

JS-6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AIR LEASE CORPORATION; ALC B378
41345, LLC; AND ALC B378 37772,
LLC,
Plaintiffs/Counter-Defendants,
v.
FAR EASTERN AIR TRANSPORT
CORP.,
Defendant/Counter-Plaintiff.

Case No. CV 16-5601- MWF (JEMx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came on for trial before the Court sitting without a jury on September 25, 2018. The following witnesses were called and examined by the parties in the order recited below:

On September 25, 2018, Anthony Battista appeared on behalf of Plaintiffs and Counter-Defendants Air Lease Corporation, ALC B378 41345, LLC, and ALC B378 37772, LLC (collectively “Air Lease” or ALC”) and gave an opening statement. Brian Sun appeared on behalf of Defendant and Counter-Claimant Far Eastern Air Transport Corporation (“Far Eastern”) and gave an opening statement.

1 On the same day, following opening statements, Mr. Battista examined **Jie Chen**,
2 executive vice president and managing director of Asia for ALC. Mr. Sun cross-examined
3 Mr. Chen.

4 On September 26, 2018, Mr. Battista examined **Pierce Chang**, formerly the senior
5 vice president of technical asset management at ALC. Mr. Sun cross-examined Mr.
6 Chang; Mr. Battista conducted a redirect examination; and Mr. Sun conducted a recross
7 examination.

8 Next, Ms. Diana Gurfel, appearing on behalf of ALC, examined **William T.**
9 **MacCary**, senior vice president and corporate counsel at ALC. Steven J. Corr, appearing
10 on behalf of Far Eastern, cross-examined Mr. MacCary.

11 Next, between September 26 and September 27, 2018, Mr. Battista examined
12 **Frank Buratti**, director of technical asset management at ALC. Mr. Corr cross-examined
13 Mr. Buratti; Mr. Battista conducted a redirect examination; and Mr. Corr conducted a
14 recross examination.

15 On September 27, 2018, Evan M. Kwarta, appearing on behalf of ALC, examined
16 **Carol Giles**, an employee at the Giles Group, an aviation safety consulting group that
17 performs records audits and training. Mr. Corr cross-examined Ms. Giles and Mr. Kwarta
18 conducted a redirect examination.

19 Next, Mr. Battista examined **Alex Khatibi**, executive vice president for marketing
20 at ALC. Mr. Sun cross-examined Mr. Khatibi.

21 On September 28, 2018, Mr. Kwarta examined **Stuart Rubin**, vice president of ICF
22 International, Inc. (“ICF”) and an International Society of Transport Aircraft Trading
23 (“ISAT”) senior certified appraiser. Mr. Corr cross-examined Mr. Rubin.

24 Next, Mr. Kwarta examined **Samuel Engel**, senior vice president and global
25 managing director of aviation at ICF. Mr. Sun cross-examined Mr. Engel; Mr. Kwarta
26 conducted a redirect examination; and Mr. Sun conducted a recross examination.

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1 Next, Jason L. Liang, appearing on behalf of Far Eastern, examined **Kung Wei**
2 (**“Alex”**) **Wang**, deputy manager for the maintenance department at Far Eastern. Mr.
3 Battista cross-examined Mr. Wang and Mr. Liang conducted a redirect examination.

4 On October 3, 2018, Mr. Battista examined **Steven F. Udvar-Házy**, executive
5 chairman of ALC. Mr. Sun cross-examined Mr. Hazy; Mr. Battista conducted a redirect
6 examination; and Mr. Sun conducted a recross examination.

7 Next, Mr. Battista examined **Kishore Korde**, executive vice president at ALC. Mr.
8 Corr cross-examined Mr. Korde.

9 Next, Mr. Corr examined **Quentin Brasie**, Far Eastern’s aircraft storage expert.
10 Mr. Battista cross-examined Mr. Brasie and Mr. Corr conducted a redirect examination.

11 On October 4, 2018, Mr. Liang examined **Ching-Wen Cheng**, Chief Financial
12 Officer of the Hua-Fu Group. Mr. Kwartta cross-examined Ms. Cheng; Mr. Liang
13 conducted a redirect examination; and Mr. Kwartta conducted a recross examination.

14 Next, Mr. Liang examined **Chin Chih (“CC”) Tseng**, Chief Operating Officer of
15 Far Eastern. Mr. Battista cross-examined Mr. Tseng and Mr. Liang conducted a redirect
16 examination.

17 On October 12, 2018, Mr. Corr examined **Chase Perry**, Far Eastern’s damages
18 expert. Mr. Kwartta cross-examined Mr. Perry; Mr. Corr conducted a redirect
19 examination; and Mr. Kwartta conducted a recross examination.

20 Next, Alexandra N. Fries, appearing on behalf of Far Eastern, examined **Cynthillia**
21 **Kuo**, senior manager of the accounting department at ALC. Mr. Battista cross-examined
22 Ms. Kuo; Ms. Fries conducted a redirect examination; and Mr. Battista conducted a
23 recross examination.

24 Next, Mr. Liang examined **Czar Vigil**, senior vice president and corporate counsel
25 at ALC. Mr. Battista cross-examined Mr. Vigil and Mr. Liang conducted a redirect
26 examination.

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1 Next, Mr. Corr examined **Bret Weinberg**, director of aircraft specification and
2 procurement at ALC. Mr. Battista cross-examined Mr. Weinberg and Mr. Corr conducted
3 a redirect examination.

4 The Court also reviewed the designations and counter-designations of the
5 deposition transcripts of **Szu Hsuan Lin**, a deputy project manager in the planning
6 division at Far Eastern, dated November 28, 2017, together with exhibits thereto; Alex
7 Wang, dated October 27, 2017, together with exhibits thereto; and CC Tseng, dated
8 October 25, 2017, October 26, 2017, and February 27, 2018, together with exhibits
9 thereto.

10 During and after testimony, exhibits were marked and received into evidence. (*See*
11 *Corrected List of Admitted Trial Exhibits (Docket No. 322-2)*). Following the
12 presentation of evidence and the parties' closing arguments, the matter was taken under
13 submission.

14 Having carefully reviewed the record and the arguments of counsel, as presented at
15 the trial and in their written submissions, the Court now makes the following findings of
16 fact and reaches the following conclusions of law under Rule 52 of the Federal Rules of
17 Civil Procedure. Any finding of fact that constitutes a conclusion of law is also hereby
18 adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact
19 is also hereby adopted as a finding of fact.

20 I. FINDINGS OF FACT

21 A. **The Parties**

22 1. Plaintiff and Counter-Defendant Air Lease Corporation is a Delaware
23 corporation with its principal place of business in California. Plaintiffs and Counter-
24 Defendants ALC B378 41345, LLC and ALC B378 37772, LLC are Delaware limited
25 liability corporations that have their principal places of business in Delaware. Air Lease
26 Corporation is the sole member, servicer, and manager of ALC B378 41345, LLC and
27 ALC B378 37772, LLC. ALC leases and sells commercial aircraft to air carriers around
28 the world.

1 2. Defendant and Counter-Claimant Far Eastern Air Transport Corporation is a
2 Taiwanese commercial air carrier with its principal place of business in Taiwan.

3 **B. Far Eastern’s Bankruptcy and Subsequent Development Plan**

4 3. Far Eastern received court approval for bankruptcy protection in the Republic
5 of China (Taiwan) in May 2008. During the restructuring period, Far Eastern’s MD-80
6 aircraft were in storage and Far Eastern did not operate commercial flights.

7 4. The Hua-Fu Group became the majority shareholder of Far Eastern in 2008.

8 5. Far Eastern resumed operations in April 2011 and Far Eastern’s existing fleet
9 was returned to service.

10 6. The Taipei District Court approved Far Eastern’s completion of its
11 bankruptcy reorganization in October 2015.

12 7. In 2014, Far Eastern prepared a Five Year Fleet Development Plan for
13 submission to the Taiwanese Civil Aviation Authority (“CAA”).

14 8. Far Eastern was interested in renewing its fleet to fly to farther destinations,
15 as the MD-80 aircrafts in their fleet could not fly long distances.

16 9. Far Eastern considered the purchase or lease of Boeing, Airbus, Bombardier,
17 and Embraer aircraft before focusing on the purchase or lease of B738s. In the case of
18 Boeing, Far Eastern considered the potential purchase or lease of B738s and 737-900
19 aircraft.

20 10. Far Eastern contacted potential lessors in 2014. As of March 2015, Far
21 Eastern received proposals from several lessors for the lease of B738 aircraft. In February
22 2015, Far Eastern sought and received permission from the CAA to lease two B738
23 aircraft.

24 **C. The MSN 41345 Lease**

25 11. In February 2015, Far Eastern contacted ALC to inquire about the availability
26 of B738 aircraft for delivery in 2016.

27 12. In April 2015, Far Eastern also pursued six other B738 aircraft from UTAir
28 that it knew were stored. (*See Ex. 1207*).

1 13. Szu Hsuan Lin testified that in considering whether a particular airplane
2 manufacturer or leasing company has suitable aircraft for operation by Far Eastern, Far
3 Eastern considers, among other factors, the aircraft's age, the leasing period, and the rent.

4 14. On June 1, 2015, ALC provided Far Eastern with a term sheet for one new
5 B738 aircraft, Manufacturer Serial Number 41345 ("MSN 41345"), which was executed
6 on June 3, 2015.

7 15. After ALC sent a draft of the lease agreement for MSN 41345 on June 12,
8 2015, Far Eastern's legal team reviewed the draft clause-by-clause, and the parties
9 exchanged comments and drafts.

10 16. ALC and Far Eastern held lease negotiation meetings in Taipei regarding
11 MSN 41345 on July 6, 2015. The lease agreement for MSN 41345 (the "MSN 41345
12 Lease") was executed on July 13, 2015. (*See Ex. 78*).

13 17. On June 12, 2015, Far Eastern applied to the CAA for permission to operate
14 two B738 aircraft, which the CAA granted on July 13, 2015.

15 **D. Lease Negotiations Regarding MSN 37772**

16 18. On June 7, 2015, Far Eastern notified ALC that it was interested in leasing a
17 second B738. On June 11, 2015, ALC offered Far Eastern a second B738 aircraft for
18 delivery in 2016, but the offer expired before meaningful discussions took place.

19 19. Far Eastern expressed interest in delivery in the May to June 2016 timeframe
20 so that Far Eastern could utilize the aircraft for the summer peak season.

21 20. In August 2015, ALC offered Far Eastern a young 737-800 aircraft,
22 Manufacturer Serial Number 37772 ("MSN 37772"). ALC informed Far Eastern that
23 MSN 37772 was on lease to Air Berlin with Air Berlin's lease return set for November
24 2020, but that Air Berlin was interested in terminating the lease early to switch to Airbus
25 aircraft.

26 21. On August 27, 2015, ALC sent a proposed letter of intent ("LOI") for MSN
27 37772. (*See Ex. 216*). A revised LOI was sent on September 16, 2015. (*See Ex. 1217*).
28 The revised LOI specified a lease execution date of October 15, 2015. (*See Joint*

1 Stipulation of Facts (Docket No. 257-2)). The LOI contained the majority of the
2 commercial terms, such as the lease rate, reserves, and deposits, as well as information
3 regarding the technical conditions of the aircraft. The LOI also specified the delivery
4 condition of MSN 37772 was “AS IS WHERE IS.” Far Eastern sought clarification
5 regarding the “AS IS WHERE IS” clause. ALC responded, and also explained that prior
6 to delivery, MSN 37772 would undergo a C-Check. A C-Check is a “heavy check”
7 during which an aircraft is stripped down and systems and structures are examined and
8 inspected to, among other things, ensure the airworthiness of the aircraft.

9 22. Jie Chen, the ALC marketing executive directly responsible for the marketing
10 and negotiation of the Far Eastern leases, testified that, during negotiations of the LOI, Far
11 Eastern may have asked whether the airplane was flying, to which Mr. Chen responded in
12 the affirmative.

13 23. Far Eastern signed the revised LOI on September 19, 2015.

14 24. Alex Wang, deputy manager for the maintenance department at Far Eastern,
15 testified that during his August and September 2015 meetings with Mr. Chen and Pierce
16 Chang of ALC, he did not ask about the operational status of MSN 37772 specifically, but
17 that he did ask Mr. Chang whether Air Berlin was using MSN 37772, and that based on
18 Mr. Chang’s response, he concluded that the aircraft was in operation.

19 25. After the LOI was executed, Mr. Chen gave the LOI to Toby MacCary so
20 that he could prepare a draft lease agreement based on the terms and conditions outlined in
21 the LOI. On September 29, 2015, ALC sent a draft lease for MSN 37772 to Far Eastern.
22 During negotiations of the lease agreement, Amanda Lin from Far Eastern prepared an
23 “open issues list,” which was a complete chart representing all of the issues raised by
24 either side during the negotiation of the lease agreement. On October 9, 2015, Far Eastern
25 provided its comments to the MSN 37772 lease. During this time, Far Eastern never
26 asked whether MSN 37772 was flying, or how Air Berlin was operating the Aircraft.

27 26. The parties did not execute the lease by October 15, as contemplated by the
28 LOI.

1 27. On November 7, 2015, Air Berlin put MSN 37772 into storage. Air Berlin
2 did not notify ALC that MSN 37772 was inducted into storage. The lease agreement for
3 MSN 37772 did not require Air Berlin to notify ALC that the aircraft was being placed in
4 storage.

5 28. Mr. Hazy, ALC's CEO, testified that ALC mandates in its lease agreements
6 that the airline is responsible for maintenance and upkeep of the aircraft in compliance
7 with the regulations of the country in which the airline operates.

8 29. The fact that MSN 37772 was being stored by Air Berlin was publicly
9 available on aviation websites. However, at no point before the parties signed the MSN
10 37772 lease agreement did ALC tell Far Eastern that the aircraft was in storage.

11 30. On November 19, 2015, ALC sent Far Eastern a revised version of the MSN
12 37772 lease and a side letter, including a "redline" comparing the updated iteration of the
13 MSN 37772 lease to the prior version. (*See Joint Stipulation of Facts*).

14 31. On November 20, 2015, Far Eastern paid the first security deposit in the
15 amount of \$317,000 pursuant to the MSN 37772 LOI.

16 32. On December 3, 2015, Air Berlin sent ALC a utilization report for MSN
17 37772, which indicated that the aircraft flew 34 hours in November, down from 226 hours
18 in October. (*See Ex. 119*). A utilization report is a document submitted by ALC's air
19 carrier lessees that reports the usage of the aircraft, including flight hours and the number
20 of cycles flown, for a particular period of time, typically one calendar month. These
21 reports are sent to ALC's utilization report email address on a monthly basis, which
22 includes various departments of ALC.

23 33. Mr. Chen travelled to Taipei in early December 2015 to assist in finalizing
24 the lease agreement for MSN 37772. During these negotiations, the parties never
25 discussed the flying status of the aircraft. Mr. Chen testified that, over the span of his
26 nearly 30-year career negotiating hundreds of lease agreements, no airline has ever raised
27 the issue of aircraft storage.

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1 34. The meeting did not result in final execution of the lease agreement since
2 there were a few outstanding issues that needed to be further negotiated. After returning
3 to Los Angeles, Mr. Chen emailed CC Tseng, Far Eastern's COO, and urged him to
4 execute the lease agreement so that ALC could begin modification of MSN 37772 as soon
5 as possible to suit Far Eastern's specifications – such as creating a first-class cabin – so
6 that delivery could be made by June 2016. The lease agreement for MSN 37772 was
7 executed on December 11, 2015 (the "MSN 37772 Lease"). (*See* Ex. 9).

8 35. During the lease negotiations for MSN 37772, the operational status of the
9 aircraft was never mentioned by either party.

10 36. On January 7, 2016, Far Eastern submitted a lease and purchase plan for its
11 use of MSNs 37772 and 41345 to the CAA.

12 37. In the first quarter of 2016, in preparation for the introduction of two new
13 aircraft to its fleet, Far Eastern hired 20 new pilots and 34 engineers and sent them to
14 Seattle, Washington for training.

15 **E. Early Termination of Air Berlin's Lease Agreement**

16 38. During the negotiations for Air Berlin's early termination of the lease
17 agreement for MSN 37772, ALC and Air Berlin did not discuss whether the aircraft was
18 being stored or would be stored.

19 39. The lease termination agreement was signed on December 22, 2015. (*See*
20 Ex. 3). The effective date of the lease termination was anticipated to be July 1, 2016.

21 40. Mr. Khatibi testified that it was his understanding that MSN 37772 was
22 operational when the lease termination agreement was signed. Mr. Khatibi testified that
23 he did not know that MSN 37772 was in storage until Mr. Chen asked him in May 2016
24 for confirmation from Air Berlin that MSN 37772 was indeed parked.

25 41. Mr. Khatibi testified that he has negotiated hundreds of leases in his career,
26 and that storage has never been raised in these negotiations.

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1 42. Mr. Khatibi also testified that leasing companies do not keep track of the day-
2 to-day operations and treatment of the assets they lease, so there would be no reason to
3 check storage specifically.

4 43. Pursuant to the lease termination agreement between ALC and Air Berlin,
5 Air Berlin paid a \$1 million fee for early termination. Mr. Khatibi testified that this
6 termination fee acts primarily as a penalty for lost business but is also designed to pick up
7 some of the cost to transfer the aircraft to the new lessee. A number of different variables
8 affect the total of a given early termination fee, including the relationship with the
9 terminating lessee, the prospect of continued business with the terminating lessee, and
10 how many other aircraft may be involved in the termination process.

11 **F. MSN 37772 Lease Agreement**

12 44. The lease agreement between ALC and Far Eastern had a provision that
13 required Far Eastern to notify ALC if it put the aircraft in storage. Section 15.3 of the
14 lease agreement states in full: “If the Aircraft, any Engine or any Part is out of revenue
15 service (except for the performance of maintenance, repair or Overhaul procedures),
16 Lessee shall promptly notify Lessor thereof and the Aircraft, such Engine or such Part
17 shall be properly and safely stored, maintained, and insured in accordance with accepted
18 industry and manufacturer specifications and procedures.”

19 45. ALC began using a new form lease agreement in June 2015. The lease
20 agreement between ALC and Air Berlin for MSN 37772, which was executed in August
21 2011, did not include a storage provision similar to Section 15.3 of the lease agreement for
22 MSN 37772 between ALC and Far Eastern. (*See Ex. 325*).

23 **G. Communications Regarding Status of MSN 37772**

24 46. The MSN 37772 Lease required Far Eastern to develop a maintenance
25 program for the aircraft, and to obtain approval from the CAA. In order to develop a
26 bridging maintenance plan for MSN 37772, Far Eastern required various documents,
27 including the Boeing Maintenance Planning Document (“MPD”) and other documents
28 reflecting Air Berlin’s maintenance programs and inspections.

1 47. To that end, Far Eastern requested various documents from ALC. In
2 response, in October 2015, Frank Burrati, the ALC executive responsible for arranging the
3 delivery of MSN 37772 to Far Eastern, sent Far Eastern a variety of MSN 37772's
4 maintenance documents, including the Task Card Last Compliance Print ("TCLCP" or
5 "Last Done Next Due" or "LDND"), which is a record of all the maintenance tasks
6 performed on an aircraft and a statement of when the maintenance task is next scheduled
7 to be performed. (*See* Ex. 4). However, despite Far Eastern's requesting it, ALC did not
8 send a copy of Air Berlin's maintenance program, explaining that it was proprietary and
9 Far Eastern would instead have a chance to review it on-site during a pre-delivery records
10 inspection.

11 48. Pursuant to Far Eastern's request, on January 22, 2016, Mr. Buratti sent an
12 updated LDND to Mr. Wang. (*See* Ex. 5). In order to get the latest LDND, Mr. Buratti
13 had to ask Air Berlin for a copy. Mr. Buratti did not review the document before he sent it
14 to Mr. Wang.

15 49. The first line of the first page of the updated LDND stated "STORAGE FOR
16 MORE THAN 7 DAYS (B737NG)." The second line stated, "STORAGE FOR MORE
17 THAN 30 DAYS (B737NG)." Both lines indicated that storage of the aircraft began on
18 November 7, 2015. The updated LDND was circulated to at least 29 employees at Far
19 Eastern, many of whom were in the Maintenance and Engineering Division. None of the
20 people in the email chain raised a concern about the length of storage of MSN 37772
21 despite the first four entries on the LDND being related to storage tasks.

22 50. On May 16, 2016, Mr. Wang requested an updated LDND for MSN 37772.
23 (*See* Ex. 12). In response to Mr. Wang's request, on the following day, Mr. Buratti
24 mistakenly sent Mr. Wang the LDND he had previously sent in January 2016. To make
25 sure there was not a more recent LDND available, Mr. Burrati checked the aircraft's
26 utilization report for January 2016 and noticed that the aircraft reported no flight hours
27 that month. Mr. Burrati then checked the aircraft's utilization reports for February
28 through May 2016 and observed that these reports also indicated zero utilization. Mr.

1 Burrati noted that because MSN 37772 had not flown since the last updated LDND,
2 nothing on the LDND had changed.

3 51. On May 17, 2016, Mr. Buratti received an email from Mr. Wang asking
4 whether MSN 37772 was parked in a hangar or outside, if there were any issues with the
5 paint, and for the storage task records. (See Ex. 262). Mr. Buratti also received an email
6 from Glen Lee at Far Eastern on May 18, 2016, telling him that Far Eastern “will work
7 with [ALC] for aircraft delivery issue.”

8 52. Mr. Buratti testified that his practice when receiving utilization reports from
9 airlines every month is to save them to a folder on his computer, but he does not open the
10 reports unless he needs to obtain specific information from them.

11 53. Low utilization of an aircraft is common and may stem from a number of
12 reasons, including scheduled maintenance, seasonal demand, and bad weather.

13 **H. Rescission of MSN 37772 Lease**

14 54. On May 23 and May 24, 2016, Far Eastern sent letters to ALC indicating that
15 it first learned of the storage of MSN 37772 in May 2016, and on that basis, it was
16 rescinding the lease agreement. At that point, Far Eastern had never inspected MSN
17 37772 or its storage records, or asked if the storage would impact the agreed-upon
18 delivery date. Far Eastern never paid the second and third deposits for MSN 37772. Far
19 Eastern had not yet signed an Acceptance Certificate for MSN 37772.

20 55. On May 27, 2016, ALC sent Far Eastern a letter stating that under the MSN
21 37772 Lease, Far Eastern had no right to rescind. ALC also sent Far Eastern a “Parking
22 Notification Statement” from Air Berlin, which stated that MSN 37772 had been parked
23 since November 7, 2015; Air Berlin had no obligation to notify ALC of the storage and
24 had not notified Air Berlin of the storage; and that during the storage, MSN 37772 had
25 been maintained in accordance with applicable regulations. Air Berlin had provided this
26 statement to ALC at ALC’s request, so that ALC could provide it to Far Eastern. (See
27 Exs. 38-39).

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1 56. After Far Eastern rescinded the MSN 37772 Lease, Mr. Chen and Mr. Burrati
2 flew out to Taipei to meet with Mr. Tseng in person to discuss the issues. The meeting
3 occurred on May 27, 2016. The transcript of this meeting, surreptitiously recorded by Mr.
4 Chen with Mr. Burrati's knowledge, is Exhibit 1073.

5 57. On June 9, 2016, Mr. Hazy emailed Mr. Tseng with the following offer: (1)
6 ALC would agree to postpone delivery of MSN 41345 to June 23, 2016; (2) the parties
7 would mutually terminate the MSN 37772 Lease and ALC would apply Far Eastern's
8 \$317,000 security deposit from the MSN 37772 Lease to the security deposit Far Eastern
9 owed on the MSN 41345 Lease, and (3) the parties would release each other from any
10 claims or liability in connection with the MSN 37772 Lease.

11 58. On June 13 and June 15, 2016, Mr. Hazy wrote to Far Eastern, following up
12 on the offer set forth above. He indicated that Far Eastern had no legal right to rescind or
13 terminate the MSN 37772 Lease, but that due to the parties' relationship, ALC would
14 "respect" Far Eastern's decision not to take MSN 37772. Mr. Hazy also indicated that
15 ALC could enforce the agreement in court, but that was not how he conducted business
16 with "good airlines" and that instead he would "take the high road" to allow Far Eastern to
17 take only the MSN 41345 Lease, if Far Eastern complied with the lease agreement in all
18 respects.

19 **I. Attempted Delivery of MSN 41345**

20 59. As required by the MSN 41345 Lease, ALC customized MSN 41345 to Far
21 Eastern's specifications. Far Eastern executed the Acceptance Certificate, pursuant to
22 Section 2.6 of the lease agreement.

23 60. ALC's expectation was that Far Eastern would execute the lease termination
24 agreement for the MSN 37772 Lease, and so, on June 14, 2016, ALC sent Far Eastern an
25 invoice that applied the \$317,000 from the MSN 37772 security deposit to the outstanding
26 amount due on the security deposit for MSN 41345. With the application of the \$317,000
27 from the MSN 37772 security deposit, the amount due on the security deposit for the
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1 MSN 41345 was \$83,000. ALC paid the \$83,000 due under the invoice dated June 14,
2 2016.

3 61. On June 21, 2016, ALC's General Counsel reiterated to Far Eastern that in
4 order to complete the leasing of MSN 41345, ALC needed full payment of the outstanding
5 \$317,000 balance of the security deposit for MSN 41345, and that the \$317,000 security
6 deposit made for MSN 37772 would be credited to MSN 41345 once Far Eastern signed a
7 lease termination for the MSN 37772 Lease.

8 62. Representatives for ALC and Far Eastern met at Boeing's delivery center in
9 Seattle, Washington, on June 23, 2016, for delivery of MSN 41345. The night before,
10 ALC had sent Far Eastern a lease termination agreement for the MSN 37772 Lease. The
11 lease termination agreement included the mutual release that ALC offered to Far Eastern
12 regarding the MSN 37772 Lease. Again, on June 26, 2016, Mr. Hazy explained to Far
13 Eastern that because, in his view, there was a valid lease agreement for MSN 37772, it
14 could only be terminated by signing a lease termination, and only then could the \$317,000
15 deposit made on the MSN 37772 be applied to the balance owed on the MSN 41345
16 Lease. ALC reiterated the importance of the lease termination agreement in several other
17 communications.

18 63. However, Far Eastern did not sign the lease termination agreement for the
19 MSN 37772 Lease. Far Eastern explained that it would proceed with delivery of MSN
20 41345, but it would not sign a release as to MSN 37772, because Far Eastern had suffered
21 millions of dollars' worth of damages related to the collapse of that lease agreement.

22 64. On June 27, 2016, after several days of attempting to finalize delivery of
23 MSN 41345, Far Eastern told ALC that if delivery was not completed that day, Far
24 Eastern would fly back to Taiwan. That day, ALC agreed to tender delivery of MSN
25 41345 to Far Eastern by hand-delivering to Far Eastern representatives at Boeing's
26 delivery center a tender of delivery letter. The letter noted that delivery was "under the
27 assumption and good faith that our two companies will resolve by July 1, 2016, the
28 outstanding issues related to the termination of the lease agreement for MSN 37772, and

1 the transfer of the security deposit of \$317,000 under the MSN 37772 lease to the MSN
2 41345 lease once that lease is terminated.” Far Eastern refused delivery of MSN 41345,
3 and instead flew back to Taiwan.

4 65. ALC’s General Counsel testified in deposition that ALC had decided to apply
5 the \$317,000 to the amount due on the MSN 41345 security deposit so that Far Eastern
6 could take the aircraft, and that she understood that the issues involving the MSN 37772
7 agreement would be resolved at a later date.

8 **J. Significance of Storage**

9 66. Carol Giles testified that air carriers often store aircraft in the course of their
10 regular operations, commonly in response to decreased demand. In its maintenance
11 program, Boeing outlines the procedure for how to properly store an aircraft. Ms. Giles
12 testified that proper storage does not affect airworthiness or maintenance condition of the
13 aircraft, and that in her experience she has not observed any lingering issues with
14 maintenance after an aircraft was placed in a proper storage program.

15 67. Ms. Giles testified that, in order to determine whether the storage of MSN
16 37772 affected the aircraft’s airworthiness, she looked at its storage records, at the storage
17 program from the aircraft maintenance manual from Boeing, at the aircraft’s C-Check
18 records, and for anomalies or other issues. Ms. Giles testified that her review of these
19 records did not reveal any issues arising from the storage of MSN 37772.

20 68. Ms. Giles testified that even though Air Berlin performed two work orders
21 late and that the records for MSN 37772 were missing an additional two work orders, the
22 aircraft was still airworthy.

23 69. Of the late orders, one was a work order for a seven-day and 14-day interval
24 check. Ms. Giles testified that “it’s not a good thing” to perform an inspection late, but
25 that “[y]ou can actually do the 14-day check and take credit for everything else below that
26 14-day check.” Regarding the second late inspection, Ms. Giles testified that the fact that
27 the check was five days late is “not something you want to see.” However, Ms. Giles
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1 testified that these two late checks would not be a reason “to take away the MRO’s
2 certificate because they missed—they didn’t do two checks on time.”

3 70. Ms. Giles further testified that, with respect to the missing work orders, she
4 could nevertheless discern that the work orders were in fact completed when she reviewed
5 a work order summary that reflects all the work for a period of time that was completed on
6 that aircraft. Ms. Giles testified that, in her experience, regulators can look to other
7 records to recreate the maintenance history of the aircraft if there are missing work orders.

8 71. MSN 37772 underwent a pre-delivery C-Check on May 27, 2016, which was
9 completed on June 9, 2016.

10 72. Stuart Rubin testified that, based on his experience, proper aircraft storage
11 does not adversely impact aircraft value. Mr. Rubin testified that the ISTAT handbook
12 and industry bluebooks do not mention the effect of storage on value.

13 73. Mr. Rubin further testified that, while there may be additional costs of
14 returning an aircraft to operational status after a period of storage, these additional costs
15 do not impact the value of the aircraft.

16 74. Mr. Rubin testified that his practice as an appraiser is to include information
17 in his appraisal regarding an aircraft’s storage if he receives that information from the
18 lessee, but that if he does not receive that information he does not actively seek it out.

19 75. MSN 37772 had a valid certificate of airworthiness during the entire period
20 of storage.

21 76. After the C-Check for MSN 37772, the German aviation authority issued an
22 export certificate of airworthiness to India. (*See Ex. 328*). MSN 37772 also received a
23 certificate of airworthiness when delivered to SpiceJet, the subsequent lessee of MSNs
24 37772 and 41345, by the Indian aviation authority. (*See Ex. 329*).

25 77. Quentin Brasie testified that long-term storage of aircraft has a material
26 impact on the aircraft’s maintenance, airworthiness, safety, and adversely affects the time
27 to return the aircraft to service. Mr. Brasie testified that, even though these risks may be
28 mitigated by a C-Check, latent maintenance risks may develop after a period of storage.

1 78. Mr. Brasie also testified that the value of a stored aircraft is less than the
2 value of an operational aircraft because of uncertainty regarding the costs or time required
3 to return the aircraft to service.

4 79. Mr. Brasie testified that, even though storage decreases the value of an
5 aircraft, storage is not factored in industry blue books because those guides are geared
6 towards giving a value based upon the half-time hypothetical aircraft for the year of
7 manufacture.

8 80. Mr. Brasie also testified that storage is ordinarily verbally discussed at the
9 onset of any negotiation for the sale or lease of an aircraft, but that these discussions do
10 not typically appear in lease agreements.

11 81. Mr. Braise also testified that Air Berlin missed four storage checks and was
12 late on six other storage checks. Mr. Brasie testified that any break with the maintenance
13 program is material, and therefore Air Berlin's improper storage of MSN 37772 rendered
14 the aircraft unairworthy. Mr. Brasie also testified that even though MSN 37772 had an
15 airworthiness certificate from the German aviation authorities, the airworthiness certificate
16 does not mean that the aircraft is airworthy, but rather that the aircraft meets its type
17 design.

18 **K. Departmental Interaction at ALC**

19 82. In order to effectuate the negotiation and finalization of a lease agreement,
20 various departments of ALC, including marketing, technical, and finance, must interface
21 and share information.

22 83. In order to facilitate the negotiation of maintenance reserves, the marketing
23 department must coordinate with the finance department regarding the rates for the
24 reserves. Maintenance reserves are intended to ensure that a lessee pays an amount
25 needed for future maintenance based on its use of the aircraft.

26 84. After a lease is executed, the accounting department of ALC uses utilization
27 reports to calculate the total amount in maintenance reserves due for a particular airline for
28 a given time period. To facilitate the issuance of maintenance reserve invoices, at the

1 beginning of the lease term, the accounting department sets up a general calculation sheet
2 for that particular aircraft based on the terms stated in the lease agreement. The
3 calculation sheet allows the accounting department to input utilization numbers each
4 month as reported in the utilization reports to produce maintenance reserve invoices.
5 Specifically, to calculate the maintenance reserve fees owed to ALC, the accounting
6 department multiplies the number of flight hours reported in a utilization report by the
7 maintenance reserve rate as set out in the lease agreement.

8 85. Ms. Kuo testified that she knew that MSN 37772 flew only 34 hours in
9 November 2015 and flew no hours in December 2016, as Ms. Kuo needed that
10 information to produce the maintenance reserve invoices to Air Berlin. Ms. Kuo also
11 testified that flight hours on utilization reports normally vary for aircraft from month to
12 month.

13 **L. Post-Incident Conduct**

14 86. After the dissolution of the MSN 37772 and MSN 41345 Leases, Far Eastern
15 contacted several other aircraft lessors or sellers about acquiring other B738 aircraft.

16 87. On May 24, 2016, the same day that Far Eastern rescinded the lease
17 agreement for MSN 37772, ALC began re-marketing the aircraft. Mr. Hazy directed his
18 marketing team to begin reaching out to other airlines that operate Boeing 737-800s to
19 remarket the aircraft. His marketing team approached between 12 to 15 airlines in both
20 the northern and southern hemispheres. Kishore Korde at ALC was aware that SpiceJet,
21 an Indian air carrier, was looking for two 737-800s, so he contacted SpiceJet to explore
22 the opportunity of a leasing agreement. Mr. Korde did not try to remarket the aircraft to
23 other airlines. Mr. Korde testified that he negotiated the terms and conditions of MSN
24 41345 with SpiceJet between June 28 and June 30, 2016.

25 88. Within two months, ALC re-leased MSN 37772 and MSN 41345, and
26 delivered both aircraft to SpiceJet for lower rent rates and shorter lease terms. On June
27 30, 2016, ALC entered into a 76-month lease agreement with SpiceJet for MSN 37772,
28 with a base monthly rent of \$290,000. (*See Ex. 10*). The lease agreement with Far

1 Eastern for MSN 37772 contemplated a 96-month lease with a base monthly rent of
2 \$317,000. On July 14, 2016, ALC entered into a 96-month lease agreement with SpiceJet
3 for MSN 41345, with a base monthly rent of \$317,500. (See Ex. 79). The lease
4 agreement with Far Eastern for MSN 41345 contemplated a 144-month lease with a base
5 monthly rent of \$378,000.

6 89. SpiceJet was able to secure a lower lease rate for MSN 41345 in part because
7 MSN 41345 was already customized to Far Eastern's specifications and SpiceJet was
8 acquiring the aircraft towards the end of the peak summer season in India.

9 90. Mr. Korde testified that there was a sense of urgency to get both aircraft
10 placed with SpiceJet as soon as possible because the summer season for SpiceJet was
11 closing.

12 91. During negotiations, ALC disclosed to SpiceJet that MSN 37772 was in
13 storage. Mr. Korde testified that he does not recall SpiceJet raising the issue of the
14 storage of MSN 37772 during the lease negotiation.

15 92. Mr. Hazy testified that it was easier to lease the two aircraft as a package to
16 SpiceJet, but that if there would have been a better deal to split up the aircraft and lease
17 them separately to two different airlines, ALC would have explored that option. But
18 ultimately, SpiceJet was willing to take both aircraft and to do so expeditiously.

19 93. Mr. Hazy testified that meeting the 10-Q reporting deadline, in which ALC
20 would have to report any unleased aircraft, did not impact the lease rate to SpiceJet. Mr.
21 Hazy testified that ALC's goal was to place both aircraft as quickly as possible to generate
22 revenue before the end of the peak summer season. Mr. Korde also testified that he does
23 not recall having any discussions with Mr. Hazy regarding closing the deal with SpiceJet
24 before the financial quarter closed.

25 94. Section 15.3 of the lease agreement between ALC and SpiceJet for MSN
26 37772 provides in full: "If the Aircraft, any Engine or any Part is out of revenue service
27 (except for the performance of maintenance, repair or Overhaul procedures), Lessee shall
28 promptly notify Lessor thereof and the Aircraft, such Engine or such Part shall be properly

1 and safely stored, maintained, and insured in accordance with accepted industry and
2 manufacturer specifications and procedures.”

3 95. SpiceJet has been continuously flying both aircraft since acquiring them
4 without incident.

5 96. Under California law, the Court concludes as set forth below that its rulings
6 on materiality in regard to the MSN 37772 Lease are findings of fact. Indeed, that was the
7 basis for the denial of summary judgment. Nonetheless, the Court’s specific findings on
8 materiality and reasons therefor are set forth in the Conclusions of Law so that they flow
9 from the discussion of the elements.

10 97. Likewise, the Court’s determinations as to damages are findings of fact. The
11 damages are based on the evidence. For example, while both experts were qualified and
12 well-prepared, the Court views the testimony of Samuel Engel as more persuasively
13 explaining the appropriate damages, based both on the evidence and California law. The
14 Court’s specific findings on damages are set forth in the Conclusions of Law so that they
15 flow from the discussion of California law and lead into the verdict.

16 98. I will drop the third person for a moment and mention a “non-finding” of
17 fact. That is the meeting between Messrs. Chen and Buratti with representatives of Far
18 Eastern, including Mr. Tseng, that is referenced above in paragraph 56. Despite the
19 attention the meeting and the recording received at trial, I don’t think that evidence helps
20 or hurts either side. Mr. Chen’s decision to record the meeting does not tell me anything
21 about ALC’s business culture. Perhaps Mr. Chen hoped to salvage the relationship;
22 perhaps he hoped to use the recording to justify himself somehow to Mr. Hazy. It doesn’t
23 really matter. I think Mr. Tseng’s outrage over the storage was genuine, but neither the
24 storage nor the outrage justified either breach of contract. The outrage was probably
25 rooted in a personal sense of betrayal. It doesn’t really matter.

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1 5. Here, ALC's damages are the difference in value between the value in the Far
2 Eastern lease agreement and the SpiceJet lease agreement. Samuel Engel, ALC's
3 damages expert, testified that that he used a but-for calculation methodology to determine
4 ALC's damages – in other words, he compared the value that ALC would have received
5 under its leases with Far Eastern versus the value that it is receiving and will receive under
6 its leases with SpiceJet.

7 6. Chase Perry, Far Eastern's damages expert, testified that Mr. Engel's opinion
8 as to ALC's lost profits is overstated, namely because Mr. Engel did not consider a
9 number of possible alternative scenarios. For example, Mr. Perry testified that Mr. Engel
10 failed to consider the possibility that ALC rushed to sign the SpiceJet leases and therefore
11 received a below-market deal. In this example, Mr. Perry suggested that the Court
12 increase the SpiceJet lease rates by at least 10%. In sum, Mr. Perry testified that Far
13 Eastern's lost profits and other damages, would total \$5.6 million: \$3.6 million for lost
14 profits and \$2 million for other damages. As to ALC's damages, its damages could be as
15 low as \$6 million.

16 7. The Court **FINDS** that the testimony of Mr. Engel better explained the proper
17 damages, pursuant both to the evidence and California law, than did the testimony of Mr.
18 Perry. To the extent that the Court is called upon to make a credibility determination
19 between these two opinion witnesses, the Court chooses Mr. Engel, based on logic,
20 common sense, the experience and expertise of the witnesses, and their performance under
21 cross-examination.

22 8. The Far Eastern lease for MSN 41345 created a nominal value to ALC of
23 \$84.9 million, which pursuant to Section 20.6 of the lease agreement, is to be discounted
24 to present value at a rate of 4%. \$84.9 million discounted to present value at 4% is \$65.1
25 million.

26 9. The SpiceJet lease for MSN 41345 created a nominal value to ALC of \$62.7
27 million, which pursuant to Section 20.6 of the lease agreement, is to be discounted to
28

1 present value at a rate of 4%. \$62.7 million discounted to present value at 4% is \$50.5
2 million.

3 10. Therefore, the difference in value between the Far Eastern and SpiceJet
4 leases for MSN 41345 is \$14.6 million, on a discounted basis.

5 11. ALC is entitled to the full amount set forth above, as the Court **FINDS and**
6 **CONCLUDES** that ALC reasonably mitigated its damages. ALC moved to re-lease
7 MSN 41345 as soon as possible after Far Eastern's breach; ALC sought to re-lease MSN
8 41345 on the best terms it could obtain; ALC re-leased MSN 41345 in an amount of time
9 that was as good as or better than the industry standard for re-leasing an aircraft; and ALC
10 obtained the best possible lease terms it was able to. Accordingly, no discount from the
11 \$14.6 million is merited.

12 **B. ALC's Transition Cost Damages for Breach of MSN 41345 Lease**

13 12. ALC also is entitled to the cost to re-configure MSN 41345 from Far
14 Eastern's desired specifications to those desired by SpiceJet because the re-configuration
15 was required in order for ALC to re-lease the aircraft. *See Brandon & Tibbs*, 226 Cal.
16 App. 3d at 461 (citing *Vitagraph, Inc. v. Liberty Theaters Co.*, 197 Cal. 694, 697 (1925);
17 *Rosenberger v. Pac. Coast Ry. Co.*, 111 Cal. 313 (1896) (holding that special losses that a
18 party incurs in a reasonable effort to avoid losses resulting from a breach of contract are
19 recoverable as damages).

20 13. These costs total \$800,000. ALC expended \$500,000 to re-configure the
21 seats onboard MSN 41345. The cost to re-paint MSN 41345 was \$100,000. ALC
22 expended an additional \$200,000 in amounts necessary to undertake additional re-
23 configurations for SpiceJet, including replacing placard cards, interior upgrades, and
24 purchasing additional parts. These costs were a condition of re-leasing MSN 41345 to
25 SpiceJet, without which ALC's damages would have been greater. Accordingly, no
26 discount is merited.

1 **C. ALC’s Remarketing Damages for Breach of MSN 41345 Lease**

2 14. ALC also is entitled to the costs it incurred to re-market MSN 41345 to
3 SpiceJet subsequent to Far Eastern’s breach. *See Brandon & Tibbs*, 226 Cal. App. 3d at
4 461 (citing *Vitagraph, Inc.*, 197 Cal. 694; *Rosenberger*, 111 Cal. 313) (holding that
5 special losses that a party incurs in a reasonable effort to avoid losses resulting from a
6 breach of contract are recoverable as damages).

7 15. These costs were incurred in tandem with ALC’s efforts to re-market MSN
8 37772 because they were marketed together. The total amount of ALC’s re-marketing
9 costs for both aircraft was \$74,200, at the time each expense was incurred, meaning no
10 discounting is necessary. Half of those marketing expenses, representing half of the
11 aircraft marketed, is \$37,100. Expending these costs was necessary to obtaining a
12 substitute lessee subsequent to Far Eastern’s breach, without which ALC’s damages
13 would be greater. Accordingly, no discount from the \$37,100 is merited.

14 **D. Pre-Judgment Interest as to MSN 41345 Lease**

15 16. As outlined above, ALC’s total damages arising from Far Eastern’s breach of
16 the MSN 41345 Lease are \$15,437,100.

17 17. Under California law, ALC is entitled to pre-judgment interest on that
18 amount from the date of its Complaint, July 27, 2016, through the date final judgment is
19 rendered, at a rate of 10 percent *per annum*, either simple or compounded at the Court’s
20 discretion. *See California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 34-
21 35, 221 Cal. Rptr. 171 (1985) (affirming jury decision to award pre-judgment interest
22 calculated from the time the indemnity should have been paid up to the date of the
23 judgment.); *see also SP INVESTMENT FUND I, v. Ivan Grossman*, No. B284289, 2018
24 WL 4113837, at *4 (Cal. Ct. App. Aug. 29, 2018); *Lehman Bros. Holdings, Inc. v. First*
25 *Guar. Fin. Corp.*, No. SACV090435AGMLGx, 2011 WL 13225086, at *4 (C.D. Cal.
26 May 23, 2011); *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1587, 36 Cal. Rptr. 2d 343
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28

1 (1994), *as modified* (Nov. 14, 1994), *as modified on denial of reh'g* (Nov. 17, 1994), *as*
2 *modified* (Nov. 22, 1994).

3 18. The Court determines that ALC is entitled to pre-judgment interest at the rate
4 of 10 percent *per annum*, in simple interest. Given the current low interest rates
5 prevailing, compounding the interest would be a windfall to ALC.

6 **E. Attorneys' Fees as to MSN 41345 Lease**

7 19. Under Section 23.4 of the MSN 41345 Lease, because ALC is the prevailing
8 party in the dispute regarding MSN 41345, it is entitled to reasonable attorneys' fees. *See*
9 *Exxess Electronix v. Heger Realty Corp.*, 64 Cal. App. 4th 698, 706, 75 Cal. Rptr. 2d 376
10 (1998); Cal. Code Civ. Proc. § 1021 ("Except as attorney's fees are specifically provided
11 for by statute, the measure and mode of compensation of attorneys and counselors at law
12 is left to the agreement, express or implied, of the parties[.]"). ALC shall be awarded its
13 reasonable attorneys' fees in an amount to be determined by the Court after submission of
14 the bill of costs. *See KKE Architects, Inc. v. Diamond Ridge Dev., LLC*, No.
15 CV0706866MMFMFO, 2008 WL 11422047, at *3 (C.D. Cal. Apr. 21, 2008).

16 **F. ALC's Contract Claims as to MSN 37772**

17 20. The Court concludes that Far Eastern is liable for the following claims as to
18 MSN 37772: (1) breach of contract; (2) breach of the duty of good faith and fair dealing;
19 (3) breach of implied-in-fact contract; and (4) common count for work, labor and services
20 as to MSN 37772. The damages, however, are the same for these counts. In other words,
21 the tortious claim for breach of the implicit duty of good faith and fair dealing does not
22 give rise to different damages.

23 21. To prevail on a claim for breach of contract under California law, a plaintiff
24 must show: "(1) the existence of a valid contract between the parties, (2) plaintiff's
25 performance or excuse for nonperformance, (3) defendants' unjustified or unexcused
26 failure to perform, and (4) damages to plaintiff caused by the breach." *Susilo v. Wells*
27 *Fargo Bank, N.A.*, 796 F. Supp. 2d 1177, 1188 (C.D. Cal. 2011) (citing *Lortz v. Connell*,
28 273 Cal. App. 2d 286, 290, 78 Cal. Rptr. 6 (1969)).

1 22. Far Eastern did not perform its MSN 37772 lease obligations. Far Eastern (1)
2 did not pay two required \$317,000 security deposits in breach of Sections 4.1 and 4.1.1 of
3 the lease; (2) did not accept delivery of MSN 37772 in breach of Section 2.6 of the lease;
4 and (3) failed to make any rent payments required by lease Sections 4.2 and 20.1.1.

5 23. In its August 7 Order, the Court held that three of Far Eastern’s alleged
6 excuses for its non-performance fail as a matter of law: (1) that ALC did not perform its
7 obligations under the MSN 37772 Lease; (2) that Far Eastern properly rescinded the lease
8 under the terms of the agreement; and (3) that ALC waived its right to sue for breach of
9 the agreement. The only excuse the Court did not dismiss was Far Eastern’s claim that it
10 was excused from performing due to ALC’s misrepresentation – negligent or intentional –
11 of the condition of the aircraft.

12 24. California courts require proof of the following elements for a party to
13 prevail on a negligent misrepresentation claim: “[M]isrepresentation of a past or existing
14 material fact, without reasonable ground for believing it to be true, and with intent to
15 induce another’s reliance on the fact misrepresented; ignorance of the truth and justifiable
16 reliance on the misrepresentation by the party to whom it was directed; and resulting
17 damage.” *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967, 983, 132 Cal. Rptr. 2d
18 635 (2003). The elements of fraudulent misrepresentation are the same, with the
19 additional element of scienter. *Dougherty v. Bank of Am., N.A.*, 177 F. Supp. 3d 1230,
20 1245 (E.D. Cal. 2015) (citing *Charnay v. Cobert*, 145 Cal. App. 4th 170, 184, 51 Cal.
21 Rptr. 3d 471 (2006)).

22 25. “[O]ne who learns that his statements, even if thought to be true when made,
23 have become false through a change in circumstances, has the duty before his statements
24 are acted on to disclose the new conditions to the party relying on his original
25 representations.” *Koch v. Williams*, 193 Cal. App. 2d 537, 541, 14 Cal. Rptr. 429 (1961)
26 (plaintiffs defrauded in purchase of real property by defendants’ failure to disclose that a
27 drainage easement across the property had been granted by defendants to the city during
28 escrow). However, “this duty is clearly limited to pre-transaction occurrences.” *Shamut*

1 *Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477, 1487 (9th Cir. 1994) (no continuing disclosure
2 duty after sale completed).

3 26. “Common agency principles hold that knowledge of any agent of a
4 corporation is imputed to the other agents of the corporation and to the principal.”
5 *Gilberd v. Dean Witter Reynolds, Inc.*, No. C 91-3254 TEH, 1992 WL 880089, at *4
6 (N.D. Cal. Aug. 11, 1992). California Civil Code § 2332 provides that “as against a
7 principal, both principal and agent are deemed to have notice of whatever either has notice
8 of, and ought, in good faith and the exercise of ordinary care and diligence, to
9 communicate to the other.” *Id.*

10 27. To prove a negligent misrepresentation, Far Eastern had to prove: (1) that
11 ALC represented to Far Eastern in July or August 2015 that MSN 37772 was “in
12 operation;” (2) ALC knew that such representation later became false prior to lease
13 signing; (3) ALC had a duty to correct the prior representation at that time; (4) ALC failed
14 to correct the alleged representation with the intent that Far Eastern would rely on the
15 prior truth of the representation; (5) the representation was regarding a material fact; (6)
16 Far Eastern justifiably relied on the representation and ALC’s failure to correct it; and (7)
17 damages.

18 28. The Court finds that ALC did make a representation that MSN 37772 was in
19 operation. Mr. Chen testified that, during negotiations for the LOI as to MSN 37772, Far
20 Eastern may have asked whether the aircraft was flying, to which Mr. Chen testified that
21 he responded in the affirmative. The parties do not dispute that this representation was
22 true when made, as MSN 37772 was not parked until November 2015.

23 29. In the Court’s August 7 Order, the Court identified the relevant question as
24 “whether, *prior to the signing of the MSN 37772 lease agreement*, ALC became aware
25 that MSN 37772 had been inducted into storage.” (August 7 Order at 21 (emphasis in
26 original)).

27 30. The Court **FINDS** that ALC did not know, nor should it have known, that Air
28 Berlin stored MSN 37772 prior to execution of the lease.

1 31. Air Berlin had no obligation to inform ALC of the storage, and Air Berlin
2 specifically stated in its Parking Notification Statement that it had not informed ALC of
3 the storage. Furthermore, that MSN 37772 flew only 34 hours in November, as evidenced
4 by the utilization report received by ALC on December 3, 2015, was insufficient to put
5 ALC on notice that MSN 37772 had been parked. Low utilization can signify a number of
6 things other than storage of the aircraft, such as regular maintenance or a drop in demand.
7 Furthermore, Mr. Burrati and Mr. Chang testified that their practice during the relevant
8 time period when receiving these reports was not to look at them until there was a specific
9 reason to do so, undermining a finding of actual knowledge. However, even if Mr. Burrati
10 or Mr. Chang had looked at the utilization report received on December 3, 2015, the 34
11 hours of flight time indicated in the report would not have necessarily put Mr. Burrati or
12 Mr. Chang on notice that MSN 37772 was parked. Ms. Kuo also testified that, even
13 though the December 3 utilization report indicated that MSN 37772 had flown only 34
14 hours in November, low utilization is not cause for alert when the accounting department
15 uses the utilization reports to calculate maintenance reserves. Because ALC did not know,
16 nor should it have known, that its representation later became false prior to execution of
17 the lease agreement, ALC did not have a duty to correct.

18 32. The Court **FINDS** that ALC's representation did not concern a material fact.

19 33. "A misrepresentation is judged to be" material "if a reasonable man would
20 attach importance to its existence or nonexistence in determining his choice of action in
21 the transaction in question." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 977,
22 938 P.2d 903 (1997). A matter is material if "the maker of the representation knows or
23 has reason to know that its recipient regards or is likely to regard the matter as important
24 in determining his choice of action, although a reasonable man would not so regard it."
25 *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 333, 246 P.3d 877 (2011) (quoting
26 Restatement (Second) of Torts § 538(2)(b)).

27 34. The weight of the testimony at trial is that storage under an approved
28 program does not impact airworthiness, maintenance condition, or value of an aircraft.

1 35. Furthermore, the weight of the testimony at trial is that air carriers around the
2 world routinely store aircraft.

3 36. The weight of the testimony at trial is that any mistakes as to Air Berlin's
4 storage of MSN 37772 were minor and inconsequential.

5 37. Furthermore, during lease negotiations for MSN 37772, Far Eastern never
6 mentioned storage.

7 38. Prior to when the lease for MSN 37772 was signed, in April 2015, Far
8 Eastern pursued six other B738 aircraft from UTAir that it knew were stored.

9 39. Because the Court finds that ALC did not know, nor should it have known,
10 that Air Berlin stored MSN 37772 prior to execution of the lease, Far Eastern's claim for
11 negligent and fraudulent misrepresentation, violation of the UCL, and unjust enrichment
12 claims likewise fail.

13 **G. Far Eastern's Affirmative Defenses**

14 40. Far Eastern raises a plethora of affirmative defenses. A number of Far
15 Eastern's defenses were addressed in the Court's August 7 Order, such as Far Eastern's
16 defense for ratification and waiver. Furthermore, the Court need not address several of
17 Far Eastern's other defenses; Far Eastern's affirmative defenses regarding excuse of
18 performance, failure to disclose material information, and failure to mitigate, for example,
19 are addressed above in the course of ruling on ALC's claims. The remainder of Far
20 Eastern's affirmative defenses, such as unclean hands, fail because the Court **FINDS and**
21 **CONCLUDES** that ALC did not become aware that MSN 37772 had been inducted into
22 storage prior to the signing of the MSN 37772 Lease. Finally, to the extent Far Eastern's
23 affirmative defenses are duplicative or coterminous with a counterclaim, for example, Far
24 Eastern's affirmative defense for unjust enrichment and misrepresentation, the Court
25 concludes the affirmative defenses rise or fall with the counterclaim.

26 **H. ALC's Contract Damages for Breach of MSN 37772 Lease**

27 41. ALC is entitled to the following categories of damages: (1) the difference in
28 value as between the Far Eastern and SpiceJet leases for MSN 37772; (2) the costs to re-

1 configure MSN 37772 to SpiceJet's specifications; (3) the costs to re-market MSN 37772;
2 (4) pre-judgment interest; and (5) attorneys' fees.

3 42. Items 3 through 5 were covered above with respect to MSN 41345, and the
4 same analysis that applied to MSN 41345 applies here. ALC is therefore entitled to: (1)
5 \$37,100 in re-marketing costs for MSN 37772; (2) its reasonable attorneys' fees; and (3)
6 pre-judgment simple interest from the date of the Complaint through the date of judgment
7 at 10 percent *per annum*.

8 43. ALC's damages are the difference in value between the value in the Far
9 Eastern lease agreement and the SpiceJet lease agreement.

10 44. The Far Eastern lease for MSN 37772 created a nominal value to ALC of
11 \$60.6 million. Pursuant to Section 20.6 of the MSN 37772 Lease, ALC's damages are to
12 discounted to present value at a rate of 4%. \$60.6 million discounted to present value at
13 4% is \$50.0 million.

14 45. The SpiceJet lease for MSN 37772 created a nominal value to ALC of \$51.3
15 million. Pursuant to Section 20.6 of the MSN 37772 Lease, ALC's damages are to
16 discounted to present value at a rate of 4%. \$51.3 million discounted to present value at
17 4% is \$43.3 million.

18 46. Therefore, ALC's damages arising from the difference in value of the two
19 MSN 37772 leases is \$6.6 million on a discounted basis.

20 47. ALC is entitled to the full amount set forth above, as the Court **FINDS and**
21 **CONCLUDES** that ALC reasonably mitigated its damages. ALC moved to re-lease
22 MSN 37772 as soon as possible after Far Eastern's breach; ALC sought to re-lease MSN
23 37772 on the best terms it could obtain; ALC re-leased MSN 37772 in an amount of time
24 that was as good as or better than the industry standard for re-leasing an aircraft; and ALC
25 obtained the best possible lease terms it was able to. Accordingly, no discount from the
26 \$6.6 million is merited.

1 **I. ALC's Transition Cost Damages for Breach of MSN 37772 Lease**

2 48. ALC also is entitled to the cost to re-configure MSN 37772 from Far
3 Eastern's desired specifications to those desired by SpiceJet because the re-configuration
4 was required in order for ALC to re-lease the aircraft.

5 49. These costs total \$2.3 million.

6 50. ALC expended \$1.5 million to increase the thrust and maximum take-off
7 weight in MSN 37772. That improvement was not needed by SpiceJet, which operates
8 approximately half of its fleet without that upgrade. ALC could not recover that cost, and
9 accordingly, it is recoverable from Far Eastern in full.

10 51. ALC expended \$500,000 to re-configure the interior of MSN 37772.
11 Expending these re-configuration costs was a condition of re-leasing MSN 37772 to
12 SpiceJet, without which ALC's damages would have been greater. Accordingly, ALC is
13 entitled to the full value of this expense.

14 52. ALC expended an additional \$300,000 in amounts necessary to undertake
15 additional re-configurations for SpiceJet, including replacing placard cards, interior
16 upgrades, and purchasing additional parts. ALC has proven that the full value of these
17 costs were incurred. Expending these costs was a condition of re-leasing MSN 37772 to
18 SpiceJet, without which ALC's damages would have been greater.

19 53. The Court determines, however, that a \$1 million discount is warranted from
20 the total transition costs. Pursuant to the early termination agreement for MSN 37772, Air
21 Berlin paid a \$1 million penalty to ALC to cover, in part, some of the cost to transfer the
22 aircraft to the new lessee.

23 54. Accordingly, the Court awards ALC \$1.3 million in transition costs.

24 55. ALC's total damages award is thus \$23,374,200.

1 **VERDICT**

2 The Court **FINDS** and **RULES** as follows:

- 3 1. On Plaintiffs' First Claim for breach of contract as to MSN 37772, the Court
4 finds in favor of Plaintiffs.
- 5 2. On Plaintiffs' Second Claim for breach of the duty of good faith and fair dealing
6 as to MSN 37772, the Court finds in favor of Plaintiffs.
- 7 3. On Plaintiffs' Third Claim for breach of implied in fact contract as to MSN
8 37772, the Court finds in favor of Plaintiffs.
- 9 4. On Plaintiffs' Fourth Claim for Work, Labor and Services as to MSN 37772, the
10 Court finds in favor of Plaintiffs.
- 11 5. On Plaintiffs' Eighth Claim for Work, Labor and Services as to MSN 41345, the
12 Court finds in favor of Plaintiffs.
- 13 6. On Defendant's First Claim for fraud and intentional misrepresentation as to
14 MSN 37772, the Court finds in favor of Plaintiffs.
- 15 7. On Defendant's Second Claim for fraud and negligent misrepresentation as to
16 MSN 37772, the Court finds in favor of Plaintiffs.
- 17 8. On Defendant's Fourth Claim for Unjust Enrichment as to MSN 37772, the
18 Court finds in favor of Plaintiffs.
- 19 9. On Defendant's Fifth Claim for violation of California's Unfair Competition
20 Law as to MSN 37772, the Court finds in favor of Plaintiffs.
- 21 10. ALC's total damages award is **\$23,374,200**:
- 22 a. \$14.6 million for breach of the MSN 41345 Lease, which represents the
23 difference in value between the Far Eastern and SpiceJet leases on a
24 discounted basis.
- 25 b. \$800,000 in transition cost damages for breach of the MSN 41345 Lease.
- 26 c. \$37,100 in remarketing expenses for breach of the MSN 41345 Lease.
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- 1 d. \$6.6 million for breach of the MSN 37772 Lease, which represents the
2 difference in value between the Far Eastern and SpiceJet leases on a
3 discounted basis.
4 e. \$1.3 million in transition cost damages for breach of the MSN 37772
5 Lease.
6 f. \$37,100 in remarketing expenses for breach of the MSN 37772 Lease.

7 The Court will enter a separate judgment pursuant to Federal Rules of Civil
8 Procedure 54 and 58(b) in this amount, plus awarding prejudgment interest and attorneys'
9 fees and costs to be determined.

10 Dated: May 22, 2019



11 MICHAEL W. FITZGERALD
12 United States District Judge
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