Docket #0012 Date Filed: 4/25/2022

Case No. 22-00008 (LHR)

In the United States District Court
for the Southern District of Texas
Houston Division

IN RE Speedcast International Limited, *et al.*,

Reorganized Debtors.[1]

Inmarsat Global Limited, Inmarsat Solutions B.V., Inmarsat Maritime Ventures, Ltd., Inmarsat Inc., Inmarsat Solutions (US) Inc., Inmarsat Solutions (Canada) Inc., and Inmarsat Solutions AS Norway

Appellants,

v.

Speedcast International Limited et al.,

Appellees.

On Appeal from the U.S. Bankruptcy Court for the Southern District of Texas, Case No. 20-32243 (The Hon. Marvin Isgur)

APPELLANTS' REPLY BRIEF

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[1] A complete list of the Reorganized Debtors in these Chapter 11 cases is identified in Inmarsat's Notice of Appeal, at Dkt. No. 1813, and may also be obtained on the website of the Reorganized Debtors' claims and noticing agent at http://www.kccllc.net/speedcast. The Reorganized D[illegible] purposes of these Chapter 11 cases is 4400 S. Sam H[illegible] Texas 77048.

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April 25, 2022

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BEFORE THE HONORABLE UNITED STATES DISTRICT COURT:

Inmarsat Global Limited, Inmarsat Solutions B.V., Inmarsat Maritime Ventures, Ltd., Inmarsat Inc., Inmarsat Solutions (US) Inc., Inmarsat Solutions (Canada) Inc., and Inmarsat Solutions AS Norway (collectively, "**Inmarsat**" or "**Appellant**"), creditors in the underlying bankruptcy proceeding and Appellants, file this Reply to Speedcast International Limited's ("**Speedcast**" or "**Appellee**") brief (Dkt. No. 11)[2], and respectfully state as follows:

INTRODUCTION

The parties largely agree on the facts and issues in this case. It is undisputed that Inmarsat reserved "Permitted Claims," as defined in the Termination Agreement, related to post-petitions services provided by Inmarsat. It is also undisputed that Inmarsat provided post-petition services and those services were priced, invoiced, and paid pursuant to the discounted pricing terms of the amended SAA rather than any MSA. Where the parties disagree is (1) the definition of "Permitted Claim" in the Termination Agreement, and (2) though the parties agree that pricing for the FX services at issue was set by the SAA, Speedcast dismisses the role of pricing from its analysis. Under Speedcast's interpretation, incorrectly adopted below, the only "Permitted Claim" would be for services provided under

[2] Unless otherwise stated, all abbreviations and defined terms herein are the same as those in Inmarsat's opening brief on appeal (Dkt. No. 7).

the MSAs and priced by the MSAs, yet every penny paid by Speedcast for FX services in 2020 was at the discounted price set by the amended SAA.

Speedcast's contention is not only wholly inconsistent with the parties' conduct, but contrary to the plan language of the Termination Agreement. When the parties negotiated, drafted, and executed the Termination Agreement, both Inmarsat and Speedcast knew that the amended SAA determined the price that Speedcast paid for FX services by giving Speedcast a 30% discount in exchange for the Take-or-Pay provision setting a Minimum RGU commitment. Consistent with this understanding, they drafted the defined term "Permitted Claim" in the Termination Agreement to expressly encompass pricing terms, including "fees and costs," provided by Existing Agreements that were "otherwise" not MSAs. App. at A0223-24. Specifically, the Termination Agreement defined Permitted Claims as those claims made for services "under, and otherwise on the terms of, any Existing Agreement or the Surviving Agreement, including any applicable interest, fees or costs relating to such payment claims which are, or become, due and payable under the terms of the relevant Existing Agreement or the Surviving Agreement (as applicable)." *Id.*[3]

Speedcast and Inmarsat also knew that the releases granted by the Termination

[3] Speedcast's brief conveniently omits the "any applicable interest, fees or costs" provision when selectively quoting the "Permitted Claim" definition.

Agreement were not all-encompassing. Before the argument on Speedcast's objection to Inmarsat's Administrative Expense Claim below, the parties confirmed in a Stipulation of Agreed Facts that Speedcast had "agreed to carve out from the definition of 'Released Claims' any Permitted Claims for payment by Inmarsat for ongoing Services delivered 'under, and otherwise on the terms of, any Existing Agreement or the Surviving Agreement' after the Petition Date through December 31, 2020." A-005. Since Permitted Claims were not released by the Termination Agreement, the parties knew that Administrative Expense Claims for unpaid amounts due for FX services delivered to Speedcast could be made.

Accepting Speedcast's reading that all such claims were foreclosed by the Termination Agreement would give Speedcast the amended SAA's discount—received only because the discounted pricing was "otherwise on the terms of any Existing Agreement"—while ignoring the corresponding Take-or-Pay provisions of the same Existing Agreement. Such result would not only be inconsistent with the plain language of the Termination Agreement and the parties' conduct in implementing the Termination Agreement, but also materially changes the parties' bargain.

Speedcast takes great pains to support reading out the "otherwise on the terms of, any Existing Agreement" clause, suggesting that Inmarsat's insistence that the amended SAA and MSAs be read together would lead to an absurd result (while

happily accepting the 30% discount that only comes from reading the agreements together). For all of the posturing in its appellate brief, however, Speedcast has not—and cannot—explain what the phrase "and otherwise on the terms of" adds to the definition of "Permitted Claims" if not the pricing terms. The only logical interpretation, and the only interpretation consistent with the parties' post-petition conduct, is that "otherwise on the terms of, any Existing Agreement" clearly includes the amended SAA. Any other interpretation effectively reads "otherwise on the terms of, any Existing Agreement" out of the Termination Agreement. Thus, Inmarsat has a "Permitted Claim" because the amended SAA is an "Existing Agreement" that both set the discounted price for FX services *and* required Speedcast either to meet its Minimum RGU commitment to qualify for the discount or pay the Shortfall Amounts under the amended SAA's formula (together, the "**Take-or-Pay provision**").

Indeed, Speedcast's argument contravenes the very commercial purpose of a Take-or-Pay provision—a supplier, like Inmarsat, never sets out to recover Shortfall Amounts from its counterparty; the purpose of a Take-or-Pay provision is to create ongoing revenue streams that ideally continue beyond the term of the Take-or-Pay provision itself. Speedcast's interpretation would destroy that purpose: Speedcast failed in its obligation to "take" the requisite level of FX services, meaning the contemplated revenue stream never solidified, and the "pay" portion of the provision

now represents the agreed, minimum benefit that Inmarsat should derive from the arrangement.

Respectfully, this Court should hold Speedcast to its promise in the amended SAA, an Existing Agreement whose discount Speedcast accepted for FX services, and allow Inmarsat's Administrative Expense Claim for the Shortfall Amount because Speedcast failed to meet its Minimum RGU commitment. That Speedcast ended up in bankruptcy is no fault of Inmarsat or the agreements between the parties, including the Termination Agreement; Speedcast should not also be unjustly enriched at Inmarsat's expense as a result of the mistaken decision of the Bankruptcy Court. Speedcast failed to take, and now it must pay.

ARGUMENT

I. Since the SAA is an Existing Agreement that Provided the Essential Price Terms for FX Services, Any Claim Related to Services under the SAA is a Permitted Claim.

As explained above, the Termination Agreement defines "Permitted Claims" as those claims made for services "under, and otherwise on the terms of, any Existing Agreement or the Surviving Agreement, including any applicable interest, fees or costs relating to such payment claims which are, or become, due and payable under the terms of the relevant Existing Agreement or the Surviving Agreement (as applicable)." Inmarsat's Administrative Expense Claim falls squarely within the definition of a Permitted Claim: Inmarsat provided Speedcast with FX services from

the Petition Date through December 31, 2020 as ordered; the FX services were provided "under" the MSAs, which Speedcast acknowledges are "Existing Agreements." The actual FX prices were set "under, and otherwise on the terms of," the amended SAA—also an "Existing Agreement"—affording Speedcast a 30% discount on specified conditions; one of those conditions was the Minimum RGU commitment; and when Speedcast failed to meet the Minimum RGU commitment by December 31, 2020, an Existing Agreement—the amended SAA—reset pricing to include the Shortfall Amounts. Inmarsat's claim for the Shortfall Amounts is a Permitted Claim under the Termination Agreement, recoverable by Inmarsat as an Administrative Expense.

In the Speedcast worldview, on the other hand, Speedcast is entitled to enjoy the pricing discount provided under the terms of the amended SAA without meeting the Minimum RGU commitments set by the amended SAA. Speedcast calls any other result "absurd" but has no answer to the question why Speedcast should enjoy the benefit of the discounted pricing under the amended SAA (which is apparently otherwise unimportant), while the Take-or-Pay requirements go unenforced? Put another way, what consideration did Inmarsat receive for the 30% discount accorded Speedcast under the amended SAA if not the Minimum RGU commitment or, failing the minimum, the Shortfall Amount? Speedcast has no response besides its blinkered reliance on the term "under" because Speedcast unrealistically divorces price from

the FX services it received. The Bankruptcy Court's error in siding with Speedcast stems from a similarly inaccurate view of the parties' commercial bargain and leads to an absurd result where Speedcast is receiving more than it ever bargained for. The parties looked to the SAA for the payment terms for services provided under the MSAs (consistent with their prepetition course of dealing) and Speedcast cannot, as a matter of bedrock rule of contract law, reply upon a favorable payment term while ignoring a less favorable term.

Consideration is a critical term in any commercial bargain and the amended SAA—which set the discount Speedcast enjoyed—must be read *in conjunction with* the MSAs under which the FX services were delivered. Thus, Inmarsat's citations to cases interpreting "and" in the "several" sense are entirely appropriate and instructive; it is *Speedcast's* interpretation that would lead to commercially absurd results. *See* Dkt. No. 7 at 15-17. Indeed, the cases cited by Speedcast with respect to the "conjunctive" reading of "and" belie their argument. *Sasson*, *Progressive*, and *Maxwell* each involved a dispute in which the respective court determined that "and" would not be read in the "several" sense because, despite arguments to the contrary, no ambiguity existed in those agreements requiring such a reading. *See* Dkt. No. 11 at 10-11; *Sasson v. TLG Acquisition LLC*, 127 A.D. 3d 480, 481 (1st Dep't 2015); *Progressive Ne. Ins. Co. v. State Farm Ins. Co.*, 81 A.D.3d 1376, 1378 (4th Dep't

2011); *Maxwell v. State Farm Mut. Auto. Ins. Co.*, 92 A.D.2d 1049, 1050 (3d Dep't 1983).[4]

Any other reading of the clause, "under, and otherwise on the terms of, any Existing Agreement," effectively eliminates the reference to "and otherwise on the terms of any, Existing Agreements" in the definition of Permitted Claims, and it is not proper to read out terms when construing a contract. *See Uptown Grill, L.L.C. v. Shwartz*, 817 F.3d 251, 257 (5th Cir. 2016) ("The court may not disregard any contract provision 'under the pretext of pursuing its spirit' unless the provision is unclear or ambiguous, 'as it is not the duty of the courts to bend the meaning of the words of a contract into harmony with a supposed reasonable intention of the parties.'") (internal citation omitted); *see also Scot Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571, 574 (5th Cir. 1998). Another way of analyzing the language is that, had the parties intended pricing for FX services to exclude the SAA's discount and Take-or-Pay provisions, the Termination Agreement would have referenced only the applicable MSAs rather than use the broader, "and otherwise on the terms of, *any Existing Agreement*." If the pricing were only the

[4] Pursuant to New York law, when no ambiguity exists, "the term "'[a]nd' is considered also as 'or' unless the document shows on its face that the word 'and' is to be literally construed." *Murphy v. Long Island Oyster Farms, Inc.*, 112 A.D.2d 276, 277 (2d Dep't 1985). Speedcast has not explained away the requirement that the unambiguous "and" term be read severally.

prices set in the MSAs, there would have been no 30% discount on the invoices for FX services. A0229-230. Reading the clause to give meaning to all of the words in the definition of "Permitted Claims" is consistent with the parties' conduct in pricing the FX services at a 30% discount to MSA pricing on all of the 2020 FX invoices.

Speedcast's own cases recognize that if an interpretation of "and" in a given contractual provision defies common sense, courts must then read the term severally. *In re Velazquez*, 660 F.3d 893, 897 (5th Cir. 2011); *Bruce v. First Fed. Sav. and Loan. Ass'n of Conroe, Inc.*, 387 F.2d 712, 715 (5th Cir. 1988); *Am. Bankers Ins. Grp. v. U.S.*, 408 F.3d 1328, 1332 (11th Cir. 2005); *Crank v. Fed. Emergency Mgmt. Agency*, Case No. CV 18-410-BAJ-EWD, 2019 WL 9899509, at *3 (M.D. La. Aug. 8, 2019); *see also Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex.*, 180 S.W.2d 906, 908 (Tex. 1944) (noting that a court may interpret "and" as "or" to "effectuate the manifest intention of the user.").

Under that legal framework and on these facts, the "and" term in the definition of Permitted Claims must be read severally. By failing to read the language in that way, the Bankruptcy Court's interpretation rewarded Speedcast with an unearned 30% discount to MSA pricing with no corresponding Minimum RGU commitment, wrongfully absolving Speedcast of its obligations under the Take-or-Pay provision. That windfall cannot be what the parties intended when they billed and paid for the FX services ordered "under" the MSAs and did so at the 30% discount to the rate set

in the MSAs; that discount only exists because of the amended SAA. The only reasonable conclusion is that, when they carved out Permitted Claims from Released Claims, the parties intended the amended SAA to be an "Existing Agreement" subject to, and to be interpreted in conjunction with, the MSAs under which FX services were actually provided. Any other reading fails to give meaning to each phrase in the definition of Permitted Claims, is inconsistent with the parties' own conduct, and would be grossly unfair.

Speedcast's additional arguments are based on general principles of law that do not take into account the undisputed facts of this case. For instance, Speedcast argues that Inmarsat's interpretation of Permitted Claims as requiring services be delivered across an Existing Agreement cannot be so because it would read out "otherwise on the terms of any Existing Agreement," and would render the words "under" and "and" meaningless, violating the very principles of contract interpretation on which Speedcast relies. Dkt. No. 11 at 13. In contrast to Speedcast's approach, setting aside both words and clauses, nothing about Inmarsat's argument causes disharmony among the provisions of the Termination Agreement. In fact, Inmarsat's interpretation is the only one that provides a way to harmonize the MSAs, the amended SAA under which the parties actually priced post-petition services, and the Termination Agreement in a coherent way.

Speedcast suggests that the phrase "and otherwise on the terms of" is merely an explanatory phrase that does not change the meaning or grammar of the provision, but that does not explain the reference to Existing Agreements. Nor does Speedcast grapple successfully with the New York rule of construction that the "and" must be read as a "several" term because no other interpretation allows for the MSAs, amended SAA, and Termination Agreement to exist in a way that aligns with the parties billing and payment practices. *See Murphy*, 112 A.D.2d at 277; *see also* Dkt. No. 7 at 15-17.

In that same vein, Speedcast asserts that the interpretation of "Permitted Claims" as a narrow exception to "Released Claims" that does not include pricing under the amended SAA is consistent with the plain meaning of the Global Settlement. But again, if that were the case, and the parties truly believed that the amended SAA were no longer relevant, why was Speedcast billed, and Inmarsat paid, at the discounted prices set in the amended SAA? The parties' practices from the Petition Date through the end of 2020 demonstrate that the amended SAA plays an essential role in the delivery of FX services. And that role is an important one: without the amended SAA, Speedcast would not have benefitted from discounted pricing at all.

Thus, it is Speedcast's unduly narrow reading of "Permitted Claims" that runs afoul of the canons of contract interpretation. Contrary to Speedcast's arguments,

the interplay among the MSAs, amended SAA, and Termination Agreement was not meant to be ignored, and it was error for the Bankruptcy Court to do so as a matter of law. Inmarsat's claim for the Shortfall Amounts is a Permitted Claim under the Termination Agreement and it should be allowed as an Administrative Expense Claim.

II. Inmarsat Does Not Seek To "Claw Back" the 30% Discounted Pricing of the SAA.

Speedcast's misapprehension as to the interplay of the amended SAA and MSAs likewise colors its argument that the 30% discount is a "red herring." First, Inmarsat plainly stated in its opening brief that it did *not* seek to "claw back" the 30% discount.

Nevertheless, Speedcast sets up this strawman and batters that argument instead of addressing Inmarsat's claim that it is entitled to the Shortfall Amounts as an Administrative Expense Claim based on the plain language of the Permitted Claim definition and Speedcast's failure to meet its Minimum RGU commitments. In the course of attacking the non-existent 30% claim, Speedcast reiterates its argument that the Shortfall Amounts are not "Permitted Claims" because no services have been provided "under" the SAA. The 30% misdirection should not distract this Court, just as repeating the "under" argument in different guise should not convince the Court, to read everything in a vacuum. To be clear, the 30% discount is important to show that Speedcast took advantage of the discounted pricing set by the amended

SAA when it paid for FX services under the MSAs, but the additional price for FX services when the Minimum RGU Commitment has not been met is the Shortfall Amount.

Finally, Speedcast also suggests that, pursuant to the sale of certain assets and assignment of customer contracts from Speedcast to Inmarsat during the Bankruptcy Proceedings, the broad releases entered into by the parties foreclose any recovery of Shortfall Amounts pursuant to the amended SAA. That is a surprising declaration of fact by Speedcast given that the heart of this dispute is whether the language of the Termination Agreement allows for "Permitted Claims"—an exception to "Released Claims"—in these circumstances. To suggest that the parties somehow agree on the breadth of these releases and that the releases foreclose Inmarsat's claim has no basis in the documents or in the record below.

CONCLUSION

For the reasons articulated above and in Inmarsat's opening brief, Inmarsat respectfully requests that this Court reverse the Order of the Bankruptcy Court and remand this matter for further proceedings consistent with this Court's decision. Inmarsat respectfully requests such other and further relief as necessary to give effect to the Court's order.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(ii) because this brief contains 3019 words, excluding the parts of the brief exempted by Rule 8015(g). This brief complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and the type-style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

By: */s/ Bob B. Bruner*
Bob B. Bruner

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, a true and correct copy of the foregoing was served on all parties entitled to receive notice through the Court's CM/ECF automatic electronic notice system.

By: */s/ Bob B. Bruner*
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