SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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

Plaintiffs,

- v -

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

Defendants.

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INDEX NO. 650140/2012

MOTION DATE 5/26/2017

MOTION SEQ. NO. 007

DECISION AND ORDER

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

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

Upon the foregoing documents, it is

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

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

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

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

Background

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

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

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

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

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

Also, Indenture § 6.07 provided:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED that the Clerk is directed to enter judgment accordingly.

1/11/2018
DATE

SALIANN SCARPULLA, J.S.C.

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