Atlantic Aviation Invs. LLC v MatlinPatterson Global Advisers LLC
2013 NY Slip Op 31594(U)
June 26, 2013
Sup Ct, NY County
Docket Number: 602286/09
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS, *Justice* **PART** 53

ATLANTIC AVIATION

- V -

MATLINPATTERSON GLOBAL

INDEX NO. 602286/09

MOTION DATE

MOTION SEQ. NO. 013

MOTION CAL. NO.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to ,were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s)

Answering Affidavits - Exhibits No(s)

Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with accompanying Memorandum Decision.

DATED: 6/26/13

CHARLES E. RAMOS J.S.C.

1. CHECK ONE : [ ] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: [ ] GRANTED [x] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION
--X
ATLANTIC AVIATION INVESTMENTS LLC,

Plaintiff,

- against -

MATLINPATTERSON GLOBAL ADVISERS LLC, MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP, MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II LP, and VOLO LOGISTICS LLC,

Index No. 602286/09

Defendants,
--X
VOLO LOGISTICS LLC,

Third-Party Plaintiff,

LAN PAX GROUP S.A. and LAN AIRLINES S.A.,

Third-Party Defendants.
--X

Charles E. Ramos, J.S.C.:

Plaintiff Atlantic Aviation Investments LLC (AAI) moves for a partial summary judgment award of damages against defendants, MatlinPatterson Global Opportunities Partners II LP, MatlinPatterson Global Opportunities Partners (Cayman) II LP (collectively the MP Funds), and Volo Logistics LLC (Volo). Defendants cross-move for an order granting additional disclosure.

Background

This action was previously assigned to the Justice Richard Lowe, who granted AAI's motion for summary judgment on liability, by decision dated May 5, 2011 (the May 5 decision), which was

affirmed by the First Department (*Atlantic Aviation Invs., LLC v MatlinPatterson Global Advisers*, LLC, 92 AD3d 461 [1st Dept 2012]).

The May 5 decision concerned the interpretation of the parties' "Memorandum of Understanding" (the MOU) and the agreement within the MOU, the "Make-Whole Agreement." The MOU memorialized the transaction, whereby plaintiff, defendant Volo, and nonparty CAT LLC (CAT) would become lenders to nonparty VRG, a Brazilian airline, and then become owners in VRG (the Transaction).

The MOU states that Volo is an affiliate of the MP Funds and nonparty VarigLog. VarigLog incorporated VRG to hold the assets of two other companies purchased by VarigLog (MOU at 1).[1] VarigLog and nonparty Volo de Brasil own 100% of VRG, and Volo owns all of the MP Funds' and its affiliates' economic and beneficial interest in VarigLog and its affiliates (*id.*). The opposing affidavit by Lawrence Teitelbaum states that the MP Funds are indirect owners of Volo and CAT.

The MOU contemplates that Volo, plaintiff, and CAT will loan VRG $171 million. Plaintiff's share of the loan is $17.1 million, 10% of the total loan, in return for which plaintiff will obtain a 10% equity interest in VRG. Volo and CAT will loan

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[1] Unless otherwise indicated, the MOU and other documents are attached to Becker's affirmation supporting plaintiff's motion.

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45% of the total loan and each obtain 45% ownership in VRG. The MOU calls the percentages "Transaction Percentages."

The MOU would be effective upon execution by the parties; this event is the "First Closing" (First Closing) (¶ 1.1.1 [a]), upon which plaintiff would provide VRG with the first part of its loan, $9.6 million (¶ 1.4). The "Second Closing" (Second Closing) would follow, upon which the lenders would advance the rest of their loans "under the definitive Transaction Documents, which the Parties agree shall be finalized before such Second Closing" (*id.*).

The "Transaction Documents" were to provide that the Second Closing "shall be conditioned upon the satisfaction" of various conditions, including governmental approval of plaintiff and CAT taking ownership in VRG (*id.*). The "Transaction Consummation" would take place "promptly" after the Brazilian government issued its approval (*id.*). In the Transaction Consummation, the lenders would surrender their loans in exchange for equity ownership in VRG (*id.*). Each lender's equity in VRG would be equivalent to its Transaction Percentage (*id.*).

The lenders would enter the Transaction Documents before the Second Closing (¶ 1.6). "For the purposes of the Second Closing and the Transaction, the Parties intend to finalize" the Transaction Documents, including the loan documentation for the loans, the Make-Whole Agreement, a share acquisition agreement,

"Corporate Governance Provisions," and other agreements (*id.*).

The first page of the MOU states that Volo or its affiliates have committed to make an additional investment in the amount of $75 million. The MP Funds and Volo warrant to CAT and AAI that VRG has been provided with "irrevocable commitments for loans and/or equity contributions in the" amount of $96 million, through a series of loans termed the Volo Loans (¶ 1.2).

As the MOU makes clear, plaintiff and CAT could not become owners in VRG unless the Brazilian government approved the Transaction. Plaintiff and CAT made the loans contemplated by the MOU, but did not take ownership in VRG, apparently because the Brazilian government did not approve and because VarigLog sold VRG. Exactly why the MOU did not unfold as contemplated is not clear from the record.

At issue in the May 5 decision was whether plaintiff was entitled to a share of the proceeds from the sale of VRG. The MOU defines certain occurrences as "Exit[s]" (¶ 5.3.1). An Exit may lead to a recovery or a loss (¶ 1.1.1 [h]). Under the Make-Whole Agreement, in the event of an Exit that results in any party receiving or retaining more or less consideration than its Transaction Percentage, the parties shall make a payment to the other parties "so as to make the net amount of such consideration received by each equal to the Transaction Percentages" (¶ 1.1.1 [h] [I]).

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"Such payment shall include ... the Parties exchanging consideration to" attain a balance reflecting their Transaction Percentages (*id.*). That is, the effect of an Exit must be adjusted so that each lender is compensated or endures a loss equivalent to its Transaction Percentage (*id.*). The MP Funds would make the appropriate payment on behalf of Volo or its affiliates, and the affiliates of plaintiff and CAT would make the payments on behalf of plaintiff and CAT (*id.*).

Plaintiff moved for summary judgment on liability, on the grounds that the sale of VRG was an Exit and the Make-Whole Agreement entitled plaintiff to a share of the sale proceeds. In the May 5 decision, the Court determined that, although the Transaction had not come to fruition and the Second Closing had not taken place, the sale of VRG was an Exit, and the Make-Whole Agreement entitled plaintiff to part of the sale proceeds.

The First Department agreed, stating that "[u]nder the make-whole agreement, Volo and the MP Funds are obligated to ratably share with plaintiff the funds received by VarigLog, Volo's affiliate, in connection with the sale of shares" of VRG (*Atlantic*, 92 AD3d at 461-462). Although the parties to the MOU intended to enter into another, final version of the Make-Whole Agreement, the MOU was nonetheless a complete and enforceable contract (*id.*).

In its instant motion, plaintiff moves for an award of

damages. Plaintiff seeks 10% of $320 million, the sum allegedly fetched by VRG. Defendants cross-move, claiming that more disclosure is needed to ascertain the sale price. Defendants also claim that plaintiff is entitled to less than 10% of whatever the sale price may be, that plaintiff's Transaction Percentage was diluted, pursuant to certain terms of the MOU, and that plaintiff must share in certain losses and expenses incurred by defendants.

Letters between the parties

The parties entered into the MOU in September 2006. In letters dated October 25, 2006, November 17, 2006, December 6, 2006, and December 13, 2006, Volo wrote to plaintiff and/or CAT seeking the fulfillment of their funding commitment in respect to the $171 million addressed in the MOU. The December 13, 2006 letter was also a letter agreement between plaintiff and Volo, in which plaintiff "has determined to waive the conditions set forth in sections [of the MOU] as concerns the Second Closing ... with respect to AAI funding the AAI Capital Investment as provided herein" (Ex. G). Other aspects of the letter agreement are raised below.

On January 16, 2007, Volo wrote plaintiff that VRG was making a "Capital Call Amount" of $24 million in excess of the $171 million. The letter requested that plaintiff loan VRG 10% of $24 million. The additional $24 million shall "to the extent

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funded in full on a pro rata basis by AAI, preserve the agreed proportionate allocations of the Parties interest in [VRG]" (Ex. H).

If AAI did not participate, its "proportionate interest in [VRG] shall be ratably reduced" (*id.*). Volo wrote other letters to plaintiff concerning the sale of VRG, the distribution of plaintiff's pro rata interest in the sale proceeds, the dilution of plaintiff's Transaction Percentage to 7.1%, and plaintiff's responsibility for 10% of Volo's expenses (Exs. L and M, April 5 and 26, 2007). On May 2, 2007, AAI's attorneys wrote to Volo objecting to the reduction of AAI's Transaction Percentage (Ex. N).

The sale of VRG

The "Purchase and Sale Agreement" (PSA) recites that VarigLog and Volo de Brasil are selling VRG (Woll Affirmation [Aff.] opposing plaintiff's motion, Ex. 1, at 7). VarigLog sold the bulk of VRG to GTI S.A. (GTI), an affiliate of GOL Linhas Areas Inteligentes S.A. (GOL). The transaction closed in April 2007.

Plaintiff claims that VRG was sold for $320 million, and that the sale price was divided into $98 million in cash, $177 million in shares of the buyer company, and $45 million in assumed debt by the buyer.

Defendants claim that the buyer did not assume any of VRG's

debt, that the sale price was much less than $320 million, less even than the $275 million price set forth in the PSA, and that the value of GOL shares that VarigLog was entitled to receive under the PSA was reduced due to restrictions on the transfer and sale of GOL shares.

After the sale of VRG closed, a dispute developed between VarigLog and GTI about the application of a purchase price adjustment. In January 2008, GTI commenced an arbitration in Brazil seeking a reduction of the purchase price. The arbitral tribunal issued a final award in September 2010, determining that the cash purchase price should be reduced by $55 million.

Whether the May 5 decision determined the sale price

The May 5 decision stated that VRG was sold for $320 million, divided as plaintiff alleges. Plaintiff argues that the statements pertaining to the sale price of VRG in the May 5 decision constitute the law of the case, and that the issue of price cannot be reconsidered.

Pursuant to the law of the case doctrine, a judge or court may not alter a ruling "on the merits made by a judge or court of coordinate jurisdiction" (*Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335 [1st Dept 2009]; *Bobrow v Bobrow*, 181 AD2d 556, 557 [1st Dept 1992]).

The issue determined by the May 5 decision was that plaintiff was entitled to a percentage of the sale price of VRG,

and was not a ruling on the amount of the sale price.

The statements concerning the $320 million were part of the background to the case and derived mainly from information provided by plaintiff. Those statements were based on the data and law presented by the parties in that procedural posture, and did not represent a setting down of undisputed facts (*see 191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 [1st Dept 2011]). Rather they were dictum, defined as "[a]ny statement, explanation, rationale, or observation not directly related or necessary to the outcome of the particular dispute before a court ..." (*London Terrace Towers, Inc. v Davis*, 6 Misc 3d 600, 612 [Civ Court, NY County 2004]). Dictum is not law of the case (*Bobrow*, 181 AD2d at 557).

Whether plaintiff establishes the sale price in this motion

Plaintiff cites to the deposition testimony of defendants' principals in an effort to demonstrate the price fetched by VRG. Mark Palmer, lead counsel for defendants in the MOU negotiations and now a partner in the MP Funds, previously testified that VarigLog received a total cash sum of $98 million and shares worth $177 million (Palmer Transcript [Tr.] at 164-165). Lawrence Teitelbaum, the chief financial officer of the MP Funds, testified that he received information that VRG was sold for $275 million in cash and stock and $45 million assumed in debt, and that those amounts represented the $320 million from the sale

(Teitelbaum Tr. at 181-182). Teitelbaum stated that VarigLog received funds from the sale (*id.* at 62).

Ahmad Al-Sati, defendants' in-house counsel, testified that VarigLog received 6.1 million shares and a little less than $100 million cash (Al-Sati Tr. at 103). None of the deponents were sure about the accuracy of their figures or could state with certainty from where the figures derived.

To prove the sale price, plaintiff must come forward with supporting documentary evidence or an explanation as to how the total amount of the debt was calculated; conclusory allegations as to the amount are insufficient (*see Sterling Natl. Bank v Biaggi*, 47 AD3d 436, 437 [1st Dept 2008], citing *HSBC Bank USA v IPO, LLC,* 290 AD2d 246, 246 [1st Dept 2002]).

The plaintiff has failed to prove the sale price for VRG. The deposition testimony is inconclusive and there is no documentation or explanation for the figures.

Dilution of Transaction Percentages and obtaining financing in excess of $171 million for VRG

Defendants claim that, because plaintiff did not advance 10% of the total loan to VRG, its Transaction Percentage was reduced. Teitelbaum's affidavit states that Volo alone funded the $24 million requested in the January 2007 letter, that Volo funded $65 million above the $171 million in the MOU, and that Volo and CAT together funded $219 million, which is about 93% of the total

investment of $236 million. Of that, plaintiff funded $17.1 million.

Defendants claim that plaintiff's Transaction Percentage is 7.1%. Plaintiff claims that the MOU does not allow for Transaction Percentage dilutions in the absence of a Second Closing and, even if it did, Volo's request for $24 million was improper because it was not made according to the MOU's guidelines for raising funds in excess of $171 million.

One of the basic tenets of contract law is that all agreements are to be construed in accordance with the intent of the parties, and the best evidence of their intent is what they state in their writing (*Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 405-406 [1st Dept 2012], *affd* 20 NY3d 1082 [2013]). A contract should be construed, wherever possible, in such a way as to reconcile and give effect to all of its provisions (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc. LLP,* 6 NY3d 371, 374 [2006]).

To determine the meaning, the court reads the contract as a whole and its various provisions contextually (*Waverly Corp. v City of New York,* 48 AD3d 261, 265 [1st Dept 2008]). Each provision "will be interpreted with reference to the whole; and if possible [the contract] will be so interpreted as to give effect to its general purpose" (*Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 248 [1942]). Where the

contract clearly demonstrates the parties' over-all intention, isolated provisions should be interpreted in a manner that will carry out the purpose of the contract (*Kass v Kass*, 91 NY2d 554, 567 [1998]). Lastly, when a contract includes general and special provisions relating to the same issue, the special provisions control, even if there is an inconsistency between the specific provisions and the general provisions (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998]).

For the sake of convenient reference, the relevant portions of the MOU cited below are lettered.

A. Section 1.1.1 is entitled "New Loans and Additional Investments" and it addresses plaintiff's loans. Upon the First Closing, AAI will provide the "Initial AAI Loan" which is AAI's "Initial Funding Obligation" of $9.6 million (¶ 1.1.1 [a], [b], ¶ 2).

As a condition to the Second Closing, VRG and plaintiff shall make a loan agreement about the "Initial AAI Loan," which shall include Corporate Governance Provisions agreed to by the parties, amongst others (¶ 1.1.1 [b]).

Upon government approval, CAT and AAI shall surrender their loans to VRG in exchange for 45% and 10%, respectively, of the equity interests of VRG; Volo shall have 45% equity interest in VRG (¶ 1.1.1 [d]):

> "The foregoing equity percentages shall be subject to ... dilution to the extent of any future equity issuances authorized by [VRG] in accordance with the Transaction Documents to the extent Volo, CAT or AAI ... decide not to subscribe for the purchase of its ratable share of such equity" (*id.*).

At the time that "Additional Initial Investments" are required to be made, Volo shall fund 45% of such "Additional Initial Investment" in the form of an "Additional Equity Investment" and/or "Additional Loans" (¶ 1.1.1 [e]).

CAT shall fund 45% of such "Additional Initial Investment" in the form of "Additional CAT LLC Loans," and AAI shall fund 10% of such "Additional Initial Investment" in the form of "Additional AAI Loans" (*id.*).

B. The Make-Whole Agreement provides that, upon the occurrence of an Exit, Volo, CAT, and plaintiff shall share in the recovery according to their Transaction Percentages:

> "It is understood that the foregoing assumes that Volo, CAT, and AAI ... each subscribe for 45%, 45% and 10%, respectively, of any additional debt or equity issuances authorized by the Company in accordance with the Transaction Documents beyond the Additional Investment Amount. To the extent that is not the case and additional debt or equity financing is required and is completed prior to the occurrence of the Transaction ... the Make-Whole Agreement will provide for an appropriate adjustment to the formula set forth above" (¶ 1.1.1 [h] [iii]).

C. Section 1.1.2, "Shareholding Structure," provides the ownership plan for VRG. Volo and CAT will receive 45% each, and AAI, 10%, "at the time of consummation of the Transaction" (¶ 1.1.2):

> "The foregoing percentage interests are subject to pro rata dilution for ... subsequent issuances of equity approved by [VRG] in accordance with the Transaction Documents, to the extent not subscribed for by Volo, CAT or AAI ..."

D. Section 1.2, "Initial Investment Amount," provides that the MP Funds and Volo represent to CAT and AAI that VRG has been provided with commitments for loans or equity contributions in the aggregate amount of $96 million through a series of loans, termed the "Volo Loans" (¶ 1.2).

E. Section 1.3, "Total Investment Amount," provides that CAT commits to the total amount of $76.95 million and AAI to the total amount of $17.1 million "(together the Total Funding Commitments)" (¶ 1.3):

> "The parties acknowledge that any budget agreed upon by Volo and CAT ... pursuant to the approval rights described in the Corporate Governance Provisions" may call for funding in excess of the sum of (a) the "Total Funding Commitments," and (b) proportional amounts to be provided by Volo or its affiliates (*id.*). AAI shall have no obligation to fund more than $17.1 million (*id.*).

> "The Parties agree that if such additional funding is required pursuant to the Company's [VRG] budget as approved during such period by the Board of Directors of the Company and also approved pursuant to the approval rights described in the Corporate Governance Provisions, and such amounts ... are not provided by Volo, CAT or AAI ..., the Company shall be entitled to issue equity or debt as it requires to secure such funding and, notwithstanding anything to the contrary herein, any non-funding holder's participation may be diluted for such issuance until the Company has raised the required capital in debt and/or equity" (¶ 1.3).

F. Section 1.4, "Effectiveness; Closings," includes a paragraph about the Second Closing, which says that "each of CAT

and AAI irrevocably commits to advance, when due, its Total Funding Commitment in the form of Additional CAT LLC Loans ... or Additional AAI Loans ... under the definitive Transaction Documents, which the parties agree shall be finalized before such Second Closing" (¶ 1.4).

G. Section 1.6, "Documentation," provides that the parties will enter into final Transaction Documents, including loan documentation for CAT's and AAI's loans, shareholders' agreement, Corporate Governance Provisions, and others (¶ 1.6).

H. Section 2, "Initial Funding Obligations," states that, at the First Closing, AAI agrees to fund the $9.6 million plus "Transaction Costs" (¶ 2).

I. Section 3.1, "Further Funding Obligation," states that AAI and CAT will each fund "its pro rata share of the Additional Initial Investment at the time and in the manner required ... and conditioned upon Volo and its affiliates meeting their obligations hereunder to funds its ratable amount up to the Total Funding Commitment ..." (¶ 3.1).

Additionally, "any interim funding provided prior to the Second Closing shall be deemed to be pre-funding ofSecond [sic] funding commitments so as to reduce the Second Closing funding commitment of the parties ..." (¶ 3.1).

J. Section 5.1.3., "Board of Directors," provides that VRG shall have an eight-member board. After the Transaction is

consummated, Volo and CAT shall appoint three members each to VRG's board, AAI shall appoint one member, and one member shall be "independent" (¶ 5.1.3).

If the parties "reduce their stock ownership by transferring among each other or by failing to subscribe for additional shares on a pro rata basis, Board seat rights shall be addressed as to apportionment in the Transaction Documents or between the affected Parties" (*id.*). "The guiding principal [sic] on apportionment shall be board representation in proportion to ownership" (*id.*).

K. Section 13, "Compliance with Corporate Governance Provisions," states that the MP Funds and Volo covenant with CAT and AAI that until the Transaction is completed, they will cause VRG to comply with the Corporate Governance Provisions (¶ 13).

The MOU permits Transaction Percentages to be diluted

Parts A, B, C, and E of the MOU address investment in VRG, in the form of equity and/or debt financing (e.g. loans), in excess of the $171 million. Part A addresses what happens if VRG issues more equity interests after the lenders have taken their equity interests in VRG pursuant to the Second Closing.

The lenders may choose to increase their investment in VRG in order to maintain the same percentage of ownership in VRG. If the lenders do not increase their investment, their pro rata share in VRG will be diluted commensurate with their investment.

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Part B, the Make-Whole Agreement, says that funding beyond $171 million may be required, and if the lenders do not invest in the extra funding according to their Transaction Percentages, what they gain from any Exit recovery will be adjusted accordingly. Part C provides that the percentages may be diluted for subsequent equity issuances. Part D pertains to Volo's loans to VRG that are not included in the $171 million amount.

Part E states that the parties may invest or lend more than $171 million. Those lenders who do not participate in additional financing, whether for equity or debt, will have their interests diluted.

Parts F, H, and I concern the $171 million funding. The reference in Part H to interim funding pertains to funding up to the $171 million amount, but does not reference funding beyond that amount. Part D does not affect the Transaction Percentages as it concerns loans not included in the $171 million.

The MOU provides that a party that does not subscribe to equity or debt financing beyond the $171 million may have its Transaction Percentage diluted. This means that the party will have its share of an Exit recovery reduced.

According to Part B, if such financing is completed before the Transaction occurs, the percentages will be adjusted. Contrary to plaintiff's arguments, the fact that the Second Closing did not take place and the Transaction Documents were not

executed does not prevent dilution of Transaction Percentages. The MOU's numerous references to pro rata division evidence the parties' desire to maintain a pro rata relationship between loans/investments, Exit recoveries, and ownership in VRG, even if the Second Closing did not take place. In the event the Second Closing took place, Part J provides that board membership must reflect proportion of ownership.

Also, in the May 5 decision, the Court determined that plaintiff was entitled to share in the Exit recovery, even though the Second Closing did not occur. Defendants then argued that since the Second Closing did not occur, there could not have been any Exit.

Now plaintiff contends that there cannot be any dilution because the Second Closing did not occur. Plaintiff's position is inconsistent with the Court's construction of the MOU in the May 5 decision, which is based on the MOU's intendment.

A contract will not be interpreted to reach a result that is absurd, unreasonable or contrary to the reasonable expectations of the parties (*Matter of Lipper Holdings v Trident Holdings,* 1 AD3d 170, 171 [1st Dept 2003]).

There is also the consideration that the December 13, 2006 letter agreement states that plaintiff waives the Second Closing. Although none of the parties refer to a waiver.

The MOU's guidelines for increasing investment were not followed

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Part A makes it clear that the parties must be given a choice about whether to subscribe to additional financing. Defendants consulted plaintiff about contributing to the $24 million loan to VRG. Plaintiff refused to fund 10% of that and Volo allegedly funded the entire amount. Defendants do not claim that they consulted plaintiff about other loans in excess of the $171 million loan. This means that if plaintiff's Transaction Percentage is diluted, it can only be diluted in consideration of the $24 million loan.

The next issue is whether defendants should have followed certain procedures in order to add $24 million to VRG's debt. Parts A and C require that equity issuances must be according to the Transaction Documents. Part B says that equity or debt financing must be according to the Transaction Documents. Part E speaks of equity or debt financing as approved by the Board of Directors of VRG and approved pursuant to procedures in the Corporate Governance Provisions.

Parts A, G, and K show that the Transaction Documents were to include Corporate Governance Provisions. As plaintiff points out, the Transaction Documents were not made, and there is no indication that Corporate Governance Provisions were drawn up. The next issue is whether VRG's Board of Directors had to approve the financing above the $171 million.

According to the MOU, the answer is yes. Plaintiff states

that there is no evidence that VRG's board approved the extra financing, and defendants do not claim board approval. Palmer did not know if the January 2007 capital call for $24 million above the $171 million was authorized (Palmer Tr. at 247-248). Teitelbaum's affidavit does not address the issue.

Defendants contend that additional financing did not require formal approval, and that the $171 million financing in the MOU was accomplished without such approval. Defendants argue that the parties' course of performance shows that formal approval was not needed to issue debt in excess of $171 million.

The parties' course of performance under a contract may provide evidence of what they intended when they made the contract (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999]). Here, however, there is no such evidence. There is no affidavit or testimony by a person with knowledge as to whether the parties intended to issue future debt or equity financing without board approval. While plaintiff proves the provisions of the MOU, defendants fail to raise an issue of fact as to whether the MOU was followed.

Volo made the $24 million capital call without following the provisions in the MOU. Accordingly, the $24 million may not be used to reduce plaintiff's Transaction Percentage, which remains at 10%.

Whether plaintiff must share in costs and losses

Section 1.7 of the MOU is entitled "Costs; Leaseco." The MOU indicates that Leaseco is a company that leases aircraft to VRG.

At the same time as AAI makes its initial loan, AAI will reimburse defendants 10% of their reasonable and documented costs and expenses incurred in the preparation of certain other documents referred to in the MOU (¶ 1.7). Those costs are Transaction Costs, capped at $8.2 million; plaintiff's share is $820,000 (*id.*). Plaintiff will not share in the costs of preparing the MOU or any Transaction Document (*id.*).

Plaintiff shall proportionately share other reasonable and documented transaction costs incurred by the parties to the MOU and by VRG "related to the Transaction and Leaseco as reasonably agreed in any applicable letter agreement" (*id.*). Plaintiff will fund its pro rata portion of costs in connection with acquiring aircraft leased to VRG pursuant to a "Leaseco Term Sheet," and "other definitive documents to be agreed in connection therewith" (*id.*).

The entity Leaseco is now known as Hemisphere Aircraft Leasing (Hemisphere). In the December 13, 2006 letter agreement, plaintiff and Volo agreed to finalize definitive documents concerning funding, governance, and leasing for Hemisphere (Ex. G). Promptly after the execution and delivery of such documents, AAI would fund its 10% pro rata share of the investment in

Hemisphere (*id.*). Plaintiff contends that since documents relating to Hemisphere were not finalized, it does not owe any costs in that regard.

At his deposition, Palmer testified that he did not think the Hemisphere documents were finalized or that AAI signed any. Whether the documents were finalized is an issue for later determination. Otherwise, plaintiff acknowledges its responsibility for 10% of documented costs, and claims that defendants have so far failed to document, which defendants do not deny.

As to losses, turning again to the Make-Whole Agreement, it provides that if there is an Exit that results in a recovery by Volo, CAT, or AAI or

> "realization of any loss by Volo, CAT or AAI ... in respect of any CAT Loans, AAI Loans, any remaining funded Volo Loans or Additional Loans or Volo's or its affiliates' equity interests: i. To the extent that Volo, CAT or AAI ..., receive or retain aggregate consideration in an amount that is less than, or in excess of, its applicable Transaction Percentage (after taking into account any actual liability or loss that CAT or AAI would be equally responsible for had their investments been made on the date of the capitalization of [VRG], [the parties] shall make, as applicable, a payment to the other party or parties so as to make the net amount of such consideration received by each equal to the Transaction Percentages"

(¶ 1.1.1 [h] [I]).

This means that if an Exit leads to a recovery or an Exit leads to a party losing money on its loan, the parties will make each other whole to the extent of each one's Transaction

Percentage. Teitelbaum's affidavit states that defendants took a loss for accounting and tax purposes of approximately $219 million since they were not paid back on the loans. But defendants do not argue that the Exit brought about this loss.

Moreover, the loss on the loans is not the same as a loss on the sale of VRG. For instance, a loss would have occurred if the sale price for VRG was lower than the company's value, which is not alleged. In addition, apparently, plaintiff also lost its investment as it was not paid back the loans. Accordingly, whatever defendants gained by selling VRG, it must be shared with plaintiff. Section 1.1.1 [h] [I] of the Make Whole Agreement states that the loss that plaintiff would have suffered if it had been a lender on the date VRG was capitalized must be taken into account. The parties do not address this. These are more issues for later determination.

Defendants point to VarigLog's assumption of VRG debt as a loss that should be accounted for. Pursuant to a December 2006 debt assumption agreement to which Volo, CAT, and AAI were parties, VarigLog assumed $56 million of VRG's debts (Woll Aff., Ex. 7). Later, allegedly in order to enable VRG to be sold on a debt free basis, VarigLog assumed $93.7 of VRG debt in June 2007 (*id.*, Ex. 8). It is not shown that these agreements affect the MOU. Accordingly, plaintiffs' motion for summary judgment on the issue of damages is denied, due to the existence of triable

issues of fact.

Defendants' Cross Motion

Defendants request additional discovery concerning the consideration received by the sale of VRG. During oral argument, the Court permitted the parties permission to conduct discovery while the instant motions were pending. To that extent, the cross motion was granted. In conclusion, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for disclosure is granted, as limited by this order and decision.

Dated: June 26, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS