

**Whitebox Convertible Arbitrage Partners L.P. v
Fairfax Fin. Holdings, Ltd.**

2008 NY Slip Op 33621(U)

October 17, 2008

Supreme Court, New York County

Docket Number: 600306/08

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

Justice

Index Number : 600306/2008

WHITEBOX CONVERTIBLE

vs

FAIRFAX FINANCIAL

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
OCT 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

IN ACCORDANCE WITH THE ACCORDING MEMORANDUM DECISION IS DISPOSED OF

Dated: 10/17/08


HON. CHARLES E. RAMOS, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
WHITEBOX CONVERTIBLE ARBITRAGE PARTNERS
L.P., HFR RVA COMBINED MASTER TRUST,
GUGGENHEIM PORTFOLIO COMPANY XXXI, LLC,
INVESTCORP SILVERBACK ARBITRAGE MASTER
FUND LTD., OTA LLC, ZAZOVE AGGRESSIVE
GROWTH FUND, L.P., ZAZOVE HIGH YIELD
CONVERTIBLE SECURITIES FUND, L.P.,
LIBERTYVIEW CREDIT OPPORTUNITIES FUND, LP,
LIBERTYVIEW FUNDS, LP, LIBERTYVIEW SPECIAL
OPPORTUNITIES FUND, LP, and NORTH POLE
CAPITAL MASTER FUND,

Index No. 600306/08

Plaintiffs,

-against-

FAIRFAX FINANCIAL HOLDINGS, LTD.,

Defendant.

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

Charles Edward Ramos, J.S.C.:

The defendant Fairfax Financial Holdings, Ltd. ("Fairfax") moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the amended complaint of the plaintiffs, Whitebox Convertible Arbitrage Partners, L.P., HFR RVA Combined Master Trust, Guggenheim Portfolio Company XXXI, LLC, Investcorp Silverback Arbitrage Master Fund Ltd., OTA LLC, Zazove Aggressive Growth Fund, L.P., Zazove High Yield Convertible Securities Fund, L.P., Libertyview Credit Opportunities Fund, LP, Libertyview Funds, LP, Libertyview Special Opportunities Fund, LP, and North Pole Capital Master Fund (collectively "Whitebox").

As alleged in the amended complaint, Fairfax is a Canadian financial services holding company. In July 2003, Fairfax issued US\$200 million of 5% convertible senior debentures due July 15, 2023 (the "Notes"). The Notes are governed by an indenture,

dated July 14, 2003 (the "Indenture"), and are convertible into subordinate voting shares of Fairfax (the "Shares") using the defined conversion rate set forth in Section 10.2 of the Indenture (the "Conversion Rate"). The initial Conversion Rate was 4.7057 Shares per US\$1000 Note. Whitebox was the holder of some of these Notes.

The Indenture provides that the Conversion Rate may be increased if, prior to July 15, 2003, Fairfax distributed to its shareholders more than Cdn\$3.00 per Share in cash in any twelve month period. However, the increase must be of at least 1%, otherwise the increase is carried forward and included in the next calculation.

On January 4, 2007, Fairfax declared an annual dividend of US\$2.75 per Share and a Record Date of January 25, 2007.

On January 2, 2008, Fairfax declared an annual dividend of US\$5.00 per Share and a Record Date of January 14, 2008.

Although the 2008 dividend is greater than Cdn\$3.00 per Share, it is undisputed that, pursuant to Section 10.3(i) of the Indenture, no adjustment of the Conversion Rate is required because the increase would be less than 1%.

On January 9, 2008, Fairfax called all the Notes for redemption and set a redemption date of February 13, 2008. Fairfax also announced that the holders of the Notes may exercise their conversion rights at the initial Conversion Rate of 4.7057 until February 12, 2008, which was one day before the date of redemption.

On January 15, 2008, Whitebox surrendered its Notes for conversion, but expressly reserved its right to additional Shares under the increased Conversion Rate. However, Fairfax denied Whitebox's request to increase the Conversion Rate.

Whitebox then commenced this action seeking damages for Fairfax's breach of the Indenture. Fairfax moved to dismiss the amended complaint.

As a preliminary matter, Fairfax argues that this action must be dismissed because Whitebox failed to comply with Section 6.6 of the Indenture, which sets forth five conditions that must be satisfied before pursuing any remedy with respect to the Notes or the Indenture.

While, the Court agrees that Whitebox failed to comply with Section 6.6(4) of the Indenture by not allowing 60 days for the Trustee to comply with the request, in light of the fact that the Trustee has waived the 60 day requirement and the default, this Court finds no reason to bar this action under Section 6.6 of the Indenture.

Fairfax moves to dismiss pursuant to 3211(a)(1) on the ground that the Indenture establishes a defense to the allegations in the amended complaint.

In 2007, Fairfax declared a dividend of US\$2.75 per Share and in 2008, a dividend of US\$5.00 per Share.

Fairfax does not dispute that the amount of the dividends in the period between January 25, 2007 and January 14, 2008 exceeded Cdn\$3.00 per share, but Fairfax argues that Whitebox is

[* 5]

misinterpreting the language in Section 10.3(f) of the Indenture. While Whitebox is using the time between Record Dates to measure the twelve months between dividends, Fairfax purports that the Indenture clearly states that the twelve months is measured by when the dividends are actually distributed, which would be February 8, 2007 in 2007 and February 11, 2008 in 2008. Using the dates proposed by Fairfax, there is more than twelve months between the dividends, therefore, no increase in the Conversion Rate is required.

Whitebox argues that the Indenture states that the twelve months are measured by the Record Dates, which were January 25, 2007 and January 14, 2008, and because the aggregate amount of dividends for that period exceeded Cdn\$3.00 per share, Whitebox is entitled to have the Conversion Rate increased.

It is undisputed that in reviewing "a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 20 [2005]).

Section 10.3(f) of the Indenture states:

"In case [Fairfax] shall, by dividend or otherwise, distribute to all holders of its Shares cash...to the extent that the aggregate amount of any such cash distributions and dividends in any 12-month period exceeds, with respect to the period:

(A) prior to July 15, 2008 Cdn\$3.00 per Share (or if such distribution or dividend is declared in U.S. dollars, as determined using

the noon buying rate in The City of New York for cable transfers in Canadian dollars as certified for customs purposes by the Federal Reserve Bank of New York on the date such distribution or dividend is declared); or

(B) on or after July 15, 2008, 4.0% of the Current Market Price (as defined in Section 10.3(g) of the Shares,

in each case as determined on the Record Date for such distribution or dividend, then, in such case, the Conversion Rate shall be increased..."

The Court disagrees with Fairfax's interpretation and finds that Section 10.3(f) of the Indenture unambiguously states that the determination of whether the dividend exceeded Cdn\$3.00 per Share in any twelve month period is "as determined on the Record Date."

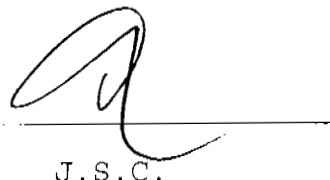
Therefore, Fairfax has failed to conclusively establish a defense, pursuant to CPLR 3211(a)(1), to the cause of action asserted by Whitebox. (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Furthermore, the Court finds that Whitebox's allegation that Fairfax has breached Section 10.3(f) of the Indenture by failing to increase the initial Conversion Rate from 4.7057 to 4.7968 sufficiently forms a cause of action, thereby defeating Fairfax's motion to dismiss pursuant to CPLR 3211(a)(7).

According it is,

ORDERED that the defendant Fairfax Financial Holdings, Ltd.'s motion to dismiss the amended complaint is denied in its entirety.

Dated: October 17, 2008


J.S.C.

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. CHARLES E. RAMOS