

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ALAFCO Aviation Lease and Finance Company (K.S.C.P.),)	
)	
Plaintiff,)	
v.)	Case No. _____
)	
The Boeing Company,)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff ALAFCO Aviation Lease and Finance Company (K.S.C.P.) (“ALAFCO”), for its Complaint against Defendant The Boeing Company (“Boeing”), alleges through its undersigned counsel as follows:

Introduction

1. This is an action for breach of contract seeking, among other relief, return of approximately \$336 million in advance payments made by ALAFCO pursuant to an aircraft purchase agreement with Boeing.
2. The agreement at issue provides for the purchase of 40 Boeing 737 MAX aircraft to be delivered in specified months beginning in March 2019.
3. In late 2018 and early 2019, the 737 MAX aircraft was involved in two tragic air accidents. In each case, the aircraft suddenly crashed to the ground shortly after takeoff, killing everyone aboard. In the wake of these disasters, Boeing suspended deliveries of 737 MAX aircraft to all customers in March 2019.

4. Boeing has now failed to deliver 10 of the 40 aircraft ordered by ALAFCO. These delivery failures, and the circumstances in which they have occurred, substantially impair the value of the purchase agreement as a whole. Accordingly, ALAFCO has cancelled its 737 MAX aircraft orders and requested return of all advance payments. Boeing has not returned the advance payments or otherwise recognized the cancellation.

5. In this action, ALAFCO seeks return of the advance payments made to Boeing along with other damages available for breach of contract.

The Parties

6. ALAFCO is a Kuwait corporation with its principal place of business in Kuwait City, Kuwait. ALAFCO is in the business of purchasing large commercial aircraft and leasing such aircraft to commercial airline customers.

7. Boeing is a Delaware corporation with its principal place of business in Chicago, Illinois. Boeing is in the business of designing, manufacturing and selling large commercial aircraft.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because this is an action between a citizen of a state and a citizen of a foreign state, and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

9. This Court has personal jurisdiction over Boeing because Boeing maintains its principal place of business in the State of Illinois.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred in this District and because Boeing is subject to personal jurisdiction in this District.

Relevant Facts

11. ALAFCO has agreed to purchase, and Boeing has agreed to deliver, a total of 40 Boeing model 737-8 aircraft, which are commonly known as “737 MAX” aircraft.

The Purchase Agreement

12. The purchase is documented in a Purchase Agreement Number PA-03856 between Boeing and ALAFCO dated October 20, 2012 (the “Purchase Agreement”). The Purchase Agreement expressly incorporates the terms of an Aircraft General Terms Agreement between Boeing and ALAFCO dated September 25, 2006 (the “AGTA”). The Purchase Agreement also expressly incorporates various supplemental agreements and letter agreements.

13. The Purchase Agreement is governed by the laws of the State of Washington.

14. The Purchase Agreement initially provided for the purchase of 20 737 MAX aircraft for delivery between June 2019 and December 2021.

15. On or about November 12, 2017, Boeing and ALAFCO entered Supplemental Agreement No. 1 to the Purchase Agreement (“SA-1”), which amended the Purchase Agreement to provide for the purchase an additional 20 737 MAX aircraft by ALAFCO for delivery between February 2022 and December 2023. SA-1 refers to the initial 20 aircraft orders as “Block A” and the second 20 aircraft orders as “Block B.” SA-1 also amended the delivery schedule for some of the Block A aircraft orders.

16. On or about March 6, 2018, Boeing and ALAFCO entered Supplemental Agreement No. 2 to the Purchase Agreement (“SA-2”), which amended the delivery months for some of the Block A aircraft orders.

17. On or about October 2, 2018, Boeing and ALAFCO entered Supplemental Agreement No. 3 to the Purchase Agreement (“SA-3”), which amended the delivery months for some of the Block A aircraft orders.

18. On or about October 25, 2018, Boeing and ALAFCO entered Supplemental Agreement No. 4 to the Purchase Agreement (“SA-4”), which amended the delivery month for one of the Block A aircraft orders.

19. Taking into account the amendments set forth in the supplemental agreements, the Purchase Agreement as of the beginning of 2019 called for 40 737 MAX aircraft to be delivered in particular months beginning in March 2019 and continuing through December 2023.

20. The Purchase Agreement requires Boeing to deliver one or more 737 MAX aircraft to ALAFCO in each of the scheduled delivery months. The AGTA provides that Boeing will notify ALAFCO of the approximate delivery date at least 30 days before the scheduled month of delivery and again at least 14 days before the scheduled delivery date.

21. The AGTA requires Boeing to manufacture each aircraft to conform to the Type Certificate issued by the Federal Aviation Administration (“FAA”) and to deliver each aircraft with an airworthiness certificate issued pursuant to FAA regulations. Furthermore, Exhibit C to the AGTA warrants that each aircraft will be delivered to ALAFCO free from defects in material and defects in design.

22. The Purchase Agreement requires ALAFCO to make certain advance payments to Boeing based on the delivery month of each aircraft on order. ALAFCO has advanced a total of \$336,439,850 in advance payments to Boeing in connection with the Purchase Agreement.

23. ALAFCO has other obligations under the Purchase Agreement including, for example, the selection of cabin configuration and buyer-furnished equipment for each aircraft on order.

Limitations of Liability for Delivery Delay

24. The Purchase Agreement purports to limit Boeing's liability for aircraft delivery delays in Article 7 of the AGTA and in a letter agreement attached to the Purchase Agreement.

25. Article 7 of the AGTA purports to limit Boeing's liability in the event of an Excusable Delay. The term "Excusable Delay" is defined as "any delay in the scheduled delivery month of an aircraft or other performance under a purchase agreement caused by (i) acts of God; (ii) war or armed hostilities; (iii) government acts or priorities; (iv) fires, floods, or earthquakes; (v) strikes or labor troubles causing cessation, slowdown or interruption of work; (vi) inability, after due and timely diligence, to procure materials, systems, accessories, equipment or parts; (vii) inability, after due and timely diligence, to obtain type certification; or (viii) any other cause to the extent such cause is beyond Boeing's control and not occasioned by Boeing's fault or negligence."

26. Article 7 requires Boeing to give written notice of a delay as follows: "Boeing will give written notice to Customer (i) of a delay as soon as Boeing concludes that an aircraft will be delayed beyond the scheduled delivery month due to an Excusable Delay and, when known, (ii) of a revised delivery month based on Boeing's appraisal of the facts."

27. Article 7 provides that either party may terminate an aircraft delivery if the revised delivery month is more than 12 months after the scheduled delivery month. Such termination must take place within 30 days of the notice from Boeing. If the Excusable Delay is 12 months or less, or if neither party elects to terminate, Article 7 states that ALAFCO must accept the aircraft when tendered for delivery.

28. Article 7 provides that the termination rights described above are the exclusive remedy for Excusable Delay.

29. One of the letter agreements attached to the Purchase Agreement—specifically the letter agreement titled “Liquidated Damages – Non-Excusable Delay” dated October 20, 2012—purports to limit Boeing’s liability for delays arising from other causes. The letter defines a “Non-Excusable Delay” to be: “Delay in delivery of any Aircraft beyond the last day of the delivery month (Scheduled Delivery Month) established in the Purchase Agreement by any cause that is not an Excusable Delay pursuant to Article 7 of the AGTA and for which Customer is otherwise entitled to a remedy from Boeing pursuant to applicable law.”

30. This letter agreement provides that ALAFCO will not have any right to refuse to accept delivery of an aircraft for Non-Excusable Delay unless the aggregate duration of the delay exceeds 180 days (*i.e.*, six months). It goes on to state: “Within 30 days of receipt or written notice from Boeing that delivery of an Aircraft or Substitute Aircraft will be delayed beyond the Non-Excusable Delay Period, either party may terminate the Purchase Agreement as to such Aircraft or Substitute Aircraft by written or telegraphic notice given to the other.” If neither party terminated “within said 30 day period” the Purchase Agreement will remain in effect with respect to such aircraft.

31. In the event of Non-Excusable Delay, the letter agreement provides for liquidated damages and other compensation to be paid by Boeing to ALAFCO. In addition, if an aircraft order is terminated based on Non-Excusable Delay, Boeing is required to “promptly repay” the entire principal amount of advance payments made by ALAFCO with respect to the aircraft.

32. Similar to Article 7 of the AGTA, the letter agreement provides that the remedies provided in the letter agreement are the exclusive remedies available to ALAFCO for a Non-Excusable Delay by Boeing.

Grounding of 737 MAX Aircraft

33. Boeing began delivering 737 MAX aircraft to commercial customers in May 2017. On October 29, 2018, a 737 MAX aircraft operated by Lion Air (Flight 610) crashed in Indonesia shortly after takeoff, killing all 189 people aboard. A similar crash occurred a few months later. On March 10, 2019, a 737 MAX aircraft operated by Ethiopian Airlines (Flight 302) crashed in Ethiopia after takeoff, killing all 157 people aboard.

34. On March 13, 2019, in the wake of these two tragic incidents, the FAA issued an order prohibiting the operation of 737 MAX aircraft (the “Grounding Order”). At the same time, Boeing discontinued all deliveries of 737 MAX aircraft to customers. The Grounding Order remains in place today, and Boeing has not delivered any 737 MAX aircraft to customers since March 2019.

35. It has become increasingly clear from reporting in the public press that the Lion Air and Ethiopian Airlines crashes were caused by defects in the manufacture and design of the 737 MAX aircraft. Such defects include, for example, defects in the Maneuvering Characteristics Augmentation System (“MCAS”) implemented on the 737 MAX. Since the Grounding Order was entered, Boeing has been working to persuade the FAA and other aviation authorities that defects in the MCAS system, as well as other potential defects, have been resolved.

Cancellation by ALAFCO

36. As described above, the Purchase Agreement provided for delivery of 737 MAX aircraft to ALAFCO in specific months beginning in March 2019. Boeing has notified ALAFCO that many of these aircraft will be delayed, but has not provided any revised delivery months for such aircraft.

37. For example, on March 22, 2019, Boeing provided a written Notice of Delay to ALAFCO indicating that the aircraft scheduled for delivery in March 2019 would be delayed beyond its contractual delivery month. Boeing has not provided a revised delivery month for this aircraft. A series of similar notices have been delivered to ALAFCO for the aircraft scheduled for delivery from April 2019 through January 2020. Boeing has not provided revised delivery months for any of these aircraft.

38. On October 29, 2019, ALAFCO sent a letter to Boeing terminating the order for the aircraft scheduled for delivery in March 2019 based on Non-Excusable Delay. The letter notes that the Non-Excusable Delay period for that aircraft expired on September 30, 2019 and demands return of all advance payments for the aircraft, along with liquidated damages and other compensation due under the Non-Excusable Delay letter agreement.

39. Boeing responded in a letter dated on December 3, 2019. Boeing stated that it “respectfully disagrees” with ALAFCO’s assertion of rights under the Non-Excusable Delay letter agreement. Consistent with this, Boeing has not tendered the return of advance payments made by ALAFCO for this aircraft.

40. The December 3, 2019 letter also states that seven additional aircraft scheduled for delivery between February 2020 and October 2020 will be delayed indefinitely.

41. On March 6, 2020 ALAFCO sent a letter to Boeing cancelling all 40 of its aircraft orders pursuant to Sections 2-612 and 2-711 of the Uniform Commercial Code (“UCC”), and requesting immediate return of all advance payments under the Purchase Agreement. The letter notes that Boeing has failed to make timely delivery of nine of the aircraft on order, and that such defaults substantially impair the value of the Purchase Agreement as a whole.

42. To date, Boeing has not returned any advance payments to ALAFCO.

**First Claim for Relief
Breach of Contract**

43. ALAFCO repeats and incorporates the allegations in paragraphs 1 through 42 as if set forth fully herein.

44. Boeing and ALAFCO are parties to the Purchase Agreement which, as amended, provides for the purchase of 40 Boeing 737 MAX aircraft to be delivered in specific months beginning in March 2019.

45. ALAFCO has fully performed its obligations under the Purchase Agreement, including by making advance payments to Boeing totaling approximately \$336 million.

46. Boeing has breached the Purchase Agreement by failing to make timely delivery of the first 10 aircraft due under the Purchase Agreement. Boeing has also notified ALAFCO that additional aircraft orders will be delayed indefinitely. These defaults, taking all relevant circumstances into account, substantially impair the value of the Purchase Agreement as a whole.

47. The limitation of liability provision in Article 7 of the AGTA does not apply, among other reasons, because Boeing has failed to deliver required notices to ALAFCO, because Boeing's delivery failures do not arise from Excusable Delay and because, taking all relevant circumstances into account, the limitation of liability fails of its essential purpose pursuant to Section 2-719 of the UCC.

48. The limitation of liability provision in the Non-Excusable Delay letter agreement does not apply, among other reasons, because Boeing has failed to deliver required notices to ALAFCO, because Boeing has refused to offer the compensation and termination rights that would arise from Non-Excusable Delay and because, taking all relevant circumstances into account, the limitation of liability fails of its essential purpose pursuant to Section 2-719 of the UCC.

49. On March 6, 2020, ALAFCO validly cancelled all 40 aircraft orders under the Purchase Agreement pursuant to Sections 2-612 and 2-711 of the UCC, and demanded return of all advance payments made by ALAFCO. Termination of the aircraft orders was also justified pursuant to Section 2-616 of the UCC.

50. Boeing has failed to return any of the advance payments to ALAFCO.

51. In addition to the amount of the advance payments, as a direct and proximate result of Boeing's breaches, ALAFCO has suffered other damages recoverable pursuant to the UCC including, but not limited to, the difference between the purchase price and the market value of the aircraft had they been delivered to ALAFCO on time and as warranted by Boeing.

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Request for Relief

WHEREFORE, plaintiff ALAFCO requests the following relief:

- a) Final judgment against Boeing for return of advance payments totaling approximately \$336 million;
- b) Final judgment against Boeing for other damages recoverable pursuant to the UCC in an amount to be determined at trial;
- c) Interest on the foregoing at the applicable statutory rate; and
- d) Such other relief as the Court may deem just and proper.

Dated: April 22, 2020

Respectfully submitted,

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