UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CUMULUS MEDIA HOLDINGS INC.
and CUMULUS MEDIA INC.,

Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A., *et al*,

Defendants.

----------x

New York, N.Y.

16 Civ. 9591 (KPF)

February 24, 2017
10:00 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

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MICHAEL A. LYNN

(Case called)

THE COURT: I understand we have working technology so we can begin.

THE DEPUTY CLERK: Counsel, please identify yourselves for the record, beginning with plaintiffs.

MR. MOLO: Good morning, Judge. Steven Molo, Justin Weiner and Lisa Bohl here on behalf of the plaintiffs. We also have our technology man here as well --

THE COURT: Yes.

MR. MOLO: -- who is hard at work, sitting at the end of the table.

THE COURT: Apparently in this courtroom one needs to be. Thank you very much.

And at the back table?

MR. TURNER: Good morning, your Honor. Alan Turner from Simpson, Thacher & Bartlett representing JP Morgan Chase & Co., here with my partner Mr. Rice and my colleague Mr. O'Connor.

THE COURT: Good morning.

MS. PRIMOFF: Good morning, your Honor. Your Honor, I'm Madlyn Primoff on behalf of the term loan parties, of Arnold & Porter Kaye Scholer. I am here with my partner Mike Messersmith and my colleague Michael Lynn.

THE COURT: And good morning to you as well.

Let me begin with perhaps the one easy thing of this

morning and that is to thank all of you for the written materials that I have received. As I have mentioned in a different context earlier in the week, I get some pretty awful written submissions and I am so gratified to get good ones and these were obviously and uniformly excellent. So, I thank those of you who are sitting right here in the first two tables and I thank the many associates and partners with whom you are working who I am sure did a lot of work to make these as beautiful as they are.

I have some questions. They are not indicative of anything other than that I have some questions so, please, don't read into them too deeply and my contemplation is I will hear from both sides -- three sides -- and I will take a break and if at all possible, I will give you an oral decision this morning because I know that there are some time sensitivities. I also should just mention that I thank you for agreeing to this adjournment. I had a civil asset forfeiture trial of nine days duration that I wasn't expecting to have, much less be it nine days duration, so thank you for your patience.

Mr. Molo, I think we begin with you, sir, correct?

MR. MOLO: I think so. I am happy to begin.

THE COURT: Thank you. I am here and I am looking at the screen so what would you like me to know and then I will ask you some questions.

MR. MOLO: Certainly, Judge.

And thank you, by the way, for both setting the expedited schedule that you set and for keeping it because even though we slipped by a few days, it still may be a record for any case in this court house or anywhere else in America that you can get something teed up this quickly.

I want to talk about the issues in the briefs. I'm not going to repeat what is in there but there are things I think need to be distilled down to some fundamentals, Judge.

We come before the Court today to ask that specific terms of a contract that was heavily negotiated by specific parties, be enforced. We seek the benefit of our bargain. Now, the contract at issue here is the parties' Credit Agreement -- capital C, capital A. That credit agreement provides Cumulus several ways to borrow money. There are term loans which are now out at about $1.8 billion. There is the revolving credit facility which is now and drawn, at this point in time it is at zero, but Cumulus, I want to make sure you understand, too, Cumulus has been paying an origination fee and it pays fees each quarter to have that credit facility.

THE COURT: Yes.

MR. MOLO: There are letters of credit and swing lines also under the credit agreement although those are not at issue here.

Now, the credit agreement, while it is an important document, does not control every detail of how the company runs

its business.

THE COURT: May I stop you for one moment? Thank you.

MR. MOLO: Sure.

THE COURT: You have so much to tell me I want to hear it all, but I care about the court reporter and the Judge. So, I'm going to ask you --

MR. MOLO: We have a history, this court reporter and I. I will slow down. I will slow down. I will.

THE COURT: She may have a history with you.

MR. MOLO: The credit agreement, as I say, doesn't control every detail. It is an important document and it is not even Cumulus' sole source of capital or provides Cumulus with its sole source of capital. As we all know from this case, that there are $610 million outstanding in the senior notes which are the subject of this exchange transaction, so there really are two issues as we have gone through all the briefing and I am not going to go through the exchange transaction that's been laid out in the papers and in our demonstrative exhibit at Exhibit J to the Weiner affidavit which is there. So, I'm not going to go through all of that but there is really two issues, first, whether Cumulus can refinance the senior notes with other than "permitted financing" the defined term in the agreement. The answer to that question is yes. The second question is, is the transaction nonetheless barred by negative covenant that

applies broadly to the amendments of the agreements other than the credit agreement and the answer to that is no.

Now, the credit agreement, if you will bear with me here for just a moment, it is an extensive document but it essentially does three things -- it describes the debt, it sets out the things that Cumulus must do to access that debt, and then it sets out certain things that Cumulus cannot do. Those terms, as well as every term in this agreement, was heavily negotiated by big time lawyers at big time law firms and by big boy parties.

THE COURT: Many big girl parties too.

MR. MOLO: I mean, we are talking about a $2 million transaction here. So, this is not something that was just, you know, printed off of a form and people signed up. This was heavily negotiated.

If you will just indulge me for a moment, I just want to go through the credit agreement briefly. The table of contents really kind of gives you the flow and the structure of the agreement.

So, Section 1 has the definitions and defined terms and I have a set of these on papers for your Honor as well so you can take them, and if you want them now -- here, I will give them to the other side as well.

THE COURT: I am enjoying them on the screen, that is fine.

MR. MOLO: But, there are defined terms, a whole host of the defined terms, but for purposes of our discussion this morning the term permitted refinancing, loan document agreement hereof, are all defined terms.

You go down to Sections 2, 3, and 4, and they talk about the parameters of each type of loan, Section 2 about the term loan, Section 3 about the resolving credit, and then Section 4 applies to both of them. Section 5 talks about -- it has got the representations and warranties that Cumulus must make in order to get the loans, and then Section 6, the conditions precedent, things like legal opinions and such that might be there. But then we come to really sort of the -- I'm not going to say one is more important than the other because in fact it is not, the document must be read in a whole, but for purposes of our discussion, these key issues of the obligations, okay? So, first in Section 7 we have the things that Cumulus must do, the affirmative covenants, things like payment of its obligations and notices and compliance with the environmental laws, and then we have in Section 8 the negative covenants, things like limitations and liens, prohibition on the sale of assets, transactions with affiliates. Every one of these things some mother sent their son or daughter to law school to be involved in the negotiation of. These are all heavily negotiated terms as these agreements are developed. And that's it, though. 7 and 8 are it in terms of the

obligations and the limitations. The parties negotiated the terms in what Cumulus must do, what Cumulus may not do. There is a lot of give and take in this. Each side, each party to the agreement has its own motivations. People go into these negotiations never getting a hundred percent of what they want, there is a give and a take, and there is commercial decisions that are made. But once they're made, once those decisions are made and people say, you know what? I didn't get this, I got that, then you have got a document you have to live with. You have got a set of rules. You have got rules of the road that govern the relationship and those rules govern the road whether it's sleeting, whether it's sunny, whether it's bumpy, whether it's smooth. That is what covers the relationship between the parties going forward. Now, however things have played out, these parties were sophisticated, they had their reasons, and if the contract does not prohibit something, then it is allowed.

Now, onto the first two issues that we talked about. The credit agreement does not require the use of permitted financing as that is a defined term to refine the senior notes. There are 18 pages -- in the negative covenants there, Section 8, there are 18 pages of negative covenants and nowhere -- nowhere -- do they restrict the refinancing of the senior notes to "permitted refinancing" as that is a defined term under the agreement. Nowhere.

Now, the term lenders, kind of half-heartedly because they don't really raise this until page 20 of their brief, claim that Section 8.8(j) of the credit agreement imposes this restriction. And, as I say, I don't think that they really believe this because it has not been the focus of their argument.

Section 8.8(j) is not a restriction on refinancing, it is a restriction on prepayment of the senior notes. Here is the actual text of Section 8.8(j), negative covenant. The borrower agrees that it shall not, and then limitation on restricted payments, make any optional payment or prepayment on the principal of the senior notes or any permitted refinancing of the senior notes except that -- so there is a general prohibition -- then we have the exception in Section J. The borrower and its restricted subsidiaries may make payments in respect of the senior notes and any permitted refinancing thereof, in connection with any refinancing -- any refinancing -- of the senior notes or any permitted refinancing thereof permitted pursuant to the terms hereof. And the hereof is a defined term in the agreement which the first two, the agreement as a whole, it is to take the agreement as a whole and not look at any particular provision

Now, the term lenders claim that even though the plain language, this heavily negotiated language at 8.8(j) says that any refinancing can be used on its face that that's not what it

means. That is not really what it means. It is really wishful thinking on their part. What the term lenders would do is rewrite the agreement or have this Court to do so to do this: They would have the agreement rewritten by the Court to strike the word "any refinancing" and substitute the words "permitted refinancing." And that's simply not allowed. By substituting permitted refinancing they would amend the agreement and they would amend the parties' relationship and the rules of the road that were set at the outset of this contract. That's now how contracts are interpreted. This Court cannot infer terms, it must look to the words of the agreement, and where contract provisions use different language the Court must assume that the parties intended different meanings.

THE COURT: So there is significance to the fact that permitted refinance is capitalized in some parts and not in another others?

MR. MOLO: Absolutely. It is a defined term.

THE COURT: And so the inclusion of the word "a" or "any" in front of the word refinancing --

MR. MOLO: Any financing.

THE COURT: Any financing.

MR. MOLO: Or refinancing, excuse me. Any refinancing.

THE COURT: Yes.

MR. MOLO: Is different for permitted refinancing.

Any refinancing means just what we are doing or any type of refinancing. Permitted refinancing is a specific type of refinancing with specific characteristics that set forth, in the agreement, that in certain circumstances the company might say that there is an advantage to using the permitted refinancing methods --

THE COURT: But, sir, why have a permitted refinancing term defined? Why have it capitalized and all of that if they didn't mean it, if the parties didn't think that it was going to be the way of refinancing?

MR. MOLO: It would be a way of refinancing, not the way of refinancing. There is a difference.

THE COURT: Yes.

MR. MOLO: And, the any refinancing gives the company -- this is something we bargained for. We paid for this, we paid to have the flexibility to be able to go in not knowing what would happen, for sure, okay, because as I say, we don't know whether it is going to be sunny, we don't know whether it is going to be sleeting, we just know we are going down the road. But we wanted to have the flexibility that we could use any refinancing and in fact what we are doing now is a different type of refinancing than what is called a permitted refinancing. The permitted refinancing has specific characteristics with specific advantages and specific disadvantages and that's one way to do it, okay, but there are

other ways to do it such as the exchange transaction here.

You know, the fact that the parties bargained for these terms, they have to be given a meaning. We can't read a contract and have a term be considered superfluous. In fact, there is Second Circuit case law that we cite that says even one term that we consider superfluous in a contract is impermissible in construing it. And so, looking at this, if the parties are using permitted refinancing and they're using any refinancing, they knew how to write this agreement to make it look like this, what I have just put here where it says term lenders wishful thinking, permitted refinancing. They could have done that. All right? They didn't. What they negotiated was the actual language which says any refinancing of the senior notes or any permitted refinancing thereof permitted pursuant to the terms of the agreement hereof.

So, this is the bargain that we struck and all we are asking for is to have that enforced. And, as I say, I don't really even think that they believe that.

THE COURT: I will let them tell me.

MR. MOLO: But I am sure they'll get up here and tell you whatever they'll tell you about that.

THE COURT: Yes.

MR. MOLO: All right?

So, the parties could have reached this different bargain but they didn't and just to show you that what I am

explaining isn't like some far-fetched, crazy Molo theory --

THE COURT: Oh, I would never say that.

MR. MOLO: But you are free to think that -- the credit agreement, by the way, does use the term "refinancing" elsewhere.

THE COURT: Yes.

MR. MOLO: Section 4.5, 8.2, 8.15, the word "refinancing" is used without using the term "permitted refinancing." Term lenders go back and say, oh, other places where they talk about the senior notes, the term permitted refinancing appears. So what? That doesn't matter. What matters is they know the difference between the words "refinancing" and "permitted refinancing" and have chosen not to use that exclusively in 8.8J.

THE COURT: Just to probe that, sir. If, somewhere in this agreement there was the term "any refinancing" but everywhere else there was the term "permitted refinancing," you would be making the same argument?

MR. MOLO: I'm sorry, your Honor?

THE COURT: What your adversaries needed to do in order to win on their particular argument --

MR. MOLO: Right.

THE COURT: -- was to, in every location in this credit agreement, use "permitted refinancing."

MR. MOLO: Or at least use it at least use it in 8.8J

instead of using the term any refinancing. The reason I show you here 4.5, 8.2 and 8.15 is to show you that the term refinancing is used without reference to permitted refinancing.

THE COURT: Yes.

MR. MOLO: So, in other words, this was a calculated choice, this evidences the fact that this was a choice, a decision on the part. Yes, they should have -- for them to be right on 8.8(j) the agreement should be written differently and it isn't. And what I want to show you, though, is that parties do -- commercial parties do make a decision sometimes to limit -- to limit a situation like this to a situation where there is a permitted refinancing. This term permitted refinancing in this sort of agreement is not -- it is a term that you would see in credit agreements like this. What I am showing you on the left is, again, what you saw from us a moment ago, 8.8(j) in connection with any refinancing of the senior notes in the blue of Cumulus. What I put there on the screen on the right is a credit agreement that was attached to the 10K of SunGard, another public company which JP Morgan, by the way, happens to be a party to that agreement as well. In that agreement the parties did make an appropriate limitation. You see prepayments, etc., indebtedness. The refinancing thereof with the net cash proceeds of any indebtedness (to the extent such indebtedness constitutes a permitted refinancing).

The reason I show you that, Judge, is to demonstrate

that what I am saying, which is that the parties negotiated the terms that are in 8.8(j) of our agreement, is commercially -- that's a commercial decision and this, in the SunGard case, there was a different commercial decision reached but it is not some far-fetched idea.

THE COURT: Let's just offer the alternative possibility, though, that it wasn't a negotiated decision but sloppy draftspersonship and that's what we are dealing with here. It doesn't matter.

MR. MOLO: It does not matter at all because those were the rules and we would have to live with that sloppy draftsmanship just as they would. People pay the legal fees they pay, they spent the time they spent, and they came up with an agreement. And I am sure -- I mean, I don't know how many iterations there were of this. It doesn't matter for purposes of this decision, whether it was for -- they went into a room and signed it or whether or not they spent 10 months getting there -- it is more likely the latter -- but that's not an issue for the Court. What matters to this Court are what are the words of this agreement. And we know it was heavily negotiated and, you are right, it doesn't really matter.

THE COURT: Okay. Please, continue.

MR. MOLO: Sure.

So, I next want to turn to the argument that they really focus on which is Section 8.16 and this is their primary

argument and they argue that 8.16 which does prohibit amendments to certain agreements that would have an adverse material effect on the company, there is such a limitation there, 8.16. But their real beef here -- and I am going to go through this in just a second with you in greater detail, Judge -- but their real beef here, their complaint -- and we talked about when we were here the last time, their collateral is being diluted. Okay? It is not all there to secure their loans. The collateral that is there to secure the term loans under our transaction is now also going to secure revolving debt that is used as part of the exchange offering.

THE COURT: And Cumulus doesn't dispute that it is a dilution of the collateral?

MR. MOLO: It is. There is no question. It absolutely is.

THE COURT: Is that materially adverse?

MR. MOLO: Well, it's not at all.

THE COURT: For the term lenders? Really? To have more fingers in that pie?

MR. MOLO: No.

THE COURT: Why not?

MR. MOLO: It is shocking that we would find this -- for them to come in here and say this, there is gambling is Casablanca. They agreed to this very thing. They agreed that the revolving credit facility loans could be used -- could be

securitized by the same -- not securitized -- collateralized by the same collateral that was there for their term loans. That is something that is in the agreement in the statement of material facts at paragraph 25 and it is set forth at 4.25 of the credit agreement. They acknowledge in their answer that the credit agreement provides that the collateral that secures the term loans can also be used to secure the revolving loans.

Now, think about it for just a second. They made a commercial decision. They decided at the time -- we are talking about almost $2 billion in term loans, $1.8 billion in material loans -- that in exchange for the interest rates that they got, in exchange for the fees they got, in exchange for the other favorable terms that they received as part of the agreement they would allow, among other things, the collateral that is being used to secure their loans to also be used to secure up to $400 million in the revolving credit facility. They agreed to that, that's part of the agreement. So, what is happening here, them running in and saying, well, this transaction materially, adversely affects us, it is within the four corners of the agreement, it was contemplated that at some point in time, should the company decides to do so, it could draw on the revolving facility and it could make loans and their collateral would be used as collateral for those loans. And so, to come in here and say that, I mean that's -- that was a judgment that they made, it was a bargain they struck and at

the time, even now, it is not necessarily irrational. I mean, when we are talking about somebody who is going to make a $1.8 billion loan saying -- and that's a term loan, all right -- saying that you know what? I will allow up to -- it doesn't mean it is going to be immediately writing a check, even in this transaction it is going to be up to $305 million that would be secured, it is not the full 400, but up to 400 it is not irrational to say especially because it is a revolving line, maybe it is going to go up, it is going to go down. And so for someone to make that decision, whatever the reasons doesn't matter, they made it. And as we were just saying a moment ago, it is in the agreement and now they've got to live by that.

Now, that, again, was the deal they struck, it is a deal they've got to live with now. So, regardless how they feel about the company today -- and their brief is filled with all of these things about the company's performance -- well, yeah maybe they're now a nervous lender. The facts are what they are and those facts are not relevant here but, I mean, I would be a fool to say that's not their motivation. Obviously they feel like they're not going to get their loans repaid and they feel that if in fact this collateral is now used to collateralize the revolving loans that, you know, there is less there in the way of collateral for them, less security for them. I get that. Okay? But that's not -- that's okay, they

can have all the feelings they want. Their legal obligations are to abide by the terms of the contract.

THE COURT: But what you are suggesting then is that the materially adverse, that adjective-adverb combination exists solely for situations that are not contemplated by the agreement and so, therefore, because they knew going into the agreement, as you have described it, that there was the possibility that this could happen, that there could be either incremental revolving credit facilities or the revolving credit facility that is in the agreement already, they cannot make a material adversity argument with respect to things that are contemplated by the agreement.

Is that what I am hearing you say?

MR. MOLO: This is like I am saying that they're shocked there is gambling in Casablanca.

THE COURT: Right.

MR. MOLO: It is like say, oh my God, they're going to use our collateral as collateral for these other loans, we are going to be materially and adversely affected. That just isn't the case but we don't even get there. I just want to take it because I think that this argument, frankly, Judge, it is a bogus argument, it is not an argument that is sincere and grounded in fact and certainly not grounded in very fundamental principles of contract law but I wanted to address the harm point first but we don't even get there.

We don't even get to the harm point because when you now look at 8.16 on the screen there, you will see that it doesn't even apply to amendments to the credit agreement. Okay? What 8.16 -- and again, as I mentioned going through the table of contents, these documents, in the commercial world, have kind of an ebb and a flow and there is different things that people expect from one another in these sorts -- of going into these sorts of agreements.

So, what 8.16 really deals with in negative covenants is really the kinds of agreements, the lenders have extracted a promise as part -- this is for benefit of the letters they are promised from Cumulus -- we are lending money to your organization as we understand the organization and as you have described it to us. Okay? Now don't you go changing things too much, all right, in order for us to -- we are relying on what you are telling us so you are going to make a promise here, the 8.16 negative covenants on sorts of business documents, day-to-day, not the credit agreement. You can't make changes that have a material, adverse effect. So, corporate organizational documents as you see there, 8.16A, look at the nature of these corporate organizational documents. 8.16B. These are really kind of debts outside of the agreement. If you went and looked at the schedule it is like leases or letters of credit to secure leases that they have, and C is any document entered into govern preferred stock.

So, these are documents that really -- clearly they're not the credit agreement, the credit agreement which also is a defined term, Agreement -- capital A -- is used to refer to the credit agreement and then there is another term, defined term, loan documents, which includes the credit agreement that is at issue here.

THE COURT: But any credit agreement doesn't include this credit agreement?

MR. MOLO: No, it does not. It would include these sorts of credit agreements that I am talking about. There is all kinds of agreements that relate to credit. An executive's American Express card I guess is a credit agreement. That wouldn't be contemplated, necessarily here, as something that would ever rise to the level of being a material adverse effect. They don't use, again, the defined term and, again, we go back to very, very basic principles of contract construction. Where there are defined terms and whether there are ordinary terms you must give each their meaning and so, because they use credit agreement here -- little C, little A, okay -- and they don't use Agreement -- capital A -- or they don't use Loan Documents -- capital L, capital D -- which includes credit agreement, that is the way that's interpreted.

Now, again, they're refusing to give the terms their ordinary meaning. This is the way they would like the document to have been written as they sit here today. They would like

the document to have in there not only A, B, C, but also D, a document that says or a phrase that says: The loan documents, which actually does include the agreement or including the agreement meaning this credit agreement, and it doesn't say that. Those are the words that they would like to put into the agreement that are not there.

Now, this is simply not permitted and were there any doubt -- were there any doubt -- in your mind that what I am saying about the purpose and intent of this agreement and the purpose and intent of the term credit agreement as is used there, is not relating to the credit agreement at issue in this case. Look at 11.1 which is a separate section that is devoted to amendments of the credit agreement meaning the credit agreement -- this big credit agreement that we are talking about. It would make no sense in a document of this complexity involving billions of dollars with highly sophisticated parties with extraordinarily sophisticated advisors to put such an important restriction on the amendment of the credit agreement into 8.16 when there is a separate provision 11.1 that deals specifically with amendments to this agreement.

Now, even if 8.16 did apply -- let's just assume for a moment that it did -- the language of the sections we rely on to address the transaction, to effect the transaction, actually override or would override the general terms of 8.16.

If you look to 11.1E which is used in connection with

the amendment of the financial covenants it says: Notwithstanding anything to the contrary contained herein. And that notwithstanding anything to the contrary is actually magic language in New York. That language trumps any general prohibition, that was the word that was used in the BNP Paribas case, Southern District of New York case, and we cite all of the cases on page 17 and 18 of our brief that go through this.

Section 4.24, similarly, which is used in modification of the credit facility, that uses the term notwithstanding anything to the contrary of the agreement.

Section 4.25, which talks about -- which is used in connection with the creation of the incremental facility says that it uses the specific language you see down here, amended. And the general rule of contract interpretation, of course, is that the specific trumps the general.

Now, if you buy the term lender's argument then those provisions are meaningless. All of those provisions are meaningless. They say that, no, this provision 8.16, which really deals with something completely different, doesn't deal with amendments to the credit agreement, that that controls and that none of these provisions mean anything and they're superfluous and that goes against all rules of contract construction. New York Law interprets, as I say even just one clause as being important, and to find it superfluous is inappropriate. Here we are talking about a whole host of them

plus a contorted construction.

So, those are the plain terms of the contract. We are simply asking that they be given their plain meaning and whatever the outcome may be today of the company and its performance, and whatever the outcome that may have been anticipated by the lenders at the time, sobeit. What they did, which is what business people do, is they assessed the situation, they made commercial judgments and they came to an agreement. All we are asking is that they be held to that agreement.

THE COURT: Let me ask you some related questions.

MR. MOLO: Sure.

THE COURT: In January, I believe you advised that approximately 70 percent of those who could participate were interested in participating in the proposed refinancing. Has that number changed? Because I thought there was a 90 percent threshold.

MR. MOLO: May I just consult?

THE COURT: Of course.

MR. MOLO: I don't want to give inaccurate information.

THE COURT: I would prefer accurate information, of course.

(Pause)

MR. MOLO: It is still about 70 percent.

THE COURT: They're waiting to see what I do here. Yes, no surprise.

Your March 13 date, it is real?

MR. MOLO: It is a real date but I want to also be clear, and I said this when I was last here and I want to make sure it was understood, that it was an expedited proceeding and everything like that, we cannot unilaterally extend that.

THE COURT: Yes.

MR. MOLO: That is not to say it is inconceivable that some negotiation could be had but, right now, yes, that is a real date.

THE COURT: All right.

MR. MOLO: Okay.

THE COURT: Because have you wrecked my January and February, I just want to make sure it was for a good reason.

Finally --

MR. MOLO: I'm sorry about that.

THE COURT: That's all right. Occupational hazard.

It is my understanding -- well, it was surprising to me to see Cumulus invoke Rule 56(d). I understand that is in response to your adversary's cross-motion, but do you really think discovery is necessary and, if so, on what?

MR. MOLO: No, we don't think --

THE COURT: Okay.

MR. MOLO: This could be decided right now on these

papers --

THE COURT: Okay.

MR. MOLO: -- unless you think you are going to decide against me. No, no.

THE COURT: I understand.

MR. MOLO: No, no.

But, in all seriousness, this is a contract provision. Look, the whole thing is about what is the language of the contract. That's what this is about.

THE COURT: Yes.

MR. MOLO: So we don't need discovery, we should be able to go forward without it but, obviously, if for some reason the Court thinks otherwise then we are going to do whatever needs to be done.

THE COURT: I appreciate that. I am saying, given our very thoughtful discussions last time, I wasn't expecting to see a reference to 56(d).

MR. MOLO: That's what that's about and they loaded up their brief with all of those facts and everything like that. So, we are lawyers and we invoke. So that was it. Okay?

THE COURT: Thank you so much.

MR. MOLO: If you had any questions on JP Morgan Chase you can address that point to Mr. Weiner.

THE COURT: All right. Go ahead. I would be happy to hear whatever you want to tell me.

MR. WEINER: Your Honor, I will be very brief, actually.

THE COURT: Okay.

MR. WEINER: There has been back and forth in the brief about whether JP Morgan Chase has breached the contract.

THE COURT: Yes.

MR. WEINER: I think for today's purposes we can simplify that. In its reply brief, JP Morgan Chase said it will process the assignments, it will sign the amendment in accordance with any Court order determining the proposed transaction is permitted. That's all we ask. The Court has authority to enter such an Order under the Declaratory Judgment Act under the starter case that we cited. So, unless you have any questions for me, that is all the relief we seek today.

THE COURT: No, I do understand that. Thank you very much.

MR. WEINER: Thank you.

THE COURT: I contemplated hearing from JP Morgan Chase's attorney first only because they were the original litigant, not the intervenor, but if the parties have arranged some different distribution of labor, it doesn't matter to me.

MR. TURNER: We have agreed to that also.

THE COURT: Thank you.

Mr. Turner?

MR. TURNER: Good morning again, your Honor.

THE COURT: Good morning, sir.

MR. TURNER: Alan Turner, representing JP Morgan Chase Bank.

Let me start with the breach of contract claim. It sounds to me as if the plaintiff is perhaps conceding that there is no breach of contract claim. I don't think it can seriously contend that there has been a breach of contract here. We said in our papers that Section 10.4 --

THE COURT: They're not nodding along with you, sir, by okay, yes.

MR. TURNER: But, as we laid out in our papers Section 10.4, which is part of a suite of protections that the administrative agent bargained for in this agreement, and which are institutionally very important for the bank not just in this credit agreement but also in other credit agreements and other standard provisions, it is important that that provision be upheld. It is designed for exactly the kind of situation we have here where there is a dispute between the company and the lenders and the administrative agent, quite properly says, we are going to wait, let that dispute be resolved, we are entitled under the agreement -- we are fully justified under the agreement -- in refraining from acting on the loan documents making the changes that you have requested.

THE COURT: Let me probe that a little bit more, sir.

MR. TURNER: Sure.

THE COURT: I understand your point which is that your client is somewhat caught in the middle, but if your client had a view or belief that Cumulus' position was completely justified, would you still have sat on the sidelines?

MR. TURNER: That's an interesting question and one that I have thought about, your Honor. I don't know the answer to that.

THE COURT: All right.

MR. TURNER: We are not faced with that situation here.

THE COURT: But in your brief, sir, you don't merely say it is our obligation with where there are folks, very thoughtful folks, very sophisticated folks who are fighting over something to stay on the sidelines, you actually weighed into the debate and I found that interesting. So, it is more than simply -- well, it is more than simply remaining on the sidelines. What am I to deduce from that, if anything?

MR. TURNER: I think what you are to deduce from that, your Honor, is that JP Morgan, as the agent, has read the contract, has a view on what Section 8.8 means and how it applies here, and there is nothing improper in taking a position with respect to how the agreement, in which it is an administrative agent, should be read. But, that said, the request that JP Morgan Chase signed certain documents to actually implement the transaction would, in itself, that would

be taking the side of Cumulus and essentially allowing the transaction to go ahead unless the term lenders were to come in and seek an injunction.

So, with respect to the actions on which JP Morgan Chase was asked to use its powers as administrative agent to sign the amendments that are sought and to process and approve the consents to assignment, those are things that JP Morgan Chase can properly say under the agreement we are just not going to do that until we know whether or not this transaction is in fact permitted.

THE COURT: All right. Why I am asking, sir, is not merely to get your thoughts on the situation but because I do have questions about the opposition arguments to Mr. Molo's position and I don't know whether it is appropriate for me to direct them to you or to direct them to Ms. Primoff in the first instance.

MR. TURNER: Certainly, your Honor, the Section 8.8 argument I am fully prepared to address.

THE COURT: And Section 8.16?

MR. TURNER: We have not addressed 8.16 in our argument.

THE COURT: That is fine.

MR. TURNER: We thought that was better for the term lenders to explain why they're materially and adversely affected.

THE COURT: Why don't you talk to me about 8.8. Thank you.

MR. TURNER: Certainly, your Honor.

Let me start with the theme that Mr. Molo turned to time and again in his argument which was that this was a heavily negotiated agreement and that the parties should be held to their agreement. We agree. This is not about rewriting the contract. We are not asking the Court to do so. We are, instead, asking that the Court interpret and apply the agreement exactly as it was written. And what that means with respect to Section 8.8 is to determine exactly what it is that Cumulus bargained for.

Now, Mr. Molo suggested that Cumulus bargained for the ability to conduct any refinancing of the senior notes but that is not what Section 8.8(j) provides. What they bargained for was the ability to conduct any refinancing of the senior notes that is permitted pursuant to the terms hereof.

THE COURT: Then why use any refinancings? Why use a refinancing? Why not just say consistently throughout: Permitted refinancing or refinancing. We can talk about, later, about how best to pronounce that second word.

MR. TURNER: There are certainly other ways that this provision could have been written to the same effect.

THE COURT: Yes.

MR. TURNER: But the question here for the Court is

not could the parties have more immaculately stated their intent. Is there some other form in which it could be used.

THE COURT: And this is your argument in your reply brief which I remember very well. I guess my concern is, is there significance to the fact that at times the agreement specifies any refinancing.

MR. TURNER: I think here in 8.8J --

THE COURT: Yes.

MR. TURNER: -- the phrase is not just any refinancing, it is any refinancing permitted pursuant to the terms hereof and that means the agreement as a whole. Now, what it does --

THE COURT: Then why have any permitted -- why use -- why have the term -- permitted refinancings, refinancing -- if in fact it means -- if you are going to have any refinancings later on. It seems odd to me that you would define this term and later say any refinancing permitted under this agreement because I would have thought that was what was defined earlier as permitted refinancings. So why?

MR. TURNER: I think this is an example, your Honor, of the parties being able to accomplish the same effect by using different language. The parties could have written it that way, perhaps.

THE COURT: Yes.

MR. TURNER: I think it would have been very awkward

because of course, in the middle of that provision, we already have the term permitted refinancing because it refers to situations where there has already been permitted refinancing so that complicates things. So, you could have had a term that said any refinancing permitted pursuant -- any refinancing or permitted refinancing that is a permitted refinancing. And I think it would become very unwieldily but I think the intent is clear, if you are saying a refinancing permitted pursuant to the terms hereof, where does one go? Where does one go to find that permission? And looking to the definition of permitted refinancing is the obvious place to go. But, if that is not the place to go, where else does one look? And it is really incumbent on Cumulus to identify some other provision in the agreement which it says gives it permission to conduct this refinancing because if it is not a permitted refinancing and the plaintiff really only half-heartedly suggests that it does -- and I will answer any questions you have about that.

THE COURT: No, no. You have already told me it was a waiver, I'm not worried about that.

MR. TURNER: So, if that is not where one looks, where does one look? The plaintiff points only to provisions in the agreement that permit it to incur indebtedness. They point to the provisions that allow it to draw down under the revolving facility, to create an incremental facility, and to the provisions that allow them to change the terms of the existing

revolving facility because they can't borrow under it right now. All of that only points to permissions to actually draw down the revolving facility and first they have to overcome hurdles that stand in their way to doing so.

THE COURT: So, you are fine with them taking out all the debt that they want so long as they don't try and prepay this or, worse yet, dilute the collateral?

MR. TURNER: I think those steps, Ms. Primoff will tell you, would violate 8.16, but as far as 8.8J is concerned --

THE COURT: Yes.

MR. TURNER: -- they're not implicated by those steps. They're not implicated by those steps.

The last step of the transaction and in the briefing it is laid out as four different steps, the last step is the most important because that is the refinancing, that is where the senior notes are paid off and the money is drawn down using the revolving facilities. And unless Cumulus can point in the agreement to any provision that says it can refinance the senior notes in that manner, then it is out of luck because if it is not a permitted refinancing and if there is nowhere else in the agreement that gives that permission, then there is nothing.

THE COURT: But do they not point to 4.24 and 4.25 and 11.1 as sources of that permission?

MR. TURNER: Those, again, go only to the changes that they need to make to the revolving facilities in order to actually draw them down in order to get the financing.

THE COURT: I see. It needs to be shown to me where they can actually do something with the money that they've drawn down.

MR. TURNER: Exactly.

THE COURT: I understand. I understand your argument. I am not saying I agree with it but I do understand it. Please, continue.

MR. TURNER: Mr. Molo started with the proposition that if the contract does not prohibit something then it is allowed and the silence that followed that was that here, at Section 8.8, prohibits the prepayment of the senior notes. There is a general prohibition on that and that makes a lot of sense because the term lenders, obviously, did not want to have the senior notes paid out first. So, there is that general prohibition and they must overcome that prohibition by pointing to an exception under 8.8.

THE COURT: But, sir, twice now you have talked about what the term note holders would have wanted, what their intent must have been. What Mr. Molo has said to me, very clearly, and what I am sort of wrestling with right now is maybe that was the intent but I have got the agreement that I have gotten and, so, could you speak to that issue, please? I think what

he is saying is he doesn't really care what the intent was, it is what is in the agreement.

MR. TURNER: Oh, I agree completely, your Honor.

THE COURT: Okay.

MR. TURNER: It doesn't come down to intent other than by reading what the contract says because that is the expression of the parties' intent.

THE COURT: Okay.

MR. TURNER: Our argument is that if you read, according to their plain and ordinary meaning, the words in Section 8.8(j), they tell you that you have to find a permission for a refinancing of the senior notes and if it is not a permitted refinancing as that term is defined, then one must find some other form of permission in the agreement. Here, there is none. The only form of refinancing for the senior notes is a permitted refinancing and we know that because if you look at 8.2H of the agreement, which is the provisions that outlines the kinds of indebtedness that the company can incur it says that -- let me find the exact words so I don't misquote it -- it says that the company can incur indebtedness of the borrower in respect of the senior notes outstanding on the restatement effective date -- that's the date of the agreement -- and any permitted refinancing thereof.

So, that is a clear indication that if Cumulus is going to refinance the senior notes, the only form of

refinancing that is contemplated under 8.2H is a permitted refinancing. I think that helps the Court when reading it together with Section 8.8(j) and understanding what the parties -- what the plain words of the contract mean.

THE COURT: All right.

MR. TURNER: Mr. Molo, in his argument, also addressed a different credit agreement that JP Morgan Chase was administrative agent for, the SunGard credit agreement. I think if we are trying to interpret this agreement based on what the SunGard agreement means we are really well beyond the bounds of how one would normally read a contract, but I just note that is agreement negotiated between different parties in 2005, probably written by different lawyers, and in fact the provisions that Mr. Molo put up side by side, they're really quite different in their content and their structure, and one cannot interpolate from the SunGard agreement that here, in our agreement, that permitted, pursuant to the terms hereof, means something different than what we are saying. In fact, if you look at Section 7.13 of the SunGard agreement, it does not even use the words "permitted pursuant to the terms hereof which we have in our agreement.

So, again, that is an example of the parties to contracts using different words to effect the same result. And really, the Court here is not tasked with a question of determining whether the parties could have expressed themselves

differently. There are really any number of ways that the parties could have expressed the same thing. The task of the Court is to determine what do these words actually mean, not could something better have been written. One can always second guess, particularly when one has benefit of an actual fact situation before you, one can always speculate about different language that might have more perfectly fit that situation, but obviously, when the parties are negotiating the agreement, they're trying to anticipate all kinds of possible situations that may happen in the future and express themselves generally in a way that will cover those situations and I think they properly and adequately did here. I think the only reasonable reading of 8.8(j) is that it needs to be a permitted refinancing and if Cumulus says, well, no it doesn't need to be, then what permission in the agreement does it point to that gives it the ability to refinance the senior notes in this way.

THE COURT: So, to be clear, sir, both you and Mr. Molo agree that the provisions of the agreement that we have been discussing are unambiguous.

MR. TURNER: All parties have said that, yes.

THE COURT: Different reads, I understand.

MR. TURNER: Yes.

THE COURT: But you are not suggesting there is an ambiguity in any of these provisions that requires, for example, extrinsic evidence or things of that nature.

MR. TURNER: Correct, your Honor. There is difference of opinion as to what it means and your Honor will resolve that, but we believe there is no ambiguity.

THE COURT: Thank you very much.

MR. TURNER: Thank you very much.

THE COURT: Ms. Primoff, let me hear from you.

MS. PRIMOFF: Thank you, your Honor. Do you have a copy of the agreement?

THE COURT: I do.

MS. PRIMOFF: Very good.

I am just going to pick up where Mr. Turner left off on the 8.8 issue and then we will come back to a few other things and we, too, agree, that the agreement is unambiguous and we, too, agree with Mr. Molo that Section 8 of the agreement is the negative covenants and I think of these as the thou shalt not provisions. *This is what thou shalt not do, Cumulus.*

So, the credit agreement governs the relationship between Cumulus and the term lenders and the term lenders come ahead of the unsecured notes in priority of payment. So, they're very concerned about whether restricted payments can be made to these unsecured noteholders who come behind them in the waterfall. So, Section 8.8 exists to say you cannot make restricted payments to these unsecured noteholders so long as the term loans are outstanding.

THE COURT: Could you please respond to Mr. Molo's argument that there is an imprecision if not an omission in the language because they could have said specifically that this agreement is the agreement that matters as opposed to other credit agreements?

MS. PRIMOFF: On the 8.16 point?

THE COURT: You are still with 8.8?

MS. PRIMOFF: I am.

THE COURT: Just know that I do want an answer to that question at some point can.

MS. PRIMOFF: Okay.

THE COURT: Okay. Thank you.

MS. PRIMOFF: So on the 8.8 point, what the provision says is they can't make restricted payments and then in (j) except in connection with a refinancing permitted pursuant to this agreement.

THE COURT: Yes.

MS. PRIMOFF: And Mr. Molo wants to read that to say any refinancing but it is not any refinancing. Your Honor has to give effect, as you recognized, to the words pursuant to this agreement. So, it is incumbent upon Cumulus to identify some provision in the agreement that allows the refinancing. And that they cannot do. They concede that it is not a permitted refinancing and they cannot point any other refinancing of the unsecured notes that is permitted under the

agreement. And what I would like to do is take a look at 11.1(e), your Honor --

THE COURT: Yes.

MS. PRIMOFF: -- which is the provision that Cumulus actually cites in their papers and 11.1(e) makes a comparison -- 8.2(a) talks about permitted refinancing of the term loans and then 11.1(e) talks about something else entirely, a replacement term loan. And that's precisely our point. When the agreement was talking about a refinancing of the term loan that was not a permitted refinancing, it identifies a replacement term loan and that is specifically provided for in 11.1(e) with regard to the term loans but there is no comparable provision for the unsecured notes. So, because they can't identify some provision of the agreement that allows for this refinancing of the unsecured notes that they want to do, the only refinancing that the four corners of the documents allows for is a permitted refinancing.

So, our position is quite clear. Our position is that 8.8(j)1 left open the possibility that the parties, elsewhere in the agreement, could have provided for some refinancing of the unsecured notes just like they provided in 11.1 for some refinancing of the term loans, but they didn't, they didn't provide for any other kind of refinancing of the notes --

THE COURT: So, the agreement has a placeholder that nowhere exists in the rest of the agreement?

MS. PRIMOFF: That's exactly right.

THE COURT: Why do that?

MS. PRIMOFF: Flexibility. Let's say down the road they wanted to amend the agreement to provide for another kind of refinancing other than a permitted refinancing.

THE COURT: Could they not then amend both provisions?

MS. PRIMOFF: They could.

THE COURT: Okay.

MS. PRIMOFF: But this is the way they did it. It does say any refinancing permitted pursuant to the terms of this agreement. It left open the possibility that there could be some refinancing but the only one that's allowed for today, within the four corners, is a permitted refinancing.

THE COURT: All right. Keep going.

MS. PRIMOFF: Okay.

We agreed with Mr. Turner that they repeatedly confused incurrence of a debt with refinancing of the debt and this is critical to our argument.

Section 8.2, again, we are in the thou shalt not -- 8.2 says thou shalt not incur debt except for a specific debt allowed in 8.2. 8.3 says they shall not incur liens other than specific liens allowed by 8.3. 8.8 says they shall not make restricted payments. And, again, focusing on the 8.8(j)1 exception, the section is for a refinancing permitted pursuant to the agreement and all the parties agree that a refinancing

is both the incurrence of the debt and the repayment of the debt so it is entirely improper for Cumulus to point to the incurrence provisions of the credit agreement and say that they allow for the repayment because incurrence and -- incurrence is only half the equation. A refinancing is incurrence and repayment, you can't just point to incurrence and say you are allowed to make restricted payments under 8.8. That's exactly why 8.8 exists in the loan document, to prevent Cumulus from making payments on the unsecured notes. That's exactly why it is there.

Cumulus says in their reply papers that 8.8 is not a restriction on refinancing. That is respectfully dead wrong. 8.8 is a restriction on refinancing. It is there to say you cannot make these payments.

And then Mr. Turner referred to Section 8.2H and we agree that that's the clearest intention in the document, that the only refinancing permitted of the unsecured notes is a permitted refinancing and I am sure I will mess up the maxim but the maxim *expressio unius est exclusio alterius* which the Second Circuit relies on all the time which is to say the inclusion of one thing implies the exclusion of another. Section 8.2(h) says they can incur the notes and permit a refinancing of the notes. It doesn't say and any other refinancing of the notes. So, it is a permitted refinancing of the notes.

We have pointed out in our papers that in every other instance in the credit agreement where the unsecured notes are mentioned together with a refinancing, it's always a permitted refinancing so we point to Section 7.10(a), 8.4(g), 8.8(h), 8.8(i), 8.8(l), 8.12, 8.13. Every situation in the credit agreement save 8.8(j)(1) that says refinancing and unsecured notes, it is always a permitted refinancing.

I just want to spend a couple of minutes on the implications of Cumulus' position. So, if Cumulus can take any indebtedness it can incur under Section 8.2 and make restricted payments in violation of 8.8, then the exceptions follows the rule.

THE COURT: This is my question of Mr. Turner. Your clients aren't upset or maybe not at least under 8.8, with the taking on of additional debt, it is the payments that bother you.

MS. PRIMOFF: Exactly, because the definition of refinancing is incurrence and payment. We don't disagree that if the -- if the incurrence tests were met they can incur. So, if they have the right to incur they have the right to incur. There is leverage ratios that are prerequisites to the incurrence. So, if they can incur, they can incur, but the repayment is something else entirely.

THE COURT: Okay. Please continue.

MS. PRIMOFF: Okay.

The second implication, and this is highly nuanced, so just bear with me. I apologize.

THE COURT: I thought you were going to say I wouldn't be able to understand it. I will try.

THE MARSHAL: I am sure you will be able to understand it.

THE COURT: I am listening really carefully. Go ahead.

MS. PRIMOFF: Section 8.8(j)2 has another exception and what 8.8(j)2 says is that if the company has a leverage ratio of four times or less, meaning that the amount of its debt is less than four times what its earnings is, the company is allowed to freely pay the unsecured notes.

So, Mr. Molo's reading of the credit agreement allows a complete end run around 8.8(j)2 that would write the provision out of the credit agreement.

So, if the company had a leverage ratio in excess of four times but it wanted to pay down these notes, it could simply go borrow on the revolver, use the revolver to pay down the notes, and then repay the revolver with its cash and it is not allowed to do that. If Mr. Molo's interpretation were correct that it could do that, then the company would never rely on 8.8J2. So, we don't read provisions of the agreement to make them superfluous.

THE COURT: I was going to say, are you arguing that

8.8(j)2 would then be superfluous?

MS. PRIMOFF: Yes. Exactly.

THE COURT: Okay.

MS. PRIMOFF: And then the third implication of Cumulus' interpretation is that Cumulus would be better off doing a lower case refinancing than a permitted refinancing. So, the language of 8.8(j) itself applies -- so, the restriction on restricted payments applies to the unsecured notes and any permitted refinancing of the unsecured notes and then on the face, if you could do a refinancing of the unsecured notes, that's not a permitted refinancing, then those restrictions would no longer apply and that's a result that's preposterous and anomalous and cannot be what was intended.

THE COURT: Maybe. I think Mr. Molo's point, and I mentioned it as well to Mr. Turner, is it may just be that there is this loophole, this is this proper way of reading the agreement that allows them to do what Cumulus wishes to do and while it may not have been the intent of the parties and it may have been lost in the many negotiations, it exists. So, if it exist I can't look past it, correct? You are going to tell me it doesn't exist, I understand that, but I am just saying, when you and Mr. Turner speak about the parties' intent, what I am concerned about is I am stuck with the document that I am stuck with and so I have to make sense out of that. I don't know how much I get to really think about the parties' intent.

MS. PRIMOFF: Okay. That's fair, your Honor.

8.8(j)(1) says, on its face, any financing permitted pursuant to this agreement, it is incumbent upon them to point to some provision that permits this refinancing that they want to do and I haven't heard them -- I haven't seen it in their papers and I haven't heard it today. They haven't pointed to anything that permits this. So, we think that the document, as drafted, doesn't permit any refinancing, it is any refinancing pursuant to this agreement, permitted by this agreement.

THE COURT: All right. Now, one thing we haven't talked about this morning is one of your sort of secondary arguments which is the implied covenant of good faith. Are you not focusing on that this morning? You want me to focus on the agreement itself and not the, you know, breaches of any implied covenants, correct?

MS. PRIMOFF: Correct. We think that there are issues under the implied covenant. We don't think that Cumulus exercised any judgment as to whether the lenders would be materially and adversely affected. We think that what they want to do deprives the lenders of the fruits of their bargain but we are not here on summary judgment on that.

THE COURT: That is really my question.

MS. PRIMOFF: Okay.

THE COURT: Okay. I have heard from your colleagues and adversaries. To what extent do I need discovery at this

time?

MS. PRIMOFF: Again, we think that you can rule in our favor on the issues that have been briefed to you today.

THE COURT: Okay.

MS. PRIMOFF: Just to wrap up on the 8.8 issue and then we will turn to the other?

THE COURT: Please.

MS. PRIMOFF: There is two cases cited in our paper, Citibank v. Norske and Bank of New York v. Realogy.

THE COURT: One is a Judge Sullivan decision I am familiar with, yes.

MS. PRIMOFF: And they both dealt with distressed exchange offers where the companies were looking to elevate unsecured notes into secured debt. In both instances the Court struck them down as violating the governing documents and negative covenants closely, and it protected the lender's bargained for rights and protections and we just ask that the Court do the same here today.

Turning to the 8.16 issue --

THE COURT: Yes.

MS. PRIMOFF: -- do you mind if I hand up a chart?

So, 8.16 is a covenant, a negative covenant, and so it is one of the thou shalt nots that says that Cumulus shall not amend the credit agreement in a way that materially and adversely affects the lenders and my clients are the term loan

parties who have intervened in this matter -- thank you, your Honor -- they hold nearly $600 million in term loan debt. My firm also represents a committee of ad hoc term loan lenders which holds 1.1 of the $1.8 billion term loan facility and the position of the ad hoc committee is identical to the positions of the term loan parties. So, let's talk about why this transaction materially and adversely affects the term loan lenders.

These loans are intended to be low risk loans, they've got an interest rate of 4.25 percent, they are first priority secured paper, and we have submitted the affidavit of Carlyn Taylor of the financial advisory firm of FTI, and as set forth in Ms. Taylor's affidavit, the company has been performing very poorly since these loans were incurred in December 2013. So, the company has lost half of its earnings and its leverage has doubled in that time period. The company has $1.8 billion of term loans, there is zero outstanding on the revolver today, and it has got the $610 million of unsecured debt. If we look at the chart that I handed up which is attached to Ms. Taylor's declaration at page 6 -- this is just a blow up of what was in her declaration -- what this shows is that the term lenders are presently undercollateralized by $361 million. So, what that means is the term loan debt is $1.8 billion, the enterprise value of Cumulus, according to Ms. Taylor, is 1.449, so there is a shortfall of $361 million so that a dollar of term loan

can be expected today to only return a recovery of 80 cents.

THE COURT: One moment, please.

(pause)

MS. PRIMOFF: Now, Cumulus is proposing to exchange those $610 million of unsecured notes into $305 million of secured revolver loans that would be pari passu with the term loans in the collateral and basically that means they share and share proportionally, and they are proposing to do this at a time when the company is insolvent and the term lenders are undercollateralized. So, this chart shows the effect of adding $305 million of secured loans to $1.8 billion of secured loans, and what it shows is that instead of recovering $1.449 billion of value, the term lenders would recover only $1.24 billion of value. So, instead of getting 80 cents on the dollar, they would only get 68.5 cents on the dollar. So, in effect, this is a value transfer from the secured term loans to unsecured creditors of $209 million.

Now, Cumulus has not seriously disputed that we are materially and adversely affected.

THE COURT: Mr. Molo did it very differently. He is not going to engage with you on the numbers, what he says is that's what your clients bargained for. You admitted the possibility that these revolvers could be used and that incremental ones could be added and therefore you cannot now claim material adversity because you built it into the

agreement.

Could you speak to that issue?

MS. PRIMOFF: Absolutely.

So, we bargained that as long as we are not materially and adversely affected, then they could incur these new loans and put those loans at the same collateral level as us, but that's exactly what 8.16 was there to protect the lenders against. It says to Cumulus, thou shalt not approve an amendment to the credit agreement that materially and adversely affects the lenders. This materially and adversely affects us and we have quantified it to the tune of $209 million.

Just to put some numbers around this -- no, no, these are easy numbers. In order for Cumulus to borrow on the revolver what Section 8.1 of the credit agreement says is that as of today they have to have a leverage ratio of 5 to 1. They admit that the leverage ratio is more than 5 to 1 and, in fact, in Ms. Taylor's declaration, it says the leverage ratio today is 8.5 to 1. So, they need an amendment to the credit agreement in order to do away with the leverage ratio so that they can borrow on revolver. So, Mr. Molo is not exactly correct. They didn't have a free reign to just borrow on the revolver whenever they wanted. There was a leverage ratio built in. Now, 11.1 says that the term lenders don't get to vote on whether that leverage ratio should be waived.

THE COURT: Right.

MS. PRIMOFF: And we agree with that. We don't get a vote. But what 8.16 does is it protects the lenders by saying that if the company is going to agree to an amendment that would do away with that leverage ratio, then the company has to exercise its judgment to say that the lenders won't be materially and adversely affected and the company has not exercised that judgment. On the contrary, the company is tacitly admitting that we will be materially and adversely affected. All that 11.1 does is say that the term lenders don't get to vote on this but, importantly, we are not saying we should get to vote. We are not saying that at all. What we are saying is that Cumulus has an obligation and Mr. Molo is saying, well, then that should have been spelled out in 11.1. We don't agree with that at all because the thou shalt not provisions are contained in Section 8, they're contained in the negative covenants of the agreement. So, the Cumulus, thou shalt not consent to this amendment that materially and adversely affects the lenders, it is right where you expect it to be, Section 8, 8.16.

We just want to make the point that it is in the Taylor declaration, the term loans are currently trading at 67 cents and you would expect the revolver loans which are secured by the collateral to trade at the same level as the term. So, no business-oriented revolver lender would lend a hundred cents only to have it trade at 67 cents.

The reality is the company is not receiving any cash for this transaction. The company is not receiving any liquidity for this transaction. This is just an artifice, it is a way to elevate unsecured, out-of-the-money creditors into secured debt.

Now, I think Mr. Molo argued and I think this is the point that the Court was asking me to direct to earlier, that 8.16 says any credit agreement, and we read 8.16 exactly how it is drafted. It says any credit agreement -- it says any credit agreement -- that was for debt that was allowed under 8.2. The term loan debt was allowed under 8.2 so that the term loan debt falls squarely within the plain language of 8.16.

Is that the question?

THE COURT: That is the question. I am going to be looking at that more carefully. Thank you.

MS. PRIMOFF: With regard to Mr. Molo's argument that 11.1, 4.24 and 4.25 somehow trump 8.16, well, New York Law says that notwithstanding anything to the contrary controls if it is to the contrary. Our position is very, very simple: It is not to the contrary. 11.1 on the amendments to the credit agreement to do away with this leverage ratio can be and should be read harmoniously with 8.16. So, 11.1 speaks to which lenders get to vote on it, term lenders don't get to vote, but under 8.16 Cumulus still has to exercise its judgment over whether this transaction materially and adversely affects the

lenders.

THE COURT: Could you clarify something for me, please?

I believe in the briefing from Cumulus there is a suggestion of the fact that the credit agreement speaks to Lenders -- capital L Lenders -- but there are different types of lenders. And I think the concern and the argument that was being posed by your adversary was that two -- in doing what you -- if I were to do what you wanted me to do, I would thereby be prioritizing your clients over the senior noteholders and they, too, are lenders, are they not?

MS. PRIMOFF: The senior noteholders are not lenders under this agreement so the lenders, under this agreement, are revolving lenders who have zero dollars of credit exposure today and the term lenders. The senior noteholders' rights are governed under a separate indenture.

THE COURT: All right. So I'm not picking and choosing among various categories of lenders?

MS. PRIMOFF: No, not at all. The revolver lenders, qua lenders --

THE COURT: They're not lenders at all.

MS. PRIMOFF: They're technically lenders under the credit agreement because they got revolving credit, commitments outstanding.

THE COURT: Yes.

MS. PRIMOFF: But there is zero dollars drawn on those commitments so they have no exposure, they've got no skin in the game today.

THE COURT: Fair enough. Although, I suppose if the proposed refinancing were to take place, there would be a new class of lenders.

MS. PRIMOFF: The revolver would be funded.

THE COURT: Yes.

MS. PRIMOFF: But this goes back to my point. Nobody would really fund $305 million of revolver debt and actually lend money for it because it is not going to trade at $305 million. So, in their capacity as revolver lenders, of course they're materially and adversely affected. It is only in their capacity as unsecured noteholders that they're benefited, but your Honor need not be concerned with that, that's irrelevant to the questions under 8.16 because 8.16 only deals with the term lenders and the revolver lenders, it doesn't deal with unsecured note holders.

THE COURT: Okay. Thank you.

MS. PRIMOFF: We think that, quite simply, they've proposed an inequitable scheme to deprive the term lenders of rights and protections that we bargained for under the credit agreement. We heard Mr. Molo time and time again say enforce the bargain, enforce the bargain. This is the bargain that we struck. We struck a bargain that protected us from having

restricted payments being made to junior creditors and that's what they're proposing to do and they have not identified an exception that allows them to do it and they're doing it at a time when it materially and adversely affects us.

So, with that, unless your Honor has further questions, I will sit down.

THE COURT: I don't. Thank you.

MR. MOLO: May I respond briefly? I will take the points as they were raised.

THE COURT: All right.

MR. MOLO: On the point about how it would be unwieldy to make the changes that would have given them what they wanted, this is how unwieldy it would have been to substitute in the word permitted refinancing for the word refinancing. That's how unwieldy it would be and, you know, when the parties wanted to condition actions and link them to specific definitions, they knew how to do that.

If you were to go to Section 7.11 of the credit agreement, it prohibits subsidiaries generally from taking on debt and it uses this language: Except for liabilities expressly permitted to be incurred in accordance with the definition of broadcast license subsidiary. They could have said that in connection with the refinancing of the senior notes, in accordance with the definition of permitted financing. They didn't do that. They knew how to do that.

They did it in this very agreement, Section 7.11. I am not sure -- nobody cites any authority for the fact that if it is, I mean, if it is not prohibited, all right, it is allowed and as far as being consistent with the agreement hereof, again in our brief and both in Exhibit J to the Weiner declaration in the chart we take you through and tie you to each and every provision of the credit agreement that permits to us do the transaction that we are doing.

On the SunGard point that was offered -- of course the language is different but the point is the parties can draft different language and they can draft it just like they could have drafted it to include permitted refinancing here and they did something different in SunGard.

I wanted to show you what I was suggesting wasn't crazy because JP Morgan itself was in there.

THE COURT: No, I understand.

MR. MOLO: As far as Ms. Primoff's point about the term "any refinancing" giving the lenders flexibility, I was just taken aback by that so that they could later amend it. Any lawyer that put that in there on behalf of a lender so that the lender could have the flexibility as opposed to that being a restriction on the part where they don't have their law license taken away, it was just a wholly illogical, frankly crazy interpretation of what could have possibly happened and why that is there. Regardless of it, it is what is there and

it says any refinancing. If they wanted to limit it they could have used the term refinancing and they didn't.

On the 8.8(j)2 point about the limitations that that imposes, the exception doesn't swallow the whole. In any tender offer, exchange offer situation like this, not everybody is going to participate, not every owner. So, those restrictions will persist for those who don't and, in any event, the leverage ratio in that requires -- there is a cash exception that requires the 4-to-1 leverage ratio. The refinancing exception, there is none. And so, this is a refinancing, it's not a prepayment. And I think that that's key to keep that in mind.

And even when you think about it, for purposes of what Ms. Primoff was arguing and we thought that they would never prepay these, well, not prepaying, we are refinancing it, and in the context of that it is being done with the anticipated consequences that they had signed up for when they signed the agreement. Now, maybe they didn't think it was going to happen this way but there is nothing here to complain about. This whole thing with this chart, I mean, you know, I could tell you that by doing this transaction and providing the company with that amount of debt relief that is going to come by having senior noteholders pay down that amount, things are going to turn around and the company is going to have the runway that it feels that it needs so they can keep all the employees, keep

them employed. So, that is pure speculation and we didn't engage and is not part of anything here but anything they say I can come back and say the opposite to it and see what happens.

That is not the question before us. The question is what does the agreement say? And the agreement says that we can do what we have done and that's it. We are talking about an inequitable, unfair. This is called business. Business means risk. Risk means sometimes things turn out well, sometimes things don't turn out as you anticipated but you had an agreement, you have an agreement and you must honor it. That's all we asking for.

If you will give me one moment, Judge?

THE COURT: Of course.

(Counsel conferring)

MR. MOLO: Thank you.

THE COURT: All right.

MR. TURNER: Your Honor, may I very briefly respond?

THE COURT: Extremely briefly.

MR. TURNER: I will stay here, your Honor.

THE COURT: Yes.

MR. TURNER: In my presentation and Ms. Primoff's presentation we challenged the plaintiff to identify a provision of this agreement that says that this refinancing is permitted. Mr. Molo still has not identified any such provision.

I would also like to refer the Court back to the plaintiff's complaint because they really have ignored in their papers and in their presentation what I think are the key words in 8.8(j), permitted pursuant to the terms hereof. Those words must be given meaning and in paragraph --

THE COURT: I believe Mr. Molo has suggested that by identifying other provisions in the agreement that allow him to do each components of the proposed refinancing that, indeed, he does have a refinancing that in the aggregate is permitted by this agreement. I know you disagree with that but I think he is answering your challenge. I don't think you agree with the manner in which he has done it but, please, continue.

MR. TURNER: I would refer your Honor back to paragraph 64 of the plaintiff's complaint that acknowledges that a refinancing must be permitted pursuant to the terms hereof and that is the terms of the credit agreement and 8.2(h) tells us that a refinancing of the senior notes or a permitted refinancing are the only kinds of indebtedness that can be incurred with respect to the senior notes. And, read in conjunction with 8.8(j), those clearly indicate that only a permitted refinancing would be permitted here and it just doesn't, your Honor.

THE COURT: I understand your point. Thank you.

Mr. Molo, did I misstate your position?

MR. MOLO: No, your Honor. You understand it

perfectly.

THE COURT: Okay. Thank you very much.

Let's take 15 minutes and I will do my very best to get you something that I can read to you in 15 minutes. Thank you. You are welcome to stretch your legs as you see fit.

(Recess)

THE COURT: In the interest of time, I am prioritizing quickness of delivery versus lyricism of opinion and I will ask you to just bear with me as I read notes from several places. This is quite a lengthy decision, at least by my standards, so I will ask for your patience for that as well.

We are here because plaintiffs Cumulus Media Holdings Incorporated, and Cumulus Media Incorporated, brought this action against -- initially against defendant JP Morgan Chase Bank in December of 2016 in JP Morgan's capacity as administrative agent under the amended and restated credit agreement dated December 23rd, 2013.

Cumulus sought a declaration that the credit agreement permitted a particular proposed refinancing which I will call the proposed refinancing, initial caps, and that JP Morgan Chase breached the credit agreement by withholding consent to certain components of that refinancing.

A group of lenders holding approximately $600 million in secured term loans sought to intervene, they were permitted to intervene on December 22nd of last year. They have brought

four cross-claims against Cumulus. They are seeking a declaratory judgment that the proposed refinancing violates Section 8.8 and 8.16 of the credit agreement and constitutes an event of default under that agreement. They are seeking, as well, declaratory judgment that the exchange offer violates an implied covenant of good faith and fair dealing under the credit agreement. They're seeking a declaratory judgment that the term lenders are entitled to most favored nation treatment with respect to the term loans and they seek indemnification of their legal fees and costs pursuant to Section 11.5 of the credit agreement.

Everyone has filed a cross-motion for summary judgment. I am going to resolve all of them now and for the reasons that I am about to describe, Cumulus' motion for summary judgment is denied, JP Morgan Chase' motion for summary judgment is granted, and the term lenders' motion is granted in part and denied in part.

The basic facts of the parties' identities and relationships with each other are not in dispute and I am therefore only going to describe them briefly.

The plaintiffs, who I will refer to collectively as Cumulus, are a radio broadcasting company that owns and operates A.M. and F.M. radio stations across the United States. The facts that I believe to be undisputed suggest that Cumulus' financial situation has deteriorated significantly since this

credit agreement was executed a little over three years ago. JP Morgan Chase is a national banking association, it serves as the administrative agent, and the defendant-intervenors are a subset of group of lenders who have funded the term loans. All of the parties to this lawsuit are also parties to the credit agreement, they agree that the credit agreement is governed by New York Law, and the Court will interpret it according to New York law.

Cumulus currently has $1.81 billion in outstanding term loans. The term loans are secured by first priority liens on and security interests in substantially all of Cumulus' assets which I will refer to as the Collateral -- again, initial cap -- and these will mature on or before December 23rd, 2020. At the moment, the term lenders indicate that Cumulus has roughly $1.449 billion in collateral. The credit agreement, by its terms, allows only for $2.025 billion total in term loans, although that cap can be increased by amending the agreement to allow for incremental term facility and any loan extended under that facility would be secured by the same collateral that secures the term loan.

There is, as well, a $200 million revolving credit facility in the credit agreement. At the moment, or at least the provisions of the agreement provide that these revolving loan commitments can be drawn upon only if certain financial conditions are met or a majority of the revolving lenders agree

to waive those conditions and this, too, can be increased by amending the credit agreement to create an incremental revolving facility. It is my understanding that Cumulus has not drawn down any loans from that facility as it now stands because it cannot satisfy the credit agreement's requisite financial commitments. Any loans, if drawn, would mature on December 23rd of 2018.

Now, in addition to the term loans and revolving credit facility, Cumulus has $610 million, approximately, in unsecured loans which I will refer to as the senior notes, and they were issued by a group of lenders whom I will refer to as the senior noteholders under an indenture dated May 13th of 2011. The senior notes are scheduled to mature on May 1st of 2019. And although this wasn't discussed much today, there is a provision that provides that 90 days prior to the senior notes' maturity date, if the aggregate principal amount of the senior notes exceeds $200 million, the term loans' maturity date will spring forward to that date, January 30th, 2019, and become immediately due.

There are and there have been discussions about Cumulus' proposed refinancing plan. I won't go into tremendous detail on it. It was announced in a form 8K filed with the Securities and Exchange Commission on December 6th of 2016. It would permit Cumulus to refinance $610 million debt under the senior notes with up to $305 million in secured debts borrowed

under the revolving credit facility. The senior noteholders, in consideration for participating in this, would receive revolving loans in an amount equal to 50 percent of the principal amount of the senior notes tendered, and shares of Cumulus Media Incorporated Class A common stock and Cumulus would, in turn, retire and cancel the participating senior notes.

There are several steps contemplated by the proposed refinancing and for ease of reference, I have got them limited to four: They involve assigning the revolving credit commitments, amending the leverage covenants and other terms of the revolving credit facility, adding an incremental revolving facility, and drawing on the revolving and incremental revolving facilities and paying off the senior notes.

So, dealing first with step one, the idea would be that the current revolving lenders would assign their loan commitments to new revolving lenders which would be subject to the approval of JP Morgan Chase in its capacity as administrative agent. Any lender rejected by JP Morgan Chase as an assignee would automatically participate through a trust held by Cantor Fitzgerald. And, all new revolving lenders, individually and as part of the trust, would continue to have revolving commitments under the credit agreement.

There are then several amendments that would be undertaken to the credit agreement, they would amend the credit

agreement to provide an incremental revolving facility through which Cumulus would borrow $105 million in additional revolving loans beyond the $200 million capacity that's currently in the revolving credit facility. These would be secured and guaranteed with the other facilities on a pari passu basis and are required to have a final maturity no earlier than the term loan maturity date. Cumulus would be able to use the proceeds of the incremental facility only for general corporate purposes and the incremental facility may be made available only if, after giving effect thereto and the use of the proceeds thereof, no default or event of default exists.

There would, as well, be several amendments to several negative covenants in Section 8. There would be a modification of the loan ratio. I believe in particular what they're seeking to do is eliminate the financial maintenance covenants. And, there is some discussion -- I am going to hold off on this for a while -- but the authority for this particular amendment is sourced to Section 11.1 of the credit agreement and we have had substantial discussion about it today so I won't go into it too much, the parties are aware of it.

In addition to that, there would be modifications to the revolving credit facility. Specifically, the amendments would increase the interest rate of the revolving loans to 14.25 percent, extend the revolving credit facility's maturity date to November 23rd of 2020, and increase the undrawn

commitment fee to 5 percent.

These modifications are sourced to Section 4.24 of the credit agreement.

Then, when the assignments and these amendments are concluded, Cumulus would pay off the senior notes with borrowings under the revolving credit facility and the incremental revolving credit facility.

With respect to the procedural background of this case, on or about December 6th of 2016, when Cumulus announced the proposed refinancing, it asked JP Morgan Chase to confirm that JP Morgan Chase would consent to the revolving credit commitment assignment and execute the credit agreement amendments. There had been a prior request from the revolving lenders on November 30th of 2016 seeking JP Morgan Chase's consent, and on December 2nd of 2016 there was an inquiry by counsel for an ad hoc group of term lenders who had contacted JP Morgan Chase expressing some concern about this. There was a response from JP Morgan Chase indicating that it was reviewing the proposed assignments and amendments and sought further detail. Cumulus reiterated its requests for JP Morgan Chase's consent and execution on December 7th. And then, on December 9th, there was a letter that JP Morgan Chase sent to members of the Cumulus Media Incorporated lending syndicate in which Chase asserted its rights under Section 10 of the credit agreement and indicated that it would not act immediately with

respect to approving or signing the proposed assignments and amendments, but would host a conference call for the lenders in the following week to discuss the proposal and Chase invited Cumulus to address the lenders at that time.

Before the conference was held -- I'm not even sure if it was scheduled -- this action was brought on December 12th of 2016. I have already discussed the relief sought. On December 15th, the term lenders' petitioned to intervene. That was granted at a show cause hearing held on December 22nd. We then set a very expedited schedule for motions for summary judgment. Cumulus filed its motion on the 13th of January, the cross-motions and opposition were filed on the 27th of January, cumulus filed its reply and opposition on February 3rd, and the term lenders and Chase filed a reply on February 10th.

In the interim, there were a few developments on January 11th of 2017. Cumulus announced that 70.7 percent of the outstanding principal amount of the senior notes had been tendered, and Cumulus had also announced that the expiration date of the exchange offer had been extended to March 13th, 2017, and this was discussions that I had with counsel. I think with respect to the quantum of lenders who would participate, I think they're in part waiting for this decision and so I will do that.

I am not going to discuss the standards for summary judgment because I know all of the lawyers in this room are

familiar with them. There are lots of principles of New York contract Law that I will refer to just briefly.

Under New York Law, when one is considering a contract on a summary judgment motion, the analysis takes place in two stages. The Court must first determine, as a matter of law, whether the disputed contractual terms are ambiguous and that requires a Court to construe contract terms in accordance with the parties' intent which is generally discerned from the four corners of the contract itself.

There are circumstances in which one can find ambiguity and perhaps consider extrinsic evidence, but generally speaking, the motion for summary judgment may be granted only where the agreement's language is unambiguous and conveys a definite meaning. Let me just note, however, that just because the parties are arguing about what a particular provision means, just because there are different interpretations of a provision that does not necessarily make something ambiguous. A Court may not find a contract ambiguous where the interpretation urged by one party would strain the contract language beyond its reasonable and ordinary meaning.

Again, these are principles that I know the lawyers in this room are very familiar with. I will just give a couple of cites even though these are things with which each of you is familiar. Ellington v. EMI Music Incorporated, 21 N.E.3d 1000, (N.Y. 2014); Olin Corporation v. American Home Assurance Corp,

704 F.3d 89 (2d Cir. 2012), and Law Debenture Trust Company of New York v. Maverick Tube Corporation, 595 F.3d 458 (2d Cir. 2010).

There are other provisions of contract interpretation that apply here. In interpreting a contract under New York Law, words and phrases should be given their plain meaning and the contract should be construed so as to give full meaning and effect to all of its provisions. That is Process America Incorporated v. Cynergy Holdings, LLC, 839 F.3d 125 (2d Cir. 2016).

The contract must be read as a whole. There is, as well, in the same Process America decision, an articulation of the very well-established principle that Courts disfavor reading of a contract that renders any provision superfluous. And so, in situation of contract ambiguity, an interpretation that gives reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable. And that's a quote from Second Circuit decision from 2014, Sompo Japan Insurance Company of America v. Norfolk Southern Railway Company.

I also note, and because it is quite relevant to this case, that specific terms and exact terms are given what greater weight than general language, and I am aware of the established principle that where contract provisions use different language, Courts must assume the parties intended

different meanings. I am citing here Bank of New York Mellon Trust Company v. Morgan Stanley Mortgage Capital Incorporated, 821 F.3d 297, (2d Cir. 2016).

Again, I am really glossing over the legal points here because the parties are aware of them. Let me get, please, to the analysis.

Beginning with Cumulus' motion for summary judgment first. They've asked me to enter summary judgment declaring that JP Morgan Chase has breached the credit agreement and that its proposed refinancing is consistent with the terms of that agreement. I can find neither but I am going to begin with the latter.

At its essence, the argument of Cumulus is that it ought to be permitted to execute the Proposed Refinancing -- and I am using initial caps there -- even if it is not a Permitted Refinancing -- again, initial caps. The credit agreement, as a whole, may -- may -- allow for a refinancing that is not a permitted financing -- and that's something I will discuss in a few moments -- but I do not believe that it permits the proposed refinancing, and in so doing I have considered the relationship between and among the negative covenants in Section 8 of the credit agreement and the rest of the credit agreement. And let me explain to you, please, my understanding.

I find, first, that the proposed refinancing is barred

by Section 8.2 and that identifies the indebtedness that Cumulus must bear. Section 8.2(h) permits Cumulus to incur and bear indebtedness in respect of the senior notes outstanding on the date of the agreement and any permitted refinancing thereof. This language limits the senior note indebtedness in plain terms. Cumulus may bear indebtedness derived only from any permitted refinancing of the senior notes, not any refinancing thereof. And in keeping with the way that Cumulus itself contends the agreement should be read, I am giving meaning to this express limitation.

I will pause for this frolic and detour and make my apologies to the drafters of this section, but I don't find Section 8, including Section 8.8, to be a model of clarity. The parties have asked me to consider Section 8.8J which appears to permit Cumulus to make payments in respect of the senior notes and any permitted refinancing thereof in connection with any refinancing of the senior notes or any permitted refinancing thereof permitted pursuant to the terms hereof. To my mind, this last clause, "permitted pursuant to the terms hereof," must apply to both clauses. It allows payments in two cases. In connection with any refinancing that is permitted by the contract as a whole and in connection with any Permitted Refinancing -- initial caps -- permitted by the contract as a whole because otherwise, Section 8.8(j) would be redundant and superfluous. The contract does not need to

specify any that any permitted refinancing thereof must be permitted pursuant to the contract as a whole because every permitted refinancing is already permitted by the contract by its definition.

Cumulus goes a step further, however, and it contends that although the phrase "any refinancing of the senior notes permitted pursuant to the terms hereof," must encompass any refinancing that is permitted by any provision of the contract, and just stated somewhat differently, Cumulus argues that because various provisions of the credit agreement authorize the assignments and amendments required to execute the components of the proposed refinancing, the proposed refinancing, as a whole, must be authorized by the credit agreement and perhaps -- perhaps -- if the contract did not contain the negative covenants that it does, this argument would succeed but I cannot read Section 8.2 out of the contract which only allows Cumulus to bear indebtedness with regard to the senior notes that is derived from these notes or any permitted refinancing thereof.

Cumulus is correct that Section 8.2 allows for debt borne in conjunction with a revolving credit facility and an incremental credit facility but JP Morgan Chase and the term lenders are correct to emphasize that a refinancing involves two steps, the borrowing of the funds and their use to refinance a debt. And the definition of refinancing that

Cumulus itself provides at page 9 of its brief confirms this understanding.

Cumulus' argument fails at the definition's second component. Section 8.2's permission that Cumulus borrow under revolving credit facility and/or an incremental credit facility does not allow also that Cumulus may use those funds to refinance the senior notes in a refinancing that would not qualify as a permitted refinancing. Any attempt to do so would conflict with Section 8.2 because it would leave Cumulus to bear an indebtedness related to refinancing of the senior notes that is not a permitted refinancing.

And let me pause here for a moment to talk about why I believe the proposed refinancing is not a permitted refinancing.

A permitted refinancing of all or any portion of any indebtedness is a refinancing, refunding, renewal, or extension of such indebtedness where the principal amount thereof does not exceed the principal amount of the indebtedness so modified, refinanced, refunded, renewed, or extended, and other than with respect to a permitted refinancing in respect of indebtedness permitted pursuant to 8.2(j), such modification, refinancing, refunding, renewal, or extension has a final maturity date equal to or later than the final maturity date of the indebtedness being modified, refinanced, refunded, renewed, or extended. And to the extent that the liens securing the

indebtedness being refinanced are subordinated to the liens securing the obligations, any liens securing such refinancing indebtedness is subordinated to the liens securing the obligations on terms at least as favorable when taken as a whole to the lenders as those contained in the applicable subordination language, if any, for which for the indebtedness being refinanced.

Now, in the opening brief Cumulus did not argue that the proposed exchange is a permitted refinancing. The term lenders may be correct that such an argument is waived. There was some suggestion in the reply brief that it might be but I don't believe it is.

First, the parties agree that unless 100 percent of the current revolving lenders assign their commitments, some amount of the loans drawn from the revolving credit facility will remain due on December 23rd, 2018. This maturity date is earlier than the final maturity date that the then-refinanced senior notes would have originally had which is May 2019, such that the refinancing would not be a Permitted Refinancing under Section 1.1. And because the credit agreement requires that revolving loans be made pro rata by all revolving lenders, Cumulus could not avoid this problem by drawing only from those lenders who have agreed to the maturity date extension.

Now, Cumulus' attempt to argue around this provision is to note that the outcome is unlikely because refusing to

assign their positions is against the revolving lenders' interests. That may be, but that is irrelevant. The proposed refinancing, by its terms, does not have a definitive final maturity date equal to or later than the final maturity date of the indebtedness being identified. It is not a permitted refinancing. Even if a hundred percent of the current revolving lenders did assign, it would still not be permitted because the definition of a permitted refinancing requires, as well, that the liens securing the indebtedness being refinanced that are subordinate to the liens securing the term loans must remain subordinated on terms as least as favorable to the lenders as before. Here, Cumulus' proposed exchange would refinance the unsecured senior notes with a lien on Cumulus' assets that is less favorable to the lenders as it was before. It seeks to refinance an unsecured debt and to grant its holders a first lien.

Cumulus notes that this provision is inapposite because there are, at present, no liens securing the senior notes. Yeah, maybe, but if this is the case, Cumulus' proposed exchange must fail on a different basis because then suddenly there is a new lien and then the proposed refinancing would violate Section 8.3 in the manner that JP Morgan Chase has argued.

Now, let me just pause for a moment and say that I'm not sure, and therefore I'm not going to agree with JP Morgan

Chase or the term lenders that it must be true that the only refinancing of the unsecured notes permitted under the credit agreement is a Permitted Refinancing with initial caps. I am mindful of my obligation to give meaning to all of the contracts provisions and construing the credit agreement in plaintiff's favor, I note that its plain text contains words like "any refinancing." And so, if the only possible language -- if the only possible refinancing were a permitted refinancing, I'm not sure what this language would be for.

The issue is one of the theoretical versus actual. There may be daylight between a refinancing permitted under this agreement and a permitted refinancing. It doesn't mean that the credit agreement is ambiguous. At the very least, the term lenders are correct that the daylight between these concepts is vanishingly small if it exists at all. And so, while there may, somewhere out there, be refinancings that are permitted by the contract as a whole that nonetheless fall outside of the category of a permitted refinancing, I cannot find that Cumulus' proposed refinancing is that type. It is not permitted under the credit agreement for the reasons I have just described already and several others. I also do not believe that the refinancing is permitted by Section 3.2.

Now, Cumulus argues that reading Section 8.2 to limit Cumulus' rights to bear senior note indebtedness that is refinanced other than by a -- excuse me -- permitted

refinancing, is improper. Let me consider the additional argument that this reading conflicts with Section 2 of the credit agreement which allows Cumulus to use the proceeds of its borrowing under the revolving credit facility for general corporate purposes. If there is a conflict here, I believe that it is of Cumulus' own making and I believe that it is voided.

Section 3.2 permits Cumulus to use the proceeds of its borrowing under the revolving credit facility for general corporate purposes but I don't believe that that would include general corporate purposes used in a manner that would violate Section 8's negative covenants. I do appreciate counsel's suggestion that Section 8 is a list of thou shalt nots, but as I consider the placement and location and purpose of Section 8, what I think is that it exists where it is and how it is so that it informs the grants of permission in other locations of the section by which I mean if you are entitled to do something under one section, implicitly there is indication that so long as it doesn't violate other covenants. I don't think it had to be for example, a bracket or parenthetical at the end of each grant of permission saying so long as you don't violate the negative covenants. That's implicit.

I find the reading that Cumulus has of general corporate purposes to be simply too broad because of my concern that it would read many of Section 8's negative covenants out

of the contract.

Among other things, as the term lenders have explained, Cumulus' reading would obviate the need for the second exception in section 8.8(j). The first, 8.8(j)(1) is something that has already been discussed, allows Cumulus to make payments on the senior loans in conjunction, as part of the refinancings that are permitted by the credit agreement.

The second exception, 8.8(j) 2, allows for payments on the senior notes if Cumulus' consolidated first lien net leverage ratio is at a 4.1 threshold which is higher than the 5.1 threshold that the ratio must meet for Cumulus to draw on the revolving credit facility. If Cumulus' reading were correct, Cumulus could withdraw under the revolver when the ratio was at 4.1 and make payments on the senior loans in circumstances where such a payment would be barred by 8.8(j)(2) and its 5.1 ratio requirement. If that's the case then why -- why -- have subsection 8.8(j)(2) at all? For that provision to have any meaning it must exist to limit other provisions of the credit agreement such as Section 3.2.

My point is that the specific negative covenants in Section 8 must be read to govern general grants of rights like those found in Section 3.2. And this reading is in keeping with the preference of the Courts in this circuit for contract interpretations that give meaning to all of a contract's provisions.

The parties at the back table have site cited the Citibank and Bank of New York cases, one from this district, one from the Delaware Chancery Court. I am aware that neither case is binding on me but I do agree that those cases provide analogous facts and persuasive reasoning with which my holding today is consistent.

I think it also is in keeping with other general rules of contract interpretation such as the fact that the specific governs the general. And I also credit this part of defendant's argument: Sections like 8.8(i) which allow the prepayment of the senior notes in exchange for common stock, allow prepayment of the senior notes where such prepayment will not harm the rights an the interests of the term lenders. Their permitted refinancing provision, the consolidated first lien net average ratio and its utilization as a threshold for drawing down the revolving credit facility and all of Section 8's negative covenants all embody the parties' intent to imbalance Cumulus' interest in financial flexibility with the term lenders' interest and repayment and this interest accords with common sense.

The credit agreement, as a whole, attempts to maximize Cumulus' ability to borrow and invest without compromising its financial health and, by extension, the likelihood that the term loans and the loans extended under the revolving credit facility will be repaid. What Cumulus wants me to do is to

extract, to pluck assorted provisions out of context, string them together in a way that may permit this refinancing but actually undermine and indeed violate the remainder of the agreement and I am not going to do that.

There is another argument that has been raised and that has been raised principally by the intervenors and that is that the contemplated transaction cannot take place in light of Section 8.16. This permits Cumulus to amend, modify, waive, or otherwise change or consent or agree to such things to any indenture, credit agreement, or other document entered into evidence to govern -- sorry entered into, to evidence or govern the terms of any indebtedness identified on schedule 8.2, or permit to be created, incurred, or pursuant to Section 8.2 and in each case any indenture, credit agreement, or other document entered into with respect to any extension, renewal, replacement, or refinancing thereof only -- and it took me a while to get there but this is the point -- only, so long as so doing would not in any material respect adversely affect the interests of the lenders or would otherwise not be prohibited hereunder.

Now, what the terms lenders have suggested to me, and they gave me a demonstrative to that effect today, is that the proposed refinancing would result in the transfer of $209 million in value from the term lenders to the unsecured senior noteholders because it provides for the unsecured senior notes

to be replaced by new revolving loans that would be secured by the same collateral that secures the term loans and on a pari passu basis thus diluting the terms lenders already undercollateralized position, and this value dilution would affect both the term lenders and the revolving lenders.

The term lenders have separately argued that increasing the debt would worsen, materially, Cumulus' ability to refinance the term loans. I don't think anyone is suggesting that there is any additional cash that's being created by the proposed exchange. Cumulus is proposing retiring $610 million of unsecured senior notes and replacing them with $305 million of secured revolving loans. I take the point of the defendants here that the economics of this transaction are that the senior noteholders are forgiving half of the face value of their unsecured and underwater debt in exchange for getting a first lien security interest on the remainder. No one is disputing as well that Cumulus' collateral is valued at $1.449 billion, far less than the $1.81 billion that they owe under the term loans that this collateral secures. And that's even less than the $2.42 billion total of Cumulus' interest bearing liabilities which include as well the $610 million owed on the senior note.

I am aware that materiality is frequently and generally a question fact to be resolved at trial, but here I have accepted the uncontroverted factual evidence that these --

of what these effects would be, and I find them to be material. I do not accept the argument made to me today that simply by allowing revolving loan facilities or incremental revolving loan facilities that the term lenders have ex-ante acceded to them not being materially adverse. I agree with Ms. Primoff's argument on this front that there is a baseline level of protection and that while they were agreeing to permit the revolving credit facilities and the incremental revolving credit facilities, they were doing so with the knowledge that the negative covenants in Section 8 including that of Section 8.16, existed to protect them.

Rather than disputing materiality under session 8.16, Cumulus has focused its argument on the applicability of 8.16 and perhaps I should have dealt with that first but let me speak to that.

To my mind, Section 8.16 informs my understanding of the Court as a whole and it supports my determination that all of the provisions in the contract, taken together, evince an intent to balance the interests of the lenders in repayment with the interests of Cumulus in business growth and development, but 8.16 affirmatively bars the proposed refinancing. It applies to any credit agreement entered into to evidence or govern any indebtedness permitted to be created, incurred, or assumed pursuant to subsection 8.2. And the very first indebtedness permitted to be created, incurred, or

assumed pursuant to subsection 8.2 is the indebtedness of the loan parties under this agreement including indebtedness in respect of any incremental facility and permitted refinancing thereof. The credit agreement is, therefore, a credit agreement that was entered into to evidence or govern an indebtedness that was permitted to be created, incurred, or assumed pursuant to subsection 8.2. This conclusion I find bolstered by Cumulus and the term lenders' shared contention that the use of the term "any" evinces an intent that the clause in which "any" is used be construed broadly. In specific regard, I find persuasive the term lenders' argument that the contracting parties would have included a carve-out for the credit agreement in Section 8.16 if they had intended it not to apply.

As Cumulus has argued to me elsewhere, a Court will not shoehorn into a contract additional terms that the parties wish had been included, particularly where the contract could easily have been drafted to incorporate expressly the terms that the party now urges the Court to apply. I am quoting some case cites from page 10 of the plaintiff's brief.

I do not find, as has been suggested to me, that the interpretation offered by the folks at the back table conflicts with Sections 11.1 or 4.24 or 4.25 of the agreement. These define the scope of permissible amendments to the credit agreement, they identify the parties that must consent to such

amendments. They provide for and govern affirmative rights to amend the credit agreement and Section 8.16 establishes the circumstances in which these affirmative rights are curtailed. In other words, while Cumulus may have rights under these provisions to amend the credit agreement, Section 8.16 cabins in the exercise of those rights. Cumulus may not exercise its rights under subsections 11.1(e), 4.24, and 4.25 for doing so would, in a material respect, affect adversely the interest of the term lenders.

I agree, as well, with the term lenders that Cumulus' contrary understanding of the relationship between these provisions would not give full meaning and effect to all of the credit agreement provisions. I do not find -- I am not going to read out Section 8.16 and I am not going to find it trumped by these other provisions either.

Cumulus, understandably, argues that under the term lenders' interpretation, Cumulus could never add on an incremental facility and could never amend the leverage covenants because such action necessarily creates more debt with the security interest in the collateral. Their concern is that this would nullify Sections 4.24, 4.25, and 11.1, thereby eliminating rights that Cumulus had bargained and paid for. I disagree. I find that incorrect. These amendments would be permitted if Cumulus' financial situation were not so dire that they would necessarily harm the interests of the term lenders.

It is only because the value of Cumulus' collateral is less than the sum of its debts that the creation of additional secured interests would affect adversely the interests of the term lenders in a material respect.

I agree that the credit agreement affords Cumulus rights to amend the contract, rights to create an incremental revolving facility, things of that nature, but what I can't agree to is that these rights are unbounded by Section 8's negative covenants.

Reading the credit agreements as Cumulus wishes me to do would create conflict and superfluity, and I do not believe that Sections 4.4, 4.25 and 11.1 can override Section 8's negative covenants if these covenants are to have any meaning at all. I just don't find the converse. I don't find any problem with the fact that understanding Section 8 to impose limits on the affirmative rights provided for in these sections, I don't find it creates superfluity. I find it consistent with the intent evinced by the structure and context of the contract as a whole.

So, ultimately, I can't agree with Cumulus' argument that the credit agreement permits each component of the refinancing and therefore the proposed refinancing as a whole. The credit agreement does not permit each component of the refinancing. It does not permit the repayment of the senior notes with proceeds from a refinancing that is not a permitted

refinancing. And, it does not permit the proposed refinancing as a whole because the proposed refinancing adversely affects the lenders' interests in a material respect.

I am now working backwards to the first of Cumulus' arguments which is that JP Morgan chase has breached the credit agreement.

Under New York Law, the elements of such a breach would be the existence of such a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach.

JP Morgan Chase has argued here that it has not breached the credit agreement but, rather, has performed in accordance with it, and the obligations at issue that arise from several provisioned in the agreement including Section 11.6, Section 11.1 and Section 4.25.

Again, this is a situation where some issues, including the issue of reasonableness of conduct, might be inappropriate at the summary judgment stage and might be better accorded to a trier of fact, but here I find that Section 10 of the credit agreement unambiguously protects JP Morgan Chase's decision to confer with the lenders before acting on Cumulus' proposed transaction. Section 10.4 of the agreement provides that JP Morgan Chase shall be fully justified in failing or refusing to take any action under the loan document unless it

shall first receive such advice or concurrence of the required lenders, or where unanimous consent of the lenders is expressly required hereunder, such lenders as JP Morgan Chase deems appropriate.

Here, Chase sought the advice and concurrence of the required lenders, but Cumulus filed the instant action before that consent could be procured and certain term lenders have indicated expressly by their appearance in this litigation that rather than consenting to the proposed exchange, they are concerned by and they object to it.

I find that JP Morgan Chase was justified in refusing to take further action, I find that their conduct was provided for by the credit agreement, and I therefore find that they have not violated the credit agreement by invoking the protections that it expressly affords.

Cumulus' has asked me to look at an objective factors requirement. I agree with JP Morgan Chase that the cases cited in this regard are inapposite. This isn't a case where consent was withheld for a reason not provided by the contract, with some sort of improper purpose of extracting value not permitted by the contract. JP Morgan Chase withheld its consent as its contract permitted in keeping with its obligations as the administrative agent and not because of some identified ulterior motive. Given that, and given that many courts including the Process America Court I mentioned earlier, find

these circumstances insufficient to raise a triable issue of fact, I am granting JP Morgan Chase's motion for summary judgment.

With respect to the term lenders, there are some additional arguments that I believe to be mooted by a decision that I have rendered this afternoon. I am not getting into the issue of extrinsic evidence. I don't have any here given the way in which this case progressed but I am not getting into it. I don't believe, as well, that I need to address the term lenders' claim that Cumulus has breached its implied obligation of good faith and fair dealing. I do understand that the term loan lenders may be correct that they are permitted to plead such claims in the alternative. I have found that the proposed refinancing would breach the express terms of the credit agreement and I therefore am not going to pause to consider this alternative ground. I also think if I got to it, there would be issues of fact, so I'm not going to.

There is as well a counterclaim as an alternative theory that's been raised by the term lenders -- I have termed it the most favored nation and that's how the parties have termed it as well -- that if the proposed transaction were a permitted refinancing, term lenders' would enjoy the benefit of the most favored nation clause in Section 4.25 because an incremental revolving loan that is not freely prepayable because of the restricted payments covenant should be

recharacterized as a term loan.

Now, Cumulus has argued for summary judgment on that claim but it hasn't argued that its proposed refinancing is a permitted refinancing, at least not with any degree of clarity and precision that I can use. Because I found that the proposed refinancing is not a permitted refinancing, the question of waiver is irrelevant. I believe that this argument is mooted but the parties will of course let me know. No one has addressed the issue of indemnification and therefore I'm not going to be addressing it, and the term lenders have argued in their counterclaims that allowing the proposed refinancing would trigger an event of default. I don't think I have been presented with this for summary judgment purposes. I have found that the proposed refinancing would in fact breach the credit agreement and is not authorized under it so I don't believe I need to address this any further.

Given all of this and thanking all of you for your patience in listening to it, I am denying Cumulus' motion, I am granting JP Morgan Chase's motion, and I am granting in part and denying in part the term lenders' motion.

Now, I realize I have just thrown a lot of stuff at you and I realize that for some of you there are some time sensitivities. I don't know what the parties want to do and I'm not going to trouble you here to tell me. I want you to talk to each other and get back to me as soon as you think

appropriate be that Monday, be that next week, with whether I have any claims are left in this litigation that the parties wish to pursue, whether someone wants me to enter final judgment, whether barring that and if the parties are of the belief that what I have just done is not a judgment from which an appeal can be taken whether I should be either discussing or entertaining with the parties the possibility of an interlocutory appeal or something else.

I want you to think about what I have said, to consider it, to talk among yourselves, and to get back to me again as soon as you feel appropriate and I will deal with it as soon as I can.

Thank you very much, again, for all of your hard work, and I will let you go. Thank you.

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