To be Argued by:
BRIAN M. QUINN
(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division - Third Department

RICHMOR AVIATION, INC.,

Plaintiff-Respondent,

-against-

SPORTSFLIGHT AIR, INC.,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Columbia County Index No.: 2171/07

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PRELIMINARY STATEMENT

Defendant appeals from a judgment of the Supreme Court, Columbia County (Czajka, J.), entered on February 4, 2010, which awarded damages in favor of Plaintiff and against Defendant in the amount of $1,119,650, plus interest. Defendant contends that the judgment was against the weight of the evidence and that the trial court made improper evidentiary rulings and miscalculated damages. As set forth below, however, Defendant's contentions are unsupported and ignore the trial court's credibility determinations. Accordingly, this Court should affirm the judgment.

COUNTER STATEMENT OF FACTS

In April 2007, Plaintiff commenced this action against Defendant for breach of contract and unjust enrichment in connection with Plaintiff's provision of certain charter flights [10-17].[1] According to the verified pleadings, Plaintiff initially agreed to provide certain private flights from May 6, 2002 to November 6, 2002 ("initial six-month term") in exchange for Defendant's guarantee of 250 flight hours at a discounted hourly rate of $4,900 per flight hour [11-12, 30, 221-225]. The parties subsequently agreed to a monthly extension of their agreement with a guarantee of 50 flight hours per month for both the initial six-month term and the extended term [11-12, 27-28, 30].

In its verified pleadings, Defendant generally denied liability and raised numerous affirmative defenses; Defendant, however, did not assert any counterclaims or offsets [18-24].

At trial, Plaintiff submitted the parties' written contract (dated June 2002) [36, 221-225].

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[1] Unless otherwise indicated, all page references are to the volume entitled "Record on Appeal."

The written contract provided Defendant with a discounted hourly rate of $4,900 per flight hour [72, 221, 750] for a certain plane (tail number N85VM)[2] and guaranteed Plaintiff 250 hours of flight time during the initial six-month term with an option to extend the contract with a guarantee of 50 hours of flight time per month thereafter [221, 224]. The guarantee stemmed from Defendant's need for Plaintiff to supply Defendant's (United States Government) client with an available plane and flight crew capable of flying within 12 hours of notice [11-12, 30, 60, 66-68, 100, 113]. These circumstances prevented Plaintiff from chartering out the subject plane to other customers [11-12, 30, 60, 66-68, 100, 113]. For example, because Defendant required Plaintiff to perform within 12 hours of notice, Plaintiff could not charter out the subject plane to other customers for even one day [11-12, 30, 60, 66-68, 100, 113].

Plaintiff also submitted numerous invoices that were paid by Defendant [36, 63, 71, 226-242, 263-319]. These invoices revealed the dates of the flights and the number of hours flown [226-242, 263-319]. This information was also summarized in a document (admitted into evidence) detailing all of the flights flown on the subject plane from May 2002 to May 2005 [36, 66, 71, 76, 117-118, 221-225, 320-324].

For each invoice, Defendant paid Plaintiff for the actual hours flown and for its additional expenditures, such as catering and ground transportation, which were billed at actual costs in accordance with the written contract [62-63, 71, 76-77, 224, 226-242, 263-319].

Based on these invoices and the trial testimony of Plaintiff's president, Mahlon Richards [51], the evidence demonstrated that Plaintiff did not fly the minimum of 250 hours of flight time

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[2] Around October 2004, the subject plane's tail number changed due to security reasons [74, 106, 109, 320].

during the initial-six month term and that it was paid for only 169 hours of flight time [57-64, 172-173, 185, 226-242, 321].

These facts were not disputed. In fact, Defendant's owner (and its only witness at trial), Donald Moss, admitted that a shortfall existed and that Defendant never paid for any unused flight time [172, 185].

Based on this evidence, Plaintiff established that (on November 7, 2002) a shortfall remained of approximately 81 hours or $396,900 [62-64, 221, 224, 226-242, 321]. Towards this amount, a credit existed in the amount of $146,410 for the unused portion of the initial $147,000 (30 hour) deposit [148, 225, 822-827]. Even with this credit, however, Defendant remained liable under the written contract for the remaining $250,490 [57-66, 172-173, 185, 221-225].

At that time (November 7, 2002), Defendant could have ended the parties' relationship by satisfying the $250,490 obligation. Alternatively, Defendant could have attempted to dispute 35.7 flight hours or $174,930 of this amount (as it did post trial) based on the subject plane allegedly being unavailable at some unidentified time due to maintenance [18-24, 150, 808-809].

Defendant, however, neither disputed the amount owed nor paid any amount regarding the shortfall [57-59, 185]. Rather, as Mr. Richards testified, Mr. Moss called Mr. Richards via the telephone shortly after the initial six-month term and informed Mr. Richards that Defendant wanted to continue its contract with Plaintiff with a 50-hour-monthly guarantee [57-59]. Mr. Moss requested that the shortfall of 81 hours be rolled over to the next month to allow Defendant the opportunity to make up the time in light of Mr. Moss' expectation that the United States Government would need Plaintiff's standby services for more than 50 flight hours a month [58]. Mr. Richards

agreed to extend the contract and carry over the unused hours, but only after Mr. Moss agreed that "whenever the contract ends, [Plaintiff] need to have flown 50 hours a month for every month during that term" [58-59]. This agreement was between Plaintiff and Defendant [58-59].

In reliance on Defendant's unequivocal promise [58-59], Plaintiff indisputably credited the remaining $146,410 deposit towards an invoice dated November 26, 2002 regarding 44.5 flight hours flown between November 20-26 [264, 321, 822, 827]. Plaintiff also indisputably credited these 44.5 flight hours towards Defendant's 50-hour-monthly guarantee [321]. Plaintiff did not retain any amounts of the initial deposit as payment for the initial shortfall [148, 822-827]. The remaining $590 of the initial deposit was credited towards prior invoices dated October 16, 2002 and August 22, 2002 [822, 825-826].

After November 6, 2002, as demonstrated by the trial testimony and additional invoices, Plaintiff continued to fly in accordance with the initial written agreement, e.g., by remaining on standby, billing Defendant at the same discounted rate, and leaving the plane off the market [11-12, 28, 58-88, 161, 243-259, 263-319, 321-322]. Defendant similarly continued to accept and pay for Plaintiff's services as it had done during the initial six-month term [69, 76-77, 173-174, 263-323].

From November 7, 2002 to March 6, 2003, for example, Plaintiff flew nine trips for a total of 226.5 fight hours (approximately 57 hours per month) [263-273, 321]. Except for one 7.7 hour flight [267], Plaintiff used the subject plane (tail number N85VM) for Defendant's client and billed Defendant at the agreed-upon $4,900 discounted rate for the remaining (218.8) flight hours [263-273]. No outside charter flights were flown on the subject plane [58-59, 221, 321].

As to the one (7.7 hour) flight with a different plane (Trip Date: December 16, 2002) [267],

Plaintiff credited the 7.7 flight hours towards Defendant's 50-hour-monthly obligation [321-322]. Mr. Richards testified that Plaintiff occasionally used a different plane to fly the trips for Defendant's client [96-97, 105-106, 117]. For example, a different plane would be used if the subject plane was unavailable for maintenance or if Defendant's client requested a different plane for security reasons [96-97, 117]. The different planes, however, were the same size, did the same job, and cost less money per flight hour [97, 267]. Defendant indisputably received credit for such hours towards its 50-hour-monthly obligation, paid for those services, and did not complain about them [69, 71, 76-77, 117-118, 173-174, 321].

On March 6, 2003, Defendant again could have terminated the parties' agreement and paid what it owed for the shortfall. Defendant, however, again choose to roll the dice. Perhaps Mr. Moss subjectively did not want to pay anything. Or, perhaps Mr. Moss subjectively believed that he could direct more hours towards Plaintiff to reduce or eliminate the shortfall. Regardless of Mr. Moss' subjective belief, however, Plaintiff relied on Mr. Moss' objective manifestations. For example, in reliance upon Defendant's November 2002 promise (to extend the agreement) and Defendant's continued acceptance of Plaintiff's services, Plaintiff continued to keep the subject plane off the market and to perform as it had done during the initial six-month term [11-12, 28, 58-88, 160-161, 243-259, 263-319, 321-322].

From March 7, 2003 to November 6, 2003, the number of flight hours fluctuated. From March 7, 2003 to May 6, 2003 (2 months), Plaintiff flew only 30.4 flight hours [274-277, 321-322]. The following month (May 7, 2003 to June 6, 2003), however, Plaintiff flew 49.3 flight hours [278-280, 322]. Again, over the next two months (June 7, 2003 to August 6, 2003), Plaintiff flew only 25.9 flight hours [281-282, 322]. The following month (August 7, 2003 to September 6, 2003),

however, Plaintiff again flew 50 flight hours [284, 322]. Finally, from September 7, 2003 to November 6, 2003, Plaintiff flew 60.3 flight hours [286-287].

Over this time period, Defendant was well aware of the increasing shortfall because it repeatedly paid Plaintiff's invoices, which listed the exact number of hours flown each month [263-289]. At anytime during this period, Defendant could have ended the parties' relationship or renegotiated it. Defendant, however, continued to pay Plaintiff's invoices and did not complain or request any renegotiation to solve the increasing shortfall [58-66, 69, 71, 173-174].

By November 2003, it became apparent that the initial carry over solution (by itself) would not solve the shortfall [64-66, 74-77]. Concerned about the increasing shortfall, Mr. Richards contacted Mr. Moss in November 2003 and suggested to Mr. Moss that Plaintiff be allowed to charter the subject plane to other customers and credit Defendant with the corresponding flight hours [28, 66-69]. Given that the hours flown had averaged approximately 37 hours for the preceding year (November 7, 2002 to November 6, 2003), the parties believed that the extra charter hours could potentially decrease the shortfall [66].

This arrangement allowed Defendant's client to continue to pay a low rate and to enjoy Plaintiff's standby services to meet its needs. It also allowed Defendant to continue to profit for each hour flown and to defer payment for any shortfall.

Pursuant to this arrangement, if Plaintiff received outside requests for the subject plane, it would ask whether the United States Government needed the subject plane [66-69, 72, 755-760]. If no missions were anticipated, upon consent, Plaintiff would charter the subject plane to other customers and credit Defendant accordingly [66-69, 755-760]. If the need for a trip occurred on short notice and if the subject plane was out on a charter, Plaintiff would still attempt to obtain a

different (substantially-similar) plane/crew for Defendant's client within 12 hours of notice and would credit any such flight hours accordingly [66-68, 117]. This relationship benefitted both parties. It allowed Defendant to postpone paying for the shortfall and provided it with the opportunity to reduce and/or extinguish it.

Based on the parties' November 2003 agreement, Plaintiff was able to place the plane on the market (to some extent) for the first time since May 2002 [66, 221, 321-322]. On November 20, 2003, Plaintiff flew its first flight for someone other than Defendant's client, and Plaintiff credited Defendant for the flight hours [65-68, 71, 322].

From November 7, 2003 to January 10, 2005 (approximately 14 months), this agreement continued [290-319, 322-323]. Over this time period, Defendant benefitted from and paid Plaintiff for 30 missions or approximately 650 flight hours [290-319, 322-323]. For these flights, Plaintiff used the subject plane and billed Defendant at the discounted $4,900 flight hour rate.[3] Although Plaintiff occasionally used a different (substantially-similar) plane, it received no complaints and satisfactorily performed its standby duties [69, 71, 76-77, 96-97, 117, 173-174]. During this period, Plaintiff also credited Defendant for approximately 113.1 outside charter hours pursuant to the parties' November 2003 mitigation agreement [66-67, 322-323, 780, 809]. Defendant also continued to accept and pay for Plaintiff's services as it had done since May 2002 [290-323].

After January 10, 2005, however, Defendant's client stopped using the plane on a regular basis [323-324]. As a result, Plaintiff was essentially able to charter the plane to other customers on an unrestricted basis (although it apparently continued to notify Defendant's client about these

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[3] As mentioned previously, around October 2004, the subject plane's tail number changed due to security reasons [74, 106, 109, 320].

charter flights) [66, 323-324]. Between January 13, 2005 and April 29, 2005 (approximately 3 ½ months), for example, Plaintiff flew approximately 200 outside charter hours [323-324].

Around May 2005, Plaintiff realized that Defendant's client was not booking any more flights and sought to collect the shortfall/debt owned by Defendant [16-17, 29, 65, 322-323]. Thereafter, Plaintiff and Defendant spoke approximately every two months about the shortfall and payment [29]. Defendant, however, was unwilling to settle the matter [11-12, 16-17, 320]. By invoice dated October 5, 2005, Plaintiff submitted a bill for approximately $1,000,000 (without any interest due) [16, 65, 102-103]. After unsuccessful collection efforts and meetings with Mr. Moss, Plaintiff again submitted another invoice, dated October 19, 2006, which essentially added interest and recalculated the hours used from 1306 to 1258 [17, 102-103]. Both invoices were based on trip dates from May 2002 to May 2005 and credited outside charter hours from November 2003 to May 2005 [16-17, 320-324]. Despite Plaintiff's demands for payment, however, Defendant refused to pay any amounts [11-12].

Defendant's trial counsel declined to cross-examine Mr. Richards about several relevant issues and called only one witness, Mr. Moss, who generally provided conclusory testimony and at best offered his piecemeal account of the parties conversations [154-155, 182]. According to Mr. Moss, Defendant continued to pay all the invoices and received profits, but the parties had some kind of a pay as you go arrangement without any 50-hour-monthly guarantee [119-192]. Mr. Moss also testified that there "might have been a commitment" [182].

After hearing the testimony from these two witnesses and receiving various documents into evidence, Supreme Court, Columbia County (Czajka, J.), credited the testimony of Mr. Richards (rather than Mr. Moss) and determined that Defendant was liable for breach of contract [191-217].

The trial court then requested post-trial submissions on the issue of when the parties' contract ended [214].

In response, Plaintiff submitted a post-trial letter brief asserting that the contract ended on January 10, 2005 (the date of the last trip) [319, 323, 777-780]. Defendant, on the other hand, submitted a post-trial letter brief asserting that the parties' contract ended on November 6, 2002 and that Defendant did not commit to any subsequent 50-hour-monthly guarantee [781-787].

Thereafter, the trial court issued an order determining that the contract expired on January 10, 2005 and requested post-trial submissions on the calculation of damages [8-9].

Based on the January 10, 2005 expiration date, the parties submitted post-trial letter briefs calculating damages [777-780, 808-809, 822-827]. As requested by both parties [780, 809], the trial court determined that Defendant's total obligation was 1600 hours over the 32 month period (May 2002 to January 2005) and that Plaintiff flew (and was paid for) only 1258.4 hours [780, 809]. As requested by both parties [780, 809], the trial court also determined that Defendant should be credited in the undisputed amount of 113.1 flight hours for the relevant outside charter hours that Plaintiff flew (from November 20, 2003 to January 10, 2005) [4, 780]. Based on these calculations, the trial court determined 228.5 hours as the shortfall (for the 32 month time period of May 2002 to January 2005) [4, 780]. At $4,900 per flight hour, the trial court calculated damages as $1,119,650 [4]. In addition, as requested by both parties [780, 809], the trial court awarded Plaintiff interest based on the parties' contractual provision requiring monthly interest at 1½% on balances past due, which was also mentioned on all the invoice that Plaintiff sent Defendant [4, 16-17, 225, 226-242, 263-319].

The trial court, however, rejected Defendant's contention (raised for the first time in its post-trial submission [18-24, 148, 808-809]) that it was entitled to a reduction of the shortfall amount by 30 hours (or $147,000) based on the payment of the initial deposit [4, 780]. Defendant untimely raised the offset issue and, in any event, merely speculated that the initial deposit was not credited towards a previous invoice/trip. Plaintiff, on the other hand, established (via its business records) that the $147,000 amount was credited (in 2002) towards both Defendant's total obligation and the amounts billed in the previous invoices [264, 321, 822, 827]. For example, $146,410 of the initial deposit was credited towards the $240,643.95 balance on an invoice dated November 26, 2002 (regarding 44.5 flight hours) [264, 822, 827]. As reflected by Plaintiff's business records, this $146,410 credit reduced the November 26, 2002 invoice's balance to $94,233.95, which Defendant paid on February 14, 2003 in cash [264, 827]. Defendant submitted no evidence at trial or thereafter to contradict these facts [148, 808-809].

In addition, the trial court rejected Defendant's contention (raised for the first time in its post trail submission [18-24, 150, 808-809]) that it was entitled to a 35.7 hour credit for some unidentified date/time that the subject plane was allegedly unavailable due to maintenance [4, 780]. At trial, Defendant's counsel failed to question either witness about any specific details regarding the alleged 35.7 hours [150]. For example, Defendant's trial counsel did not question either witness about the underlying circumstances or whether Plaintiff was given the opportunity to offer a (substantially-similar) substitute plane on that particular occasion.

Thereafter, Defendant filed a notice of appeal and sought a discretionary stay of the judgment. In support of its motion, Mr. Moss swore that Defendant's "only assets" throughout most of its existence "were computers and telephones" (Moss' Affidavit [sworn 6-2-10] [unattached]).

After this Court denied the motion, however, Plaintiff learned that Defendant reported total assets of over $1.5 million on its 2008 tax returns. Similarly, Defendant reported gross sales/receipts of over $5 million on its 2009 tax returns. Defendant's assets, however, were depleted (sometime after the 2008 tax year) and Defendant was dissolved effective July 9, 2010 (after the judgment). In addition, a new (Delaware) corporation (Classic Air Charter, Inc.) was formed in November 2009, with a principal place of business at Defendant's prior New York address. Although Mr. Moss swore (at his October 2010 deposition) that he was only a "consultant" of the new corporation, the Delaware public records list him as the President and sole Director.

On appeal, Defendant now essentially asserts that the trial court erroneously credited Mr. Richards' testimony rather than crediting Mr. Moss' testimony. It is respectfully submitted that the Court should affirm the judgment.

ARGUMENT

POINT I THE EVIDENCE DOES NOT SO PREPONDERATE IN DEFENDANT'S FAVOR SUCH THAT THE JUDGMENT COULD NOT HAVE BEEN REACHED ON ANY FAIR INTERPRETATION OF THE EVIDENCE

Defendant contends that the trial court's determination was against the weight of the evidence and does not accord with governing contract principles. However, this contention should be rejected outright because it is unsupported by the evidence and ignores the trial court's credibility determinations. For example, Defendant contends that there was no meeting of the minds and that the terms were somehow too uncertain to enforce. However, the trial court found credible Mr. Richards' testimony that the parties agreed that they would continue the terms of the written contract with a guaranteed minimum of 50 hours per month, which the parties subsequently performed [57-58, 221-225]. The trial court also credited Mr. Richards' testimony that the subject plane was kept off the market and exclusively used by Defendant's client until November 20, 2003, at which time Plaintiff began requesting permission until May 2005 to charter out its own plane [66-69, 321-323, 755-760]. Given the evidence and the credibility determinations, this Court should affirm the judgment.

A. The Evidence Supports the Trial Court's Findings

"When weight of evidence is the issue, a verdict for the plaintiff may not be disregarded unless the evidence so preponderates in favor of the defendant that it could not have been reached on any fair interpretation of the evidence" (Moffatt v Moffatt, 86 AD2d 864, 864 [2d Dept 1982]; see Lolik v Big V Supermarkets, Inc., 86 NY2d 744, 746 [1995]). In performing a weight analysis, an appellate court accords "deference to the credibility determinations made by the [trier of fact],

which had the opportunity to see and hear the witnesses" (Miranco Contr., Inc. v Perel, 57 AD3d 956, 957 [2d Dept 2008]; see Nicastro v Park, 113 AD2d 129, 136-137 [2d Dept 1985]; see also Rini v Kenn-Schl, LLC, 64 AD3d 988, 989 [3d Dept 2009]; Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster, 40 AD3d 1289, 1291 [3d Dept 2007]; Allen v Kowalewski, 239 AD2d 879, 880 [4th Dept 1997]).

1. Defendant Failed to Pay Plaintiff for all 250 Guaranteed Hours During the Initial Period.

Here, in determining liability and awarding damages for the initial period, the trial court relied on the written contract as well as both parties' testimony that Plaintiff was guaranteed payment of at least 250 hours. The evidence demonstrated that Defendant did not pay Plaintiff for 250 hours; rather, Defendant paid Plaintiff for only approximately 169 hours, which entitled Plaintiff to additional payment for 81 hours or $396,900 (81 hours times $4,900 per hour) [57-64, 75, 172-173, 185].

Moreover, Mr. Richards explained why it did not submit a bill immediately after the initial period for this amount. Specifically, he testified that Mr. Moss requested that the contract continue and that these hours be carried over (as they had been doing under the written contract) to allow Defendant the opportunity to make them up in light of Mr. Moss' expectation that the United States government would fly more than 50 hours per month [57-58]. Mr. Richards agreed to this arrangement upon condition that Defendant guarantee payment for any unused hours at the end of the Defendant's need for Plaintiff's services, as had been the same previous arrangement [58-59]. Notably, Mr. Moss did not testify that Defendant paid for the 81 hour shortfall or that Plaintiff agreed not to pursue its contractual right for such payment [172-173, 185].

2. The Parties Agreed that Plaintiff Would be Compensated for at Least 50 Hours per Month until the Parties Chose to End the Arrangement

In addition, Plaintiff's owner testified that the parties agreed to extend their contractual relationship in November 2002 upon the condition that Plaintiff be compensated for at least 50 flight hours per month [58-59, 221]. This agreement was evidenced by Plaintiff's continued billing of Defendant at the discounted rate and Defendant's continued payment of the bills and acceptance of Plaintiff's standby services [263-324]. In reliance on Mr. Moss' promise, Plaintiff continued to keep the plane off the market (until November 2003), continued to provide standby services, and continued to offer Defendant a discounted rate of $4,900 per hour for the subject plane. This agreement was also evidenced by the fact that Plaintiff proposed a credit system to reduce Defendant's ultimate liability for shortfalls while allowing Defendant to keep Plaintiff on standby [66-69]. Under the credit system, Plaintiff requested to charter out the subject plane on certain days and, upon consent, credited Defendant for any such outside charter hours obtained [66-69].

Moreover, it is irrelevant as to why Defendant would agree to this arrangement. Defendant manifested an objective basis upon which Plaintiff relied [57-70]. In any event, Mr. Moss testified that he entered into the written contract in 2002 based on the government's commitment to pay for a guaranteed 250 hours of flight time during the initial six month term [134-135]. Mr. Moss may have pocketed any shortfall money paid by the government and decided to exercise the written contract's option so that he would not have to pay any shortfall money until perhaps a later date. Similarly, Defendant apparently obtained some kind of profit or commissions from its contract with Plaintiff. Defendant's exercise of the option allowed it to receive the same discounted rate and the advantages of Plaintiff's standby services. The lower cost and standby advantages provided an

incentive to the government to use Plaintiff's services, which translated into more profits and commissions for Defendant. At best, Mr. Moss may have expected that the government would fly 50+ hours per month to make up the shortfall. At worst, Mr. Moss may have believed that he could avoid any liability by denying that he made any such oral representations and/or stopping Defendant's operations, given that its "only assets were computers and telephones."

Similarly, Mr. Moss relied financially on two corporations that benefitted greatly from the continuation of the parties' agreement. One of these other corporations, for example, received $5,400 per flight hour from the government (via separate contracts) for Plaintiff's standby services [750]. By satisfying these two corporations and acting in their interests (at the potential expense of Plaintiff), Mr. Moss essentially profited tremendously by setting himself up for potentially a great deal of more business (via government contracts) than Plaintiff (a 125-employee operation [51]) could offer.

3. The Parties' Performance Evidenced their Agreement

The evidence received at trial manifested the parties unmistakable intent to perpetuate the contract between November 7, 2002 and January 10, 2005. Specifically, beginning November 8, 2002 – a mere two (2) days after the end of the initial six (6) month term – until January 10, 2005, Plaintiff facilitated fifty-five (55) flights at the request of Defendant, and did so at least once per month during this period [263-324]. These flights totaled over one thousand eighty-nine (1,089) flight hours as detailed in Plaintiff's summary received in evidence [321-323]. In addition, from January 9, 2002 until January 5, 2005 the United States Department of State issued letters of public convenience to Plaintiff [243-259], and on April 8, 2004, Mr. Richards, on behalf of the Plaintiff,

mailed letters to the Naval Facilities Engineering Command, the Joint Staff and the Department of the Army requesting an amendment to Plaintiff's current permit [260-262].

More significant than both the frequency with which Defendant procured the services of Plaintiff and the efforts undertaken to secure the letters of public convenience is the November 2003 agreement. That Defendant did not (at any time) seek to end its discounted rate or Plaintiff's standby services, but rather chose instead to remain bound and accept a reduction in its monthly obligation when possible plainly illustrates that Defendant's conscious object was to retain (50) hours of flight availability per month and demonstrates the great value of this availability to Defendant. In this regard, Defendant has certainly realized the benefit of its bargain and its intent to remain bound is beyond reasonable dispute.

In Warner-Lambert, the plaintiff sought a declaratory judgment that it was no longer obligated to make periodic payments on the manufacture of Listerine under an 1881 agreement on the ground that the contractual term was unbounded by definite limitation of time (see Warner-Lambert Pharm. Co. v John J. Reynolds, Inc. 178 F Supp 655 [SDNY 1959]). In finding for the defendant, the court reasoned "that the mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the party" (Warner-Lambert, 178 F Supp at 661; see Haines v City of New York, 41 NY2d 769 [1977]). Further, "where it appears that the parties did, in fact, intend that the obligation terminate at an ascertainable time, the courts, in effect, will supply the missing clause and construe the contract accordingly" (Warner-Lambert, 178 F Supp at 661; see Haines, 41 NY2d at 769). The court recognized that plaintiff's obligation to pay was not, in fact, indefinite, as the obligation would cease at such time as the plaintiff

discontinues manufacture and sale of the product (Warner-Lambert, 178 F Supp at 661; see Haines, 41 NY2d at 769). Similar to the agreement at issue in Warner-Lambert, Defendant's obligation to pay would cease immediately at the time that the flights were no longer required.

The foregoing circumstances provided substantial grounds for the trial court to ascertain the parties' intent and "fairly and reasonably" fix the duration of the contract in accordance with the Court of Appeals' directive in Haines. This, not vitiation, was the proper course, as the conclusion that a party's promise should be ignored as meaningless "is at best a last resort" (Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 483 [1989]; see also Rooney v Tyson, 91 NY2d 685, 692 [1998] ["New York's jurisprudence is supple and realistic, and surely not so rigid as to require that a definite duration can be found only in a determinable calendar date. Thus, although the exact end-date of Tyson's professional boxing career was not precisely calculable, the boundaries of beginning and end of the employment period are sufficiently ascertainable"]).

B. Defendant's Weight Analysis is Unsupported by the Evidence and Ignores the Trial Court's Credibility Determinations

In support of its weight analysis, Defendant relies primarily on Mr. Moss' trial testimony. Such testimony, however, was discredited by the trial court [191-217] and, as such, possesses no weight (see Rini v Kenn-Schl, LLC, 64 AD3d 988, 989 [3d Dept 2009]; Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster, 40 AD3d 1289, 1291 [3d Dept 2007]; Allen v Kowalewski, 239 AD2d 879, 880 [4th Dept 1997]).

Similarly, Defendant relies upon Mr. Moss' deposition testimony [612-776]. The deposition testimony (with exhibits), however, was not admitted into evidence or relied on by the trial court in

reaching its decision [36-37, 49-50, 191-192].[4] As such, Defendant should not be allowed to rely upon it for any reversal or modification of the judgment (Czernicki v Lawniczak, 25 AD3d 581, 852 [2d Dept 2006] ["We note that both the plaintiff's attorney's reply affirmation and the defendant's deposition transcript excerpts attached as an exhibit thereto and included in the record on appeal are dehors the record and were not considered on this appeal"]).

Even if the deposition testimony were considered, however, it (like the trial testimony) added nothing to the weight, especially given the trial court's adverse credibility determinations against Mr. Moss [191-217].

Defendant also relies upon a July 29, 2003 e-mail purportedly from (DynCorp's) Steven Lee to Mr. Moss expressing his "expectations" of Plaintiff [342]. The e-mail is dated approximately 9 months after the parties' November 2002 agreement and Plaintiff was not copied on it. In addition, it was purportedly sent by Mr. Lee in response to some unknown conversation he had with Mr. Moss, who subsequently employed Mr. Lee for about 2 years [123, 342]. Given the sketchy nature of this e-mail, no basis exists to afford it any credibility or weight, especially given Defendant's failure to call Mr. Lee as a witness.

Defendant also relies upon a written contract between two other corporations. Defendant asserts that it had an oral agreement with one of the corporations [191], which, in turn, had a written agreement with another corporation regarding Plaintiff's provision of the standby services [742-750].

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[4] At trial, Plaintiff's counsel wanted to read a portion of the deposition transcript [49]. The trial court informed Plaintiff's counsel that it would consider such portion if Plaintiff's counsel marked up the deposition transcript and submitted it to the trial court [49-50]. This, however, was never done because the parties subsequently agreed to an immediate bench decision on the issue of liability [191-192].

According to Defendant, it relied on the written agreement of these two other corporations when it executed its written agreement with Plaintiff in June 2002. Defendant asserts that it would not have extended any agreement with Plaintiff without some kind of payment commitment from these other two corporations.

The trial court, however, was free to disregard such testimony as not credible. First, Defendant did not inform Plaintiff that it would pay only up to what it received from others [146]. Second, regardless of whether any other contracts existed, the continuation of the agreement between Plaintiff and Defendant allowed Mr. Moss to profit for each flight hour flown and allowed him to pocket any shortfall monies paid by the government. Third, some kind of extension agreement (either written or verbal) indisputably existed between these other corporations because they purportedly continued supplying Defendant with money. Given that Defendant submitted no evidence of the exact terms of the subsequent agreements or the exact amount of money it made from them, it is submitted that the trial court was not required to take Defendant's explanation of those agreements at face value. Fourth, Mr. Moss may have made the November 2002 promise to Mr. Richards out of mere anticipation of some kind of extension agreement of the separate contracts, which would have allowed Mr. Moss to keep his deal with Plaintiff together so that he could continue to profit from it. The fact that Mr. Moss' subjective anticipation did not come to fruition did not provide Defendant with a valid excuse to dishonor its promise to Plaintiff.

1. Plaintiff Repeatedly Discussed the Shortfall with Defendant

Defendant improperly rests its weight analysis on its improper assumption that Plaintiff failed to notify Defendant about the amounts owed until October 2005. The credible evidence, however,

demonstrates that the parties repeatedly discussed the shortfall during the parties' relationship and that Plaintiff repeatedly notified Defendant about its continued 50-hour-monthly obligation under the agreement [29, 57-66]. In May 2005, after it became apparent that the government stopped requesting trips, Plaintiff again verbally demanded payment of the shortfall and shortly thereafter submitted written bills for such payment [16-17, 29].

2. The Parties Continued the Agreement on the Same Terms

Contrary to Defendant's contention, the parties continued the agreement on the same terms after November 6, 2002. As had been performed under the written agreement, Plaintiff continued to keep the subject plane off the market, billed Defendant at the same $4,900 discounted rate, remained on standby, and continued to provide the subject plane exclusively to Defendant's client. Defendant, similarly, continued to pay all invoices and repeatedly reaffirmed its obligation to pay for any shortfalls at the end of the agreement [58, 66].

Moreover, contrary to Defendant's contention, the parties' occasional use of a different plane (at a cheaper rate and upon Defendant's consent) did not justify a different conclusion. A different plane was used, for example, if the subject plane was unavailable for maintenance or if Defendant's client requested a different plane for security reasons [96-97, 117]. The different planes, however, were the same size, did the same job, and costed less money per flight hour [97]. Defendant indisputably received credit for such flight hours towards its 50-hour-monthly obligation, paid for those services, and did not complain about them [69, 71, 76-77, 117-118, 173-174, 263-324].

3. The Parties Remained in Privity

Defendant also contends that it lacked any privity with Plaintiff after November 2002 and that privity existed solely between Plaintiff and the other corporations. At his deposition, however, Mr. Moss admitted that he possessed no factual basis to make such an assertion [686-687].

In any event, the parties' privity relationship originated from their written contract (dated June 2002). Defendant initialed it four times and signed it three times in its own capacity (via Moss). The written contract unambiguously obligated Defendant to pay for Plaintiff's services,[5] and even Mr. Moss testified at trial that he was not suggesting that he entered into the parties' agreement on behalf of some third party [175].

Thereafter, as Mr. Richards testified, an extension agreement was reached in November 2002 between Plaintiff and Defendant. Thereafter, the parties continued to perform as they had in the past, and Defendant never sought any release from its payment obligations [57-77, 173-174, 243-324]. Plaintiff also continued to discuss the shortfall with Defendant throughout the term of the agreement and the parties entered into the mitigation agreement in November 2003 [28, 57-66].

Accordingly, it is submitted that no basis exists to conclude that the parties no longer remained in privity after November 6, 2002.

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[5] For example, the written contract provides in at least seven additional places that it was between Plaintiff and Defendant (bottom of pages 1-5; top of pages 2 & 4). It also unambiguously provides that Defendant was individually liable under the contract (page 3, paragraph 12 reads: "[Defendant] shall pay [Plaintiff] the fees and charges in accordance with [Plaintiff's] invoices"; the note at the bottom of page 4 reads: "Any taxes due are the responsibility of [Defendant]"; the last paragraph on page 5 reads: "[Defendant] agrees to pay an additional amount equal to one and one half percent (1 1/2 %) interest per month on balances which are past due thirty-one (31) days or reasonable attorney's fees on the cost of collection.").

4. No Basis Exists for Any Adverse Findings Against Plaintiff

Defendant asserts (for the first time on appeal) that Plaintiff should have produced detailed business records of its standby flight crew or evidence that it maintained an insurance policy on the subject plane as it had under the initial written contract. Defendant also asserts that Plaintiff should have admitted more detailed business records regarding the outside charter hours. According to Defendant, the trial court should have made adverse findings against Plaintiff. These assertions, however, are raised for the first time on Defendant's appeal and, as such, they are not preserved for appellate review (see Sutton v Burdick, 75 AD3d 884, 885 [3d Dept 2010]).

In any event, it is submitted that Plaintiff met its burden at trial based upon Mr. Richards' testimony and the various documents admitted into evidence. In opposition, Defendant provided no evidence to support its weight analysis. For example, despite the liberal discovery rules, Defendant provided no evidence to discredit Plaintiff's evidence demonstrating that Plaintiff successfully provided standby services; that only Defendant's client used the plane until November 2003 (despite its market value); that Plaintiff chartered the plane out for 113 hours from November 2003 to January 2005; and that Plaintiff received no complaints about its performance. Accordingly, without any such evidence, it cannot be said that the evidence weighs in Defendant's favor.

Similarly, no adverse finding is permitted because Defendant requested no such finding at trial. Nor did any basis for such a finding exist. Well before litigation, Plaintiff informed Defendant and/or its client about the outside charters before flying them [66]. As such, Defendant either knew or could have known about each one. Thereafter, Plaintiff discussed the shortfall with Defendant and subsequently submitted written invoices detailing the charter hours [16-17, 29, 320-324].

During discovery, Defendant again possessed the opportunity to investigate the validity of the 113 hour amount. Thereafter, at trial, Mr. Richards testified about these 113 hours, and the trial court received into evidence a summary of all the charter flights [320-324]. Although Defendant's trial counsel could have cross-examined Mr. Richards about each of these outside charter flights, it declined to do so.

Accordingly, it is submitted that Defendant's adverse-finding assertion is not preserved and lacks any factual or legal support.

POINT II THE TRIAL COURT MADE PROPER EVIDENTIARY RULINGS

Trial courts are afforded "wide discretion" in evidentiary rulings (Saulpaugh v Krafte, 5 AD3d 934, 934-935 [3d Dept 2004]; see People v Carroll, 95 NY2d 375, 385 [2000]; Matter of Berrouet v Greaves, 35 AD3d 460, 461 [2d Dept 2006]). Even relevant "evidence may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it" (Salm v Moses, 13 NY3d 816, 818 [2009]; see Kish v Board of Educ. of City of N.Y., 76 NY2d 379, 384-385 [1990]). Absent an abuse of discretion, a trial court's evidentiary rulings should not be disturbed (see Salm, 13 NY3d at 818). Moreover, any "error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced" (CPLR 2002; Doty v Maniccia, 58 AD2d 937, 938 [3d Dept 1977]).

A. The Trial Court Properly Excluded the Unsigned Written Contract

As evidence of the parties' non-agreement, Defendant attempted to introduce an unsigned written contract (dated November 2002). If executed, the proposed written contract would have covered the dates of November 7, 2002 to February 6, 2003 and required a guarantee of 450 hours

for the nine month term from May 2002 to February 2003 [326-331].

The trial court, however, properly excluded its admission for this purpose [89-93]. It was simply irrelevant to prove any non-agreement. Indeed, both parties agreed that some sort of agreement existed, whether it was a pay as you go (as asserted by Defendant) or a 50-hour-monthly guarantee (as asserted by Plaintiff); Defendant also admittedly continued to pay for Plaintiff's services after November 6, 2002, which evidenced some sort of agreement.

Further, to the extent Defendant now asserts (on appeal) that the unsigned written contract (dated November 2002) should have been introduced to prove that Defendant rejected it, it is submitted that such an argument is not preserved. Defendant failed to lay any foundation for its assertion that Mr. Moss rejected it because it contained the 50-hour-monthly guarantee. In fact, this entire assertion rests on impermissible speculation (Salm v Moses, 13 NY3d 816, 818 [2009]; Henriques v Kindercare Learning Ctr., Inc., 6 AD3d 220, 221 [1st Dept 2004]).

Morever, any error would have been harmless because the trial court permitted Defendant's trial counsel to extensively cross-examine Mr. Richards about the matter [84-88, 94] (see CPLR 2002; Doty, 58 AD2d at 938).

B. The Trial Court Properly Excluded Defendant's Propensity Evidence

Defendant asserts that the trial court erroneously sustained an objection to a question regarding whether Mr. Moss had ever entered into an agreement with an operator without having some firm commitment from a customer.

Mr. Moss, however, was essentially being asked about his propensity to act in conformity with his prior character. Such evidence was inadmissible because it does not possess the same level

of reliability as admissible habit evidence (McKane v Howard, 202 NY 181, 185 [1911] ["Because of the usual slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges and not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged" (internal quotation marks and citations omitted)]; see Liberto v Worcester Mut. Ins. Co., 87 AD2d 477, 479 [2d Dept 1982]).

Indeed, Moss' prior decisions to enter into unspecified business agreements did not concern any habit (e.g., a repeated response to a frequent stimuli). Rather, such decisions were less frequent and involved complex calculations of weighing costs and benefits and, as such, evidence of such prior decisions did not posses any indicia of reliability as to a future indication of conduct.

In addition, because Defendant repeatedly asserted its lack of commitment defense throughout the proceeding, and because the trial court rejected the merits of this assertion, it cannot be said that the result of the case would be different had the trial court permitted Mr. Moss to answer this question (see Doty, 58 AD2d at 938).

C. The Trial Court Properly Excluded Testimony regarding a Chain of Events

Further, contrary to Defendant's contention, the trial court properly rejected Mr. Moss' attempt to testify about the chain of events leading up to the execution of the written contract (dated June 2002) [100]. This evidence was irrelevant because the parties executed the signed contract [224-225], which contained a merger clause [223], and Mr. Moss himself testified that he was not suggesting that no privity existed between the parties [175].

D. The Trial Court Properly Excluded Questioning of a Speculative Motive

Further, Defendant contends that the trial court should have permitted its counsel to cross-examine Mr. Richards about statements made in its October 2006 letter seeking compensation. In the subject letter, Plaintiff sought payment and noted that it performed despite negative publicity regarding the rendition flights [320]. According to Defendant, Plaintiff's statements evidenced an ulterior motive to seek compensation.

Mr. Richards, however, testified that he had discussed the shortfalls with Mr. Moss before any negative publicity and that he repeatedly expressed his intention to submit a bill for them if they were not flown off [57-77]. As such, Defendant's theory of an ulterior motive rested on speculation. Moreover, even if relevant, this questions was properly excluded as likely to result in a waste of time or confusion of the issues [114-116] (Salm, 13 NY3d at 818; see Kish, 76 NY2d at 384-385).

In any event, the so-called evidence of the negative publicity was admitted into evidence and considered by the trial court via the October 2006 letter. Defendant's trial counsel also extensively cross-examined Mr. Richards' about his truthfulness, and the court considered his financial motives to lie [108-116]. As such, it cannot be said that any error resulted in any prejudice to Defendant.

POINT III PLAINTIFF DID NOT WAIVE ITS RIGHT TO DAMAGES

Defendant asserts (for the first time) that Plaintiff waived its rights to damages by unreasonably delaying its collection efforts. This assertion, however, is not preserved for appellate review and should not be considered by this Court (see Sutton v Burdick, 75 AD3d 884, 885 [3d Dept 2010]).

In any event, this assertion contradicts the credible evidence that the parties agreed to

postpone payment for any shortfall hours until the end of the agreement [58-59]. This is evidenced by the indisputable proof that Defendant never paid for the 81 hour shortfall and the credible testimony and averments of Mr. Richards that the parties discussed the shortfall on a regular basis [27-29, 58-77, 185]. Around May 2005, Plaintiff realized that the agreement had ended, and afterwards spoke approximately every two months about the shortfall and payment [29]. When Defendant failed to make any payments, Plaintiff then issued written invoices for the amounts due in both 2005 and 2006 prior to commencing this action in 2007 [10, 16-17].

Further, Defendant remained fully aware of the exact number of hours being flown throughout the agreement. Defendant received and paid numerous invoices that detailed the dates of the trips and the number of hours flown [226-242, 263-319]. Accordingly, it is submitted that Defendant's waiver argument is not preserved and lacks merit.

POINT IV THE TRIAL COURT PROPERLY CALCULATED DAMAGES

Finally, Defendant contends that the trial court erroneously determined damages on four issues. The doctrine of waiver, however, bars Defendant from raising two of the issues. The remaining two issues concern alleged offsets that were raised for the first time after trial and that possess no evidentiary support. As such, it is respectfully submitted that the trial court correctly calculated damages.

A. Total Obligation

First, Defendant contends that Defendant's total obligation under the 32 month agreement (May 2002 to January 2005) was 1550 hours (250 hours for the first six months plus 50 hours per month thereafter) rather than 1600 hours (32 months times 50 hours). Defendant, however, waived

its right to assert this contention based on its trial counsel's calculation of damages using the 1600 hours figure rather than the 1550 hour figure [809]. As it did with other calculations, Defendant's trial counsel could have objected to this figure, but rather intentionally declined to raise the issue [809]. Moreover, contrary to appellate counsel's contention, this calculation was not based on mathematical error; Plaintiff repeatedly asserted that Defendant's total obligation was 50 hours per month starting from May 2002 [11-12, 16-17, 27, 58, 66, 780].

In any event, as the evidence demonstrated, Plaintiff agreed to defer payment and carry over the hours of the initial shortfall in exchange for Defendant's promise to guarantee 50 hours per month for the entire term (starting from May 2002). This essentially changed the initial guarantee from 250 hours over the first six months to 300 hours. Moreover, considering that the parties' written contract was ambiguous regarding Defendant's ability to carry over unused hours and defer payment for shortfalls, this agreement was supported by consideration [221-225].

B. $147,000 (30 Hour) Deposit

Second, Defendant asserts that it was entitled to offset the 1600 hour obligation for the initial $147,000 (30 hour) deposit. Defendant, however, failed to assert this claim in its pleadings and rather first raised it after trial. Further, even had Defendant timely notified Plaintiff of this alleged offset/counterclaim, Defendant still would have possessed the burden of proof (Whitaker v Kowalski, 33 NY2d 661, 663 [1973]; Perkins v Meyer, 302 NY 139, 150 [1950]). Here, however, neither witness testified that the amount was not credited, and Defendant has submitted no proof contradicting Plaintiff's business records that indisputably demonstrated that the $147,000 was already credited against three specific invoices. Accordingly, the trial court correctly rejected

Defendant's alleged 30 hour (or $147,000) offset based on Defendant's failure to timely raise the issue or to meet its burden of proof.

C. The Alleged 35.7 Hour Offset

Third, Defendant asserts that the trial court erroneously refused to credit it for 35.7 hours that the subject plane was allegedly unavailable (at some unidentified date) for maintenance. Defendant, however, also failed to assert this claim in its pleadings and rather first raised it after trail. This trial strategy essentially deprived Plaintiff of the ability to testify/submit evidence on the issue.

Further, even had Defendant properly notified Plaintiff of this alleged offset/counterclaim, Defendant still would have possessed the burden of proof on the issue. Given that Defendant's counsel declined to question Mr. Richards about the alleged offset and asked Mr. Moss only one brief question about it [150], it cannot be said that Defendant met its burden, especially since the written contract was silent on the maintenance issue and no evidence existed regarding the parties' intent or conduct that favored Defendant's position.

In any event, both parties anticipated that the plane would require maintenance, and Defendant never unequivocally informed Plaintiff that it intended to count such hours towards the minimum commitment. If it had, Plaintiff could have attempted to pull the plane out of maintenance or to utilize a substitute plane. Accordingly, the trial court properly declined to credit this alleged offset.

D. Interest or Attorney's Fees

Finally, Defendant asserts that the trial court erroneously awarded interest and that it should have merely awarded reasonable costs of collection. Defendant, however, waived this contention because its trial counsel calculated damages based on the written contract's interest rate rather than

attorney's fees [809]. In any event, had Defendant raised the issue at any time before this appeal, Plaintiff would have asserted that the parties' contract provided Plaintiff with the ability to elect either interest or attorney's fees and that all the invoices noted the applicable interest rate rather than any mention of attorney's fees.

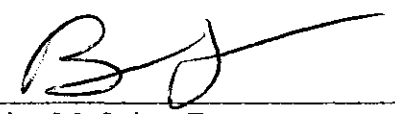
Moreover, using the lesser sum of the two would encourage defendants to avoid payment for long periods of time. Defendant, for example, has avoided paying any amounts due for years and should not be rewarded for its conduct.

CONCLUSION

As set forth above, Defendant's contentions are unsupported and ignore the trial court's credibility determinations. Accordingly, it is respectfully submitted that this Court should affirm the judgment.

Date: December 2, 2010
Albany, New York

TABNER, RYAN AND KENIRY, LLP



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