SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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N888JK LIMITED,

Index No.

Plaintiff,

- against -

COMPLAINT

EQUIOM (ISLE OF MAN) LIMITED AS TRUSTEE OF ANAP AIRCRAFT OWNERSHIP TRUST,

Defendant.

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Plaintiff N888JK Limited ("Plaintiff"), by its attorneys, Smith, Gambrell & Russell, LLP, as and for its Complaint against Defendant Equiom (Isle of Man) Limited as Trustee of ANAP Aircraft Ownership Trust ("Defendant"), hereby alleges as follows:

THE PURPOSE OF THIS ACTION

1. In this action, Plaintiff seeks a declaration that it has the right to receive the deposit in the amount of $500,000 paid by Defendant pursuant to a Used Aircraft Purchase Agreement between Plaintiff and Defendant that has been terminated due to Defendant's breach of its obligation to purchase the aircraft.

THE PARTIES

2. Plaintiff is a British Virgin Islands corporation which owns an Embraer Legacy 600 aircraft, serial number 14501037, bearing United States registration mark N888JK, equipped with two Rolls-Royce model AE3007A1E engines, serial numbers CAE-313069 and CAE-313071, APU model Sundstrand APS500R, serial number SP-E0314611, together with all avionics, accessories or other equipment and documentation attached thereto or directly associated therewith (collectively the "Aircraft").

3. Upon information and belief, Defendant is an Isle of Man corporation which is the Trustee for the ANAP Aircraft Ownership Trust with a registered address of Jubilee Buildings, Victoria Street, Douglas, Isle of Man, 1M1 2SH.

4. Pursuant to a written contract for the sale of the Aircraft described herein, the parties agreed that any legal proceeding based upon the aircraft purchase agreement or breach thereof "shall be brought exclusively to the courts of New York, to the exclusion of all other courts and tribunals." (Purchase Agreement, § 17).

BACKGROUND

A. Aircraft Purchase Agreement and the Initial Deposit.

5. On or about December 30, 2019, Plaintiff and Defendant entered into a "Used Aircraft Purchase Agreement" pursuant to which Defendant was to purchase the Aircraft (hereinafter "Purchase Agreement").

6. The Purchase Agreement provides that the purchase price for the Aircraft was $6,875,000 ("Purchase Price").

7. The Purchase Agreement further provides that Defendant would be obligated to pay, and in fact Defendant did pay, a $500,000 deposit ("Initial Deposit") toward the Purchase Price. The Initial Deposit was paid to an escrow agent, Insured Aircraft Title Service, LLC ("Escrow Agent").

8. The Purchase Agreement provides that once Defendant executes a pre-purchase technical acceptance of the Aircraft, it will be in breach if it does not accept delivery of the Aircraft and pay the remaining balance of the Purchase Price after certain conditions are met. (Purchase Agreement, § 9.3 pp. 7-8).

9. The Purchase Agreement further provides that if Defendant fails to cure any breach within ten business days of written notice from Plaintiff, Plaintiff's sole remedy is that it may terminate the Purchase Agreement, and the Initial Deposit is thereupon forfeited and required to be paid to Plaintiff as liquidated damages. (Purchase Agreement, § 9.4, p. 8).

10. The Purchase Agreement further provides that "[i]n addition to any other remedies provided under this Agreement, the prevailing party shall be entitled to recover its legal fees and costs in any action brought to enforce a claim under this Agreement or to interpret a term under this Agreement." (Purchase Agreement, § 25, p. 12).

B. Purchase Agreement and Pre-Purchase Inspection.

11. The Purchase Agreement provides that Defendant would have the opportunity to conduct a pre-purchase inspection of the Aircraft ("Pre-Purchase Inspection") and that it could reject the Aircraft or preliminarily accept the condition of the Aircraft subject to correction of any discrepancies that would be corrected by Plaintiff prior to Closing. (Purchase Agreement, § 6.2).

12. Exhibit C to the Purchase Agreement is a Pre-Purchase Inspection Acceptance or Rejection Notice pursuant to which Defendant could either reject the Aircraft after the Pre-Purchase Inspection or Defendant could accept the Aircraft subject to specified discrepancies being repaired (the "Discrepancies"). (Purchase Agreement, p. 19).

13. As for the Closing and Delivery of the Aircraft, the Purchase Agreement provides that "[a]fter the Discrepancies are corrected as set forth in Clause 6.2 as evidenced by the Aircraft Return-to-service certified by the Inspection Facility, the parties shall proceed to Closing within two-(2) Business Days." (Purchase Agreement, § 8.1).

C. Plaintiff's Pre-Delivery Acceptance of the Aircraft.

14. On or about January 6, 2020, Plaintiff moved the Aircraft to the agreed upon Inspection Facility, Duncan Aviation in Provo, Utah, for the Pre-Purchase Inspection by Defendant.

15. Defendant initially signed the Pre-Purchase Inspection Acceptance Notice providing that it preliminarily accepted the Aircraft without attaching a list of Discrepancies to be rectified by Plaintiff, but Defendant indicated thereon that certain items of a cosmetic nature, which do not meet the definition of "Discrepancy," should be corrected.

16. The broker for the transaction notified Defendant that the Pre-Purchase Inspection Acceptance Notice needed to be revised, as there had not been any Discrepancies found by the Inspection Facility and, therefore, Plaintiff did not need to rectify any Discrepancies on the Aircraft.

17. On or about February 26, 2020, Defendant finally provided a revised Pre-Purchase Inspection Acceptance Notice confirming that no Discrepancies had been found that needed to be rectified by Plaintiff.

18. On or about February 26, 2020, the Escrow Agent confirmed it was holding the $500,000 Initial Deposit paid by Defendant, and the revised Pre-Purchase Inspection Acceptance Notice, duly signed by Defendant, then accepted by the Plaintiff, was provided to the Escrow Agent, thus making the Initial Deposit non-refundable under the terms of the Purchase Agreement.

D. Discussions about Closing Date for the Purchase Agreement.

19. Thereafter, the Inspection Facility, Duncan Aviation, was tasked with continuing the general scheduled maintenance of the Aircraft agreed by both parties in the Purchase Agreement, completion of which was necessary to put the Aircraft in the Delivery Condition

agreed by the parties in the Purchase Agreement (Purchase Agreement, § 7), whereupon the Aircraft would be certified for Return to Service by the Inspection Facility, and the closing could proceed.

20. Duncan Aviation initially indicated that the Return to Service Date for the Aircraft would be March 7, 2020, which would have meant the Closing of the Purchase Agreement would occur on March 9.

21. On February 28, 2020, the Parties agreed to schedule a test flight to occur on March 9, 2020.

22. Defendant, however, preferred to close no earlier than March 18, 2020, and in fact commented that it might purposefully enter into default so that it could close on its preferred closing date by taking advantage of the ten-day cure period in the Purchase Agreement.

23. On March 5, 2020, the test flight was cancelled because the parties were still working on details of the closing documents.

24. Thereafter, the parties discussed the possibility of a closing on March 13, 2020.

25. On March 9, 2020, Duncan Aviation informed Plaintiff that there would be a delay of the Return to Service Date for the Aircraft because parts provided by the Aircraft manufacturer were defective, and that it needed to obtain additional parts from Embraer or other sources in order to put the Aircraft in the Delivery Condition and certify the Aircraft for Return to Service.

26. On March 14, 2020, Duncan Aviation provided notice to Plaintiff and Defendant that it expected to get the remaining parts needed so the Aircraft would be ready for Return-to-Service by March 23 at the latest. Duncan Aviation further indicated that it expected the closing of the Purchase Agreement could occur towards the end of the week of March 16 or early the week of March 23.

E. After Confirmation of the Return-to-Service Date, Defendant Suddenly Claims Force Majeure.

27. In response to Duncan Aviation's confirmation that the Closing could occur within days, Defendant suddenly claimed a Force Majeure Event had occurred on March 7, 2019, a week earlier, invoking clause 14 of the Purchase Agreement. Specifically, on March 14, 2020, Defendant sent an e-mail stating that it was formally notifying Plaintiff that "the repeated and ongoing inability of Seller (and/or its agents) to 'obtain Aircraft materials, accessories, equipment, or parts from the vendors. . .' as contained in Clause 14 [of the Purchase Agreement], is to be considered by [Defendant] as a "Force Majeure Event" under Clause 14 with effect from Saturday 7th March 2020, the date of the [Return to Service] as originally advised by Seller to Buyer."

28. The March 14, 2020 email went on to state that the Defendant's position was also that the "ongoing disruption caused by the Coronavirus issue and the US Government declaration of a 'National Emergency' on 13th March 2020 within the United States is also to be classified as a 'Force Majeure Event' under the [Purchase Agreement] based on the fact that such events are outside the control of both Buyer and/or Seller."

29. Clause 14 of the Purchase Agreement provides as follows:

> **14. Force Majeure.** No party shall be liable for any failure of or delay in performance hereunder for the period that such failure or delay is due to Acts of God or the public enemy; war, insurrection or riots; fires, governmental actions; strikes or labour disputes; inability to obtain Aircraft materials, accessories, equipment, or parts from the vendors; or any other cause beyond the affected party's absolute control (each, a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event, the time required for performance by the affected party of its obligations arising under this Agreement shall be extended by a period equal to the duration of the Force Majeure Event. In case the Force Majeure Event continues more than thirty (30) days this Agreement shall automatically terminate on the thirty-first (31st) day and Escrow Agent shall return all the monies and the documents to its original depositor and following such return, no party shall have any further rights or liabilities to the others with respect to this Agreement.

(Purchase Agreement, p. 11).

30. On March 17, 2020, Defendant sent another email "formally advising Seller that under Clause 14 of the Agreement, a 'Force Majeure Event' has taken place due to the ongoing and worsening global pandemic situation with COVID19/Coronavirus which has led to multiple travel bans and the declaration of various 'States of Emergency' in several countries, including the declaration of a 'National Emergency' in the USA where the aircraft is currently domiciled."

31. The March 17, 2020 email further claimed that the Purchase Agreement would "automatically terminate on the thirty-first (31st) day (after the "Force Majeure Event") unless an earlier termination date is agreed between the Parties."

32. Nothing about the National Emergency declared by the United States government prevented Plaintiffs from making the Aircraft available for a test flight or otherwise putting the Aircraft in the Delivery Condition and closing the transaction by delivering the Aircraft to Defendant.

33. Further, nothing about the National Emergency declared by the United States government prevented Defendant from participating in a test flight or from closing the transaction by paying the balance of the Purchase Price and taking delivery of the Aircraft. The test flight, payment of the balance of the Purchase Price, exchange of sale documents, filing the appropriate documents with the FAA, and delivery of the aircraft from Plaintiff to Defendant all could have happened on March 24, 2020, notwithstanding the coronavirus pandemic and any related travel restrictions or the National Emergency declared by the United States government.

34. On March 17, 2020, the broker for the transaction wrote a detailed response to Defendant rejecting the Force Majeure claims and providing a detailed explanation as to why a claim of Force Majeure was inaccurate. Plaintiff further confirmed that it had been advised that

the Return-to-Service date for the Aircraft would be March 23, 2020, and that it would reconfirm that Return-to-Service date with the Inspection Facility.

35. On March 17, 2020, Plaintiff wrote to Defendant formally rejecting Defendant's invocation of Force Majeure and reconfirmed the validity of the Purchase Agreement.

F. Aircraft is Cleared for Return to Service but Defendant Fails to Comply with Closing Obligations.

36. On March 18, 2020, Duncan Aviation reconfirmed to Plaintiff that the Aircraft would be ready for Return-to-Service on March 20, 2020.

37. On March 18, 2020, Plaintiff re-confirmed to Defendant that the Aircraft would be in Return-to-Service condition on March 20, 2020, and that Defendant's test flight was scheduled for March 21, 2020.

38. On March 20, 2020, Plaintiff wrote to Defendant and provided evidence that the Aircraft had been certified in Return-to-Service condition by Duncan Aviation earlier that day, and accordingly, Plaintiff was formally notifying Defendant to perform its obligations pursuant to Clause 8 of the Purchase Agreement to proceed with the Aircraft Delivery and Closing. Plaintiff's March 20, 2020 notice further notified Defendant that a flight test was scheduled for the afternoon of Saturday March 21, 2020 (Utah local time), and the Closing Date would be March 24, 2020, two business days after the Aircraft's Return-to-Service in compliance with the Purchase Agreement. The Escrow Agent was also informed of the Closing Date and had been following up with Defendant to obtain outstanding closing documents, as the Purchase Agreement required Defendant to provide in advance of the Closing.

39. Defendant did not conduct a test flight or otherwise comply with any of its closing obligations in the Purchase Agreement despite the Plaintiff repeatedly advising Defendant that a flight crew and operations team were standing by for a test flight until March 24, 2020.

40. On March 23, 2020, the Escrow Agent notified Plaintiff that it had not received the balance of the Purchase Price or the signed Delivery Receipt.

G. Defendant Claims Entirely New Basis for Force Majeure.

41. On March 23, 2020, Defendant's counsel sent a new letter claiming an entirely different Force Majeure event. This time Defendant claimed that Defendant's "representatives were prevented from remaining in the United States due to the travel restrictions put in place, and [Defendant] ha[d] attempted to identify alternative representatives to participate in the flight test, but ha[d] been unable to do so given the global pandemic." The letter went on to claim that "neither the flight test nor the Closing can proceed for the foreseeable future."

42. The March 23, 2020 letter also stated that "[u]nless the pandemic and government travel restrictions change substantially within the next 30 days, the Agreement will terminate pursuant to the Force Majeure clause, and Equiom is entitled to a return of its Initial Deposit from the Escrow Agent."

H. Plaintiff Demands Defendant Proceed with Closing and Arranges Flight Crew for Test Flight.

43. Early on March 24, 2020, Plaintiff sent a Formal Notice to Complete, which asked Defendant to perform its obligations pursuant to Clause 8 of the Purchase Agreement and proceed with the Aircraft Delivery and Closing on March 24, 2020. Plaintiff also notified Defendant again that Plaintiff had arranged a flight crew and operational readiness to perform Defendant's flight test, with engineers standing by for any findings from the flight test.

44. On March 24, 2020, the Escrow Agent notified Plaintiff that it had never received the balance of the Purchase Price or the signed Delivery Receipt as required from Defendant under the Purchase Agreement and, further, had received no word from Defendant about proceeding with

the Closing by 3:30 p.m. Oklahoma time, when Federal Aviation Administration registry office in Oklahoma City closed for business for the day.

45. Later in the day on March 24, 2020, after Defendant failed to close the transaction before the FAA registry closed for business for the day, Plaintiff notified Defendant that Defendant had defaulted under the Purchase Agreement by, among other things, failing to pay the balance of the Purchase Price for the Aircraft when the time for Purchaser's performance had come due ("Notice of Default").

46. On March 26, 2020, Plaintiff, through its counsel, sent a notice to Defendant confirming that Plaintiff had provided a Notice of Default on March 24, 2020, and reminding Defendant that pursuant to Section 9.4 of the Purchase Agreement, Defendant had ten days from the Notice of Default to cure the defaults.

47. On March 31, 2020, Defendant's counsel responded to the March 26, 2020 letter and claimed that Defendant was not in default. Specifically, Defendant claimed that its representatives (who were not identified) were allegedly unable to participate in a flight test due to the coronavirus pandemic and resulting government travel restrictions, which Defendant claimed constituted Force Majeure Events under the Purchase Agreement. Defendant claimed that it had given formal notice of the Force Majeure Event on March 17, 2020, and that "[u]nless the pandemic and travel restrictions change substantially within 30 days, the Agreement will terminate pursuant to the Force Majeure clause, and [Defendant] is entitled to a return of its Initial Deposit."

48. Defendant did not explain how the coronavirus prevented it from conducting its test flight. Nor could it. There were no prohibitions on test flights or private flights at any point during the pandemic, and Plaintiff had in fact arranged for a crew to conduct the test flight for Defendant on March 24, 2020. The only reason the test flight did not occur is that Defendant elected not to

take the test flight when Plaintiff made the Aircraft and crew available, apparently because Defendant's preferred personnel had chosen to leave the test site before participating in the test flight.

49. On April 8, 2020, Plaintiff wrote to Defendant and notified Defendant that the ten-day cure period had expired on April 7, 2020, and Defendant had failed to cured its defaults by, among other things, paying the balance of the Purchase Price for the Aircraft. Plaintiff noted that while it had the right to terminate, it was not yet terminating the Purchase Agreement. Instead, Plaintiff proposed that the parties jointly agree to direct the Escrow Agent to release the Initial Deposit to Plaintiff, and then the parties could negotiate the terms of a new purchase agreement for the Aircraft if Defendant actually wanted to purchase the Aircraft.

50. On April 14, 2020, Defendant responded to Plaintiff's April 8, 2020 letter. Defendant did not accept Plaintiff's offer and instead argued again that the pandemic somehow excused its breaches. Yet, Defendant's letter actually confirmed that there was no justification for its breaches. Defendant admitted that it had the personnel present in Provo, Utah, that it wanted to participate in the test flight for the Aircraft, but those personnel decided they wanted to return to Nigeria before the Nigerian government's travel restrictions took effect. In short, by Defendant's own admission, there was nothing preventing Defendant's personnel from participating in the test flight; they merely had a personal desire to fly to Nigeria before any travel restriction would go into effect. Defendant's personnel were not required to leave the United States when they did. They chose to leave.

51. While nothing prevented Defendant's preferred personnel from staying in Utah and taking part in the test flight when Plaintiff arranged for it, nothing in the Purchase Agreement gave Defendant a right to have specific personnel participate in the test flight. Even after Defendant's

preferred personnel left the United States voluntarily for reasons of their own convenience, Defendant could have chosen to have other representatives take part in the test flight on Defendant's behalf. Having third-party representatives take part in test flights such as this one is commonplace in the industry. Numerous such independent qualified third-party representatives were in fact available to take part in the test flight and could have been engaged by Defendant to participate in the test flight on Defendant's behalf. Defendant chose to not pursue this option for its own reasons.

52. Moreover, Defendant's preferred personnel or other representatives actually taking part in the test flight was not a condition to Defendant's obligation to close the transaction by paying the Purchase Price and taking delivery of the Aircraft. The relevant condition was that Plaintiff would arrange for a test flight of the Aircraft. Plaintiff did so.

I. Plaintiff Terminates the Purchase Agreement and Demands the Initial Deposit Be Released to It.

53. On April 17, 2020, Plaintiff sent Defendant a notice that it was terminating the Purchase Agreement pursuant to Clause 9.4 (the "Termination Notice"). The Termination Notice further notified Defendant that the Initial Deposit was forfeited and was to be paid to Plaintiff as liquidated damages in accordance with Clause 9.4.

54. On April 22, 2020, five days after the termination of the Purchase Agreement, Defendant sent a response disputing the termination and opposing the Escrow Agent's release of the Initial Deposit to Plaintiff. Defendant referenced its March 17, 2020 Force Majeure Notice claiming that its flight crew's personal decision to return to Nigeria constituted a Force Majeure Event, and that the Purchase Agreement actually terminated 31 days after March 17, 2020. Defendant also claimed that it "had attempted in good faith to pursue Closing of the transaction by

extending the Purchase Agreement to allow for resolution of the alleged Force Majeure Events within a reasonable time period."

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

55. Plaintiff repeats and re-alleges each and every allegation set forth in the previous paragraphs above as if fully set forth herein.

56. Plaintiff asserts that it is entitled to the Initial Deposit as liquidated or other damages for Defendant's breaches of the Purchase Agreement.

57. Defendant asserts that it is entitled to return of the Initial Deposit because the Purchase Agreement terminated due to a Force Majeure Event as specified in the Purchase Agreement.

58. A justiciable controversy exists between Plaintiff and Defendant as to what the parties' rights are under the Purchase Agreement.

WHEREFORE, Plaintiff demands judgment that this Court declare and determine as follows:

(1) That Defendant breached the Purchase Agreement and that as a result, Plaintiff is entitled to the Initial Deposit as liquidated or other damages for Defendant's breaches; and

(2) That Plaintiff be awarded its attorneys' fees and costs in pursuing this matter.

Plaintiff demands such other further and different relief as the Court may deem just and proper in the circumstances, together with the costs and disbursements of this action.

Dated: New York, New York
May 28, 2020

SMITH, GAMBRELL & RUSSELL, LLP

/s/ John G. McCarthy

By: _____
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