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Court of Appeals

of the

State of New York

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P., AQR DELTA MASTER ACCOUNT, L.P., AQR DELTA SAPPHIRE FUND, L.P. and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs-Appellants,

– against –

CLEVELAND UNLIMITED, INC., CLEVELAND UNLIMITED AWS, INC., f/k/a Triad AWS, Inc., CLEVELAND UNLIMITED LICENSE SUB, LLC, CLEVELAND PCS REALTY, LLC, CSM WIRELESS, LLC, CSM COLUMBUS (OH) OPERATING SUB, LLC, CSM INDIANAPOLIS OPERATING SUB, LLC, CSM COLUMBUS (IN) OPERATING SUB, LLC, CSM NEW CASTLE OPERATING SUB, LLC, CSM CANTON OPERATING SUB, LLC, CSM YOUNGSTOWN OPERATING SUB, LLC, CSM CLEVELAND OPERATING SUB, LLC, CSM COLUMBUS (OH) LICENSE SUB, LLC, CSM INDIANAPOLIS LICENSE SUB, LLC, CSM COLUMBUS (IN) LICENSE SUB, LLC, CSM NEW CASTLE LICENSE SUB, LLC, CSM CANTON LICENSE SUB, LLC, CSM YOUNGSTOWN LICENSE SUB, LLC, CSM CLEVELAND LICENSE SUB, LLC and CUI HOLDINGS, LLC,

Defendants-Respondents.

MOTION FOR LEAVE TO APPEAL

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NOTICE OF PLAINTIFFS-APPELLANTS'
MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed affirmation of Clay J. Pierce, the supporting memorandum of law, the record on appeal and briefs filed in the First Department of the Appellate Division, and all other papers filed herein, Plaintiffs-Appellants CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds—AQR Diversified Arbitrage Fund (collectively, "Plaintiffs-Appellants") will move this Court at a Motion Part at the Courthouse located at 20 Eagle Street, Albany, New York 12207, on November 19, 2018, for an Order:

A. Pursuant to N.Y. CPLR § 5602(a)(1)(i) and 22 NYCRR § 500.22, granting Plaintiffs-Appellants leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, First Department, dated and entered on June 26, 2018, which affirmed the Decision and Order of the Supreme Court of the State of New York, New York County, dated January 11, 2018, and entered on January 16, 2018, and the corresponding judgment dated and entered on February 7, 2018, granting summary judgment to Respondents and dismissing Plaintiffs-Appellants' complaint;

B. For such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 8, 2018

DRINKER BIDDLE & REATH LLP

By: _____

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

CNH Diversified Opportunities Master Account, L.P., is managed by CNH Partners, LLC. CNH Partners, LLC is affiliated with and owned in part by AQR Capital Management, LLC ("AQR LLC") and CNH Capital Management, LLC ("CNH Capital"). AQR Capital Management Holdings LLC ("AQR Holdings") is the sole member and owner of AQR LLC. AQR Capital Management Group, L.P. ("AQR Group") is the majority owner of AQR Holdings. AQR Capital Management Group GP, LLC is the general partner of AQR Group. RAIM Corp. is the majority owner of CNH Capital.

AQR Delta Master Account, L.P., and AQR Delta Sapphire Fund, L.P., are funds managed by AQR LLC.

AQR Funds—AQR Diversified Arbitrage Fund is managed by AQR LLC and is part of a series of the AQR Funds Trust.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

PRELIMINARY STATEMENT AND REASONS FOR LEAVE TO APPEAL

The Court of Appeals should review this matter because the lower courts have adopted an interpretation of a key bond indenture provision that puts New York law directly at odds with the law of the U.S. Court of Appeals for the Second Circuit and the federal courts in general. The provision at issue concerns a bondholder's fundamental right to pursue and obtain principal and interest payments. It appears in virtually every corporate bond indenture in the United States and is integral to the protection of corporate bondholders' right to be repaid.

The Trust Indenture Act of 1939 (the "TIA") requires that all indentures registered with the Securities and Exchange Commission ("SEC") include this provision. For decades, the bond market has likewise insisted that all indentures that are not registered with the SEC include the equivalent provision as a matter of contract, thereby ensuring that investors in nonregistered bonds enjoy the same protections as purchasers of SEC-registered bonds. The provision at issue thus exists as both a requirement of federal law and a creature of state contract law.

Because New York law governs virtually all bond indentures, the Court of Appeals necessarily plays a key role in interpreting and enforcing disputed indenture provisions. The Second Circuit has ruled on the relevant provision of the TIA. This Court, however, has never had the opportunity to rule as a matter of New York contract law on the correct interpretation of the corresponding indenture

provision at issue in this case. Review by this Court is critical to ensuring that investors' reasonable expectations regarding their right to the payment of principal and interest are satisfied, and that New York continues to function as the hub for the $9 trillion U.S. corporate bond market.[1]

The indenture provision at issue provides as follows:

> Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on a Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

This language is straightforward: no matter what transactions or machinations a company or other bondholders may take pursuant to other provisions of the governing indenture, the legal right of any non-consenting bondholders to demand payment of principal and interest from the issuer cannot be taken away. These rights are sacrosanct, and the bond market's stability depends in great part on their preservation. The Second Circuit confirmed this fact in its 2017 decision in *Marblegate Asset Mgt., LLC v. Education Mgt. Fin. Corp.*, 846 F.3d 1 (2d Cir. 2017), which held that the corresponding provision of the TIA is violated whenever a bondholder's "legal right" to the payment of principal and

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[1] *See* US Bond Market Issuance and Outstanding, https://www.sifma.org/resources/research/bond-chart/ (last visited Nov. 8, 2018).

interest is removed without the holder's consent. In the present case, however, both the trial court and the Appellate Division reached a decision directly contrary to *Marblegate*, effectively nullifying the protections that have shielded bondholders since the 1930s.

Plaintiffs-Appellants (the "Minority Noteholders") are the holders of $5 million of secured bonds issued by Respondent Cleveland Unlimited, Inc. ("Cleveland Unlimited"). Cleveland Unlimited defaulted on its bond debt at maturity in December 2010 and then negotiated a deal with a majority group of bondholders (the "Majority Noteholders") requiring all the company's bondholders to exchange their notes for shares of Cleveland Unlimited common stock. The Minority Noteholders refused to agree to this plan, based on their concerns about Cleveland Unlimited's long-term viability and their desire to retain their rights as creditors as opposed to equity holders.

In response, Cleveland Unlimited and the Majority Noteholders devised a scheme intended to force the Minority Noteholders to exchange their bonds for common stock. The company and the Majority Noteholders executed on their scheme in the Fall of 2011 as a part of a "strict foreclosure" transaction—*i.e.*, a transaction occurring outside of any legal proceeding and without any of the due process protections that normally safeguard creditors. By its terms, the so-called

"strict foreclosure" purported to "terminate" all rights of the Minority Noteholders to collect any further principal and interest on their notes.

Following the transaction, the Minority Noteholders promptly filed this litigation against Cleveland Unlimited and its affiliate guarantors. The Minority Noteholders claim all outstanding principal and interest owed on their notes. In prosecuting their claims, the Minority Noteholders repeatedly underscored the fact that the Indenture by its express terms prohibited their right to payment from being "impaired or affected" without their consent. Remarkably, the trial court sided with Respondents, finding that a decision by the majority of noteholders was sufficient under the Indenture's terms to eliminate the payment rights of any non-consenting bondholder. The Appellate Division affirmed on similar grounds.

The decisions by the lower courts upend everything that the market had previously understood about minority bondholders' legal right to payment. If allowed to stand, the Appellate Division's decision would create a massive hole in the rights of minority bondholders. Indeed, the decision threatens to return the bond markets back to the 1930s, when insiders and equity holders regularly trampled on the rights of minority bondholders. These practices were put to an end only when the SEC Chairman at that time—future Supreme Court Justice William O. Douglas—persuaded Congress to pass the TIA.

As noted above, the Second Circuit made clear in *Marblegate* that the contractual language at issue in this case guarantees every non-consenting bondholder's "legal right" to pursue the payment of principal and interest from bond issuers. The *Marblegate* decision has been a subject of no less than seven law review articles in the 22 months since it was issued. Because the Appellate Division has reached a decision directly contrary to *Marblegate*, New York law is now entirely out of sync with federal decisions interpreting substantively identical language. Given that New York at present is the home for the corporate bond market, this Court, as the final word on New York jurisprudence, should hear this issue and decide whether and how New York law should deviate from federal law in interpreting a substantially identical provision.

For the above reasons and those set forth below, the Court should grant the Minority Noteholders' motion for leave to appeal.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case because it originated in the Supreme Court for the County of New York, and the Appellate Division's decision finally determined the action by affirming summary judgment for Respondents. CPLR 5602(a)(1)(i).

QUESTION PRESENTED

The Appellate Division's decision raises the following issue for appeal, which was raised and preserved in the court below (App. Br. at 6):

- Where an Indenture provides that bondholders' right to the payment of principal and interest may not be "impaired or affected" without their consent, may the issuer and a majority group of noteholders terminate the payment rights of all bondholders so long as such termination does not involve a formal amendment of the Indenture? The Appellate Division incorrectly found that a bondholder's payment rights could be stripped so long as the underlying Indenture was not formally "amended." This ruling is contrary to the plain terms of the Indenture, the TIA, the Second Circuit's *Marblegate* decision, and the applicable legislative history.

FACTUAL AND PROCEDURAL BACKGROUND

The Minority Noteholders owned $5 million in senior secured notes (the "Notes") issued by Cleveland Unlimited, a regional telecommunications company that previously operated in Ohio. (A-135, ¶¶ 40, 42; A-214; § 4.09(3); A-270; A-373-A-374, § 2.1; A-391, § 9.1.) Cleveland Unlimited issued the Notes in 2005 pursuant to the Indenture, which set forth the respective rights of the issuer and its noteholders. (A-161; A-639, ¶ 1.) Section 6.07 of the Indenture provided that:

> Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal

> of, premium, if any, and interest and Additional Interest, if any, on a Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

(A-233-A-234, § 6.07.) (emphasis added).

Section 6.07 of the Indenture mirrors Section 316(b) of the TIA, which provides as follows:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder.

15 U.S.C. § 77ppp(b) (emphasis added). In Section 11.01 of the Indenture, the parties formally incorporated by reference all applicable terms of the TIA, including Section 316(b). 15 U.S.C. § 77ppp(b); (A-162; A-255, § 11.01.)

On December 15, 2010, Cleveland Unlimited defaulted on its obligation to pay the principal owed on the Notes. (A-138, ¶ 53; A-152, ¶ 53; A-476, ¶ B.) After months of discussions, the Majority Noteholders proposed that all holders exchange their secured bonds for shares of Cleveland Unlimited. (A-532, §§ 2.1, 2.2.) In connection with this proposal, Cleveland Unlimited made available for review certain non-public information concerning its operations and finances.

After reviewing this newly available information, the Minority Noteholders determined that they would be better off remaining as secured creditors of the company, and did not want to become shareholders. (A-611-A-622.)

Once the Minority Noteholders communicated their decision to counsel for the Majority Noteholders, the Majority Noteholders opted to forcibly implement a debt-for-equity swap as part of what they dubbed a "strict foreclosure" under Section 9-620 of the New York Uniform Commercial Code. By its terms, the transaction would have the same effect as a voluntary exchange transaction but (according to counsel for the Majority Noteholders) would not require the consent of the Minority Noteholders. (A-546.) This transaction afforded the Minority Noteholders no due process, as would be found in a Chapter 11 proceeding or even a traditional court-supervised foreclosure. When they learned of the proposed transaction, the Minority Noteholders immediately advised the issuer and other parties that the transaction was contrary to Section 6.07 of the Indenture and the corresponding section of the TIA, and that they did "not join in or in any way consent to the proposed transaction." (A-558.)

Despite the Minority Noteholders' express objection, in September 2011, the indenture trustee, at the direction of the Majority Noteholders and in agreement with Cleveland Unlimited as the issuer of the Notes, purported to "terminate" the

Minority Noteholders' right to the payment of principal and interest on their Notes. (A-559-A-568; A-585.) As stated in the indenture trustee's notice to noteholders:

> [B]y operation of law as a result of the strict foreclosure, the indebtedness evidenced by the Notes shall be deemed paid and cancelled and with limited exceptions, the obligations of the Company under the Indenture shall be terminated. The rights of the holders will be limited to receiving their pro rata share of the aforementioned distribution [of Cleveland Unlimited stock] and no further distributions will be made to Holders on account of the Notes.

(A-585.) (emphasis added).[2]

Following the transaction, the Minority Noteholders filed this collection case against Cleveland Unlimited and its affiliate-guarantors, seeking a judgment for all amounts due under the Notes. (A-129-A-144.) In response, Cleveland Unlimited and the other Respondents argued that the "strict foreclosure" had terminated the Minority Noteholders' payment rights. Ruling on the parties' cross-motions for summary judgment, the trial court agreed with the company, finding that Section 6.07 was rendered superfluous under these facts and the Minority Noteholders' express right to the payment of principal and interest in cash was trumped by other

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[2] Subsequent to the transaction, the Majority Noteholders also entered into very lucrative loan transactions with Cleveland Unlimited that effectively increased the Majority Noteholders' recovery at the expense of the Minority Noteholders (who were not allowed to participate in the transactions).

provisions of the Indenture and accompanying agreements. (A-8-A-25; A-26-A-43.)

Specifically, the trial court reviewed various provisions of the Indenture, as well as the related Collateral Trust Agreement and Security Agreement, and found "that there was a collective design to this transaction, and the Collateral Trustee was to act for all of the noteholders in the event of the issuer's default, upon the direction of a majority of noteholders." (A-19.) According to the trial court, Section 6.07 did not "unravel the collective design of this transaction or trump the other provisions in the Collateral Trust or the Security Agreement, like the provision empowering the Collateral [Trustee] to pursue remedies under the UCC."[3] (A-21.) The trial court reached this conclusion despite the language in Section 6.07 stating that it applied "notwithstanding any other provision of th[e] Indenture."[4]

The Appellate Division affirmed the trial court's ruling on the ground that there was no conflict between Section 6.07 of the Indenture and the provisions relied upon by the Respondents. The Appellate Division ruled that:

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[3] Seemingly inconsistent with its own decision, the trial court concluded its opinion by noting that "Plaintiffs retain the legal right to obtain payment by suing Cleveland Unlimited as the issuer of the original notes." (A-24.) Of course, that is exactly what the Minority Noteholders are doing with this lawsuit.

[4] In addition, to the extent there was any doubt about the Indenture being the controlling document, the parties had agreed in the Security Agreement that "[t]he actions of the Collateral Trustee hereunder are subject to the provisions of the Indenture." (A-396-A-397, § 11.1(a).)

> Section 6.07 of the Indenture, which sets forth that the holder's right to payment of principal and interest on the note, or to bring an enforcement suit, "shall not be impaired or affected without the consent of such Holder," does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them.

Ex. E to Affirmation of Clay J. Pierce ("Pierce Aff.").

In support of its conclusion that there was no conflict between Section 6.07 and the other relevant provisions of the Indenture, the Appellate Division found that Section 316(b) of the TIA—upon which Section 6.07 is based—"prohibits only non-consensual amendments to an indenture's core payment terms." Ex. E to Pierce Aff. The Appellate Division based this finding on its reading of the Second Circuit's decision in *Marblegate*. According to the Appellate Division's (flawed) analysis, because Respondents did not formally amend the Indenture in conducting the debt-for-equity exchange—rather, the Minority Noteholders' right to payment was simply "terminated"—there was no violation of Section 316(b) of the TIA and thus no violation of the Section 6.07 of the Indenture.

The Appellate Division's ruling constitutes a gross misapplication of *Marblegate,* which found Section 316(b) to apply where a holder's "legal right" to payment was impaired or affected. Neither side in this case disputes that the transaction purported to terminate the Minority Noteholders' legal right to the payment of principal and interest. By doing so, the transaction effectively nullified

the core payment terms with which the *Marblegate* court was concerned—all over the express objection of the Minority Noteholders.

ARGUMENT

I. THE APPELLATE DIVISION'S DECISION EXTINGUISHES PAYMENT PROTECTIONS FOR MINORITY BONDHOLDERS THAT HAVE EXISTED FOR DECADES

In holding that Section 6.07 does not "supersede" or "conflict with" other provisions of the Indenture, the Appellate Division effectively nullified protections that minority bondholders have relied upon for decades.[5] Until this decision, indentures subject to New York law have always included the legal right of minority bondholders to the payment of principal and interest. If the Appellate Division's decision stands, that will no longer be the case.

Here, the indenture trustee (acting at the direction of the Majority Noteholders) purported to "terminate" the Minority Noteholders' rights to payment in full. That action not only "conflicts" with the command of Section 6.07, it is directly contrary to Section 6.07's longstanding purpose of safeguarding every bondholder's right to be repaid. Put differently, the "termination" of the Minority Noteholders' right to payment necessarily "impair[ed]" and adversely "affect[ed]" that right. In reaching a different conclusion, the Appellate Division ignored both

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[5] The American Bar Foundation's 1965 Model Indenture Provisions and related Sample Incorporating Indenture, which were prepared for use in both registered and nonregistered offerings, contained this provision. The provision has remained in every iteration and update of the Model Indenture up to the present.

the plain language of the Indenture and the history of the statute on which Section 6.07 is modeled.

Section 6.07 of the Indenture is based on Section 316(b) of the TIA, which provides that:

> Notwithstanding any other provision in the Indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder.

15 U.S.C. § 77ppp(b). Notably, the parties agreed in Section 11.01 of the Indenture that "[a]ny provision of the TIA which is required to be included in a qualified Indenture, but not expressly included herein, shall be deemed to be included by this reference." (A-255, § 11.01.) Because Section 316(b) is one of the TIA sections that is "required to be included in a qualified indenture," Section 11.01 incorporates it into the Indenture.[6]

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[6] Section 318(c) of the TIA, 15 U.S.C. § 77rrr(c), specifically states that:

> The provisions of sections 77jjj of this title to and including 77qqq of this title that impose duties on any person (including provisions automatically deemed included in an indenture unless the indenture provides that such provisions are excluded) are a part of and govern every qualified indenture, whether or not physically contained therein, shall be deemed retroactively to govern each indenture heretofore qualified, and prospectively to govern each indenture hereafter qualified under this subchapter and shall be deemed retroactively to amend and supersede inconsistent provisions in each such indenture heretofore qualified.

Congress passed the TIA to prevent out-of-court debt restructurings from being forced onto minority bondholders, as Cleveland Unlimited and the Majority Noteholders attempted to do here with their debt-for-equity transaction. *See In re Board of Directors of Multicanal S.A.*, 307 B.R. 384, 388 (Bankr. S.D.N.Y. 2004) ("One purpose of the statute was to regulate and reform prior practice whereby indentures contained provisions that permitted a group of bondholders . . . to agree to amendments to the indenture that affected the rights of other holders—so-called 'majority' or 'collective' action clauses."). The legislative history of the TIA is replete with expressions of concern for the rights of minority bondholders in out-of-court restructurings between a debtor and a majority of its bondholders.[7] Before passage of the TIA, "protective committees" representing a majority of bondholders could restructure debt in any way they saw fit, regardless of the needs or wishes of the minority; the SEC considered this unfair and in need of redress.[8]

Section 316(b), 15 U.S.C. § 77ppp(b), falls within the range of provisions encompassed by the above paragraph, and is therefore is "a part of and govern[s] every qualified indenture, whether or not physically contained therein."

[7] *See* S. Rep. No. 76-248, at 26 (1939) ("Evasion of judicial scrutiny of the fairness of debt-readjustment plans is [intended to be] prevented by [Section 316(b)'s] prohibition."); H.R. Rep. No. 76-1016, at 56 (1939) ("[T]he right of any indenture security holder to receive his principal and interest when due and to bring suit therefor may not be impaired without his consent.").

[8] *See* Secs. & Exch. Comm'n, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees* Part VI at 63 (Adelaide Rosalia Hasse ed. 1936) ("[B]y virtue of indenture provisions, the dissenter may be remitted to the mercy of a protective committee and the majority. The fate of minorities cannot fairly be left in the hands of majorities and protective committees without control or restraint.").

The Appellate Division's decision ignores this history and casts aside the primary purpose behind Section 316(b) and the parallel provision in the Indenture—the legal right of minority bondholders to the payment of interest and repayment of principal.

II. THE COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE THE APPELLATE DIVISION MISUNDERSTOOD AND MISAPPLIED THE SECOND CIRCUIT'S DECISION IN *MARBLEGATE*

Although the Appellate Division was correct to look to the Second Circuit's decision in *Marblegate* when interpreting Section 6.07, it fundamentally misunderstood the holding in that case when it found the actions of Respondents were permissible because they "did not amend core payment terms of the Indenture." Ex. E to Pierce Aff. Notwithstanding the language that Respondents will surely take out of context, *Marblegate* does not stand for the proposition that Section 316(b) of the TIA protects against only "formal amendments" to an indenture, as opposed to other impairments of payment rights that are not effectuated by a document entitled "Amendment to Indenture." Because the Appellate Division misunderstood *Marblegate*, New York law is now at odds with the leading federal case dealing with Section 316(b) of the TIA and the protection of minority bondholders.

Although the disputed transaction in this case did not involve a document titled "Amendment to Indenture," there is no question that the transaction amended

a core payment term. Indeed, it entirely extinguished the Minority Noteholders' right to payment. For that reason, it necessarily violated Section 6.07 of the Indenture and Section 316(b) of the TIA.

A review of the facts in *Marblegate* underscores the Appellate Division's misunderstanding of that decision. The dispute in *Marblegate* arose when Education Management Corporation ("EDMC") tried to force an out-of-court restructuring on unsecured noteholders. EDMC pursued the restructuring because its subsidiary, Education Management Finance Corporation ("EDM Issuer"), was unable to make payments on $1.3 billion of secured bank debt issued under a 2010 credit agreement, as well as approximately $217 million of outstanding unsecured notes that it had issued under an indenture qualified under the TIA. *Marblegate*, 846 F.3d. at 3.

In September 2014, a majority of the bank debt holders agreed to restructure EDM Issuer's imminent payment obligations under the credit agreement. *Id.* at 4. To effectuate the restructuring, the bank debt holders agreed to foreclose on their security interest over substantially all of the assets of EDM Issuer, effectively leaving EDM Issuer with nothing of value. *Id.* The agent for the bank debt would then sell those assets to a new EDMC subsidiary. *Id.* The new EDMC subsidiary would issue new debt and other securities to most of the creditors—including the unsecured noteholders—in exchange for the creditors' existing debt. *Id.* Where a

noteholder did not voluntarily agree to give up its existing notes, that creditor would receive nothing from the new EDMC subsidiary but would retain its rights against EDM Issuer. *Id.*

Although non-consenting noteholders retained their "legal right" under the indenture to sue and collect payments due under their existing notes as against EDM Issuer, "the foreclosure would transform the EDM Issuer into an empty shell," leaving EDM Issuer unable to satisfy any judgment. *Id.* The *Marblegate* plaintiffs objected to the restructuring on this basis. When EDMC sought to effectuate the restructuring over their objection, the plaintiffs sued for violation of Section 316(b) of the TIA. *Id.* at 5.

The plaintiffs in *Marblegate* argued before the Second Circuit that, "although the contractual terms governing *Marblegate's* Notes had not changed, the plaintiffs' practical ability to receive payment would be completely eliminated by virtue of the [restructuring], to which it did not consent." *Marblegate,* 846 F.3d at 5 (emphasis added). In other words, if the restructuring were to be completed as planned, EDM Issuer would be left with no assets to satisfy Marblegate's claim. Thus, while the plaintiffs could sue EDM Issuer and obtain a judgment for the full amount owed, that judgment would essentially be worthless.

In its decision, the Second Circuit confirmed that Section 316(b) "prohibits non-consensual amendments of core payment terms (that is, the amount of

principal and interest owed, and the date of maturity)." *Id.* at 7. But the court rejected Marblegate's argument that impairment of its practical ability to get paid by the issuer constituted a TIA violation. *Id.* at 15. Instead, it found that the challenged transaction did not violate Section 316(b) because the foreclosure did not alter the plaintiffs' "legal right" to sue EDM Issuer and obtain a judgment for principal and interest:

> [W]e hold that Section 316(b) of the TIA does not prohibit the Intercompany Sale in this case. The transaction did not amend any terms of the Indenture. Nor did it prevent any dissenting bondholders from initiating suit to collect payments due on the dates specified by the Indenture. Marblegate retains its legal right to obtain payment by suing the EDM Issuer, among others.

Id. at 17 (emphasis added).

The Second Circuit in *Marblegate* confirmed that Section 316(b) "prohibits non-consensual amendments of core payment terms (that is, the amount of principal and interest owed, and the date of maturity)" and that it bars "collective action clauses"—i.e. "indenture provisions that authorize a majority of bondholders to approve changes to payment terms and force those changes on all bondholders." *Id.* at 7. The court was unwilling to hold, however, that impairment of Marblegate's practical ability to get paid by the issuer constituted a TIA violation. *Id.* at 15.

The Appellate Division's decision in this matter conflicts with *Marblegate* because it allows a majority of noteholders to terminate the Minority Noteholders' legal right, without their consent, to sue and seek to collect principal and interest. *Marblegate*, in contrast, expressly found that the transaction at issue did not violate the TIA because the noteholders "retained a contractual right to collect payments due under the Notes." *Id.* at 4.

The Appellate Division's failure to correctly apply *Marblegate* poses a clear threat to New York's position as the hub for the nation's corporate bond markets. The decision effectively allows bare majorities of noteholders to force minorities into out-of-court restructurings against their will. Because the bond market will almost certainly reject this change in the law, issuers will be forced to consider issuing their bonds with indentures governed by the laws of other states, where the protections of the TIA and corresponding contractual language remain effective.[9] All of this results from a fundamental misunderstanding of the relevant law by the lower courts. This Court should correct these errors before they do damage to New York's financial markets.

[9] Respondents have previously attempted to dismiss this argument by noting that this case has not generated any coverage in the legal or financial press. That is immaterial. What matters is that the leading federal case on Section 316(b) of the TIA now conflicts with New York law on that same provision.

III. *MARBLEGATE* DOES NOT STAND FOR THE PROPOSITION THAT ANY "FORECLOSURE" IS EXEMPT FROM SECTION 316(B) OF THE TIA

Respondents have previously argued that under *Marblegate,* any kind of foreclosure—including what they colloquially describe as a "strict foreclosure" here[10]—cannot result in any violation of the TIA. This argument fails because unlike this case, *Marblegate* involved an ordinary foreclosure—*i.e.*, one that did not purport to terminate the holders' legal right to payment.

In the transaction challenged in *Marblegate*, the senior secured creditors (that is, the banks) foreclosed on all the issuer's assets, leaving the non-consenting junior creditor (Marblegate, a noteholder) with no practical ability to collect against the issuer because the issuer (the empty shell) had nothing left. The plaintiff junior creditor argued that the transaction violated the TIA because, even though its legal rights remained intact, the foreclosure would remove all assets from the entity obliged to pay principal and interest on the notes. The Second Circuit disagreed, holding that the TIA protects against only the impairment of a holder's "legal right" to pursue payment against the issuer.

The facts in this case are the opposite of those in *Marblegate*. Here, the issuer, Cleveland Unlimited, remained intact with all of its operating assets. By

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[10] The U.C.C. provisions at issue here (N.Y. U.C.C. §§ 9-620 to 9-622) do not use the term "foreclosure" anywhere in their title or text.

filing this collection action on the Notes, the Minority Noteholders are simply following through on what *Marblegate* held was the critical right preserved by the TIA—the right to sue and obtain a judgment to collect payment on the Notes. The Minority Noteholders' right to receive payment and, where necessary, to file suit to collect payment is the precise right protected by the TIA and the parallel language in the Indenture and that the Minority Noteholders are trying to enforce in this litigation.

Critically, the Second Circuit's discussion of foreclosures in *Marblegate* addressed only ordinary foreclosures—a historically common event in which a senior secured creditor would exercise its rights to seize collateral to the detriment of the junior creditor. *Marblegate,* 846 F.3d at 9 (the drafters of the TIA were aware of foreclosures "like the one that occurred in this case") (emphasis added).[11]

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[11] This is described specifically in section 2.E. of the opinion, which concerns the 1940 SEC Report: "Particularly compelling is the Report's discussion of the role of junior creditors in foreclosure-based reorganizations. In characterizing the choice faced by junior creditors when deciding whether to participate in foreclosure-based reorganizations, the 1940 SEC Report noted that 'the participation in the plan given to junior creditors was the product of practical reasons, not legal compulsion.' And in comparison to dissenting secured creditors entitled to a pro rata distribution of foreclosure proceeds, the 1940 SEC Report noted that if junior creditors 'refused participation in the plan, they were thrown back to participation in such of the debtor's assets as to which senior creditors could lay no prior claims,' which was 'at best nominal.'" *Id.* at 13 (citing Secs. & Exch. Comm'n, *Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees*, Pt. 8 (1940)).

That foregoing passage makes clear that the Second Circuit was considering foreclosures that push junior creditors to participate through "practical reasons, not legal compulsion." *Id.* Indeed, the passage notes that junior creditors that refused to participate in the transaction would still retain their rights against the issuer and any remaining assets that it might hold. The Second Circuit held that these foreclosures did not violate the TIA because they only affected the junior creditor's practical right to collect, not their legal right to pursue the issuer.

The Second Circuit had no reason to consider, however, whether a so-called "strict foreclosure" that purports to terminate minority holders' legal right to payment and legal right to sue the issuer was permissible under the TIA. Indeed, the Second Circuit made clear that the retention of the "legal right to obtain payment by suing the EDM Issuer" was critical to its decision. *Id.* at 17.

IV. HAD THE APPELLATE DIVISION INTERPRETED SECTION 6.07 OF THE INDENTURE PROPERLY, IT NECESSARILY WOULD HAVE GRANTED JUDGMENT FOR THE MINORITY NOTEHOLDERS

Had the Appellate Division enforced Section 6.07 in accordance with its plain terms and the Second Circuit's ruling in *Marblegate*, it necessarily would have reversed the trial court's decision and granted summary judgment for the Minority Noteholders.

As discussed above, the trial court ruled for Respondents based on its conclusion that Section 6.07's protections for the Minority Noteholders' payment rights should not be allowed to frustrate the "collective design" evidenced by the provisions cited by the Majority Holders—*i.e.*, various provisions of the Indenture and the accompanying Security Agreement and Collateral Trust Agreement that authorized the trustee to seize and monetize collateral pledged by Cleveland Unlimited in the event that it defaulted on its bond debt. The trial court's ruling on this point is clearly incorrect. In fact, the Minority Noteholders' right to payment

absolutely takes precedence over the "collective design" of other provisions according to the plain language of the documents.

A contract clause containing the phrase "notwithstanding any other provision" will override any conflicting provisions in the contract. *See Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 158 (2015) (affirming summary judgment reasoning that the phrase "notwithstanding any other provision" in the indenture clause trumped a similar conflicting provision) (internal citation omitted). In addition, here the parties expressly agreed in the Security Agreement that "[t]he actions of the Collateral Trustee hereunder are subject to the provisions of the Indenture." (A-396-A-397, § 11.1(a).)

Under the above language, the trustee is necessarily bound by Section 6.07 of the Indenture, and any actions taken by the trustee pursuant to the Indenture, the Security Agreement, or the Collateral Trust Agreement are subject to the Indenture's absolute protection of the Minority Noteholders' right to receive all principal and interest due under the Notes.[12]

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[12] The Appellate Division closed its decision by stating that "the record shows that plaintiffs received and accepted the resulting equity from the debt restructuring." The record shows no such thing. To the contrary, the Minority Noteholders expressly and repeatedly objected—in writing—to the debt-for-equity transaction. That the Respondents went ahead with the transaction anyway does not amount to acceptance of the equity by the Minority Noteholders. In response, the Minority Noteholders promptly brought suit. It is nonsensical to think that the Minority Noteholders somehow acquiesced in the transaction when their objection was the subject of litigation.

Respondents argued below that the application of Section 6.07 would have left the trustee unable to pursue any of the remedies authorized in the Indenture. That is simply not the case. Under Section 6.03 of the Indenture, the trustee is empowered to "pursue any available remedy by proceeding at law or equity" to collect principal or interest or to enforce the Notes' terms. (A-232, § 6.03.). Similarly, under Section 9.1 of the Security Agreement (a provision repeatedly cited by Respondents), "the Collateral Trustee may . . . (iv) Take possession of the Collateral or any part thereof . . . [and] (viii) Subject to the provisions of this Agreement and applicable law, exercise all the rights and remedies of a secured party on default under the UCC[.]" (A-391-A-393, § 9.1.) The only action unavailable to the trustee as a result of Section 6.07 of the Indenture is the trustee's ability to impair the noteholders' payment rights. The trustee still has the ability to "take possession" of the Collateral, pursue remedies "at law or equity," and exercise the "rights and remedies of a secured party on default under the UCC."[13]

In support of their respective decisions, the trial court and the Appellate Division mistakenly relied on this Court's decision in *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007). In fact, *Beal* provides no support for either court's

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[13] The fact that the "strict foreclosure" may have complied with the terms of U.C.C. is irrelevant. It is well settled under New York law that when the parties to a contract agree to specific terms, those terms will trump any conflicting provisions of the U.C.C. N.Y. UCC § 1-302(a) ("Except as otherwise provided in subsection (b) or elsewhere in this act, the effect of provisions of this act may be varied by agreement.").

decision. In *Beal*, which involved a syndicated credit agreement and not a bond indenture, this Court found that an individual bank lender could not act contrary to the decisions of a majority of syndicated bank lenders seeking to resolve a default on a corporate loan. *Beal*, 8 N.Y.3d at 320. The dispute in *Beal* arose when 36 of 37 lenders agreed that entering into a settlement was a better option than attempting to recover all of the amounts owed under the credit agreement. *Id.* The one lender that refused to consent moved to file suit on its own behalf, and the rest of the lenders sought to force the dissenting lender to comply with the deal struck by the majority. *Id.*

Because the credit agreement in *Beal* included no provision addressing the right of an individual creditor to proceed contrary to the majority, this Court was required to look at other relevant clauses of the agreement in order to ascertain the parties' intent:

> Here, of course, neither the Credit Agreement nor the Keep-Well contains an explicit provision stating that a Lender may—or may not—take individual action in the event of default, and thus we are compelled to look to other specific clauses and the agreements as a whole to ascertain the parties' intent.

Id. at 326. This Court's analysis of other provisions in the credit agreement and related agreements led it "to conclude that the agreements have an unequivocal collective design." *Id.*

In citing *Beal*, the lower courts failed to recognize that this Court's approach in that case was driven by the lack of "an explicit provision stating that a Lender may—or may not—take individual action in the event of default." This case presents the opposite set of facts, because Section 6.07 explicitly answers the question that the documents in the *Beal* case did not—*i.e.*, whether an individual noteholder can pursue its right to the payment of principal and interest even where a majority has decided to waive the noteholders' rights pursuant to an out-of-court deal. *Beal* was not intended to nullify a provision like Section 6.07. For that reason, *Beal* supports the Minority Noteholders, not Respondents.

V. RESPONDENTS' EQUITABLE ARGUMENTS ARE BOTH IRRELEVANT AND INACCURATE

Throughout this litigation, Respondents have argued that they are entitled to judgment whether or not they breached the terms of the Note because any recovery by the Minority Noteholders would be inequitable. This argument played no part in either of the lower court decisions, and thus should play no role on this motion for leave to appeal. The argument also is based on clear misstatements of the applicable facts and law.[14]

By way of example, the Majority Noteholders have repeatedly argued that, should the Minority Noteholders prevail in this matter, they would receive more than was recovered by the Majority Noteholders. That may be true, but it is irrelevant. The fact that the Majority Noteholders decided to give up their bondholder rights does not mean that the Minority Noteholders must do the same, or that the Minority Noteholders should not be permitted to recover a sum that exceeds what the Majority Noteholders realized on their stock. Unlike the Minority Noteholders, the Majority Noteholders believed Cleveland Unlimited would succeed and thus that there was significant upside in the company's equity.

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[14] Respondents have accused the Minority Noteholders of trying to get a double recovery—*i.e.*, to recover on their bonds but also keep the Cleveland Unlimited shares they were forced to accept. Respondents are being disingenuous. In fact, the Minority Noteholders have repeatedly made clear that they would gladly surrender any shares they received if they are paid what they are owed on their Notes.

The Minority Noteholders declined to make that bet, and thus are not obliged to share in the Majority Noteholders' losses.

Similarly, Respondents have no grounds to block the Minority Noteholders' recovery on their Notes based on their argument that the stock forced on the Minority Noteholders was more valuable than the bonds Respondents purported to terminate as part of the "strict foreclosure." *See* Resps.' App. Div. Br. at 33-36. This is a contract case, and the Minority Noteholders are entitled to recover damages sufficient to "restore the injured party to the position he would have had if the contract had been fully performed." *HYMF, Inc. v. Highland Capital Mgmt., L.P.*, No. 601027/2009, 2012 WL 1071401, at *11 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 23, 2012) (emphasis added) (citing *Brushton–Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C.*, 91 N.Y.2d 256, 262 (1998)).[15] Critically, both the Notes and the Indenture required that the Minority Noteholders be paid cash, not stock. Because the Minority Noteholders were entitled to receive cash, no purported payment of stock can satisfy Cleveland Unlimited's contractual obligation.

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[15] In arguing that the Minority Noteholders may come out ahead of their fellow bondholders, Respondents conveniently ignore the fact that Respondents have made distributions to the Majority Noteholders on behalf of their "equity" positions but have not made distributions to the Minority Noteholders. Respondents also ignore the fact that, after liquidating the Company's assets in 2014 and 2015, the Respondents paid $34 million plus interest to certain of the Majority Noteholders who had been invited to make a senior secured loan to Cleveland Unlimited immediately following the "strict foreclosure." The Minority Noteholders were never offered the opportunity to participate in this deal, even though it substantially increased the return earned by the company's participating noteholders on their initial investment.

CONCLUSION

Because the issue raised by this appeal has never been addressed by this Court and involves matters of significant importance to New York State, this Court should grant the Minority Noteholders' motion for leave to appeal.

Dated: November 8, 2018

Respectfully submitted,

DRINKER BIDDLE & REATH LLP

By: _____

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STATE OF NEW YORK
COURT OF APPEALS

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND, Plaintiffs, v. CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC, Defendants.	New York County Index No. 650140/12

AFFIRMATION OF CLAY J. PIERCE IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

CLAY J. PIERCE, an attorney admitted to practice in the courts of this state, affirms as follows under the penalty of perjury:

1. I am a member of the law firm of Drinker Biddle & Reath LLP, 1177 Avenue of the Americas, 41st Floor, New York, New York 10036, counsel for Plaintiffs-Appellants CNH Diversified Opportunities Master Account, L.P.; AQR Delta Master Account, L.P.; AQR Delta Sapphire Fund, L.P.; AQR Funds—AQR Diversified Arbitrage Fund in the above-referenced action. I make this affirmation in support of Plaintiffs-Appellants' motion for leave to appeal.

2. On January 11, 2018, the Honorable Saliann Scarpulla of the Supreme Court of the State of New York, County of New York, denied Plaintiffs-Appellants' motion for summary judgment and granted Defendants-Respondents' motion for summary judgment. Notice of entry of the trial court's orders of January 11, 2018, were served on January 16, 2018. *See* Exhibit A.

3. Plaintiffs-Appellants filed their notice of appeal of the trial court's orders of January 11, 2018, on January 24, 2018. *See* Exhibit B.

4. On February 7, 2018, the trial court entered judgment against Plaintiffs-Appellants and in favor of Defendants-Respondents. Notice of entry of the judgment was served on February 8, 2018. *See* Exhibit C.

5. Plaintiffs-Appellants filed their notice of appeal of the judgment on February 8, 2018. *See* Exhibit D.

6. Notice of entry of the merits decision by the Appellate Division was served on June 27, 2018. *See* Exhibit E.

7. Plaintiffs-Appellants filed a motion for leave to appeal with the Appellate Division on July 26, 2018. *See* Exhibit F.

8. The Appellate Division denied Plaintiffs-Appellants' motion for leave to appeal on October 9, 2018. Notice of entry of the Appellate Division order denying Plaintiffs-Appellants' motion for leave to appeal was served on October 9, 2018. *See* Exhibit G.

9. This motion for leave to appeal is being made to the Court of Appeals on November 8, 2018, and is therefore timely.

Dated: New York, New York
November 8, 2018

Clay J. Pierce

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

Hon. Saliann Scarpulla

Motion Seq. No. 006

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of a Decision and Order with respect to Motion Seq. No. 006 in the above-captioned matter dated January 11, 2018 and entered in the office of the Clerk of the Supreme Court, New York County, on the 16th day of January 2018.

Dated: New York, New York
January 16, 2018

DECHERT LLP

By: */s/ Brendan Herrmann*

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39

Justice

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CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P., AQR DELTA MASTER ACCOUNT, L.P., AQR DELTA SAPPHIRE FUND, L.P., AQR FUNDS-AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

- v -

CLEVELAND UNLIMITED, INC., CLEVELAND UNLIMITED AWS, INC., F/K/A TRIAD AWS, INC., CLEVELAND UNLIMITED LICENSE SUB, LLC, CLEVELAND PCS REALITY, LLC, CSM WIRELESS, LLC, CSM COLUMBUS (OH) OPERATING SUB, LLC, CSM INDIANAPOLIS OPERATING SUB, LLC, CSM COLUMBUS (IN) OPERATING SUB, LLC, CSM NEW CASTLE OPERATING SUB, LLC, CSM CANTON OPERATING SUB, LLC, CSM YOUNGSTOWN OPERATING SUB, LLC, CSM CLEVELAND OPERATING SUB, LLC, CSM COLUMBUS (OH) LICENSE SUB, LLC, CSM INDIANAPOLIS LICENSE SUB, LLC, CSM COLUMBUS (IN) LICENSE SUB, LLC, CSM NEW CASTLE LICENSE SUB, LLC, CSM CANTON LICENSE SUB, LLC, CSM YOUNSTOWN LICENSE SUB, LLC, CSM CLEVELAND LICENSE SUB, LLC, CUI HOLDINGS, LLC

Defendants.

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INDEX NO. 650140/2012

MOTION DATE 5/26/2017

MOTION SEQ. NO. 006, 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER

Upon the foregoing documents, it is

Motion sequence Nos. 006 and 007 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Plaintiffs CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds-AQR

Diversified Arbitrage Fund (collectively "Plaintiffs"), a group of investors which invested $5 million in secured notes issued by defendant Cleveland Unlimited, Inc. and guaranteed by its affiliates, is seeking recovery in full thereon, even though the notes and guarantees were extinguished, because the collateral trustee, at the direction of 96% of the noteholders, foreclosed on the collateral in full satisfaction of the notes. Then, in a debt for equity restructuring transaction, all notes, including those held by Plaintiffs, were exchanged for all the equity of defendant Cleveland Unlimited, Inc. ("Cleveland Unlimited").

Plaintiffs claim that they did not consent to the restructuring transaction, which violated the terms of the notes, the indenture, and the Trust Indenture Act of 1939 (TIA) (15 USC §§ 77aaa et seq). Cleveland Unlimited and the remaining defendant guarantors (collectively, "Defendants") claim that the collateral trustee was expressly authorized under the parties' agreements to foreclose and pursue this debt for equity exchange, and that Plaintiffs accepted and still hold the equity, and therefore suffered no damages. They contend that Plaintiffs' interpretation of the agreements would confer preferential status upon them, and would result in Plaintiffs receiving payments that none of the other noteholders would get. Both parties seek summary judgment based on the language of the contracts.

Background

Cleveland Unlimited was an Ohio-based regional wireless communications provider. Defendant CUI Holdings, LLC ("CUI") owned all its stock. On December 15, 2005, Cleveland Unlimited issued $150 million of senior secured floating rate notes,

pursuant to an Indenture dated December 15, 2005, which notes came due in 2010. All defendants, except for Cleveland Unlimited, CUI, and Cleveland Unlimited AWS, Inc., were the original guarantors on the notes (the "Original Guarantors"), and non-party US. Bank National Association ("U.S. Bank") was the indenture trustee (the "Indenture Trustee"), pursuant to an indenture agreement (the "Indenture").

In addition to the Indenture, Cleveland Unlimited, the Original Guarantors, and the Indenture Trustee entered into a security agreement (the "Security Agreement") and a collateral trust agreement (the "Collateral Trust Agreement"). U.S. Bank was also named the Collateral Trustee under the Collateral Trust Agreement.

Upon later amendments to those agreements, defendants CUI and Cleveland Unlimited AWS, Inc. also became guarantors.

The Cleveland Unlimited notes were subject to the terms and conditions set forth in the Indenture, which provided that the notes matured on December 15, 2010. Under the Indenture, in section 6.03, the Indenture Trustee was granted the right to "pursue any available remedy by proceeding at law or in equity to collect the payment" on behalf of the noteholders. Section 6.05 of the Indenture provided that a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to [the Indenture Trustee] . . . or exercising any trust or power conferred on [the Indenture Trustee] . . . including, without limitation, any remedies provided for in Section 6.03."

Also, Indenture § 6.07 provided:

> Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on the Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

Indenture § 12.08 provided that "each Holder, by acceptance of its Note(s) agrees that . . . [the Collateral Trustee] may, in its sole discretion and without the consent of . . . the Holders, take all actions it deems necessary and appropriate in order to . . . collect and receive any and all amounts payable" under the notes and guarantees. Pursuant to section 11.01 of the Indenture, the parties agreed that even though it was not qualified under the TIA, "[a]ny provision of the TIA which is required to be included in a qualified Indenture, but not expressly included herein, shall be deemed to be included by this reference."

Under the Collateral Trust Agreement § 3.3, the Collateral Trustee was empowered to act as directed by the majority of the noteholders "in the exercise and enforcement of the Collateral Trustee's interest, rights, powers and remedies in respect of the Collateral." The noteholders agreed that they lacked "any right individually to realize upon any of the Collateral," and agreed "that all powers, rights and remedies . . . may be exercised solely by the Collateral Trustee."

Pursuant to Security Agreement § 2.1, the guarantors, except for CUI, pledged and granted to the Collateral Trustee a lien on, and security interest in, the collateral, which

included substantially all of Cleveland Unlimited's assets. That agreement also expressly granted the Collateral Trustee the "right . . . to endorse, assign or otherwise transfer . . . or endorse for negotiation any or all of the Securities Collateral [including the stock of Cleveland Unlimited]" in the event of a default, and to exercise "all the rights and remedies of a secured party on default under the UCC.". The Security Agreement further provided that the Collateral Trustee's action was subject to the provisions of the Indenture and the Collateral Trust Agreement.

In April 2010, Plaintiffs purchased in aggregate $5 million (3.33% of outstanding principal amount) of Cleveland Unlimited's notes on the secondary market. These notes, which were due to mature in six months, were given a low rating by Moody's and judged to be a high credit risk.

In December 2010, Cleveland Unlimited determined that it could not repay the principal of the notes on maturity, and commenced negotiations with a committee of noteholders, including Plaintiffs, that held more than 99% of the notes, to devise a restructuring transaction that would avoid bankruptcy. As part of the restructuring, all members of the committee, including Plaintiffs, and the Collateral Trustee, agreed to forbear from exercising rights and remedies available under the Indenture, the UCC or any other applicable law, until April 30, 2011.

Pursuant to the forbearance agreement, CUI pledged the outstanding stock of Cleveland Unlimited as additional collateral on the notes, and CUI agreed to transfer all its Cleveland Unlimited stock to a new entity, CUI Acquisition Corp., for the benefit of

the noteholders (the "Proposed Transaction"). The Proposed Transaction involved an exchange of Cleveland Unlimited's debt for equity in the form of its stock.

On April 28, 2011, Plaintiffs informed the other noteholders, holding 96% of the notes (the "Majority Noteholders"), that it was not willing to participate in the Proposed Transaction, and, instead, was seeking full payment under the notes, plus interest and penalties. The Proposed Transaction did not close on April 30, 2011, and negotiations continued.

Cleveland Unlimited and the Majority Noteholders, to avoid a bankruptcy, determined to complete a strict foreclosure. On June 1, 2011, counsel for the 96% noteholders informed Plaintiffs of the planned strict foreclosure, but Plaintiffs made no effort to enjoin the foreclosure. Subsequently, the Majority Noteholders directed the Collateral Trustee to "foreclose strictly" on CUI's stock in Cleveland Unlimited, and that collateral was transferred to the Collateral Trustee for the sole benefit of the noteholders in full and final satisfaction of the obligations of Cleveland Unlimited, CUI, and the guarantors. The Indenture Trustee then transferred shares representing 96.63% of the shares of Cleveland Unlimited stock to CUI Acquisition Corp., 3.33% of the shares to Plaintiffs, and the rest to the unrelated noteholders.

After the strict foreclosure, Plaintiffs retained the shares of Cleveland Unlimited, and have identified themselves as holders of the shares in correspondence with Cleveland Unlimited's management.

On January 17, 2012, Plaintiffs commenced this action by filing a summons and a motion for summary judgment in lieu of complaint seeking recovery of $5 million in

principal on the notes, plus interest, costs, and disbursements, including attorneys' fees. That motion was denied, Justice Kapnick finding that "plaintiffs do not dispute that they received and retained the Company stock that was acquired through the strict foreclosure" (Decision/Order, NYSCEF Doc. No. 26 [July 16, 2013], at 10-11).

On August 15, 2013, Plaintiffs filed a plenary complaint alleging two claims: breach of contract against Cleveland Unlimited, and breach of guaranty against the guarantors of the notes. Defendants answered the complaint, admitting the transactions, but denying the legal effect of them, asserting defenses of accord and satisfaction, waiver, set-off, and release.

Plaintiffs move for summary judgment (motion seq. No. 006), arguing that Defendants' termination of Plaintiffs' right to recover on the notes was contrary to section 6.07 of the Indenture and section 316 (b) of the TIA, which unambiguously provide that Plaintiffs' right to payment may not be impaired or affected without their consent. They contend that the TIA was adopted to prevent this situation, where an issuer colludes with majority bondholders to prejudice the rights of the minority.

Plaintiffs contend that a recent decision of the Second Circuit, *Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.* (846 F3d 1 [2d Cir 2017]), determined that section 316 (b) of the TIA prohibits parties in a foreclosure from altering a noteholder's legal right to collect principal and interest without its consent. They assert that the foreclosure and debt for equity exchanged by Defendants impaired Plaintiffs' legal right to payment without their consent.

Plaintiffs contend that section 6.07 of the Indenture takes precedence over all other provisions of the Indenture and the Security Agreement. They also argue that none of the provisions relied upon by Defendants may "override" section 6.07. Further, Plaintiffs urge that Defendants' set-off defense, that is, that any judgment should be reduced by the value of the shares transferred to Plaintiffs, fails as a matter of law, because the Indenture required payment in cash, not stock; Plaintiffs had an absolute right to receive principal and interest in cash; and they have offered to return the shares to Defendants since the strict foreclosure.

In opposition and in support of their own summary judgment motion (motion seq. No. 007), Defendants assert that the strict foreclosure fully complied with the UCC sections 9-620 and 9-622, and was authorized by the parties' agreements. They contend that the agreements gave the Indenture Trustee the right to pursue any available remedy to collect payment (Indenture § 6.03), and permitted a majority of the noteholders to direct the Trustee's exercise of its powers, including with respect to remedies pursued under the Indenture § 6.03.

Defendants also maintain that the Security Agreement authorized the Collateral Trustee to exercise the rights of a secured party under the UCC, including taking possession of the collateral and transferring any or all of it. Defendants rely upon *Beal Sav. Bank v Sommer* (8 NY3d 318 [2007]) as support for their interpretation of the agreements. Defendants urge that that the language of the agreements demonstrates the parties' intent that they act collectively in the event of default and in restructuring the

debt of their borrower, and the Trustee and a supermajority of noteholders agreed that the foreclosure and debt for equity exchange benefitted all more than any of the alternatives.

Defendants further argue that the strict foreclosure did not violate section 6.07 of the Indenture, or section 316 (b) of the TIA, if it applied, because those provisions only restrict the ability to amend the Indenture, and no such amendment occurred here. Defendants contend that Plaintiffs' interpretation of the agreements disregards other clear provisions in their agreements. Finally, Defendants urge that summary judgment is appropriate, because plaintiffs have not suffered any damages. Plaintiffs' own valuation of the Cleveland Unlimited shares right after the strict foreclosure show that the value increased. In any event, defendant guarantors assert that they are entitled to summary judgment on the second claim, because the strict foreclosure provided that the transaction would be in full and final payment of the obligations on the notes and guarantees.

Discussion

To establish a breach of contract, the plaintiff must demonstrate the existence of a contract with the defendant, performance by the plaintiff, defendant's breach, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). An indenture agreement is a contract and "interpretation of indenture provisions is a matter of basic contract law" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559 [2014] [internal quotation marks and citations omitted]). In interpreting a contract, the court must look to the language used, for "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain

meaning of its terms" (*id.* at 559-560 [internal quotation marks and citations omitted]; *accord Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d at 324). The court must construe the contracts to give meaning and effect to the material provisions, and should not render any provision meaningless (*id.*). The agreements "should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325 [internal quotation marks and citation omitted]).

In the default provisions of the Indenture, the Indenture Trustee and the Collateral Trustee were expressly given the exclusive right to exercise various remedies, and to do so at the direction of the majority of noteholders. Thus, it had the right to "pursue any available remedy by proceeding at law or in equity to collect the payment" of any amounts due under the notes (Indenture § 6.03), and a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee . . . including, without limitation, any remedies provided for in Section 6.03" (*id.*, § 6.05 [emphasis in original]).

The noteholders further agreed that the Collateral Trustee "may, in its sole discretion and without the consent of the Indenture Trustee or the Holders, take all actions . . . to . . . collect and receive any and all amounts payable" under the notes (*id.*, § 12.08). These Indenture provisions were summarized in the Form of Note, signed by

each noteholder, which stated that "[t]he Indenture permits, subject to certain limitations therein provided, Holders of a majority in principal amount of the Notes outstanding to direct the Trustee in its exercise of any trust or power" (Form of Note § 16).

The Collateral Trust Agreement, entered into on the same date and as part of the same transaction, gave the Collateral Trustee the right to "sell, assign, collect, assemble, foreclose on . . . or otherwise exercise or enforce the rights and remedies of a secured party . . . with respect to the Collateral" (Collateral Trust Agreement, § 3.1). It also clearly provided in section 3.3, that upon notice of a default entitling the Collateral Trustee to foreclose upon, collect or otherwise enforce its liens, the Collateral Trust could await direction by a majority of the noteholders, and would act, or decline to act, as directed by the majority "in the exercise and enforcement of the Collateral Trustee's interests, rights, powers and remedies in respect of the Collateral," and that, unless directed to the contrary by a majority of the noteholders, it could, in any event, take such action with respect to any default as it deemed advisable and in the interest of the noteholders (*id.*, § 3.3).

Further, the Collateral Trustee was "irrevocably authorized and empowered" to exercise its powers in accordance with the Security Documents, and no holder "shall have any right individually to realize upon any of the Collateral," and "all powers, rights and remedies arising out of or in connection with the Security Documents may be exercised solely by the Collateral Trustee" (*id.*, § 3.5). These provisions, along with the Indenture, plainly demonstrate that the parties contemplated that the Collateral Trustee would take

collective action on behalf of all noteholders pursuant to a direction of the majority noteholders.

In the Security Agreement, also part of the same transaction, the Collateral Trustee was given the right "to endorse, assign or otherwise transfer . . . or endorse for negotiation any or all of the Securities Collateral [which included the Cleveland Unlimited stock]" (Security Agreement § 3.1). Moreover, the parties agreed that, upon a default, the Collateral Trustee may "exercise all the rights and remedies of a secured party on default under the UCC" (*id.*, § 9.1 [viii]).

Interpreting these unambiguous agreements together and shows that there was a collective design to this transaction, and the Collateral Trustee was to act for all the noteholders in the event of the issuer's default, upon the direction of a majority of noteholders. None of the agreements, except for the noteholders' individual notes, even individually name the noteholders, and they are simply referred to collectively as a group. Together, these agreements plainly grant the Collateral Trustee the right to pursue a remedy, such as a strict foreclosure under UCC §§ 9-620 and 9-622, if so directed by a majority of noteholders. Thus, the Collateral Trustee's pursuit of the out-of-court debt restructuring transaction here at the direction of the Majority Noteholders was authorized under the parties' agreements.

Beal Sav. Bank v Sommer (8 NY3d 318, *supra*) is instructive. In that case, involving a syndicated loan arrangement, a supermajority of 95.5% holders of the principal amount of debt incurred by the borrower and the administrative agent entered into a settlement with a trust and with two other sponsors. Thirty-six of 37 lenders

agreed that the settlement was of greater benefit to the consortium than an attempt to recover under the loan agreement (*id.* at 323). Like the agreements at issue here, the administrative agent was authorized under the agreements to exercise any and all remedies at law or in equity upon direction by a supermajority of lenders (*id.* at 321-322).

The plaintiff in *Beal Sav. Bank*, the only objecting minority (4.5%) lender, sued the trustee for breach, asserting that there were no provisions in the agreements precluding a lender from proceeding individually to collect the unpaid debt. The Court of Appeals, however, held that the "specific, unambiguous language of several provisions, read in the context of the agreements as a whole, convinces us that . . . the lenders intended to act collectively in the event of the borrower's default and to preclude an individual lender from disrupting the scheme of the agreements at issue" (*id.* at 321).

Also like the Majority Noteholders here, the lenders in *Beal Sav. Bank* "exercised their rights by restructuring the debt of a financially troubled Borrower" (*id.* at 330). The Court found that "the supermajority vote is meant to protect all Lenders in the consortium from a disaffected Lender seeking financial benefit perhaps at the expense of other debtholders" (*id.* at 332).

The plaintiff dissenting lender pointed to provisions of the credit agreement which provided that there could be "no amendment, modification or waiver" to loan documents that would release the sponsors under the loan without the consent of all lenders, and a provision of the parties' Keep Well agreement, which stated that the sponsors' obligations were "absolute and unconditional under any and all circumstances" (*id.* at 330). The Court of Appeals found that the unanimous consent clause was to ensure that

the terms of the loan could not be altered in a manner inconsistent with what all the lenders agreed to, but determined that the settlement did not release the trust by amending, modifying or waiving any provision of the agreements (*id.*).

Similarly, Plaintiffs in this action rely upon section 6.07 of the Indenture, asserting that this section takes precedence over all other sections of the Indenture and the Security Agreement, and argue that Defendants terminated plaintiffs' legal right to receive principal and interest on their notes without their consent in breach that provision.[1] However, this section does not unravel the collective design of this transaction or trump the other provisions in the Collateral Trust or the Security Agreement, like the provision empowering the Collateral to pursue remedies under the UCC. If section 6.07 were read so broadly, then the remedies provided the Collateral Trustee to act on behalf of all the noteholders, at the direction of a majority of noteholders, would be rendered meaningless.

Moreover, for section 6.07 to supersede other provisions in the Indenture, the other provisions must actually conflict (*see Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 158-159 [2015] [notwithstanding clause does not supersede other provision because they did not conflict]). The general provision in section 6.07, protecting individual noteholders' right to payment under the notes, does not actually conflict with, or override the specific, clear language in several other provisions in the Indenture (i.e. §§ 6.03, 6.05), the Collateral Trust Agreement (§§ 3.1, 3.3, 3.5), and the Security Agreement (§§

[1] Section 6.07 provides, in relevant part, "[N]otwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal . . . and interest . . . shall not be impaired or affected without the consent of such Holder."

3.1, 9), which empower the Collateral Trustee to act upon default at the direction of a majority of noteholders. This is particularly true when the agreements are read in the context of the transaction as a whole. While section 6.07 prohibits noteholders from amending the Indenture's core payment terms without the consent of all noteholders, the strict foreclosure, and then the debt for equity transaction, did not release the debt by amending or modifying the Indenture's core payment terms. As in *Beal Sav. Bank v Sommer*, section 6.07 of the Indenture did not preclude the Collateral Trustee, at the direction of the Majority Noteholders, from seeking the best recovery upon Cleveland Unlimited's default on the notes.

Plaintiffs argue that the Second Circuit's recent decision in *Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.* (846 F3d 1), which addresses section 316 (b) of the TIA (upon which section 6.07 is based) supports their contentions. That case, however, does not support Plaintiffs. In *Marblegate* the Second Circuit unequivocally held that "Section 316 (b) prohibits only non-consensual amendments to an indenture's payment terms" (*id.* at 3). *Marblegate* involved nearly identical facts as those in this action -- a debtor in financial distress, and secured creditors who sought to relieve that debtor of its debt obligations by doing an out-of-court restructuring, involving a foreclosure.

Upon the foreclosure, the collateral agent sold the foreclosed assets to a newly formed subsidiary of the debtor, and that subsidiary would exchange debt for equity only to consenting creditors, and continue the business. In exchanging the notes for equity in the new subsidiary, noteholders were warned that they would not receive payment if they

did not consent to this intercompany sale. The Second Circuit noted that no terms of the Indenture were altered, and the noteholders retained the legal right to collect payments under the notes, though the original debtor was transformed into an empty shell, and, thus, their practical ability to collect on payments was affected (*id.* at 3-4).

In *Marblegate* the Second Circuit determined that the broad reading of section 316 (b), asserted by the dissenting noteholder was not warranted. It found nothing in that statute that required that the noteholders be afforded an absolute and unconditional right to payment (*id.* at 7). Rather, the statute bars, for example, formal amendments and indenture provisions such as "collective-action clauses," which are clauses that authorize a majority of bondholders to approve changes to payment terms and force those changes on all bondholders," and "no-action clauses," which prevent individual noteholders from suing issuers for breach of indenture, leaving the trustee as the sole party to bring an action (*id.*).

The foreclosure transaction in *Marblegate* did not formally amend any Indenture payment terms that eliminated the right to sue for payment and the Second Circuit found that the legislative history of TIA section 316 (b) does not prohibit foreclosures, even when they affect a noteholder's ability to receive full payment. It rejected the noteholder's argument that the right to receive payment is "impaired" when the assets available for such payment are placed beyond the reach of a dissenting noteholder, because that situation "could apply to <u>every</u> foreclosure in which the value of the collateral is insufficient to pay creditors in full" (*id.* at 16 [emphasis in original]). The court also noted that its holding did not leave dissenting noteholders at the mercy of

majority noteholders, because the dissenting noteholders still had the legal right to pursue other available remedies, including successor liability or fraudulent conveyance, or could insist on credit agreements that forbid such intercompany sale transactions (*id.*).

As in *Marblegate*, the foreclosure transaction at issue here did not amend any terms of the Indenture. Nor did it prevent Plaintiffs, as dissenting noteholders, from bringing an action to collect payments due on the dates indicated in the Indenture. Plaintiffs retain the legal right to obtain payment by suing Cleveland Unlimited as the issuer of the original notes. In sum, there was no breach of Indenture section 6.07, no basis for a claim of breach of the guarantees, and Plaintiffs' claims should be dismissed as a matter of law. Accordingly, it is

ORDERED that the defendants' motion (motion seq. No. 007) for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' motion for summary judgment (motion seq. No. 006) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/11/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER	[ ]	SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ]	DO NOT POST	[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

Hon. Saliann Scarpulla

Motion Seq. No. 007

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of a Decision and Order with respect to Motion Seq. No. 007 in the above-captioned matter dated January 11, 2018 and entered in the office of the Clerk of the Supreme Court, New York County, on the 16th day of January 2018.

Dated: New York, New York
January 16, 2018

DECHERT LLP

By: */s/ Brendan Herrmann*

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 39
Justice

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CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P., AQR DELTA MASTER ACCOUNT, L.P., AQR DELTA SAPPHIRE FUND, L.P., AQR FUNDS-AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

- V -

CLEVELAND UNLIMITED, INC., CLEVELAND UNLIMITED AWS, INC., F/K/A TRIAD AWS, INC., CLEVELAND UNLIMITED LICENSE SUB, LLC, CLEVELAND PCS REALITY, LLC, CSM WIRELESS, LLC, CSM COLUMBUS (OH) OPERATING SUB, LLC, CSM INDIANAPOLIS OPERATING SUB, LLC, CSM COLUMBUS (IN) OPERATING SUB, LLC, CSM NEW CASTLE OPERATING SUB, LLC, CSM CANTON OPERATING SUB, LLC, CSM YOUNGSTOWN OPERATING SUB, LLC, CSM CLEVELAND OPERATING SUB, LLC, CSM COLUMBUS (OH) LICENSE SUB, LLC, CSM INDIANAPOLIS LICENSE SUB, LLC, CSM COLUMBUS (IN) LICENSE SUB, LLC, CSM NEW CASTLE LICENSE SUB, LLC, CSM CANTON LICENSE SUB, LLC, CSM YOUNSTOWN LICENSE SUB, LLC, CSM CLEVELAND LICENSE SUB, LLC, CUI HOLDINGS, LLC

Defendants.

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INDEX NO. 650140/2012

MOTION DATE 5/26/2017

MOTION SEQ. NO. 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER

Upon the foregoing documents, it is

Motion sequence Nos. 006 and 007 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Plaintiffs CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds-AQR

Diversified Arbitrage Fund (collectively "Plaintiffs"), a group of investors which invested $5 million in secured notes issued by defendant Cleveland Unlimited, Inc. and guaranteed by its affiliates, is seeking recovery in full thereon, even though the notes and guarantees were extinguished, because the collateral trustee, at the direction of 96% of the noteholders, foreclosed on the collateral in full satisfaction of the notes. Then, in a debt for equity restructuring transaction, all notes, including those held by Plaintiffs, were exchanged for all the equity of defendant Cleveland Unlimited, Inc. ("Cleveland Unlimited").

Plaintiffs claim that they did not consent to the restructuring transaction, which violated the terms of the notes, the indenture, and the Trust Indenture Act of 1939 (TIA) (15 USC §§ 77aaa et seq). Cleveland Unlimited and the remaining defendant guarantors (collectively, "Defendants") claim that the collateral trustee was expressly authorized under the parties' agreements to foreclose and pursue this debt for equity exchange, and that Plaintiffs accepted and still hold the equity, and therefore suffered no damages. They contend that Plaintiffs' interpretation of the agreements would confer preferential status upon them, and would result in Plaintiffs receiving payments that none of the other noteholders would get. Both parties seek summary judgment based on the language of the contracts.

Background

Cleveland Unlimited was an Ohio-based regional wireless communications provider. Defendant CUI Holdings, LLC ("CUI") owned all its stock. On December 15, 2005, Cleveland Unlimited issued $150 million of senior secured floating rate notes,

pursuant to an Indenture dated December 15, 2005, which notes came due in 2010. All defendants, except for Cleveland Unlimited, CUI, and Cleveland Unlimited AWS, Inc., were the original guarantors on the notes (the "Original Guarantors"), and non-party US. Bank National Association ("U.S. Bank") was the indenture trustee (the "Indenture Trustee"), pursuant to an indenture agreement (the "Indenture").

In addition to the Indenture, Cleveland Unlimited, the Original Guarantors, and the Indenture Trustee entered into a security agreement (the "Security Agreement") and a collateral trust agreement (the "Collateral Trust Agreement"). U.S. Bank was also named the Collateral Trustee under the Collateral Trust Agreement.

Upon later amendments to those agreements, defendants CUI and Cleveland Unlimited AWS, Inc. also became guarantors.

The Cleveland Unlimited notes were subject to the terms and conditions set forth in the Indenture, which provided that the notes matured on December 15, 2010. Under the Indenture, in section 6.03, the Indenture Trustee was granted the right to "pursue any available remedy by proceeding at law or in equity to collect the payment" on behalf of the noteholders. Section 6.05 of the Indenture provided that a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to [the Indenture Trustee] . . . or exercising any trust or power conferred on [the Indenture Trustee] . . . including, without limitation, any remedies provided for in Section 6.03."

Also, Indenture § 6.07 provided:

> Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on the Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

Indenture § 12.08 provided that "each Holder, by acceptance of its Note(s) agrees that . . . [the Collateral Trustee] may, in its sole discretion and without the consent of . . . the Holders, take all actions it deems necessary and appropriate in order to . . . collect and receive any and all amounts payable" under the notes and guarantees. Pursuant to section 11.01 of the Indenture, the parties agreed that even though it was not qualified under the TIA, "[a]ny provision of the TIA which is required to be included in a qualified Indenture, but not expressly included herein, shall be deemed to be included by this reference."

Under the Collateral Trust Agreement § 3.3, the Collateral Trustee was empowered to act as directed by the majority of the noteholders "in the exercise and enforcement of the Collateral Trustee's interest, rights, powers and remedies in respect of the Collateral." The noteholders agreed that they lacked "any right individually to realize upon any of the Collateral," and agreed "that all powers, rights and remedies . . . may be exercised solely by the Collateral Trustee."

Pursuant to Security Agreement § 2.1, the guarantors, except for CUI, pledged and granted to the Collateral Trustee a lien on, and security interest in, the collateral, which

included substantially all of Cleveland Unlimited's assets. That agreement also expressly granted the Collateral Trustee the "right . . . to endorse, assign or otherwise transfer . . . or endorse for negotiation any or all of the Securities Collateral [including the stock of Cleveland Unlimited]" in the event of a default, and to exercise "all the rights and remedies of a secured party on default under the UCC." The Security Agreement further provided that the Collateral Trustee's action was subject to the provisions of the Indenture and the Collateral Trust Agreement.

In April 2010, Plaintiffs purchased in aggregate $5 million (3.33% of outstanding principal amount) of Cleveland Unlimited's notes on the secondary market. These notes, which were due to mature in six months, were given a low rating by Moody's and judged to be a high credit risk.

In December 2010, Cleveland Unlimited determined that it could not repay the principal of the notes on maturity, and commenced negotiations with a committee of noteholders, including Plaintiffs, that held more than 99% of the notes, to devise a restructuring transaction that would avoid bankruptcy. As part of the restructuring, all members of the committee, including Plaintiffs, and the Collateral Trustee, agreed to forbear from exercising rights and remedies available under the Indenture, the UCC or any other applicable law, until April 30, 2011.

Pursuant to the forbearance agreement, CUI pledged the outstanding stock of Cleveland Unlimited as additional collateral on the notes, and CUI agreed to transfer all its Cleveland Unlimited stock to a new entity, CUI Acquisition Corp., for the benefit of

the noteholders (the "Proposed Transaction"). The Proposed Transaction involved an exchange of Cleveland Unlimited's debt for equity in the form of its stock.

On April 28, 2011, Plaintiffs informed the other noteholders, holding 96% of the notes (the "Majority Noteholders"), that it was not willing to participate in the Proposed Transaction, and, instead, was seeking full payment under the notes, plus interest and penalties. The Proposed Transaction did not close on April 30, 2011, and negotiations continued.

Cleveland Unlimited and the Majority Noteholders, to avoid a bankruptcy, determined to complete a strict foreclosure. On June 1, 2011, counsel for the 96% noteholders informed Plaintiffs of the planned strict foreclosure, but Plaintiffs made no effort to enjoin the foreclosure. Subsequently, the Majority Noteholders directed the Collateral Trustee to "foreclose strictly" on CUI's stock in Cleveland Unlimited, and that collateral was transferred to the Collateral Trustee for the sole benefit of the noteholders in full and final satisfaction of the obligations of Cleveland Unlimited, CUI, and the guarantors. The Indenture Trustee then transferred shares representing 96.63% of the shares of Cleveland Unlimited stock to CUI Acquisition Corp., 3.33% of the shares to Plaintiffs, and the rest to the unrelated noteholders.

After the strict foreclosure, Plaintiffs retained the shares of Cleveland Unlimited, and have identified themselves as holders of the shares in correspondence with Cleveland Unlimited's management.

On January 17, 2012, Plaintiffs commenced this action by filing a summons and a motion for summary judgment in lieu of complaint seeking recovery of $5 million in

principal on the notes, plus interest, costs, and disbursements, including attorneys' fees. That motion was denied, Justice Kapnick finding that "plaintiffs do not dispute that they received and retained the Company stock that was acquired through the strict foreclosure" (Decision/Order, NYSCEF Doc. No. 26 [July 16, 2013], at 10-11).

On August 15, 2013, Plaintiffs filed a plenary complaint alleging two claims: breach of contract against Cleveland Unlimited, and breach of guaranty against the guarantors of the notes. Defendants answered the complaint, admitting the transactions, but denying the legal effect of them, asserting defenses of accord and satisfaction, waiver, set-off, and release.

Plaintiffs move for summary judgment (motion seq. No. 006), arguing that Defendants' termination of Plaintiffs' right to recover on the notes was contrary to section 6.07 of the Indenture and section 316 (b) of the TIA, which unambiguously provide that Plaintiffs' right to payment may not be impaired or affected without their consent. They contend that the TIA was adopted to prevent this situation, where an issuer colludes with majority bondholders to prejudice the rights of the minority.

Plaintiffs contend that a recent decision of the Second Circuit, *Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.* (846 F3d 1 [2d Cir 2017]), determined that section 316 (b) of the TIA prohibits parties in a foreclosure from altering a noteholder's legal right to collect principal and interest without its consent. They assert that the foreclosure and debt for equity exchanged by Defendants impaired Plaintiffs' legal right to payment without their consent.

Plaintiffs contend that section 6.07 of the Indenture takes precedence over all other provisions of the Indenture and the Security Agreement. They also argue that none of the provisions relied upon by Defendants may "override" section 6.07. Further, Plaintiffs urge that Defendants' set-off defense, that is, that any judgment should be reduced by the value of the shares transferred to Plaintiffs, fails as a matter of law, because the Indenture required payment in cash, not stock; Plaintiffs had an absolute right to receive principal and interest in cash; and they have offered to return the shares to Defendants since the strict foreclosure.

In opposition and in support of their own summary judgment motion (motion seq. No. 007), Defendants assert that the strict foreclosure fully complied with the UCC sections 9-620 and 9-622, and was authorized by the parties' agreements. They contend that the agreements gave the Indenture Trustee the right to pursue any available remedy to collect payment (Indenture § 6.03), and permitted a majority of the noteholders to direct the Trustee's exercise of its powers, including with respect to remedies pursued under the Indenture § 6.03.

Defendants also maintain that the Security Agreement authorized the Collateral Trustee to exercise the rights of a secured party under the UCC, including taking possession of the collateral and transferring any or all of it. Defendants rely upon *Beal Sav. Bank v Sommer* (8 NY3d 318 [2007]) as support for their interpretation of the agreements. Defendants urge that that the language of the agreements demonstrates the parties' intent that they act collectively in the event of default and in restructuring the

debt of their borrower, and the Trustee and a supermajority of noteholders agreed that the foreclosure and debt for equity exchange benefitted all more than any of the alternatives.

Defendants further argue that the strict foreclosure did not violate section 6.07 of the Indenture, or section 316 (b) of the TIA, if it applied, because those provisions only restrict the ability to amend the Indenture, and no such amendment occurred here. Defendants contend that Plaintiffs' interpretation of the agreements disregards other clear provisions in their agreements. Finally, Defendants urge that summary judgment is appropriate, because plaintiffs have not suffered any damages. Plaintiffs' own valuation of the Cleveland Unlimited shares right after the strict foreclosure show that the value increased. In any event, defendant guarantors assert that they are entitled to summary judgment on the second claim, because the strict foreclosure provided that the transaction would be in full and final payment of the obligations on the notes and guarantees.

Discussion

To establish a breach of contract, the plaintiff must demonstrate the existence of a contract with the defendant, performance by the plaintiff, defendant's breach, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). An indenture agreement is a contract and "interpretation of indenture provisions is a matter of basic contract law" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559 [2014] [internal quotation marks and citations omitted]). In interpreting a contract, the court must look to the language used, for "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain

meaning of its terms" (*id.* at 559-560 [internal quotation marks and citations omitted]; *accord Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d at 324). The court must construe the contracts to give meaning and effect to the material provisions, and should not render any provision meaningless (*id.*). The agreements "should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325 [internal quotation marks and citation omitted]).

In the default provisions of the Indenture, the Indenture Trustee and the Collateral Trustee were expressly given the exclusive right to exercise various remedies, and to do so at the direction of the majority of noteholders. Thus, it had the right to "pursue any available remedy by proceeding at law or in equity to collect the payment" of any amounts due under the notes (Indenture § 6.03), and a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee . . . including, without limitation, any remedies provided for in Section 6.03" (*id.*, § 6.05 [emphasis in original]).

The noteholders further agreed that the Collateral Trustee "may, in its sole discretion and without the consent of the Indenture Trustee or the Holders, take all actions . . . to . . . collect and receive any and all amounts payable" under the notes (*id.*, § 12.08). These Indenture provisions were summarized in the Form of Note, signed by

each noteholder, which stated that "[t]he Indenture permits, subject to certain limitations therein provided, Holders of a majority in principal amount of the Notes outstanding to direct the Trustee in its exercise of any trust or power" (Form of Note § 16).

The Collateral Trust Agreement, entered into on the same date and as part of the same transaction, gave the Collateral Trustee the right to "sell, assign, collect, assemble, foreclose on . . . or otherwise exercise or enforce the rights and remedies of a secured party . . . with respect to the Collateral" (Collateral Trust Agreement, § 3.1). It also clearly provided in section 3.3, that upon notice of a default entitling the Collateral Trustee to foreclose upon, collect or otherwise enforce its liens, the Collateral Trust could await direction by a majority of the noteholders, and would act, or decline to act, as directed by the majority "in the exercise and enforcement of the Collateral Trustee's interests, rights, powers and remedies in respect of the Collateral," and that, unless directed to the contrary by a majority of the noteholders, it could, in any event, take such action with respect to any default as it deemed advisable and in the interest of the noteholders (*id.*, § 3.3).

Further, the Collateral Trustee was "irrevocably authorized and empowered" to exercise its powers in accordance with the Security Documents, and no holder "shall have any right individually to realize upon any of the Collateral," and "all powers, rights and remedies arising out of or in connection with the Security Documents may be exercised solely by the Collateral Trustee" (*id.*, § 3.5). These provisions, along with the Indenture, plainly demonstrate that the parties contemplated that the Collateral Trustee would take

collective action on behalf of all noteholders pursuant to a direction of the majority noteholders.

In the Security Agreement, also part of the same transaction, the Collateral Trustee was given the right "to endorse, assign or otherwise transfer . . . or endorse for negotiation any or all of the Securities Collateral [which included the Cleveland Unlimited stock]" (Security Agreement § 3.1). Moreover, the parties agreed that, upon a default, the Collateral Trustee may "exercise all the rights and remedies of a secured party on default under the UCC" (*id.*, § 9.1 [viii]).

Interpreting these unambiguous agreements together and shows that there was a collective design to this transaction, and the Collateral Trustee was to act for all the noteholders in the event of the issuer's default, upon the direction of a majority of noteholders. None of the agreements, except for the noteholders' individual notes, even individually name the noteholders, and they are simply referred to collectively as a group. Together, these agreements plainly grant the Collateral Trustee the right to pursue a remedy, such as a strict foreclosure under UCC §§ 9-620 and 9-622, if so directed by a majority of noteholders. Thus, the Collateral Trustee's pursuit of the out-of-court debt restructuring transaction here at the direction of the Majority Noteholders was authorized under the parties' agreements.

Beal Sav. Bank v Sommer (8 NY3d 318, *supra*) is instructive. In that case, involving a syndicated loan arrangement, a supermajority of 95.5% holders of the principal amount of debt incurred by the borrower and the administrative agent entered into a settlement with a trust and with two other sponsors. Thirty-six of 37 lenders

agreed that the settlement was of greater benefit to the consortium than an attempt to recover under the loan agreement (*id.* at 323). Like the agreements at issue here, the administrative agent was authorized under the agreements to exercise any and all remedies at law or in equity upon direction by a supermajority of lenders (*id.* at 321-322).

The plaintiff in *Beal Sav. Bank*, the only objecting minority (4.5%) lender, sued the trustee for breach, asserting that there were no provisions in the agreements precluding a lender from proceeding individually to collect the unpaid debt. The Court of Appeals, however, held that the "specific, unambiguous language of several provisions, read in the context of the agreements as a whole, convinces us that . . . the lenders intended to act collectively in the event of the borrower's default and to preclude an individual lender from disrupting the scheme of the agreements at issue" (*id.* at 321).

Also like the Majority Noteholders here, the lenders in *Beal Sav. Bank* "exercised their rights by restructuring the debt of a financially troubled Borrower" (*id.* at 330). The Court found that "the supermajority vote is meant to protect all Lenders in the consortium from a disaffected Lender seeking financial benefit perhaps at the expense of other debtholders" (*id.* at 332).

The plaintiff dissenting lender pointed to provisions of the credit agreement which provided that there could be "no amendment, modification or waiver" to loan documents that would release the sponsors under the loan without the consent of all lenders, and a provision of the parties' Keep Well agreement, which stated that the sponsors' obligations were "absolute and unconditional under any and all circumstances" (*id.* at 330). The Court of Appeals found that the unanimous consent clause was to ensure that

the terms of the loan could not be altered in a manner inconsistent with what all the lenders agreed to, but determined that the settlement did not release the trust by amending, modifying or waiving any provision of the agreements (*id.*).

Similarly, Plaintiffs in this action rely upon section 6.07 of the Indenture, asserting that this section takes precedence over all other sections of the Indenture and the Security Agreement, and argue that Defendants terminated plaintiffs' legal right to receive principal and interest on their notes without their consent in breach that provision.[1] However, this section does not unravel the collective design of this transaction or trump the other provisions in the Collateral Trust or the Security Agreement, like the provision empowering the Collateral to pursue remedies under the UCC. If section 6.07 were read so broadly, then the remedies provided the Collateral Trustee to act on behalf of all the noteholders, at the direction of a majority of noteholders, would be rendered meaningless.

Moreover, for section 6.07 to supersede other provisions in the Indenture, the other provisions must actually conflict (*see Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 158-159 [2015] [notwithstanding clause does not supersede other provision because they did not conflict]). The general provision in section 6.07, protecting individual noteholders' right to payment under the notes, does not actually conflict with, or override the specific, clear language in several other provisions in the Indenture (i.e. §§ 6.03, 6.05), the Collateral Trust Agreement (§§ 3.1, 3.3, 3.5), and the Security Agreement (§§

[1] Section 6.07 provides, in relevant part, "[N]otwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal . . . and interest . . . shall not be impaired or affected without the consent of such Holder."

3.1, 9), which empower the Collateral Trustee to act upon default at the direction of a majority of noteholders. This is particularly true when the agreements are read in the context of the transaction as a whole. While section 6.07 prohibits noteholders from amending the Indenture's core payment terms without the consent of all noteholders, the strict foreclosure, and then the debt for equity transaction, did not release the debt by amending or modifying the Indenture's core payment terms. As in *Beal Sav. Bank v Sommer*, section 6.07 of the Indenture did not preclude the Collateral Trustee, at the direction of the Majority Noteholders, from seeking the best recovery upon Cleveland Unlimited's default on the notes.

Plaintiffs argue that the Second Circuit's recent decision in *Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.* (846 F3d 1), which addresses section 316 (b) of the TIA (upon which section 6.07 is based) supports their contentions. That case, however, does not support Plaintiffs. In *Marblegate* the Second Circuit unequivocally held that "Section 316 (b) prohibits only non-consensual amendments to an indenture's payment terms" (*id.* at 3). *Marblegate* involved nearly identical facts as those in this action -- a debtor in financial distress, and secured creditors who sought to relieve that debtor of its debt obligations by doing an out-of-court restructuring, involving a foreclosure.

Upon the foreclosure, the collateral agent sold the foreclosed assets to a newly formed subsidiary of the debtor, and that subsidiary would exchange debt for equity only to consenting creditors, and continue the business. In exchanging the notes for equity in the new subsidiary, noteholders were warned that they would not receive payment if they

did not consent to this intercompany sale. The Second Circuit noted that no terms of the Indenture were altered, and the noteholders retained the legal right to collect payments under the notes, though the original debtor was transformed into an empty shell, and, thus, their practical ability to collect on payments was affected (*id.* at 3-4).

In *Marblegate* the Second Circuit determined that the broad reading of section 316 (b), asserted by the dissenting noteholder was not warranted. It found nothing in that statute that required that the noteholders be afforded an absolute and unconditional right to payment (*id.* at 7). Rather, the statute bars, for example, formal amendments and indenture provisions such as "collective-action clauses," which are clauses that authorize a majority of bondholders to approve changes to payment terms and force those changes on all bondholders," and "no-action clauses," which prevent individual noteholders from suing issuers for breach of indenture, leaving the trustee as the sole party to bring an action (*id.*).

The foreclosure transaction in *Marblegate* did not formally amend any Indenture payment terms that eliminated the right to sue for payment and the Second Circuit found that the legislative history of TIA section 316 (b) does not prohibit foreclosures, even when they affect a noteholder's ability to receive full payment. It rejected the noteholder's argument that the right to receive payment is "impaired" when the assets available for such payment are placed beyond the reach of a dissenting noteholder, because that situation "could apply to <u>every</u> foreclosure in which the value of the collateral is insufficient to pay creditors in full" (*id.* at 16 [emphasis in original]). The court also noted that its holding did not leave dissenting noteholders at the mercy of

majority noteholders, because the dissenting noteholders still had the legal right to pursue other available remedies, including successor liability or fraudulent conveyance, or could insist on credit agreements that forbid such intercompany sale transactions (*id.*).

As in *Marblegate*, the foreclosure transaction at issue here did not amend any terms of the Indenture. Nor did it prevent Plaintiffs, as dissenting noteholders, from bringing an action to collect payments due on the dates indicated in the Indenture. Plaintiffs retain the legal right to obtain payment by suing Cleveland Unlimited as the issuer of the original notes. In sum, there was no breach of Indenture section 6.07, no basis for a claim of breach of the guarantees, and Plaintiffs' claims should be dismissed as a matter of law. Accordingly, it is

ORDERED that the defendants' motion (motion seq. No. 007) for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' motion for summary judgment (motion seq. No. 006) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/11/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	DO NOT POST		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

EXHIBIT B

A-5

NOTICE OF APPEAL, DATED JANUARY 24, 2018 [A-5-A-7]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND, Plaintiffs, v. CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC, Defendants.	Index No. 650140/2012 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiffs CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds—AQR Diversified Arbitrage Fund (collectively, "Plaintiffs") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from a Decision and Order issued by the Honorable Saliann Scarpulla, dated January 11, 2018, entered by the Clerk of the Supreme Court, New York County, on January 16, 2018, and served

with Notice of Entry on January 16, 2018, which denied Plaintiffs' motion for summary judgment and granted the motion for summary judgment of Defendants Cleveland Unlimited, Inc.; Cleveland Unlimited AWS, Inc., f/k/a Triad AWS, Inc.; Cleveland Unlimited License Sub, LLC; Cleveland PCS Realty, LLC; CSM Wireless, LLC; CSM Columbus (OH) Operating Sub, LLC; CSM Indianapolis Operating Sub, LLC; CSM Columbus (IN) Operating Sub, LLC; CSM New Castle Operating Sub, LLC; CSM Canton Operating Sub, LLC; CSM Youngstown Operating Sub, LLC; CSM Cleveland Operating Sub, LLC; CSM Columbus (OH) License Sub, LLC; CSM Indianapolis License Sub, LLC; CSM Columbus (IN) License Sub, LLC; CSM New Castle License Sub, LLC; CSM Canton License Sub, LLC; CSM Youngstown License Sub, LLC; CSM Cleveland License Sub, LLC; and CUI Holdings, LLC. A copy of the Decision and Order (Doc. Nos. 236 and 237) is annexed hereto as Exhibit A.[1]

Dated: New York, New York
January 24, 2018

DRINKER BIDDLE & REATH LLP

By: /s/ James H. Millar
James H. Millar
Clay J. Pierce
Richard M. Haggerty

1177 Avenue of the Americas, 41st Floor
New York, NY 10036
Tel: (212) 248-3140

Counsel for Plaintiffs CNH Diversified Opportunities Master Account LP, et al.

[1] The court issued the order twice on its docket, because it consolidated Plaintiffs' and Defendants' motions for summary judgment (Motion Sequence Nos. 006 and 007). The two orders are identical.

TO: DECHERT LLP
Allan S. Brilliant
Debra D. O'Gorman
Daphne T. Ha
Brendan Herrmann
1095 Avenue of the Americas
New York, NY 10036
Tel: (212) 698-3500

Attorneys for Defendants
Cleveland Unlimited, Inc., et al.

EXHIBIT C

A-51

JUDGMENT, ENTERED FEBRUARY 7, 2018, APPEALED FROM [A-51-A-56]

FILED: NEW YORK COUNTY CLERK 02/08/2018 04:04 PM INDEX NO. 650140/2012
NYSCEF DOC. NO. 247
NYSCEF DOC. NO. 245 RECEIVED NYSCEF: 02/08/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

(B) CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

(A) CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

JUDGMENT

This matter having come before the Court, Hon. Saliann Scarpulla, Justice of the Supreme Court, presiding, upon a motion for summary judgment by Defendants Cleveland Unlimited, Inc.; Cleveland Unlimited AWS, Inc. f/k/a Triad AWS, Inc.; Cleveland Unlimited License Sub, LLC; Cleveland PCS Realty, LLC; CSM Wireless, LLC; CSM Columbus (OH) Operating Sub, LLC; CSM Indianapolis Operating Sub, LLC; CSM Columbus (IN) Operating Sub, LLC; CSM New Castle Operating Sub, LLC; CSM Canton Operating Sub, LLC; CSM Youngstown Operating Sub, LLC; CSM Cleveland Operating Sub, LLC; CSM Columbus (OH)

A-52

License Sub, LLC; CSM Indianapolis License Sub, LLC; CSM Columbus (IN) License Sub, LLC; CSM New Castle License Sub, LLC; CSM Canton License Sub, LLC; CSM Youngstown License Sub, LLC; CSM Cleveland License Sub, LLC; and CUI Holdings, LLC (collectively, the "Defendants") against Plaintiffs CNH Diversified Opportunities Master Account, L.P.; AQR Delta Master Account, L.P.; AQR Delta Sapphire Fund, L.P.; and AQR Funds—AQR Diversified Arbitrage Fund (collectively, the "Plaintiffs"), pursuant to Rule 3212 of the New York Civil Practice Law and Rules, and a Decision and Order dated January 11, 2018 and entered January 16, 2018, granting Defendants' motion for summary judgment dismissing Plaintiffs' Complaint, and denying Plaintiffs' motion for summary judgment for breach of contract and breach of guaranty, having been duly rendered and entered;

NOW, on motion of Defendants, through their counsel Dechert LLP, it is

ADJUDGED, that The complaint is dismissed, [redacted]

and it is further

ADJUDGED, that Defendants, having their principal places of business at 7165 East Pleasant Valley Road, Independence, OH 44131-5541, have judgment and recover of Plaintiffs, with an address at Two Greenwich Plaza, 4th Floor, Greenwich, CT 06830-2962, costs and disbursements of this action in the sum of ~~$695.00~~ as Taxed by the clerk $785.00, and that Defendants have execution therefor.

FILED

FEB - 7 2018

COUNTY CLERK'S OFFICE
NEW YORK

CLERK

A-53

T 156— Bill of Costs (with CPLR sections) Blank Court, 1-95

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Supreme COURT
COUNTY OF New York

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiff(s)

against

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; and CUI HOLDINGS, LLC

Defendant(s)

Costs of

DEFENDANTS CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC

COSTS

	$
Costs before note of issue CPLR §8201 subd. 1	200.00 ✓
Costs after note of issue CPLR §8201 subd. 2	200.00 ✓
Trial of issue CPLR §8201 subd. 3	
Allowance by statute CPLR §8302(a), (b)	
Additional allowance CPLR §8302 (d)	
Motion costs CPLR §8202	
Appeal to Appellate Term CPLR §8203 (b)	
Appeal to Appellate Division CPLR §8203 (a)	
Appeal to Court of Appeals CPLR §8204	
Costs upon frivolous claims and counterclaims CPLR §8303-a	

DISBURSEMENTS

	$
Fee for index number CPLR §8018(a)	
Referee's fees CPLR §8301(a)(1), 8003(a)	
Commissioner's compensation CPLR §8301(a)(2)	
Clerk's fee, filing notice of pend. or attach. CPLR §8021(a)(10)	
Entering and docketing judgment CPLR §8301(a)(7), 8016(a)(2)	
Paid for searches CPLR §8301(a)(10)	
Affidavits & acknowledgments CPLR §8009	
Serving copy summons & complaint CPLR §8011(h)(1), 8301(d)	
Request for judicial intervention	
Note of issue CPLR §8020(a)	
Paid referee's report CPLR §8301(a)(12)	
Certified copies of papers CPLR §8301(a)(4)	
Satisfaction piece CPLR §5020(a), 8021	
Transcripts and filing CPLR §8021	
Certified copy of judgment CPLR §8021	
Postage CPLR §8301(a)(12)	
Jury fee CPLR §8020(c)	
Stenographers' fees CPLR §8002, 8301	250.00 ✓
Sheriff's fees on execution CPLR §8011, 8012	
Sheriff's fees, attachment, arrest, etc. CPLR §8011	
Paid pltfng cases CPLR §8301(a)(6)	
Clerk's fees Court of Appeals CPLR §8301(a)(12)	
Paid copies of papers CPLR §8016(a)(4)	
Motion expenses CPLR §8301(b)	~~45.00~~ 135.00
Fees for publication CPLR §8301(a)(3)	
Serving subpoena CPLR §8011(h)1, 8301(d)	
Paid for Search CPLR §8301(a)(10)	
Referee's report	
Attendance of witnesses CPLR §8001(a)(b)(c), 8301(a)(1)	
	$ 385.00

I HEREBY CERTIFY THAT I HAVE ADJUSTED THIS BILL OF COSTS AT
$ 785.00

FEB -7 2018

M. A-T

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FILED

FEB - 7 2018

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NEW YORK

Costs	$400.00	
Disbursements	385.00	~~295.00~~
Total	$ 785.00	~~$695.00~~

FILED: NEW YORK COUNTY CLERK 02/08/2018 04:04 PM INDEX NO. 650140/2012
NYSCEF DOC. NO. 247 RECEIVED NYSCEF: 02/08/2018

STATE OF NEW YORK, COUNTY OF New York ss. ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that I am Debra O'Gorman

the attorney(s) of record for the Defendants in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names in traveling to, and the same distance in returning from, the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: February 7, 2018

Debra O'Gorman
The name signed must be printed beneath

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FEB - 7 2018
COUNTY CLERK'S OFFICE
NEW YORK

Index No. 650140/2012

Supreme COURT

COUNTY OF New York

CVH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiff (s)

against

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., d/b/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CVH HOLDINGS, LLC

Defendant(s)

Bill of Costs and Notice of Taxation

Please Take Notice that the within is a true copy of the items of costs and disbursements in the within action *taxed* and that the same will be taxed** by the Clerk of Court, at his/her office in the courthouse thereof on at M. of that day—and the amount inserted in the judgment.

Yours, etc.

Dechert LLP

Attorney(s) for Defendants

To Drinker Biddle & Reath LLP

Attorney(s) for Plaintiffs

Service of the within bill of costs and notice of taxation is hereby admitted on

Attorney(s) for

* Strike out one (CPLR §8402, §8403)

State of New York, County of New York ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on

deponent served the within bill of costs and notice of taxation on

attorney(s) for

herein, at his/her office at

during his/her absence from said office

strike out either (a) or (b)

(a) by then and there leaving a true copy of the same with

his/her clerk; partner; person having charge of said office.

(b) and said office being closed, by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or box.

Sworn to before me on .....

State of New York, County of New York ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on

deponent served the within bill of costs and notice of taxation on

attorney(s) for

at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within New York State.

Sworn to before me on .....

A-55

D4, LLC
222 Andrews Street
Rochester, NY 14604

Voice: 585-385-4040

INVOICE

Invoice Number: 5003645
Invoice Date: Sep 20, 2016
Page: 1

Dechert, LLP
1095 Avenue of the Americas
New York, NY 10036-6797
United States

Debra D. O'Gorman
1095 Avenue of the Americas
New York, NY 10036-6797

600124	CNH Diversified	60-0000-4696	9/20/16

	PAYMENT TERMS: DUE UPON RECEIPT CNH DIVERSIFIED OPPORTUNITIES vs CLEVELAND UNLIMITED, INC Index No. 650140/12 Date of Deposition: 9/8/16 5 day Expedite Transcript of M. Mitchell		
430.00	Deposition Services - Expedite Transcript	4.500	1,935.00
1.00	Deposition Services-3-5 day expedite	1,219.050	1,219.05
1.00	Deposition Services-Full Day Per Diem	100.000	100.00
430.00	Deposition Service-Realtime Hook-Up	1.250	537.50
430.00	Deposition Services-Rough ASCII	1.000	430.00
1.00	Deposition Services-Standard Ground Delivery	12.000	12.00
34.00	Deposition Services - After Hours Pages	0.750	25.50

Remit To: D4, LLC
222 Andrews Street
Rochester, New York 14604

Federal ID: 16-1532901

Invoice Subtotal	4,259.05
Sales Tax	
Credits Applied	
Net Invoice Due	4,259.05

powered by people D4

A-56

FILED: NEW YORK COUNTY CLERK 02/08/2018 04:04 PM INDEX NO. 650140/2012
NYSCEF DOC. NO. 245 RECEIVED NYSCEF: 02/08/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

JUDGMENT

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FILED AND DOCKETED
FEB - 7 2018
AT 1:54 PM
N.Y., CO. CLK'S OFFICE

DECHERT LLP
Allan S. Brilliant
Debra D. O'Gorman
Daphne T. Ha
Brendan Herrmann
1095 Avenue of the Americas
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Attorneys for Defendants

EXHIBIT D

NOTICE OF APPEAL, DATED FEBRUARY 8, 2018 [A-48-A-50]

INDEX NO. 650140/2012

NYSCEF DOC. NO. 246 RECEIVED NYSCEF: 02/08/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND, Plaintiffs, v. CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC, Defendants.	Index No. 650140/2012 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiffs CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds—AQR Diversified Arbitrage Fund (collectively, "Plaintiffs") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the Judgment entered by the Clerk of the Supreme Court, New York County, on February 7, 2018, which dismissed Plaintiffs' complaint and entered judgment and taxed costs in favor of

Defendants Cleveland Unlimited, Inc.; Cleveland Unlimited AWS, Inc., f/k/a Triad AWS, Inc.; Cleveland Unlimited License Sub, LLC; Cleveland PCS Realty, LLC; CSM Wireless, LLC; CSM Columbus (OH) Operating Sub, LLC; CSM Indianapolis Operating Sub, LLC; CSM Columbus (IN) Operating Sub, LLC; CSM New Castle Operating Sub, LLC; CSM Canton Operating Sub, LLC; CSM Youngstown Operating Sub, LLC; CSM Cleveland Operating Sub, LLC; CSM Columbus (OH) License Sub, LLC; CSM Indianapolis License Sub, LLC; CSM Columbus (IN) License Sub, LLC; CSM New Castle License Sub, LLC; CSM Canton License Sub, LLC; CSM Youngstown License Sub, LLC; CSM Cleveland License Sub, LLC; and CUI Holdings, LLC. A copy of the Judgment (Doc. No. 245) is annexed hereto as Exhibit A.[1]

Dated: New York, New York
February 8, 2018

DRINKER BIDDLE & REATH LLP

By: /s/ James H. Millar
James H. Millar
Clay J. Pierce
Richard M. Haggerty

1177 Avenue of the Americas, 41st Floor
New York, NY 10036
Tel: (212) 248-3140

Counsel for Plaintiffs CNH Diversified Opportunities Master Account LP, et al.

[1] Plaintiffs have already filed a notice of appeal with respect to the Court's orders on summary judgment. *See* Doc. No. 240.

TO: DECHERT LLP
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Attorneys for Defendants
Cleveland Unlimited, Inc., et al.

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of a decision and order (Renwick, J.P., Gische, Gesmer, Kern, JJ.) in the above-captioned matter dated and entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on the 26th day of June 2018.

Dated: New York, New York
June 27, 2018

DECHERT LLP

By: */s/ Brendan Herrmann*

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Attorneys for Defendants

TO: DRINKER BIDDLE & REATH LLP
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Attorneys for Plaintiffs

Renwick, J.P., Gische, Gesmer, Kern, JJ.

6967-
6968 Index 650140/12

CNH Diversified Opportunities Master Account, L.P., et al.,
Plaintiffs-Appellants,

-against-

Cleveland Unlimited, Inc., et al.,
Defendants-Respondents.

Drinker Biddle & Reath LLP, New York (James H. Millar of counsel), for appellants.

Holwell Shuster & Goldberg LLP, New York (James M. McGuire of counsel), for respondents.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 7, 2018, inter alia, dismissing the complaint pursuant to an order, same court and Justice, entered January 16, 2018, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment, unanimously affirmed. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly dismissed plaintiffs' breach of contract claim based on section 6.07 of the parties' Indenture. A fair reading of the Indenture, Collateral Trust Agreement and Security Agreement (Agreements) demonstrates that the collateral trustee was authorized to pursue default remedies, including the strict

foreclosure at issue here, if so directed by a majority of the noteholders. Section 6.07 of the Indenture, which sets forth that the holder's right to payment of principal and interest on the note, or to bring an enforcement suit, "shall not be impaired or affected without the consent of such Holder," does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them. Section 6.07 of the Indenture, which tracks the language of section 316(b) of the Trust Indenture Act of 1939 (15 USC § 77ppp[b]) "prohibits only non-consensual amendments to an indenture's core payment terms" (*Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.*, 846 F3d 1, 3 [2d Cir 2017]). Here, the strict foreclosure and debt equity restructuring did not amend the core payment terms in violation of section 6.07 of the Indenture, even if it had a "similar effect" (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 330 [2007]). Furthermore, the record shows that plaintiffs received

and accepted the resulting equity from the debt restructuring.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

EXHIBIT F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

New York County
Index No. 650140/12

RECEIVED
JUL 26 2018
SUP COURT APP. DIV.
FIRST DEPT.

NOTICE OF MOTION FOR REARGUMENT
OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the accompanying Affirmation of Clay J. Pierce, dated July 26, 2018, the exhibits thereto, Memorandum of Law, and all prior pleadings and proceedings herein, Plaintiffs-Appellants CNH Diversified Opportunities Master Account, L.P., AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds—AQR Diversified Arbitrage Fund (collectively, "Plaintiffs-Appellants") will move this Court at the

Supreme Court of the State of New York, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on August 13, 2018 at 10 a.m., for an Order granting reargument in the above-captioned appeal or, in the alternative, granting leave to appeal to the Court of Appeals.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, shall be served on or before August 6, 2018.

Dated: July 26, 2018
New York, New York

DRINKER BIDDLE & REATH LLP

By: /s/ James H. Millar
James H. Millar
Clay J. Pierce
Richard M. Haggerty

1177 Avenue of the Americas, 41st Floor
New York, NY 10036
Tel: (212) 248-3140

Counsel for Plaintiffs-Appellants CNH Diversified Opportunities Master Account LP, AQR Delta Master Account, L.P., AQR Delta Sapphire Fund, L.P., and AQR Funds—AQR Diversified Arbitrage Fund

TO: DECHERT LLP
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Debra D. O'Gorman
Daphne T. Ha
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HOLWELL SHUSTER & GOLDBERG LLP
James M. McGuire
750 Seventh Avenue, 26th Floor
New York, NY 10019
Tel: (646) 837-8532

Attorneys for Defendants-Respondents
Cleveland Unlimited, Inc., et al.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND, Plaintiffs, v. CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC, Defendants.	New York County Index No. 650140/12

AFFIRMATION OF SERVICE

RICHARD M. HAGGERTY, an attorney admitted to practice in the courts of this state, affirms as follows under the penalty of perjury:

I am an attorney with the law firm of Drinker Biddle & Reath LLP, 1177 Avenue of the Americas, 41st Floor, New York, New York 10036, counsel for Plaintiffs-Appellants CNH Diversified Opportunities Master Account, L.P.; AQR Delta Master Account, L.P.; AQR Delta Sapphire Fund, L.P.; AQR Funds—AQR Diversified Arbitrage Fund in the above-referenced

action. I certify that, on this date, I served Plaintiffs-Appellants' motion for reargument or, in the alternative, for leave to appeal on counsel for Defendants-Respondents listed below via email and hand delivery:

DECHERT LLP
Allan S. Brilliant
Debra D. O'Gorman
Daphne T. Ha
1095 Avenue of the Americas
New York, NY 10036
Tel: (212) 698-3500

Dated: July 26, 2018
New York, New York

Richard M. Haggerty

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CNH DIVERSIFIED OPPORTUNITIES MASTER ACCOUNT, L.P.; AQR DELTA MASTER ACCOUNT, L.P.; AQR DELTA SAPPHIRE FUND, L.P.; and AQR FUNDS—AQR DIVERSIFIED ARBITRAGE FUND,

Plaintiffs,

v.

CLEVELAND UNLIMITED, INC.; CLEVELAND UNLIMITED AWS, INC., f/k/a TRIAD AWS, INC.; CLEVELAND UNLIMITED LICENSE SUB, LLC; CLEVELAND PCS REALTY, LLC; CSM WIRELESS, LLC; CSM COLUMBUS (OH) OPERATING SUB, LLC; CSM INDIANAPOLIS OPERATING SUB, LLC; CSM COLUMBUS (IN) OPERATING SUB, LLC; CSM NEW CASTLE OPERATING SUB, LLC; CSM CANTON OPERATING SUB, LLC; CSM YOUNGSTOWN OPERATING SUB, LLC; CSM CLEVELAND OPERATING SUB, LLC; CSM COLUMBUS (OH) LICENSE SUB, LLC; CSM INDIANAPOLIS LICENSE SUB, LLC; CSM COLUMBUS (IN) LICENSE SUB, LLC; CSM NEW CASTLE LICENSE SUB, LLC; CSM CANTON LICENSE SUB, LLC; CSM YOUNGSTOWN LICENSE SUB, LLC; CSM CLEVELAND LICENSE SUB, LLC; and CUI HOLDINGS, LLC,

Defendants.

Index No. 650140/2012

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of an order (Renwick, J.P., Gische, Gesmer, Kern, JJ.) in the above-captioned matter dated and entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on the 9th day of October 2018.

Dated: New York, New York
October 9, 2018

DECHERT LLP

By: */s/ Brendan Herrmann*

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- and -

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clay.pierce@dbr.com
richard.haggerty@dbr.com

Attorneys for Plaintiffs

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 9, 2018

Present - Hon. Dianne T. Renwick Justice Presiding,
Judith J. Gische
Ellen Gesmer
Cynthia S. Kern

CNH Diversified Opportunities Master Account, L.P., et al.,
Plaintiffs-Appellants,

M-3700
Index No. 650140/12

-against-

Cleveland Unlimited, Inc., et al.,
Defendants-Respondents.

Plaintiffs-appellants having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on June 26, 2018 (Appeal Nos. 6967-6968),

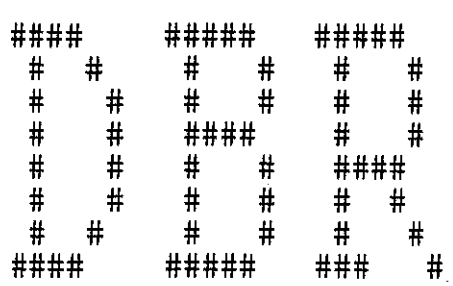
Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

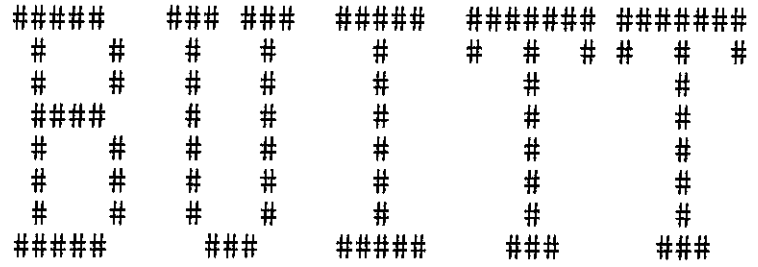
It is ordered that the motion is denied.

ENTERED: October 9, 2018

CLERK

Username: DBR\BUITT





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Date: 11/8/2018
Time: 10:15:09 AM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

LYNN BORTLE and LINDA BORTLE,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS, *et al.*,

Defendants.

NOTICE OF MOTION TO PRECLUDE ON BEHALF OF DEFENDANT LIGHTNIN

Index No. 004263/2017

PLEASE TAKE NOTICE:

MOTION BY:

BARCLAY DAMON LLP
Attorneys for Defendant
Lightnin
Office and Post Office Address
80 State Street
Albany, New York 12207
Telephone: (518) 429-4241

DATE, TIME & PLACE:

January 7, 2019, 10:00 a.m.
Onondaga County Courthouse
505 S. State Street
Syracuse, New York 13202

SUPPORTING PAPERS:

Affirmation of Linda J. Clark, Esq., with exhibits thereto;

Memorandum of Law.

RELIEF DEMANDED:

(1) an Order to preclude the testimony of plaintiff's expert, Dr. David Zhang and any other expert that plaintiff plans to introduce to support a theory that "cumulative exposure" to asbestos was a contributing fact to Plaintiff's lung cancer;

(2) Alternatively, an Order precluding any testimony or evidence on a cumulative exposure or "each and every fiber theory";

(3) Alternatively, an Order compelling a *Frye* hearing if such testimony is not precluded;

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(4) an Order precluding cumulative and duplicative testimony by Plaintiffs' experts; and

(5) such other and further relief as the Court deems just, fair and proper.

NATURE OF ACTION: Products Liability.

DEMAND FOR ANSWERING AFFIDAVITS: Pursuant to the Scheduling Order for this matter, opposition papers are due on or before November 30, 2018.

DATED: November 8, 2018

BARCLAY DAMON LLP

By: Linda J. Clark
Linda J. Clark

Attorneys for Defendant
Lightnin
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Albany, New York 12207
Telephone: (518) 429-4241

TO: Joseph W. Belluck, Esq.
Belluck & Fox, LLP
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