IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
SPEEDCAST INTERNATIONAL LTD., *et al.*,[1]	)	Case No. 20-32243 (MI)
	)	Judge Marvin Isgur
Debtors.	)	(Jointly Administered)

REPLY OF AD HOC GROUP OF SECURED LENDERS IN SUPPORT OF DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND PROVIDING CLAIMS WITH SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES, (IV) MODIFYING THE AUTOMATIC STAY, (V) SCHEDULING A FINAL HEARING, AND (VI) GRANTING RELATED RELIEF

The ad hoc group of secured lenders to SpeedCast International Ltd. ("Speedcast") and certain of its subsidiaries (the "Ad Hoc Group"), through its undersigned counsel, hereby files this reply to the objection of Credit Agricole Investment Bank ("CACIB") [ECF No. 167] (the "CACIB Objection") to the *Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims With Superpriority Administrative Expense Status, (III) Granting Adequate Protection to The Prepetition Secured Parties, (IV) Modifying the*

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at http://www.kccllc.net/speedcast. The Debtors' service address for the purposes of these chapter 11 cases is 4400 S. Sam Houston Parkway East, Houston, Texas 77048.

(….continued)

Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [ECF No. 27] (the "DIP Motion"),[2] and avers as follows:

PRELIMINARY STATEMENT

1. The Debtors and the DIP Lenders have worked quickly and tirelessly to reach an agreement in these extraordinarily difficult times that would provide the Debtors with the financing needed to facilitate a successful reorganization.

2. The DIP Facility's terms reflect the reality that the Debtors and the DIP Lenders face.

3. The Debtors entered chapter 11 in immediate need of liquidity in order to continue operating as a viable going concern and avoid a messy liquidation that would be to the detriment of the Debtors' estates and all stakeholders. Indeed, notwithstanding the funding of the first $35 million of the DIP Facility following entry of the Interim Order, the Debtors remain in need of additional near-term funding. The DIP Facility provides the Debtors with this much-needed access to capital.

4. Importantly, however, in these extraordinary times, the DIP Lenders' ability and willingness to provide the DIP Facility is subject to the important protections and rights in the Final Order. The DIP Lenders are able and willing to offer that financing, but can only do so on terms that reflect the likelihood that the Debtors will be able to resume profitable operations.

5. As the Court is aware, the Debtors' customers (and key sources of revenue), include leading companies in industries (e.g., passenger cruises, offshore drilling) that face deep and potentially existential challenges due to the COVID-19 pandemic, the collapse in oil prices

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the DIP Motion, DIP Credit Agreement (as defined in the DIP Motion) or CACIB Objection.

and the resulting economic dislocation. At the same time, the upheaval in global markets has put strain on capital and made it more difficult for lenders to make investments and underwrite loans.

6. In these extraordinary and challenging circumstances, the DIP Lenders have been able to commit to finance the Debtors' efforts to reorganize through the Chapter 11 Cases. And after extensive, hard-fought negotiations, the Debtors and the DIP Lenders were able to agree to a set of terms on which to provide that financing. In this environment, the resulting DIP Facility is an achievement and one that should not be undone, particularly as a result of the objections currently before the Court. The DIP Facility reflects compromise and an exercise of the Debtors' good faith business judgment. Most importantly, it was structured and implemented to comply with the terms of the Debtors' prepetition loan documents and applicable law.

7. Since the Chapter 11 Cases began, the Debtors, the DIP Lenders and the Prepetition Lenders (including the members of the Ad Hoc Group) have continued to work with other stakeholders to achieve consensus support for the DIP Facility. To that end, the Ad Hoc Group is pleased that, as of the time of this filing, an agreement in principle has been reached with the Official Committee of Unsecured Creditors (the "Committee") and the Debtors to resolve the Committee's objection [ECF No. 200].[3] At this juncture, CACIB stands alone in its objection to the DIP Motion.

8. CACIB's objection is without merit for several reasons. The main argument that it advances—that the Roll-Up violates the SFA—is incorrect. Specifically, the Roll-Up does not implicate the provision of the SFA that CACIB seizes upon because the Roll-Up does not call for

[3] The parties are working to document this resolution in a revised proposed final order approving the DIP Facility and the Ad Hoc Group understands that the Debtors intend to file that revised proposed order with the Court as soon as it is in agreed form. In the unlikely circumstance that this agreement in principle does not result in a form of order that is acceptable to each of the Debtors, the Committee and the Ad Hoc Group, the Ad Hoc Group reserves the right to supplement this response in writing and to present argument with respect to the Committee's objection at the May 20, 2020 hearing.

any distribution of proceeds of collateral or any other amounts by the Prepetition Agent and does not alter the Prepetition Agent's payment waterfall. Rather, like any other DIP loan, it is an agreement among the Debtors and DIP Lenders that does not implicate transfer of funds through an agented loan structure.

9. There are other defects in CACIB's objection, too.

- CACIB's objection should be overruled because nothing is due and owing to CACIB at this time. CACIB's Designation of Early Termination was not issued in accordance with the governing documents that CACIB admits dictate when and how it may issue such a notice.
- CACIB ***consented*** to the Third Amendment (which validated the Roll-Up) in its capacity as Lender and its consent as Secured Hedging Bank was ***not*** necessary to implement the Third Amendment or the Roll-Up.
- CACIB, as a Secured Hedging Bank, is not a holder of liens and therefore cannot argue that it is entitled to adequate protection, especially when it authorized the Prepetition Agent to act on its behalf regarding matters related to Collateral under the SFA.
- CACIB's argument under Section 510 of the Bankruptcy Code is a non-sequitur, because the Roll-Up does not implicate the SFA waterfall provision.

10. For these reasons, and as explained more fully below, CACIB's objection should be overruled.

I. The Roll-Up Does Not Violate the SFA.

11. CACIB's argument that the Roll-Up is an improper amendment to the waterfall provision in Section 7.02 of the SFA is a red herring and should be dismissed out of hand.

12. First and foremost, there was no amendment to Section 7.02 of the SFA. The Third Amendment to the SFA does not mention Section 7.02 nor does it even discuss, let alone alter, the application of proceeds under the SFA. Rather, the Third Amendment permits the Prepetition Agent to enter into the DIP Credit Agreement, among other things, and directs the agent not to object to any proposed order approving the DIP Facility. Without any amendment to the waterfall provisions in Section 7.02 of the SFA, CACIB's argument falters on its first step.

13. Notwithstanding the plain language of the Third Amendment, CACIB argues that the Third Amendment "effectively" modifies the waterfall provisions. However, a closer examination of Section 7.02 shows that the provision in fact has a specific and narrow scope that is not in any way implicated by the Third Amendment or the Roll-Up. Specifically, Section 7.02 of the SFA provides that the "***Agents*** shall apply (a) the proceeds of any collection, sale, foreclosure, or other realization upon any Collateral, consisting of cash, and (b) ***any amounts received in respect of the Obligations*** following the termination of the Commitments and any of the Loans becoming due and payable pursuant to Section 7.01 as follows . . ." (emphases added).[4]

14. By its plain terms, Section 7.02 dictates how the ***Prepetition Agent***—not the Debtors or the DIP lenders or anybody else—is to distribute any "amounts received" upon the occurrence of an Event of Default under the SFA. Indeed, CACIB recognizes that the waterfall

[4] That section then creates a seven-tier waterfall for distribution by the Prepetition Agent to parties to the SFA. As relevant here, CACIB, as a Secured Hedging Bank, would be entitled to collect under the waterfall's third and fourth tiers if the Roll-Up were being administered through the Prepetition Agent as part of the SFA—***which it is not***.

mandated by Section 7.02 of the SFA controls actions that the ***Prepetition Agent*** may take. (*See* CACIB Obj. ¶ 4 ("Section 4.2 of the Security Trust Deed requires that the ***Security Trustee*** [*i.e.*, the Agent] apply all distributable proceeds received by it in accordance with the waterfall provisions of Section 7.02 of the SFA. Section 7.02 of the Guarantee Agreement also provides that any proceeds received ***by the Prepetition Agent*** from the collection or enforcement of the Guarantee Agreement are to be applied in accordance with Section 7.02 of the SFA." (emphases added).)

15. It follows, therefore, that any purported amendment to Section 7.02 of the SFA would necessarily implicate—and amend—how the ***Prepetition Agent*** is to distribute "amounts received" through Section 7.02's waterfall.

16. The Roll-Up has no such effect. Rather, it provides that "[s]ubject to and effective upon entry of the Final Order, . . . the Debtors shall be deemed to exchange and substitute (and prepay) Prepetition Loans of the DIP Lenders on a cashless, dollar-for-dollar basis with the DIP Roll-Up Loans. . . . The DIP Roll-Up Loans deemed substituted and exchanged (and used to prepay Prepetition Loans) . . . shall be deemed exchanged (and prepaid) therefor." Interim DIP Order, ¶ 4.04(b). The Roll-Up does not concern, or even reference, the Prepetition Agent. The Roll-Up Loans themselves are not "amounts received" by the Prepetition Agent, but are expressly deemed an exchange by "the Debtors" in the Interim DIP Order, ¶ 4.04(b), and issuance of the Roll-Up Loans occurs "automatically" under the terms of the DIP Credit Agreement without any action by the Prepetition Agent, § 2.01(b). Accordingly, the issuance of Roll-Up Loans does not provide any "amounts" to the Prepetition Agent, nor does it direct the Prepetition Agent as to how to distribute any "amounts received" to the Prepetition

Lenders, Secured Hedging Banks, or anyone else. Indeed, the Prepetition Agent has not and will not receive any "amounts" for distribution in connection with the Roll-Up.

17. The Roll-Up Loans are issued under an entirely separate facility, where the relationship between the DIP Facility and the SFA are governed by the Intercreditor Agreement, and therefore are not part of, and cannot effectuate an amendment to, the SFA. Moreover, the Roll-Up cannot be an amendment to the SFA's waterfall provision because it does not modify the terms by which the Prepetition Agent must distribute proceeds and other amounts received under the SFA. CACIB's objection fails.[5]

II. CACIB's April 27, 2020 Declaration of Early Termination Date Was Ineffective.

18. Even at the outset, CACIB's objection to the Roll-Up fails because no Event of Default under the ISDA Master Agreement between CACIB and SpeedCast International Limited (the "ISDA") has occurred, and CACIB's Designation of Early Termination (the "Designation") is, accordingly, ineffective.

19. Section 7.01 of the SFA identifies certain circumstances that may constitute an Event of Default thereunder. Among them are the "volunt[ary] commence[ment] or fil[ing of] any petition seeing relief under Title 11 of the United States Code . . . ." The Debtors voluntarily commenced this petition seeking relief under Title 11. There is no dispute that that event could constitute an Event of Default under the ***SFA***.

20. But the mere occurrence of one of the enumerated Events of Default under the ***SFA*** does not mean CACIB has the right to notice an Early Termination Date under the ***ISDA***. Indeed, pursuant to the ***ISDA***, there are ***two*** conditions precedent to the noticing of an Event of

[5] The Roll-Up is not part of, or an amendment to, the SFA merely because it calls for payments to parties to the SFA. It is a separate agreement reached among the DIP lenders and the Debtors.

Default. ***First***, an Event of Default under the SFA must occur, ***and second,*** the "Administrative Agent [must give] a notice [of the Event of Default] under Section 7.01 of the Facility Agreement."[6] ISDA § 5(a)(ix).

21. Only one of those preconditions is satisfied here. An Event of Default under SFA § 5(a) has occurred, but the Administrative Agent has ***not*** given notice of any such Event, in part because the Prepetition Secured Parties have not directed the Administrative Agent to provide a notice to exercise remedies under the SFA. The result is simple: CACIB's Designation was ineffective and it is not owed $23,803,088 or any other amounts under the SFA or otherwise.

III. CACIB Consented to the Third Amendment, But Its Consent as a Secured Hedging Bank Was Not Required to Effectuate the Third Amendment.

22. Although CACIB's objections fail on their face, they should also not be credited because ***CACIB consented to the Third Amendment***, which includes an agreement among the Debtors, the other Loan Parties, and Lenders (both as defined in the SFA) that, among other things, the DIP Credit Agreement and the other "Loan Documents," as defined in the DIP Credit Agreement, "shall be deemed permitted and not in conflict with the provisions of the Credit Agreement or any other Loan Document." ***CACIB has already provided its agreement that the DIP Facility is consistent with the SFA***.

23. CACIB hardly acknowledges this fact—burying it in a footnote in its Objection. (CACIB Obj. ¶ 3 n.5.) At the same time, CACIB attempts to explain away this consent by claiming that it did so as Lender, and not as a Secured Hedging Party.

[6] In the Designation, CACIB claims that it is providing notice of the Early Termination Date "in accordance with Section 6(a) of the [ISDA]" of the Early Termination Date. At minimum, the Designation is an implicit recognition by CACIB that the Designation is governed by the terms of the ISDA.

24. CACIB cannot have it both ways: its objections to the Third Amendment should be disregarded because it has ***already consented*** to it.

25. Further, the Third Amendment was duly approved by the Loan Parties and Lenders to the SFA. Because the provision did not amend (and, as noted above, did not otherwise implicate) the waterfall provision in the Credit Agreement, no additional consent from Secured Hedging Banks was required.

26. Section 9.08(c) of the SFA provides that a Secured Hedging Bank's consent to an amendment is required only where an amendment (i) amends Sections 7.02 or 9.08(c) of the SFA (which the Third Amendment did not); (ii) imposes a cap on the Obligations in respect of Secured Hedging Agreements, subject to clause THIRD or FOURTH of the enforcement waterfall set forth in Section 7.02; or (iii) amends the definition of "Secured Hedging Agreement" or "Secured Hedging Bank." SFA § 9.08(c). That Section then proceeds as follows: "no Secured Hedging Bank shall have any right to notice of any action of, subject to the immediately preceding sentence of this Section 9.08(c), to consent to, direct or object to any action hereunder or under any Loan Document or otherwise . . . ***other than in its capacity as a lender***."

27. CACIB duly provided its consent ***in its capacity as lender*** pursuant to SFA § 9.08(c). Its consent in its capacity as Secured Hedging Bank was not required because it did not have consent rights in that capacity. Far from a "two-step process [that] eviscerate[d] CACIB's rights under the SFA," (CACIB Obj. ¶ 18.), the Third Amendment and the Roll-Up do not even implicate—let alone eviscerate—any of CACIB's rights under the SFA. In fact, the entire process was well known to, and expressly approved by, CACIB.

IV. CACIB Is Not Entitled to Adequate Protection as a Secured Hedging Bank.

28. CACIB's contention that it has not been provided adequate protection in its role as Secured Hedging Bank underscores its fundamental misunderstanding of the Secured Hedging Banks' relationship with the SFA.

29. Section 364(d)(1)(B) of the Bankruptcy Code provides that, to "authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien," there must be "adequate protection of the interest of the ***holder of the lien*** on the property of the estate on which such senior or equal lien is proposed to be granted" (emphasis added).

30. CACIB is not a holder of any Liens under the SFA. Rather, as is common in many credit transactions, the Prepetition Agent, as Collateral Agent, is the holder of all Liens granted under the SFA. *See* SFA, Schedule 1.01(a) ("The Security to be provided to or granted in favor of the Collateral Agent and/or the Security Trustee, for the benefit of the Secured Parties, will be given or granted in accordance with the Security principles set forth in this Schedule); *see id.* § 1(g)(vii) ("All Security shall be granted in favor of the applicable Security Agent . . . .). Although the Secured Hedging Banks are beneficiaries of the Liens, they are not holders of the Liens, and therefore are not covered by Section 364 of the Bankruptcy Code by its plain terms.

31. Moreover, like the Lenders under the SFA, the Secured Hedging Banks authorized the Prepetition Agent to "take such actions on behalf of such . . . other Secured Party and to exercise such powers as are delegated to such Agent by the terms and provisions hereof and of the other Loan Documents," including to "execute any and all documents (including releases) with respect to the Collateral, the Guarantees of the Obligations and the rights of the

Secured Parties with respect thereto, as contemplated by and in accordance with the provisions of this Agreement and the Security Documents." SFA § 8.01. Accordingly, CACIB expressly authorized the Prepetition Agent to take action regarding the Liens, including entry into the Third Amendment with the direction of the Required Lenders under the SFA, and therefore cannot now argue that the adequate protection package under the Final Order is inadequate when the Agent was directed by the Third Amendment not to raise such an objection.

32. CACIB does not argue that the adequate protection provided to the Lenders under the SFA is inadequate under Section 364 and, as a Secured Hedging Bank, it has no authority to make such arguments. CACIB's adequate protection argument fails.

V. The Roll-Up Does Not Violate Section 510(a) of the Bankruptcy Code.

33. CACIB's argument that the Roll-Up violates Section 510(a) of the Bankruptcy Code is irrelevant. The SFA creates a waterfall to the extent the Prepetition Agent receives amounts to be distributed to the SFA parties. The Roll-Up, by contrast, has nothing to do with the Prepetition Agent or the SFA's establishment of priorities. Rather, the Roll-Up creates rights under a separate agreement among the Debtors and DIP lenders and provides certain rights on account of participation in the DIP. The Roll-Up simply does not implicate Section 510(a) of the Bankruptcy Code because the Roll-Up does not negate or alter the terms of any subordination agreement.

CONCLUSION

34. For the reasons set forth herein, and for the reasons advanced by the Debtors, the Ad Hoc Group respectfully requests that the Court (i) overrule CACIB's Objection and (ii) grant the Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens

and Providing Claims with Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing and (VI) Granting Related Relief.

Dated: May 19, 2020
Houston, Texas

Respectfully Submitted,

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