

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

77 NOV 13 AM 11:13

PATRICIA GEFIN

HAMPSON AEROSPACE, INC.,

Plaintiff,

v.

No. CV 2007 098 35

ECLIPSE AVIATION CORPORATION,

Defendant.

SUMMONS
SERVING

**COMPLAINT FOR ANTICIPATORY REPUDIATION, REPUDIATION, AND BREACH
OF CONTRACT AND FOR DECLARATORY JUDGMENT.**

COMES NOW the Plaintiff Hampson Aerospace Inc. and for its Complaint against Defendant Eclipse Aviation Corporation, states as follows:

FACTS APPLICABLE TO ALL COUNTS.

1. Plaintiff Hampson Aerospace, Inc. (Hampson) is a Delaware corporation, whose principal place of business is in the State of Texas. Hampson is a manufacturer of certain components and assemblies for jet aircraft.
2. Defendant Eclipse Aviation Corporation (Eclipse) is a Delaware corporation, whose principal place of business is in the State of New Mexico. Eclipse is a manufacturer of twin engine jet aircraft.
3. Jurisdiction and venue are proper in this Court because the Agreement that is the subject hereof was created in whole or in part in Bernalillo County, New Mexico, and the causes of action asserted herein arise out of Eclipse's transaction of business within and breaches of contract within Bernalillo County, New Mexico. The Court has jurisdiction over the parties and jurisdiction over the subject matter.

4. Effective February 22, 2007, Plaintiff Hampson and Defendant Eclipse entered into an Agreement. While the Agreement contains a clause describing its terms as confidential, New Mexico law requires disclosure of certain terms of the Agreement in order for Plaintiff to pursue this action to enforce it.¹ In accordance with N.M. Civ. P. Rule 9(I), Hampson has not attached the Agreement to this filing, but has instead served it with this Complaint upon Eclipse. Hampson intends to request of the Court that it permit the Agreement to be filed under seal. Hampson incorporates herein the terms of the Agreement as though fully set forth in this Complaint.

5. Paragraph 1 of the Agreement materially requires that Eclipse pay Hampson an amount specified in that Paragraph in accordance with the schedule and under the terms set out in Paragraphs 1a. through e. Eclipse partially performed its payment obligations, paying Hampson, in or about March 2007, the payment required by Paragraph 1a. The Agreement requires Eclipse to make further payments to Hampson specified in Paragraphs 1b. and c., beginning no later than November 30, 2007, and to continue paying Hampson monthly thereafter until Eclipse pays the full contractual amount required by Paragraph 1 of the Agreement.

6. Paragraph 1e of the Agreement requires that Eclipse pay these amounts without delay and without asserting any setoff, counterclaim or deduction whatsoever against these payment obligations.

7. On September 28, 2007, Rich Shepherd, Director of Procurement for Eclipse, called and represented to Greg Frye, an authorized corporate representative of Hampson, that

¹ In light of the confidentiality provision, Hampson's allegations concerning the precise terms of the February 22, 2007 Agreement are less specific than would typically be alleged under these circumstances. Inasmuch as the contractual terms at issue are plain and unambiguous, Hampson intends to move for partial summary judgment after Eclipse has answered the Complaint. In the context of that procedure, Hampson will address maintaining the confidentiality of these provisions with the Court and with Eclipse.

pursuant to a decision made in a meeting between Shepherd, Bill Bonder (Vice President of Procurement of Eclipse), and Peg Bilson (Chief Operating Officer of Eclipse), Eclipse would renege in its contractual commitments as set forth in the February 22, 2007 Agreement and would not make the payments referred to above that come due beginning November 30, 2007. According to Shepherd, Eclipse's decision to breach its contractual obligations was subject to possible "reassessment" by Eclipse in January 2008.

8. On October 10, 2007, Hampson corresponded with Eclipse, notifying it, among other things, that:

- a. "Eclipse's actions and statements have made Hampson insecure in respect of the performance of Eclipse that is required under the [Agreement], Paragraph 1. Eclipse's actions and statements constitute a repudiation of and anticipatory breach of the [Agreement], Paragraph 1."
- b. Hampson "demands that Eclipse provide Hampson written adequate assurances of its due and timely performance of all payment obligations it is required to fulfill under Paragraph 1, without the assertion of any 'set off, counterclaim or deduction.'" Hampson demanded that Eclipse provide those assurances by no later than 5:00 p.m., Central time, on Friday, October 12, 2007.
- c. Those assurances "must include a written affirmation that Eclipse recognizes and stipulates that it is bound by the terms of Paragraph 1 as written, that it will comply therewith, and that Eclipse will pay the amounts required under Paragraph 1, on the schedule set out therein, without asserting any setoff, counterclaim or deduction whatsoever against these payment obligations."
- d. If Eclipse "does not strictly and timely comply with this demand, or should Eclipse take any other action in the interim that is inconsistent with Hampson's rights and interests under Paragraph 1, Hampson will take whatever action it deems necessary to protect itself and its rights and interests under the [Agreement], Paragraph 1."

9. Defendant Eclipse requested additional time to respond to Hampson's October 10, 2007 letter. Hampson agreed. On October 19, 2007, Eclipse responded to Hampson's October 10, 2007 demand. The Eclipse October 19 response did not provide the assurances Hampson

required in its October 10, 2007 letter. Hampson, on October 23, 2007, notified Eclipse that Eclipse's October 19, 2007, letter was deficient and reiterated that Eclipse's payment obligations under Paragraph 1 of the Agreement are not subject to any setoff, counterclaims, or deductions and again requested Eclipse's assurances of performance.

10. The Agreement, Paragraph 4, also materially requires that Eclipse purchase a minimum number of shipsets from Hampson or pay for that number for calendar year 2007 and imposes similar obligations upon Eclipse for calendar year 2008. Eclipse, therefore, is obligated to pay Hampson, for both 2007 and 2008, total amounts for each year that are at least equal to the minimum number of shipsets identified in Paragraph 4 of the Agreement, multiplied by an agreed-upon price per shipset.

11. On October 25, 2007, Greg Frye on behalf of Hampson and Bill Bonder and Rich Shepherd on behalf of Eclipse met in Albuquerque. At the meeting, Bonder agreed and committed on behalf of Eclipse, among other things, that Eclipse would comply with the payment obligations of Paragraph 1 of the February 22 Agreement. They also discussed Eclipse's obligations under Paragraph 4 of the Agreement.

12. On October 29, 2007, Hampson sent a letter to Eclipse confirming, among other things, that at the October 25, 2007, meeting, Bonder agreed and committed on behalf of Eclipse that Eclipse would comply with the payment obligations of Paragraph 1 of the Agreement. The letter also stated Hampson's position, taken in compromise, of the total 2007 payment obligation Eclipse owes to Hampson under Paragraph 4 of the Agreement. Hampson, to compromise, also agreed to a material reduction in Eclipse's 2008 obligation under Paragraph 4 of the Agreement.

13. Contrary to honoring the representations made by Eclipse representatives during the October 25, 2007 meeting, Eclipse again sought to renege. On November 7, 2007, Eclipse stated to Hampson, among other things, as follows:

Let me respond directly to your demand for assurances that Eclipse will pay Hampson the monies coming due under the [Agreement].
It will not. [Emphasis supplied.]

* * *

[T]he [Agreement] was procured by fraud, and Eclipse exercises its right to rescind the [Agreement] on that basis.

14. Defendant Eclipse refuses to acknowledge its obligations to pay the monies coming due under the Agreement, Paragraphs 1 and 4. Eclipse asserts “Hampson must immediately return all sums that Eclipse paid to it under the [Agreement].” Defendant Eclipse clearly and unequivocally and absolutely refuses to perform under the Agreement. Eclipse has engaged in anticipatory repudiation of and has repudiated and breached the February 22, 2007 Agreement.

COUNT I
ANTICIPATORY REPUDIATION, REPUDIATION AND BREACH OF CONTRACT.

15. Hampson realleges and incorporates herein the allegations of each of the preceding Paragraphs of this Complaint.

16. In contravention of law and although it was required to provide further assurances, Defendant Eclipse unambiguously, clearly, unequivocally, and absolutely has failed and refused, in response to Hampson’s demand, to provide further assurances that Eclipse will abide by and comply with and satisfy its obligations under the February 22 Agreement. Defendant Eclipse unambiguously, clearly, unequivocally, and absolutely has stated its intention to not honor the Agreement. Defendant Eclipse, by this conduct and by its other actions, has

engaged in anticipatory repudiation of, and has repudiated, and has breached the February 22 Agreement.

17. Defendant Eclipse otherwise and in other respects has failed and refused to honor the Agreement and has breached its terms.

18. Defendant Eclipse's actions, repudiation, and breaches have directly, proximately and reasonably foreseeably damaged Hampson, and Hampson is entitled to an award of damages. By virtue of Eclipse's breaches, Hampson has incurred and will incur special damages, including without limitation, lost revenues, business interruption and delays, the loss of the use of money, attorneys' fees, costs, and other damages.

19. Defendant Eclipse has overreached and has engaged in the above actions willfully, intentionally, knowingly, wantonly, and with malice aforethought.

20. Hampson, thus, is entitled to a judgment for punitive damages as against Defendant Eclipse.

21. Hampson requests that the Court enter its Order awarding damages to Hampson for Defendant Eclipse's anticipatory repudiation, repudiation, and breach of the Agreement, including without limitation, damages in the amount of the present value of all future payments that Eclipse is obligated to make under Paragraphs 1 and 4 of the Agreement, and that the Court award Hampson its attorneys' fees, costs, and other damages, and finally that the Court award punitive damages against Eclipse for its willful breach of contract, and grant such other and further relief as may be appropriate.

COUNT II
DECLARATORY JUDGMENT.

22. Hampson realleges and incorporates herein the allegations of each of the preceding Paragraphs of the Complaint.

23. There is a dispute and there exists a case and controversy between Plaintiff Hampson and Defendant Eclipse concerning the enforceability of the Agreement. Hampson contends that the Agreement is enforceable by this Court in accordance with its terms, and that Defendant Eclipse is liable for damages for anticipatory repudiation, repudiation, and breach of the Agreement. Plaintiff further contends that by the express terms of the Agreement, Paragraph 1e., Eclipse must pay the amounts due without asserting any setoff, counterclaim, or deduction whatsoever against those payment obligations.

24. Defendant Eclipse now contends that it is entitled to “rescind” the Agreement, on the basis of an alleged “fraud.” Eclipse also contends that it is entitled to assert setoffs, counterclaims, and deductions against those payment obligations, notwithstanding the express language of Paragraph 1e of the Agreement.

25. Defendant Eclipse also claims that the matters asserted in this action regarding the Agreement must be arbitrated, despite that the Agreement contains no arbitration provision, because a separate agreement between the parties called “Purchase Agreement,” that is dated December 5, 2003, Section 17, contains an arbitration provision. Defendant Eclipse does so despite that Eclipse in Paragraph 7 of the February 22 Agreement released all of its pre-existing claims related to the matters resolved by the February 22 Agreement, including claims for arbitration. Eclipse also advances the dispute resolution provision of the Purchase Agreement despite that, by virtue of its conduct, Eclipse waived the right to seek arbitration as to disputes arising from the February 22 Agreement.²

26. There is a dispute and there exists a case and controversy between Hampson and Eclipse concerning the above controversies.

² Concurrently with the filing of this Complaint, Hampson has served Eclipse with its “Notice of Demand for Dispute Resolution,” seeking arbitration of the disputes between the parties that arise under the Purchase Agreement. Those arbitrable disputes do not include the claims arising under the February 22, 2007 Agreement.

27. The Court should enter its judgment declaring that the February 22 Agreement is enforceable according to its terms, that Defendant Eclipse has engaged in anticipatory repudiation of and has repudiated and breached the Agreement, and that this Court has the jurisdiction and authority to adjudicate the Parties' rights thereunder, including that the current dispute is not subject to the Purchase Agreement's arbitration provision, and the Court should enter such other declaratory judgments and relief as may be just and proper.

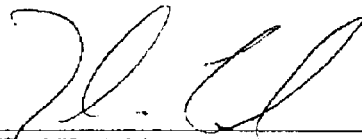
PRAYER FOR RELIEF.

WHEREFORE, Plaintiff Hampson hereby requests that the Court enter its judgments for Plaintiff in accordance with demands made herein, and award Plaintiff such other and further relief as may be appropriate.

JURY DEMAND.

Plaintiff hereby demands and, by separately filing of a Jury Demand, further demands that all matters properly triable to a jury herein be tried to a jury of six (6) persons. Plaintiff has submitted its check for the jury fee in the amount of one hundred dollars (\$100.00) for such demand.

ATKINSON & THAL, P.C.



Clifford K. Atkinson
John S. Thal
Ben Davis
201 Third St. NW, Suite 1850
Albuquerque, NM 87102
Telephone: (505)-764-8111
Attorneys for Plaintiff