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July 17, 2020

VIA EMAIL
VIA ECF

Michael E. Gertzman
Erin J. Morgan
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

Re: Hunter Communications, Inc. et al v. Panasonic Avionics Corporation, 7:20-cv-03434-KMK

Dear Mr. Gertzman:

As you know, this firm is counsel to Plaintiffs Hunter Communications, Inc. and Hunter Communications Canada, Inc. (collectively, "Plaintiffs" or "Hunter Communications") in the above-captioned action. Pursuant to Judge Kenneth M. Karas' Individual Rule II.A, we submit this letter setting forth the bases for Hunter Communications' anticipated and interrelated motions (1) to dismiss Defendant Panasonic Avionics Corporation's ("Defendant") Counterclaims pursuant to FED. R. CIV. P. 12(b)(6); and (2) to strike the Second, Third, and Seventh through Eleventh Affirmative Defenses in Defendant's Answer dated June 26, 2020 ("Answer") pursuant to FED. R. CIV. P. 12(f).

I. Nature of the Claims and Counterclaims

On February 27, 2015, Hunter Communications and the Defendant entered into a Master Services Agreement (the "MSA") and related individual Service Order Form PAC 003 (the "SOF"), pursuant to which Hunter Communications agreed to provide Defendant with satellite transmission bandwidth at various specific coordinates in exchange for a fixed monthly fee. The parties agreed to amend the SOF twice. Most recently, on or about October 18, 2018 the parties agreed to the SOF amendment titled, PAC 003-A2 ("SOF 003-A2" and together with the MSA collectively, the "Services Agreement"). SOF 003-A2 specified terms, including partially overlapping but independent durations of satellite services to be provided by Hunter

Communications and monthly fees to be paid by Defendant, applicable to two bandwidths of satellite services. Specifically, in SOF 003-A2, the parties agreed that the services and payment terms for bandwidth number 1 would run from October 1, 2015 through January 31, 2019, and the services and payment terms for bandwidth number 2 would run from October 1, 2015 through October 16, 2020.

Hunter Communications' Complaint alleges that it has provided all required services called for under the Services Agreement without interruption and that Defendant has breached its obligations to pay monthly invoices for services (and accumulated interest on unpaid amounts) rendered since March 1, 2020. In its response to the Complaint, Defendant contends that the COVID-19 pandemic excuses its payment obligations under the Services Agreement and Defendant asserts three Counterclaims and twelve Affirmative Defenses, the majority of which are dependent upon that argument.

For the reasons outlined below, Hunter Communications intends to file a motion to dismiss Defendant's Counterclaims and a motion to strike the Second, Third, and Seventh through Eleventh Affirmative Defenses included in Defendant's Answer.

II. Defendant's Counterclaims Should Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(6)

For a claim to survive a motion to dismiss, the claimant must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To that end, the court may consider factual content such as works referenced in the claim as well as documents that the claimant "either possessed or knew about and upon which it relied in bringing the suit." *See Rothman v. Gregor*, 220 F.3d 81, 88–89 (2d Cir. 2000).

Here, Defendant's Counterclaims fail to allege facts in support of its claims to relief that are sufficient to meet the *Twombly* and *Iqbal* "plausible on its face" standard. Defendant's Counterclaims put forward the fact that an international pandemic known as COVID-19 was declared on March 11, 2020 and has existed since. The Counterclaims then present Defendant's claims to be relieved of all ongoing payment obligations under the Services Agreement and hold Hunter Communications in breach for failing to agree that a Force Majeure event has occurred under the parties' contract as *ipse dixit*, without any allegation purporting to connect the pandemic to the performance of the parties' respective obligations under the Services Agreement, let alone to plausibly support a claim that Defendant's failure to meet its ongoing payment obligations has been caused by the pandemic.

Under New York law, "a force majeure clause's primary purpose is to 'relieve a party from its contractual duties **when its performance has been prevented by a force beyond its control**

or when the purpose of the contract has been frustrated. . . . The burden of demonstrating force majeure is on the party seeking to have its performance excused, . . .and **the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure**." *Rochester Gas and Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 at *7 (W.D. N.Y. 2009) (quotations and citations omitted; emphasis added). "Mere impracticality or unanticipated difficulty is not enough to excuse performance." *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl,* 720 F. Supp. 312, 318 (S.D.N.Y. 1989). "New York law requires a narrow interpretation of force majeure clauses." *Carrollton Bank v. Fujitsu Transaction Solutions, Inc.*, 56 Fed. Appx. 603, 606 (4th Cir. 2003). *See also Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985)(rejecting buyer's defense of force majeure to avoid paying for goods where the cargo ship was detained before delivery due to unseaworthiness, because buyer's interpretation of the force majeure provision would "wholly overturn the allocation of duties provided for in [the] sales [contract]".

Where, as here, a contract includes an express force majeure provision, New York courts look to the express terms of that provision to determine whether non-performance is excusable *See, e.g., Kel Kim Corp. v. Central Markets*, 70 N.Y.2d 900, 902–03 (N.Y. 1987). Here, the Force Majeure provision of the parties' Service Agreement only excuses a party's failure of performance "if such failure results from" a list of specified events and occurrences.[1] *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (permitting courts to consider documents integral to a claim when deciding a motion to dismiss pursuant to Rule 12(b)(6)).

Defendant's Counterclaims fail to allege any fact in support of a contention that Defendant's failure to pay monthly invoices from March 2020 **is the result of** the COVID-19 pandemic, let alone facts sufficient to make such a conclusion plausible. The Counterclaims do not include an allegation that Defendant's revenues have been impacted in any way by the pandemic. The Counterclaims include no factual allegation of any kind regarding the terms of Defendant's sales contracts with its customers. Specifically, Defendant does not allege that its sales revenues rise or fall by the number of commercial airline flights between March 1 and October 15, 2020, or the number of commercial airline passengers on those flights.

In a preliminary statement preceding its Answer – a procedural oddity that does not constitute an allegation incorporated within the Counterclaims (*See* FED. R. CIV. P. 10(b)) – Defendant suggests that the COVID-19 pandemic has negatively impacted commercial airlines'

[1] Hunter Communications disputes the allegations that the COVID-19 pandemic constitutes any of the events identified in the Force Majeure provision of the Services Agreement and does not waive its argument that any Amended Answer and/or Amended Counterclaim asserting the same or similar defenses or claims should be stricken and/or dismissed for failure to identify the occurrence of an event meeting the definition of "force majeure" as a matter of the parties' contract and New York law.

business, but it makes no similar suggestion regarding its own revenues. Instead, the preliminary statement contends that "players at all levels of the commercial airline supply chain—including [Defendant]—have revisited their contracts and provided relief to their clients." [ECF No. 17 at unnumbered paragraph on p. 1.] Defendant does not contend that a voluntary decision to "provide[] relief"[2] to third parties, however significant or insignificant that unidentified "relief" may be, meets the definition of a force majeure event under the Services Agreement. It does not, given that it was a voluntary act wholly within Defendant's control. Instead, the Counterclaims identifies and purports to rely upon the general health risks posed by the pandemic and related government actions to reduce those risks, but the Counterclaims do not allege that those conditions have any direct impact on Defendant's revenues. The Counterclaims simply are devoid of any allegation from which it may plausibly be concluded that the loss of revenue or other financial impacts experienced by the Defendant have been so severe they render Defendant unable to make monthly payments to Hunter Communications for the services provided under the Services Agreement. *See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 27 Misc.3d 1222(A), No. 2413–09, 2010 WL 1945738, *5 (N.Y. Sup.Ct. May 12, 2010) (finding that the defendant failed to demonstrate that it was prevented from complying with its contractual obligations due to events entirely outside of its control). *See also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (explaining that pleading standards require enough factual allegations to raise a right to relief above the speculative level); *see also Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota, LLC*, 871 F. Supp. 2d 843, 855 (D. Minn. 2012)(dismissing force majeure counterclaims where the counter-plaintiff failed to demonstrate how performance was excused for reasons out of its control other than financial hardship). Here, Defendant does not even allege it has suffered the financial hardship repeatedly found to be insufficient itself to avoid performance under the doctrine of force majeure. As a result, Defendant's Counterclaims fail to allege the necessary element of each claim as a matter of law, and the Counterclaims should be dismissed.

III. Defendant Has Not Sufficiently Pleaded Its Second and Ninth Affirmative Defenses of Frustration of Purpose and Impracticability

The Second and Ninth Affirmative Defenses should be stricken because Defendant fails to plead sufficient facts to make out its purported affirmative defenses of frustration of purpose and impracticability. *See GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2d Cir. 2019) ("the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense," and is to be applied in a "context-specific" manner). Although Defendant does more than merely recite boilerplate affirmative defenses by legal title (unlike with its Tenth and Eleventh Affirmative Defenses, *see below*), Defendant's Second and Ninth Affirmative Defenses fail to include **any** factual allegations connecting the

[2] Notably, Defendant purposefully avoids identify the alleged "relief" provided to its customers, leaving to speculation whether Defendant agreed merely to temporarily extend one or more customer's payment terms, or permanently waive payment of some portion of one or more invoices.

general allegation that the world is experiencing a global pandemic to the Defendant's ability to perform its payment obligations under the Services Agreement or Defendant's enjoyment of the full contractual benefits contemplated when entering the Services Agreement. The lack of any factual allegation connecting current public health circumstances to Defendant's performance of the Services Agreement leaves the Second and Ninth Affirmative Defenses mere bald assertions that Defendant no longer should be required to pay for the satellite services provided by Hunter Communications. Such conclusory arguments are insufficient to make out plausible affirmative defenses of frustration of purpose and impracticability. *See Shechter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir. 1996) (holding that "bald assertions" are not enough to plead affirmative defenses).

The defense of frustration of purpose is only available "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *See A + E Television Networks, LLC v. Wish Factory Inc.*, No. 15-CV-1189 (DAB), 2016 WL 8136110, at *12–13 (S.D.N.Y. Mar. 11, 2016) (quoting *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 924 N.Y.S.2d 391, 394 (1st Dep't 2011)). The Services Agreement provides for satellite services to be provided by Hunter Communications on two bandwidths commencing on October 15, 2015 and continuing until January 31, 2019 (Bandwidth 1) and October 16, 2020 (Bandwidth 2). Given that approximately ninety-two of a total one hundred months of satellite services on the two bandwidths covered by the Services Agreement already had been fully performed by the parties at the time that Defendant contends the pandemic commenced, it is almost incomprehensible that Defendant would characterize a predicted eight months of operations during a pandemic as frustrating the entire purpose of the parties' contract. Defendant's Affirmative Defenses allege no facts to explain its counter-intuitive argument; Defendant merely declares it to be so in conclusory fashion.

Defendant does not allege that it does not have sales contracts for its entertainment and WiFi services in place running through the remaining March to October 16, 2020 term of the Services Agreement with Hunter Communications. Defendant does not allege that its airline customers are not paying – or will not pay – the amounts owed to Defendant under existing contracts covering that eight month period. In short, Defendant's Affirmative Defenses fail to allege that it could, or would, have sold any additional services to its customers based on the satellite services provided by Hunter Communications from March 1 to October 16, 2020, had there been no COVID-19 pandemic.

Even if Defendant were to allege that its anticipated revenues fell since March 1, 2020 – an allegation not made in the Second and Ninth Affirmative Defenses – lost profitability does not excuse performance of its payment obligations under the frustration doctrine. A party is not excused from a contract simply because it becomes more economically difficult to perform. *See, e.g.*, *Clarex Ltd. v. Natixis Sec. Americas LLC*, No. 1:12-CV-7908-GHW, 2014 WL 4276481, at *11-12 (S.D.N.Y. Aug. 29, 2014) ("[A] change in market conditions or an increase in the cost of performance are insufficient grounds to assert [commercial impracticability and frustration of purpose]. Quite a bit more is required than demonstrating a desire to avoid the consequences of a

deal gone sour."). Relatedly, impracticability is only available when "performance [is rendered] objectively impossible ... by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim*, 70 N.Y.2d at 902. Defendant's assertion of an impracticability defense fails to allege any fact that plausibly supports the conclusion its performance of the final eight months of payment obligations is objectively impossible after enjoying ninety-two months of full profits from the resale of the satellite services provided by Hunter Communications on the two bandwidths covered by the parties' Services Agreement. Accordingly, even if Defendant were to amend its Answer and Affirmative Defenses to allege that it has lost otherwise anticipated revenues beginning in March 2020, the Second and Ninth Affirmative Defenses would still fail as a matter of law, because financial hardship is not a basis to avoid performance under the frustration of purpose or impracticability defenses. *See Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) ("Mere impracticality or unanticipated difficulty is not enough to excuse performance.").

IV. Defendant's Third, Seventh, and Eighth Affirmative Defenses for Force Majeure, Breach of Contract, and Unclean Hands Are Insufficient As A Matter of Law and Should Be Stricken

For the reasons set forth above in Section II, Defendant has failed to plausibly allege a claim that an event of force majeure has occurred excusing Defendant's remaining performance under the Services Agreement and that Hunter Communications breached a contractual obligation triggered by the occurrence of such an event. Each of Defendant's Third, Seventh, and Eighth Affirmative Defenses similarly depends on Defendant establishing that its performance is excused under the Force Majeure provision of the Services Agreement and that Hunter Communications breached an obligation under that provision. Because the Defendant has failed to plead facts sufficient to plausibly make out those necessary underlying elements, the Third, Seventh, and Eighth Affirmative Defenses should be stricken. *See GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d at 98.

V. Defendant's Tenth and Eleventh Affirmative Defenses for Waiver and Estoppel Should Be Stricken Because They Contain No Factual Allegations Whatsoever

Defendant's Tenth ("Waiver") and Eleventh ("Estoppel") Affirmative Defenses are mere boilerplate recitations of legal defenses by title, supported by no factual allegations of any kind. As a result, these defenses fail to meet even the most basic and minimal notice pleading requirements of the Federal Rules of Civil Procedure. Defendant has failed to allege any statement, conduct, act, or omission by Hunter Communications that it contends amounts to a waiver of the claims asserted in the Complaint, or an equitable basis to estop Hunter Communications from asserting its claims. Hunter Communications has no way to determine what facts are at issue based on the inclusion of these affirmative defenses. Mere conclusory assertions of legal theories are not sufficient to give plaintiffs notice of the defenses and, thus, Defendant's Tenth and Eleventh Affirmative Defenses should be stricken. *See Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531

F. Supp. 2d 620, 623 (S.D.N.Y. 2008) (dismissing affirmative defenses, including equitable estoppel, where defendant asserted nothing more than conclusions of law).

Please advise how Defendant intends to proceed, consistent with Judge Kenneth M. Karas' Individual Rule II.A.

Sincerely,

/s/ Steven M. Cowley

Steven M. Cowley

cc: Hon. Kenneth M. Karas, *via ECF*