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United States District Court, M.D. Florida,
Tampa Division.
REGIONS BANK, Plaintiff,
v.
Larry S. HYMAN, assignee for G3 Tampa, LLC, etc., Bing Charles W. Kearney, Jr., Brian Seeger, Tracy J. Harris, Jr., and Gregory Bennett, Defendants.

No. 8:09–CV–1841–T–17MAP.
Sept. 28, 2012.

Allison Doucette, Cheryl Ann Thompson, John A. Anthony, Stephenie Biernacki Anthony, Anthony & Partners, LLC, Tampa, FL, for Plaintiff.

Jesse Lee Ray, Jesse Lee Ray, Attorney at Law, PA, Herbert Roy Donica, Donica Law Firm, PA, Tampa, FL, for Defendants.

MEMORANDUM OPINION
ELIZABETH A. KOVACHEVICH, District Judge.

***1** The Court conducted a bench trial on July 9, 10, 11, 12 and 17, 2012. The bench trial included resolution of the pending counts of the Second Amended Complaint (Dkt.56), as shown in the Amended Joint Pretrial Statement (Dkt.126) and Pretrial Order (Dkt.127). The Second Amended Complaint incorporates the Exhibits attached to the Amended Complaint (Dkt.14) and the Complaint (Dkt.1). The basis of jurisdiction is diversity.

The Second Amended Complaint includes the following:

Count I	Suit on Note	Larry Hyman, Assignee, G3 Tampa,, LLC
Count II	Suit on Guaranties (Gross Negligence)	Kearney, Harris
Count III	Suit on Guaranties	Kearney, Harris
Count IV	Foreclosure	(Dismissed)
Count V	Declaratory Relief	Kearney, Harris, Seeger

The Court notes that Defendant Gregory Bennett was dismissed without prejudice. (Dkt.100). Count IV of the Second Amended Complaint was dismissed with prejudice. (Dkt.101). Prior to trial, the Court granted Plaintiff's Motion for Default Judgment on Count I as to Larry Hyman, Assignee of G3 Tampa, LLC, such that after the Court determines the value of the collateral on the date of the Transfer, the Court will enter a final default judgment that fixes the amount owed by the Borrower, G3 Tampa, LLC, on the Obligation, after credit is applied for the value of the Transfer. (Dkt.98).

G3 Tampa, LLC purchased the Aircraft in 2005, financing the purchase with a loan from Plaintiff Regions Bank. G3 Tampa, LLC granted Regions Bank a security interest in the Aircraft to secure the Obligation. After G3 Tampa, LLC stopped making payments on the loan, Plaintiff Regions Bank send a notice and demand letter on August 25, 2009, accelerating the loan. On September 9, 2009, Plaintiff Regions Bank filed the Complaint, seeking a final judgment against the Borrower and the Obligors.

As to Count I, Plaintiff Regions Bank contends the total amount of the Obligation is $6,229,598.72, plus accrued interest through the date of judgment. Plaintiff Regions Bank concedes that Defendants are due a set-off in the amount of $2,500,000, or such other amount as is determined to be the value of the Aircraft at the time of the Transfer, together with attorney's fees and costs.

As to Count II, Plaintiff Regions Bank seeks a joint and several judgment against Obligors Kearney and Harris, for the full amount of the Count I Judgment, determining that the Guaranty Limitations are not enforceable, plus interest, and attorney's fees and costs recoverable as provided in the Loan Documents.

As to Count III, Plaintiff Regions Bank seeks a final judgment limited to $638,968.75 as to Defendants Tracy Harris, Jr. a Brian Seeger, and to $3,407, 620.35 as to Defendant Bing Charles W. Kearney, Jr., giving effect to the Guaranty Limitations, plus interest, and attorney's fees and costs recoverable as provided in the Loan Documents. Count III is an alternative Count to Count II.

As to Count V, Plaintiff seeks declaratory relief as to the Obligor Letters of November 25, 2009 and December

8, 2009.

***2** After consideration of the testimony, exhibits, pretrial stipulation, and argument of counsel, the Court makes the following findings of fact and conclusions of law. To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. To the extent that any of the conclusions of law might constitute findings of fact, they are adopted as such.

I. Preliminary Issues

A. Admissibility of Exhibits

The Court notes that the parties entered into a stipulation as to the trial exhibits, identifying "Irrelevant Exhibits" and "Disputed Exhibits. (Dkt.151). The Parties stipulated that the following exhibits would not be admitted as irrelevant: Defendants' Exhibits Nos. 2, 3, 9, 10, 27, 28, 31, 32, 89, 102, 122, 131. The Parties stipulated that the relevancy of the following Exhibits is disputed: Plaintiff's Exhibit Nos. 35, 36, 37, 40, 41,42,44,45, 51, 132, 133; Defendants' Exhibit Nos. 6, 7, 29, 30, 33, 34, 74, 84, 88, 97, 98, 99, 128.

The Court notes that the Parties have filed their agreed transcript of the Recording that was played during the trial and admitted into evidence (Def.Ex.123(a). (Defendants' Exhibit 123(b)).

As to Exhibits 132 and 133, deposition transcripts of Tracy Harris, Jr. and Bing Charles W. Kearney, Jr., the Court notes that the witnesses both testified individually and in their capacity as corporate representative. The Bank designated testimony from the depositions in the Amended Joint Pretrial Statement without objection by Defendants.

Plaintiff's Exhibits:

35	Overruled.
36	Overruled.
37	Overruled.
40	Overruled.
41	Overruled.
42	Overruled.
44	Overruled.
45	Overruled.
51	Overruled.
132	Overruled.
133	Overruled.

Defendants' Exhibits:

6	Sustained.
7	Sustained.
29	Sustained.
30	Sustained.
33	Sustained.
34	Sustained.
74	Sustained.
84	Sustained.
88	Sustained.
97	Sustained.

98	Sustained.
99	Sustained.
128	Sustained.

B. Motions to Strike

The Court has entered orders on the pending Motions to Strike separately. (Dkts.156, 157, 174).

C. Judicial Notice

A related case was filed in Hillsborough County Circuit Court, Case No. 09–CA–028980, G3 Tampa, LLC, Assignment for benefit of creditors. Plaintiff Regions Bank requested the Court to take judicial notice of the Assignment Papers for all purposes. No objection to the Request for Judicial Notice was filed. The Court has taken judicial notice of the Assignment Papers.

II. Stipulated Facts

The Court includes the Stipulated Facts shown in the Amended Joint Pre–Trial Statement, for ease of reference. (Dkt.126).

1. The Parties agree that Defendants are Obligors for the Obligation under the Loan Documents. At the time of execution of the Loan Documents in 2005, Regions appraised the Plane for $6,619,698.00.

2. The Parties stipulate that the Plane was properly maintained and insured through December, 2007.

***3** 3. The Parties agree that the Assignment of the Aircraft was filed after the Bank initiated this litigation.

4. The Parties agree that the Assignee sought to abandon the Aircraft and the Bank filed objections to the same in the Abandonment Action.

5. The Parties agree that the Assignee abandoned the Aircraft on the Transfer Date to the Bank based upon entry of an agreed order that preserved the Bank's claims in this litigation.

III. Findings of Fact

In this section, Plaintiff's Exhibits are referred to as "Ex. ____"; Defendants' Exhibits are referred to as "D. Ex. ____", and trial testimony is referenced by (date, p. ____).

1. G3 Tampa, LLC is a Florida limited liability company that was formed on July 14, 2005. Bing Charles W. Kearney, Jr. and Tracy J. Harris, Jr. were named managers/managing members in the Articles of Incorporation.

2. The Operating Agreement for G3 Tampa, LLC was executed on July 14, 2005 by G3 Tampa, LLC's members: Gregory Bennett, Todd Taylor, Bing Charles W. Kearney, Jr., Brian Seeger and Tracy J, Harris, Jr. (Guarantors) G3 Tampa, LLC was created to acquire, own and operate for the use and benefit of the Members a Gulfstream American Corp. G–1159A executive jet, U.S. Registration No. N704JA, serial no. 432, and to conduct such other business as the Members deem advisable.

3. In July, 2005, the Guarantors had multiple businesses and investment properties, and substantial net worth. Bing Charles W. Kearney, Jr. was one of the founders of Platinum Bank and was a member of its loan committee. In its underwriting of the Obligation, the Bank relied upon the strength of the Guarantors' liquidity as a basis for repayment of the Obligation. Ex. 2.

4. G3 Tampa, LLC is a "Manager-managed" limited liability company. In the Operating Agreement dated 7/14/2005, Bing Charles W. Kearney, Jr. and Tracy J. Harris, Jr. are appointed Managers of the Company. The Operating Agreement states:

> 3. Management. All business of the Company shall be conducted by a "Manager" who shall have the power to execute agreements and to undertake indebtedness on behalf of the Company. Bing Charles W. Kearney, Jr. and Tracy J. Harris, Jr. are hereby appointed and designated as Managers of the Company.
>
> Ex. 1.

5. The Credit Offering Memorandum dated 7/25/2005 pertaining to the loan to G3 Tampa, LLC from Regions Bank states, *inter alia:* "The individuals are all in the real estate business, they are partners in different projects over the years, all are very successful as evidenced by their personal statements. The individuals are purchasing this aircraft for both personal use as well as leasing when the aircraft is not being used."

6. The Guarantors were joint and several unlimited guarantors of the Obligation. The Guarantors were each sophisticated businessmen and were very familiar with the contractual obligations and responsibilities associated with the borrowing of money.

7. In connection with its approval of the initial Obligation, the Bank obtained an appraisal of the Aircraft reflecting a value of $6,619.698. Ex. 2. The Bank approved funding of the full amount necessary to purchase the Aircraft.

***4** 8. The Obligation was secured by the Aircraft described as Gulfstream American Corp. G–1159A Executive Jet Aircraft, FAA registration Number N704JA, serial number 432 including parts and accessories and Aircraft related books and records ("the Aircraft"), as well as the books and records of the Borrower. Ex. 5.

9. The Loan Documents were executed on 8/1/2005, and were modified on 5/15/2007. The Loan Documents include the Credit Agreement, Promissory Note ($5,715,000), Aircraft Chattel Mortgage, Security Agreement and Assignment of Leases and Rents, and the Guaranties of Bing Charles W. Kearney, Jr., Brian Seeger, Tracy J. Harris, Jr. and Gregory Bennett. The Modified Loan Documents include the Renewal Promissory Note ($5,111,750), First Amendment to Credit Agreement, Consent and Reaffirmation of Guarantor and Amendment of Guaranty Agreement (Kearney), Consent and Reaffirmation of Guarantor and Amendment of Guaranty Agreement (Seeger), Consent and Reaffirmation of Guarantor and Amendment of Guaranty Agreement (Bennett), Consent and Reaffirmation of Guarantor and Amendment of Guaranty Agreement (Harris), Consent and Reaffirmation of Guarantor and Amendment of Guaranty Agreement (Kearney), ISDA Swap Agreement, with Attached Schedule. Ex. 2–13, 16–21,25.

10. The Credit Agreement includes the following provisions:

> Article I of the Credit Agreement includes definitions and accounting terms, as follows:
>
> ....
>
> **"Default"** means any of the events specified in **Section 8.01,** whether or not any requirement for the giving of notice, the lapse of time, or both, or any other conditions, has been satisfied.
>
> **"Events of Default"** means any of the events specified in **Section 8.01,** provided that any requirement for the giving of notice, the lapse of time, or both, have been satisfied.
>
> ....
>
> **Section 1.02. Accounting Terms and Uniform**
>
> **Commercial Code.** All accounting terms not specifically defined herein shall be construed in accordance with GAAP and all financial data submitted pursuant to this Agreement shall be prepared in accordance with such principles. When used herein, the term "financial statements" shall include the notes and schedules thereto. Terms relating to the Collateral, if not expressly defined herein, shall have the meanings ascribed thereto in the Uniform Commercial Code as enacted in the State of Florida including, without limitation, Florida Statutes 679 relating to secured transactions, as amended from time to time.
>
> **Section 1.03. Construction.** Unless the context of this Agreement clearly requires otherwise, references to the plural shall include the singular, references to the singular include the plural, the term "including" is not limiting, and the term "or" has, except where otherwise indicated, the inclusive meaning represented by the phrase "and/or". The words "hereof", "herein", "hereby", "hereunder, and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. Section, subsection, clause, schedule and exhibit references are to this Agreement unless otherwise specified. Any references in this Agreement or in the Loan Documents to this Agreement or any of the Loan Documents shall include all alterations, amendments, changes, extensions, modifications, renewals, replacements, substitutions and supplements thereto and thereof, as applicable. All of the schedules and exhibits to this Agreement shall be deemed incorporated by reference. Each references (sic) to "Borrower" or "Borrowers" shall be deemed to relate to each Borrower individually and to all Borrowers collectively it being the intent of the parties that the obligations, representations, warranties and pledges of each Borrower hereunder shall be joint and several.

***5** Article II of the Credit Agreement includes the Loan terms, as follows:

> **SECTION 2.01. (a) The Loan.** The Bank agrees, on the terms hereinafter set forth, to make a loan to Borrower on the date of this Agreement in the principal amount of **FIVE MILLION SEVEN HUNDRED FIFTEEN THOUSAND DOLLARS ($5,715,000.00).** There is no revolving feature to the Loan.
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> ....
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> **(h) Collateral Security for the Loan.** The Loan shall be secured by Borrowers granting to the Bank a duly perfected first lien security interest in all of the Collateral.
>
> ....
>
> **SECTION 2.10. Additional Remedies of Bank.** In addition to other remedies available to the Bank in an Event of Default under this Agreement, should Borrower default, violate, breach or fail to comply with and perform any one or more of the express covenants, conditions and provisions of this Agreement, which default, violation, breach or failure remains uncured ten (10) days after written notice thereof to the Borrower, or default under any of the Notes, then the Bank shall have the absolute right, at its option and election, to (1) cancel this Agreement by written notice to the Borrower; (2) institute appropriate proceedings to specifically enforce performance hereof; (3) withhold further Advances hereunder; (4) take immediate possession of the Collateral, (5) appoint a receiver, as a matter of strict right without regard to the solvency of Borrower, for the purpose of preserving the Collateral, preventing waste, and to protect all rights accruing to Bank by virtue of this Agreement. All expenses incurred in connection with the appointment of said receiver, or in protecting, preserving, or improving the Collateral shall be chargeable against the Borrower and shall be enforced as a lien against the Collateral. Nothing herein shall be construed to require notice or opportunity to cure in the event that Borrower defaults in any obligation to pay money under the Note. The said remedies and rights of Bank shall be cumulative and not exclusive, the Bank to be privileged and have the absolute right to resort to any one or more, or all of the said remedies, neither to the limited exclusion of the other, or any other remedy available to the Bank at law or equity, in the event of any such default or breach of said agreement or provisions by the Borrower. The Bank shall have the absolute right to apply any balance of the Loan funds as a payment toward the Note, and no other party shall have any interest in any Loan funds so applied and shall not have any right to garnish, require or compel payment thereof toward discharge or satisfaction of any claim or lien which they or any of them have or may have.
>
> ....

Article IV of the Credit Agreement states Borrower's representations and warranties to the Bank, including **SECTION 4.13, (a) through (e), Warranties and Representations Relating to Aircraft.**

Article V of the Credit Agreement states Borrower's Affirmative Covenants, as follows:

> ***6** So long as the Note shall remain unpaid or the Bank shall have any Commitment under this Agreement, each entity constituting the Borrowers shall:
>
> ....
>
> **SECTION 5.03. Maintenance of Properties.**

(a) Maintain, keep and preserve, all of its properties (tangible and intangible) necessary or useful in the proper conduct of its business, in the aggregate, in reasonable working order and condition, ordinary wear and tear excepted;

(b) Borrower shall, at their sole expense, maintain and keep the Aircraft in good order and repair, ordinary wear and tear excepted. Without limiting the generality of the foregoing, Borrowers shall:

> (i) Keep the Aircraft in accordance with and in compliance with the requirements of Borrower's FAA approved maintenance program, all of the manufacturers' manuals and mandatory service bulletins, and all of the manufacturers' non-mandatory service bulletins relating to airworthiness;
>
> (ii) replace in or on the Aircraft, any and all engines, parts, appliances, instruments or accessories which may be worn out, lost, destroyed or otherwise ren-

dered unfit for use;

(iii) perform all overhauls, checks, inspections, and maintenance service to all parts of the Aircraft as are required to be performed under all applicable mandatory Airworthiness directives (AD notes), Federal Aviation Regulations (FARs), Special Federal Aviation Regulations (SFARs), and manufacturers' mandatory service bulletins affecting airworthiness, the compliance date of which shall fall due during the term of this Agreement.

(c) Borrower, at its own cost and expense, will promptly replace all engines, accessory equipment or parts, which may from time **to** time become worn out, lost, stolen, destroyed, seized, confiscated, damaged beyond repair or permanently rendered unfit for use for any reason whatsoever....

SECTION 5.05, (a) through (i), of the Credit Agreement states the duties of Borrower as to **Maintenance of Insurance**

SECTION 5.08 of the Credit Agreement states the Borrower's Reporting Requirements, including Borrower's duty to furnish to Regions Bank. **SECTION 5.08(6)** provides:

(6) Notice of Defaults and Events of Default. Immediately after the occurrence of each Default or Event of Default, **a** written notice setting forth the details of such Default or Event of Default and the action which is proposed to be taken by the Borrower with respect thereto;....

SECTION 5.10 and **SECTION 5.11** of the Credit Agreement provide:

SECTION 5.10. Logs and Certificates. Borrower shall keep and maintain on the Aircraft at all times, the Aircraft's Certificate of Airworthiness and Certificate of Aircraft Registration together with all other documents and records required by law to be maintained on the Aircraft. All items contemplated by this **Section 5.10** as well as all owner's and operating manuals, user's guides, pilot's guides, flight manuals, flight logs and records, airframe and engine inspection logs and records, all service bulletin compliance logs and records, and all airworthiness directive compliance logs and records, shall be produced for inspection by the Bank or its designated representative upon request by the Bank.

***7 SECTION 5.11. Storage of the Aircraft.** The aircraft shall be parked and stored in an appropriate hangar at all times that it is not engaged in or preparing for flight or in-transit between its principal location and a flight destination. Notwithstanding in-transit status, the Borrower shall not permit the Aircraft to be parked or stored on tarmac, open to the elements, for any period in excess of ten (10) days.

Article VI of the Credit Agreement states the Negative Covenants, as follows:

So long as the Note shall remain unpaid none of the entities constituting the Borrower will, without the prior written consent of the Bank:

....

SECTION 6.08. Restrictions as to Use of Aircraft.

....

(b) Borrower shall not use or permit the Aircraft to be used in any manner or for any purpose excepted from or contrary to any insurance policy or policies required to be carried and maintained pursuant to the provisions of this Agreement or for any purpose or for the carriage of any goods of any description excepted or exempted from or contrary to said insurance policies, or to do any other act or permit anything to be done which could reasonably be expected to invalidate or limit any other insurance policy or policies of which could in any way reasonably be expected to invalidate or limit any other insurance policy or policies of which could in any way render or cause the title of the Borrower or the lien right of the Bank to be in any way jeopardized or unperfected or in any way invalid as against the Borrower or any third parties.

....

(e) Borrower shall not lease or charter the Aircraft, nor transfer operation and control of the Aircraft to an operator, nor enter into a service contract whereby the Borrower operates the aircraft on behalf of a third party, in any event without the written consent of the Bank.

Article **VIII** of the Credit Agreement provides:

SECTION 8.01. Events of Default. The occurrence of any of the following events shall constitute an Event of Default:

(1) The Borrower should fail to pay the principal of, or interest on the Note, or any amount fee, as and when due and payable or Borrower or any Guarantor shall fail to pay any debt owed to the Bank as and when due and payable;

....

(3) Borrower shall fail to perform or observe any term, covenant, or agreement not requiring the payment of money contained in any Loan Document (other than the Note) to which it is a party on its part to be performed or observed which failure continues for a period of fifteen (15) days following receipt by Borrower of written notice from the Bank.

Article IX of the Credit Agreement states:

SECTION 9.01. Amendments, Etc. No amendment, modification, termination or waiver of any provision of any Loan Document to which the Borrower is a party, nor consent to any departure by the Borrower from any Loan document to which it is a party shall in any event be effective unless the same shall be in writing and signed by the Bank, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

***8** ....

SECTION 9.03. No Waiver; Remedies. No failure on the part of the Bank to exercise and no delay in exercising any right, power, or remedy under any Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any rights under any Loan Documents preclude any other or further exercise thereof or the exercise of any other right. The remedies provided in the Loan Documents are cumulative and not exclusive of any remedies provided by law.

....

SECTION 9.06. Governing Law and Venue. This Agreement and the Note shall be governed by, and construed in accordance with, the laws of the State of Florida. Hillsborough County, Florida shall be the exclusive venue for any litigation involving this Agreement. The prevailing party shall be entitled to recover its reasonable attorneys' fees and costs in any litigation involving this Agreement, including, without limitation, fees and costs on appeal.

....

SECTION 9.11. Attorney's Fees. The Borrower shall pay the Bank's reasonable attorneys' fees in connection with the enforcement of any of the Loan Documents after Default by Borrower. The prevailing party in any litigation arising under or in any way related to any of the Loan Documents shall be entitled to recover its reasonable attorney's fees and paralegals' fees including, without limitation, fees on appeal.

SECTION 9.12. Complete Agreement. This is (sic) Agreement and the related Loan Documents embody the entire agreement between the parties. Any and all representations, warranties or agreements of the parties, whether written or oral, are superseded by this Agreement. No course of dealing may be asserted by either party to negate, waive or modify any provision of this Agreement. This Agreement cannot be amended or modified except by written instrument signed by both parties.

11. The members of G3 Tampa, LLC shared the expenses for ownership and operation of the Aircraft, including hangar lease fees, insurance, maintenance, fuel, pilot and flight crew fees, and sales tax according to a formula developed by Brian Seeger (“Seeger Formula”). (7/17/2012, p. 131–133, 140).

12. The revenues received from members and third parties for use of the Aircraft were not sufficient to cover all of the operating expenses of the Borrower, such that the Borrower was insolvent at all times after inception through November 19, 2009. Ex. 64, (7/17/2012, pp. 55–58, p. 155).

13. In July, 2007, G3 Tampa, LLC approached the Bank to modify the terms of the original Loan Documents to extend the maturity date, provide for a period of interest-only payments, reduce the interest rate, and fix the interest rate pursuant to a swap agreement. Ex. 9, 10, 11.

The Swap Agreement executed in conjunction with the 2007 Modification was the instrument by which G3 Tampa, LLC converted their variable interest rate to a fixed rate.

14. In connection with its underwriting and approval of the 2007 Modification, the Bank performed an evaluation of the Aircraft and determined that it had an approximate value of $6,039,003 as of March 6, 2007. Ex. 11, (7/11/2012, p. 183–184, 186–187).

***9** 15. In connection with the Swap Agreement component of the 2007 Modification, the Bank made a recording (the "Recording") of its conversation with Bing Charles W. Kearney, Jr., in his capacity as a managing member of G3 Tampa, LLC and others. Ex. 123a, 123b, (7/9/2012, p. 168–169; 7/10/2012, p. 11–17). The Recording reflects a minute or so of conversation between the Borrower and the Bank which occurred prior to the Bank's announcement that it would be recording the call. (7/10/2012, p. 18–20,24–25).

16. The Borrower did not voice an objection to the Bank's recording during the Recording. Ex. 123a, 123b. The Swap Agreement provides for consent to recording.

17. The Bank produced the Recording to Defendants in response to a discovery request but otherwise never published or transmitted the Recording to any third party. Ex. 123a, 123b.

18. Defendant Bing Charles W. Kearney, Jr. admitted no evidence nor identified in his testimony any damage that could be linked to the Recording. (712/2012, p. 134).

19. Each of the Guarantors and Todd Taylor executed a "Consent and Reaffirmation of Guarantor and Amendment to Guarantor Agreement" dated effective May 15, 2007, each of which limited the guaranties of the Guarantors in proportion to their then ownership interests in G3 Tampa, LLC. Ex. 18–21, (7/9/2012, p. 71–73).

20. After the Modification, Todd Taylor assigned his rights and interests in G3 Tampa, LLC to Bing Charles W. Kearney, Jr. Ex. 27, (7/17/2012, p. 44).

21. In consideration for a release of Todd Taylor's Limited Guaranty, the Bank approved a further modification of the Loan Documents to permit Bing Charles W. Kearney, Jr. to execute a second and final guaranty ("Substitute Kearney Guaranty") that increased the limitation of his Limited Guaranty in proportion to his increased ownership stake in G3 Tampa, LLC. Ex. 26, (7/9/2012, p. 73–74). The Bank released Todd Taylor from his guaranty. Ex. 26, (7/9/2012, p. 73–74).

22. The Bank did not take action to reflect on the Limited Guaranty of Bing Charles W. Kearney, Jr. was superseded and replaced by the Substitute Kearney Guaranty. (7/9/2012, p. 119). Bing Charles W, Kearney, Jr. did not present testimony or evidence that contravened the facts as to the Substitute Kearney Guaranty at trial.

23. After the purchase of the Aircraft and through 2008, G3 Tampa, LLC utilized Southern Air Systems, Inc. ("Southern Air") to perform the inspections and maintenance required by Maintenance Obligation. Ex 87, p. 28–30.

24. As part of the service provided to G3 Tampa, LLC, Southern Air procured insurance on the Aircraft in fulfillment of the Insurance Obligation for all relevant years through the termination of its services. D. Ex. 7, Ex. 87, p. 36.

25. On June 11, 2008, G3 Tampa, LLC entered into an Aircraft Sales Management Agreement with ATC Jets, LLC ("ATC")-, appointing ATC as the sole marketing agent to sell the Aircraft, with an asking price of $7,350,000.00. Ex. 28, (7/11/2012, p. 88–90). At that time, ATC was in agreement with the 2008 asking price as being within the range of similar aircraft on the market, even though a substantial percentage of available aircraft of the same model as the Aircraft were on the market and the average number of days on the market was more than a year. Ex. 28, (7/11/2012, p. 90–94). The 2008 asking price presumed that the Aircraft was airworthy and current with its Maintenance Obligation. (7/11/2012, p. 94–95).

***10** 26. On November 17, 2008, G3 Tampa, LLC decided to terminate the listing agreement with ATC, and to move the Aircraft from Tampa International Jet Center to St. Petersburg. Ex 29.

27. G3 Tampa, LLC notified Tampa International Jet Center of G3 Tampa LLC's intent to vacate on November 28, 2008, and cancelled the management agreement with Southern Air Systems on December 1, 2008. Ex. 30, 31.

28. As a result of the cancellation of the agreement with Southern Air, G3 Tampa, LLC was required to obtain its own insurance. G3 Tampa, LLC procured a new insurance policy to cover the Aircraft as of December 31, 2008. Ex. 32. The insurance policy contained an "Industrial Aid Amendment" ("Industrial Aid Exclusion') that precluded G3 Tampa, LLC from charging others for the use of the Aircraft for any expense other than "direct aircraft expenses like gas and oil" (collectively, the "Direct Expense"). G3 Tampa, LLC paid $9,535 of the $24,039 premium (the "Insurance Premium"). Ex. 87, p. 6, 36. G3 Tampa, LLC almost immediately suspended coverage under the Insurance Policy, for which it received a refund of $1,997 of the Insurance Premium.

29. In January, 2009, the Bank conducted an internal desktop evaluation of the Aircraft and estimated a value of $4,800,000 for the Aircraft (the "January 2009 Value"). Ex.48, 55, (7/11/2012, p. 187–189). The January 2009 Value assumed that the Aircraft was airworthy, up to date with all inspection and maintenance requirements, and undamaged in the absence of any information to the contrary.

30. Mike Hamill proposed a "dry lease" arrangement with G3 Tampa, LLC in January, 2009. A "dry lease" is an arrangement whereby the lease of an aircraft is without crew. In January and February, 2009, Mike Hamill met with Bing Charles W. Kearney, Jr. and Rosie Appelbe to discuss options to lease the Aircraft. Ex. 33, 25, 36, 51, (7/12/2012, p. 39–40, p. 78–80). The Exhibits reflect G3 Tampa, LLC's knowledge that at that time the Aircraft required that some Maintenance be performed.

31. At trial, Bing Charles W. Kearney, Jr. testified that he did not recall talking with Mike Hamill about the "Unconsented Lease"; however, the Exhibits establish that the meetings occurred and that the parameters and terms for Unconsented Leases were discussed and notated. Ex. 33, 35, 36, 51.

32 Mike Hamill executed the proposed agreement with G3 Tampa, LLC on behalf of Pro Pilot Services, LLC on February 1, 2009. D. Ex. 37.

33. On February 12, 2009, G3 Tampa, LLC entered into an Office Hangar Lease Agreement with Sheltair St. Petersburg, LLC. Ex. 38.

34. G3 Tampa, LLC made payments to Pro Pilot Services for February and March, 2009.

35. On February 17, 2009, G3 Tampa, LLC authorized Michael J. Hamill, Benjamin S. Vesey, and Greg R. Woodbridge to use the G3 Tampa, LLC credit card to purchase material and goods for the sole and exclusive use and operation of the Aircraft. Ex. 39.

36. On February 17, 2009, G3 Tampa, LLC retained counsel in connection with a "dry lease" of the Aircraft. Exh. 40, 41, 42.

***11** 37. On February 23, 2009, the Aircraft was flown from St. Petersburg, FL to Orlando, FL, then to Detroit, Michigan, returning to Orlando, FL and St. Petersburg, FL on February 24, 2009. Ex. 43, ("Planet Hollywood Unconsented Lease").

38. On February 23 and 24, 2009, the Aircraft had an expired fire extinguisher; therefore the Aircraft was not airworthy. Ex. 101, (7/12/2012, p. 51–52, 109–110).

39. It is undisputed that Robert Earl used the Aircraft with the consent and agreement of the Managers of G3 Tampa, LLC and G3 Tampa, LLC, and paid money for its use at the rates reflected in the Exhibits. The documents show that Rosie Appelbe, at the instruction of the Managers, prepared paperwork that contained calculations relating to the revenues derived from the Planet Hollywood Unconsented Lease. Ex. 46, D. Ex. 41.

40. The books and records of G3 Tampa, LLC suggest that G3 Tampa, LLC engaged in other Unconsented Leases on a more informal basis and had charged third parties for the Aircraft's use utilizing the Seeger Formula or some other method. Ex. 87, p. 20–23, (7/12/2012, p. 71–73; 7/17/2012, p. 49, 53, 161–162). The Court has no knowledge of the specific terms of the prior arrangements, and notes only that the books and records show some income from prior trips charged to third parties.

41. On February 24, 2009, Pepper Downie of Blue Star Jets e-mailed Chase Kearney with his contact information. D. Ex. 39.

42. G3 Tampa, LLC's initial contact with Blue Star Jets was informal and did not result in any meaningful discussion or negotiation about specific lease opportunities. Ex. 125, p. 43. The Court does not credit the testimony of Bing Charles W. Kearney, Jr. and G3 Tampa, LLC's testimony to the contrary, and credits the Blue Star testi-

mony on this point. Ex. 125, p. 43, (7/12/2012, p. 23–25, 29–30; 7/17/2012, p. 32–33, 35).

43. On February 26, 2009, Mike Hamill evaluated the invoices issued to Robert Earl for the flight on 2/23/2009 and 23/24/2009 as to form; in the e-mail Mike Hamill expresses his hope that Robert Earl will become "a long-term dry lease customer." Ex. 45.

44. G3 Tampa, LLC was paid $27,582.00 for the cost of the flight, and paid sales tax of $1,674.92 to the State of Florida for the flight. Ex. 45, 46, 47; D. Ex. 41.

45. In March, 2009, Greg Woodbridge obtained estimates for required maintenance on the Aircraft. Exh. 49. Greg Woodbridge also obtained storage procedures for the airframe and APU (Auxiliary Power Unit), and provided them to G3 Tampa, LLC. Ex. 50

46. Greg Woodbridge issued an invoice for contract maintenance he performed to G3 Tampa, LLC dated March 12, 2009. D. Ex. 42.

47. Mike Hamill scheduled trips for April, 2009, but on March 24, 2009, Rosie Appelbe, Bing Charles W. Kearney Jr.'s assistant, advised him via e-mail that Bing Kearney did not want the plane flown. Ex. 51.

48. At all times after the Planet Hollywood Unconsented Lease and prior to the Assignment Action, G3 Tampa, LLC maintained the Aircraft in an enclosed hangar, but did not fly the Aircraft. Ex. 38, 75, 87, p. 28. On or after March 31, 2009, G3 Tampa, LLC, under the direction and control of the Managers, did not complete or report to Gulfstream required maintenance or inspections of the Aircraft, as reflected in the CMP reports, such that there were Maintenance Obligation defaults from March 31, 2009 and thereafter. Ex. 48, 63, (7/12/2012, p. 73–74, 79, 108, 116–117; 7/12/2012, p. 47, 53–54, 61–62). The Managers made a conscious and deliberate decision to terminate all inspections and maintenance required of the Aircraft, undoubtedly due to economic considerations, after obtaining estimates for inspections and maintenance of the Aircraft. Ex. 49, 51, (7/17/2012, p. 54–55). The books and records of G3 Tampa, LLC do not reflect any payments for inspection or maintenance of the Aircraft after March 31, 2009. Ex. 87, p. 29–30.

***12** 49. On April 3, 2009, G3 Tampa, LLC requested a modification of the loan to interest only payments at 3% interest rate for twelve months, and also advised of G3' intent to sell the Aircraft. Ex. 52. At that time, the Bank was not told about the Unconsented Lease, that G3 Tampa, LLC's past marketing efforts had been unsuccessful, or that there were Maintenance Obligation defaults.

50. On April 14, 2009, the Bank notified G3 Tampa, LLC that the Swap Agreement prevented the Bank from modifying the interest rate of the loan; the Bank further advised of the technical default associated with the loan, in that Gregory Bennett had not provided an updated personal financial statement. Ex. 54.

51. In May, 2009, Ronald Ciganek, Regions Bank, met with G3 Tampa, LLC, during which they generally discussed a possible sale or lease of the Aircraft ("Generic Lease Request"). Ex. 57, (7/9/2012, p. 79–81). There is no credible evidence that any of the Obligors advised the Bank of any specific leasing opportunity or of an exigent need for the Bank to immediately respond to the Generic Lease Request.

52. In June, 2009, G3 Tampa, LLC, at the direction of Bing Charles W.I Kearney, effectuated a stop payment on the Obligation. It is undisputed that the Obligors thereafter made no further payments to the Bank. Ex. 60, 61, 72, 77, 78, 90, 91, 92, 124. Defendants contend that this action was precipitated and caused by the Bank's failure to respond to a specific lease request and the loss of a valuable potential lease. The Court does not credit the testimony of Defendants on these points, there being no evidence to support their testimony. The record reflects that G3 Tampa, LLC was in default of its Maintenance Obligation well before the May meeting and prior to the earliest date advanced by Defendants as having made the Generic Lease Request of the Bank.

53. On June 30, 2009, *CMP.net* issued a Maintenance Program Review to G3 Tampa, LLC, in which G3 Tampa, LLC was notified of manufacturer maintenance requirements due.

54. In July, 2009, Ronald Ciganek again met with G3 Tampa, LLC.

55. On July 21, 2009, Chase Kearney e-mailed Pepper Downie of Blue Star Jets to set a telephone conference regarding possible lease of the Aircraft. D. Ex. 59.

56. On July 22, 2009, Bing Kearney e-mailed How-

ard Moses of Blue Star Jets, acknowledging a conversation about "G3." D. Ex. 61.

57. On July 23, 2009, Bing Kearney e-mailed Ron Ciganek of Regions Bank, asking him to "look into" Blue Star Jets. D. Ex. 63. This was the first time that Blue Star was identified to the Bank as a potential opportunity to facilitate a lease of the Aircraft. Ex. 68.

58. On July 24, 2009, Howard Moses responded by e-mail that, due to high monthly payments and negative equity, Blue Star had nothing that would mitigate G3's risk at an acceptable level, but Blue Star had two groups considering a straight lease, and expected to hear from them the following week, Ex. 125, D. Ex. 67. It is undisputed that Blue Star never presented any specific teasing possibilities to G3 Tampa, LLC for the Aircraft after that communication or any earlier time. Ex. 125, p. 37–40 and Exhibit 2 of Ex. 125.

***13** 59. Defendants testified that they would have supported a lease of the Aircraft for an amount that required continued capital contributions from G3 Tampa, LLC's members, but there is no evidence that the Obligors reported this position to Blue Star, Ex. 125, p. 12–24, and Exhibits 2 and 2 to Ex. 125, (7/12/2012, p. 113–114, 126–127; 7/17/2012, p. 31–32).

60. On July 28, 2009, Ron Ciganek of Regions Bank responded to the request of Bing Charles W. Kearney, Jr. that Regions Bank would be supportive of allowing G3 Tampa, LLC to charter the Aircraft through Blue Star Jets. Ex. 69, 70, (7/9/2012, p. 84–85). No specific lease request was presented to the Bank at that time or at any other time.

61. On August 5, 2009, G3 Tampa, LLC requested various documents from the Bank as to the Generic Lease Request and the Swap Agreement ("August 2009 Requests"). Ex. 69. The Bank did not respond to these requests.

62. On August 10, 2009, G3 Tampa, LLC engaged Jesse Ray to represent them. Ex. 87, p. 13 and 18, (7/12/2012, p. 130). G3 Tampa, LLC also advised the Bank that it had "halted" its "negotiations with the leasing company" and was seeking a meeting with the Bank to "devise a final strategy." D. Ex. 70. Although Defendants now allege that the failure of G3 Tampa, LLC's leasing efforts was due to the Bank's delay in providing written consent to the Generic Lease Request, it is apparent from the evidence and the testimony of Obligors and Blue Star that the Obligors engaged in limited discussions and negotiations with Blue Star in July, 2009 through October, 2009. Ex. 125. It is also apparent that G3 Tampa, LLC's efforts to procure a lease of the Aircraft did not terminate or fail due to any action or inaction of the Bank as acknowledged by Blue Star but as a consequence of the negative financial and market conditions that were affecting many businesses at that time, including the Borrower. Ex. 125, p. 40–41.

63. On August 24, 2009, the Loan was transferred to Special Assets. Exh, 71.

64. On August 25, 2009, Regions Bank, by its counsel, issued a demand and acceleration letter, which outlined a payment default and a technical default. Ex. 72, (7/11/2012, p. 108). John Anthony ("Bank Counsel") transmitted the Demand Letter to Steve Leslie ("Leslie") with a confidentiality restriction, following a general discussion with Harley Riedel ("Riedel"), with the anticipation and expectation that Leslie's and Riedel's firm might be representing the Obligors, given that it had just filed petitions under the Bankruptcy Code on behalf of Bing Charles W. Kearney's principal business and its related entities. D. Ex. 72, (7/11/2012, p. 33–36, p. 52–56). Bank Counsel also had a conversation with David Jennis ("D.Jennis"), after being approached in connection with possible representation of Bing Charles W. Kearney or his companies in litigation against Whitney Bank. (7/12/2012. p. 30–31, 38–39, 57–62).

65. The Bank accelerated and demanded payment of the full amount of the Obligation, in the absence of any payments made after the Demand letter. On September 9, 2009, this case was commenced by the filing of the Complaint. During the litigation, the Bank terminated the Swap Agreement, and unwound the swap transaction. Ex. 90, 91, 92 (7/9/2012, 185–187, 203–204, 207).

***14** 66. Following the commencement of the litigation, in an effort to amicably resolve the case and the issues stated in the Demand letter, the Bank agreed to participate in a meeting ("Settlement Meeting") with Obligors. Chase Kearney requested a copy of the Regions Code prior to the Settlement Meeting. D. Ex. 77. During the Settlement Meeting, the Bank requested that the Obligors execute a "Bilateral Agreement" intended to protect the confidentiality of settlement communications and promote the unrestricted and honest communication necessary to resolve a delinquent obligation. D. Ex. 76,

(7/10/2012, 42–44).

67. The Obligors were unwilling to execute the Bilateral Agreement without counsel present, and Bing Charles W. Kearney identified Jennis, Riedel and Alberto Gomez ("Gomez") as attorneys who might be retained to represent Obligors. (7/10/2012, p. 12, 44–46). Due to the unwillingness of the Obligors to execute the Bilateral Agreement, and the absence of counsel for Obligors at the Settlement Meeting, Bank Counsel reached out again to Jennis, Riedel and Gomez ("Kearney Company Attorneys") in the hope that one of them would be representing Obligors, and a settlement dialogue could commence. D. Ex. 79, (7/10/2012, p. 12, 40, 44–46) (collectively "Attorney Communications"). In follow-up e-mails, Bing W. Charles Kearney reiterated to the Bank and Bank Counsel that the Obligors had not yet retained counsel. D. Ex. 80. It is apparent from the evidence that Obligors had retained counsel prior to the Demand Letter and were actively working with counsel as to issues with the Obligation. It is also apparent from the evidence that Obligors failed to disclose to the Bank or Bank Counsel that they had retained counsel, and that such failure precipitated the Attorney Communications.

68. At the Settlement Meeting, general concepts to address delinquent payment on the Obligation were discussed by the parties, including a possible sale or lease of the Aircraft, coupled with a temporary modification or forbearance of the Obligation. The Obligors did not address with the Bank at the Settlement Meeting, or in subsequent communications, the fact that the Managers had purposefully elected to discontinue all inspections and maintenance on the Aircraft. Ex. 48, (7/10/2012, p. 112).

69. Following the commencement of this litigation, the Bank received correspondence from Obligors' Counsel (the "Attorney Communications Correspondence") alleging that the Attorney Communications were in violation of the Regions Code and had negatively impacted the credit, reputation, credibility or other aspects of the Guarantors' business or personal affairs. Ex. 80, 81, (7/12/2012.P.145–146).

70. Upon receipt of the Attorney Communications Correspondence, the Bank amended its complaint to add Count V, seeking declaratory relief as to the Attorney Communications, and a determination of whether the Regions Code prohibited the Attorney Communications and implicated a cognizable claim against the Bank for damages resulting from those communications (the "Declaratory Relief Count").

***15** 71. The Regions Code is applicable to associates and directors of the Bank and its affiliates. The Regions Code notes that the Bank has an expectation that its vendors and agents will also adhere to the Regions Code. The Regions Code (III A) requires that confidential non-public information not be disclosed to anyone who is not authorized to receive it or has no business-related reason to know the information ("Business Exception").

72. On November 17, 2009, G3 Tampa, LLC commenced an assignment for the benefit of creditors ("Assignment Action") in Hillsborough County Circuit Court, Case No. 09–CA–028980. Ex. 78. The Assignment was initiated by James Reed in his capacity as Assistant Manager of G3 Tampa, LLC. Ex. 76, (7/17/2012, p. 8–9). It is unclear whether the Managers had the right under the Operating Agreement to delegate the ability to execute documents in connection with the Assignment Action.

73. In delegating Reed to assign the Aircraft and other assets of G3 Tampa, LLC to the Assignee, the Managers did not direct or delegate any responsibilities to supervise or oversee the Maintenance Obligation as to the Aircraft or to report the status of inspections or maintenance to the Assignee. (7/17/2012, p. 62–63, 66–67). The Obligors, and Managers in particular, were aware that, as of the date of the Assignment Action, no inspections or maintenance of the Aircraft had been done for more than six months, and that negligible funds were being assigned with the Aircraft that could be used for insurance or maintenance. Ex. 48, 77, 78, (7/12/2012, p. 131; 7/17/2012, p. 67–68).

74. On December 29, 2009, Assignee filed Assignee's Notice of Intent to Abandon. Ex. 83.

75. On December 31, 2009, Regions Bank filed an Objection to abandonment. Ex. 84. On January 19, 2010, Regions Bank filed a Supplemental Objection. Ex. 86. The objections of the Bank involved the Obligors' Maintenance Obligation and legal positions taken by Obligors in this case. (7/10/2012, p. 80–82, 116–117). At trial, Defendants contended that they understood and accepted that they were liable to the Bank on the Obligation, notwithstanding the filing of the Assignment Action. Defendants argued at trial that this position should have been obvious to the Bank and that, as a consequence, the Abandonment Objections were not "well founded." The Court does not agree.

76. There is nothing in the record that supports Defendants' position (that Defendants remained liable to the Bank on the Obligation) other than their testimony, and as developed at the Trial, Defendants took no action, either formal or informal, in this litigation or in the Assignment Action, to apprise the Bank of their position. The Guarantors entered a limited appearance in the Assignment Action for the specific purpose of objecting to the compromise between the Assignee and the Bank. Defendants could have amended their Answer in this litigation to clarify that they had no expectation that their liability would be satisfied by the Assignment absent a determination that the Aircraft had a value in excess of the Obligation. The Guarantors could have entered a limited appearance in the Assignment Action to put on the record their agreement that the Abandonment of the Aircraft would not release the Bank's claims against them. The Guarantors could have reached out to the Bank and offered to turn over the Aircraft at any point after they recognized and acknowledged that it was no longer viable to own and operate it through G3 Tampa, LLC. The Court finds the testimony of Bing W. Charles Kearney, Tracy Harris, Jr., Brian Seeger and James Reed incredible as to the motivation and basis for the actions and inactions of the Obligors in connection with the Maintenance and Insurance Obligation defaults and the filing of the Assignment Action.

***16** 77. The Court finds the testimony of Bing Charles W. Kearney, Jr., Brian Seeger and James Reed untenable as to their belief or expectation that John Sykes ("Sykes") was causing his pilots or mechanic to turn the engines of the Aircraft periodically, or to ensure covers were placed on the engine, inlet or tailpipe openings of the Aircraft, in the absence of any direct evidence that the Hangar was notified that the Aircraft would be removed from the Hangar, that the log books were updated as to the turning of the engines, that Sykes was notified of the filing of the Assignment Action, or calling at Trial a witness with personal knowledge of the actions purportedly taken on behalf of G3 Tampa, LLC, The Court credits the testimony of Daniel Boyer ("Boyer") and Michael Tufano, corporate representative of the Bank ("Tufano") that neither observed any covers on the Aircraft during physical inspections at the Hangar occurring on different dates. (7/10/2012, p. 213–214; 7/17/2012, 224). The Court also credits the testimony of Daniel Boyer that, in the absence of log book notations reflecting the running of the engines, the engines would be construed as not having been started for purposes of determining the alternatives to returning the Aircraft to airworthy status. Ex. 101, (7/10/2012, 196–197, 208–209; 7/11/2012, p. 7–11; 7/17/2012, p. 213).

78. The Bank agreed to ensure that the Aircraft was insured and maintained in the Hanger, as permitted by the Credit Agreement, pending the disposition of the Abandonment Objections. D. Ex. 1, (7/10/2012.P.117). The Bank did not agree to assume the Maintenance Obligation that was acknowledged by G3 Tampa, LLC to be the sole responsibility of the Borrower under the Loan Documents. Ex. 3, (7/17/2012, p. 41–42). In addition to the fact that the Maintenance Obligation at all times rested with G3 Tampa, LLC, the Court credits the testimony of David Talbert, corporate representative of the Bank, that the Bank would have exposed itself to potential liability had it undertaken responsibility for inspection and maintenance of the Aircraft as a non-owner. (7/11/2012, p. 197–198).

79. On March 31, 2010, Assignee filed Assignee's Amended Notice of Intent to Abandon.

80. In January, 2010, the Bank conducted an evaluation of the Aircraft, and determined it had an estimated value of $2,600,000, assuming all inspections and maintenance were current. (7/11/2012, p. 199–201).

81. As of May 12, 2010, the Bank had taken a charge down of the value of the Aircraft to $2,600,000. Ex. 89, D. Ex. 92, (7/10/2012, p. 128).

82. On May 24, 2010, the Bank sent a Notice of Default under the ISDA Master Agreement. Ex. 90.

83. On June 2, 2010, the Bank sent a Notice of Early Termination Ex, 91, and Notice of Amounts Due Upon Early Termination. Ex. 92.

84. The Bank reached an agreement with the Assignee as to the terms under which an abandonment of the Aircraft would occur that addressed its concerns expressed in the Abandonment Objections and preserved its rights in this litigation. Ex, 93.

***17** 85. The Hillsborough County Circuit Court approved the abandonment of the Aircraft to Regions Bank on September 22, 2010. Ex. 95. Larry S. Hyman, Assignee, executed an Aircraft Bill of Sale to transfer the title to the Aircraft to Regions Bank on September 22, 2010. Ex. 96.

86. At the time of the Transfer, the Aircraft was non-operational and not airworthy due to its being out of compliance with its maintenance and reporting requirements. Ex. 48, 101, (7/11/2012, p. 19–33).

87. On November 15, 2010, Kent Harrell, Senior V.P. of Regions Bank, entered into an Aircraft Sales Management Agreement with ATC Jets, LLC, appointing ATC as the sole marketing agent for the Aircraft. (Ex. 97). The Agreement appoints ATC as the sole marketing agent to market the Aircraft and solicit offers of expression of interest in the Aircraft on behalf of the Bank. The Agreement states that ATC "shall actively seek purchasers" by: contacting operators of the Aircraft type and informing them of the availability of the Aircraft by causing the Aircraft to be advertised in trade journals; preparing and distributing brochures and sales materials delineating the particulars of the Aircraft; will insure that the party expressing an interest in Aircraft has the technical and operational information necessary to make an assessment of the Aircraft; may conduct negotiations if so instructed, and will assist prospective purchasers with trade-ins and financing. Ex. 97, 99.

88. The Bank authorized Fair Wind Air Charter to have access to the CMP for record maintenance. Ex. 98.

89. ATC compiled a Status Report, which includes: November 19, 2010, Initial Assessment of condition of Aircraft, Daniel Boyer; CMP Maintenance Report as of December 15, 2010; separate evaluations conducted for the Airframe, Engines, and Instrumentation/Avionics. The total baseline cost of repairs was estimated to range from $530,000 tp $810,000. Exh. 101, (7/11/2012.P.19–36). The Court credits the Status Report and the related testimony of Daniel Boyer as credible evidence of the minimum amount that would have been required to return the Aircraft to an airworthy status. The Court does not credit the testimony of Bing Charles W. Kearney or James Reed to the extent that it is inconsistent with the Status Report or Daniel Boyer's testimony. The Court also accords no weight to the testimony of Stanley Wagner, proffered by Defendants as a corporate representative of G3 Tampa, LLC on the issue of maintenance. (7/17/2012, p. 107–130). The proffer of Stanley Wagner's testimony reflects that he had no connection with G3 Tampa, LLC until shortly prior to Trial, has no personal knowledge of any of the events at issue in this litigation, is being paid purely for his attendance and testimony at Trial, and conducted minimal investigation and review prior to his testimony.

90. Chris Henderson testified at trial as the corporate representative of Fair Wind Air Charter. His experience included 20 years of working with ATC Jets, LLC (aircraft sales) and Fair Wind Air Charter (charter management), including sales of ten GIII aircraft and a hundred other aircraft sales. (7/11/2012, pp. 85–87). Chris Henderson explained the analysis by which he determined a reasonable asking price for the Aircraft. (7/11/2012, pp. 103–104).

***18** 91. On February 2, 2011, Chris Henderson recommended an "As Is Where Is" sale of the Aircraft to the Bank, based on the condition of the Aircraft and market conditions; he expected offers to purchase for less than $1,000,000. Ex. 100, 102, 106, 110. (7/10/2012, p. 120–123). Chris Henderson provided information on sale prices of other aircraft to the Bank for comparison. Ex. 105.

92. Kent Harrell, Regions Bank, testified that the Bank authorized the evaluations included in the Status Report, and elected not to perform the repairs. (7/10/2011, p. 121).

93. The marketing strategy of ATC and the anticipated price point is consistent with the Bank's valuation of the Aircraft at the time of Transfer, adjusting the January, 2010 value for the maintenance and airworthy issues identified in the Status Report. The Court credits the testimony of David Talbert as to the Bank's opinion of value as the Owner of the Aircraft in the amount of $1,000,000. (the "Transfer Value"). The Court also credits the testimony of ATC and finds that it is supportive of the Transfer Value. (7/11/2012, p. 84–174).

94. Daniel Boyer testified that he showed the Aircraft to prospective buyers, (7/11/2012, p. 33, 34).

95. Offers to purchase were made in February and March, 2011, all of which were "as is" and all of which included an opportunity to conduct due diligence prior to locking in the contract, with prices that ranged from $500,000 to $800,000. Ex. 103, 104, 107, 109, 111, 113, 119.

96. On June 2, 2011, JRS Aviation, Inc. executed an offer to purchase agreement with ATC as agent for Regions Bank for the purchase price of $625,000, paying a deposit of $400,000. Ray Henderson executed the agreement in his capacity as Manager of ATC. Ex. 113.

97. On June 8, 2011, JRS Aviation, Inc. entered into a Purchase and Sale Agreement with Regions Bank, Ex. 113.

98. On June 16, 2011, the Seller's Escrow Closing Statement was approved by Michael Tufano, Regions Bank.

99. The sale price of the Aircraft represents a sales price that is consistent with an arms-length transaction between a willing buyer and a willing seller, and is reflective of saturated market conditions, lack of available credit, and the need to sell the Aircraft "as is" due to the lack of airworthiness and the unknowns that flow from that. Defendants have put no evidence in the record that selling the Aircraft with a pre-buy that would have required obtaining a ferry permit and moving the Aircraft and incurring additional expense for an unknown result, would have resulted in a greater return at the sale.

100. The Court does not credit testimony of Defendants or James Reed that is contrary to the Transfer Value for the reasons set forth in the Court's conclusions of

101. Commercial reasonableness is a finding of fact. Factors which may be considered in determining commercial reasonableness include, as applicable:

1) the mode of sale of the collateral;

(2) whether a sale of the collateral was at wholesale or retail;[

***19** (3) whether the collateral was sold as a unit or in parcels;

(4) the time of the sale, in particular, whether there was excessive delay in effecting the sale;

(5) the place of the sale;

(6) the adequacy of the advertising for the sale;[

(7) the fair market value of the collateral in relation to the price obtained; [and

(8) whether the secured party purchased the collateral at a sale carried out by him or her or by one acting in his or her behalf.

(9) an auctioneer's experience in liquidating particular asset;

(10) although the smallness of the sale price for the collateral does not, in itself, cause a disposition to be commercially unreasonable, it is a factor to be considered.

102. The Guarantors argue that the Transfer is covered by Ch. 679, *Florida Statutes*, and if the sale of the Aircraft was not commercially reasonable, the Aircraft is presumptively valued at the amount of the liability owed by the Guarantors, and the Bank has the burden of demonstrating otherwise. The Bank disputes whether Ch. 679, *Florida Statutes* applies in this context, since the Bank did not take possession of the Aircraft under Ch. 679, *Fla. Stat.*, where ownership of the personal property remains with the borrower through the sale conducted by the creditor, requiring the sale be commercially reasonable. The Bank took ownership of the Aircraft, over its objection, pursuant to Ch. 727, *Florida Statutes.* The Bank argues that the Bank, as the owner of the Aircraft, had no duty to the Guarantors as to the subsequent sale process. The Parties have agreed that the relevant date for determining the Set Off Credit is the date of the Transfer, not the date of the Sale. The date of the Sale is the relevant date for determination of deficiency amounts under Ch. 679, *Florida Statutes.*

The Guarantors are "debtors" under the provisions of Florida's UCC covering secured transactions, as persons who owe payment or other performance of secured obligations. That the Guarantors elected to utilize an Assignment for benefit of creditors, a device available to insolvent debtors, does not change that fact. The Court therefore finds that the disposition of the collateral is subject to the statutory requirement of commercial reasonableness. Since the Bank did not repossess the collateral, the Court could not apply the standards of commercial reasonableness to that aspect.

The collateral in this case, the Aircraft, was abandoned to Bank on September 22, 2010. Upon taking possession of collateral after default, a secured party then "may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or after following any commercially reasonable preparation or processing." § 679.610(1), *Fla. Stat.* "Every aspect of a disposition of collateral, including the method, manner, time,

place, and other terms, must be commercially reasonable." § 679.610(2), *Fla. Stat*. The rules governing commercial reasonableness are in place "to protect the debtor, because they help prevent the creditor from acquiring the collateral at less than its true value or unfairly understating its value so as to obtain an excessive deficiency judgment." *Burley v. Gelco*, 976 So.2d 97, 100 (Fla. 5th DCA 2008). (citations omitted).

***20** Commercial reasonableness is defined in § 679.627(2), *Florida Statutes*:

> A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (a) In the usual manner on any recognized market;
>
> (b) At the price current in any recognized market at the time of the disposition; or
>
> (c) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Subsections (2)(a) and (2)(b) are irrelevant here, as the term "recognized market" applies "only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges." *Burley*, 976 So.2d at 101 n. 3 (quoting U.C.C. § 9–627 cmt. 4 (2002).

If disposition of the collateral is found commercially unreasonable, a rebuttable presumption arises that fair market value at time of repossession was equal to amount of debt it secured. The burden to prove the fair market value of the collateral will be on the secured party. If the secured party meets this burden, he will be allowed to recover a deficiency judgment in the amount equal to the total debt minus the fair market value of the collateral as ultimately determined.

If the collateral is disposed of in a commercially unreasonable manner, the debtor may not receive as great a credit against his debt as if the sale had been conducted in a commercially reasonable manner. The damages the debtor will suffer are equal to the difference between the price obtained in a commercially unreasonable sale and the fair market value of the collateral i.e. what it should have brought in a **commercially reasonable sale**.... Thus, the rights of the debtor can be adequately protected by determining the fair market value of the collateral at time of repossession and awarding the debtor an additional credit in the amount of the difference between the fair market value of the collateral as determined and the amount the collateral brought in a commercially unreasonable sale. *Weiner v. American Petrofina Marketing, Inc.*, 482 So.2d 1362, 1364 (Fla., 1986)

This rule is in accord with the spirit of the Uniform Commercial Code and its disfavor of penalties. Section 671.106, *Florida Statutes* states:

> The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law.
>
> *Id.*

103. The Guarantors contend the sale was commercially unreasonable in the following ways:

> 1. the Bank caused the Aircraft to depreciate because of the passage of time required to resolve the Bank's Objections to the Abandonment of the Aircraft in the Assignment Action;
>
> 2. the Bank did not perform Maintenance after the Transfer to the Bank;
>
> ***21** 3. the final price of $625,000 was too low.

As to the depreciation of the collateral and the performance of Maintenance after the Transfer, the ownership of the Aircraft was not transferred to the Bank until September 22, 2010. The Bank did not cause Defendants to default on payment of the Obligation, and did not cause Defendants to file the Assignment for benefit of creditors. The collateral was within the control and custody of Obligors until November 11, 2009, at which time various Maintenance obligations were overdue. After the Assignment was filed, the collateral was within the custody and control of the Assignee. The Assignee preserved the collateral in the condition it was in when the collateral was put within the Assignee's custody; the Assignee did not have the overdue Maintenance obligations performed due to lack of any resources.

After the collateral was transferred to the Bank on September 22, 2010, the Bank had the condition of Aircraft evaluated, as reflected in the Status Report. While it did require a period of time to assemble all the relevant information, the amount of time that elapsed was not unreasonable. The Bank did not move the Aircraft from where it was held while in the Assignee's custody; the Bank preserved the Aircraft within the same environment in which it was held when ownership was transferred to the Bank. The Bank took the Aircraft as it was, not better and not worse. After considering all relevant circumstances, as noted in Ex. 102, the recommendation of the exclusive marketing agent for the Aircraft, the Bank elected to offer the Aircraft for sale in "As is Where Is" condition. The Bank did not create or cause the uncertainties associated with extended lack of Maintenance; the decision to offer the collateral for sale was a reasoned decision. The repairs at issue were not minor. Given the scope of the work required to restore the Aircraft to airworthy condition, this decision was reasonable under the circumstances. *See* *Whitney National Bank v. Air Ambulance by B & C Flight Management, Inc.*, 516 F.Supp.2d 802, 817 (S.D.Tex.2007).

As to the sale at a price that was too low, the Court notes that offers were made that ranged in value. The actual sale price was less than other offers that had been accepted, but which did not close. Defendants did not challenge the manner of sale. The fact that a secured party could have obtained a higher price is not sufficient, by itself, to deem a sale commercially unreasonable. ATC is a reputable, experienced broker who sold the Aircraft in a manner consistent with standard industry practice. ATC marketed the Aircraft, obtained offers from various entities interested in purchasing the Aircraft, rejected a low bid, and ultimately sold the Aircraft for the best offer it could get at that time. The Court concludes that the sale of the Aircraft was commercially reasonable.

104. The amount of a deficiency judgment to which a secured party is entitled is a matter of fact, not law. To establish entitlement to a deficiency judgment of a certain amount, the secured party must show that the disposition of the collateral was commercially reasonable but nevertheless resulted in a recovery less than the amount of the secured debt. The Court has determined that the disposition of the Aircraft was commercially reasonable.

***22** 105. A defaulting party is liable for any deficiency remaining after the secured party disposes of collateral. § 679.608(d), *Fla. Stat*. To obtain the deficiency, the secured party must show that the disposition was commercially reasonable or that the fair market value of the collateral was less than the debt that the collateral secures. *Burley*, 976 So.2d at 101. Where a debtor places in issue the commercial reasonableness of a secured party's disposition of collateral, the secured party bears the "burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part." § 679.626(2), *Fla. Stat.*; *Burley*, 976 So.2d at 100. The Bank has met its burden,

106. As of January 3, 2011, the Obligation was owed in the aggregate amount of $6,229,598.72, inclusive of principal, accrued interest and late charges, as follows:

Loan Principal:	$5,136,839.00
Loan Interest	142,504.88
Late Charges	14,832.00
Swap Principal	866,348.29
Swap Interest	26,531.92
Swap Late Charges	1,156.02
Storage Fees	34,379.40

Insurance	7,006.40
TOTAL AMOUNT OF OBLIGATION	$6,229,598.72

From this amount, together with accrued interest through the date of judgment, the Borrower is due a set off in the amount of the Transfer Value to be applied to the Obligation (the "Count I Judgment Amount"), together with attorney's fees and costs that may be requested by motion post judgment. The Court has determined the Transfer Value to be $1,000,000. The Court believes that the fair market value as of the date of the Transfer is to be considered in establishing the right to a deficiency, but the amount obtained from the sale of the collateral determines the amount of the deficiency. The sale amount of $625,000 establishes a deficiency amount of $5,604,598.72, together with accrued interest, attorney's fees and costs. The Court directs the Clerk of Court to enter judgment as to Larry S. Hymen, as Assignee of G3 Tampa, LLC in the amount of $5,604,598.72.

107. As to Count II, the Bank seeks the Count I Judgment Amount as to both Kearney and Harris in excess of the Liability Limitations, in the amount determined in Count I, due to breaches of their obligations under the Loan Documents to ensure the Aircraft was airworthy, appropriately insured, and not leased without the consent of the Bank. The Court has determined that the conduct of Defendants, based on the particular facts of this case, is not sufficient to establish liability in excess of the Liability Limitations.

108. As to Count III, which is an alternative to Count II, pursuant to the Loan Documents, there are limitations (the "Liability Limitations") on the guaranties executed by and sought to be enforced against the Guarantors, such that the damages sought in Count II as against each Defendant are capped by applicable Liability Limitations. Accordingly, the Court finds that the Count I Judgment Amount is limited to $638,968.75 as to Harris and Seeger, and to $3,407,620.35 as to Kearney. The Court finds that the Bank has proven liability and amount as to Count III, as to all Guarantors.

Harris	$ 638,968.75
Seeger	$ 638,968.75
Kearney	$ 3,407,620.35

***23** 109. The Loan Documents also include liability for reimbursement of the Bank's attorney's fees, court costs and related compensable expenses incurred in prosecuting and enforcing its rights and remedies pursuant to the Loan Documents, including attorney's fees and costs paid by the Bank to its counsel as compensation and reimbursement for its efforts to enforce the Loan Documents in the Assignment Action and this litigation. The Court finds that the Bank is entitled to seek a determination as to its entitlement to attorney's fees and costs after the entry of judgment as to its claims as set forth in the Complaint and the judgment shall reserve jurisdiction to consider those claims.

IV. CONCLUSIONS OF LAW

JURISDICTION

1. The Court's jurisdiction is based on diversity. Federal courts sitting in diversity apply the forum state's choice of law rules. *See* *Boardman Petroleum, Inc. v. Federated Mutual Insurance Co.*, 135 F.3d 750 (11th Cir.1998). The Court therefore applies Florida conflicts of law rules to determine what law controls substantive issues. Under Florida law, courts will enforce contractual choice of law provisions unless the law of the chosen forum contravenes strong public policy of the forum. *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So.2d 306, 311 (Fla.2000). In this case, the parties agreed that the Note and Credit Agreement would be governed by and construed in accordance with Florida law.

LOAN DOCUMENTS

The Bank has alleged that the Obligors are liable to the Bank under the Loan Documents for the Obligation.

2. To establish breach of contract, the Bank is required to show: (a) a valid contract; (2) material breach; and (3) damages. *Geoffrey Todd Hodges, Trustee v. Eugene Buzzeo*, 193 F.Supp.2d 1279, 1283 (M.D.Fla.2002), citing *Abruzo v. Haller*, 628 So.2d 1338, 1340 (Fla. 1st DCA 1992).

3. The Obligors do not dispute that the Loan Documents create a valid contract or that the Bank provided consideration for the same through the funding of the loan proceeds that were used to acquire the Aircraft, such that the first element is established.

4. The Obligors do not dispute that G3 Tampa, LLC, the Borrower, failed to make the payment due on the Obligation in June, 2009, together with all subsequent payments as well as the payments due under the Swap Agreement, such that a material breach is established.

5. The Bank has been damaged by the Obligors' breach of the Loan Documents. As of the Transfer Date, the fair market value of the Aircraft, $1,000,000., was substantially less than the amount owed on the Obligation, $6,229,598.72. This establishes that the Bank is entitled to a deficiency judgment on the Note as to Count I and on the Guaranties as to Count II or Count III.

SUBSTITUTE KEARNEY GUARANTY

6. The Court finds that the evidence and testimony presented reflects the intent of the Bank and Bing Charles W. Kearney, Jr. that the Substitute Kearney Guaranty was intended by the parties to be the applicable and enforceable Loan Document as to Bing Charles W. Kearney, Jr.'s guaranty of the Obligation.

DEFENSES

***24 7. First Defense.** Satisfaction. Defendants have not established that the fair market value of the collateral exceeded the amount of the debt due; therefore this defense is overruled.

SET OFF CREDIT

8. Second Defense. The Guarantors have asserted as an affirmative defense that they are due Set Off Credit against the Obligation for the fair market value of the Aircraft as of the date of the Transfer. The Guarantors have the burden of persuasion as to the Set Off Credit raised as an affirmative defense.

9. The Guarantors did not provide evidence as to the value of the Aircraft as of the date of Transfer.

10. At Trial, the Bank opined that the Aircraft had a value of $1,000,000 as the Transfer Value as of the date of the Transfer. The Bank as owner of the Aircraft can provide opinion testimony as to the value of the Aircraft. *Electro Services, Inc. v. Exide Corp.*., 847 F.2d 1524 (11th Cir.1988); *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213 (11th Cir.2003).

11. To the extent that the Borrower seeks to testify as to the value of the Aircraft as of the date of the Assignment Action, it is held to the same standard as the Bank and its members or officers are required to have particularized knowledge within the field or other similar attributed that provide a degree of reliability to their testimony. None of the Guarantors established the requisite degree of particularized knowledge to permit them to testify as to value.

12. The Guarantors' opinion as to value of the Aircraft on the date of the Assignment is not admissible, and, if it is admissible, is entitled to less weight than a person who has particularized knowledge in the field.

13. Third Defense. Estoppel. Defendants have not established the presence of any conduct by the Bank that would estop the Bank from enforcing the agreements; therefore this defense is overruled.

14. Fourth Defense. Failure to Mitigate Damages. Defendants have not established the presence of any conduct by the Bank which amounts to a failure to mitigate damages, including the “Generic Lease Request,” the Abandonment Objection or the Maintenance Obligation; therefore this defense is overruled.

15. Fifth Defense. Breach of Credit Agreement. Defendants have not established that Plaintiff Breached the Credit Agreement, and therefore overruled.

16. Sixth Defense. Unclean Hands. This case is an action at law. Defendants have not established that the Bank engaged in a course of inequitable conduct which include the alleged “Generic Lease Breach”, the “Recording” and the “Attorney Communications.” This defense is

overruled.

17. Seventh Defense. Avoidable Consequences. Defendants have not the presence of any conduct

18. Eighth Defense. Good Faith and Fair Dealing. Defendants have not established a breach of any agreement by Plaintiff; therefore this defense is overruled.

19. Ninth Defense. Payment. Defendants have not disputed the amount of the debt due or show that the fair market value of the collateral exceed the amount due; therefore this defense is overruled.

***25 20. Tenth Defense.** Contributory Negligence. Defendants have not the presence of any conduct that amounts to contributory negligence; therefore this defense is overruled.

21. Eleventh Defense. Condition Precedent. Defendants have not established that Plaintiff failed to perform any condition precedent; therefore this defense is overruled.

22. Twelfth Defense. Standing. This defense was abandoned; therefore it is overruled.

COUNT II SUIT ON GUARANTIES (GROSS NEGLIGENCE)

GROSS NEGLIGENCE

23. The Bank contends that Managers Kearney and Harris acted with gross negligence in entering into the Unconsented Lease and prior Unconsented Leases, by deliberately and knowingly abandoning the Maintenance Obligations, and by allowing the Insurance Policy to lapse.

24. Gross negligence is shown by demonstrating a party's knowledge of the existence of circumstances which constitute a clear and present danger amounting to more than normal peril, but the party still undertakes a conscious, voluntary act or omission which is likely to result in injury.

MAINTENANCE OBLIGATION

25. The Credit Agreement included provisions which were intended to preserve the value of the Aircraft, in which the Bank had a security interest. The Maintenance Obligation is one such provision.

26. Due to its nature, the Aircraft is subject to rigorous regulatory requirements. The logbooks which document that maintenance and inspections have been done are a vital part of the Aircraft, and are necessary to preserve its value. Regular maintenance and inspections avoid the prohibitive costs and uncertainties to restore an Aircraft to airworthy status.

INSURANCE POLICY

27. 14 C.F.R. Sec. 91.501 governed the conduct of G3 Tampa, LLC in its operation of the Aircraft.

28. The Seeger Formula includes charges that are not permitted under applicable law and that do not constitute Direct Costs of operating the Aircraft within the meaning of the Insurance Policy. No member of G3 Tampa, LLC explained the hourly charge or linked the hourly charge with allowable Direct Expenses of the Aircraft, which are not otherwise overhead or required to be apportioned on a reasonable pro rata basis. (7/12/2012, p. 87–91; 7/17/2012, p. 133, 140).

29. Defendants misconstrue operating expenses with Direct Expenses. G3 Tampa, LLC's documents reflect that when Direct Expenses are deducted from the price paid for the Planet Hollywood Unconsented Lease, G3 Tampa, LLC violated the Industrial Aid Restriction in the Insurance Policy. Ex. 1, 3, 19, 25, 32, 44, 46; D. Ex, 5,

30. The Bank contends that the Direct Costs for a flight are those stated in 14 C.F.R. Sec. 91.501(d), and the Direct Costs referred to in the applicable insurance policy would be construed consistent with the statutory definition. The Bank contends that the assessment of other costs under the Seeger Formula to third parties on flights that violate Chapter 91 also violate the Industrial Aid Exclusion and invalidate the insurance Policy.

***26** 31 A violation of the Industrial Aid Exclusion voids the Insurance Policy and relieves the insurer from any liability under the policy. The Planet Hollywood Unconsented Lease violated the Industrial Aid Exclusion. Ex. 32.

UNCONSENTED LEASE

32. The Disputed Bank Exhibits support the Bank's theory that G3 Tampa, LLC intended to and did consummate an Unconsented Lease regardless of whether G3

Tampa, LLC executed the lease agreement executed by or on behalf of the Planet Hollywood Unconsented Lease. D. Ex. 40.

33. The Unconsented Lease violated the terms of the Credit Agreement, which requires prior written consent by the Bank.

34. The purpose of requiring consent from the Bank is to allow the Bank to evaluate particular facts, so that the Bank can evaluate the risk of impairment to the value of the collateral in which the Bank has security interest. When the Loan was granted to G3 Tampa, LLC, the Aircraft was in the custody of local businessmen well known to the Bank. The lease of an Aircraft to unknown third parties exposes the Bank to the risk of total loss of the Aircraft, should the third party take the Aircraft and disappear, or to substantial impairment, should the third party crash the Aircraft.

35. The Unconsented Lease violated the terms of the Credit Agreement, and the terms of the Unconsented Lease may have theoretically voided coverage available under the applicable insurance policy. The fact is that nothing happened on the flight that damaged the Aircraft. The failure to perform the Maintenance Obligation has the same effect whether it is subjectively intentional, or unintentional due to lack of funds to pay for the Maintenance Obligation. The failure to perform the Maintenance Obligation is a breach of the Credit Agreement which impaired the value of the collateral. The Court is not convinced that the facts of this case show that the Bank sustained more damages than it otherwise would have due to Defendants' actions or omissions. The Court concludes that the enforcement of unlimited guaranties due to the presence of gross negligence is not warranted.

36. The Court concludes that any liability of the Guarantors should be entered pursuant to Count III, subject to the limitations on the guaranties, and therefore dismisses Count II with prejudice.

COUNT III SUIT ON GUARANTIES

37. The Bank has established the liability of the Guarantors, subject to the limitations of the guaranty agreements in effect.

COUNT V—DECLARATORY RELIEF

The Bank seeks a declaratory judgment as to the Attorney Communications made on behalf of the Bank in connection with its efforts to negotiate with the Obligors as to the delinquent Obligation.

38. Declaratory judgments require the showing of: (a) a *bona fide* present need for a declaration; (b) a present, ascertainable state of facts or controversy as to a state of facts; (c) some immunity, power, privilege or right of the complaining party is dependent on the facts or the law applicable to the facts; (d) some person or persons who have or may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; (e) the antagonistic parties are all before the court; and (f) the relief sought is not merely the giving of legal advice or answering questions arising from curiosity. Ch. 86.011, *Florida Statutes.*

***27** 39. The Court finds that a definite and concrete controversy is present, that the facts of this claim are ascertainable, that the Guarantors have asserted claims against the Bank, that all of the parties are before the Court, and that the Bank is in need of a declaration as to its obligations and defenses.

ATTORNEY COMMUNICATIONS

40. The Attorney Communications fall within the Business Exception and were expressly limited to a narrow discussion of the delinquent Obligation that was the subject of the Demand Letter and Settlement Meeting. Because the Attorney Communications were limited to attorneys with connections to Obligors or their companies, the Bank had an expectation, which was fulfilled, that the communications would be treated as confidential by the recipients.

41. At Trial, the Guarantors all conceded that they authorized the transmittal of the Attorney Communications Correspondence. (7/12/2012, p. 145–146; 7/17/2012, p. 167–169, 198. The Guarantors continued to contend they were damaged by the Communications, but were unable to identify any exhibit that evidenced such damages. (7/12/2012, p. 135–136; 7/17/2012, p. 167–169, 198–199.). The Court finds that the record is devoid of any evidence that establishes quantifiable damages that can be linked to the Attorney Communications.

42. The Court finds that declaratory judgment should be rendered in favor of the Bank and against the Guarantors that the Attorney Communications do not violate the Regions Code and do not give rise to a cause of action in favor of the Guarantors against the Bank. Accordingly, it is

ORDERED that:

As to Count I, a final default judgment in favor of Regions Bank and against Defendant Larry S. Hyman as Assignee of G3 Tampa, LLC in the amount of $5,604,598.72 shall be entered;

As to Count II, Count II is **dismissed with prejudice;**

As to Count III, a joint and several final judgment shall be entered in favor of Regions Bank and against Guarantors as follows:

Tracy J. Harris, Jr.	$ 638,968.75
Brian Seeger	$ 638,968.75
Bing Charles Kearney, Jr.	$ 3,407,620.35

As to Count V, the entry of a final judgment in favor of Plaintiff Regions Bank and against Tracy Harris, Jr., Brian Seeger and Bing Charles W. Kearney, Jr. that the Attorney Communications do not violate the Regions Code and do not give rise to a cause of action against Regions Bank.

The Court **reserves jurisdiction** for the determination of attorney's fees and costs. The Clerk of Court shall enter the above final judgments shall close this case.

DONE and ORDERED.

M.D.Fla.,2012.
Regions Bank v. Hyman
Slip Copy, 2012 WL 4479080 (M.D.Fla.)

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