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STEVEN M. COWLEY
DIRECT DIAL: +1 857 488 4261
PERSONAL FAX: +1 857 401 3090
E-MAIL: SMCowley@duanemorris.com

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September 4, 2020

VIA EMAIL AND 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. Counsel:

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") Amended 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 Amended Answer pursuant to FED. R. CIV. P. 12(f).

As you are aware, in accordance with Judge Karas' Individual Rules, Hunter Communications sent a letter to counsel for Defendant on July 17, 2020 setting forth the bases for Hunter Communications' intended motions (1) to dismiss Defendant's 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 original Answer dated June 26, 2020 ("Answer") pursuant to FED. R. CIV. P. 12(f). In response, while claiming to dispute the deficiency of its Counterclaims and Affirmative Defenses, Defendant filed an Amended Answer on August 21, 2020. Hunter Communications maintains that the Amended Answer does not resolve the deficiencies in the pleading of Counterclaims and Affirmative Defenses. Accordingly, Hunter Communications intends to pursue motions to dismiss and to strike on the grounds explained below.

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, and continues to provide, 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 now amended 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 depend on that argument.

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 the asserted claims that are sufficient to meet the *Twombly* and *Iqbal* "plausible on its face" standard. Defendant's Counterclaims put forward the fact that the COVID-19 pandemic was declared on March 11, 2020 and has existed since. The Counterclaims then present Defendant's demand to be relieved of all outstanding and ongoing payment obligations under the Services Agreement and to hold Hunter Communications in breach for failing to agree that a Force Majeure event has occurred under the parties' contract in conclusory and implausible fashion. Defendant's amended attempt to connect

the pandemic to the performance of the parties' respective obligations under the Services Agreement are unavailing and inadequate as a matter of law. Despite amending its pleading, Defendant still does not allege that its performance of ongoing payment obligations to Hunter Communications has been rendered impossible by the pandemic. Instead, the Amended Counterclaims merely add allegations relating to the impact of the pandemic on **other parties** in the months **after** Defendant ceased performing its obligations. Defendant's Amended Counterclaims contend that some of its customers' payments have been altered and / or delayed, while acknowledging that some of those payment modifications are the result of Defendant's voluntary agreement. Notably, Defendant's Amended Counterclaims still do not allege that the combinations of its assets, revenues earned from resales of Hunter Communictions' services over the first (53) months of the parties' Services Agreement and ongoing revenues it acknowledges receiving from its customers leave it without resources to pay the final eight and one half (8.5) months of fees owed to Hunter Communications before the contract expires.

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]". Despite being informed of its deficient original pleading and then amending its Counterclaims, contrary to New York law, Defendant fails to allege that it made any effort to perform its payment obligations to Hunter but had no funds or other assets with which to make those payments.

Where, as here, a contract includes a written force majeure provision, New York courts look to the express terms of that provision to determine whether non-performance is excused. *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. *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)).

In a preliminary statement preceding its Amended 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 some commercial airlines' business, asserting that "many commercial airlines have been unable to meet their financial obligations" and 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. 23 at unnumbered paragraphs on pp. 1-2]. Defendant's Amended Answer also claims that "nearly 75% of [Defendant's] customers that access [Hunter Communications'] satellites have been unable to fulfill their payment obligations" under their contracts with Defendant. [ECF No. 23 at ¶60.] But, none of these allegations make out a claim against Hunter Communications for a failure to recognize a valid force majeure event in March 2020, where none of the impacts allegedly felt by airline customers are alleged to have occurred prior to the Defendant asserting that such an event relieved it of its obligation to make a payment due on March 1, 2020, and Defendant never alleges that it experienced any occasion before or after purporting to declare a force majeure event when it did not have assets available to meet its payment obligations to Hunter Communications.

From all that appears in the Amended Counterclaims, all of the third-party impacts purportedly relied upon by the Defendant occurred in the months **after** Defendant declared such an event. Defendant fails to allege that even one customer failed to make a payment owed to Defendant, let alone that a payment was not made as a result of a COVID-19 pandemic, prior to Defendant's assertion that a force majeure event excused its refusal to pay the monthly fee due to Hunter Communications on March 1, 2020. Defendant's Amended Counterclaim does not cure this deficiency by adding an allegation that several of its clients have declared bankruptcy and "numerous others have ceased or significantly reduced payment under their contracts with [Defendant]." [ECF No. 23 at ¶¶59, 71.] Again, there is no allegations that these circumstances occurred prior to Defendant's assertion of a force majeure event.

Even if Defendant were to add such an allegation, bankruptcy filings by some airline customers in no way equates with permanent loss of the anticipated revenue from those customers. To the contrary, the Bankruptcy Code appears to protect Defendant's expected profits under its services contracts with airline customers who file for bankruptcy, the only apparent impacts going to when and in what manner will those profits be received. Specifically, §365(a) of the United States Bankruptcy Code permits a trustee or debtor-in-possession to assume or reject a debtor's executory contracts (*i.e.*, contracts under which performance or obligations remains due to some extent on both sides). *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019); 11 U.S.C. § 365(a). If an executory contract is assumed, any defaults thereunder must be cured by the trustee at the time of assumption. 11 U.S.C. § 365(b). If an executory contract is rejected, rejection "constitutes a breach of such contract[,]" and "the counterparty thus has a claim against the estate for damages resulting from the debtor's nonperformance." *Tempnology*, 139 S. Ct. at 1658. Even assuming that one or more airline customers will terminate their contracts with the Defendant, despite the lack of such allegation in the Amended Counterclaims, Defendant does not allege any reason it will not receive the net profits it would

have earned from those customers had they performed their contracts. Even if the bankruptcy process delays the anticipated time it will take Defendant to be paid by some customers, delay in receiving its anticipated profits or increased costs associated with collecting those profits, does not constitute frustration of purpose justifying Defendant's avoidance of its payment obligations to Hunter Communications.[1] *See 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281, 244 N.E.2d 37, 41 (1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused."); *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 demonstrated only financial hardship, which was insufficient to establish that performance was excused for reasons out 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).

Other than an unspecified impact on its short-term profits, Defendant fails to allege any facts demonstrating that an event covered by the parties' force majeure provision and outside of its control has left it incapable of performing its payment obligations under the Services Agreement. On the contrary, Defendant admits (see Amended Answer at lines 2 and 3 of the unnumbered paragraph on p. 2) that it has voluntarily "revisit[ed]" its contracts with an unspecified number of unidentified airline customers to "provide relief to [those] clients." Defendant does not allege that the revisions agreed to with its customers are economically disadvantageous to the Defendant, and there is no basis to suggest that modified payment terms necessarily result in reduced income or profits for the Defendant over the duration of those "revisit[ed]" customer contracts. For example, an agreement to reduce or suspend current payments for a period of time in exchange for an extension of a the customers' service contract obligations may well net Defendant more profits, not less, in the long term. Defendant's failure to allege that it will not be paid the full amounts originally expected, if not more, from its customer contracts is a glaring omission in light of its opportunity to amend the Counterclaims after Hunter Communications identified the deficiencies in the original allegations.

Moreover, Defendant's voluntary decision to revise some customer contracts and accept reduced payments for the time being cannot give rise to a valid claim of force majeure regardkess in light of Defendant's acknowledgment that the parties' contract requires that Defendant's failure to pay Hunter Communications "results from any act of God, governmental action … or any other circumstances reasonably beyond the control of the Company." See Amended Answer at ¶ 66. Defendant's voluntary acts and customer relationship decisions are wholly within Defendant's control and cannot form the basis of a viable claim of force majeure under the Services Agreement. *See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 27 Misc.3d 1222(A), No. 2413–09, 2010 WL

[1] To the contrary, it appears Defendant opportunistically is trying to manufacture a windfall by preserving its ability over time to collect the full profits it anticipates from customer contracts reselling Hunter Communications' services, while avoiding the agreed-upon payments to Hunter Communications for those services.

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).

For all of these reasons, Defendant's Counterclaims fail to allege a necessary element of each claim – *i.e.,* the occurrence of a force majeure event excusing Defendant's performance of its obligations under the Services Agreement - as a matter of law, and the Counterclaims should be dismissed.

III. Defendant's Second and Ninth Affirmative Defenses of Frustration of Purpose and Impracticability Fail as a Matter of Law and Should Be Stricken

The Second and Ninth Affirmative Defenses should be stricken because Defendant's Amended Answer renders these affirmative defenses insufficient as a matter of law and unavailable altogether. Defendant's Second and Ninth Affirmative Defenses are based entirely on factual allegations that Defendant's customers are making reduced payments at this time. Defendant cannot make out a viable defense of frustration of purpose or impracticability based on nothing more than reduced profits or higher expenses associated with its resale of services obtained from Hunter Communications under the Services Agreement. It is well-established that financial hardship is not a basis to avoid performance under 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."). And, by Defendant's own admission, the Services Agreement cannot be said to fail of its essential purpose, because Defendant's Amended Answer now acknowledges that some of the satellite capacity acquired from Hunter Communications is used by the Defendant's customers and it is receiving some of the payments due from those customers. [ECF No. 23 at ¶¶ 59, 71.] Specifically, Defendant alleges that "much of the satellite capacity for which [Defendant] has contracted" with Hunter Communications – as opposed to all of the satellite capacity provided by Hunter Communications - is now unused. [ECF No. 23 at ¶ 59.] Importantly, Defendant is referring to partial use **by its customers** of the bandwidth capacity provided by Hunter Communications. The Amended Affirmative Defenses do not allege that Defendant itself uses anything less than all of the bandwidth obtained from Hunter Communications, by making it fully available to its customers, and Defendant also admits it is receiving payment from at least 25% of its customers for their use of the bandwidth. [ECF No. 23 at ¶ 71.] Those admissions alone bar Defendant from invoking the defense of frustration of purpose. *See, e.g.*, *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 219-220 (N.D.N.Y. 2012), aff'd, 798 F.3d 90 (2d Cir. 2015) (ruling against lessees of oil and gas drilling rights claim to extend the lease terms based on claims of force majeure, impossibility and frustration of purpose based on a government imposed moratorium on new permits for so-called hydro-fracking while environmental impacts were studied, because there was no moratorium on permits for conventional drilling, even though the lessors argued that conventional drilling was not viable as it could not be done profitably). Like the lessors on the oil and gas leases at issue in *Beardslee*, Hunter Communications did not "guarantee production nor that defendant[] would profit," 904 F. Supp. 2d at 220, so Defendant's

protest that it is not earning as much right now as it hoped simply does not justify its avoidance of the contractual obligations to which it agreed.

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 had been fully performed already by the parties at the time that Defendant contends the pandemic commenced, it is almost incomprehensible that Defendant would characterize a drop in its customers' business during the final eight months of operations as frustrating the entire purpose of the parties' contract.

Defendant's Amended Counterclaims do not allege that it has lost any profits as a result of the COVID-19 pandemic. Instead, Defendant alleges that some of its customers are not paying according to their original contract terms, but acknowledges at the same time that it has cut significant costs. [ECF No. 23 at ¶ 62]. Even assuming that that Defendant intends to imply that the balance between the undisclosed amount of delayed revenues and the reduction of its expenses results in reduced profits at this time, Defendant's Second and Ninth Affirmative Defenses fail as a matter of law because 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, and still receives ongoing revenue from some resale of Hunter Communications' services. In fact, Defendant's admission that it is receiving payment from at least 25% of its customers necessarily acknowledges that both the Defendant and a meaningful percentage of its customers continue to utilize Hunter Communications' services, precluding Defendant's attempt to avoid paying for those services on the ground that the Services Agreement no longer serves any purpose. *See, e.g.*, *Wheelabrator Envtl. Sys., Inc. v. Galante*, 136 F. Supp. 2d 21, 34 (D. Conn. 2001) (rejecting a frustration of purpose defense where the defendant admitted it had the ability to perform its obligations under the contract and even partially performed at all relevant times). Use

of and payment for satellite services provided by Hunter Communications by some of Defendant's customers confirms that performance of the Services Agreement is not objectively impossible, and any economic difficulties with collecting payment from most does not entitle Defendant to the impracticability and frustration defenses. *See Clarex Ltd.*, 2014 WL 4276481, at *11-12. *See also Beardslee,* 904 F.Supp.2d at 220 ("While defendants submit evidence that [hydro-fracking] is the only commercially viable method of production and drilling using conventional methods is impractical, '[m]ere impracticality is not enough to excuse performance.'")(citation omitted).

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 such that Hunter Communications can be said to have breached a contractual obligation triggered by the occurrence of a force majeure event. Each of Defendant's Third, Seventh, and Eighth Affirmative Defenses similarly depends on Defendant plausibly alleging 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 fail as a matter of law and should be stricken. *See GEOMC Co. v. Calmare Therapeutics Inc.,* 918 F.3d 92, 98 (2d Cir. 2019) ("There is no dispute that an affirmative defense is improper and should be stricken if it is a legally insufficient basis for precluding a plaintiff from prevailing on its claims.").

V. Defendant's Tenth and Eleventh Affirmative Defenses For Waiver and Estoppel Are Insufficient As A Matter of Law and Should Be Stricken

The Amended Answer also fails to salvage the deficient Tenth ("Waiver") and Eleventh ("Estoppel") Affirmative Defenses. Defendant still does not allege any statement, conduct, act, or omission by Hunter Communications that would amount to an intentional relinquishment of any rights under the Services Agreement or that Defendant somehow relied on a representation by Hunter Communications to its detriment. *See S.E.C. v. KPMG LLP*, No. 03 CIV. 671 (DLC), 2003 WL 21976733, at *3 (S.D.N.Y. Aug. 20, 2003) (striking affirmative defenses for waiver and estoppel where the factual allegations pleaded were insufficient as a matter of law to plead the defenses). Hunter Communications challenged Defendant's initial versions of its Waiver and Estoppel defenses on the grounds that they consisted of nothing more than bare conclusory assertions of legal theories by title, with no accompanying factual allegation at all. *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). In its Amended Answer, Defendant now acknowledges that these defenses are premised solely on an unidentified agreement Defendant "believes" Hunter Communications may have reached with an unidentified third party concerning unidentified contract terms

applicable to their independent relationship. Defendant does not allege that Hunter Communications ever communicated anything to the Defendant that Defendant interpreted as a waiver of any right under their Services Agreement, or that otherwise induced the Defendant to cease performing its payment obligations under that contract. In short, Defendant's new allegations do not support the alleged affirmative defenses of Waiver and Estoppel. To the contrary, the allegations in the Amended Counterclaims establish as a matter of law that neither defense exists.

For the foregoing reasons, Hunter Communications respectfully requests a pre-motion conference regarding its anticipated motions to dismiss and to strike. Thank you for your consideration in this matter.

Sincerely,

/s/ Steven M. Cowley

Steven M. Cowley

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