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Case No. 3D23-2117

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

El Clan A, LLC.,

Appellant,

v.

Paradise Airlines, Inc. a Foreign Corporation and Christian Canache, individually, a Florida Resident.

Appellees.

APPELLANT'S REPLY BRIEF

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Appellant, El Clan A, LLC ("Appellant"), by and through its undersigned counsel, files this Reply Brief to the Response by Appellees Paradise Airlines, Inc. and Christian Canache ("Appellees") and in support hereof states as follows:

I. The Agreement

1. Appellee does not address the inconsistent holding by the Trial Court regarding the enforceability of the Agreement. In its Answer Brief, Appellee continues to champion the material terms of the terms of the Agreement, which Appellee disputed and introduced evidence of its unenforceability. "It was not a final document." *Christian Canache T.181:11*.

2. Despite Mr. Canache as president of the Appellee Paradise renouncing the Agreement under oath and presenting evidence of the Agreement's unenforceability[1], Appellee nevertheless requests of this Court to enforce its terms

[1] Q. Back to the top. Mr. Canache, I'll ask you again: Is this a true and correct copy of the Nonexclusive Aircraft Sublease Agreement, Part 135 operation entered into between El Clan and Paradise 19 Airlines?

A: This is not signed by me, neither does it have a date. T.171:15-21

Q. Okay. Mr. Canache, my question again is: Were the parties, El Clan and Paradise Airlines, bound by the terms of the document that we marked as Plaintiff's Exhibit 2, the Nonexclusive Aircraft Sublease Agreement prior to October 31, 2018?

A. Okay. Well, I am not a lawyer but I understand. From what I understand is that there is no date that that would start being so once the plane started to fly.

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and ban consequential damages as disallowed under the renounced Agreement, preclude a trial by jury for issue so triable since the renounced Agreement contains a waiver and to Award Attorney's fees as permitted under the renounced Agreement. All the while, Appellee asks the Court to ignore the material terms of the very same Agreement that require the Aircraft's Maintenance and Historical Logs ("Maintenance Logs") be returned to Appellant.

3. "A trial court's interpretation of a contract is reviewable by this court under a de novo standard of review provided the language is clear and unambiguous and free of conflicting inferences." *N. Star Beauty Salon, Inc. v. Artzt*, 821 So. 2d 356, 358 (Fla. 4th DCA 2002). Accordingly, Appellant petitions this court to review the agreement, and enforce all of its terms or none of them.

II. Fraudulent Fuel Charges

4. With regards to the fraudulent invoices for false fuel sales, Appellee's Response Brief misdirects the Court into believing that Appellant withdrew its fraud claim. Appellant incorrectly submits that, "After years of claiming $4,500.00 for fraud, Mr. Serrano conceded at trial that, "With regard to the $4,500, Mr. Hiller is correct. We withdraw the claim..." *Response Brief pg. 9.* Such is incorrect. Appellant

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sought fraud claims for false fuel invoices since the inception of the case and throughout its closing argument.

> As to the elements of fraud here, they fit squarely in. It is Mr. Canache through his company Paradise generating an invoice that he knows is false, submitted so that reliance by the Plaintiff could be had and money was deducted from the advances. *T 571:5-9*
>
> …
>
> There is two invoices here, Judge. The total gallonage is, I believe, $1,069, if I am not mistaken. It is $1,062 as well, Judge, at a dollar markup. That is the fraudulent component. We ask the Court to award $1,062 for fraud against both Mr. Canache and Paradise for generating the false invoice so that the money could be paid. *T 571:14-20*

5. There were many instances of false fuel invoices and fraudulent charges in the many months that the Aircraft operated, for which payments were never disbursed, amounts never paid, nevertheless reimbursements sought and received. The one presented above was one where Paradise and Canache were caught red-handed, with admissible competent undisputed evidence, that went wholly undisputed throughout the pendency of the case.

6. Other claims for fraudulent payments asserted were not so clear since these were not discovered in time to verify the fraud with actual suppliers.

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Accordingly, Appellant did withdraw one claim for false reimbursement of payment for $4,500, but this had nothing to do with fraudulent fuel reimbursement, it was for a false payment to a consultant Luis Irizzary. (R. 276-280)

7. Appellant initially pursued this payment and reimbursement as a fraudulent claim, in good faith, since Mr. Irizzary asserted under oath that he never received such payment. (R. 276-280 – "I never received any compensation from Christian Canache or Paradise Airlines for work regarding the Aircraft…I did not submit for payment of $4,500.000.") Thereafter, conflicting testimony from several witnesses revealed that the issue with regards to the $4,500 could not likely meet the exacting evidentiary standard for fraud (clear and convincing, pleading with specificity, etc.) Thus, since issues were not sufficiently crystalized as to the $4,500 payment to Irizzary, Appellant withdrew that issue and that issue only – not the fuel fraud. The contention in Appellee's Response Brief, (Pg. 9) is nothing more than a disingenuous attempt to convey to the Court that Appellant withdrew or abandoned its fraudulent fuel sale claim since it withdrew one of the instances of fraudulent for a $4,500, not for fuel, but reimbursement of payment to a consultant, Luis Irizarry.

8. There can be no doubt in Appellee that fraudulent fuel claims were moving forward since evidence of the false invoices was introduced, Appellees' and

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its counsel were present during the above-referenced closing arguments where damages for the fraudulent fuel charges were made, and the competing judgments presented to the Court detailed the damages for fraudulent fuel charges. Other than an attempt at a Hail Mary lob to try to persuade this Court of an amendment, Appellee's claim that the fraudulent fuel sale claim was withdraw is wholly without merit.

III. Return of the Aircraft Maintenance Logs

9. Appellee continues to cite to the renounced Agreement for to support its contention that Jury Trial was waived (Sec. 14.4), Limitations of Liability and that consequential damages were waived (Sec. 10.5). If the renounced Agreement is truly valid and enforceable, then the Court must also enforce Sec. 6.3 (all maintenance and operational records, manuals, logs specifically relating to the Aircraft shall be transferred to the Lessor [Appellant]) and 13.1 (Lessee shall return or cause to return all aircraft documents). R 715-727. Alternatively, cite some reason why those terms beneficial to Appellee are enforceable while those beneficial to Appellant are not.

10. There was no evidence presented that Appellee Lessee ever returned the records to the Appellant. At best, Appellee Lessee left the records in the Aircraft

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when Lessee's pilot flew the Aircraft to Textron for maintenance. ("they were left on the plane" *Response Brief pg. 19*) Not one iota of evidence that the record supports the contention that the Maintenance Logs were ever returned to the Appellant Lessor as specifically required by the unambiguous terms of the Agreement. The obligation was to return them or cause them to be returned. That never happened and this litigation ensued as a result of that material breach.

11. Appellee cites no authority as to why or how the terms of the renounced Agreement favorable to Appellee (waiver of jury trial, limitation of liability) should be enforced, while the material terms important to the Appellant (return the Maintenance Logs) should be ignored or somehow unenforceable. Moreover, if the renounced Agreement was deemed enforceable, and the terms requiring the return of the Maintenance Logs enforceable, the failure to return the Maintenance Logs or cause these to be returned, renders the Appellant the prevailing party entitled to attorney's fees.

12. In its reply brief, Appellee contends that, "the Trial Court clearly found the agreement governed and denied relief based on the unambiguous language of the agreement" *Response Brief Pg. 15*. but includes no citation to this unsupported claim. Where, and how was that finding, and where is the finding that the terms

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material to Appellant are also enforceable? The Court made no such finding and Appellant's chief issue on appeal is for an even-handed *de novo* review of the validity and enforceability of the Agreement – all terms of the Agreement, not just those favorable to the Appellee.

13. Appellee contends that, "The burden was on Appellant to prove that Appellees were still in possession of the logbooks." Such is not correct and the record is devoid of any support for such burden. If the Agreement is valid and enforceable, then Appellant's burden is to demonstrate that the Maintenance Logs were never returned to the Appellant in material breach of the clear and unobvious terms of the Agreement – not that Appellee still has them. If these Maintenance Logs were lost, stolen, intentionally destroyed, discarded, or anything else, and thus Appellee is no longer in possession of the Maintenance Logs, Appellee is not off the hook. Appellee then has to contend direct and proximate damages stemming from the breach - including the costs of reconstruction of the Maintenance Logs. The Court doesn't have to determine the whereabouts of the Maintenance Logs, only that these were not returned to the Appellant as required by the Agreement.

IV. Replevin

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14. The Replevin cause of action is brought in the alternative since during the pendency of this litigation, Appellee renounced the validity and enforceability of the Agreement as unsigned, undated, conditions present not satisfied, etc.

15. There has never been a dispute that the Maintenance Logs belong to Appellant. Under its Replevin claim, Appellant sought the return of the Maintenance Logs, or if the whereabouts are undetermined, the monetary damages stemming from Appellant's dispossession of the Maintenance Logs. "Generally speaking, interest on the value of the property wrongfully detained is the proper measure of damages in an action of replevin." *Ocala Foundry & Machine Works v. Lester*, 49 Fla. 199, 38 So. 51, 53 (1905).

V. Direct damage naturally flowing from the failure to return the Maintenance Logs

16. Appellee contends that "not one shred of evidence was submitted to demonstrate that the records were actually recreated … and amounts paid". Such is false. Appellant introduced evidence, which was admitted, of the invoice by Textron to reconstruct the Maintenance Log (R. 2032-2037) and undisputed evidence of payment for the restoration of the Maintenance Log, (T.60:16-61:13; T.324:17-325:5).

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17. Additionally, Witnesses for the Appellant, including Alejandra Gutierrez (Appellant's corporate director that authorize the payment of the invoice for the reconstruction of the records) and Gilbert Ducournau (the person spearheading the reconstruction of the maintenance records) both testified of the charges by Textron outlined in the invoice[2], the fact that payment was tendered to Textron[3] (T.60:16-61:13; T.324:17-325:5), and that as a result, the Maintenance Log were partially reconstructed, and that with the reconstructed Maintenance Log, operation of the Aircraft under 14 CFR Part 135 was finally permitted at an alternative air carrier (Aitheras). T.336:14-337:1.

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[2] Q. And so Invoice No. IX00419526 is what we have identified as Exhibit 8 from Textron for payment of the books to be reconstructed?

A. Yes, this invoice is in El Clan's records.

Q. Is it a true and correct copy of the invoice you received and paid, correct?

A. Yes. T.62:13-19

[3] Q. Are you a hundred percent sure as you sit here today that payment was made to Textron for reconstruction of the books?

A. Yes, I am sure.

Q. And were there books reconstructed by Textron?

A. Yes. T.61:3-8…

A. Yes, I do believe so because the invoice was for the first part of the semester. Then the reconstructed books were delivered and it was paid, yes. T.108:23-25

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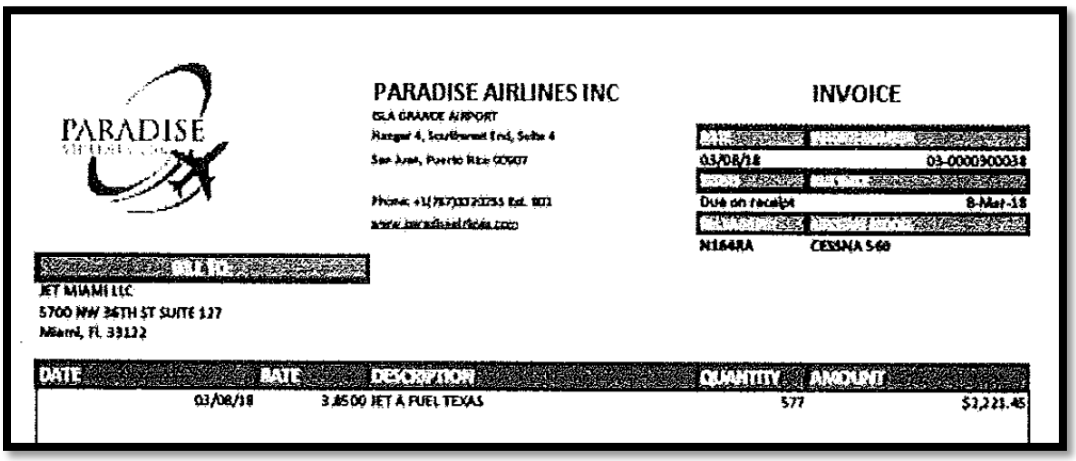
18. Certainly, more than a "shred of evidence" was introduced and admitted at trial, and sufficient competent evidence to support Appellant's claim for direct damages.

VI. Fuel fraud

19. Appellee contends that the fraud claim should be denied since, other fraud claims for higher amounts were withdrawn, and only approximately $1,062 are being claimed for fraud. The fact that the amount is comparatively nominal is of no avail.

20. The facts and evidence demonstrated that Appellee Paradise, fabricated false invoices for fuel it did not sell, (R. 948-949) on Paradise letterhead, and Chrisitan Canache submitted theses false and patently fraudulent invoices to Appellant for reimbursement – and was reimbursed for it.



PARADISE AIRLINES INC

INVOICE

03/08/18 03-0000300038

Due on receipt 8-Mar-18

N164RA CESSNA S-60

JET MIAMI LLC
5700 NW 36TH ST SUITE 127
Miami, Fl. 33122

DATE	RATE	DESCRIPTION	QUANTITY	AMOUNT
03/08/18	3.8500	JET A FUEL TEXAS	577	$2,221.45

R. 949

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21. Sure, Appellees were caught for this nominal amount, but the minimal amount does not extinguish the fraud, does not preclude damages resulting from fraud or somehow make fraud a breach of contract.

VII. Judicial Disqualification

22. Although not a substantive issue on appeal, Appellee argues to this Court that Appellant's Counsel should be "admonishes for impugning the Trial Court's Character." *Response Brief pg. 34*. It is true that Appellant filed a Motion to Recuse the substituted trial judge. There is no dispute that Judge Rodriguez-Fonts lived in the community where Appellees' trial counsel, Douglas Hiller, was the attorney for the Homeowners Association and its registered agent. There is also no dispute that Judge Rodriguez- Fonts and Douglas Hiller shared a personal relationship, and that was apparent throughout the litigation, and such was disclosed. Accordingly, raising those issues that may warrant disqualification is not without merit and not subject to "admonishment" since they are true and without dispute.

23. Appellee does not dispute that it was granted 13 continuances, while Appellant urgently required its Maintenance Logs. Appellee does not dispute that the Court granted Appellant's Motion so that the trial could proceed by jury, and

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such was reversed a mere 3 days before trial[4]. While there may be other explanations, one reasonable explanation may be a well-grounded subjective fear that Appellant "will not receive a fair trial in the hands of the judge." It is reasonably possible for Appellant, or a reasonable person, to objectively believe that the lawyer occupying a perceived position of authority over the judge, could have tipped the scales in favor of Appellee.

24. Again, not a substantive issue on appeal, but the issue raised by Appellee. "The facts alleged in a motion to disqualify need only show a well-grounded fear that the movant will not receive a fair trial at the hands of the judge." *Mackenzie v. Super Kids Bargain Store,* 565 So. 2d 1332, 1334 (Fla. 1990). The test for determining the legal sufficiency of a motion to disqualify or recusal is whether the facts alleged would prompt a reasonably prudent person to fear that they would not be able to obtain a fair and reasonable trial. The facts alleged in a motion to disqualify or recusal must be taken as true. *Law Offices of Herssein v. United Servs.*

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[4] "In promulgating the rule there was no purpose to deprive anyone of a jury trial, *even if possible.* In fact, there was no intent to coerce a litigant to relinquish his right to trial by jury. When the right is claimed the court has no alternative." *Wood v. Warriner,* 62 So.2d 728 (Fla. 1953) (en banc).

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Auto. Ass'n, 229 So. 3d 408, 409 (Fla. 3d DCA 2017), *citing " Molina v. Perez*, 187 So. 3d 909, 909 (Fla. 3d DCA 2016).

25. While the Appellant is not insensitive to the fact that a motion to disqualify may impinge on the sensitivity of jurists, "review of the facts focuses the reasonable effect on the party seeking disqualification, <u>not the subjective intent of the judge</u>." *Law Offices of Herssein* at 409, *(emphasis added)*. The disqualification rule in Florida is clearly designed to prevent "an intolerable adversary atmosphere" between the trial judge and a litigant. *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978).

26. "Significantly, the standards for disqualification do not turn on a demonstration of actual bias or partiality on the part of the judge or the judge's own perception of his or her impartiality. Rather, disqualification is required where the facts alleged and established, which must be taken as true, would place a reasonably prudent person in fear of not receiving a fair trial or impartial proceeding." See *Kline v. JRD Mgmt. Corp., 165 So.3d 812 (Fla. 1st DCA 2015) citing MacKenzie v. Super Kids Bargain Store, Inc.*, at 1334 (Fla. 1990). Appellant submitted an affidavit asserting that it didn't feel it could obtain a fair trial. The Motion at the trial level, and the reference thereto at the Appellate level is meritorious and not subject to the admonishment sought by Appellees.

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27. Whether the Motion to Disqualify was procedurally correct is not an issue on appeal. Whether a conflict existed that warranted disqualification and/or a voluntary recusal, is a meritorious assertion that thwarts the admonishment sought in its Response Brief and raises an issue that should be considered by this Court in the totality of circumstances.

CONCLUSION

28. For the foregoing reasons, this Appellate Court should reverse the Final Judgment in favor of Appellees and remand the matter for judgment in favor of El Clan.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal and/or electronic mail this 11th day of January 2024 on:

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CERTIFICATE OF COMPLIANCE

Counsel for El Clan A, LLC. hereby certifies that the type style utilized in this brief is 14-point Times New Roman Style and that it complies with the word-limit requirement of Appellate Rule 9.210.

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