Docket #0012 Date Filed: 7/13/2020

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

In re:	§	**Chapter 11**
	§	
SPEEDCAST INTERNATIONAL LIMITED, *et al*.	§	**Bankruptcy Case No. 20-32243**
Debtors.[1]	§	
	§	**(Jointly Administered)**
	§	
CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,	§	
Appellant,	§	
	§	**Civil Action No. 4:20-CV-01970**
v.	§	
	§	
SPEEDCAST INTERNATIONAL LIMITED, *et al.*,	§	
Appellees.	§	
	§	

APPELLEES' OPPOSITION TO MOTION OF APPELLANT CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK TO EXPEDITE APPEAL

TO THE HONORABLE LEE H. ROSENTHAL, U.S. DISTRICT JUDGE:

SpeedCast International Limited and its debtor affiliates in the above-captioned chapter 11 cases, as debtors and debtors-in-possession (collectively, the "**Debtors**" or "**Appellees**"), respectfully submit this *Opposition to Motion of*

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

2032243200925000000000014

Appellant Credit Agricole Corporate and Investment Bank to Expedite Appeal ("**Opposition**").

PRELIMINARY STATEMENT

1. By its motion to expedite (the "**Motion**," Dkt. No. 6), Credit Agricole Corporate and Investment Bank ("**CACIB**") seeks to expedite consideration of its misguided and moot appeal, recklessly flouting a cardinal tenet of appellate jurisprudence that a party may not raise issues, arguments, or positions for the first time on appeal. CACIB's predominant argument here is that the Bankruptcy Code[2] does not permit, and bankruptcy courts are not authorized to approve, "roll-ups" as part of a postpetition debtor financing. Despite ample opportunity, CACIB never once uttered this broad sweeping assertion in the Bankruptcy Court below. Indeed, CACIB did not raise or argue this issue during its oral objection at the two separate hearings for the approval of Debtors' postpetition financing, nor did CACIB raise it in its written objection to the approval of postpetition financing on a final basis.

2. Compounding this overarching defect in its appeal, CACIB now seeks an expedited review solely so that this Court can determine "the validity of the rollup . . . before the parties proceed further down the current road[.]" Mot. at p. 4. The appropriate judicial mechanism for such a situation is the pursuit of a stay

[2] All statutory references herein are to the "**Bankruptcy Code**," 11 U.S.C. §§ 101 et seq., unless otherwise indicated.

pending appeal under Bankruptcy Rule 8007. *See e.g.*, *In re Tolco Properties, Inc.*, 6 B.R. (Bankr. E.D. Va. 1980) ("[T]he purpose of a stay pending appeal is to maintain the status quo and to prevent harm to the moving party between the time the original order was entered and the decision on appeal."). CACIB chose not to seek a stay pending appeal, but now claims that this Court should afford it expedited consideration because with the passing of time the "roll-up arrangement that stands at the center of the postpetition financing would only become more cemented[.]" Mot at. 3. If CACIB wished to halt implementation of the postpetition financing, which inherently includes the Roll-Up,[3] CACIB needed to seek and obtain a stay of the Bankruptcy Court's order approving the postpetition financing. CACIB failed to do that, presumably because it does not meet that standard.

3. The reality is that this appeal is statutorily moot and must be dismissed pursuant to section 364(e), as further explained in Appellees' recently filed motion to dismiss appeal (Dkt. No. 9). To that end, the Debtors have already requested (by way of pre-motion conference letter in accordance with the Court's rules) that the Court not only deny the meritless Motion, but, in fact, suspend or extend the briefing schedule so as to avoid the pointless and unnecessary expense of briefing an appeal that should be summarily disposed of.

[3] Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the DIP Finance Order (Bankr. Dkt. No. 239; Appellate Record ("AR") 2874).

4. The dichotomy is clear. CACIB seeks to expedite consideration of its appeal, which is premised upon an issue that was not raised in the Bankruptcy Court and that seeks a result that is not available to it, in any event, pursuant to section 364(e). Conversely, the Debtors seek to avoid the expense and waste of judicial resources involved in reaching CACIB's flawed "merits" given the straightforward grounds for summary dismissal of its appeal.

5. CACIB's Motion must be denied and the Debtors' request to suspend or extend should be granted. There is no emergency or other compelling reason to expedite the consideration of CACIB's version of the merits of this appeal. If such grounds truly existed, then CACIB should have sought a stay pending appeal. Its refusal to do so is telling. Despite CACIB's late and ineffective protestations, the fact is that the Roll-Up has occurred, and the financing transaction has already been "cemented." Mot. at 3. The Roll-up cannot now be undone, no matter what the result of this appeal, as mandated by section 364(e). CACIB's argument that the appeal should "speed up" so as to avoid any further effect of the Roll-Up is misplaced. There is only reason to suspend or defer further activity in this appeal; there is absolutely no reason to expedite.

ARGUMENT

6. CACIB's Motion should be denied, and particularly so given the flawed and impermissible foundation on which the appeal rests.

7. First, CACIB's appeal seeks to undo the Roll-Up. The Roll-Up is one of the primary benefits and protections granted to the DIP Lenders in the DIP Finance Order. As more fully set forth in Appellees' Motion to Dismiss (Dkt. No. 9), CACIB's appeal is statutorily moot and must be dismissed in accordance with section 364(e) and applicable Fifth Circuit precedent.

8. Second, CACIB has plainly stated that its primary challenge on appeal is that roll-ups are not permitted by the Bankruptcy Code. This is an entirely new assertion that CACIB never previously raised below in the Bankruptcy Court, either by written objection or during oral arguments at separate hearings on the interim and final approval of the DIP Finance Motion. It is black letter law that arguments not raised to the court below are waived on appeal. *See e.g., In re Ginther Trusts*, 238 F.3d 686, 689 (5th Cir. 2001) ("It is well established that we do not consider arguments or claims not presented to the bankruptcy court") (quoting *Gilchrist v. Westcott, (In Matter of Gilchrist)*, 891 F.2d 559, 561 (5th Cir. 1990)). Accordingly, this Court should not consider CACIB's new argument that roll-ups are impermissible under the Bankruptcy Code.[4] Thus, CACIB's purported primary basis for expedition is not an issue properly before the Court.

[4] Notably, the Debtors' DIP Finance Motion (Bankr. Dkt. No. 27; AR 0152), paragraphs 37-42, very plainly sets forth the argument (supported by significant precedent) that the Roll-Up is permissible and within the Bankruptcy Court's authority to approve. Even in light of this, CACIB never once asserted the argument it now prioritizes on appeal—that roll-ups are not permitted under the Bankruptcy Code.

Indeed, if any aspect of this appeal should be expedited, it should be the dismissal of this appeal.

9. CACIB's Motion should also be denied given the absence of any emergency or exigent circumstances. Although CACIB claims the appeal must be heard before the Roll-Up becomes "more cemented," (Mot. at p. 3), the reality is that the Roll-Up has already been completed. The DIP Finance Order provides that, upon its entry by the Bankruptcy Court, the exchange and substitution of debt effected by the Roll-Up occurred, was effective, and was "indefeasible" (subject only to one inapplicable exception relating to future creditors' committee rights). *See*, DIP Finance Order ¶¶ 4(a) and (b). Section 364(e) simply does not permit the reversal or modification of this important protection granted to the DIP Secured Parties in the DIP Finance Order.

10. Incredibly, CACIB asserts that "[a]ll parties have an interest in resolving any uncertainty surrounding the roll-up," a statement that completely misrepresents the Debtors' (and presumably DIP Lenders') "interests" and views. See Mot. at p. 3. The Roll-Up amount is now part of the superpriority, priming lien that must be repaid to the DIP Secured Parties in connection with the Debtors' chapter 11 cases. The speed at which this appeal is considered (if it is ever considered given the mandate of section 364(e)) will not change that fact.

11. CACIB additionally asserts a purely speculative concern as to the potential occurrence of certain milestones as reason to expedite the appeal. However, CACIB fails to enunciate any truly impending harm. Even if it could point to a specific harm likely to occur, such harm could have been avoided had CACIB simply sought a stay pending appeal.

12. Finally, CACIB's Motion should be denied as it is an improper surrogate for the vehicle that CACIB should have been pursued—a stay pending appeal. Bankruptcy Rule 8007 sets out the proper mechanism to achieve the result CACIB now seeks. For whatever reason, CACIB chose not to seek a stay pending appeal. Still, the entirety of the Motion is premised upon CACIB's desire to "stop the train" from proceeding ahead, *i.e.*, stop the implementation of the Roll-Up. Where an objecting party wishes to avoid any adverse effects of implementation of an order as it pursues an appeal, the party needs to seek and obtain a stay pending appeal. By failing to do so, CACIB has exposed itself to the exact risk (or "harm") that it now seeks relief from. This Court should not permit CACIB to escape the result of its flawed process decisions and strategy.[5]

CONCLUSION

13. For the reasons stated above, the Debtors respectfully request that CACIB's Motion be denied and that the Court grant to the Debtors such other

[5] To be clear, the Debtors assert that there is no relief whatsoever that may be granted to CACIB vis-à-vis the Roll-Up in light of the plain mandate of section 364(e).

relief as to which it is entitled.

Dated: July 13, 2020

Respectfully submitted,

MCKOOL SMITH PC

/s/ John J. Sparacino
John J. Sparacino, attorney-in-charge
SBN 18873700 | SDID 12551
Veronica F. Manning
SBN 24098033 | SDID 2781496
Thomas J. Eisweirth (*Pro hac vice* pending)
600 Travis St., Ste. 7000
Houston, TX 77002
Tel.: (713) 485-7300
Fax: (713) 485-7344
jsparacino@mckoolsmith.com
vmanning@mckoolsmith.com
teisweirth@mckoolsmith.com

Gayle R. Klein
SBN 00797348 | SDID 22651
One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001
Tel.: (212) 402-9400
gklein@mckoolsmith.com

Conflicts Counsel to the Debtors

RULE 8015(h) CERTIFICATE OF COMPLIANCE

This Opposition complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8013(f)(3)(A) because it has 1,523 words, excluding the items that do not count toward the limit set forth in Federal Rule of Bankruptcy Procedure 8015(g).

/s/ John J. Sparacino
John J. Sparacino

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing *Appellees' Objection to Motion of Credit Agricole Corporate and Investment Bank to Expedite Appeal* was served by electronic delivery on all counsel of record and persons and entities receiving ECF notice in this case on July 13, 2020.

/s/ John J. Sparacino
John J. Sparacino