that "decisions in *Lange* and *Feldbaum* [were] directly on point."[4] Quadrant appealed that decision to the Supreme Court. On February 12, 2013, the Supreme Court issued a mandate to Vice Chancellor Laster asking him to explain his decision to dismiss the case.[5] In its mandate, the Supreme Court noted that the no-action clauses in *Lange* and *Feldbaum*, which Vice Chancellor had relied on in dismissing *Quadrant*, contained slightly different language that than clause in *Quadrant*.[6]

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[3] *Tang Capital P'rs, LP v. Norton*, 2012 WL 3776669, at *3 (Del. Ch. Aug. 31, 2012).
[4] *Quadrant Structured Products Co., Ltd. v. Vertin*, 2012 WL 2051753, at *1 (Del. Ch. June 5, 2012)(ORDER).
[5] *See Quadrant Structured Products Co., Ltd. v. Vertin*, No. 338, 2012, ¶1 (Del. Feb. 12, 2013)(ORDER)(slip copy).
[6] *See id.* at ¶¶5-6 ("[T]he no-action indenture clause in those cases were critically different from the no-action clause in the Athilon indenture . . . ."). Specifically, the *Lange* and *Feldbaum* clauses prevented security holders from pursuing remedies with respect to the indentures "o*r the Securities*". *Id.* This "or the Securities" language is not present in the Athilon Indenture, and is likewise not included in the Savient Indenture relevant to my decision. The argument that the

Therefore, the Supreme Court directed Vice Chancellor Laster to explain why the difference in language is legally insignificant and if New York law provides any support for finding the difference in language legally insignificant.

Meanwhile, the Defendants moved to dismiss the remaining counts of the Complaint in this action, and I held oral argument on March 27, 2013. In the interim between the time of oral argument and the time at which I planned to issue my Opinion on the Motion to Dismiss the remaining Counts, Vice Chancellor Laster published the *Quadrant* Report, fulfilling the Supreme Court mandate, that, while not in direct disagreement with the reasoning in my Memorandum Opinion, calls the law underlying that Opinion into doubt.[7] In brief, after a comprehensive analysis of both New York and Delaware law, Vice Chancellor Laster changed his mind to decide that the no-action clause did *not* bar Quadrant's claims.[8]

Quadrant is now back on appeal before the Supreme Court. In light of the *Quadrant* Report, I convened a teleconference with the parties *sua sponte* to

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"or the Securities" language is legally significant was neither made before Vice Chancellor Laster, in the first round of *Quadrant* briefing, nor before me in this matter. *See* Ans. Br. Pls. & Tang Cap. P'rs, LP in Opp'n to Def.'s Mot. to Dismiss Count V 20-27, July 13, 2012 (neglecting to distinguish the language of the no-action clauses in *Lange* and *Feldbaum* from the no-action clause in this case); *Quadrant*, 2013 WL 3233130 ("Quadrant also argued for the first time [before the Supreme Court] that *Feldbaum* and *Lange* 'construed substantially different contracts' and that the Athilon Clause applied 'only to claims that arise from the governing indenture itself.'")(quoting the appellants' opening brief).

[7] *See generally Quadrant*, 2013 WL 3233130 ("In my view, the defendants are correct to point out the tension between the rulings in the Delaware statutory receivership cases and the plain language of the no-action clauses at issue.").

[8] *See id.* ("It appears that as a matter of New York law, the differences between the Athilon Clause and the *Feldbaum/Lange* clause are significant.").

discuss whether it may be appropriate to consider an interlocutory appeal of my previous Memorandum Opinion which interpreted a no-action clause that is similar to the clause on appeal in *Quadrant*. In response, the Plaintiffs moved for Partial Final Judgment on June 26, 2013. The Defendants opposed the Motion on July 11, 2013.

B. Analysis

In general, litigants may not seek to appeal a decision of the Court of Chancery until all claims in the action have been adjudicated. An exception to that rule is found in Court of Chancery Rule 54(b).[9] Appeal of a partial final judgment is appropriate only if "(1) the action involves multiple claims or parties, (2) at least one claim or the rights and liabilities of at least one party has been finally decided, and (3) that there is no just reason for delaying an appeal."[10] Here, this action involves several claims, only one of which is the subject of this Motion. That claim, for the appointment of a receiver, has been finally decided. Therefore, the only issue is where there is any "just reason for delaying the appeal."[11]

[9] Ct. Ch. R. 54(b) ("When more than 1 claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon 1 or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment.").

[10] *Rich v. Fuqi Int'l, Inc.*, 2012 WL 5392162, at * (Del. Ch. Nov. 5, 2012)(quoting *In re TriStar Pictures, Inc., Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989))(emphasis removed).

[11] *See id.*

At the time I denied the Plaintiffs' first motion for a partial final judgment, I considered the law underlying my analysis to be settled. My decision rested largely on this Court's decision in *Elliott Associates, L.P. v. Bio–Response, Inc.*,[12] which was factually similar to this case.[13] That fact, coupled with the Plaintiffs' delay in seeking the Motion, convinced me that this was not a special scenario warranting appeal of a partial final judgment. Therefore, I denied the first motion for a partial final judgment. In the meantime, however, the Supreme Court issued its Mandate in *Quadrant* requiring Vice Chancellor Laster to publish his Report, which considered arguments not brought before me in this action. The *Quadrant* decision, while not directly contradicting the analysis in my Memorandum Opinion, certainly calls the legal reasoning underlying my Memorandum Opinion into question.[14] This change in the landscape of the law, when combined with the Supreme Court's mandate requesting Vice Chancellor Laster to explain his decision, has convinced me that it is appropriate to grant the Plaintiffs' request for

[12] 1989 WL 55070 (Del. Ch. May 23, 1989).
[13] *See Tang*, 2012 WL 3072347, at *6.
[14] The Defendants argue that *Quadrant* is not in conflict with my decision, since Vice Chancellor Laster expressly distinguished this case from *Quadrant*. Defs.' Br. Opp'n Pls.' Mot. Part. Fin. J. 7-9. The Defendants also cite to a New York case from 1933 which could be read to support my decision to dismiss the receivership claim. *See id.* at 6-7 (citing *Greene v. N.Y. United Hotels, Inc.*, 185 N.E. 798, 798 (N.Y. 1933)). Finally, the Defendants argue that my decision is correct for alternative reasons separate from the issues raised in *Quadrant*. Of course, should the Supreme Court hear this appeal in conjunction with *Quadrant*, the Defendants are free to raise each of these bases to affirm. In finding this issue appropriate for a partial final judgment, *I am not withdrawing my Memorandum Opinion*. Instead, I merely see the benefit of the Supreme Court having the opportunity to hear these two similar cases in conjunction, should the Court choose to do so.

a partial final judgment. In particular, considerations of judicial economy and the administration of justice drive my decision.

1. Judicial Economy

The Supreme Court has set a briefing schedule for the *Quadrant* appeal which is set to conclude in mid-August. Granting the Plaintiffs' Motion here would allow the parties to complete briefing on an appeal of my decision on a similar timetable. Doing so would allow the Supreme Court, should it exercise its discretion to do so, to decide two substantially similar issues in conjunction, which would conserve considerable judicial resources. Moreover, it appears that important issues in this case are almost identical to the issues that will be decided in the *Quadrant* appeal. The *Quadrant* no-action clause is similar to the clause I interpreted in this action. Likewise, both indentures are governed by New York law. The Supreme Court's review of each clause would necessarily involve an analysis of the same legal and contract interpretation principles. Therefore, on the basis of judicial economy, I believe it is appropriate to grant the Plaintiffs' Motion.

2. Administration of Justice

Furthermore, the most just decision here is to allow the Plaintiffs to pursue their receivership claim as soon as possible. Though the law appeared to be settled at the time I decided the receivership claim, that law now appears otherwise. By its nature, the Plaintiffs' claim for the appointment of a receiver is

time sensitive, since the claim is contingent on Savient's being insolvent in order for the Plaintiffs to satisfy the receivership statute, 8 *Del. C.* § 291. This action has already been delayed for almost a year while several claims remaining under the Complaint have been briefed. Therefore, I find it in the interest of justice to allow the Plaintiffs to ask the Supreme Court to hear this appeal now, separately from an appeal of any other issues the parties wish to challenge following my adjudication of the remaining claims.

For the foregoing reasons, I determine that there is "no just reason for delaying an appeal" of my decision to dismiss the Plaintiffs' receivership claim, and I expressly direct an entry of judgment on that limited issue. Therefore, the Plaintiffs' Motion for Entry of a Partial Final Judgment is GRANTED. In light of this decision, and because the appeal may affect my decision as to the merits of the other claims before me, I will stay consideration of the Defendants' pending Motion to Dismiss the Remaining Counts of the Complaint until resolution of the appeal. To the extent the foregoing requires an order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III