Docket #0027 Date Filed: 8/3/2020

NO. 4:20-CV-01970

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

CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Appellant,

V.

SPEEDCAST INTERNATIONAL LIMITED, et al.,

Appellees.

On Appeal from the United States Bankruptcy Court for the Southern District of Texas, Houston Division
Case No. 20-32243 (MI)

RESPONSE OF APPELLANT CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

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Appellant Credit Agricole Corporate and Investment Bank respectfully submits this response in opposition to SpeedCast International Ltd.'s motion to dismiss the appeal as moot.

PRELIMINARY STATEMENT

SpeedCast argues that Section 364(e) of the Bankruptcy Code prevents this Court from granting Credit Agricole any effective relief. But Section 364(e) has no role in cases such as this one, where the Bankruptcy Court authorized a form of financing that Section 364 does not permit—as the Eleventh Circuit and courts around the country have held. Even if it did play some part in this appeal, this Court has wide room to grant effective relief outside the limitations of Section 364(e). It could enforce Credit Agricole's right to repayment under a binding subordination agreement with SpeedCast's lenders, as the Bankruptcy Code requires, or grant Credit Agricole adequate protection against the roll-up, as the Bankruptcy Code also requires.

BACKGROUND

Because this appeal's facts have been set forth in Credit Agricole's opening brief, they require only short mention here. (Docket Entry No. 4 at 12–21).

SpeedCast, along with some of its affiliates (collectively, "SpeedCast"), declared chapter 11 bankruptcy. D.E.1; ROA.72.[1] SpeedCast required new financing to stay afloat. SpeedCast sought what is called postpetition financing (also, debtor-in-possession, or "DIP," financing). Some of SpeedCast's pre-bankruptcy creditors, referred to below as the DIP Lenders, offered this financing, but with a catch. In addition to loaning SpeedCast $90 million in new money, at a generous rate of interest, the DIP Lenders also demanded repayment on $90 million of their pre-bankruptcy debt before anyone else. *See* D.E.208-6 at 42–44; ROA.1378–40.

[1] The "D.E." cites refer to docket entries in the Bankruptcy Court proceeding. The "ROA" cites refer to the record on appeal, filed in this Court's docket. (Docket Entry No. 2).

The arrangement between SpeedCast and the DIP Lenders, known as a "roll-up," effectively deprived other pre-bankruptcy creditors of an equal chance for payment on their claims against SpeedCast. The bankruptcy estate only has limited value. Credit Agricole, one of SpeedCast's other creditors, objected on this basis and under a privately negotiated agreement between Credit Agricole and other lenders. D.E.167 at 8–12; ROA.998–1002.

This private agreement is the Syndicated Facility Agreement. About two years before bankruptcy, SpeedCast entered the Syndicated Facility Agreement with Credit Agricole and the entities that would become the DIP Lenders, among others. D.E.208-10; ROA.1680. In case SpeedCast defaulted on its obligations, the Agreement specified the order of repayment between the secured creditors in a "waterfall" provision. D.E.208-10 at 165–70; ROA.1844–49. After a default, the Agreement required the parties to share *pro rata* in proceeds from SpeedCast's collateral, after certain costs and expenses. D.E.208-10 at 168–70; ROA.1847–49. Credit Agricole wore two distinct hats under the Syndicated Facility Agreement: lender and secured hedging bank. The Agreement made clear: "Any amendment or modification to [the waterfall provisions] that would directly and adversely affect a Secured Hedging Bank shall not be effective as to such Secured Hedging Bank without its prior written consent." D.E.208-10 at 192; ROA.1871. Credit Agricole did not consent to the roll-up as a secured hedging bank. (*See* Docket Entry No. 4 at 31–34).

The Bankruptcy Court nonetheless overruled Credit Agricole's objection and approved the post-bankruptcy financing with the roll-up, purportedly under Section 364 of the Bankruptcy Code. D.E.266 at 105–10; ROA.3035–40. In doing so, the Bankruptcy Court violated the Bankruptcy Code and the Syndicated Facility Agreement's waterfall provision. The Bankruptcy

Court further refused to ensure that Credit Agricole had "adequate protection" against the roll-up, as the Bankruptcy Code requires. *See* 11 U.S.C. § 364(d)(1)(B).

Credit Agricole appealed and filed its opening brief. (Docket Entry No. 4). One week later, SpeedCast moved to dismiss this appeal under Section 364(e) of the Bankruptcy Code, which states:

> reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

SUMMARY OF THE ARGUMENT

SpeedCast argues that this appeal is statutorily moot under Section 364(e) of the Bankruptcy Code. Its argument fails for three reasons.

First, SpeedCast argues about stays and good faith under Section 364(e), neither of which are relevant. Credit Agricole's opening brief made its position clear: Section 364 does not authorize nonconsensual roll-ups and the Bankruptcy Court erred as a matter of law by authorizing one. As a result, Section 364(e) has no role to play. That is particularly true here, where the parties negotiated an agreement that expressly requires consent to the roll-up.

Second, SpeedCast claims that Credit Agricole is barred from challenging the validity of nonconsensual roll-ups. But by filing a motion to dismiss under Section 364(e), SpeedCast has affirmatively placed the breadth of Section 364 at issue and cannot prevent Credit Agricole from raising responsive arguments. This has all the more force under this appeal's unique posture. SpeedCast's motion challenges subject-matter jurisdiction, and resolving this challenge requires deciding whether Section 364(e) protects a decision below that the Bankruptcy Court had neither

the statutory nor equitable power to make. Because this argument implicates subject-matter jurisdiction, and under a well-settled exception to the preservation requirement, the Court may consider this pure legal issue for the first time on appeal.

Finally, even if Section 364(e) did protect the Bankruptcy Court's decision, this Court could provide Credit Agricole meaningful relief without violating Section 364(e)'s protections. Besides invalidating the roll-up, Credit Agricole has sought relief in two other forms. First, Credit Agricole has asked this Court to enforce a privately negotiated subordination agreement (the Syndicated Facility Agreement) that gives Credit Agricole the right to share *pro rata* in proceeds used to repay the roll-up. Second, and alternatively, Credit Agricole is entitled to adequate protection against the roll-up. Section 364(e), by its plain language, bars neither of these forms of relief.

ARGUMENT AND AUTHORITIES

I. Section 364(e) does not protect nonconsensual roll-ups.

A. Section 364(e) protects only forms of financing authorized under Section 364, not nonconsensual roll-ups.

SpeedCast argues that this appeal is statutorily moot under Section 364(e) of the Bankruptcy Code. That Section has no application here and cannot shield decisions that exceed what either the Bankruptcy Code or equity allow.

Section 364(e) applies to "an authorization under" Section 364. *See* 11 U.S.C. § 364(e). Section 364 permits a bankruptcy court to "authorize" three types of post-petition financing. *See id.* § 364(b)–(d). It does not permit a bankruptcy court to authorize other types of financing. Construing Section 364's provisions together, as is necessary, Section 364(e) protects only a bankruptcy court's decision to authorize the types of post-petition financing enumerated under Section 364. *See United States v. Morton*, 467 U.S. 822, 828 (1984) ("[W]e read statutes as a

whole."). As the Eleventh Circuit has held: "By its own terms, section 364(e) is only applicable if the challenged lien or priority was authorized under section 364." *Matter of Saybrook Mfg. Co., Inc.*, 963 F.2d 1490, 1493 (11th Cir. 1992).

Section 364(e)'s language is not all-encompassing, and this Court should adopt the Eleventh Circuit's plain reading of it. As the Eleventh Circuit recognized, the Sixth and the Ninth Circuits have expanded Section 364(e) to shield even forms of post-petition financing that a bankruptcy court lacks power to authorize under Section 364. *See id*. (citing *In re Adams Apple, Inc*., 829 F.2d 1484 (9th Cir. 1987), and *In re Ellingsen MacLean Oil Co., Inc*., 834 F.2d 599 (6th Cir. 1987)). These Circuits have construed Section 364(e) as a blank check. But the Eleventh Circuit correctly rejected such reasoning, which "put[s] the cart before the horse" and ignores Section 364(e)'s plain language. *Id*. at 1493. A dissenting judge in the Sixth Circuit objected on the same basis, "Lenders should not be permitted to use their leverage in making emergency loans in order to insulate their prepetition claims from attack." *Ellingsen*, 834 F.2d at 607 (Merritt, J., dissenting); *see also Saybrook*, 963 F.2d at 1493 (citing Charles J. Tabb, *Lender Preference Clauses and the Destruction of Appealability and Finality: Resolving a Chapter 11 Dilemma*, 50 OHIO ST. L.J. 109, 116–35 (1989)). This Court should reject the reasoning of the Sixth and Ninth Circuits and follow the Eleventh Circuit in adhering to the plain language of Section 364(e), limiting its application to financing authorized by Section 364.

Section 364 does not authorize nonconsensual roll-ups. Rather than reiterate why, Credit Agricole incorporates the arguments set out in its appellant's brief. (*See* Docket Entry No. 4 at 22–27). The gist is this. The only circuit court to address contested roll-ups on the merits has forbidden them. *See Saybrook*, 963 F.2d at 1942–95. Section 364 provides no textual basis for elevating the priority of prepetition loans over the objection of a non-consenting creditor and doing so upsets

the Bankruptcy Code's rigid priority rules. *See id.*; *accord In re Equalnet Commc'ns Corp.*, 258 B.R. 368, 369 (Bankr. S.D. Tex. 2000) ("[A] secured creditor's prepetition loan balance could not be paid off and/or 'rolled into' a postpetition line of debtor in possession financing, with resultant enhancement of collateral position and administrative priority."); *In re Kaib*, 448 B.R. 373, 376 n.2 (Bankr. W.D. Pa. 2011) ("Cross collateralizing is generally disallowed in a bankruptcy context."); *In re Gallegos Research Grp., Corp.*, 193 B.R. 577, 585 n.2 (Bankr. D. Colo. 1995) (quoting *Saybrook* as holding that "cross collateralization in the context of postpetition financing is impermissible"); *In re Monach Circuit Indus., Inc.*, 41 B.R. 859, 862 (Bankr. E.D. Pa. 1984) (concluding that cross-collateralization "is forbidden").

As detailed in Credit Agricole's opening brief, and at least in situations where previously negotiated and enforceable agreements prohibit nonconsensual roll-ups, this Court should follow *Saybrook* in holding that contested roll-up agreements are impermissible and that the Bankruptcy Court erred as a matter of law by approving one. Because nonconsensual roll-ups are not authorized by Section 364, Section 364(e) has no part in this appeal. The Court should deny SpeedCast's motion to dismiss.

B. SpeedCast's counterarguments are unpersuasive.

SpeedCast invites this Court to extend Section 364(e) beyond its plain terms to safeguard all forms of post-petition financing, even those not authorized by Section 364 (like nonconsensual roll-ups)—no matter how far they exceed the bankruptcy court's authority. The Court should decline that invitation.

First, SpeedCast argues that the Fifth Circuit has adopted a "per se" approach to mootness under Section 364(e). (Docket Entry No. 9 at 9). But the only Fifth Circuit opinion that SpeedCast has cited—*In re TMT Procurement Corp.*, 764 F.3d 512, 521 (5th Cir. 2014) (per curiam)—

addressed neither cross-collateralization nor roll-ups. It dealt with a lien to secure new money loans, which is a form of financing that Section 364 does authorize. That opinion is inapposite.

Second, SpeedCast states that Congress designed 364(e) to encourage lenders to extend new loans to bankrupt companies despite their financial condition. (Docket Entry No. 9 at 11). This appeal will not threaten that policy. Credit Agricole does not challenge the $90 million in new money loans granted to SpeedCast, the senior liens issued to ensure those new money loans are repaid first, or the generous rate of interest those new money loans accrue each day. *See* D.E.208-6 at 9, 47; ROA.1345, 1383. Lenders still have an incentive to loan money to bankrupt companies, and on favorable terms, but the Bankruptcy Code cannot be subverted in the process. Section 364(e) does not write bankruptcy courts a blank check to permit forms of financing—like nonconsensual roll-ups—that Section 364 does not authorize and that harm other prepetition lenders by altering the Bankruptcy Code's rigid priority scheme.

Finally, SpeedCast asserts that the Court may not review the financing piecemeal because DIP Lenders would not have agreed to issue the new money loans without the roll-up. (Docket Entry No. 9 at 11). But true or not, that fact is irrelevant. It cannot alter the plain language of Section 364 or the scope of the Bankruptcy Court's authority. As the Second Circuit reasoned: "While it may be that [the lender] would not have engaged in these transactions but for its hope of securing a preferred position for the pre-petition debt, this is not the kind of prejudice that bars reconsideration." *In re Texlon Corp*., 596 F.2d 1092, 1101 (1979); *see also Ellingsen*, 834 F.2d at 607 (Merritt, J., dissenting) ("The banks here should not be permitted to make several million dollars in prepetition loans secure and uncontestable at the expense of the other creditors by the simple expedient of making a section 364 postpetition loan."). In any case, SpeedCast and the DIP

Lenders acknowledged that the new money loans could remain in place without the roll-up by making each provision in their post-petition financing agreement severable:

> In the event one or more of the provisions contained in this Agreement or in any other Loan Document should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein and therein shall not be affected or impaired thereby.

See D.E.27-1 at 206; ROA.1477.

In short, none of SpeedCast's counterarguments justify insulating the roll-up in this case from appellate review under Section 364(e).

II. Credit Agricole may argue that Section 364 does not authorize nonconsensual roll-ups.

Failing on the merits, SpeedCast resorts to waiver. It asks this Court to prohibit Credit Agricole from arguing that nonconsensual roll-ups are not authorized under Section 364. But having put this matter in issue, SpeedCast may not now limit the arguments that Credit Agricole can raise to contest mootness.

To begin, mootness is a new issue and goes to this Court's subject-matter jurisdiction. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Mootness is a jurisdictional question."); *accord Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12–13 (1992) (same). Courts analyzing Section 364(e) mootness have considered it jurisdictional. *See Adams Apple*, 829 F.2d at 1487 & n.4 (the district court did not address Section 364(e) mootness, but "because mootness defeats jurisdiction, we must raise the issue *sua sponte*"). Arguments concerning subject matter jurisdiction cannot be waived. *Robinson v. Wal-Mart Stores Tex., L.L.C.*, 561 F. App'x 417, 417 n.1 (5th Cir. 2014) (per curiam).

And even if SpeedCast's Section 364(e) argument did not implicate jurisdiction—which it does—SpeedCast has squarely placed the application of Section 364 at issue through its motion to dismiss and cannot now attempt to limit how Credit Agricole may respond to its mootness

arguments. *See Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 n.22 (5th Cir. 2001) (holding that the court may consider "responsive arguments to the appellee's own contentions"); *accord United States v. Rodriguez*, 602 F.3d 346, 361 (5th Cir. 2010).

Going still further astray, SpeedCast requests an order striking arguments from Credit Agricole's opening brief. The Bankruptcy Rules nowhere authorize a party to strike arguments from the other side's appellate brief. *Cf. Strong v. Green Tree Serv., L.L.C.*, 716 F. App'x 259, 262 n.3 (5th Cir. 2017) (per curiam) (refusing to resolve a motion to strike a portion of an appellate brief). The proper method for SpeedCast to challenge Credit Agricole's merits arguments is through its appellee brief, not a motion to dismiss.

Finally, even putting all the foregoing points aside, this Court has authority and good reason to consider Credit Agricole's argument that bankruptcy courts cannot authorize nonconsensual roll-ups. "[A] well-settled discretionary exception to the waiver rule exists where a disputed issue concerns a pure question of law" that "all parties have had an opportunity to fully brief." *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 276 (5th Cir. 2015); *New Orleans Depot Servs., Inc. v. Director, Office of Worker's Comp. Programs*, 718 F.3d 384, 388 (5th Cir. 2013) (en banc) (same). SpeedCast's challenge to the roll-up presents pure legal questions of statutory interpretation and the powers of bankruptcy courts, which the parties will have plenty of opportunity to brief both here and in the merits briefing. *See Kemp v. G.D. Searle & Co.*, 103 F.3d 405, 407 (5th Cir. 1997) ("Questions of statutory interpretation are questions of law."). In *Forte*, for example, the Fifth Circuit held that "the waiver rule [did] not bar . . . consideration" of a new statutory construction of the Texas Optometry Act. This Court should similarly consider Credit Agricole's argument on the invalidity of nonconsensual roll-ups, especially because the law is unclear in this District. While the Bankruptcy Court found that roll-ups can be authorized under

Section 364, other bankruptcy courts in this District have found otherwise. *See In re Equalnet Commc'ns Corp.*, 258 B.R. 368, 369 (Bankr. S.D. Tex. 2000). Clarity is required.

III. Even if Section 364(e) applied, this appeal is not moot.

Even assuming that Section 364(e) did apply—which it does not—this appeal is still not moot. To prevail on mootness, SpeedCast must prove that Section 364(e) makes it "impossible" for the Court to grant "any effectual relief whatever." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation omitted); *see also In re Swedeland Dev. Grp., Inc.*, 16 F.3d 552, 560 (3d Cir. 1994) (en banc). SpeedCast has not, and cannot, meet that high standard.

Section 364(e) does not categorically bar appeals of postpetition financing orders. It limits the type of relief that can be granted, stating: "The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, *does not affect the validity of any debt so incurred, or any priority or lien so granted*." 11 U.S.C. § 364(e) (emphasis added). This language is narrow. The word "validity" refers to "legal force." *In re Mansaray-Ruffin*, 530 F.3d 230, 235 & n.3 (3d Cir. 2008); *In re Hudson*, 260 B.R. 421, 433 (Bankr. W.D. Mich. 2001) ("Validity is having legal strength or force." (quotation omitted)). In additional to eliminating the roll-up, Credit Agricole requests two alternative forms of relief that would not affect the legal force of the roll-up.

First, Credit Agricole asks the Court to enforce the parties' privately negotiated subordination agreement. (Docket Entry No. 4 at 36). Under a waterfall provision in that agreement, SpeedCast and its prepetition lenders agreed that all parties would share *pro rata* in proceeds from SpeedCast's collateral, after certain costs and expenses. D.E.208-10 at 168–70; ROA.1847–49. If the $90 million roll-up remains in place, it will be repaid with proceeds from SpeedCast's collateral at the conclusion of the bankruptcy. This Court may grant effective relief by ordering that Credit Agricole is entitled to receive its *pro rata* share of those proceeds. (Docket

Entry No. 4 at 35–36). By granting such limited relief, the post-petition debt would remain valid and the roll-up liens would still get paid first. The difference would only be that Credit Agricole's contract rights are enforced. Section 364(e) is not designed to liberate debtors from prepetition contract arrangements that they privately agreed to with third parties. Such a result would contravene another command of the Bankruptcy Code: Privately negotiated subordination agreements must be enforced. *See* 11 U.S.C. § 510(a); *In re Bank of N.E. Corp.*, 364 F.3d 355, 362 (1st Cir. 2004) ("[T]he enforcement of subordination provisions is no longer a matter committed to the bankruptcy courts' notions of what may (or may not) be equitable.").

Second, courts have held that Section 364(e) does not prevent a reviewing court from ensuring that prepetition lenders, like Credit Agricole, have adequate protection against the diminution of their rights. *See In re Sonora Desert Dairy, L.L.C.*, No. AZ-13-1471, 2015 WL 65301, at *11 (B.A.P. 9th Cir. Jan. 5, 2015) (per curiam) ("Section 364(e) does not restrict us from reviewing central questions to the AgStar DIP Order: whether the bankruptcy court provided Wells Fargo with adequate protection."); *In re Westport Holdings Tampa, Ltd. P'ship*, 607 B.R. 715, 728 (M.D. Fla. 2019) ("The issue of adequate protection is not moot under Section 364(e)."); *In re Fontainbleau Las Vegas Holdings, LLC*, 434 B.R. 716, 746 (S.D. Fla. 2010) (same). Adequate protection can take many forms, such as a monetary payment or a reimbursement of fees and expenses. Because the Court has power to correct problems with adequate protection, the Court could grant meaningful relief, and this appeal is not moot.

CONCLUSION

For the reasons explained above, and in Credit Agricole's appellant brief (Docket Entry No. 4), the Court should deny SpeedCast's motion to dismiss this appeal as moot.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8013(f)(3)(A) because it has 3,465 words, excluding the parts of the brief exempted by Federal Rule of Bankruptcy Procedure 8015(g).

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CERTIFICATE OF SERVICE

In accordance with the Federal Rules of Civil Procedure, I hereby certify that a true and correct copy of the Response of Appellant Credit Agricole Corporate and Investment Bank in Opposition to Appellee's Motion to Dismiss Appeal as Moot was served on the following counsel of record on August 3, 2020:

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