

**Hudson Transp. Real Asset Master Fund LP v Ares
Mgt. LLC**

2022 NY Slip Op 30233(U)

January 11, 2022

Supreme Court, New York County

Docket Number: Index No. 653688/2021

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

HUDSON TRANSPORT REAL ASSET MASTER FUND LP, CVI AA CAYMAN SECURITIES LP, CVI AV CAYMAN SECURITIES LP, CVIC CAYMAN SECURITIES LTD., CARVAL GCF CAYMAN SECURITIES LTD., CVI CVF VI CAYMAN SECURITIES LTD., CVI CVF V CAYMAN SECURITIES LTD., and CARVAL CCF CAYMAN SECURITIES LTD.,

Plaintiffs,

INDEX NO.	653688/2021
MOTION DATE	
MOTION SEQ. NO.	002 & 003

- v -

ARES MANAGEMENT LLC, ASOF HOLDINGS I, L.P., ACOF VI HOLDINGS, L.P., VMO AIRCRAFT LEASING, LP, VMO AIRCRAFT LEASING HOLDINGS (CAYMAN), LP, and WILMINGTON TRUST COMPANY,

Defendants.

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard very extended oral argument on January 10, 2022 via Microsoft Teams on the pre-Answer motion by defendants Ares Management LLC, ASOF Holdings I, L.P., and ACOF VI Holdings, L.P. (together, "Ares"), and Vmo Aircraft Leasing, LP, and Vmo Aircraft Leasing Holdings (Cayman), LP (together, "Vmo") for an order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing Counts 2, 3, 5, 6, and 7 of the Complaint (NYSCEF Doc. No. 1) as against Ares and Vmo (seq 002). The Court also heard at that time argument on the motion by defendant Wilmington Trust Company ("Wilmington") for an order, pursuant to CPLR §§ 3211(a)(1), (3), and (7), dismissing Counts 1, 2, 3, 4, 6 and 7 as asserted against Wilmington (seq 003). The motions are granted in part and denied in part in accordance with the decision on the record on January 10, 2022 and as provided herein.

The action involves ten Boeing 737 aircraft (“the Aircraft”) which were collateral for Notes in connection with Norwegian Air Shuttle’s (“NAS”) financing and acquisition of the Aircraft. NAS issued two classes of equipment trust certificates, each of which represented beneficial interests in a pass-through-trust that owned the Notes secured by the Aircraft: Class A Certificates and Class B Certificates. As part of the restructuring of the subsidiary of NAS that leased the Aircraft, Wilmington, in its role as Trustee, allegedly sold the Aircraft to Vmo, an entity created by Ares, in a manner and at a price as directed by Ares that caused plaintiffs as Class B Certificateholders to suffer damages.

Turning first to the motion by Wilmington, the Court dismisses the First Cause of Action alleging that the sale was commercially unreasonable in violation of UCC § 9-610. The UCC defines the parties that can sue to enforce the UCC. Plaintiffs asserted in their papers that their Class B Certificates represented a “fractional undivided interest” in the Trusts that owned the Notes, which were secured by the Aircraft, which gave them standing to sue. However, during oral argument, counsel effectively conceded that this interest did not qualify plaintiffs as secured parties as defined by the UCC. Therefore, the First Cause of Action is dismissed with prejudice based on plaintiffs’ lack of standing to sue.

The Second and Third Causes of Action alleging a breach of the various contracts at issue are also dismissed as against Wilmington. Although Wilmington is a party to the contracts, the plaintiffs are not, and none of the cited provisions support plaintiffs’ theory of third-party beneficiary status. Therefore, the Second and Third Causes of Action are dismissed as against Wilmington with prejudice based on documentary evidence and failure to state a cause of action.

The Court declines to dismiss the Fourth Cause of Action alleging a breach of fiduciary duty by Wilmington. Following an event of default, an indenture trustee owes “a fiduciary duty

of undivided loyalty and ... a postdefault obligation of prudence in the exercise of the rights and powers accorded by the indenture..." *Beck v Manufacturers Hanover Trust Co.*, 218 AD2d 1, 13 (1st Dep't 1995). Because plaintiffs are seeking damages based on Wilmington's alleged misconduct and breach of duty, and not simply for the value of the Certificates, the claim is not barred by the economic loss doctrine, at least at this pre-Answer stage of the proceedings.

The Court dismisses with prejudice the Sixth and Seventh Causes of Action against Wilmington for breach of the implied covenant of good faith and fair dealing as duplicative of the other claims.

The motion to dismiss by Ares and Vmo is determined as follows. The Court dismisses with prejudice the Second and Third Causes of Action against Ares for breach of contract. Neither plaintiffs nor Ares is named as a party to the contracts, and the contractual provisions cited by plaintiffs fail to show that plaintiffs are third-party beneficiaries entitled to enforce the contracts. To the extent Ares may have assumed certain obligations upon its purchase of the Class A Certificates, those obligations did not extend to plaintiffs as other Certificateholders and investors.

The Court denies dismissal of the Fifth Cause of Action against Ares and Vmo for aiding and abetting Wilmington's breach of fiduciary duty. By, among other things, allegedly directing Wilmington to allow Ares' affiliate Vmo to act as a Stalking Horse Bidder and by further allegedly directing conditions for the sale such as a multi-million dollar fee to Vmo, Ares and Vmo allegedly substantially assisted Wilmington in the Trustee's breach of fiduciary duty by allegedly conducting a sale in a manner and at a price that dissuaded bidders and resulted in a price that prejudiced plaintiffs as investors and Certificateholders. The cause of action has been adequately stated at the pleading stage to survive dismissal.

The Court dismisses with prejudice the Sixth and Seventh Causes of Action against Ares for breach of the implied covenant of good faith and fair dealing as duplicative of the other claims.

Defendants shall file an Answer to the remaining claims within thirty days and thereafter meet and confer to complete a Proposed Preliminary Conference Order using the form available on the Part 61 website. The Proposed Preliminary Conference Order shall be efiled by March 1, 2022 with a letter providing a dial-in number for the conference, which is scheduled for March 16, 2022 at 10:30 a.m. The parties are encouraged to pursue early mediation to resolve their dispute before expending significant sums on discovery.

Dated: January 11, 2022

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: