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,

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-Respondents.

New York County
Index No. 650140/2012

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NEW YORK STATE
COURT OF APPEALS

DEFENDANTS-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Non-party CUI Acquisition Corp. owns 96.6333% of the shares of Defendant Cleveland Unlimited, Inc. The remaining balance of the shares of Defendant Cleveland Unlimited, Inc. are collectively owned by 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; and various unknown shareholders. CUI Acquisition Corp. is owned by numerous funds and other investment vehicles that are not parties to this appeal.

Defendants Cleveland Unlimited AWS, Inc. f/k/a Triad AWS, Inc.; Cleveland Unlimited License Sub, LLC; Cleveland PCS Realty, LLC; and CSM Wireless, LLC are each a wholly-owned subsidiary of Defendant Cleveland Unlimited, Inc., which is each entity's sole shareholder or sole member, as applicable.

Defendants CSM Columbus (OH) Operating Sub, LLC; CSM Indianapolis Operating Sub, LLC; CSM Newcastle Operating Sub, LLC; CSM Canton Operating Sub, LLC; CSM Youngstown Operating Sub, LLC; CSM Columbus (IN) Operating Sub, LLC; and CSM Cleveland Operating Sub, LLC are each wholly-owned subsidiaries of Defendant CSM Wireless, LLC, which is the sole member of each entity.

Defendant CSM Columbus (OH) Operating Sub, LLC is the sole member of Defendant CSM Columbus (OH) License Sub, LLC. Defendant CSM Indianapolis Operating Sub, LLC is the sole member of Defendant CSM Indianapolis License Sub, LLC. Defendant CSM Newcastle Operating Sub, LLC is the sole member of Defendant CSM Newcastle License Sub, LLC. Defendant CSM Canton Operating Sub, LLC is the sole member of Defendant CSM Canton License Sub, LLC. Defendant CSM Youngstown Operating Sub, LLC is the sole member of Defendant CSM Youngstown License Sub, LLC. Defendant CSM Columbus (IN) Operating Sub, LLC is the sole member of Defendant CSM Columbus (IN) License Sub, LLC. Defendant CSM Cleveland Operating Sub, LLC is the sole member of Defendant CSM Cleveland License Sub, LLC.

Defendant CUI Holdings, LLC is owned by its sole member, Cleveland Unlimited, LLC.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF THE FACTS 6

A. Cleveland Unlimited's Issuance of Notes 6

B. Cleveland Unlimited Defaults on the Notes and Attempts to Restructure 7

C. The Strict Foreclosure Transaction Under the UCC 9

D. The Funds' Acceptance of the Equity and Valuation Following the Strict Foreclosure 10

E. Supreme Court and the Appellate Division Granted Summary Judgment Dismissing the Funds' Complaint 11

ARGUMENT 13

I. THE FUNDS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED. 13

A. The First Department's Decision Is Consistent With The Second Circuit's *Marblegate* Decision. 13

B. The First Department's Decision Is Consistent With Settled New York Contract Law. 19

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Beal Savings Bank v. Sommer,
8 N.Y.3d 318 (2007) .... *passim*

CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.,
162 A.D.3d 573 (1st Dep't 2018) 12, 13

Emmet & Co. v. Catholic Health E.,
37 Misc. 3d 854 (Sup. Ct. N.Y. Cty. 2012), *aff'd*, 114 A.D.3d 605 (1st Dep't 2014) 14

In re Chateaugay Corp.,
961 F.2d 378 (2d Cir. 1992) 18

In re Genco Shipping & Trading Ltd.,
509 B.R. 455 (Bankr. S.D.N.Y. 2014) 18

Isaacs v. Westchester Wood Works, Inc.,
278 A.D. 2d 184 (1st Dep't 2000) 20

Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.,
846 F.3d 1 (2d Cir. 2017) .... *passim*

Muzak Corp. v. Hotel Taft Corp.,
1 N.Y.2d 42 (1956) 22

RM 14 FK Corp. v. Bank One Trust Co., N.A.,
37 A.D.3d 272 (1st Dep't 2007) 20

STATUTES & OTHER AUTHORITIES

22 N.Y.C.R.R. § 500.22(b)(4) 13, 26-27

N.Y. U.C.C. § 9-620 .... 9, 23

N.Y. U.C.C. § 9-622 .... 9, 23

Trust Indenture Act § 316(b), 15 U.S.C. § 77ppp(b) .... *passim*

Defendants-Respondents Cleveland Unlimited, Inc.; CUI Holdings, LLC; and each of the other Defendants-Respondents identified in the foregoing caption (collectively, "Respondents"), respectfully submit this memorandum of law in opposition to the motion for leave to appeal by 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, the "Funds") from a unanimous decision and order of the Appellate Division, First Department, entered on June 26, 2018 (the "Order"). The Order affirmed an order of Supreme Court, New York County (Scarpulla, J.), that granted Respondents' motion for summary judgment, denied the Funds' motion for summary judgment, and directed entry of judgment dismissing the Funds' complaint in its entirety.

PRELIMINARY STATEMENT

The Funds' application for leave is founded on two related fictions. First, the Funds imagine—and hope to convince this Court—that the Order is inconsistent with the decision last year by the Second Circuit in *Marblegate Asset Management, LLC v. Education Management Finance Corp.,* 846 F.3d 1 (2d Cir. 2017), *reh'g en banc denied* No. 15-2124, Dkt. No. 221 (Mar. 21, 2017). Second, the Funds imagine—and hope to convince this Court—that the sky is falling, claiming that because of the (illusory) conflict between the Order and *Marblegate*

New York might no longer "function as the hub for the $9 trillion U.S. corporate bond market." Funds Br.[1] at 2.

As shown below, however, *Marblegate* is wholly consistent with the Order. Indeed, the Second Circuit's repeated statements of its holdings refute the Funds' reliance on *Marblegate*. Moreover, the ground of the Second Circuit's decision—an exhaustive review of the legislative history of a provision of the Trust Indenture Act (the "TIA"), 15 U.S.C. § 77ppp(b), that (as the Funds recognize) is indistinguishable from the indenture provision on which the Funds rely—shows that it is the Funds' position that is irreconcilable with *Marblegate*. And, to boot, under the Funds' flawed reading of *Marblegate*, absurd consequences necessarily flow.

With respect to the calamitous consequences the Funds purportedly apprehend, it suffices to make three points. First, the posited financial ruin is founded solely on the incorrect contention that *Marblegate* and the Order are in tension. Second, and unsurprisingly, the Funds cannot point to a single law review article, article in the financial press, newspaper editorial, or blog post that so much as mentions this case, much less its anticipated impact on the New York bond market. Surely, a decision that "threatens to return the bond markets back to the

[1] The term "Funds Br." refers to the Memorandum of Law in Support of Plaintiffs-Appellants' Motion for Leave to Appeal, dated November 8, 2018.

1930s" would not have escaped the attention of scholars, the financial press, and commentators on and participants in New York's bond market. Funds Br. at 4.

The Funds' attempt to depict themselves as champions of "sacrosanct" rights to demand payment of principal and interest from issuers of distressed debt is risible. Funds Br. at 2. In fact, the Funds are disgruntled holders of a small minority (just over 3%) of defaulted debt who have been seeking to exploit their sudden and opportunistic non-consent to the exercise by the relevant trustee, at the behest of the holders of the overwhelming majority (over 96% of the debt), of a value-maximizing remedy—strict foreclosure—that the governing documents unambiguously authorized. The Funds' position, moreover, makes no commercial sense. They claim they are entitled to a benefit that no other noteholder could obtain, one hundred cents on the dollar; that they are entitled to that benefit at the *expense* of all other noteholders; and that they are entitled to it even though they have never identified an alternative to the strict foreclosure remedy that could have delivered more value to the noteholders.

The Funds' breach of contract claims are founded on the "notwithstanding" clause of a single provision of the indenture at issue, Section 6.07, that they acknowledge is "substantively identical" to Section 316(b) of the TIA, 15 U.S.C. § 77ppp(b). Funds Br. at 6-7. The Funds have steadfastly insisted that Section 6.07 must be given the same legal effect as Section 316(b) of the TIA.

Specifically, the Funds' argument always has been that Section 316(b), and therefore Section 6.07, precludes a majority of noteholders from directing the indenture trustee to take any action or exercise any remedy upon default, including strict foreclosure under the UCC, that impairs a non-consenting noteholder's right to full recovery on its notes after principal and interest is due.

Marblegate destroys the Funds' argument. There, as here, the note issuer was financially distressed, and the vast majority of its noteholders exercised remedies through means that included a foreclosure. *Marblegate*, 846 F.3d at 4. There, as here, the plaintiffs were the sole holdouts and held a similarly small amount, less than 2%, of the debt. *Id.* at 4-5. After an exhaustive review of the legislative history of the TIA, the Second Circuit unequivocally held that "Section 316(b) prohibits only non-consensual amendments to an indenture's core payment terms." *Id.* at 3. As the court also phrased its holding, in enacting Section 316(b) "Congress sought to prohibit formal modifications to indentures without the consent of all bondholders, but did not intend to go further by banning other well-known forms of reorganization like foreclosures." *Id.* at 13-14. The Funds' reliance on the TIA to support their breach of contract claims fails because, and it is not disputed, no amendment, let alone a non-consensual one, took place in connection with the strict foreclosure.

Nor is it surprising that, as the *Marblegate* court recognized, in enacting Section 316(b), Congress intended to "prohibit[] only non-consensual amendments to an indenture's core payment terms," and did not intend to ban "the decades-long use of foreclosure proceedings to effect reorganizations." *Id.* at 13. After all, foreclosures are often the remedial mechanism that maximizes value for all noteholders. This is because the only alternative to the simple, time-tested foreclosure remedy often is a costly bankruptcy proceeding that delivers *less* value to all noteholders. Thus, the ability of a trustee to pursue the remedy of foreclosure is an integral part of bond indentures.

Notably, as *Marblegate* explains, the exercise of foreclosure remedies "will not leave dissenting bondholders at the mercy of bondholder majorities" because they nonetheless are able "to pursue available State and Federal law remedies." *Id.* at 16. In this case, the Funds never pursued such remedies. As noted, they did not file an involuntary bankruptcy case against Cleveland Unlimited, did not seek to enjoin the strict foreclosure, and have never complained that the strict foreclosure did not comply with the UCC. In fact, the Funds never did any contemporaneous analysis to determine whether the noteholders would obtain more value through a bankruptcy or any other remedial path than the strict foreclosure, and never offered a shred of evidence that they would have fared better after a bankruptcy proceeding (or any other alternative).

Properly understood then, the authority of the trustee to pursue the strict foreclosure remedy provides a much needed remedy for maximizing value for all noteholders (including the Funds) and operates to protect the holders of a majority of defaulted debt from oppressive conduct by holdout minorities. Thus, the Funds have it backwards: it is precisely the failure to enforce the plain language of the provision authorizing the strict foreclosure remedy that would create unpredictability in the New York bond market, create confusion, and increase borrowing costs.

Nothing about this case, which simply called on Supreme Court and the First Department to apply settled law, merits review by this Court. The Funds' motion for leave to appeal should be denied.

COUNTER-STATEMENT OF THE FACTS

A. Cleveland Unlimited's Issuance of Notes

On December 15, 2005, Cleveland Unlimited issued $150 million in secured notes (the "Notes"), the terms of which are governed by an Indenture, Security Agreement, and Collateral Trust Agreement (collectively, the "Agreements"). (A.962 to A.1105 (Indenture); A.1143 to A.1234 (Security Agreement); A.1106 to A.1142 (Collateral Trust Agreement)).[2] The Indenture provides for, among other

[2] Citations beginning with "A-" are references to the record on appeal as filed with the Appellate Division, First Department. Citations beginning with "RA-" are references to the supplemental record on appeal filed by Respondents with the Appellate Division.

things, the enforcement of payment rights for holders of the Notes (the "Noteholders") by U.S. Bank as the Indenture Trustee and Collateral Trustee (collectively, the "Trustee") for the Notes. (A.1033 § 6.03, A.1034 § 6.05, A.1063 § 12.08). The Security Agreement and the Collateral Trust Agreement govern the Trustee's ability to enforce remedies against Cleveland Unlimited's assets in the event the Company is unable to pay the Notes in full. (*See, e.g.*, A.1116 § 3.3, A.1118 § 3.5(a); A.1159 § 3.1, A.1175 § 9.1(viii)). These Agreements specifically provide that the Collateral Trustee is authorized to pursue any remedy available under the UCC—one of which is strict foreclosure upon the collateral in full satisfaction of the Note debt—and is empowered to do so at the direction of a majority of Noteholders or unilaterally upon determining that such an action would serve the Noteholders' best interest. (A.1034 § 6.05, A.1063 § 12.08; A.1116 § 3.3; A.1175 § 9.1(viii)).

Despite low liquidity ratings from Moody's and other indications in the market that the Notes were a risky investment (A.1287 to A.1300), the Funds purchased $5,000,000 face amount of Notes on the secondary market in April 2010, just months before Cleveland Unlimited's default. (A.609 to A.610).

B. Cleveland Unlimited Defaults on the Notes and Attempts to Restructure

In December 2010, Cleveland Unlimited announced that it would be unable to make its final interest payment or pay the principal on its debt. (A.939 ¶ 53;

A.953 ¶ 53; A.1301). To obtain the maximum amount recoverable on the Notes, Noteholders collectively holding more than 99% of the Notes—*including* the Funds—signed an agreement (the "Forbearance Agreement") to allow Cleveland Unlimited time to pursue refinancing. (RA.76 to RA.93, RA.105). In the event that no refinancing options materialized, the Funds and the other Noteholders agreed to use their "good faith efforts" to complete a transaction through which the Noteholders and the Funds would exchange their Notes for Cleveland Unlimited stock and thereby become the Company's equity owners. (RA.86 § 11(h)).

No viable refinancing option emerged and plans were implemented to complete the debt-for-equity transaction. (A.665 ¶ 22; A.633 to A.634). Although the Funds had done no analysis showing that they would have been better off under a different transaction (RA.225 to RA.226), two days before the end of the forbearance period, the Funds performed an about-face, abruptly withdrawing their previously pledged support for the planned transaction. (A.665 ¶ 22). The forbearance period expired. (A.633 to A.634). The Funds (and the Funds alone) insisted on full payment on their Notes. (A.665 ¶ 22). Cleveland Unlimited remained in default and lacked sufficient assets to pay the full amount of interest and principal owed on the Notes. (*See* A.1030 to A.1032 § 6.01; A.1301). Cleveland Unlimited did not pursue a bankruptcy at that time because it and the Noteholders concluded that a bankruptcy would harm the Company's valuation

and reduce the amount available to satisfy the Noteholders. (A.1577 to A.1578; A.1585 to A.1586).

C. The Strict Foreclosure Transaction Under the UCC

In September 2011, the Collateral Trustee, acting on the direction of Noteholders holding in excess of 96% of the Notes, invoked the remedies provided for in the Security Agreement and Collateral Trust Agreement and foreclosed on the stock of Cleveland Unlimited pursuant to N.Y. U.C.C. Sections 9-620 and 9-622 (the "Strict Foreclosure"). (RA.131 to RA.132 § 10; A.1453 to A.1455 §§ 2, 5). The Collateral Trustee (the secured party) accepted CUI Holdings' 100% equity interest in Cleveland Unlimited for the "sole benefit of the Holders," and Cleveland Unlimited (the debtor), CUI Holdings, and the remaining Respondent guarantors, "consent[ed] without any objection" to the transfer "in full . . . satisfaction of" their obligations. (A.1453 to A.1454 §§ 2-5). The Collateral Trustee accepted all of the stock—which CUI Holdings had pledged as collateral securing the Notes as part of the Forbearance Agreement—in full satisfaction of the debt under the Notes and guaranties as provided under the UCC. (A.1453 to A.1455 §§ 2, 4-5; RA.84 §§ 10(a)-(b); A.1279 §§ 2.1-2.2). Following this exchange, the Collateral Trustee distributed the equity interests to the Noteholders on a *pro rata* basis with the Funds receiving 3.33 shares as their *pro rata* portion. (A.1454 § 3; A.1476 to A.1480).

The Funds were apprised of the Strict Foreclosure in advance but took no action to stop it. They did not seek an injunction, file an involuntary bankruptcy, or even communicate to the Company or other Noteholders that they preferred a Chapter 11 bankruptcy proceeding. (RA.255 to RA.256). In fact, the Funds did no analysis of whether the Noteholders would recover more through a bankruptcy or any alternative transaction. (RA.225 to RA.226).

D. <u>The Funds' Acceptance of the Equity and Valuation Following the Strict Foreclosure</u>

As noted, following the Strict Foreclosure, the Funds received certificates representing their *pro rata* equity interests in the Company. (A.1476 to A.1480). The Funds never rejected or returned the stock. (RA.230 to RA.231; RA.260 ("The funds did not try to return the shares.")). In fact, after receiving the stock, the Funds acknowledged they were shareholders and recorded the shares as such on their books. (A.1482, A.1794, A.1800). Indeed, when seeking information from the Company, the Funds expressly identified themselves as "holders of the equity." (A.1482). The Funds' internal valuations confirm that the Strict Foreclosure was accretive to the value of their investment. Immediately following the Strict Foreclosure, the Funds actually *increased* the value on their books and records of their collective investment in Cleveland Unlimited from $3,425,000 to $3,450,000 and further increased that valuation to approximately $3,540,000 less than two months later. (A.1794, A.1800). Such valuations were used by the Funds

for, among other things, to calculate their management fees, and the prices at which investors redeemed their shares. (RA.234 to RA.235; RA.266). The Funds never retroactively amended their valuations nor do they argue that the valuations they themselves made immediately after the Strict Foreclosure were not accurate and in compliance with governing regulations and applicable law. (RA.232 to RA.233, RA.236 to RA.237; RA.263 to RA.264).

E. Supreme Court and the Appellate Division Granted Summary Judgment Dismissing the Funds' Complaint.

By a decision and order dated January 11, 2018, Justice Saliann Scarpulla of the New York County Supreme Court granted Respondents' motion for summary judgment dismissing the Funds' complaint, denied the Funds' cross-motion, and directed entry of judgment. (A.8 to A.25; A.26 to A.43). After reviewing the relevant terms of the governing documents, Supreme Court held that "the Collateral Trustee's pursuit of the [strict foreclosure remedy] here at the direction of the Majority Noteholders was authorized under the parties' agreements." (A.37). Moreover, Supreme Court relied on both the Second Circuit's decision in *Marblegate* and Chief Judge Kaye's decision in *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007). (A.37, A.40). *Beal,* a case brought by a minority holder of debt, was "instructive" because it also involved the interpretation of contractual provisions allowing lenders to act collectively where there is also a general provision requiring unanimous consent to release certain guarantors from their

obligations. (A.37 to A.39). Consistent with the holding of *Beal*, Supreme Court concluded that Section 6.07 of the Indenture could not be interpreted to trump the provisions in the Collateral Trust Agreement and Security Agreement authorizing the Collateral Trustee to pursue remedies. (A.39).

With respect to *Marblegate*, Supreme Court rejected the Funds' claim that the decision supported their position. Correctly recognizing that "*Marblegate* involved nearly identical facts as those in this action" (A.40), Supreme Court similarly found that the "foreclosure transaction at issue here did not amend any terms of the Indenture." (A.42). Supreme Court ruled that "there was no breach of Indenture section 6.07, no basis for a claim of breach of the guarantees, and [the Funds'] claims should be dismissed as a matter of law." (*Id.*).

The Appellate Division unanimously affirmed Supreme Court's decision in its entirety, agreeing with Supreme Court on both points. *CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.*, 162 A.D.3d 573, 573-74 (1st Dep't 2018). With respect to the interpretation of the Indenture, the Appellate Division ruled that "[a] fair reading" of the collective contracts "demonstrates that the collateral trustee was authorized to pursue default remedies, including the strict foreclosure at issue here" and that the provision touted by the Funds, Section 6.07, "does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them." *Id.* at 574. With respect to

Marblegate, the Appellate Division held that it did not require a different interpretation of the contracts because "Section 6.07 of the Indenture, which tracks the language of section 316(b) of the Trust Indenture Act of 1939 (15 U.S.C. § 77ppp[b]) 'prohibits only non-consensual amendments to an indenture's core payment terms[,]'" and "the strict foreclosure . . . did not amend the core payment terms." *Id.* (quoting *Marblegate*, 846 F.3d at 3).

ARGUMENT

I. The Funds' Motion for Leave to Appeal Should Be Denied.

Of course, leave to appeal may be warranted "when the Court has an opportunity to state or to clarify the law on a particular issue"; when the "issue is novel and of state-wide importance"; or if "appellate divisions have differed in their treatment of an issue." N.Y. Prac. Civ. App. § 15:5 (West 2018); 22 N.Y.C.R.R. § 500.22(b)(4). None of these conditions apply to the Funds' motion for leave.

A. The First Department's Decision Is Consistent With the Second Circuit's *Marblegate* Decision.

The linchpin of the Funds' motion for leave to appeal is that the Order is at odds with the Second Circuit's decision in *Marblegate*. The Funds are manifestly wrong.

The Strict Foreclosure at issue here is virtually indistinguishable from the restructuring transaction in *Marblegate*. Like Cleveland Unlimited, the issuer in

Marblegate was a financially troubled borrower, and the vast majority of its noteholders exercised remedies to collect on their debts through means that included a foreclosure. *Marblegate*, 846 F.3d at 4. Like the Funds, the *Marblegate* plaintiffs were "the sole holdout[s]" and held a similarly small amount (less than 2%) of the issuer's notes. *Id.* at 4-5. Most critically, like the Strict Foreclosure here, not a single term of the indenture at issue in *Marblegate* was altered by the restructuring transaction. *Id.* at 5. Finally, and the Funds expressly agree (*see* Funds Br. at 13), the terms of Section 6.07 of the Indenture are substantively identical to the terms of Section 316(b) of the TIA at issue in *Marblegate*. *Id.* at 4.[3]

On these facts, the Second Circuit ruled that the foreclosure and other aspects of the *Marblegate* restructuring did not violate Section 316(b). That ruling, in turn, followed from the court's holding that "Section 316(b) prohibits *only* non-consensual amendments to an indenture's core payment terms," *id.* at 5 (emphasis added), or, as the court also phrased its holding, that "Congress sought to prohibit formal modifications to indentures without the consent of all bondholders, but did

[3] Given that Section 6.07 is substantively indistinguishable from Section 316(b), it should be interpreted in the same manner. *See Emmet & Co. v. Catholic Health E.*, 37 Misc. 3d 854, 859 (Sup. Ct. N.Y. Cty. 2012), *aff'd*, 114 A.D.3d 605 (1st Dep't 2014). And, as noted, the Funds agree. Funds Br. at 13.

not intend to go further by banning other well-known forms of reorganization like foreclosures." *Id.* at 13-14.

The Funds do not dispute that the *Marblegate* panel so held. Nor do the Funds take issue with either the validity of these holdings, the panel's analysis—from which these holdings followed—or the legislative history of the TIA and Section 316(b). Rather, they claim that Section 316(b) supports their position by manufacturing another holding lurking in *Marblegate*. According to the Funds, *Marblegate* also held that Section 316(b) prohibits majority action that "terminates the Minority Noteholders' legal right, without their consent, to sue and seek to collect principal and interest." Funds Br. at 19 (emphasis in original).

The Funds are wrong. They purport to discover this holding in a snippet from the opinion in which the panel stated that "Marblegate retains its legal right to obtain payment by suing the . . . Issuer, among others." *Marblegate*, 846 F.3d at 17. But two wholly unambiguous sentences in the opinion, and one word therein (italicized below), alone are sufficient to refute the Funds' reading of *Marblegate*. At the very outset of its opinion, when explaining why it was reversing the district court, the panel wrote:

> On appeal, EDMC [the issuer's parent] argues that it complied with Section 316(b) because the transactions did not formally amend the payment terms of the indenture that governed the notes. We agree with EMDC and conclude that Section 316(b) prohibits *only* non-

> consensual amendments to an indenture's core payment terms.

Id. at 3 (emphasis added).

No more need be said given that Section 316(b) prohibits *only* such non-consensual amendments. However, the Second Circuit went further to review the legislative history of the TIA, which the Funds falsely claim supports their interpretation, and reached the exact opposite conclusion—that the legislative history supported maintaining creditors' historic rights to exercise remedies against debt through foreclosure transactions outside of bankruptcy. The Second Circuit summarized its extensive review of the TIA's legislative history as follows:

> the drafters of the TIA appear to have been well aware of the range of possible forms of reorganization available to issuers, *up to and including foreclosures* like the one that occurred in this case but that the District Court concluded violated Section 316(b). *Indeed, foreclosure-based reorganizations were widely used at the time the TIA was drafted.* As we explain below, the history of the TIA, and of Section 316(b) in particular, shows that *it does not prohibit foreclosures even when they affect a bondholder's ability to receive full payment. Rather, the relevant portions of the TIA's legislative history exclusively addressed* <u>*formal*</u> *amendments and indenture provisions like collective-action and no-action clauses.*

Id. at 9 (italics added; underscoring in original).

The Second Circuit's use of the words "only" and "exclusively" hardly reflects sloppiness by the Second Circuit. *See id.* at 3, 9. These terms are squarely

rooted in the legislative history cited by the court and must be regarded as the *Marblegate* court's considered and carefully-worded conclusion.

Finally, as noted, the Funds' TIA-based argument rests entirely upon the following sentence in *Marblegate*: "Marblegate retains its legal right to obtain payment by suing the EDM Issuer, among others." Funds Br. at 18 (quoting *Marblegate*, 846 F.3d at 17). But this statement must be viewed in the light of the court's earlier and repeated statement of that holding. It also must be viewed in light of the immediately following sentence, restating its holding: "Absent changes to the Indenture's core payment terms, however, Marblegate cannot invoke Section 316(b) to retain an absolute and unconditional right to payment of its notes." *Marblegate*, 846 F.3d at 17 (internal quotation marks omitted). As the court had already explained, moreover, Section 316(b) protects two distinct rights, the "right . . . to receive payment" and the "right . . . to institute suit for the enforcement of any . . . payment" due or past-due, *id.* at 7, and Marblegate was relying only on the former right. *Id.* at 5, 6.

Thus, the sentence the Funds latch onto cannot possibly be read as another holding of the court on the issue of whether a foreclosure can terminate the right to sue protected by Section 316(b), for the simple reason that the issue was not before the court. Indeed, the sentence is plainly but another way of stating that the issue was not before the court. In contrast, it *is* in this case, and what is dispositive of

that issue is that the Funds' expansive reading of that right: (1) cannot be reconciled with either the actual holding in *Marblegate* or the legislative history of Section 316(b), and (2) as stated above, simply makes no economic sense.

Moreover, if the remedy of strict foreclosure nonetheless were construed to be barred by Section 6.07, a standard indenture provision, a commercial result that is manifestly unreasonable would ensue.[4] After all, given the greater costs of bankruptcy proceedings, the only restructuring alternative when there are minority holdouts, that reading of Section 6.07 would condemn *all* bondholders in at least some bond defaults (as this case illustrates) to recover *less* than they would pursuant to the exercise of the foreclosure remedy.[5]

In addition, the Funds' reading of Section 6.07 entails another manifest absurdity. As the *Marblegate* court recognized, the foreclosure that it upheld "would transform the . . . Issuer into an empty shell," 846 F.3d at 4, which would of course render worthless the right to sue of Marblegate and all other non-

[4] The commercially reasonable expectation that a majority of lenders will be able to cooperatively achieve a restructuring of their debt outside of bankruptcy is further reflected in the "general public policy in favor of out-of-court restructuring and settlement agreements." *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 462 (Bankr. S.D.N.Y. 2014). *See also In re Chateaugay Corp.*, 961 F.2d 378, 382 (2d Cir. 1992) (noting the "strong bankruptcy policy in favor of the speedy, inexpensive, negotiated resolution of disputes that is an out-of-court common law composition").

[5] The Funds indicate that their refusal to participate in Cleveland Unlimited's and the majority of Noteholders' proposed debt-for-equity exchange would have resulted in the filing of "a Chapter 11 proceeding," *see* Funds Br. at 8, which the Company's majority of Noteholders and management recognized would diminish the collective value of the Company for all Noteholders. (A.1577 to A.1578; A.1585 to A.1586).

consenting unsecured creditors. It is surely absurd to interpret the substantively identical Section 6.07 to permit a foreclosure transaction that renders the right to sue worthless but to prohibit, as the Funds maintain, a foreclosure transaction that "terminate[s]" that right. Funds Br. at 19.

In sum, the express holding in *Marblegate* and the TIA's legislative history showing that "Congress . . . did not intend to . . . ban[ ] . . . well-known forms of reorganization like foreclosures," leave no room for doubt that the Funds' reliance on Section 316(b) is woefully misplaced and that both Supreme Court's and the Appellate Division's interpretation of *Marblegate* is correct. Since no action is required by this Court to align the lower courts' interpretation of *Marblegate* with the Second Circuit's decision, this Court should decline to consider the Funds' appeal.

B. The First Department's Decision Is Consistent With Settled New York Contract Law.

The Funds seek to provide a basis for review by this Court by arguing that the Appellate Division's decision is at odds with New York contract law. As shown below, the Funds are wrong once again.

The Funds place great reliance on the notwithstanding clause in Section 6.07, alleging that it "override[s] any conflicting provisions in the contract." Funds Br. at 23. Of course, the provisions of a contract should be "read as a whole," *Beal*, 8 N.Y.3d at 332, and seemingly inconsistent provisions should be

harmonized whenever reasonably possible. *Isaacs v. Westchester Wood Works, Inc.*, 278 A.D. 2d 184, 185 (1st Dep't 2000). Moreover, it is well-established that "a contract should not be interpreted so as to render any clause meaningless." *RM 14 FK Corp. v. Bank One Trust Co., N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) (granting summary judgment dismissing breach of contract claim). But that is just what the Funds would do. Their unrestrained reading of the "notwithstanding" clause of Section 6.07 (an interpretation that, as noted, is refuted by *Marblegate*'s analysis of Section 316(b)) renders meaningless all of the rights and remedies of the Trustee, including the provisions of the Collateral Trust Agreement and Security Agreement that authorize the Collateral Trustee to act against the collateral and specifically and unqualifiedly authorize the Collateral Trustee to "exercise all the rights and remedies of a secured party on default under the UCC," along with the right of a majority of Noteholders to direct the Trustee to exercise these remedies. (A.1116 § 3.3, A.1118 § 3.5(a); A.1174 § 9.1(iv), A.1175 § 9.1(viii); A.1033 § 6.03, A.1034 § 6.05).

Even the specific text of the very provisions that the Funds cite in support of their claim cannot be read to reach the meaning that the Funds wish. The Funds argue that their unrestrained reading of Section 6.07's notwithstanding provision is supported by the Security Agreement, which the Funds claim says that "[t]he actions of the Collateral Trustee hereunder are subject to the provisions of the

Indenture." Funds Br. at 23 (alteration in original). However, the Funds have selectively omitted key language from this clause, which in reality reads: "[t]he actions of the Collateral Trustee hereunder are subject to the provisions of the Indenture *and the Collateral Trust Agreement*." (A.1180 § 11.1(a)) (Funds' omitted language in italics). This provision stands for the exact opposite interpretation advanced by the Funds: that all three Agreements must be read as a whole. This true meaning is further cemented by the text of Indenture Section 6.07 itself, which by its terms can override only "any other provision of this Indenture." (A.1035 § 6.07). The choice of the term "Indenture" rather than the broader term "Indenture Documents"—which is specifically defined in the Indenture to include the Indenture, the Security Agreement, and the Collateral Trust Agreement—confirms that Section 6.07 does not deprive the Trustee of remedies provided for in the Security Agreement and Collateral Trust Agreement. (*Compare* A.1034 to A.1035 § 6.07, *with id.* A.938, A.993 § 1.01 (defining "Indenture," "Indenture Documents," and "Security Documents")). These intricacies of the specific contracts on which the Funds build their case demonstrate not only that the Funds' claims fail on the merits, but also that their case is not a useful vehicle for this Court to instruct other contract parties throughout the State on generally applicable principles of law.

Yet another principle of contract interpretation is in conflict with the Funds' position. Under New York law, more specific provisions of an agreement are enforced over the more general provisions. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956). The various provisions of the Agreements authorizing the Trustee to pursue collection remedies at the direction of a majority of Noteholders are more specific provisions than Section 6.07 of the Indenture. Section 6.07 of the Indenture, which is substantively identical to Section 316(b), is a general provision and, as the *Marblegate* court found, "ultimately ambiguous" when viewed in isolation. 846 F.3d at 7. The provisions of the Security Agreement and Collateral Trust Agreement relied on by Respondents, on the other hand, as discussed above, are specific provisions and unambiguously authorize the Trustee to take numerous actions, some with and others without requiring direction by a majority of Noteholders, in the event of a default. (A.1116 § 3.3, A.1118 § 3.5(a); A.1159 § 3.1, A.1174 § 9.1(iv), A.1175 § 9.1(viii)). Most critically (and most specifically), is the grant of authority to the Trustee in the Security Agreement to "exercise all the rights and remedies of a secured party on default under the UCC," which is exactly what occurred here. (A.1175 § 9.1(viii)). Thus, these provisions are more specific and trump the general provisions of Section 6.07.

In an attempt to reconcile their reading of the notwithstanding provision of Section 6.07 with these settled precepts of New York contract law, the Funds

concede that the Trustee "still has the ability to . . . exercise the 'rights and remedies of a secured party on default under the UCC.'" Funds Br. at 24. But the Funds conveniently ignore that these UCC rights include the right to foreclose on collateral in full satisfaction of the debt—*i.e.*, to conduct a strict foreclosure under N.Y. U.C.C. §§ 9-620, 9-622. Thus the Funds would insert words into Section 9.1 of the Security Agreement so that it says "the Collateral Trustee may . . . exercise all the rights and remedies of a secured party on default under the UCC *except for the rights and remedies under U.C.C. §§ 9-620 and 9-622.*"

In another argument that is solely merits based, the Funds argue that "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)." Funds Br. at 24. However, the facts of *Beal* are highly analogous to this case and solidify the principles explained above that the Agreements must be interpreted as a whole and as written.

In *Beal*, 36 of 37 lenders holding 95.5% of the principal amount of debt at issue (over $400 million) and an administrative agent authorized to act on behalf of the lenders entered into a settlement agreement with a trust and two other "sponsors" (the trust and sponsors were essentially guarantors of the borrower's debt). *Beal*, 8 N.Y.3d at 323. The settlement agreement effectively relieved the sponsors of their payment obligations by requiring the administrative agent to forbear from enforcement actions against them. *Id.* These 36 lenders "agreed that

the terms of the settlement were of greater benefit to the consortium [of 37 lenders] than an attempt to recover under [the applicable loan agreement]." *Id.* Under one of the loan agreements, the administrative agent was authorized, *inter alia*, to "exercise any or all rights and remedies at law or in equity," *id.* at 322, upon receiving written instructions from a supermajority (two-thirds) of the lenders, *id.* at 321-22, and it had been so instructed by the 36 lenders.

The plaintiff bank, which had acquired a 4.5% interest in the debt as an assignee of the 37th lender, sued the trust seeking to recover for breach of contract. *Id.* at 323-24. In support of its contention that it had standing to sue, the plaintiff pointed to a unanimous consent clause of one of the loan agreements providing that no amendment, modification, or waiver could be made to the loan agreements so as to release the sponsors without the consent of all the lenders. *Id.* at 330. The Court of Appeals rejected the plaintiff's claim that it had standing to sue, holding 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 agreements at issue." *Id.* at 321.

In particular, the Court recognized that the "Trust acknowledge[d] that the unanimous consent clause ensures that the terms of the loan cannot be altered in a manner inconsistent with what other Lenders originally agreed to." *Id.* at 330. The

Court stressed, however, that "the Settlement did not release the Trust of its obligations by amending, modifying, or waiving any provision in the agreements." *Id.* And the Court went on to stress as well that "even if the Settlement has a similar effect to a release, the supermajority of Lenders exercised their rights by restructuring the debt of a financially troubled Borrower." *Id.* (internal quotation marks omitted). For this reason, the Court concluded, "the provisions concerning amendment, modification and waiver of the agreements do not preclude the Administrative Agent and the 95.5% of the Lenders from attempting to recover on as much of the Trust's obligations as they could." *Id.* at 330-31.

Here, too, the Trustee and virtually all other Noteholders agreed that the Strict Foreclosure remedy was of greater benefit to all than any alternative course. Here, too, it is equally clear that the overall intent of the Agreements is similarly to authorize the Trustee to act collectively when instructed by the requisite percentage of Noteholders. And here, too, the fact that the consummation of the Strict Foreclosure remedy had the effect of releasing Cleveland Unlimited is of no moment. As in *Beal*, numerous provisions of the Agreements in this case bound individual Noteholders to the Trustee's election of remedies at the direction of the majority, and Indenture Section 6.07 cannot sensibly be read to "trump" all of those provisions.

The Funds attempt to distinguish *Beal* on the basis that no provision in the agreements at issue in that case, like Indenture Section 6.07, explicitly bestowed upon the plaintiffs standing to sue. Funds Br. at 25. This is a classic example of a distinction without a difference, as it does not erase the broader rule of contract interpretation from *Beal* that a single contract provision cannot be interpreted without considering the "specific, unambiguous language of several provisions, read in the context of the agreements as a whole." *Beal*, 8 N.Y.3d at 321. Because only the application of this well-established rule is at issue here, there is no reason for the Court of Appeals to inquire about whether the facts in *Beal* are exactly the same as the facts in this case.

* * *

In sum, the Funds present no persuasive reason whatsoever why this Court should grant leave to appeal. The First Department's decision is fully consistent with *Marblegate* and settled precepts of New York contract law. Accordingly, as discussed above, the Funds' effort to convince this Court that the New York bond market is in dire peril is pure fiction. As noted above, a decision that "threatens to return the bond markets back to the 1930s" would not have been met with total silence by legal scholars and the financial press. Funds Br. at 4. For these reasons, this case does not present issues that are "novel or of public importance, present a

conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

CONCLUSION

For the reasons stated above, the Funds' motion for leave to appeal should be denied.

Dated: New York, New York
November 16, 2018

Respectfully submitted,

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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, 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-Respondents.	New York County Index No. 650140/2012

AFFIRMATION OF SERVICE

BRENDAN HERRMANN, an attorney admitted to practice in the courts of the State of New York, affirms as follows under penalty of perjury in accordance with Rule 2106 of the New York Civil Practice Law and Rules:

1. I am an associate at the law firm of Dechert LLP, 1095 Avenue of the Americas, New York, New York 10036, counsel for each of the defendants listed

in the above caption. I am over the age of eighteen and not a party to this action. I reside in New York County, New York.

2. On November 16, 2018, I caused Defendants-Respondents' opposition to Plaintiffs-Appellants' motion for leave to appeal to be served on counsel for Plaintiffs-Appellants listed below via email and overnight delivery.

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Dated: New York, New York
November 16, 2018

Brendan Herrmann