

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

HUNTER COMMUNICATIONS, INC. and
HUNTER COMMUNICATIONS CANADA,
INC.,

Plaintiffs,

v.

PANASONIC AVIONICS CORPORATION,

Defendant.

No. 7:20-cv-3434 (KMK)

**ANSWER OF DEFENDANT
PANASONIC AVIONICS
CORPORATION**

**DEFENDANT PANASONIC AVIONICS CORPORATION'S ANSWER
TO THE PLAINTIFFS' COMPLAINT AND JURY DEMAND**

In this action, Hunter Communications, Inc. and Hunter Communications Canada, Inc. (together, “Plaintiffs” or “Hunter”) sued Panasonic Avionics Corporation (“PAC”) to collect payments Hunter alleges are due under two contracts between the parties. PAC entered into both contracts—the Master Services Agreement (“MSA”), dated February 27, 2015, and the related SOF 003-A2 Service Order (together, the “Contracts”)—to procure satellite bandwidth from Hunter solely for purposes of supplying in-flight connectivity to its airline customers.

The commercial basis for those contracts—the supply of in-flight connectivity—has been fundamentally and unforeseeably altered by the COVID-19 pandemic, a global health crisis unlike anything ever seen in the history of commercial aviation. As has been widely reported, COVID-19 has devastated the commercial airline industry. Accordingly, in an effort to keep the industry afloat, players at all levels of the commercial airline supply chain—including PAC—have revisited their contracts and provided relief to their clients. Hunter, however, has refused to do so, failing to acknowledge both the reality of the circumstances and the impracticability of its contracts in the face of the COVID-19 pandemic. Indeed, because air travel has essentially

come to a halt in light of the pandemic, the obligation PAC had to make payments under those Contracts has been extinguished, both because the very purpose of the Contracts has been frustrated, and because the pandemic constitutes a force majeure event that necessitates modification or termination of the Contracts.

For these reasons, as well as others described herein, Hunter's claims are wholly without merit.

Accordingly, Defendant PAC, through its undersigned counsel, upon personal knowledge and/or upon information and belief, answers the Complaint dated May 1, 2020 (the "Complaint") as follows:

1. Defendant denies the allegations in paragraph 1, except admits that Plaintiffs purport to bring this action on the bases described therein.
2. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.
3. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.
4. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.
5. Defendant admits the allegations in paragraph 5 that it is a Delaware corporation with a principal place of business located at 26200 Enterprise Way, Lake Forest, California 92630.
6. Defendant lacks information sufficient to form a belief as to the allegations in paragraph 6, except that it admits that Plaintiffs purport in paragraph 6 to base jurisdiction of this Court on 28 U.S.C. § 1332, and that PAC is incorporated in the State of Delaware and has its principle place of business in the State of California.
7. Defendant denies the allegations in paragraph 7, except admits that it has

conducted business in the State of New York and this Judicial District, and that it has agreed to submit to the jurisdiction of appropriate New York courts.

8. Defendant denies the allegations in paragraph 8, except admits that Plaintiffs purport that, pursuant to 28 U.S.C. § 1391, venue is proper in this Court.

9. Defendant admits that Plaintiffs purport in paragraph 9 that this Court has the authority to hear causes of action seeking a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Defendant lacks information and knowledge sufficient to form a belief as to the truth of the allegations in paragraph 10, except it admits that Hunter acts as a satellite services reseller.

11. Defendant lacks information and knowledge sufficient to form a belief as to the truth of the allegations in paragraph 11.

12. Defendant admits the allegations in paragraph 12.

13. Defendant denies the allegations in paragraph 13 to the extent that they characterize the language of and obligations under Service Order Form PAC 003 (“SOF 003-A2”).

14. Defendant denies the allegations in paragraph 14 to the extent that they characterize any agreements between PAC and Hunter, including the MSA, SOF 003-A2 and any other Service Order Forms.

15. Defendant denies the allegations in paragraph 15 to the extent that they characterize the language of and obligations under SOF 003-A2.

16. Defendant denies the allegations in paragraph 16.

17. Defendant denies the allegations in paragraph 17, except admits that it received the invoice from Hunter described in paragraph 17 and that the invoice attached as Exhibit A to Plaintiffs’ Complaint is a true and correct copy of the invoice Defendant received.

18. Defendant denies the allegations in paragraph 18, except admits that it received the invoice from Hunter Communications described in paragraph 18 and that the invoice attached as Exhibit B to Plaintiffs' Complaint is a true and correct copy of the invoice Defendant received.

19. Defendant denies the allegations in paragraph 19.

20. Defendant denies the allegations in paragraph 20.

21. Defendant denies the allegations in paragraph 21.

22. Defendant denies the allegations in paragraph 22.

23. Defendant denies the allegations in paragraph 23, except admits that it received a notice in which Plaintiffs described their contentions and demands.

24. Defendant denies the allegations in paragraph 24.

25. Defendant admits the allegations in paragraph 25.

26. Defendant admits that it sent a letter to Plaintiffs on April 3, 2020, but denies the allegations in paragraph 26 to the extent that they characterize PAC's April 3 letter.

27. Defendant admits that it received a letter from Plaintiffs on April 15, 2020, but denies the allegations in paragraph 27 to the extent that they characterize Hunter's April 15 letter.

28. Defendant admits that it received a letter from Plaintiffs on April 15, 2020, but denies the allegations in paragraph 28 to the extent that it characterizes Hunter's April 15 letter.

29. Defendant denies the allegations in paragraph 29, except admits that it did not send a formal response to Hunter's April 15 letter.

30. Defendant denies the allegations in paragraph 30.

31. Defendant denies the allegations in paragraph 31 to the extent that they are not representative of the parties' obligations in the current circumstances.

32. Defendant denies the allegations in paragraph 32.

33. Defendant denies the allegations in paragraph 33.

34. Defendant denies the allegations in paragraph 34.

**FIRST CLAIM FOR RELIEF
BREACH OF CONTRACT**

35. Defendant repeats and realleges paragraphs 1 through 34 of their responses to the allegations as if fully set forth herein.

36. Defendant denies the allegations in paragraph 36.

37. Defendant denies the allegations in paragraph 37.

38. Defendant denies the allegations in paragraph 38.

**SECOND CLAIM FOR RELIEF
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

39. Defendant repeats and realleges paragraphs 1 through 34 of their responses to the allegations as if fully set forth herein.

40. Defendant admits that Plaintiffs purport in paragraph 40 to describe the law in New York with regard to the implied covenant of good faith and fair dealing, but denies the allegations therein to the extent they characterize obligations under New York law.

41. Defendant denies the allegations in paragraph 41.

42. Defendant denies the allegations in paragraph 42.

43. Defendant denies the allegations in paragraph 43.

**THIRD CLAIM FOR RELIEF
DECLARATORY JUDGMENT**

44. Defendant repeats and realleges paragraphs 1 through 34 of their responses to the allegations as if fully set forth herein.

45. Defendant denies the allegations in paragraph 45.

46. Defendant denies the allegations in paragraph 46.

47. Defendant admits the allegations in paragraph 47.

48. Defendant denies the allegations in paragraph 48.

49. Defendant denies the allegations in paragraph 49.

AFFIRMATIVE AND OTHER DEFENSES

Defendant asserts the following affirmative defenses and reserves all rights to assert other and additional defenses, counterclaims and third-party claims not asserted herein of which it becomes aware through discovery or other investigation as may be appropriate at a later time. In asserting these affirmative defenses, Defendant does not assume any burden of proof, persuasion or production with respect to any issue where the applicable law places such burden upon the Plaintiffs.

FIRST AFFIRMATIVE DEFENSE

Failure to State a Claim Upon Which Relief Can Be Granted

50. Hunter's Complaint and each purported cause of action therein fails to state a claim or cause of action against Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Frustration of Purpose

51. Hunter's claims are barred because the purpose of the Contract upon which they are based has been frustrated by the COVID-19 pandemic.

52. The singular purpose of the Contracts entered into between Hunter and PAC was for Hunter to provide PAC with satellite capacity, which PAC in turn uses to provide airlines with broadband in-flight connectivity for passengers. Those Contracts provide for satellite capacity that PAC would have needed based on the existence of the travel industry at the time the Contracts were negotiated.

53. Since the COVID-19 outbreak was declared a pandemic on March 11, 2020, years after the parties entered into the Contracts, commercial air travel has effectively come to a halt.

54. This is largely because the only way to control the spread of the highly contagious, potentially deadly COVID-19 infection is to practice "social distancing." Such practices, which are strongly recommended by the World Health Organization, the Center for Disease Control and

Prevention and various other public health organizations and governments, include: leaving home only to engage in necessary activities; staying 3 to 6 feet away from others when outside of your home; avoiding any unnecessary forms of transportation, such as air travel; and self-quarantining for 14 days upon travel to a COVID-19 “hotspot.”

55. Governments around the world have taken actions to restrict or ban travel into their countries in an effort to enforce social distancing practices and slow the spread of COVID-19.

56. At this time, there is no accepted view of when social distancing should ease, let alone cease entirely.

57. As a result, commercial air travel has decreased significantly to only a small fraction of what it was a year ago—and it is expected that the commercial airline industry will remain at a substantially depressed level for years in the future.

58. Accordingly, the satellite capacity for which PAC contracted—purchased solely for the purpose of providing airline passengers with broadband services—is both unused and unusable.

59. This disruption to the commercial aviation business resulting from the pandemic was neither caused nor anticipated by the parties, nor was it in any way foreseeable.

60. The Contracts make no sense in light of these events.

THIRD AFFIRMATIVE DEFENSE

Force Majeure

61. Hunter’s claims are barred because a force majeure event prevented performance under the MSA.

62. Under Schedule 2, Section 9 of the MSA:

“Except for the duty to pay for services already received which exceed thirty (30) days, any failure or delay in performance by either Party . . . shall not be a breach of this Agreement and shall not constitute a failure if such failure results from any act of God, governmental action . . . or any other circumstances reasonably beyond the control of the Company.”

63. The COVID-19 pandemic has resulted in the occurrence of several force majeure

events defined under the contract—all of which were unforeseeable at the time the MSA was executed on February 27, 2015.

64. First, the COVID-19 pandemic is a naturally occurring, unforeseeable virus that scientists around the world have been unable to contain despite gargantuan efforts, and therefore is an “act of God.”¹

65. Additionally, the United States government and other governments around the world have issued orders to restrict international and domestic travel in an effort to halt the spread of the virus, including banning international arrivals altogether, prohibiting international arrivals from certain countries and putting in place “stay at home” orders that restrict citizens and residents from non-essential travel. These efforts constitute “acts of government exercising appropriate jurisdiction.”

66. Finally, the uncontrollable spread of COVID-19—and the necessity of social distancing to contain the spread of the virus—constitute “circumstances reasonably beyond” Hunter’s control.

67. Accordingly, PAC did not breach its obligations under the MSA and related Service Orders by refusing to pay invoices issued in January and March for services that were to be rendered by Hunter in March and April of 2020, respectively.

FOURTH AFFIRMATIVE DEFENSE Specific Performance Is Unavailable

68. Hunter’s claim for specific performance is barred by the availability of an adequate remedy at law.

FIFTH AFFIRMATIVE DEFENSE Breach of Covenants Claim and Breach of Contract Claim Cannot Both Stand

69. Hunter’s Second Cause of Action for Breach of the Covenant of Good Faith and

¹ See Definition of “Act of God,” Black’s Law Dictionary (11th ed. 2019) (“An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.”).

Fair Dealing is barred to the extent it is duplicative of Plaintiff's First Cause of Action for Breach of Contract.

SIXTH AFFIRMATIVE DEFENSE
Failure to Mitigate Damages

70. Hunter's claim for damages is barred due to its failure to mitigate the alleged damages resulting from their claim.

71. In the face of letters and communications from the Defendant indicating inability to maintain contractual duties in light of COVID-19 pandemic, Plaintiffs failed to take any steps to mitigate the damages they allege resulted from Defendant's failure to pay under the Contracts.

SEVENTH AFFIRMATIVE DEFENSE
Plaintiffs' Breach of the Contract Prevents
Plaintiffs From Seeking To Enforce the
Claim

72. Hunter is barred from bringing or maintaining this claim or recovering any remedy against the Defendant, because Hunter breached its contractual duties, and such breach excuses any nonperformance by this answering Defendant.

73. Under Paragraph 8 of SOF 003-A2, "in the event that Force Majeure exceeds thirty (30) consecutive days, then following such thirty (30)-day period, the Parties shall meet and negotiate, *inter alia*, the conditions for the termination or modification of the applicable Service Order."

74. Accordingly, because the COVID-19 pandemic has been ongoing for more than 30 consecutive days, Hunter is obligated to meet with the Defendant and negotiate modification or termination of the current Service Order.

75. Although the Defendant has requested the required meeting and negotiation, Hunter has thus far refused to fulfill this contractual duty.

76. Hunter's refusal to fulfill its responsibilities under the contract bars its own claims of breach of contract against the Defendant.

EIGHTH AFFIRMATIVE DEFENSE
Unclean Hands

77. Hunter is barred from bringing or maintaining this claim by virtue of the equitable doctrine of unclean hands, including because Hunter has refused to fulfill its contractual obligation to meet with the Defendant and negotiate modification or termination of the current Service Order.

NINTH AFFIRMATIVE DEFENSE
Impracticability

78. Hunter is barred from recovering against the Defendant, because Defendant's obligations to perform under the law of the contract were discharged on the basis of impracticability.

79. The object of the contract became impracticable to perform upon the declaration of a global pandemic because of excessive and unreasonable difficulty or expense associated with the pandemic, the nature of which was not within the contemplation of the parties at the time the contract was formed.

TENTH AFFIRMATIVE DEFENSE
Waiver

80. By the statements, conduct, acts, or omissions attributable to Hunter alone, Plaintiffs have waived all claims and causes of action and any recovery or remedy alleged in the complaint.

ELEVENTH AFFIRMATIVE DEFENSE
Estoppel

81. By the statements, conduct, acts, or omissions attributable to Hunter alone, Plaintiffs are estopped from seeking any recovery or remedy as alleged in the Third Amended Complaint.

TWELFTH AFFIRMATIVE DEFENSE
Declaratory Judgment Is Unavailable

82. Hunter’s claim seeking a declaration that the MSA “remains in full force and effect and that no force majeure event or occurrence excuses Defendant’s ongoing performance of all its obligations under the [MSA], including its obligation to make timely payment of each monthly invoice for services provided by Hunter Communications through the remaining term of the Services Agreement” is invalid to the extent it seeks a ruling that “no force majeure event or occurrence” will occur in the future for the remainder of the Contracts and that its Contracts will remain valid for that duration.

COUNTERCLAIMS

In accordance with Rule 13 of the Federal Rules of Civil Procedure and as and for their Counterclaims against Hunter, PAC states and alleges as follows:

FIRST CLAIM FOR RELIEF
Breach of Contract

83. As described *supra* ¶¶ 61-67, Schedule 2, Section 9 of the MSA includes a clause explaining that failure of performance by either party shall not be a breach of the agreement if that failure results from a force majeure event, which is defined, in relevant part, as “an act of God, governmental action... or any other circumstances reasonably beyond the control of the Company.”

84. SOF 003-A2, which details the commitments of the parties in relation to one another, includes a clause that explains the procedure parties are obligated to follow upon the occurrence of such a force majeure event. Specifically, Paragraph 8 of SOF 003-A2, provides that “in the event that Force Majeure exceeds thirty (30) consecutive days, then following such thirty (30)-day period, the Parties shall meet and negotiate, *inter alia*, the conditions for the termination or modification of the applicable Service Order.”

85. The COVID-19 pandemic constitutes a force majeure event under this contract,

as it is (a) an act of God, (b) a governmental action, and (c) a circumstance reasonably beyond Hunter's control. (*See supra* ¶¶ 61-67.)

86. The pandemic, which is ongoing, began at least by March 11, 2020, when the World Health Organization declared the COVID-19 outbreak a global pandemic.

87. Thus, Hunter had a contractual obligation to meet with PAC to discuss modification or termination of the Contracts by April 11, 2020.

88. In a letter dated April 3, 2020, PAC notified Hunter that the COVID-19 pandemic constitutes a force majeure event, and requested a meeting with Hunter for April 13, 2020—a date after the pandemic would have been ongoing for a period of 30 days.

89. In a letter dated April 15, 2020, Hunter explicitly refused to fulfill that obligation, stating that a force majeure event had not occurred and therefore that it had no obligation to meet with PAC under the Contracts.

90. Because Hunter refused to meet with PAC as was required by the Contracts, it is in breach of a material provision of the SOF 003-A2 agreement.

91. As a direct and proximate result of Hunter's breach of SOF 003-A2, PAC has sustained losses and should be compensated. Furthermore, PAC should be excused from performing under the agreement.

SECOND CLAIM FOR RELIEF
Breach of Implied Covenant of Good Faith
and Fair Dealing

92. PAC incorporates by reference the allegations of all of the preceding paragraphs as set forth above.

93. As an implied covenant of the MSA and SOF 003-A2 agreements, Hunter agreed to deal with PAC in good faith and not to act in a manner that would deprive PAC of its benefits under the Contracts.

94. Pursuant to Section 8 of the SOF 003-A2, Hunter was required to meet and

negotiate, *inter alia*, the conditions for the termination or modification of the applicable Service Order.

95. Instead of meeting and negotiating with PAC in good faith in light of the circumstances, Hunter denied the existence of a force majeure event, refused to negotiate, and continued to charge PAC for services under the contract.

96. By refusing to honor their obligations under the contract and instead denying the existence of a force majeure event, Hunter failed to act honestly, reasonably, fairly and in good faith.

97. Hunter's actions have destroyed and/or injured PAC's right to benefit from the protections negotiated under the contract.

98. Thus, Hunter has breached the implied covenant of good faith and fair dealing implicit in all contracts governed by New York law by the manner in which it has conducted itself with regard to its obligation to meet and negotiate following the occurrence of a force majeure.

99. As a result of Hunter's breach of the implied covenant of good faith and fair dealing, PAC has suffered damages.

THIRD CLAIM FOR RELIEF Declaratory Judgment

100. PAC incorporates by reference the allegations of all of the preceding paragraphs as set forth above.

101. This dispute between Hunter and PAC is a justiciable controversy appropriate for declaratory judgment under 28 U.S. C. §§ 2201 and 2202.

102. Defendant has provided Hunter with notice that the COVID-19 pandemic frustrates the purpose of the Contracts and constitutes a force majeure event that has been ongoing for more than 30 days, and therefore that Defendant is no longer obligated to perform under the Contracts.

103. Hunter has refused to acknowledge the reality of the COVID-19 pandemic, and continued to assert—against all reason—that the Contracts remain valid, and that negotiating modification or termination of the Contracts is not warranted.

104. Thus, the Court should enter a judgment declaring:

- that the COVID-19 pandemic constitutes a force majeure provision under the Contracts;
- that the COVID-19 pandemic frustrated the purpose of the Contracts;
- and therefore that PAC did not breach its obligations under the Contracts by failing to pay under the Contracts.

PRAYER FOR RELIEF

105. WHEREFORE, PAC respectfully requests that judgment be entered in its favor and against Counterclaim-Defendants as follows:

- a. for compensatory damages, including direct, indirect, consequential and incidental damages, sufficient to compensate PAC for damages arising out of the breaches of the Contracts;
- b. for declaratory relief stating that the COVID-19 pandemic frustrated the purpose of the Contracts and constituted a force majeure event as defined by the MSA, and therefore that PAC has not breached its obligations to Hunter by failing to pay under the Contracts;
- c. for rescission of the MSA and SOF 003-A2 agreements;
- d. for costs, including attorneys' fees and expenses;
- e. for such other relief this Court may deem appropriate.

Respectfully submitted,

Dated: New York, New York
June 26, 2020

PAUL, WEISS, RIFKIND, WHARTON
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