Marks & Sokolov LLC
ATTORNEYS AT LAW

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
PHILADELPHIA | MOSCOW

Proposed Principles for the Sale of Repossessed Business Aircraft

By: Derek Bloom, Of Counsel
Marks & Sokolov, LLC
Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.marks-sokolov.com

Date: September 1, 2020

It is in the best interests of banks engaged in aircraft finance, aircraft lessors, aircraft brokers, and aircraft owners to standardize and make transparent the process to resell repossessed business aircraft. Adherence to best practices in this process would remove risks and costs for banks and other creditors, generate business for reputable aircraft brokers and appraisers, and would be fair to aircraft owners.

The process to resell repossessed aircraft should be governed by a set of principles that should be incorporated in aircraft finance and security agreements (the "Principles"). The Principles set out below would satisfy the requirements for a commercially reasonable sale of a repossessed aircraft, within the meaning of Article 9 of the Uniform Commercial Code (the "UCC"). Each party to a transaction would be treated fairly, and the risks and costs for creditors highlighted by the cases discussed below may be avoided.

Presently, banks, aircraft finance companies, and aircraft lessors (collectively, "Banks") generally each have their own standard terms and conditions for loan agreements, aircraft security agreements, and guaranty agreements. These terms and conditions vary from Bank to Bank and do not protect Banks from becoming engaged in disputes and litigation.

Existing standard terms and conditions typically provide that, following an event of default, a Bank has unlimited discretion in selling a repossessed aircraft. The Bank may sell the aircraft to any party it chooses and at any price it chooses. Not surprisingly, this discretion is sometimes abused, as illustrated in the cases discussed below, and in other cases known to the authors. Disputes typically involve the sale of an aircraft by a Bank at a price less than the aircraft's then current fair market value.

Kuznetsky Most, 21/5
Entrance 1, Suite 612
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Ph: +1-202-230-9443
www.Marks-Sokolov.com
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In stark contrast to the absence of bank regulation concerning the sale of repossessed aircraft, there are detailed rules for the appraisal and sale of commercial real estate, and of loans that are secured by commercial real estate, that are held by US banks with deposit accounts insured by the Federal Deposit Insurance Corporation (the "FDIC"). The pertinent FDIC rules are shared below and provide a useful potential source of template contract language for the Principles for the sale of repossessed business aircraft which are discussed herein.

The authors submit that banks and other creditors, aircraft brokers and aircraft appraisers should welcome the adoption of the Principles in order to better serve their customers, aircraft owners, and to avoid the time, expense, and inherent uncertainty of pursuing litigation or other dispute-resolution measures. All parties to an aircraft finance transaction would benefit from agreeing to a transparent process to dispose of repossessed aircraft, and to manage such a process in an orderly, agreed upon, and commercially reasonable manner, thereby avoiding needless costs and disputes. Adopting such a transparent process would also enable the parties to avoid the need to present expert testimony in litigation that a given resale process was commercially reasonable because the parties would have agreed, in advance, as to what a commercially reasonable resale process would be in the event of a default.

The Proposed Principles

The proposed Principles are:

1. If an event of default occurs and an aircraft is repossessed by a Bank, the resale of the aircraft by the Bank is to be completed by a "qualified broker."

2. A "qualified broker" is a professional aircraft broker who is unaffiliated with Bank who markets the aircraft to "qualified buyers" in accordance with best practices of the aircraft brokerage industry. Given the wide disparity in the value of various aircraft, different requirements would potentially apply to selecting a qualified broker, and possibly no appraisal would be required for resale of an aircraft which was purchased for a price below a certain level. For the resale of particularly expensive aircraft, there could, perhaps, be a requirement that a "qualified broker" be a member in good standing of either the International Aircraft Dealers Association (IADA) or the Global Licensed Aircraft Dealers Association (GLADA), or of another broker with substantial experience in brokering the sale of business aircraft who is not a member of one of these trade associations.

3. A repossessed aircraft is to be sold at a price not less than its "current market value". "Current market value" would mean the current market value of an aircraft (as of a date certain) as determined (at the option of the Bank) by: (a) a qualified appraiser consulting the

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www.Marks-Sokolov.com
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column "AVG. $ Retail" in the Aircraft Bluebook; or (b) Bank and Borrower requesting to carry out an appraisal of the aircraft as of that date; or (c) any other market sources acceptable to Bank and Borrower to arrive at the most probable price which an aircraft should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition, and drawing from the FDIC regulations discussed below, is that the consummation of a sale and the passing of title from seller to buyer take place under the following conditions: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and acting in what they consider to be their own best interests; (3) a reasonable time is allowed for the aircraft to gain suitable exposure in the open market; (4) payment is made in either cash in U.S. dollars or by means of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

4. A "qualified appraiser" would mean a competent, internationally-recognized person, independent of each of Bank and Borrower, who is: (a) carrying on the business of valuing aircraft of a type similar to the aircraft; (b) able to assess the condition and value of the aircraft; (c) nominated by the Bank; and who (d) would prepare an appraisal that would, at a minimum, conform to generally accepted appraisal standards as are described in the Uniform Standards of Professional Appraisal Practice (USPAP).

These Principles have been derived from a review of litigation which arose out of the seizure and sale of repossessed business jets. The Principles are also drawn from a review of the FDIC regulations which govern the resale of both repossessed real estate and loans secured by real estate.

As you review the case discussions below, consider whether application of the Principles would have avoided most, if not all, of the problems that gave rise to the litigation. Also, bear in mind that most litigation is settled prior to the issuance of court opinions and any attendant appeals therefrom. As such, the volume of cases and controversies involving repossessed business aircraft may be assumed to be much larger than the number of cases that result in reported court opinions.

The Statutory Framework for the Resale of Repossessed Aircraft: Article 9 of the Uniform Commercial Code

Article 9 of the Uniform Commercial Code (the "UCC") sets out the rules for secured transactions and was revised in 1998 and 2010. All states have enacted revised Article 9 in an effort to create a uniform system of laws for commercial transactions. Many of the cases

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discussed below concerned the prior version of the UCC which had provided, in Section 9-504(3), rules for the disposition of collateral in a manner that is "commercially reasonable". These rules are today set out in Section 9-610 of the UCC.

Today, Article 9 sets out, in Section 9-201, that a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. Section 9-609 provides that, after default, a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610. A secured party may proceed (1) pursuant to judicial process; or (2) without judicial process if it proceeds without breaching the peace.

Section 9-610 sets out the rules for disposition of collateral after default, providing that, after default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral either in its present condition or following any commercially reasonable preparation or processing. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.

A secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms, as long as such actions are commercially reasonable. A secured party may purchase collateral: (1) at a public disposition; or (2) at a private disposition, but only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed, standard-price quotations.

Section 9-611 (b) adds that a secured party that disposes of collateral under Section 9-610 shall send to the persons, including the debtor, a reasonable authenticated notification of disposition. Section 9-615 adds that a secured party shall apply or pay over for application the cash proceeds of disposition under Section 9-610 in the following order to: (1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party; (2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made; and (3) the satisfaction of obligations secured by any subordinate security interest in, or other subordinate lien on, the collateral.

Summary of Certain Case Law Concerning Commercially Reasonable Sales of Business Aircraft

Below are more detailed extracts and discussions of eight lawsuits concerning the sale of repossessed aircraft. A summary of their holdings, presenting the cases in reverse chronological order, is as follows:

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1. Regions Bank v. Thomas

A 2017 court opinion holding that a secured party cannot recover a deficiency unless it proves that compliance with the commercial code's collection, enforcement, disposition, and acceptance requirements would have yielded a sum lesser than the total secured obligation, together with attorney's fees and expenses, and a bank cannot obtain a deficiency judgment unless it presented evidence showing that, had it provided proper notice and conducted a commercially reasonable sale, it would not have been fully satisfied.

2. Aviation Fin. Group, LLC v. Duc Housing Partners, Inc.

A 2010 court opinion holding that a disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. In this instance, the Court concluded that it is undisputed based on this record that a commercially reasonable sales price for the aircraft at the time it was sold was $2,582,545, not $1,662,000.

3. Ford & Vlahos v. ITT Commercial Finance Corp.

A 1994 court opinion holding that a defendant aircraft finance company made no efforts to contact potential purchasers regarding an auction of an aircraft. The Court found that defendant aircraft finance company had available to it the resources of an aircraft broker … who knew potential aircraft buyers and the means of publicity to announce aircraft auctions…. The Court concluded that defendant did not conduct the auction sale in good faith and in a commercially reasonable manner as required by [California Uniform Commercial Code section].

4. Washington County Trust Co. v. Cloud Dancer, Inc.

A 1994 court opinion holding that, where a debtor raises the defense of commercial unreasonableness in the sale of collateral after default, the Court must examine the secured party's practices leading up to the sale. Courts have discretion in evaluating the practices of a secured party but where a sale occurs in a recognized market, that discretion is limited. This sale did not occur in a recognized market for the disposition of repossessed aircraft. Thus, the Court must examine the conduct of the plaintiff. The secured party bears the burden of establishing by a preponderance of the evidence that every aspect of the sale be commercially reasonable including its method, manner, time, place, and terms. After a careful review of the record the Court concluded the plaintiff had not met this burden of proof. The Court found

Kuznetsky Most, 21/5
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PHILADELPHIA | MOSCOW

that no aspect of this sale was commercially reasonable. The defendants are therefore entitled to the presumption that the actual fair market value of the collateral at the time it was seized was equal to the amount of the outstanding indebtedness. This presumption operates as a defense to a deficiency judgment.

5. In re Frazier

A 1988 court opinion holding that the collateral at issue was a jet aircraft with a highly specialized and limited market, and procedures employed to sell small jet aircraft are matters particularly within the knowledge of a small group of persons who are experts in the highly technical endeavor. A hasty sale, apparently to satisfy the time requirement imposed by the Bank, was not reasonable.

6. Wright v. Interfirst Bank Tyler, N.A.

A 1988 court opinion holding that the only limits on a creditor's disposition of the collateral is that it must be commercially reasonable and must be made only after notification to the debtor if required by Section 9.504. Then and only then is he entitled to sue for a deficiency. In this case, notice of the sale of an aircraft was deficient.

7. Connex Press, Inc. v. International Airmotive, Inc.

A 1977 court opinion in favor of a jet owner in which the court awarded compensatory damages and held that the jet vendor had failed to meet its obligation under the circumstances to seek an adequate price for the plane and had failed to use accepted practice to give notice and stimulate interest in the sale of the plane.

8. Jones v. Bank of Nevada

A 1975 court opinion holding that, if an aircraft is sold in conformity with reasonable commercial practices among dealers in the type of property it has been sold in a "commercially reasonable manner."

FDIC Requirements for the Resale of Commercial Real Estate

The FDIC sets out detailed requirements for the disposition of real estate by banks and by the FDIC itself if it acquires real estate from failed financial institutions. See: https://www.fdic.gov/buying/owned/

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The FDIC acquires and sells various types of real estate including commercial properties, multifamily and single family residential, developed and undeveloped land, and bank branches. Properties are generally sold individually through listings with local real estate agents and/or brokers, who are hired by FDIC real estate contractors to assist in the marketing and disposition of properties on behalf of the FDIC. Occasionally, the FDIC conducts open and online real estate auctions. All properties are sold on an "as is, where is, with all faults" basis. The FDIC makes no guarantee, warranty, or representation, express or implied, as to the location, quality, kind, character, size, description, or fitness for any use or purpose, now or hereafter with regard to any of the properties listed.

List prices are established by a variety of factors which may include, but are not limited to, independent appraisals, broker opinions of value, property condition, time on the market, and/or current market conditions. Various criteria are considered when evaluating offers from prospective purchasers. They include, but are not limited to: appraised value; purchase offer amount; earnest money deposit amount; how the purchase will be funded (e.g., cash or financing); due diligence, inspection, and closing periods; net sales proceeds; and the submission by the prospective purchaser of all complete, fully executed documents required by the FDIC. The FDIC reserves the right to accept, reject, and/or counter any offer. While reviewing such offers, the FDIC further reserves the right to continue its sales efforts, including responding to any other inquiries or offers from other parties concerning the purchase of a property.

For the FDIC, market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. See Part 323 of the FDIC Rules and Regulations concerning appraisals at https://www.fdic.gov/regulations/laws/rules/2000-4300.html.

Section 323.1(a) of the FDIC Rules and Regulations provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This subpart implements the requirements of title XI and applies to all federally related transactions entered into by the FDIC or by institutions regulated by the FDIC ("regulated institutions").

Section 323.2(a) of the FDIC Rules and Regulations provides that "Appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information. Section 323.2(h) provides that:

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PHILADELPHIA | MOSCOW

Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) Buyer and seller are typically motivated; (2) Both parties are well informed or well advised, and acting in what they consider their own best interests; (3) A reasonable time is allowed for exposure in the open market; (4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Section 323.2(h) of the FDIC Rules and Regulations provides that:

(l) State certified appraiser means any individual who has satisfied the requirements for certification in a state or territory whose criteria for certification as a real estate appraiser currently meet the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a state certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a state or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of a state or territory are inconsistent with title XI of FIRREA. The FDIC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(m) State licensed appraiser means any individual who has satisfied the requirements for licensing in a state or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the state or territory are inconsistent with title XI. The FDIC may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

Section 323.3 of the FDIC Rules and Regulations states that appraisals by a State certified or licensed appraiser are required for all real estate related financial transactions except those in which: (1) The transaction is a residential real estate transaction that has a transaction value of 400,000 or less; (2) A lien on real estate has been taken as collateral in an abundance of caution; (3) The transaction is not secured by real estate; (4) A lien on real estate has been taken for purposes other than the real estate's value; (5) The transaction is a business loan that: (i) Has a transaction value of $1 million or less; and (ii) Is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment; (6) A lease of real estate is entered

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PHILADELPHIA | MOSCOW

into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate; and in a number more circumstances.

Section 323.4 of the FDIC Rules and Regulations adds that, for federally related transactions, all appraisals shall, at a minimum: (a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Avenue NW, Washington, DC 20005, unless principles of safe and sound banking require compliance with stricter standards; (b) Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction; (c) Be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice; (d) Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units; (e) Be based upon the definition of market value as set forth in this subpart; and (f) Be performed by State licensed or certified appraisers in accordance with requirements set forth in this subpart.

Illustrative Case Law Concerning Sales of Business Aircraft Serving as Collateral for Defaulted Loans

Below are discussions of cases that have involved the resale of commercial aircraft that had served as collateral for loans that had gone into default. More specifically, the cases involve challenges by debtors to both the commercial reasonableness of the collateral sales at issue and the resulting deficiencies claimed by secured parties. These discussions are provided solely for illustrative purposes, as they illuminate the types of disputes that can arise in the absence of the adoption of the Principles suggested herein. As such, these cases are not being cited for their precedential value, if any, in their respective jurisdictions, nor have the authors attempted to ascertain the extent to which they may comprise “good law” in those jurisdictions.

1. Regions Bank v. Thomas, 532 S.W.3d 330 (Tenn. 2017)

This case concerned a debtor, Thomas (“Debtor”), who had borrowed more than $2,300,000 from Regions Bank’s (“the Bank”) predecessor for the purchase of a 1981 Hawker 700-A aircraft (the "Aircraft"), which secured the loan. Defendants (the "Guarantors") had jointly and severally guaranteed the loan. Following Debtor's default by failing to maintain insurance on the Aircraft, the Bank accelerated Debtor's payment obligations. Debtor did not repay the accelerated loan, and, in October 2007, the Bank filed suit against the Guarantors, seeking recovery of the outstanding loan balance, interest, costs, and attorney's fees. While suit was pending, the Bank repossessed the Aircraft and expended funds to render it both flightworthy and marketable. The

Kuznetsky Most, 21/5
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Moscow, 107996, Russian Federation
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www.Marks-Sokolov.com
PHILADELPHIA | MOSCOW

Bank ultimately sold the Aircraft at a private sale for $875,000. Debtor continued to timely make all payments due on the loan until the Aircraft was sold.

After finding that the Bank had disposed of the Aircraft in a commercially reasonable manner, the trial court held that the Bank was entitled to recover from the Guarantors a deficiency judgement in the amount of $1,642,771.91. Guarantors appealed.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed the trial court's rulings that Debtor had breached the loan agreement and had defaulted by failing to maintain insurance on the Aircraft; that the Bank had not waived the breach and default; and that the Bank had not acted in bad faith. However, the Court of Appeals reversed the trial court's finding that the Bank had complied sufficiently with the notice requirements of Tennessee's UCC statute, and concluded that, as a result, the Bank's sale of the Aircraft had not been commercially reasonable. The court vacated the trial court's deficiency judgment and remanded the case to the trial court for further proceedings, including discovery, on the amount of the deficiency.

On remand, the trial court held that the Bank was entitled to a deficiency judgment in the amount of $1,210,511.51, and the Guarantors appealed for a second time.

On appeal, the Appeals Court reversed, finding that the Bank had not only failed to prove that, had proper notice of the sale been given, the Guarantors could not have redeemed or purchased the collateral for an amount equal to the sum of the secured obligation, expenses, and attorney's fees, but that the Bank had offered no evidence on this point whatsoever. For this reason, the Appeals Court found that the Bank was not entitled to any deficiency.

The Bank then applied for leave to appeal the case to the Tennessee Supreme Court, and the Court granted its application. According to the Court:

We hold that a secured creditor is not required to introduce evidence negating a debtor's or a guarantor's ability or motivation to redeem or purchase the collateral for an amount equal to the sum of the secured obligation, expenses and attorney's fees in order for the creditor to rebut the presumption under the codified rebuttable presumption rule and create a question of fact. Rather, by introducing evidence that the collateral was sold for an amount equal to or in excess of its fair market value, a creditor may sufficiently rebut the presumption to create a question of fact as to whether the sale of the collateral still would have yielded proceeds less than the sum of the secured obligation, expenses, and attorney's fees had proper notice been provided. This, however, does not end the matter. In cases in which the statutorily required notice has not been provided, evidence of a debtor's or a guarantor's ability and motivation to redeem or purchase the collateral for an amount equal to the sum of the secured obligation, expenses, and attorney's fees may be relevant to the ultimate determination of the amount of proceeds that would have been

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www.Marks-Sokolov.com
PHILADELPHIA | MOSCOW

realized had the secured creditor provided the statutorily required notice. Therefore, a debtor or guarantor, may offer such evidence, in addition to any countervailing evidence regarding the fair market value of the collateral. In ultimately determining the fact question of the amount of proceeds that would have been realized had the noncomplying secured creditor provided the statutorily required notice, and the amount of the deficiency, if any, to which the creditor may be entitled, the trial court should consider and weigh the totality of the relevant evidence introduced by the parties. The ultimate burden of proof, however, remains on the noncomplying secured creditor to prove that the sale of the collateral still would have yielded proceeds less than the sum of the secured obligation, expenses, and attorney's fees had proper notice been provided. Id. at 344 (footnotes omitted).

Having held so, the Tennessee Supreme Court then remanded the case to the trial court for further proceedings consistent with its opinion; an opinion issued on October 16, 2017. In other words, after a full decade of litigation, encompassing proceedings at the trial, appellate, and state supreme court levels, the *Regions Bank* case had yet to be finally resolved. As such, it affords a prime example of the need for the adoption of the Principles proposed herein.

2. Aviation Finance Group, LLC v. Duc Housing Partners, Inc., 2010 U.S. Dist. LEXIS 39007

This case involved a collection action originally filed in an Idaho state court which was subsequently removed to federal court.

Plaintiff Aviation Finance Group, LLC ("AFG") had financed the purchase of a commercial aircraft by Defendant Duc Housing Partners, Inc. ("Duc Housing") by means of a $4.5 million loan, secured by the aircraft as collateral and personally guaranteed by Defendant Daniel Duc ("Mr. Duc"). Duc Housing defaulted on the loan with an outstanding principal balance of nearly $3 million.

After providing notice of the default to both Duc Housing and Mr. Duc, and following Defendants' failure to cure the default, AFG accelerated the loan obligation and repossessed the aircraft. AFG then hired an appraiser, who assigned to the aircraft a forced-liquidation value of $2.040 million and a then current market value of $2.576 million. Defendants, in turn, hired their own appraiser, who determined the aircraft's fair market value to be $2,582,545, but who did not provide a forced-liquidation value.

AFG first attempted to sell the aircraft by means of an online auction which it had promoted for "more than a month" through aircraft listing services, flight magazines, email databases, websites, direct mail, and telemarketing. Defendants objected to what they regarded to be a "fast-track" online auction unsuitable for such a sophisticated asset as a commercial aircraft.

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When the auction failed to produce a suitable buyer from among the highest bidders, and after rejecting a couple of bids as too low, AFG engaged a professional pre-owned aircraft broker to market the aircraft through a private sale. AFG ended up agreeing to a $2 million purchase price for the aircraft, and a sale for that amount was completed. AFG also obtained a supplemental appraisal of the aircraft which assigned it a fair market value of $2.077 million and a forced-liquidation value of $1.662 million.

AFG then sued the Defendants for the remaining balance of the loan and moved for summary judgment as to both liability and damages. In responding to AFG's motion, Defendants did not dispute their having defaulted on both the loan and the guaranty. Nor did they dispute Plaintiff's right to repossess the aircraft. Instead, Defendants argued that AFG had failed to dispose of the aircraft in a commercially reasonable manner or, alternatively, that the determination as to whether AFG had done so was a matter of disputed facts whose existence would preclude the Court's granting of summary judgment.

Following briefing and oral argument on AFG's motion, AFG filed a Notice of Stipulation with the court, stipulating that a commercially reasonable sale of the of the aircraft would have realized a sale price of $2,582,545; an amount corresponding to Defendants' expert's valuation of the aircraft. By doing so, AFG asserted, it had eliminated any potential factual dispute that might otherwise have precluded the court's granting summary judgment in its favor.

The court ultimately denied AFG's motion for two reasons. First, the court found that, under Idaho law, AFG's substantial compliance with UCC provisions in selling the aircraft did not create a conclusive presumption that the resulting sale was commercially reasonable. Second, the court found that there were a number of disputed issues of fact concerning the commercial reasonableness of the sale that precluded summary judgment, including: whether an online auction was an appropriate vehicle for the sale of such a sophisticated asset; whether the sale had been unreasonably rushed due to financial pressures faced by AFG, yielding a lower sale price than was otherwise obtainable; whether sufficient efforts and resources had been devoted to publicizing the sale; and whether the timeline presented to the court of AFG's marketing efforts and contacts with the aircraft's ultimate purchaser had been completely accurate. In the court's words:

The record, viewed in the light most favorable to Defendants, shows that AFG agreed to accept a purchase price greater than $500,000 below the appraised fair market value of the aircraft, from a buyer they describe as a "true bottom fisher," very shortly after beginning its initial marketing efforts. The record shows that AFG was under internal time pressures and there are genuine issues of material fact regarding the market for used aircraft at that time. For all of the reasons discussed above, the Court concludes that there are disputed issues of material fact as to whether

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AFG's conduct in disposing of the aircraft was commercially reasonable. Accordingly, Plaintiffs' motion for summary judgment on this issue is denied.

As with the *Regions Bank* case discussed above, the adoption of the Principles and, specifically, agreement as to what would constitute a commercially reasonable sale of collateral aircraft upon default and repossession, would have spared the parties to the above case the time and costs associated with litigating these issues.

3. Ford & Vlahos v. ITT Commercial Finance Corp., 8 Cal. 4th 1220 (1994)

In this California case, Plaintiff debtor sued Defendant secured creditor for improper disposition of a repossessed aircraft, and Defendant counterclaimed for an alleged deficiency. Granting judgment for Plaintiff, the trial court found the aircraft's sale to have been commercially unreasonable because it had been given insufficient publicity and, hence, had attracted too few bids. The trial court also found the notices of sale to have been legally insufficient. Defendant appealed.

On appeal, the court reversed in part, holding that the secured creditor's compliance with the letter of the notice requirement created a safe harbor against claims that the publicity for the sale had been inadequate. Debtor then appealed to the California Supreme Court, which granted plaintiff's petition for review and reversed. In so doing, the Court held that Defendant's having fulfilled the notice provisions did not automatically satisfy the separate, albeit related, statutory requirement that the sale's advertising be commercially reasonable. The Court concluded that the California Legislature had not intended to deem the advertising accompanying every sale to be commercially reasonable merely because such advertising complied with the applicable notice requirements.

Specifically, the Court found that, other than placing certain newspaper notices, Defendant had made no effort to contact potential purchasers regarding the auction, despite Defendant's having had available to it the resources of an aircraft broker who knew potential aircraft buyers and had the means to more effectively publicize aircraft auctions. The Court concluded that Defendant did not conduct the auction sale in good faith and in a commercially reasonable manner as required by the California UCC statute. In the Court's words:

We cannot conclude that the Legislature meant to provide that a sale's advertising is commercially reasonable as long as the bare requirements of formal notice are met, even if, to sell the type of collateral involved, a responsible dealer would employ more extensive advertising than placing a legal notice in agate type in an obscure newspaper. Publicity is much too important to a proper sale of foreclosed collateral for such a hypothesis to be commercially viable. Common sense tells us that the larger the attendance at a public sale of collateral, the

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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more likely it is that there will be competitive bidding. Competitive bidding helps to assure that the purchase price approximates the fair market value of the property and prevents a [secured party] from exaggerating his deficiency by underbidding. Hence, one of the most important elements of commercial reasonableness is the duty to surround the sale with publicity sufficient to attract a lively concourse of bidders.

The foregoing reasoning clearly applies to the sale of an airplane. Although [Defendant] offered testimony that it gave notice of the sale orally to all major airplane brokers in the United States, the [trial court] judge disbelieved this testimony, and we cannot say he was clearly wrong to do so. So far [it] appears, all [Defendant] did in the way of notice was to place an inconspicuous ad in one publication of the used-aircraft trade …. There was testimony that a serious effort to interest potential buyers would have required a more conspicuous ad plus advertising in other trade publications as well. The fact that no one showed up for the sale except [secured party] is consistent with the fact that [it] made little effort, on this occasion anyway, to sell the plane. Id. (internal quotations omitted).

4. Washington County Trust Co. v. Cloud Dancer, Inc., C. A. No. 93-252 (R. I. Super. May 25, 1994)

In this Rhode Superior Court case, R.I. Aircraft Company (the "Debtor") had executed a promissory note to the Washington County Trust Company ("Plaintiff"), securing the note with both a Grumman-built aircraft as collateral as well as a personal guaranty from the Company's sole shareholders, Gerald and Linda Butterworth. As security for their personal guaranty, the Butterworths had pledged the equity in their home.

The debtor defaulted on the note, and Plaintiff sued, seeking, in part, pre-judgment seizure or repossession of the aircraft and, thereafter, took possession of the aircraft. Plaintiff also sought and was granted a default judgment on the promissory note and planned to conduct a foreclosure sale of the pledged real estate. Plaintiff then sold the aircraft in a private sale to a third party, a Mr. Grundy, for $12,000 and sought to collect the resulting deficiency from Defendants.

For their part, Defendants (who claimed to have received no notice of the aircraft sale) argued that the court should: vacate the default judgment; find that the aircraft had not been disposed of in a commercially reasonable manner in violation of Rhode Island's UCC statute; restrain the foreclosure sale of the pledged real estate; determine the fair market value of the aircraft at the time of its repossession by Plaintiff; direct Plaintiff to account to Defendants for the difference between the aircraft's fair market value and the balance of the loan owed to Plaintiff; and deny Plaintiff an award of its attorney's fees.

In finding for the Defendants, the court stated:

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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[T]he Court finds that Washington Trust Company has failed to establish that the disposition of the collateral was commercially reasonable in any respect whatsoever. The defendants were not given proper notice of the proposed sale of the aircraft. No valid appraisal of its value was obtained by Washington Trust. The sale of the aircraft was not advertised in any commercial publication; there were no efforts made to encourage meaningful bidders for the collateral and any interested buyers were referred to Mr. Grundy, who ultimately became the only bidder at the sale.

Where a debtor raises the defense of commercial unreasonableness in the sale of collateral after default the Court must examine the secured party's practices leading up to the sale. Courts have discretion in evaluating the practices of a secured party but where a sale occurs in a recognized market, that discretion is limited. This sale did not occur in a recognized market for the disposition of repossessed aircraft. Thus, the Court must examine the conduct of the plaintiff. The secured party bears the burden of establishing by a preponderance of the evidence that every aspect of the sale be commercially reasonable including its method, manner, time, place, and terms.

After a careful review of the record the Court concludes the plaintiff has not met this burden of proof. The Court finds that no aspect of this sale was commercially reasonable. The defendants are therefore entitled to the presumption that the actual fair market value of the collateral at the time it was seized was equal to the amount of the outstanding indebtedness. This presumption operates as a defense to a deficiency judgment. Id. (citations omitted).

5. In re Frazier, 93 B.R. 366 (M.D. Tenn. 1988)

In this bankruptcy court action, Plaintiffs sued Defendants, debtors in bankruptcy, for a deficiency judgment, after the sale of collateral on a secured note. Defendants had co-signed a promissory note, payable to a bank, and had used the $850,000 in loan proceeds to purchase a jet from plaintiffs for business use. The Bank obtained and filed a security interest in the aircraft.

After the note went into default, certain of the jet’s purchasers filed for bankruptcy. The bank took possession of the plane, pursuant to its security interest, and brought a complaint against both Plaintiffs and Defendants. In response to the Bank’s suit, Plaintiffs agreed to purchase the Bank's note, take possession of the plane, and sell it within 60 days. Plaintiffs then sold the plane for $415,000 and brought an action against Defendants for a deficiency after the sale, and that action was, by agreement, transferred to the bankruptcy court.

The court found the Plaintiffs were not entitled to a deficiency judgment because they did not meet their burden of showing the plane had been sold in a commercially reasonable manner

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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when it had been sold in haste and at a low value. Further, the court found that Plaintiffs had not rebutted the statutory presumption that the fair market value of the collateral equaled the amount of the indebtedness at issue. According to the court:

A "commercially reasonable" manner in Tennessee means disposition in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business. The term 'commercially reasonable' by itself gives little guidance for the analysis of any particular case; this Court has previously identified those six (6) factors by which compliance with prevailing commercially reasonable practices may be measured. They are:

1. The type of collateral involved;

2. The condition of the collateral;

3. The number of bids solicited;

4. The time and place of sale;

5. The purchase price received or the terms of sale; and

6. Any special circumstances involved.

In order to make the determination of commercial reasonableness, the Court must look to the facts and circumstances of the sale. Following repossession of the aircraft and the transfer of rights to the [Plaintiffs], the Learjet was sold at a public sale. The aircraft, which sold to Frank Frazier's group for $850,000.00 in March 1985 was sold in April 1986 for $415,000.00.

Although failure to procure the best price for collateral does not in and of itself make a sale commercially unreasonable, and reasonableness is primarily assessed by the procedures employed, a sufficient resale price is the logical focus of the protection given debtors. The great disparity between the purchase price and the sale price of the collateral approximately one (1) year later raises the issue of whether the total circumstances demonstrate that the [Plaintiffs] took all steps considered reasonable by prevailing practices to insure [sic] that the sale of the Learjet would bring a fair price. After reviewing the circumstances of the sale and the relevant legal factors, the Court determines that the [Plaintiffs] have not met their burden for the following reasons.

Procedures employed to sell small jet aircraft are matters particularly within the knowledge of a small group of persons who are experts in the highly technical endeavor. The [Plaintiffs] offered the testimony of two (2) experts, and [Defendants] offered a third expert, Mr. Charles Mulle…

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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Based on his experience, candor and qualifications, the Court finds Mr. Mulle highly credible and uniquely qualified to assist the Court in its determination.

The value of the aircraft at the time of its sale to [Defendants] was approximately $825,000.00 to $850,000.00, as established by the testimony of the banker who initially granted the loan to the [Plaintiffs]. Mr. Mulle testified that the value was in that range and may have contained a premium of approximately $25,000.00 to $50,000.00 because the initial sale was one hundred percent (100%) financed.

The Hasty Sale Was Not Reasonable. The [P]laintiffs gained possession of the aircraft on May 2, 1986 and sold it at public auction on June 3, 1986. The Court finds the [P]laintiffs acted with unreasonable haste in their efforts to sell the aircraft, apparently in order to satisfy the time requirement imposed by the Bank.

The collateral at issue is a jet aircraft with a highly specialized and limited market. Under the circumstances of this case, the Court finds that the time permitted to advertise and market the plane to this select group of potential buyers was grossly inadequate. The [Plaintiffs] could not satisfactorily explain their actions in April and May of 1986, but the following is clear from the record. First, the [Plaintiffs] voluntarily observed the condition of selling the aircraft within sixty (60) days. Their principal advisor, who also testified at trial, was extremely inexperienced in the commercial sale of jet aircraft. The plaintiffs were aware that Mr. Mulle had worked on the aircraft previously and that he was available to assist them in the sale of the aircraft, yet neither the [Plaintiffs] nor their advisors sought Mr. Mulle out for advice or aid. The plaintiffs' advisor knew of the proposed repossession on April 23, 1986 and that the custody of the aircraft would pass to the [plaintiffs] on May 2, 1986, but made no immediate recommendations as to the means of disposing of the aircraft. After "investigating options" for at least two (2) weeks, he and the [Plaintiffs] made the initial decision to sell the aircraft at auction approximately three (3) weeks prior to the actual sale. All advertising for the sale was done from May 20, 1986 to May 29, 1986 and terminated within five (5) days of the sale.

The other expert witnesses, including the [Plaintiffs'] own expert, believed greater time was needed to explore and reach the potential market. The [Plaintiffs'] other expert witness testified that six (6) months to one (1) year was needed for the fair and proper sale of such an aircraft. Mr. Mulle considered ninety (90) days to be an appropriate, although minimum, time frame to judge the market and to make commercially reasonable efforts.

Regardless of the specific time requirements, which this Court does not determine, it is clear to the Court that the time requirement agreed to by the Bank and the [plaintiffs] was, in itself, unreasonable. The Court further finds that the [plaintiffs] sold an expensive and sophisticated jet aircraft in half the unreasonably brief time permitted by their agreement with the Bank and that this hasty sale was a significant cause of the low sale price. The Court further notes that the

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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[plaintiffs] did not request an extension of the sale date requirement, that there were no adverse consequences to a delay of up to six (6) months based on the structure of the [Plaintiffs'] loan with the Bank and that [one of the two Plaintiffs] is a sophisticated and professional investor. Under these circumstances, the time allotted prior to the sale was inadequate and not commercially reasonable.

6. Wright v. Interfirst Bank Tyler, N.A., 746 S.W.2d 874 (Tex. App. 1988)

In this Texas case, Appellant Wright had executed and delivered to Appellee Interfirst Bank ("the Bank") a promissory note in the original principal sum of $395,000.00, representing the proceeds of a loan from the Bank used by Wright to purchase a 1983 Beechcraft airplane for his personal and business use. The aircraft was covered, as collateral, by a security agreement which authorized the Bank to enforce its security interest in the collateral.

Wright defaulted in his payments on the note in March 1984 and delivered possession of the aircraft to the Bank on March 19, 1984. On April 2, 1984, Bank officer Bill McClellan wrote Wright concerning the status of Wright's indebtedness and advised him as follows:

You are hereby advised that [the aircraft] will be offered at public sale on April 13, 1984 at 12:00 Noon at the location of Interfirst Bank, Tyler, Texas.

This unit will be sold to the highest bidder. The proceeds thereof will be applied to your loan, plus any expenses incurred. Any balance outstanding will be your responsibility for payment unless this balance is paid in full prior to the sale date of April 13, 1984 . . ..

McClellan testified that at the time the April 2, 1984, letter was signed, it was not his intention to conduct a public sale of the collateral. He also stated that he never gave any notice of his intention to sell the plane at private sale. McClellan testified that the plane was sold at private sale to an aircraft sales broker from Mississippi, Bob Carr, for the sum of $250,000.00 on or about May 24, 1984.

Thereafter, the Bank successfully sued Wright for the claimed deficiency, and Wright appealed, arguing that the notice he had received of the sale had been insufficient.

According to the Appeals Court:

Section 9.504(c) reads, in pertinent part, as follows:

(c) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may [be made] . . . at any time and place

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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and on any terms but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value . . . reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . . .

We must decide in this appeal whether, under the Texas version of U.C.C., the written notice sent to Wright of a public sale to be conducted on a specific date and at a specific time and place constituted "reasonable notification" to Wright of the date after which a private sale of the aircraft would be made. The question is usually one of fact, but as we earlier concluded, in this case it is one of law.

We have carefully reviewed decisions of the courts of our sister states respecting the issue. In the main, these cases hold that where a creditor gives a notice to his debtor of one character of sale (private or public) and disposes of the collateral by a sale of a different character, the notice is insufficient and does not comply with the Uniform Commercial Code, section 9.504(3).

The Texas Business & Commerce Code does not spell out the consequences of a creditor's act of selling collateral by private sale where the notice calls for disposition by public sale. Official comment 5 to U.C.C. section 9.504 reads in part: " At a minimum [notice] must be sent in such time that [debtors] will have sufficient time to take appropriate steps to protect their interests by taking part in the sale . . . if they so desire." Moreover, as noted by Professor Garner and John I. Alber, ‘it is clear that the notice requirement is intended to allow the debtor to observe the sale procedures, and to give him the opportunity to raise money, to redeem, or to persuade his friends [or others] to buy the goods.’

The purpose of . . . notice, without doubt, is to enable the debtor to protect his interest in the property by paying the debt, finding a buyer or being present at the sale to bid on the property [at public auction] or have others do so, to the end that it not be sacrificed by a sale at less than its true value.

The code itself instructs the courts that it is to be construed to promote its purposes, to simplify and to make uniform applications thereof in all jurisdictions. Given these purposes and considering the text, we conclude, as a matter of law, that the written notice sent to Wright that a public sale of the plane would be conducted on a specific day, time, and place did not constitute "reasonable notification" under section 9.504(c) of the subsequent private sale to Carr.

Having concluded that the notice provided to Mr. Wright had been deficient, the Appeals Court reversed the deficiency judgment and rendered judgment that the Bank take nothing in its suit against Mr. Wright.

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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7. Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51 (D.D.C. 1977)

In this case, decided under Maryland law, Plaintiff jet owner, Connex Press, Inc. ("Plaintiff" or "Connex") sued Defendant jet vendor, International Airmotive, Inc. ("IAM"), for both punitive and compensatory damages, claiming that IAM had conducted a commercially unreasonable foreclosure sale of the plane.

Connex had purchased a "Sabreliner" jet from IAM in February 1971, under a conditional sales contract. IAM assigned the Connex note to American National Bank and Trust of New Jersey. When Connex defaulted, IAM repossessed the plane, paid off the bank loan, and prepared to sell the plane.

Although IAM was a dealer in aircraft and knew the market well, the sole measure it took to advertise the planned collateral sale was to place a single, identically-worded ad in both the Wall Street Journal (which ad appeared thirteen days before the sale) and the industry publication, "Trade-A-Plane" (which ad appeared five days before the sale). It took no further steps to attract buyers despite its knowing full well that the logical potential buyers were not individuals but aircraft dealers. IAM made no effort by mail or telegram to stimulate dealer interest in the sale, although that was the accepted practice in normal commercial sales of such aircraft. Further, IAM maintained a mailing list of 5,000 individuals, dealers, and companies known to be interested in receiving notices of available jet aircraft, and it also had an available sales force. It used neither of those resources in disposing of the aircraft at issue.

Additionally, the plane itself was sold on an "as is" basis. No steps were taken to improve its appearance or even to replace broken "eyebrow" windows that were covered by insurance. (Expert testimony had indicated that it would have taken more than $30,000 to put the plane in top condition.) Moreover, as the plane was kept at secret locations until the time of the sale (which was held at a small airport on the Eastern Shore of Maryland), no opportunity for close inspection of the plane prior to the sale date was afforded, even though one dealer had requested such an inspection.

IAM never advised Connex that it was not using its normal commercial procedures to stimulate interest in the plane and, thereby, to encourage an adequate price, and no representative of Connex attended when the sale occurred on schedule.

At the time of sale, IAM had made no arrangement to resell the plane and had no customer lined up. It did not intend to use the plane itself. It determined to bid only $325,000; the amount it believed it had invested. Its representatives came to bid that amount and no more. Without advance notice to potential bidders, the sum of $325,000 was fixed as the minimum acceptable bid. IAM knew the plane was worth substantially more than $325,000. Connex also was aware of

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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the plane's true value, but IAM knew that Connex was either unwilling or unable to bid at the sale and had not taken over the creditor note which defendants later purchased from the New Jersey bank. Not surprisingly, therefore, IAM was the only bidder at the sale and bought the plane for $325,000.

The court entered judgment for Connex, awarded compensatory damages, and held that IAM had failed to meet its obligation under the circumstances to seek an adequate price for the plane and had failed to use accepted practice to give notice and stimulate interest in the sale of the plane. According to the court:

In this case the defendant is an entity with special resources and expertise for the sale of aircraft. It must act in accord with its knowledge and capability and must be held to a higher standard than one not so well versed in the trade. The efforts at publicizing this sale were minimal. They were clearly insufficient for a creditor in the position of IAM. It knew who likely buyers were, had the ability to contact these buyers, and made no special effort to do so. This failure takes on added importance given the short notice of sale the advertisements provided, the decision not to take any steps to prepare the plane, and the inability of IAM to show the plane. *Id.* IAM was simply required to give more consideration to the interests of Connex, particularly given the involved course of dealing between the parties. Under all the circumstances this was not a commercially reasonable sale. IAM failed in its affirmative duty to protect the debtor. Id. (citations omitted).

8. Jones v. Bank of Nevada, 91 Nev. 368 (1975)

In this Nevada case, an aircraft leasing company, Percell-Jones Leasing, and its owners (Appellants), had executed a promissory note and a security agreement covering an aircraft. Appellants defaulted in the payment of the note and, as a result, Appellee, Bank of Nevada, took possession of the aircraft.

Following its repossession of the aircraft on April 9, 1970, and notification to appellants that the plane would be sold on or after April 24, 1970, the Bank caused advertisements to be placed in General Aviation News, Trade-A-Plane, the Wall Street Journal, the National Observer, and the major newspapers in Los Angeles, Denver, Salt Lake City, Chicago, and New York. The Bank also caused some 2,000 brochures to be prepared and distributed to approximately 240 sales organizations in the United States, to fixed-based operators who were qualified to operate the type of airplane at issue, and to major sales organizations of used aircraft. The Bank further hired a sales representative to assist in marketing the aircraft.

The Bank ended up selling the aircraft to an Arizona-based company, Omni Aircraft. Following the sale, the Bank brought an action against Appellants in the trial court, and the court awarded

Kuznetsky Most, 21/5
Entrance 1, Suite 612
Moscow, 107996, Russian Federation
Ph: +7-916-282-0182
Ph: +1-202-230-9443
www.Marks-Sokolov.com
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the Bank a deficiency judgment of $ 75,330.56. The leasing company appealed, contending that the collateral sale had not been commercially reasonable. In ruling for the Bank, the Nevada Supreme Court held that disposing of collateral to or through a dealer in the field was commercially reasonable.

According to the Court:

Although [Appellants] argued that other efforts should have been made by Bank to sell the plane, the trial judge found that the sale to Omni Aircraft met the UCC test for commercial reasonableness, noting that 'One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer -- a method which in the long run may realize better average returns since the secured party does not usually maintain its own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable.'

The court also noted that:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner. Id.