To be Argued by:
JAMES M. MCGUIRE
(Time Requested: 15 Minutes)

APL-2019-00031
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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, INC.,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT UNDER 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 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.

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INTRODUCTION

Appellants (the "Funds") are purchasers of secured notes (the "Notes") issued by Cleveland Unlimited, Inc. ("CUI"), which defaulted on the Notes' final interest and maturity payments. At the core of the Funds' argument lies a startling proposition: that they, holders of less than 4% of the Notes, are entitled to pick the pockets of their fellow noteholders by obtaining from those noteholders a recovery no other noteholder could obtain—100 cents on the dollar. And this, even though (1) the Funds and all noteholders obtained the most value available through the exercise by the indenture trustee of a strict foreclosure remedy; (2) that remedy is unambiguously authorized under the parties' agreements; (3) more than 96% of noteholders approved the remedy's exercise; (4) the Funds have never contended that the trustee breached the fiduciary duty it owed them; and (5) following the remedy's exercise, the pre-default owners of CUI retained no equity in CUI. The lower courts rejected this audacious argument. So should this Court.

After CUI defaulted, the trustee under the governing indenture and security agreements exercised the UCC "strict foreclosure" remedy, accepting pledged collateral (consisting of 100% of the equity interest in CUI) in satisfaction of CUI's debt, and distributed the foreclosed collateral ratably to the noteholders, including the Funds. As noted, the strict foreclosure delivered more value than any other available remedy, and more than a bankruptcy.

The Funds, holders of 3.34% of the value of CUI's debt, purported to disagree with the exercise of strict foreclosure (although they accepted the stock distributed to them, identified themselves as stockholders, and benefited from the distribution). The Funds did not identify any alternative by which to obtain payment on their Notes, let alone an alternative superior to strict foreclosure. Instead, they insisted, and continue to insist, that they were entitled to what their fellow noteholders could not possibly get—a 100% recovery on their Notes—to be funded, not by CUI (which could not pay), but by their fellow noteholders. They brought this action against CUI and several entities that guaranteed CUI's obligations (together, "Respondents"), asserting breach of contract claims.

The Funds do not dispute that, if the foreclosure was properly exercised, it would defeat their claims. Nor do they dispute that the remedy was authorized by the governing agreements, or that its exercise complied with the UCC. Instead, the Funds seek to avoid the remedy, arguing that it conflicts with an indenture provision—Section 6.07—that provides that a noteholder's "right" to payment shall not be "impaired" without consent.

The Funds' argument fails for several reasons. It depends on an interpretation of Section 6.07—a standard term in trust indentures—that is inconsistent with the narrow interpretation courts have historically given such terms and would bring Section 6.07 into conflict with, and negate, numerous provisions of the parties' agreements. Moreover, the Funds' reading lacks any support in the history of Section 6.07's incorporation into the standard New York indenture and contradicts the Second Circuit's construction of substantively identical language under the federal Trust Indenture Act ("TIA"). And to adopt the Funds' constriction of Section 6.07 would lead to numerous untoward consequences. It would require this Court to overrule well-established case law upholding trustee enforcement powers and render avoidable any trustee remedy that does not result in a 100% recovery. And, by putting the application of Section 6.07 at odds with the Second Circuit's interpretation of the TIA, it would introduce uncertainty into the capital markets. In short, the Funds' argument, if accepted, would lead to absurd, unfair, and unreasonable results.

This Court should adopt the prevailing interpretation of Section 6.07: It prohibits *only* non-consensual amendments to an indenture's core payment terms. This construction harmonizes Section 6.07 with the other terms of the indenture, giving effect to each. It is consistent with long-settled case law that upholds the exercise of trustee remedies that diminish or even terminate payment rights, including trustee accelerations, lawsuits and settlements. It gives Section 6.07 the effect it was intended to have when first introduced, and the effect the TIA's drafters intended when they made non-impairment language mandatory in "qualified" indentures. Its adoption here would avoid undermining the Second

Circuit's unequivocal holding that the TIA's substantively identical language "prohibits *only* non-consensual amendments to an indenture's core payment terms." The Court can therefore safely disregard the Funds' effort to sound the drumbeat of alarm by suggesting, incredibly, that capital markets would react negatively to this Court's adoption of the long-prevailing and recently-reaffirmed interpretation. That interpretation also facilitates workouts, disempowers opportunistic holdouts, and saves noteholders, issuers and shareholders from the costs and consequences of filing bankruptcy.

The Funds urge that Section 6.07 is "unambiguous." Not so. For one thing, that no court has adopted the Funds' interpretation, while the judicial consensus instead favors Respondents' reading, belies the Funds' claim that Section 6.07 can reasonably be read *only* as they read it. In any event, the Funds' "plain language" interpretation mangles multiple canons of construction and leads to absurdities.

The Funds maintain that it would be formalistic to interpret Section 6.07 to prohibit impairment caused by amendments, but not trustee remedies that result in the compromise or loss of individual noteholder rights. But the distinction is substantive. Under the "majority-action" clauses Section 6.07 prohibits, majority noteholders could, pre- or post-default, and while under no duties to the minority, amend the indenture to prejudice the minority. Section 6.07 guards against this danger—a collusive agreement between the issuer's equityholders and majority noteholders to favor themselves at the minority's expense. Absent Section 6.07, the minority would be at the mercy of an opportunistic majority.

Trustee remedies, by contrast, do not present this danger. They activate only following an event of default—which, critically, also triggers the trustee's fiduciary duties to *all* noteholders. While the majority can direct the trustee, the trustee is authorized to reject any direction that would prejudice non-directing noteholders; if it breaches its duty, it may be liable to the minority, regardless of having acted under directions. And suits against the trustee are just one way minority holders aggrieved by trustee enforcement actions can obtain judicial review. Accordingly, there are weighty reasons why the drafters of the TIA's mandatory non-impairment language expressed no concern over trustee remedies, and instead sought to *encourage* greater use of them.

Indeed, the Funds' interpretation elevates form over substance. They acknowledge, as they must, that non-impairment clauses like Section 6.07 do not bar the exercise of foreclosure remedies that provide dissenters with *no* recovery, even when they render *worthless* dissenters' "legal rights" to sue for a deficiency. But, they say, the exercise of a remedy that delivers the greatest available recovery to dissenters is barred, unless it also preserves dissenters' deficiency claims. A noteholder's legal right to pursue a deficiency has never been inviolate, however, and neither history nor precedent supports the glaring formalism at the heart of the Funds' appeal.

Regardless, the Funds cannot prevail even under their erroneous reading of Section 6.07. After all, by its terms, Section 6.07 could at most conflict with, and negate, trustee remedies found in "other provisions of th[e] Indenture." Here, however, strict foreclosure was independently authorized by two distinct security agreements. And because the indenture here is not TIA-qualified, there is no basis in law to give Section 6.07 any effect beyond that intended by the parties. Rather, as in *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007), the "collective design" of the parties' agreements controls—and it reflects their intent that the trustee be empowered to exercise the remedy.

Finally, even if the strict foreclosure breached the contract, the Funds still are not entitled to summary judgment, for two reasons. *First*, claims against Respondent CUI Holdings, LLC must be dismissed because it was "automatically and unconditionally" released under the plain terms of the Indenture when its sole asset—the stock of CUI—was foreclosed upon and distributed to CUI's noteholders. Having been released, no claim lies against it. *Second*, a damages trial must be held because the Funds benefited when they accepted and retained their share of the foreclosed collateral.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The unambiguous terms of the parties' agreements authorized the Trustee to exercise all available remedies following an event of default, including the strict foreclosure remedy of UCC 9-620. Under UCC 9-620, the secured party accepts pledged collateral—here, *all* CUI's stock—in satisfaction of the debt it secured. Where it is undisputed that the Trustee exercised its strict foreclosure remedy in compliance with the parties' agreements and the UCC, is the debt secured by the pledged collateral discharged?

   — The lower courts correctly answered this question in the affirmative.

2. Section 6.07 of the Indenture provides that each noteholder's "right" to receive payment "shall not be impaired" without consent. Courts have ruled that identical "non-impairment" language "prohibits *only* non-consensual amendments to an indenture's core payment terms," and thus does not restrict a trustee's exercise of remedial powers. Does Section 6.07 nevertheless negate the Trustee's good-faith exercise of its expressly-conferred remedial powers here, where it is undisputed that the remedy's exercise was value-maximizing, and that the alternative—bankruptcy—would have delivered less value?

   — The lower courts correctly answered this question in the negative.

3. The parties' agreement consists of three principal documents—the Indenture, the Security Agreement, and the Collateral Trust Agreement—that are each

defined separately, and, when referred to collectively, defined as the "Indenture Documents." The non-impairment language in Section 6.07 of the Indenture applies "notwithstanding any other provision of *th[e] Indenture*."[1] Assuming Section 6.07 could be interpreted to conflict with, and negate, remedial provisions "of th[e] Indenture," can it also be interpreted to conflict with, and negate, remedial provisions of the separately defined Security and Collateral Trust Agreements?

— The lower courts correctly answered this question in the negative.

4. Assuming the Court concludes that the foreclosure remedy breached the parties' agreement, two issues are presented.

    a. Respondent CUI Holdings, LLC guaranteed the Notes and pledged its sole asset, 100% of CUI's stock, as security. Under the Section 10.02 of the Indenture, a guarantor is "automatically and unconditionally" released from its obligation upon disposition of substantially all its assets. Here, where the foreclosure resulted in the disposition of CUI Holdings LLC's sole asset by distributing it to CUI's noteholders, was CUI Holdings, LLC released?

— The lower courts had no need to, and did not, reach this question. Should this Court reach it, the Court should answer it in the affirmative.

[1] All emphases are added, unless otherwise noted.

b. When the strict foreclosure remedy was exercised, CUI could not pay the Notes in full, and it is uncontested that the foreclosure remedy provided more value to noteholders than any available alternative. Moreover, the Funds accepted their ratable share of the foreclosed collateral—expressly identifying themselves as CUI shareholders (until they deemed it expedient to again call themselves noteholders)—and valued their stock more highly than they valued their Notes before the remedy's exercise. In these circumstances, assuming the strict foreclosure remedy was invalid, are the Funds entitled on summary judgment to a damages award without *any* offset for the value of their stock?

— The lower courts had no need to, and did not, reach this question. Should this Court reach it, the Court should answer it in the negative.

BACKGROUND[2]

A. CUI issues the Notes, which are governed by the Indenture Documents.

On December 15, 2005, CUI—a wireless communications company—issued $150 million in secured Notes. *See* Form of Note (A305-22). The Notes promised quarterly interest payments and repayment of principal at their December 15, 2010 maturity. A306. The remaining Respondents (the "Guarantors") guaranteed CUI's obligations. The Funds bought $5,000,000 face amount of Notes in April 2010.

The Notes are governed by three contemporaneous documents: the Indenture (A161-304), the Collateral Trust Agreement (A323-59), and the Security Agreement (A360-451). Each is defined separately in the Indenture. *See* Indenture § 1.01 (A172, A182, A192). They are also defined collectively as the "Indenture Documents." *Id.* (A182).

Under the Security Agreement, the Guarantors pledged collateral to secure CUI's payment of the Notes. By the time of the foreclosure remedy challenged here, the collateral included all CUI's stock (the sole asset of Respondent CUI Holdings, LLC), and substantially all its assets.

The Indenture Documents identify U.S. Bank, N.A., as the "Collateral Trustee" and "Trustee." *Id.* § 1.01 (A172, A194); Collateral Trust Agreement

[2] The following facts are undisputed. *See generally* A1645-63, A1689-1700. Citations beginning with "A-" refer to the Appendix.

§ 1.1 (A327, A330); Security Agreement § 1.1 (A367, A373). We refer to it in both capacities as the "Trustee."

B. <u>The Indenture Documents authorize the Trustee to enforce remedies upon default, including UCC remedies.</u>

The Indenture Documents empower the Trustee to take remedial action following an "event of default." Indenture § 6.01 (A229-30). Specifically, Section 6.03 provides that:

> If an Event of Default occurs and is continuing, [the Trustee] may pursue any available remedy by proceeding at law or in equity...to enforce the performance of any provision of the Notes, this Indenture or any of the other Indenture Documents.

A232. And under Section 12.08 (A262), the Trustee:

> may, in its sole discretion and without the consent of...the Holders, take all actions it deems necessary or appropriate in order to (i) enforce any of the terms of the Security Documents or the Collateral Trust Agreement and (ii) collect and receive any and all amounts payable....[3]

For their part, the Security and the Collateral Trust Agreements independently grant the Trustee remedial powers. Section 9.1(viii) of the Security Agreement (A391-92) states:

> Upon the occurrence and during the continuance of any Event of Default, the [Trustee] may from time to time

[3] The "Security Documents" include the Security and Collateral Trust Agreements. *Id.* § 1.01 (A192).

> exercise in respect of the Collateral...all the rights and remedies of a secured party on default under the UCC.

And, in Section 3.1(a)(4) of the Collateral Trust Agreement (A331-32), the Trustee agreed that it would:

> sell, assign, collect, assemble, foreclose on, institute legal proceedings with respect to, or otherwise exercise or enforce the rights and remedies of a secured party...with respect to the Collateral.

C. <u>CUI defaults on the Notes, and the Trustee exercises the UCC remedy of "strict foreclosure."</u>

In December 2010, CUI announced it would be unable to make its final interest payment or repay principal. A1652, A1693 (¶ 37). Ninety-nine per cent of Noteholders—including the Funds—entered into a "Forbearance Agreement" to enable CUI to pursue refinancing. *See* A1652-53, A1693-94 (¶¶ 39-44); A476-528. Ultimately, no viable refinancing emerged. The Funds, insisting on full payment, withdrew at the eleventh hour from a proposed debt-for-equity transaction. A1654-56, A1694 (¶¶ 49-50, 55).

CUI remained in default. It did not pursue a bankruptcy because it concluded that bankruptcy would ultimately reduce the amount available to repay noteholders. More than 96% of noteholders agreed with this conclusion. A1656, 1695 (¶ 60); *see also* A1577-78, A1585-86. The Funds, representing the remainder, never analyzed the question. A1656, A 1694 (¶ 57).

In September 2011, the Trustee invoked a remedy authorized in the Indenture Documents by executing a "strict foreclosure" on the stock of CUI (the "Foreclosure Remedy"). A1657, A1695 (¶ 64); *see also* A569-83. "Strict foreclosure" is the colloquial name for the remedy provided to secured creditors under UCC 9-620 and 9-622. *See* Phillip J. Hendell, *The Friendly Foreclosure*, 16 Com. L. Bull. 16 (2001) (C1908).[4] Under a strict foreclosure, the secured party accepts pledged collateral in satisfaction of the obligations the collateral was pledged to secure.

Here, the Trustee, as the secured party, accepted the collateral—in particular, the 100% equity interest in CUI pledged by CUI Holdings, LLC—in full satisfaction of the debt under the Notes and guaranties; CUI and the Guarantors "consent[ed] without any objection" to the transfer "in full...satisfaction of" their obligations. *See* Strict Foreclosure Agreement §§ 2, 4-5 (A1452-55). The Trustee then distributed the foreclosed equity interests to the noteholders *pro rata*; the Funds received 3.33 shares. A1659, A1697 (¶¶ 74-75).

D. <u>The Funds benefit from the Foreclosure Remedy.</u>

The Funds were apprised in advance that the Trustee would exercise the Foreclosure Remedy, but did not seek to enjoin it. Nor did they file an involuntary

[4] Citations beginning "C-" refer to Respondents' Compendium of Authorities.

bankruptcy, or communicate that they preferred a Chapter 11 proceeding—the desirability of which, as noted, they never analyzed. A1656, A1694 (¶ 57).

The Funds never rejected or returned the stock distributed to them. A1659, A1697 (¶¶ 76-78).[5] Indeed, after receiving the stock, the Funds acknowledged they were CUI shareholders and recorded the shares as assets on their books. A1661, A1698 (¶ 86). When seeking information from CUI, the Funds identified themselves as "holders of the equity." A1661, A1698-99 (¶ 87); *see also* A1482.

The Funds increased the valuation of their investment in CUI as a result of the Foreclosure Remedy. Immediately thereafter, the Funds increased that valuation on their books from $3,425,000 to $3,450,000, and further increased it to approximately $3,540,000 less than two months later. A1660-61, A1698-99 (¶¶ 81, 90). The Funds used these valuations to, among other things, calculate their management fees and prices at which their investors could redeem their shares. A1660, A1698 (¶¶ 82-84).

E. <u>Supreme Court grants summary judgment in favor of Respondents, and the First Department unanimously affirms.</u>

By motion for summary judgment in lieu of complaint, the Funds sued, seeking full payment on their Notes from Respondents. After Supreme Court

[5] After the Funds commenced this action they stated, in litigation briefs, that they would be "happy to return the stock" in exchange for a 100% recovery on their Notes. *Id.*

denied their motion, the Funds filed their complaint; Respondents answered and raised several defenses, including accord and satisfaction. A129-44; A158.

Following discovery, the parties cross-moved for summary judgment. Supreme Court, New York County (Scarpulla, J.S.C.) granted Respondents' motion and denied the Funds' cross-motion. A8-25, A26-43. The court held that the Trustee's Foreclosure Remedy "was authorized under the parties' agreements," A37, and, relying on *Marblegate Asset Mgmt. v. Ed. Mgmt. Corp.*, 846 F.3d 1 (2d Cir. 2017), held that the Foreclosure Remedy "did not amend any terms of the Indenture," and thus "there was no breach" of Section 6.07. A42. Relying on *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007), the court concluded that Section 6.07 does not trump the provisions in the Collateral Trust and Security Agreements authorizing the Trustee to pursue remedies available to a secured party under the UCC, including strict foreclosure. A37-40.

The Appellate Division unanimously affirmed, relying on the same cases and reasoning. A1774-76.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE REMEDIAL PROVISIONS AUTHORIZED THE FORECLOSURE REMEDY

"An indenture is essentially a written agreement that bestows legal title of the securities in a single Trustee to protect the interests of individual investors who may be numerous or unknown to each other." *Cortlandt St. Recovery Corp. v.*

Bonderman, 31 N.Y.3d 30, 39 (2018) (citation omitted). "[U]nder New York law[,] interpretation of indenture provisions is a matter of basic contract law." *Id.*

Here, the Indenture Documents unambiguously authorized the Trustee to exercise the UCC's strict foreclosure remedy. The Indenture itself empowered the Trustee to "enforce the performance of any provision of the Notes, this Indenture or any of the other Indenture Documents," while "each Holder...agree[d] that" the Trustee could "take all actions it deems necessary or appropriate" either to "enforce any of the terms of the Security Documents or the Collateral Trust Agreement" or to "collect and receive any and all amounts payable in respect of the Obligations." Indenture §§ 6.03, 12.08 (A232, A262).

In addition, the Security and Collateral Trust Agreements specifically authorized the Trustee to exercise "all the rights and remedies of a secured party on default under the UCC," and all "remedies of a secured party." Security Agreement § 9.1(viii) (A391-92); Collateral Trust Agreement § 3.1(a)(4) (A331-32). Of course, strict foreclosure in satisfaction of an obligor's debt is just such a remedy. *See* UCC 9-620(a), 9-622(a)(1).

Each of the foregoing remedial provisions is unambiguous. Indeed, in *Cortlandt*, this Court found unambiguous a provision virtually identical to Section 6.03, holding that its "plain meaning" was "to authorize a trustee to pursue *any lawful means* of enforcing the noteholders' rights." 31 N.Y.3d at 40. The Court therefore rejected the defendant's argument that the Section 6.03 should be read "narrowly" to permit the trustee to bring only a non-payment suit against the issuer. *Id.* at 41. Here, as in *Cortlandt*, the remedy the Trustee pursued was authorized under the plain language of the Indenture Documents, and the Court should reject the Funds' effort to limit the Trustee to just some of its powers. *Contra* Funds Br. 50-52.

The Funds do not dispute that the Foreclosure Remedy complied with foregoing remedial provisions, or that it complied with the UCC. The Funds also do not dispute that, generally, a valid strict foreclosure satisfies the debt secured. These concessions are dispositive: The Trustee's valid exercise of its unambiguous contractual power defeats the Funds' claims as a matter of law.

II. SECTION 6.07 DOES NOT CONFLICT WITH THE REMEDIAL PROVISIONS OR OTHERWISE PROHIBIT THE FORECLOSURE REMEDY

Ignoring the rest of the Indenture Documents, the Funds focus on a single Indenture provision, Section 6.07, which says that a noteholder's right to payment "shall not be impaired" without consent. According to the Funds, this provision conflicts with, and trumps, any exercise of trustee remedies that, in any manner, affect a noteholder's "legal right." The Funds' interpretation of Section 6.07 is neither compelled by its "plain language" nor supported by history, precedent, policy or common sense.

A. Section 6.07's language prohibits only "impairment" caused by majority amendments.

1. *Courts and commentators have long interpreted Section 6.07 to prohibit only impairment-by-amendment.*

Courts and commentators have long construed Section 6.07's "non-impairment" language—which the Funds agree is substantively identical to Section 316(b) of the TIA ("TIA§316(b)")—to prohibit only "impairment" of the "right to receive payment" through *amendments* to indentures effectuated by noteholder majorities. That is, under Section 6.07, and TIA§316(b), a contractual "*right* to receive payment" can be unlawfully "impaired" only by a change (without consent) to the terms of the contract that creates and defines that legal "right."

For example, the Southern District of New York interpreted TIA§316(b) to "proscribe[] certain so-called 'majority action clauses' in indentures," thus prohibiting "*modification* by majority securityholder vote of any core *term of the indenture*, *i.e.*, one affecting a securityholder's right to receive payment[.]" *Upic & Co. v. Kinder-Care Learning Centers, Inc.*, 793 F. Supp. 448, 452 (S.D.N.Y. 1992); *see also Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 917 (2d Cir. 2010) (non-impairment language "prohibit[s] majority bondholders from collusively agreeing to *modify* the bond's *payment terms*"). Consistently, the ABA's *Annotated Trust Indenture Act* explains that TIA§316(b) only "prohibits...an indenture from allowing 'majority actions' to *modify* core *terms of* *the indenture*." 67 Bus. Law. 979, 1146 (Aug. 2012) (collecting authorities). One treatise, summarizing the "[h]istorical interpretation" of TIA§316(b), observed that its language has been "considered to be limited to *modifying the 'core' terms of an indenture* related to repayment rights." *Business Workouts Manual* § 39:4 (2019).

A few Southern District decisions issued in 2014 and 2015 departed from this historical consensus, giving §316(b) a broad reading under which it could be violated "*either* [by] [1] an amendment to a core term of the debt instrument, *or* [2] an out-of-court debt reorganization." *BOKF, N.A. v. Caesars Ent. Corp.*, 144 F. Supp. 3d 459, 468 (S.D.N.Y. 2015). The Second Circuit disagreed and, reaffirming the historical interpretation, concluded that §316(b) "prohibits *only* non-consensual *amendments* to an indenture's core payment terms." *Marblegate*, 846 F.3d at 3; *id.* at 15 n.17 (rejecting *BOKF*). Thus, as a leading law firm observed, "the traditional interpretation of [TIA§316(b)]—only prohibiting nonconsensual amendments to an indenture's core payment terms—has now been restored in the Second Circuit." Debevoise & Plimpton, *Second Circuit Court of Appeals Lifts Cloud of Uncertainty over Bond Restructurings* (Jan. 18, 2017). And an eminent scholar at NYU Law School praised *Marblegate* as a "return to certainty and to literalism." Marcel Kahan, *The Scope of Section 316(b) After Marblegate*, 13 Capital Markets L.J. 136, 140 (2018) (C1928); *see also* William C.

Bratton Jr. & Adam Levitin, *The New Bond Workouts*, 166 U. Pa. L. Rev. 1597, 1655 (2018) (*Marblegate* "made clear that [TIA§316(b)] is to be read narrowly").

In this case, it is undisputed that the Foreclosure Remedy did amend the Indenture. Therefore, as the courts below correctly found, Section 6.07 was not violated.

2. *The Funds' contrary "plain language" interpretation is not reasonable.*

The Funds nonetheless argue that the "plain language" of Section 6.07 is not reasonably susceptible to the interpretation historically given it by the courts. Rather, per the Funds, Section 6.07 unambiguously supports them, because (they say) "the expansive phrase 'impaired or affected' makes clear that Section 6.07 is not limited in its scope to mere amendments." Funds Br. 24.

The Funds' argument fails. As a threshold matter, the Funds' interpretation cannot prevail as a matter of law. That courts have historically—and all but uniformly—read Section 6.07 in the way the Funds say it *cannot* reasonably be read defeats their argument that Section 6.07 is unambiguous. *See* 11 Williston on Contracts § 30:4 (4th ed.) ("[N]o writing is unambiguous if susceptible of two reasonable interpretations.") (citation omitted). Reading Section 6.07 to be limited to impairment-by-amendment, as courts have long done, is at least reasonable. *See Sutton v. E. River Sav. Bank*, 55 N.Y.2d 550, 555 (1982) ("[N]ot merely literal language, but whatever may be reasonably implied therefrom must be taken into account.”).

In fact, the interpretation the Funds espouse is wrong as a matter of law because it is *not* reasonable. For example, the Funds’ literalist interpretation would put Section 6.07 into conflict with the Bankruptcy Code, which permits a court to reduce the amount due under notes, as well as statutes of limitations, which bar suits. Both “impair” payment rights under the dictionary definitions the Funds cite. *See* Funds Br. 22-23. Of course, however, courts have rejected the existence of any such conflict. *See, e.g.*, *In re Board of Directors of Multicanal S.A.*, 307 B.R. 384, 388 (Bnkr. S.D.N.Y. 2004) (TIA§316(b) does not preclude “impairment” caused by bankruptcy, but merely “restrict[s] the use of collective action clauses”); *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 129 (2019) (noteholder’s suit time-barred).

To the extent the Funds’ proposed interpretation would proscribe only “impairment” caused by parties to the Indenture—a limitation that itself goes beyond the literal words used—it would still conflict with settled law. For example, the model New York-law indenture empowers trustees to accelerate debt following default. *See* American Bar Association (ABA), *Revised Model Simplified Indenture*, 55 Bus. Law. 1115, 1136-37 (May 2000) (section 6.02). Under the Funds’ wooden interpretation, however, exercising that authority would impermissibly "impair[] or affect[]" a noteholder's rights, because "[t]he normal consequence of acceleration is that interest payments that would have been due in the future are no longer due." *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 296 (2d Cir. 2009). Thus, "when lenders accelerate the maturity of the debt, they *waive* their opportunity to earn, and their claim to, interest payable over a period of years[.]" *Baybank Middlesex v. 1200 Beacon Properties, Inc.*, 760 F. Supp. 957, 966 (D. Mass. 1991).

But it has been long established in this State that accelerations, "when exercised by the trustees, bec[o]me binding and conclusive on the bondholders." *Duval v. Skouras*, 181 Misc. 651, 655 (Sup. Ct. N.Y. Cnty. 1943), *aff'd*, 267 A.D. 811 (1st Dep't 1944), and *aff'd*, 270 A.D. 841 (1st Dep't 1946); *see also, e.g., Nachman v. Tennessee Elec. Power Co.*, 174 Misc. 425, 435 (Sup. Ct. N.Y. Cnty. 1940). Indeed, the power of trustees to bind noteholders is widely accepted when, as here, the acceleration provisions are reflected on the face of the notes. *See* 6A Fletcher Cyc. Corp. § 2752 (2019) (trustee's acceleration controls "not only for the purposes of sale or foreclosure by the trustee, but also so far as the right of individual bondholders to sue is concerned"). If the Funds' interpretation of Section 6.07 were correct, however, a noteholder could *never* be bound.[6]

[6] *But cf. Brady v. UBS Financial Services, Inc.*, 538 F.3d 1319 & n.9 (10th Cir. 2008) (both opining that individual noteholder not bound by acceleration for statute-of-limitations purposes, and conceding that, "[a]rguably, the right to bring suit...is not absolute").

Likewise, the model New York-law indenture empowers trustees to sue on behalf of all holders. *See* ABA, *Revised Model*, 55 Bus. Law. at 1137 (section 6.03); *see also* Funds Br. 51 (acknowledging this power). And the law is settled that when trustees bring such suits to judgment, individual noteholder claims are "merged" into the judgment, *i.e.*, eliminated. *See* American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions*, § 5–3, at 226 (1971) (C1850). But the Funds' overbroad reading of Section 6.07 would forbid such trustee suits, because they terminate individual noteholders' "legal rights."

Inconveniently for the Funds, courts have also recognized the authority of trustees both to *settle* suits brought on behalf of noteholders and to bind dissenters to such compromises. For example, in a decision affirmed by the Southern District and Second Circuit, a bankruptcy court recognized that "[i]mplicit in the [indenture trustee's] authority to commence proceedings to remedy defaults is the power to negotiate and agree upon settlements." *In re Delta Air Lines, Inc.*, 370 B.R. 537, 548 (Bankr. S.D.N.Y.), *aff'd*, 374 B.R. 516 (S.D.N.Y. 2007), *aff'd*, 309 F. App'x 455 (2d Cir. 2009). Thus, the court held, "[i]n default situations where contractual rights are already impaired by exogenous events, non-impairment clauses are moot and the Trustee's power to sue and settle subject to direction by a majority...will be sustained over the objection of a minority or individual." *Id.* at 549 (citing, inter alia, *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007)). And while *Delta* arose in the bankruptcy context, the question there, as here, concerned the co-existence of the trustee's *contractual* right to exercise remedies and a substantively identical non-impairment clause.

The Ninth Circuit reached the same conclusion in a non-bankruptcy case, specifically rejecting the argument that standard non-impairment language forbids trustees' settlements. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1281-82 (9th Cir. 1992) (applying New York law). The court's reasoning is compelling: "Such a reading...would allow a single dissenting Bondholder, by withholding consent, to deny [the trustee] the ability to universally settle or compromise Bondholders' claims against [the issuer] as a whole, an interpretation which we find to be incongruous." *Id.* at 1281; *see also id.* at 1282 (citing EPTL § 11-1.1(b)(13) (trustee can settle claims)).

In short, the Funds' "literalist approach simply proves too much." *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1049 (2d Cir. 1982). The foregoing authorities demonstrate that the word "impair" or "affect" cannot be interpreted in a vacuum, and that "[t]he meaning of a writing may be distorted where undue force is given to single words or phrases." *Empire Properties Corp. v. Manufacturers Tr. Co.*, 288 N.Y. 242, 248 (1942). By negating an array of enforcement powers, the Funds' interpretation vitiates the axiom that "[a] reading of the contract should not render any portion meaningless." *Cortlandt*, 31 N.Y.3d at 39 (citation omitted).

The Funds can only observe that their reading permits the Trustee to exercise *some* of its expressly-conferred remedies. Funds Br. 50-52. That is no answer. The law demands that *all* provisions be given meaning. *See Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 493 (1989) (interpretation that "affords a fair meaning to *all* of the language employed...and leaves *no* provision without force and effect" is preferred). Respondents' interpretation, by respecting Section 6.07's effectiveness against majority amendments, obeys that rule; the Funds' interpretation, by negating express remedies, flouts that rule.

3. *Even if the Funds' alternative interpretation were reasonable, it would merely give rise to ambiguity*

Even if the Funds' interpretation were minimally "reasonable," it would merely present an alternative to the one long embraced by courts and thus, at most, render Section 6.07 ambiguous. *See Mostow v. State Farm Ins. Companies*, 88 N.Y.2d 321, 326 (1996) (where contract "may be reasonably interpreted in two conflicting manners, its terms are ambiguous"). Indeed, the Second Circuit held in *Marblegate* that TIA§316(b)'s substantially identical language was ambiguous, before construing it to prohibit only majority amendments. 846 F.3d at 6-8.

The Funds hope to escape *Marblegate*'s ambiguity finding, noting that the same language can be ambiguous in some contexts, but unambiguous in others.

Funds Br. 24 n.7. That hope is forlorn. The ambiguity identified in *Marblegate* concerned "whether the phrase 'right...to receive payment' forecloses more than formal amendments to payment terms that eliminate the right to sue for payment" in the context of an out-of-court restructuring. The Second Circuit expressly "agree[d] with the District Court that the text...is ambiguous.'" 846 F.3d at 6.

B. Section 6.07's history confirms that it is intended to prohibit majority amendment, not trustee remedies.

To the extent Section 6.07 is ambiguous, this Court may "turn to extrinsic evidence for guidance as to which interpretation should prevail." *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 459 (2004). That evidence overwhelmingly confirms that Section 6.07 was intended to prohibit "majority-action" indenture provisions permitting *amendments* to core payment terms—and *not* intended to limit trustees' good-faith exercise of post-default remedies.

1. *Section 6.07 originally targeted "majority-action" clauses to ensure negotiability.*

As financing through trust indentures evolved in the nineteenth century, "majority clauses permitting modification of principal and interest obligations of the debtor saw relatively little use in the United States," although such clauses were common in Canadian and English indentures. De Forest Billyou, *Corporate Mortgage Bonds and Majority Clauses*, 57 Yale L.J. 595, 596-97 (1948).

U.S. indentures eschewed majority-action clauses to ensure that the issued securities would qualify as "negotiable." "If the bonds' principal amount could be reduced, or their maturity extended, by majority vote, a minority bondholder's bond might not meet" the standard of the 1930's Negotiable Instrument Law. Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 256 (1987) (citations omitted); *see, e.g.*, *McClelland v. Norfolk S. R.R. Co.*, 110 N.Y. 469, 476 (1888) (instruments non-negotiable if "subject to the condition that the time of their payment could be changed, altered and postponed...at the option of a majority of the holders"). Moreover, state law sometimes forbade regulated businesses, like insurance companies or savings banks, from investing in securities subject to majority-action clauses. Roe, *supra*, at 257 & n.82; *see generally* Billyou, *supra*, at 597-602; *see also* Robert T. Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade*, 27 Colum. L. Rev. 901, 927 (1927) (noting rarity of majority-action clauses and associated negotiability concerns).

Thus, the "non-impairment" language found both in Section 6.07 of the standard indenture and in TIA§316(b), was designed to ensure negotiability by circumscribing majority-amendment clauses. Indeed, this language was prevalent well before the TIA's 1939 enactment. As Edmund Burke Jr., a leading proponent of the TIA, testified, "it is safe to say that [the non-impairment language later enacted as TIA§316(b)] is in 90 per cent or more" of indentures then outstanding. Trust Indentures: Hearings on H.R. 2191 & H.R. 5220 Before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong. (1939) ("1939 House Hearings") at 284 (C1063); *see also* S. REP. NO. 75-1619 (1938) ("1938 Senate Report") at 19 (C465) (noting that, "[u]ntil comparatively recently, a prohibition of this sort was perfectly standard"). And the TIA's sponsors attributed its prevalence to negotiability and "investment grade" concerns. *See id.* ("In many states, [non-impairment language] is necessary in order to preserve the negotiability of the notes or bonds[.]"). Thus, the original purpose of non-impairment clauses like Section 6.07 was to prohibit majority-amendment clauses that permitted modification of payment terms.

On the other hand, it is clear that non-impairment clauses were not intended to limit trustee enforcement powers. Rather, before the TIA was enacted, trustees exercised enforcement powers in ways that should have been impossible under the Funds' interpretation of Section 6.07's already-prevalent language.

For example, then (as now) trustees were empowered to accelerate, thereby altering noteholders' legal rights. *See* REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES ("SEC Report"), Part VIII (1940) at 28 fn. 69 (C1176) (trustees generally had power to accelerate); *see, e.g., Duval*, 181 Misc. at

655, *aff'd*, 267 A.D. 811, and *aff'd*, 270 A.D. 841. Then (as now) trustees had the power to sue for the entire amount owed, thereby altering bondholders' legal rights. *See* SEC Report, Part VI (1936) at 42 (C48) (76% of indentures gave trustees the power to sue for all amounts due); *see, e.g.*, *Watson v. Chicago, R.I. & P.R. Co.*, 169 A.D. 663, 675 (1st Dep't 1915). But the existence and exercise of these and other remedial powers was never considered an impediment to negotiability. In fact, this Court held the opposite. *See Enoch v. Brandon*, 249 N.Y. 263, 269 (1928) (the "possibility of acceleration...does not make [bonds] non-negotiable"); *Hibbs v. Brown*, 112 A.D. 214, 221 (1st Dep't 1906) (clauses permitting majority to direct trustee enforcement did not render bonds non-negotiable), *aff'd* 190 N.Y. 167 (1907). As one court observed, in language quoted by the Supreme Court, "[n]otes like this [we]re common in commercial transactions, and we are not aware that their negotiable quality [wa]s ever questioned in business dealings." *Chicago Ry. Equip. v. Merchant's Nat'l Bank*, 136 U.S. 268, 285-86 (1890) (citation omitted).

Thus, trustees routinely exercised indenture remedies that affected, and even terminated legal rights, despite the prevalence of indenture language prohibiting "impairment" of a holder's "right to payment." It follows that the exercise of such remedies could not have been a forbidden "impairment." *See* Harald Halbhuber, *Debt Restructurings and the Trust Indenture Act*, 25 Am. Bankr. Inst. L. Rev. 1, 33 (2017) (parallel reasoning for extant foreclosure sale remedies).

2. *Congress made non-impairment language mandatory to prohibit majority-amendment clauses, not to limit trustee remedies.*

In 1939, Congress passed the TIA, which made "non-impairment" clauses like Section 6.07 mandatory for indentures qualified under that Act. The statute's history confirms that (1) Congress made non-impairment language mandatory to address an increase in majority-amendment clauses at the time; and (2) the TIA was *not* intended to limit trustees' enforcement powers.

(a) SEC Report, Part VI

Part VI of the SEC Report, published in June 1936, focused on trust indentures and trustees. *See* 1939 House Hearings at 55 (C834); *see also Marblegate*, 846 F.3d at 9 ("Part VI...led to enactment of the TIA."). Part VI makes clear that non-impairment language was mandated to address "majority-action" and "no-action" clauses, not to limit longstanding trustee remedies.

The primary concerns that led to TIA§316(b) appear in an Appendix addressing "Bondholders' Meetings" and, more particularly, a subsection addressing "Reorganization By Contract." C143. The SEC noted that "generally the American indenture by specific provision expressly excludes any action *at the bondholders' meeting*"—*i.e.*, by majority or super-majority vote of the bondholders—"*impairing* the obligation of the issuer to pay principal and interest in the manner specified in the indenture," so that "such *changes* could be effected only by unanimous consent." *Id.* at 137 (C143). By contrast, "Canadian and British indentures [did] permit bondholders at a meeting by 'extraordinary resolution' to effect *changes or modifications* in the obligation...to pay principal and interest." *Id.* at 143 (C149).

The SEC observed that these provisions in Canadian and British indentures "provide[d] the machinery for reorganization by contract," but that "reorganization by contract may be effected without formality of a meeting merely by providing that assent of a specified percentage of bondholders is adequate to *change or alter the terms* of the bonds or of the indenture." *Id.* And while prior to the Great Depression such provisions were "exceedingly rare," the SEC had begun to observe them in "new indentures." The SEC recognized that allowing majorities to amend core payment terms provided advantages, but concluded on balance that these provisions "give rise to abuses and problems which must be faced if the interests of security holders are not to be made subordinate to the desires and conveniences of the dominant group." *Id.* at 150 (C156).

Thus, the principal problem TIA§316(b) addressed centered on indenture provisions permitting majority actions "impairing"—*i.e.*, "chang[ing]" or "modif[ying]" or "alter[ing]"—the core payment terms. That is to say, TIA§316(b)'s advocates were *not* concerned with the exercise by trustees of post-default remedies. Accordingly, Part VI's "focus on 'reorganization by contract' supports reading [TIA§316(b)] to prohibit amendments to core payment terms, but provides virtually no support for [the] view that [TIA§316(b)] prohibits other forms of reorganization," including trustee-initiated foreclosures. *Marblegate*, 846 F.3d at 10.

In another relevant section, titled "Protection of Minorities," the SEC again focused on indenture provisions that impaired minority rights, particularly "no-action" clauses that denied individual noteholders the right to sue. SEC Report, Part VI at 62-63 (C68-69). "[B]y virtue of [such] indenture provisions, the dissenter may be remitted to the mercy of a protective committee and the majority." *Id.* at 63 (C69). Notably, this section also did not call for limitations on trustees' exercise of their remedial powers.

Indeed, far from expressing concern about trustee remedies in Part VI, the SEC repeatedly expressed the view that active enforcement of trustee remedies tended to *protect* minority bondholders, and should therefore be *encouraged*.

For example, the SEC opined that "in the critical times of default and reorganization, it is absolutely essential that the bondholders be represented" by an "active trustee." *Id.* at 47 (C53). But, the SEC concluded, "corporate trustees commonly have not exercised their fulsome powers, however pressing the emergency." *Id.* Thus, in the "Protection of Minorities" section, the SEC observed that "[t]his inactivity of the trustee generally leaves minorities unrepresented." *Id.* at 62 (C68). And so, far from concluding that trustee remedial powers presented a problem requiring legislative action, the SEC drew the opposite conclusion: "The trustee should by law be transformed into an active trustee." *Id.* at 47 (C53).

In short, Part VI is irreconcilable with the notion that TIA§316(b) was intended or understood to limit trustee powers.

(b) Congressional reports and hearings

Subsequent congressional hearings and reports confirm that TIA§316(b) was intended to prohibit majority-amendment clauses, without limiting trustee enforcement powers.

William O. Douglas—then-Chairman of the SEC and the TIA's principal architect—testified in support of the legislation. Addressing the language that would become TIA§316(b), he noted the "confusion as to [its] effect," and clarified that it was intended:

> merely to prohibit *provisions* authorizing...a majority to force a non-assenting security holder to accept a reduction or postponement of his claim for principal, or a reduction of his claim for interest or a postponement thereof for more than 1 year. In other words, this provision merely restricts the power of the majority to *change those particular phases of the contract*.

Trust Indentures: Hearings on H.R. 10292 Before the Subcommittee of the House Committee on Interstate & Foreign Commerce, 75th Cong. (1938) ("1938 House Hearings") at 35 (C505).[7] This testimony echoed a Senate Report, which also made clear that TIA§316(b) targeted indenture "provisions" that authorize majority action that would force minority holders to accept changes to core payment terms. 1938 Senate Report at 19 (C465).

The SEC's concerns over *provisions* permitting amendment fits with the legislation's overall scheme. As Douglas had earlier testified, under the TIA, "after an indenture has been qualified, the *enforcement* of the covenants under the indenture will be left to the trustee and the security holders." Regulation of Sale of Securities: Hearings on S. 2344 Before the Subcommittee of the Senate Committee on Banking and Currency, 75th Cong. (1937) ("1937 Senate Hearing") at 47 (C279). And with respect to TIA§316(b)'s non-impairment language, Burke explained the SEC's focus on majority-amendment provisions in particular: "[A]s a matter of fact," he said, a noteholder "*cannot* be deprived of" its right to receive payment "*unless* [the] indenture specifically so provides." 1939 House Hearings at 284-85 (C1064-65).

[7] Douglas refers to Section 7(m); that section was renumbered in subsequent versions, before being enacted as TIA§316(b). *See* Senate Hearings, 76th Cong. (1939) at 19 (C586) (renumbered as part of 314); 1939 House Hearings at 30-31 (C809-10) (renumbered as 316(b)).

As one scholar put it, Burke's testimony reflects the contemporary understanding that the "right" to payment to which the TIA refers is the *contractual right* defined and reflected *in the terms of the indenture*; and that, as a result, "impairment" should be understood to refer to amendment of the terms that give rise to and govern that contractual right. *See* Halbhuber, *supra*, at 34-35. Exactly that understanding is reflected in contemporary commentary, which found it "clear that a provision in an indenture granting to a majority of the bondholders certain powers *other than amendment* may be binding on all the bondholders," including the power to direct trustee enforcement of remedies. Comment, *Postponement of Maturity Dates Under Trust Indentures*, 46 Yale L.J. 1041, 1043 n.16 (1937) (citation omitted).

At the same time, the Congressional testimony and reports refute the Funds' reading of TIA§316(b), which would curtail trustee enforcement powers. Echoing Part VI of the SEC Report, Douglas testified that "the trustee should be able to act vigorously and effectively under broad powers granted in the indentures, without the delay and difficulty of consulting and reconciling the individual opinions of securityholders." 1937 Senate Hearing at 19 (C251); 84 Congressional Record 9510 (C1107) (TIA needed because "trustees too often failed to exercise their proper responsibility" after default). Again, this history is irreconcilable with the notion that TIA§316(b) limited trustee remedies.

(c) SEC Report, Part VIII

Finally, Part VIII of the SEC Report, published in 1940, discusses then-prevalent reorganization practices. It reveals that the SEC well knew that trustees exercised post-default remedies that cut off noteholder's "legal rights"—including by diminishing or even eliminating the right to bring a deficiency claim—but never condemned those remedies for having that effect. Part VIII thus further confirms that the TIA was not intended to limit trustee remedies, or otherwise make absolute noteholders' "legal right" to payment. *See Marblegate*, 846 F.3d at 12-14 (relying on Part VIII).

In a so-called "traditional" foreclosure, majority noteholders would form a "protective committee," which would indemnify and activate the trustee. The trustee, then, would institute foreclosure proceedings, at which collateral pledged by the debtor would be sold free and clear of prior liens. The sole bidder would usually be the committee, which would transfer the foreclosed assets to a new entity, the equity of which would be distributed to participating noteholders. SEC Report, Part VIII at 15 (C1165); *see generally* Paul D. Cravath, *The Reorganization of Corporations*, in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION, AND REGULATION at 153-234 (1917) (C1621-1702).

Within the class of foreclosing creditors, dissenters had the option to take cash generated by the foreclosure sale, rather than new equity. Of course, the cash option could not equal 100 cents on the dollar. If it did, after all, everyone would dissent, and no reorganization would be possible. SEC Report, Part VIII at 19-20, 42 (C1169-70, C1190); *see also* Wilber G. Katz, *Protection of Minority Bondholders in Foreclosures and Receiverships*, 3 U. Chi. L. Rev. 517, 525 (1936) (C1786). Instead, dissenters were entitled only to a *pro rata* share of the amount bid at the foreclosure sale—an amount that would necessarily result in the dissenters (like all others) taking a loss. And while dissenters retained deficiency claims, "unless there were material unencumbered assets of the debtor, the deficiency claim would only provide recourse against an empty shell." Halbhuber, *supra*, at 13.

Unsurprisingly, then, the dissenter's deficiency claim is scarcely mentioned in the SEC's Report, let alone as a meaningful source of protection. Instead, courts developed rules to ensure reasonably high bids at foreclosure sales, and that dissenters had the opportunity to participate in a "fair plan" of reorganization. SEC Report, Part VIII at 37-60 (C1185-1208). This focus on the economic realities of foreclosure shows that the SEC did not illogically consider the formal preservation of a worthless deficiency claim vital to the protection of minorities.

Indeed, several then-extant forms of reorganization even reduced or terminated dissenters' deficiency claims, and yet the SEC did not condemn these practices for doing that. For example, in one widely-discussed case, the foreclosure decree enjoined dissenters from bringing deficiency suits. *See Phipps v. Chicago, R.I.&P. Ry. Co.*, 284 F. 945 (8th Cir. 1922). Notably, the SEC addressed *Phipps* in Part VIII, but did not fault it for enjoining deficiency suits. And *Phipps* was hardly the only case to limit a dissenter's "legal right" to a deficiency judgment. Rather, courts routinely lowered, or even terminated, deficiency rights in connection with "traditional" foreclosures. *See* Katz, *supra*, at 544-548 (C1805-09) (collecting cases). As one scholar recognized, "[t]his will mean...that a dissenting bondholder's [*pro rata*] cash distribution [from the foreclosure sale] and his share of the deficiency may not together equal the amount of the debt due him." *Id.* at 547 (C1808). The SEC was unquestionably aware of precisely this economic reality, having repeatedly cited the foregoing article in its Report. Tellingly, it expressed no concern that, as a result of trustee-initiated, foreclosure-based reorganizations, dissenters' "legal rights" to bring a deficiency suit were being terminated.

Similarly, in an Appendix to Part VIII, the SEC addressed in favorable terms an alternative foreclosure device, the "trustee's purchase," that is materially indistinguishable from strict foreclosure under the UCC. In 1940, "[t]he device [was] by no means new." SEC Report, Part VIII at 356 (C1500). "In this context the trustee [could], having taken title" to the issuer's collateral, "form[] a new entity whose securities are issued to the bondholders in exchange for the defaulted bonds." *Id*.

The SEC noted several "definite advantages" of the trustee's purchase, the "[m]ost important" of which was that "cash payment to dissenters [was] unnecessary," because "[a]ll bondholders would be *limited* to acceptance of such new securities." *Id.* Thus, per its proponents, this device would cut off deficiency rights (and oppressive minority conduct). *Id.* at 361 fn.20 (C1505) (dissenters "could not hope to be bought off as their rights would be merely an equitable interest in [the collateral] at the conclusion of the proceeding"); *see, e.g.*, *Sage v. Central R. Co.*, 99 U.S. 334, 340 (1878) (trustee's purchase "prevent[ed] any minority...from demanding...a preference"). Far from condemning the trustee's purchase, the SEC opined that this potentially advantageous alternative may have been "overlooked." SEC Report, Part VIII at 361 (C1505).[8]

Given the historical practice reflected in Part VIII, the Funds are wrong in asserting that the "traditional" foreclosure inevitably preserved the deficiency claim, and that therefore the strict foreclosure here "bore none of the hallmarks of a

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[8] The SEC also briefly addressed "strict foreclosure," noting that it had been proposed as a "more expeditious and cheaper method[] of accomplishing a foreclosure," but that "[t]he implications of this suggestion as to bondholder reorganizations have never been fully explored." *Id.* at 13 fn.20 (C1163). Notably, the "strict foreclosure" then prevailing in just a few states was dissimilar from the strict foreclosure presently authorized under the UCC, as it had the effect of cutting off a borrower's "equity of redemption" without also cutting off the creditor's deficiency claim. *See* Garrard Glenn, *A Study on Strict Foreclosure*, 29 Va. L. Rev. 519, 538-41, 553-55 (1943). As noted, strict foreclosure under the UCC closely resembles the trustee's purchase.

traditional foreclosure." Funds Br. 44; *see also id.* at 27. To the contrary, the Trustee's exercise of that remedy is materially indistinguishable from several practices that that SEC, in its comprehensive review, either expressly approved, did not condemn, or criticized only on grounds having nothing to do with the elimination of dissenters' "legal rights."

C. <u>*Marblegate* further confirms that Section 6.07 protects only against impairment caused by majority amendment.</u>

The Second Circuit's *Marblegate* decision reviewed much of the same legislative history and "conclude[d]" that TIA§316(b) "prohibits *only* non-consensual amendments to an indenture's core payment terms." 846 F.3d at 3. *Marblegate* is compelling persuasive authority that Section 6.07's substantively identical language should be given the same construction.

1. *The Second Circuit held that only impairment by majority amendment is prohibited.*

The Foreclosure Remedy here is closely analogous to the restructuring transaction in *Marblegate*. Like CUI, the issuer in *Marblegate* was financially troubled, and the vast majority of its senior noteholders exercised remedies to collect on their debts by way of foreclosure. *Id.* at 4. Like the Funds, the *Marblegate* plaintiffs were "the sole holdout[s]" and held a similarly small amount of the issuer's notes. *Id.* at 4-5. Most critically, as here, no term of the indenture in *Marblegate* was amended by the challenged restructuring transactions. *Id.* at 5.

On these facts, the Second Circuit ruled that the transactions did not violate TIA§316(b). That ruling, in turn, followed from the court's "conclu[sion]" that §316(b) "prohibits *only* non-consensual amendments to an indenture's core payment terms," 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 not intend to go further by banning other well-known forms of reorganization like foreclosures." *Id.* at 13-14. Because the restructuring transaction there did not amend the indenture's core payment terms, it did not violate §316(b). And because this case likewise involves no amendment of core payment terms, *Marblegate* provides persuasive support for concluding that the Foreclosure Remedy did not violate Section 6.07.

The Funds argue that the Second Circuit did not decide the question here because the *Marblegate* transaction affected only the "practical ability" to receive payment, so the court did not need to address whether a protected "legal right" could be "impaired" absent amendment. Funds Br. 28-30. But the court's opinion makes clear that it reached its "conclu[sion]" based upon its detailed review of the same legislative history set forth above. That history confirms that the SEC and Congress intended to prohibit, or render ineffective, indenture provisions permitting majorities to amend core payment terms. Given the Second Circuit's *ratio decidendi*, this Court should not second-guess the court's own statement of its holding, *i.e.*, that TIA§316(b) is "[l]imit[ed]...to formal indenture amendments to core payment rights." 846 F.3d at 16. Indeed, the court used the word "amendment" or equivalent language at least a dozen times.[9] The supposition that the Second Circuit did not know what its holding was about in stating and restating that holding is untenable. So, too, is the Funds' claim that this Court would "create a needless conflict between New York and federal law" (Br. 5) by holding—*in haec verba* with the Second Circuit—that Section 6.07 "prohibits only non-consensual amendments to an indenture's core payment terms."

The Funds nevertheless dismiss the Second Circuit's holding as "obiter dictum." Funds Br. 36-37. The reason, they say, is that the "collective action clauses" targeted by the TIA did not work their forbidden "impairments" exclusively by way of amendments. Funds Br. 37. Thus, the Funds conclude, the

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[9] *See id.* at 3 (defendant "argues that it complied with [TIA§316(b)] because the transactions did not formally amend the payment terms...We agree[.]"); *id.* (§316(b) "prohibits only non-consensual amendments to an indenture's core payment terms"); *id.* at 5 (defendant argued "that 'the right...to receive payment' is necessarily defined by the payment terms in the Indenture itself, such that [§316(b)] prohibits only non-consensual amendments"); *id.* at 6 (identifying the "core disagreement in [that] case" to be "whether the phrase 'right...to receive payment' forecloses more than formal amendments"); *id.* at 7 (right to receive payment, "it seems to us, prohibits non-consensual amendments of core payment terms"); *id.* at 9 (legislative history "exclusively addressed <u>formal</u> amendments and indenture provisions like collective-action and no-action clauses") (emphasis in original); *id.* at 10 (SEC Report "supports reading [§316(b)] to prohibit amendments"); *id.* (Douglas' testimony "narrowly addressed collective-action clauses and formal amendments"); *id.* at 11 ("we understand Chairman Douglas' use of the term 'debt readjustment plan' to refer narrowly and specifically to formal changes to the contractual terms governing the debt"); *id.* at 12 (Burke "made it clear that [TIA§316(b)] prohibited only formal changes to an indenture's core payment terms"); *id.* at 13-14 (court was "convince[d]" that "Congress sought to prohibit formal modifications to indentures"); *id.* at 16 ("Limiting [TIA§316(b)] to formal indenture amendments to core payment rights will not leave dissenting bondholders at the mercy of bondholder majorities.").

TIA's non-impairment language must prohibit more than "formal amendments." But this argument's premise is false: As shown, the "collective action" or "majority action" clauses targeted in the TIA, and long before it by negotiability restrictions, operated by permitting majority *amendments*. *See* pp. 26-40, *supra*. The Second Circuit came to the same understanding, defining the TIA-targeted "collective action clauses" as "indenture provisions that authorize a majority of bondholders to approve *changes* to payment terms." 846 F.3d at 7.[10]

There is thus no support for the argument that the Second Circuit mistook the legislative history, and failed to recognize that the TIA's drafters would have considered majority-directed trustee remedies to be among the targeted "collective action clauses." Funds Br. 37-38. To the contrary, the SEC sought to *encourage* the more vigorous exercise of remedies by trustees. *See* pp. 30-35, *supra*.

2. *Impairment caused by majority amendment is materially different from "impairment" by other means.*

Even so, the Funds argue that this Court must reject *Marblegate*'s narrow interpretation of Section 6.07's substantively identical language to avoid the purportedly "absurd outcome" that "a majority of noteholders would be free to terminate a minority's right to payment," so long as it did so other than by amendment. Funds Br. 40. But the distinction between impairment-by-majority-

[10] To the limited extent the legislative history discloses concern with majority-directed trustee "waivers," those concerns are addressed by TIA § 316(a), which specifically limits such waivers. This case, of course, no more involves a waiver than it does an amendment.

amendment, on the one hand, and "impairment" by other means—here, the Trustee's exercise of expressly-conferred remedial powers—is substantive.

Critically, following an event of default—the *only* time trustees can exercise remedies—"the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary." *Beck v. Manufacturers Hanover Tr. Co.*, 218 A.D.2d 1, 12 (1st Dep't 1995). The trustee "takes on a special duty to...act with *undivided loyalty* to trust beneficiaries.'" *FMS Bonds, Inc. v. Bank of New York Mellon*, 2016 WL 4059155, at *14 (S.D.N.Y. July 28, 2016). A trustee that favors some holders over others risks breaching that duty and incurring liability. *See, e.g.*, *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 103 (S.D.N.Y. 2016); *see also Cruden v. Bank of New York*, 957 F.2d 961, 968 (2d Cir. 1992) ("bad faith" suit against trustee not barred by no-action clause). This exposure persists even if the trustee acts under majority direction, *see, e.g.*, *Howe v. Bank of New York Mellon*, 783 F. Supp. 2d 466, 484 (S.D.N.Y. 2011), which explains why the model New York-law indenture empowers trustees to disobey directions that "may be unduly prejudicial to the rights of another holder," ABA, *Revised Model Simplified Indenture*, 55 Bus. Law. at 1137 (section 6.05); *see also* A233 (same provision here).

On the other hand, courts generally have not recognized any fiduciary-like duty running from majority noteholders to minority noteholders, reasoning that noteholders, unlike shareholders, are limited to their contractual rights. *Cf. Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1524-25 (S.D.N.Y. 1989) (New York law). Indeed, the ability of the indenture trustee to protect minority bondholders was an important impetus for the TIA. Thus, in Part VI of its Report, the SEC distinguished between troubling reorganizations imposed by a majority, and salutary reorganizations in which the indenture trustee took an active role on behalf of all holders. SEC Report, Part VI at 63 (C69). And the SEC recommended imposing post-default fiduciary duties on trustees so they would play this protective role. *Id.* at 70 (C76). That is just what Congress did. *See* TIA § 315(c), 15 U.S.C. 77ooo(c).

The exercise of trustee remedies is also substantively different from majority amendment because the former is subject to judicial review, including in a suit for breach of duty. *See* Point II.D.2, *infra* (discussing various means to obtain judicial review). Since trustee remedial powers activate only upon default—at a time when exogenous factors have impaired the issuer's ability to pay and judicial intervention becomes more likely—they are subject to greater scrutiny than majority amendments, which can occur regardless of an event of default. Indeed, the power of majorities to amend payment terms is dangerous precisely *because* it can be exercised in anticipation of, and to prevent, a default that would otherwise *provide* an avenue into court. Thus, while the Funds repeatedly conflate the

Trustee with the majority, the two are distinct, and operate under different constraints.

Finally, the Funds argue that limiting Section 6.07 to majority amendments would make that section superfluous, since Article 9 of the Indenture already addresses (and limits) majority-amendment powers. Funds Br. 24-25. But Section 9.02 prohibits only specifically enumerated amendments, while Section 6.07 speaks in general terms, and thus sweeps more broadly. *See also* Bratton & Levitin, *supra*, at 1659 (referring to presence of "unanimous action clause" governing amendments, and separate non-impairment clauses, as a "belt-and-suspenders drafting approach"). Moreover, Section 6.07 limits the effect of "no-action" clauses—like the one found in neighboring Section 6.06—while Article 9 does not. No provision is surplusage under Respondents' interpretation.

3. *There is no support in* Marblegate *for a distinction between a "practical ability" and "legal right" to be paid.*

Marblegate provides no support for a distinction between a permissible impairment of a noteholder's "practical ability" to receive payment, on the one hand, and an impermissible impairment of its "legal right" to do so, on the other. *Contra* Funds Br. 45.

As a preliminary matter, the Second Circuit found no "impairment" in *Marblegate*, so it could not have held that a distinction between "practical" as opposed to "legal" impairment is dispositive.[11] Indeed, the court's observation that the plaintiff "retain[ed] its legal right to obtain payment by suing the [defendant] issuer, among others," was not made in the section of its opinion interpreting TIA§316(b) at all, but served merely to refute the criticism that its interpretation—limiting the language to impairment-by-amendment "only"—would "leave dissenting bondholders at the mercy of bondholder majorities." 846 F.3d at 16. This discussion thus provides no support for the Funds' interpretation of Section 6.07's substantively identical language.

Moreover, the Funds' distinction does not withstand scrutiny. As already shown, the power of indenture trustees to affect the "legal rights" of noteholders is well established in the law, and was when the TIA was enacted. *See* pp. 20-24, 36-40, *supra*. Consistent with the peaceful coexistence for more than a century of those remedies and non-impairment clauses like Section 6.07, neither courts, commentators nor Congress have even hinted that trustee remedies that do not preserve noteholders' "legal right" to pursue deficiency judgments are forbidden. Rather, "[t]hat the Model Debenture Indenture contains analogues of each such provision strongly suggests that the Indenture provisions [the Funds] cast[] in

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[11] The same is true of the other cases the Funds cite for their proffered distinction. *See In re Nw. Corp.*, 313 B.R. 595 (Bankr. D. Del. 2004) (no violation of non-impairment language); *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas*, 2010 WL 2680336 (D. Kan. July 1, 2010) (same); *Cummings v. Chesapeake Energy Corp.*, 2017 WL 3836112, at *4-5 (W.D. Okla. Feb. 8, 2017) (same).

irreconcilable conflict are susceptible of a resolution rendering each compatible with the TIA," and with each other. *Upic*, 793 F. Supp. at 457.

And while the Funds accuse Respondents of promoting "form over substance" (Br. 41-42), the proposed distinction at the heart of their position is completely untethered to economic reality. The Funds concede that trustees may lawfully carry out foreclosure-based reorganizations that leave the issuer an empty shell, rendering worthless a dissenter's "legal right" to pursue a deficiency judgment against a "now-penniless issuer." Funds Br. 26. But, the Funds say, trustees cannot compromise a noteholder's deficiency claim—*i.e.*, its "legal right"—through the exercise of a remedy that actually *delivers value* to the noteholder. Thus, the Funds find it important—indeed, *dispositive*—that in *Marblegate* the noteholder "*technically* would continue to have a legal right to demand principal and interest," even though "as a *practical* matter [the issuer] would have no ability to make any payments." Funds Br. 29-30. This is folly. A starker and more candid elevation of "form over substance" is difficult to conceive.

The Funds' proposed distinction is also at odds with the TIA's legislative history. The TIA's drafters and advocates surely did not imbue a worthless "legal right" with controlling importance. Quite the contrary. For example, America's preeminent legal realist, Jerome Frank, worked with Douglas at the SEC while its Report was compiled, and succeeded him as SEC Chairman. Frank decried the "utter practical uselessness and meaninglessness of a judicial sale" in large corporate reorganizations, recognizing that, while preserving the deficiency claim, "the sale does the non-assenting creditor no practical good." Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va. L. Rev. 541, 562-63 (1933) (C1769-70); *see also* James N. Rosenberg, *Reorganization—The Next Step*, 22 Colum. L. Rev. 14, 17 (1922) (C1706) (deriding the "empty relief of a worthless judgment against the old company"). Just as certainly, Frank was very much in touch with the jurisprudential zeitgeist shared by the New Deal reformers who conceived of and passed the TIA; indeed, the SEC Report cited his article for the proposition that judicial sales, as then practiced, were a farce. Part VIII at 39 fn. 120 (C1187); *see also* Bratton & Leviton, *supra*, at 1617 (Frank "supervised" SEC Report with Douglas).

The notion that these reformers made non-impairment clauses mandatory to enshrine as sacrosanct a dissenter's "meaningless," "useless," or "worthless" ability to pursue a deficiency is balderdash. *See People v. Easton,* 307 N.Y. 336, 338 (1954) (law does not "enthrone technicality purely for its own sake").

D. <u>Reading Section 6.07 to limit a trustee's exercise of remedies would lead to absurd, unfair and inefficient results.</u>

The Funds' interpretation not only lacks support in precedent, history and the *Marblegate* decision. It also would lead to unfair, inefficient and commercially unreasonable results.

1. *The Funds' reading imposes unjustified costs on noteholders, companies, shareholders and the economy.*

Properly construed, Section 6.07 provides noteholders with a carefully limited veto over restructurings carried out by amendment to the indenture's terms. The Funds' interpretation would expand that veto to preclude value-maximizing restructurings brought about by a trustee's good-faith exercise of its express contractual powers. Adopting the Funds' reading would thus incentivize opportunistic and exploitative conduct by holdouts and force distressed issuers into bankruptcy, to the detriment of all—the minority, the majority, the issuer, its shareholders, and the economy at large.

Bankruptcy is expensive. As one scholar has explained, in addition to lawyer and advisor fees:

> The fundamental operational decline reduces sales and profits, but the financial stress of bankruptcy deepens these losses. Consumers hesitate to buy from a shaky company that may not survive to service its warranties and provide spare parts. Skilled managers depart. Those that stay have their attention diverted from operations to guiding the firm through bankruptcy.

Roe, *supra*, at 235. And while "[f]inancial distress short of bankruptcy also will produce most of these costs until the stress is eliminated," an out-of-court workout "can take three months, while a bankruptcy reorganization typically takes two or three years." *Id.* at 235-36.

The costs of failed workouts are not borne solely by noteholders. Rather, "[e]conomic resources can be misallocated. If attempts at workouts are unsuccessful, capital may not be made available for worthwhile projects, including the salvaging of ongoing projects, and rapid consolidation in a declining industry may be prevented." *Id.* at 243. Recognizing these costs, even Bankruptcy Courts have ceded turf, acknowledging 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). Given this policy, courts "will not attribute to Congress an intent to place a stumbling block in front of" parties seeking workouts, "in the absence of unambiguous statutory guidance." *In re Chateaugay Corp.*, 961 F.2d 378, 383 (2d Cir. 1992).

But the Funds' interpretation of Section 6.07 would needlessly condemn noteholder majorities either to propitiate holdouts with premium payments or to initiate a value-destroying bankruptcy. Remarkably, the Funds would force this choice even where, as here, it is undisputed that the Foreclosure Remedy (or an out-of-court workout) would be value-maximizing, and deliver more value to *all* noteholders, including the Funds, than bankruptcy would. "Such a result is manifestly unreasonable from both a practical and theoretical point of view." *Aron v. Gillman*, 309 N.Y. 157, 163 (1955). And the "rules of construction of contracts require, whenever possible, that an agreement should be given a 'fair and reasonable interpretation.'" *Farrell Lines, Inc. v. City of New York*, 30 N.Y.2d 76, 83 (1972). Respondents' interpretation, the generally prevailing one, is the only "fair and reasonable" one.

The Funds conjure up, and then take issue with, a "suggestion that bankruptcy is to be avoided at all costs." Funds Br. 45-46. Respondents make no such suggestion. Rather, Respondents' interpretation would allow the parties to choose the most efficient solution, which may well be bankruptcy in some cases; the Funds, on the other hand, would force bankruptcy on noteholders despite value-maximizing alternative remedies available by law.

The Funds also argue, with 20/20 hindsight, that, *in this case,* because CUI was eventually liquidated, its noteholders might have done better in a bankruptcy. This suggestion is rich in irony. After all, the Funds never analyzed whether bankruptcy would have provided for a better recovery and instead accepted their share of the foreclosed CUI equity, treating it as a free option—either the stock goes up (heads-they-win), or it goes down, and they sue on the Notes (tails-everyone-else-loses). In any event, the happenstance that CUI did poorly after the Foreclosure Remedy provides no justification at all for imposing an unreasonable construction on Section 6.07 that will govern future cases.

In addition to imposing wasteful bankruptcies, the Funds' interpretation would create inefficiency by introducing uncertainty into capital markets. By subjecting some, but not all, trustee remedies to Section 6.07's prohibition, the Funds would call on courts to decide, in each case, whether or not the particular exercise of a remedy "impaired" a legal right. No precedent teaches courts how to draw this novel distinction, and the Funds supply no limiting principle. Moreover, fact-dependent interpretation of indenture terms is disfavored, because "uniformity in interpretation is important to the efficiency of capital markets." *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982).

The Funds' position leads not just to inefficiency, but to rank unfairness. The money the Funds insist they are owed would come not from CUI's operations, but from the pockets of their fellow noteholders. *See* John C. Coffee & William A. Klein, *Bondholder Coercion*, 58 U. Chi. L. Rev. 1207, 1211-14, 1223-24, 1233 (1991) (noting inefficient and unfair "soaking up" of restructuring benefits by holdouts, which amounts to a "wealth transfer from the other bondholders"). The Funds' reliance on Section 6.07—a provision intended to protect minorities from being unfairly disadvantaged by majorities—is thus a wolf in sheep's clothing: The Funds are not aggrieved by a remedy that unfairly disfavored them; they want to be unfairly favored over their fellow holders. Their position conflicts not just with equity, but with the Indenture itself, which says that a noteholder "may not use this Indenture to prejudice the rights of another [noteholder] or to obtain a preference or priority over such other [noteholder]." Indenture § 6.06 (A233). That is what the Funds want this Court to countenance.

2. *Interpreting Section 6.07 consistent with its history does not deprive dissenting holders of judicial review.*

Finally, interpreting Section 6.07 to prohibit only non-consensual amendments to an indenture's core payment terms, and not to enfeeble trustee remedies, does not leave dissenters "at the mercy of bondholder majorities." *Contra* Funds Br. 41. As already explained, if they had a factual basis for doing so—and they did not—the Funds could have obtained judicial scrutiny of the Foreclosure Remedy by suing the Trustee for breach of its duties under the Indenture. *See* pp. 43-46, *supra*. Or the Funds could have forced CUI into bankruptcy, another remedy they neglected.

The Funds also could have brought a claim under the UCC on the grounds that its strict foreclosure provisions had not been adhered to, or that the remedy was exercised in bad faith. As the Official Comments explain, "[UCC] 1-203 imposes an obligation of good faith on a secured party's enforcement under this Article," and thus "a proposal and acceptance made under this section in bad faith would not be effective." UCC 9-260 cmt. 11. Or the Funds could have brought a fraudulent conveyance claim, because although the Foreclosure Remedy extinguished the debt owed to them, "the [fraudulent transfer] claim, if meritorious, would result in the [Foreclosure Remedy] being deemed unenforceable." *Stillwater Liqudating LLC v Partner ReIns. Co., Ltd.*, 2017 WL 318658, at *8 (N.Y. Sup. Ct.), *aff'd*, 151 A.D.3d 585, 586 (1st Dep't 2017).

The Funds' failure to pursue any of the claims available to them presents no mystery: they would have been required to prove that the Foreclosure Remedy was unreasonable, unfair or fraudulent as to them. But, of course, the Funds all but concede they cannot make such a showing.[12]

III. EVEN IF SECTION 6.07 ITSELF COULD BE READ TO LIMIT REMEDIES, IT DOES NOT IN THE CONTEXT OF THE PARTIES' AGREEMENTS

Section 6.07 can and should be read in harmony with the Trustee's broad enforcement powers under the Indenture, including those provided under Section 6.03. But even if there were a conflict between these provisions, the parties' agreement must be viewed as a whole. When it is, the "collective design" of the agreement reflects the intent that the Trustee be empowered to effectuate the Foreclosure Remedy.

A. As in *Beal*, the "collective design" of the parties' agreement reflects their intent to permit the challenged remedy.

Section 6.07 provides that "[n]otwithstanding any other provision *of this Indenture*," the right to payment shall not be impaired. A233-34. But the Trustee's post-default remedies are not conferred solely by "th[e] Indenture," but

[12] The Funds question distributions and loans made *after* the strict foreclosure (Br. 17), but never claim that the remedy itself was anything but evenhanded (or challenge those post-foreclosure transactions).

also by the distinct Security and Collateral Trust Agreements. *See* Point I, *supra*. Thus, even if Section 6.07 conflicted with, and trumped, Section 6.03 of the Indenture, it does not follow that it would override the express grant of remedies in the separately defined "Indenture Documents."

This Court's decision in *Beal* is analogous. 8 N.Y.3d at 318. There, a syndicate of lenders loaned money under several contemporaneous agreements, including a "Credit Agreement" and a "Keep-Well Agreement." *Id.* at 321. The Credit Agreement provided that an "Administrative Agent," acting on behalf of all lenders, had the power to exercise remedies in the event of a default, including the power to accelerate or sue. The Keep-Well, meanwhile, provided that following an event of default and acceleration, certain "Sponsors" and guarantors of the borrower would be required to pay an "Accelerated Payment Amount." The Keep-Well also provided that it would be "enforceable by the Administrative Agent *and each Lender*"; that "the obligations of the Sponsors under [the Keep-Well] shall be *absolute and unconditional*"; and that the Sponsors would not be released from their obligations because of "[a]ny *waiver*..., modification, *forbearance*, delay or other act or omission of the Administrative Agent or the Lenders[.]" *Id.* at 330.

The borrower fell into financial distress. Thirty-six of the 37 lenders, holding 95.5% of the debt, and the Administrative Agent, entered a settlement agreement with the Sponsors. Under that agreement, the participating lenders and

Administrative Agent agreed to forbear from exercising remedies, including demanding the Accelerated Payment Amount under the Keep-Well. *Id*. at 323.

The plaintiff, assignee of the 37th lender, sued one of the Sponsors seeking to recover for breach of the payment obligations under the Keep-Well. The plaintiff argued that it could not be deprived of its "absolute and unconditional" rights under the Keep-Well without its consent, and thus the Administrative Agent's settlement agreement did not bind it.

This Court disagreed. It recognized 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," but found no breach of contract, because "the Settlement did not release the [Sponsor defendant] of its obligations *by amending, modifying or waiving any provision in the agreements*." *Id.* at 330. Rather, "the issue concerns a default and, under the Credit Agreement, even if the Settlement has a 'similar effect' to a [forbidden] release, the supermajority of Lenders exercised their rights by restructuring the debt of a financially troubled Borrower." *Id.* "Thus," this Court explained, "the provisions concerning amendment, modification and waiver of the agreements do not preclude the Administrative Agent and 95.5% of the Lenders from attempting to recover on as much of the [Sponsor defendant's] obligations as they could," and the plaintiff was bound by the Administrative Agent's settlement. *Id.* at 330-31.

Beal stands for the proposition that an indenture trustee—"a type of agent on behalf of the [securityholder-lenders] collectively," *Cortlandt*, 31 N.Y.3d at 39—can exercise expressly-granted remedial powers to compromise claims of individual lenders, despite the presence of a "non-impairment" provision in a related agreement. *See In re Delta Air Lines, Inc.*, 370 B.R. 537, 549 (Bankr. S.D.N.Y.) (citing *Beal* for this proposition), *aff'd*, 374 B.R. 516 (S.D.N.Y. 2007), *aff'd*, 309 Fed. App'x 455 (2d Cir. 2009).

That proposition governs here. As in *Beal*, a small holdout faction purports to be dissatisfied with the compromise of its members' claims brought about by the Trustee's exercise of its powers under the Security and Collateral Trust Agreements, and seeks to negate the exercise of those powers by pointing to a unanimous-consent clause from another document, Section 6.07 of the Indenture. Here, as in *Beal*, this Court should reject the holdouts' effort to read the unanimous-consent clause to conflict with the sweeping grant of Trustee remedial powers, and instead give Section 6.07 an interpretation consistent with the "collective design" of the Indenture Documents.

The Funds' efforts to distinguish *Beal* fall flat. *First*, they claim the agreement in *Beal* "lack[ed] a non-impairment provision akin to Section 6.07." Funds Br. 52-53. The Funds get their facts wrong. The Keep-Well provided that each lender's rights under it were "*absolute and unconditional* under *any and all* *circumstances*"—language *stronger* than Section 6.07 here—and that the Sponsors "shall not be released from their obligations" because of, inter alia, "[a]ny waiver..., modification, *forbearance*, delay *or other act or omission of the Administrative Agent* or the Lenders." 8 N.Y.3d at 329-30. And yet, the Court held that the plaintiff was bound by the terms of the Administrative Agent's compromise, which included its agreement to "forbear from enforcing any obligation that the [defendant] had under the Keep-Well." *Id.* at 323. Thus, the Funds' distinction is illusory.

Second, the Funds maintain that it was unclear in *Beal* whether a lender had a contractual right to sue, making the Court's search for the "collective design" of the agreements appropriate. Funds Br. 53-54. The Funds get the facts wrong again. The Keep-Well provided specifically that its provisions "shall be...enforceable by the Administrative Agent *and each Lender*." 8 N.Y.3d at 323. Nevertheless, the Court construed this provision, like the unanimous-consent provision, narrowly, because "[a]n interpretation favoring [plaintiff's] view would render [the express grant of remedial powers] meaningless." *Id.* at 328. Thus, notwithstanding that "the Settlement ha[d] a 'similar effect' to a release"—effectively terminating both the plaintiff's right to payment and its right to enforce the Keep-Well—it was within the Administrative Agent's power to bring about that "similar effect." Consistent with *Beal*, this Court should avoid an interpretation of Section of 6.07 that would bring it into conflict, not only with "other provision[s] of *th[e] Indenture*," but with the Security and Collateral Trust Agreements as well.

B. The Funds' reliance on Section 6.07's "notwithstanding" clause is misplaced.

The Funds urge that the Trustee's powers under the Security and Collateral Trust Agreements cannot be given any greater effect than its powers under the Indenture, pointing out that Section 6.07 applies "notwithstanding any other term of this Indenture." Funds Br. 47-48. This argument is a non-sequitur, because the Security and Collateral Trust Agreements are distinct from "th[e] Indenture." As already noted, each agreement is defined separately and they also are defined collectively as the "Indenture Documents." *See* p. 10, *supra*. If Section 6.07's "notwithstanding" clause has the effect the Funds claim, then it would read "notwithstanding any other provision of the *Indenture Documents*." That is not what it says. Thus, the Funds' argument requires nullification of distinctly defined terms, contrary to the rule that "[t]he use of different terms in the same agreement...implies that they are to be afforded different meanings." *Platek v. Town of Hamburg*, 24 N.Y.3d 688, 696 (2015). This Court applied that rule to reject an interpretation that gave the same meaning to distinct indenture terms, because "[t]he indenture itself define[d]" the terms "separately, recognizing them as distinct." *Quadrant Structured Prod. Co. v. Vertin*, 23 N.Y.3d 549, 567 (2014).

Attempting to escape, the Funds point to Section 11.1(a) of the Security Agreement (A397), which says that "[t]he actions of the Collateral Trustee hereunder are subject to the provisions of the Indenture and the Collateral Trust Agreement." They argue that this language subordinates the exercise of remedies under the Security Agreement to Section 6.07 of the Indenture. Funds Br. 48-49. This argument also fails.

First, as the Funds' own cases show, a "notwithstanding" clause will only overcome another clause with which it conflicts. *See* Funds Br. 23, 47 (citing *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 158-59 (2015) (holding that the "notwithstanding" clause did not "trump" or "supersede" another provision with which it did not conflict)). As shown, Section 6.07, properly interpreted, does not conflict with the remedial provisions under the Indenture Documents. *See* Point II, *supra*.

Second, the argument is another non-sequitur. Assuming *arguendo* that the Security Agreement is generally "subject to" the Indenture, as the Funds claim, it would not follow that its provisions thereby become "provisions of th[e] Indenture," and thus within Section 6.07's "notwithstanding" override.

Third, even if the "subject to" language of Section 11.1(a) somehow makes the Security Agreement's remedial provisions tantamount to "other provisions of th[e] Indenture," the same is not true of the provisions of the Collateral Trust

Agreement. That Agreement, too, specifically authorized the Trustee to "enforce the rights and remedies of a secured party...with respect to the Collateral." A331-32. Of course, Article 9 of the UCC provides "rights and remedies of a secured party" with respect to collateral, including the remedy of strict foreclosure. *See* UCC 9-620. The Funds offer no argument that the remedies under that Collateral Trust Agreement are likewise "subject to" the Indenture.[13]

Finally, the Funds' interpretation would make the general prohibition of Section 6.07 defeat the specific remedial provisions of the Security and Collateral Trust Agreements, contrary to the canon that "the specific provision controls" over the general. *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956). Although a "notwithstanding" clause could conceivably overcome this presumption, there can be no doubt that if the Indenture provided in terms that "Section 6.07 shall not apply to remedies exercised under the Security and Collateral Trust Agreements," this Court would give effect to that expressed intent. The choice to make Section 6.07 apply "notwithstanding" other provisions of "this *Indenture*"—but *not* the provisions of "the Indenture Documents"—bespeaks the same intent. *See* William C. Bratton Jr., *Interpretation of Debt Contracts*, 5 Cardozo L. Rev. 371, 379 (1984) (in indentures, "separately negotiated terms outweigh standardized terms").

[13] The unambiguous conferral of authority on the Trustee to undertake the remedy here distinguishes this case from *Hollister v. Stewart*, 111 N.Y. 644, 654-55 (1889) (indenture did not permit trustees to enter the challenged transactions).

The Funds' effort to make Section 6.07 the master, not just of the Indenture, but of all the Indenture Documents, thus disregards this Court's admonition that "[e]xtrapolation of the particularized intent may not usually be by merely culling distinct provisions out of an entire agreement," and that "the sounder approach is to consider the entirety of the agreement in the context of the parties' relationship and circumstances." *Matter of Riconda*, 90 N.Y.2d 733, 738 (1997).

IV. EVEN IF THE FORECLOSURE REMEDY VIOLATED THE PARTIES' AGREEMENT, CLAIMS AGAINST CUI HOLDINGS, LLC MUST BE DISMISSED, AND A TRIAL MUST BE HELD ON DAMAGES

Even if, despite the foregoing, the Court were to conclude that the Funds' claims are not barred by Foreclosure Remedy, two points remain.

First, claims against Respondent CUI Holdings, LLC ("Holdings") must be dismissed because it was released. Holdings moved below on the independent basis that Section 10.02 of the Indenture released it. That provision says that "a Guarantor will be automatically and unconditionally released from its obligations" in certain specified circumstances, including sale or disposition of substantially all its assets. A253-54. That is precisely what happened here: As already noted, Holdings' sole asset was its ownership of 100% of CUI's stock, which has now been foreclosed upon and distributed to the former noteholders. Consequently, it obtained an "automatic" and "unconditional" release. The courts below did not reach this argument in light of their holdings that the Funds' claims be dismissed in their entirety. If this Court disagrees and remands for further proceedings, it should do so with the direction that all claims against Holdings be dismissed.

Second, a damages trial would be required to determine the offset value of the CUI stock the Funds accepted and retained. The Funds could not possibly prove by undisputed evidence—as they must on summary judgment—that the stock was worthless at the time they took it. To the contrary, the only evidence in the record indicates that the stock was worth approximately $3.5 million. A1794, A1800. Thus, in no event are the Funds entitled to summary judgment.

CONCLUSION

The Funds want to pick the pockets of their fellow noteholders. If that were sanctioned, the ramifications would extend far beyond this case. Long-accepted trustee powers would be cast into doubt. *Marblegate*'s widely-welcomed clarification that standard non-impairment language "prohibits *only* non-consensual amendments," would be muddled, pitting two preeminent commercial courts in conflict. And all this to pay off opportunistic holdouts, through an interpretation of non-impairment language that would serve none of the goals that language was designed to vindicate.

This Court should avoid these unfair and unreasonable results by embracing the interpretation of Section 6.07's language that has prevailed all but unanimously for decades. This Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with Court of Appeals Rule 500.13(c).

2. Respondents' brief was prepared in the processing system Microsoft Word 2010, with Times New Roman typeface, 14-point font.

3. The text of the body brief, omitting the cover page, tables, and the questions presented, has a word count of 13,999, as calculated by the processing system, and is 65 pages in length.