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

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

DEBTORS' REPLY TO OBJECTION OF CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK TO EMERGENCY MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING 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
[Relates to Docket Nos. 27 and 167]

Speedcast International Limited and its debtor affiliates in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), respectfully represent as follows in support of this *Reply to Objection of Credit Agricole Corporate and Investment Bank to Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing 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 "Reply"):[2]

[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.

[2] This Reply is filed solely in response to CACIB's objection to the Debtor's request for final approval of the DIP Motion (as that term is defined *infra* ¶ 3). Dkt. No. 167. The Debtors intend to file a separate reply to address any other objections.

2032243200519000000000003

SUMMARY OF REPLY

1. Credit Agricole Corporate and Investment Bank's ("CACIB's") Objection should be overruled and the DIP Motion, defined below, approved on a final basis for several reasons. **First**, CACIB lacks standing to pursue its Objection. In agreeing to the prepetition loan agreement (defined below as the "SFA"), CACIB contracted away its right to oppose the DIP Motion in favor of the Prepetition Agents' sole right and authority to make such an objection. **Second**, by the Third Amendment to the SFA CACIB has already expressly consented to, approved, and instructed the Prepetition Agents to facilitate the DIP Loans, the DIP Order, and the Roll-Up. **Third**, the three points urged in the Objection lack merit as (i) there has been no modification of the SFA's waterfall provision, (ii) no aspect of the DIP Order or DIP Motion in any way implicates or violates Section 510(a) of the Bankruptcy Code, and (iii) CACIB similarly lacks the right to contest the sufficiency of adequate protection (which is sufficient in any event). Each of these issues will be further discussed below.

RELEVANT BACKGROUND

2. On May 15, 2018, Speedcast International Limited ("SIL") entered into a Syndicated Facility Agreement (the "SFA") with CACIB, among others, and Credit Suisse AG, Cayman Islands Branch as the Administrative Agent, Collateral Agent, and Security Trustee (the "Prepetition Agents"). CACIB and SIL also entered into an ISDA Master Agreement ("Master Swap Agreement") and subsequent interest rate swap confirmations (together, the "Swap Agreements"). Under the SFA, CACIB is a "Lender" and a "Secured Hedging Bank."[3]

3. On April 23, 2020 (the "Petition Date"), the Debtors filed voluntary bankruptcy petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy

[3] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the SFA and the Third Amendment to the SFA.

Code"). On the same date, the Debtors filed the *Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing 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* (Dkt. No. 27) (the "DIP Motion").

4. As set forth in the DIP Motion, the Debtors requested that certain Lenders extend credit, or be deemed to extend credit, in the form of new money loans in an aggregate principal amount of up to $90,000,000 (the "New Money Loans") and loans issued in substitution and exchange of Loans under the SFA on a cashless basis directly by and between the Debtors and such Lenders—without any involvement or the Prepetition Agents or any other person—in an aggregate principal amount equal to $90,000,000 (the "Roll-Up", and together with the New Money Loans, the "DIP Loans," and the facilities providing for such DIP Loans, the "DIP Facility") pursuant to a Senior Secured Superpriority Debtor-in-Possession Term Loan Credit Agreement (the "DIP Credit Agreement").

5. To facilitate the implementation of the DIP Facility, contemporaneously with the filing of the chapter 11 petitions on the Petition Date, a group of Lenders sufficient to qualify as the Required Lenders (as that term is defined in the SFA), **including CACIB**, entered into the Third Amendment to the SFA (the "Third Amendment"). The Third Amendment was further expressly authorized by the Interim DIP Order. The Third Amendment accomplished two important and relevant functions—(i) the amendment of the SFA to facilitate the DIP Loans, and (ii) the instruction or direction by the signatory Lenders (including CACIB) to the Prepetition Agents to: (a) not oppose the DIP Order or DIP Facility, and (b) execute and deliver the "DIP

Intercreditor Agreement" (as defined in the Third Amendment § 4).

6. Specifically, the Third Amendment amended the SFA "to permit (i) entry by [the Debtors] into the DIP Credit Agreement . . . , (ii) the establishment of the DIP Facility, (iii) the incurrence of the DIP Loans, and (iv) the granting of liens securing the 'Obligations' as defined in the DIP Credit Agreement." *See* Third Amend. § 2. The Third Amendment further explicitly stated that "the DIP Credit Agreement . . . shall be deemed permitted and not in conflict with the provisions of the [SFA]." *Id*.

7. Additionally, the Third Amendment set forth two specific instructions/directions by CACIB (and the other signatory Lenders) to the Prepetition Agents. First, CACIB instructed the Prepetition Agents "to raise no objection to and to refrain from otherwise contesting . . . the DIP Order . . . ."[4] *See* Third Amend. § 2. Second, CACIB "authorize[d] and direct[ed] the [Prepetition] Agent . . . to execute and deliver the DIP Intercreditor Agreement . . . ." *See* Third Amend. § 4.

8. The DIP Intercreditor Agreement, the form of which was attached to the Third Amendment, specifically designated the prepetition loans, liens, agent, and lenders as "Junior," and the DIP Loans, liens, agent, and lenders as "Senior." Third Amend. § 4, Ex. II. That agreement further sets forth customary terms so as to implement the seniority of the DIP Facility vis-à-vis the SFA and the prepetition loans and liens. Third Amend. Ex. II.

9. This Court held an interim hearing on the DIP Motion on April 23, 2020. At the interim hearing, the very same day that CACIB agreed to the Third Amendment that authorized the DIP Loans, CACIB urged an objection to the DIP Motion, arguing that the Roll-Up violated CACIB's rights under the SFA because it was authorized without CACIB's prior written

[4] This instruction also evidences a concession by CACIB that only the Prepetition Agents have the authority or right to assert a prepetition lender or SFA-based objection to the DIP Motion. *See* Third Amend. § 2, SFA § 8.01.

consent. This Court overruled CACIB's objection and entered the Interim DIP Order,[5] authorizing on an interim basis the DIP Facility and the transactions contemplated by the DIP Credit Agreement, including the interim Roll-Up of $35 million.

10. On May 11, 2020, CACIB filed its Objection to the DIP Motion (the "Objection," Dkt. No. 167). In its Objection, CACIB urges three reasons in support of its opposition to the DIP Motion and entry of the Final DIP Order, arguing that the Roll-Up: (i) violates the SFA, (ii) violates section 510 of the Bankruptcy Code, and (iii) fails to provide CACIB adequate protection as required by section 364(d)(1)(B) of the Bankruptcy Code. *See* Objection ¶ 16.[6]

11. In the Objection, CACIB alludes to its purported termination of the Master Swap Agreement and the resulting determination of a claim defined therein as the CACIB Secured Hedging Claim.

12. The final hearing on the DIP Motion is set for Wednesday, May 20, 2020, at 1:30 p.m. CDT.

ARGUMENT

I. CACIB's Assignment of Authority to the Prepetition Agents in the SFA Deprives it of Standing to Object to the DIP Order.

13. The SFA is governed by and construed in accordance with New York law. SFA §9.07. In New York, "[i]t is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself." *In re Metaldyne Corp.*, 409 B.R. 671, 677 (Bankr. S.D.N.Y.), *aff'd*, 421 B.R. 620 (S.D.N.Y. 2009) (quoting *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (N.Y.

[5] The *Corrected Interim Order (I) Authorizing 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.* (Dkt. No. 77).

[6] Due to a typographical error, the Objection contains two paragraphs numbered 16. *See* Objection p. 7. For avoidance of doubt, the Debtors refer to the second Paragraph 16.

2009)). Accordingly, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* Material provisions should be given their full meaning and effect and no portion of a contract should be rendered meaningless. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (N.Y. 2007) (citations omitted). Further, contracts should be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" *Id.* at 324-25 (quoting *Matter of Westmoreland Coal Co. v. Entech, Inc.,* 100 N.Y.2d 352, 358 (N.Y. 2003)).

14. The SFA and related prepetition agreements, just as virtually any loan syndication involving sophisticated international lending institutions, constitute and describe complex and heavily-negotiated loan transactions and agreements. A core feature of syndicated loans is the delegation of defined rights and duties to a single entity (the agent) to act on behalf of the lending group as a whole and take certain actions on its own or at the direction of the requisite number or percentage of lenders constituting the required lenders. Where an agreement has delegated a particular right to an agent, and the agent's action has been directed by the required lenders, a single dissenting lender lacks standing to challenge the action. *See e.g.*, *In re GSC, Inc.*, 453 B.R. 132, 184 (Bankr. S.D.N.Y. 2011) (upholding agent's consent to section 363 sale at the direction of controlling lenders over objection of non-controlling lenders); *Metaldyne Corp.*, 409 B.R. 671 (approving of agent's contractual right to credit bid at section 363 sale as directed by 97% of lenders over objection of single creditor); *Beal*, 8 N.Y.3d at 330-32 (holding that an individual lender in a syndicated loan lacked standing to bring an enforcement action under keep-well agreement against the will of the other 36 lenders).

15. The SFA is precisely such an agreement. The delegation or assignment of authority to the Prepetition Agents is set forth in Section 8.01 of the SFA, whereby CACIB—and all other Lenders and Secured Parties—irrevocably appointed the Prepetition Agents to serve as its Administrative Agent, Collateral Agent, and Security Trustee. SFA § 8.01. This provision expressly and irrevocably authorizes the Prepetition Agents to take actions and exercise powers on behalf of each Lender as generally set forth in the Loan Documents, "together with such actions and powers as are reasonably incidental thereto." *Id*. That section expressly authorizes the Prepetition Agents to "negotiate, enforce or settle any claim, action or proceeding" at the direction of the Required Lenders, and any such negotiation, enforcement or settlement is binding upon each Lender. *Id.* The SFA also authorizes the Prepetition Agents 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[.]" *Id*.[7]

16. The SFA also contains rather customary provisions that expressly bar or prevent the individual Lenders from taking or pursuing various actions in contravention of the desires of the other various syndicate lenders. By entering the loan syndicate and executing the SFA, CACIB has agreed to a bar on various types of individual action, including the action represented by its Objection. CACIB's agreement to be barred from asserting any individual rights is explicitly set forth in Section 8.01 of the SFA. That section states in pertinent part that "no Secured Party shall (i) have any right individually . . . to enforce . . . any of the Obligations or (ii) take [] any actions . . . , unless expressly provided for herein or in any other Loan Document, without the prior written consent of the [Prepetition] Agent; it being understood and agreed that all powers, rights and remedies under the Loan Documents may be exercised solely by the

[7] The term "Secured Parties" is broadly defined to include the Lenders and each Secured Hedging Bank. *See* SFA, Ex. D (Guarantee Agreement).

[Prepetition] Agent[] on behalf of the Secured Parties . . . ." *Id.* There is no provision in the SFA or the other Loan Documents that expressly provides CACIB with the right, authority or power to take the individual action that CACIB is plainly asserting in pursuing its Objection.

17. In sum, the SFA is a typical syndicated loan agreement that bars virtually any individual Lender action and grants to the Prepetition Agents exclusive power and authority to take virtually all actions, particularly in conjunction with Required Lender consent or direction. CACIB's Objection flies in the face of these contractual provisions. The Debtors respectfully request that the Court refuse to afford standing to CACIB to pursue and urge its opposition.

II. CACIB has Consented and Agreed to the DIP Loans and the Roll-Up.

18. As noted earlier, the exact same day that CACIB executed the Third Amendment expressly agreeing to, authorizing, and giving directions to aid in the implementation of, the DIP Facility and the Roll Up, CACIB stood before this Court arguing its opposition to the DIP Motion and entry of the Interim DIP Order. Despite CACIB's arguments to the contrary, its (i) consent to the Third Amendment, and the Roll-Up it authorized, (ii) direction to the Prepetition Agents to permit and facilitate the DIP Loans and Facilities, and (iii) delegation and assignment of opposition rights to the Prepetition Agents in the SFA, are all binding on CACIB and may not now be "undone" or taken back.

19. In signing the Third Amendment, CACIB and the other Required Lenders amended the SFA to expressly authorize the DIP Loans, including the Roll-Up, and instructed the Prepetition Agents to refrain from objection. Third Amend. § 2. The amendments accomplished by Third Amendment were proper and valid under the terms of the SFA. Section 9.08(b) of the SFA vests in the Required Lenders the exclusive power to amend the SFA, unless such amendment falls within certain specific, narrow and inapplicable exceptions. As a result, and because CACIB specifically and purposefully delegated its rights to object to the Prepetition

Agents, CACIB has no standing to object to the entry of the Third Amendment or the DIP Credit Agreement and the Roll-Up it compels.

20. Section 9.08(c) of the SFA does place a few specific limitations on the ability to amend the SFA as such may impact a Secured Hedging Bank. Those limitations are quite specific, but the general gist is that an amendment may not change the post event of default "waterfall" in a manner that negatively affects a Secured Hedging Bank. As discussed in greater detail below, the Third Amendment did not make any of the changes prohibited by Section 9.08(c). The Third Amendment was proper and is valid under the terms of the SFA.

21. Among the most puzzling of CACIB's arguments is the assertion that its express consent to the Third Amendment should not be taken at face value because it signed the Third Amendment "as a proxy" for a purported purchaser of CACIB's Revolving Loan. Objection ¶ 5. CACIB's signature page contains no indication that CACIB was acting as a proxy. In addition, the SFA permits an assignment of the rights and remedies of a Lender only upon receipt of specified consents (which the Debtors believe were not obtained here). *See* SFA § 9.04(b). Thus, the undisputed evidence is that CACIB consented to the Third Amendment on its own behalf, voluntarily and willingly. Section 8.01 the SFA provides that the Prepetition Agents "shall be entitled to rely upon . . . any notice, request, certificate, consent, statement, instrument, document or other writing . . . believed by it to be genuine and to have been signed or sent by the proper person." SFA § 8.01. Absent clear indication on the signature page, the Prepetition Agents properly relied upon CACIB's indication of acceptance to the Third Amendment and the DIP Credit Agreement, including the Roll-Up.

22. Even assuming *arguendo* that CACIB signed the Third Amendment "as a proxy,"—presumably in violation of the assignment restrictions under the SFA—CACIB's

argument still fails. CACIB still executed the Third Amendment as CACIB to serve its own self-interest. And signing as a proxy in its Lender capacity does not change the fact that the Required Lenders consented to the Third Amendment and the terms of the DIP Credit Agreement. Through the SFA, CACIB and all other Lenders unambiguously delegated their right to object to the Prepetition Agents. Accordingly, the Prepetition Agents are the only parties that possesses the right to object to the Roll-Up—a right that the Required Lenders have expressly directed the Prepetition Agents not to exercise. Third Amend. § 2.

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

23. CACIB's first point of objection is its argument that the Roll-Up violates the SFA. The fundamental premise of this argument is that the DIP Credit Agreement and the Roll-Up (i) amend or change the waterfall provision set forth in Section 7.02 of the SFA, and (ii) such "amendment" violated Section 9.08(c) of the SFA. The glaring flaw in CACIB's position is that the SFA's waterfall has not been changed in any manner. Indeed, CACIB asserts that the Roll-Up in the DIP Credit Agreement violates the SFA because it **"effectively"** modifies the waterfall provision of Section 7.02 of the SFA without CACIB's express written consent as a Secured Hedging Bank. *See* Objection ¶ 17. CACIB's inclusion of the word "effectively" is quite telling. By including that qualifier, CACIB in fact concedes that the DIP **does not** modify the SFA's waterfall provision. Indeed, CACIB's Objection overstates the scope of the Section 7.02 which governs the actions of the *Prepetition Agents* and the manner in which the Prepetition Agents must distribute proceeds and other amounts received on account of the SFA obligations under certain circumstances.

24. Quite simply, nothing has changed or modified the waterfall provision. The Third Amendment did not touch the Section 7.02 waterfall. The proposed Final DIP Order does not touch the Section 7.02 waterfall. If, as, and when the Prepetition Agents obtain proceeds or other

amounts that are to be distributed to secured parties under the SFA (and therefore subject to the Section 7.02 waterfall), the distribution of such funds will be governed by the waterfall as stated in Section 7.02 of the SFA. Neither the entry of the proposed Final DIP Order nor the Roll-Up involves any distribution of proceeds or other amounts by the Prepetition Agents. Accordingly, contrary to CACIB's assertion, the Third Amendment (and by extension, the DIP Facility) did not require CACIB's consent because the Third Amendment did not modify or change the waterfall of Section 7.02 of the SFA. Regardless, as an entirely independent document, the DIP Credit Agreement cannot violate the terms of the SFA.

A. The Third Amendment Did Not Require Consent of Secured Hedging Banks.

25. As a Secured Hedging Bank, CACIB's right to consent or object to an amendment of the SFA is exceedingly narrow. As set forth in Section 9.08(c) of the SFA, the only circumstance in which a Secured Hedging Bank is afforded consent rights is when an amendment modifies Sections 7.02 or 9.08(c) of the SFA. In all other instances, "no Secured Hedging Bank shall have any right to notice of any action or, . . . to consent to, direct or object to any action hereunder . . . other than in its capacity as a Lender." SFA § 9.08(c).

26. The Third Amendment simply did not modify the waterfall provision of Section 7.02 of the SFA. Instead, the Third Amendment authorized the entry into the DIP Credit Agreement and the granting of certain priority liens in connection with the DIP Credit Agreement, *see* Third Amend. § 2, neither of which require the consent of Secured Hedging Banks, *see* SFA § 9.08(c); *supra* ¶ 20. There has been no change at all to the order in which proceeds or amounts received by the Prepetition Agents are distributed under the SFA. Therefore, CACIB's written consent as a Secured Hedging Bank was not required to effectuate the Third Amendment, and the terms of the Third Amendment are valid and binding against CACIB, as both Lender and as Secured Hedging Bank.

B. The DIP Credit Agreement is Independent of the SFA.

27. In its Objection, CACIB incorrectly implies that the waterfall of Section 7.02 of the SFA has been substituted for the DIP Credit Agreement's own waterfall provision. *See* Objection ¶ 14. However, the DIP Credit Agreement's waterfall provision has no controlling effect over the entirely separate SFA. Notwithstanding CACIB's attempt to conflate the two agreements, the SFA is entirely independent of the DIP Credit Agreement. As such, the DIP Credit Agreement cannot modify or amend any terms of the SFA and thus, cannot be held to somehow "violate" the SFA, as CACIB alleges.

28. Finally, and critically, the Roll-Up does not implicate the waterfall in Section 7.02 of the SFA. The waterfall only applies if, as, and when the Prepetition Agents receive certain specific funds. *See* SFA § 7.02 ("The Agents shall apply (a) the proceeds of any collection, sale, foreclosure or other realization upon any Collateral . . . and (b) any amounts received in respect of the Obligations . . . ."). It is undeniable that the Prepetition Agents have **not received any proceeds or other amounts** in connection with the Roll-Up, and indeed, will make no distribution on account of the Roll-Up. Simply put, there is nothing for the Prepetition Agents to distribute pursuant to the waterfall, and the waterfall is therefore not implicated. Approval of the DIP Motion, including the Roll-Up, simply will not cause a waterfall trigger event to occur and, as such, is not subject to the exceedingly limited consent rights of a Secured Hedging Bank under the SFA..

IV. The DIP Motion Neither Seeks to, Nor Violates § 510(a).

29. CACIB further argues that the SFA is an enforceable subordination agreement under Section 510(a) of the Bankruptcy Code, and that the DIP Motion seeks to violate Section 510(a). The characterization of the SFA as a subordination agreement is of no consequence here. Whether or not the waterfall is effectively a subordination agreement does not change the fact

that neither the Third Amendment nor the DIP Motion attempts or purports to modify or change the waterfall provision of the SFA. By the DIP Motion, the Debtors do not seek to deviate from the terms of the SFA. No provision of the proposed Final DIP Order changes how the SFA waterfall will apply in the future, upon the occurrence of a waterfall triggering event. The Roll-Up does not trigger the waterfall provision of Section 7.02, which applies only when the Prepetition Agents actually receive certain proceeds or other amounts in connection with the prepetition Obligations under the SFA. To the extent that the SFA and its waterfall are construed to be a subordination agreement, the DIP Motion does not impact in any manner whatsoever how that "subordination agreement" may be enforced in the future, if, as, and when a waterfall triggering event occurs. CACIB's argument on this point is unavailing.

V. To the Extent Such Opposition Has Not Been Waived or Assigned, CACIB's Adequate Protection Argument Fails.

30. CACIB also complains that the Debtors have not provided CACIB adequate protection in connection with the DIP Facility. The Debtors initially note that CACIB's objection on this point is particularly paradoxical given that CACIB was invited to participate in the DIP Loans and the Roll-Up, but rebuffed such invitation. Having been presented the opportunity to protect itself by participating in the DIP Facility and refusing such opportunity, CACIB's adequate protection argument rings hollow. Indeed, it would be improper and unprecedented for the Debtors to provide to CACIB the benefit of the Roll-Up without the *quid pro quo* of providing new funding by way of participation in the DIP Loans.

31. As discussed earlier, the SFA prohibits any individual Lender action, such as the opposition now being pursued by CACIB. Instead, all authority to pursue (or not pursue) any such opposition, including a challenge to the existence or sufficiency of adequate protection in this context, belongs to the Prepetition Agents. The SFA does not explicitly permit, as it must,

CACIB the right or ability to challenge the sufficiency of adequate protection. Without such explicit permission, no permission or right exists. Importantly, the authority grant to the Prepetition Agents and prohibition on individual action by Lenders extend to "Secured Parties," a defined term that includes Secured Hedging Banks. Thus, these provisions apply to CACIB in both its capacity as Lender or Secured Hedging Bank.[8]

32. CACIB, a sophisticated international financial institution, could have bargained to obtain the right to individual action in negotiating its participation in the SFA. It presumably did not do so, and instead agreed to bargain *away* any such rights in connection with joining the loan syndication. As part of joining the syndicate, CACIB agreed that its individual rights, including its ability to object to the actions of the Prepetition Agents and/or the consent/direction of the Required Lenders would be highly limited. Specifically, CACIB "understood and agreed that all powers, rights and remedies under the [SFA documents] may be exercised solely by the [Prepetition] Agent" and that no Lender has an individual right to "take or institute any actions or proceedings, judicial or otherwise, for any right or remedy against any Loan Party under any of the [SFA documents]." SFA § 8.01. Under the unambiguous terms of the SFA, CACIB lacks any right to oppose or challenge the adequate protection and is further bound to the decisions (including the acquiescence) of the Prepetition Agents and the Required Lenders to agree to the sufficiency of adequate protection as plainly reflected and accomplished in the Third Amendment.

33. Regardless, by executing the Third Amendment, CACIB has consented to the DIP Order and the DIP Loans, and thus has already conceded the sufficiency of adequate protection provided by the DIP Order. As noted above, the Third Amendment included as its Exhibit I a

[8] Secured Hedging Banks simply do not possess any lien rights in such capacity. Rather, Secured Hedging Banks derivatively benefit from the liens granted in favor of Lenders under the SFA and related documents.

form of "Corrected Interim DIP Order" which is substantively identical to the Interim DIP Order entered the next day. That order quite plainly grants adequate protection and states that such adequate protection is "reasonable and sufficient to protect the interests of" the Prepetition Lenders (including CACIB). The Court should not countenance CACIB's attempt to escape the ramifications of its agreements and concessions set forth in the Third Amendment.

VI. CACIB's Designation of an Early Termination Date under the Master Swap Agreement was Ineffective.

34. Finally, CACIB's Objection is premised on the flawed assumption that it is presently owed $23,803,088 as a "Secured Hedging Claim," and is therefore entitled to a *pro rata* distribution of the "proceeds" of the Roll-Up. *See* Objection ¶ 16.[9] This is incorrect. On April 27, 2020, CACIB sent a letter purporting to terminate its obligations under the Master Swap Agreement (the "April 27 Letter"). April 27 Letter ¶ 4. The April 27 Letter claims that the Debtors' voluntary petition under chapter 11 of the Bankruptcy Code triggered an Event of Default under the SFA, and thus constituted an default under Section 5(a)(ix) of the Master Swap Agreement. *Id.* ¶ 3. However, Section 5(a)(ix) of the Master Swap Agreement provides that a default occurs when "an 'Event of Default' as defined in the [SFA] occurs and is subsisting ***and the [Prepetition] Agent has given a notice under Section 7.01 of the [SFA].***" Master Swap Agr., Sched., Part 5(f)(i)(B) (emphasis added). The Prepetition Agents did not provide, and have not provided, notice to Debtors under Section 7.01 of the SFA.[10] Therefore, because the plain terms of Section 5(a)(ix) have not been satisfied, CACIB's designation of an Early Termination Date is invalid. Accordingly, CACIB does not have an allowable claim entitled to protection on

[9] As noted *supra* n.4, the Objection contains two paragraphs numbered 16. For avoidance of doubt, the Debtors refer here to the first Paragraph 16.

[10] This is not to suggest that the Prepetition Agent had any obligation to send notice or take any other action for an Event of Default to arise under the SFA. Rather, the Debtors point to the plain language of the Master Swap Agreement, which clearly state that a default of the Master Swap Agreement occurs when two conditions are met, only one of which has been met here. *See* Master Swap Agr., Sched., Part 5(f)(i)(B)

account of the CACIB Secured Hedging Claim.

WHEREFORE, the Debtors respectfully request the Court overrule the Objection, approve the Final DIP Motion, and grant such other and further relief as the Court may deem just and proper.

Dated: May 19, 2020

Respectfully submitted,

MCKOOL SMITH, P.C.

/s/ John J. Sparacino
John J. Sparacino (SBN 18873700)
Veronica F. Manning (SBN 24098033)
Thomas J. Eisweirth (Admitted *Pro Hac Vice*)
600 Travis St., Ste. 7000
Houston, TX 77002
Tel.: (713) 485-7300
jsparacino@mckoolsmith.com
vmanning@mckoolsmith.com
teisweirth@mckoolsmith.com

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

Proposed Conflicts Counsel to the Debtors

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Debtors' Reply was served by electronic delivery on all persons and entities receiving ECF notice in this case on May 19, 2020.

/s/ Thomas J. Eisweirth
Thomas J. Eisweirth