UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,*	**Civil Action No.: 1:08-cv-01164**
v.	**Judge: Hon. Richard W. Roberts**
SIGNATURE FLIGHT SUPPORT CORPORATION, *and*	**Deck Type: Antitrust**
HAWKER BEECHCRAFT SERVICES, INC., *Defendants.*	**Date Filed: December 15, 2008**

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT SIGNATURE'S MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT

The United States opposes the motion by Defendant Signature Flight Support Corporation ("Signature") to release Signature from its core obligation under the Final Judgment ("FJ") entered by this Court a mere six weeks ago to promptly divest fixed base operations ("FBO") assets at Indianapolis International Airport ("IND") to an independent firm with the incentive and ability to compete vigorously with Signature. The Final Judgment, with the Hold Separate and Preservation of Assets Stipulation and Order ("Hold Separate" or "HS"), resolved the United States' allegation that Signature's agreement to acquire the FBO operations of defendant Hawker Beechcraft Services ("Hawker") at seven U.S. airports violated Section 7 of the Clayton Act and should be enjoined. Signature agreed to the divestiture, and the Court found the Final Judgment to be in the public interest.

Having received its "benefit of the bargain," that is, having closed the Hawker transaction, Signature now asks the Court to remove its core obligation under the Final Judgment – to promptly complete the only divestiture the decree requires. Signature claims that requiring divestiture at this time is "inequitable" because the bids it received for the assets are too low. But the terms of the Final Judgment and Hold Separate, like virtually all of the United States' settlements of merger challenges, set no floor (or ceiling) on the sale price for the divested assets; provided for appointment of a trustee if the defendants did not divest in a limited, specified period; and precluded Signature from objecting to the sale price. The fundamental goal is the protection of competition, and prompt divestiture, not delayed by defendants' concerns about price or other terms, is critical.[1] In consenting, Signature expressly represented that it "later will raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the [Final Judgment's] provisions." HS, § IV.F.

Signature has not met – and cannot meet – its burden of establishing that compliance with the decree as entered would be "no longer equitable," Fed. R. Civ. P. 60(b)(5), by using the current "financial meltdown" to abrogate its commitment to sell at any price without any claim of hardship. Further delay would seriously undermine the competitive purposes of the decree. Accordingly, the Court should deny Signature's motion to extend its right to divest for a year beyond the 160 days it has already been provided, and proceed under the trustee provisions of the Final Judgment.[2]

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[1] See Antitrust Division's Merger Remedy Guidelines at pp. 4, 29 and 33, http://www.usdoj.gov/atr/public/guidelines/205108.htm.

[2] The United States plans to petition the Court for appointment of a trustee in separate papers that will be filed shortly.

BACKGROUND

A. The Complaint, Hold Separate, and Final Judgment

On February 21, 2008, Signature agreed to acquire Hawker's FBO operations at IND and six other airports for $128.5 million. FBOs provide flight support services to general aviation customers, including sales of fuel and access to terminal facilities, hangars, ramps, and office space. On July 3, 2008, the United States filed a complaint alleging that the proposed acquisition of Hawker's assets at IND would substantially lessen competition in the provision of FBO Services at IND in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that Signature and Hawker are the only providers of FBO services at IND and compete directly on price and quality of services and that the transaction would create a monopoly.

At the same time the Complaint was filed, Signature agreed to, and the United States filed, a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition by requiring the divestiture of either Signature's facility at IND or Hawker's existing and future facilities at IND. In order to allow the entire Hawker acquisition to close pending entry of the proposed Final Judgment, the parties entered into, and the Court approved, the Hold Separate.[3]

The Court signed and entered the Hold Separate on July 18, 2008, and Signature closed its Hawker acquisition on July 24, 2008. Having found the Final Judgment to be in the public interest, this Court entered the Final Judgment on October 29, 2008.

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[3] Until the required divestiture is completed, the Hold Separate and the Final Judgment require, among other provisions, that Signature operate the Hawker divestiture assets as an independent, ongoing, economically viable competitive business held separate and apart from Signature's businesses.

The Final Judgment and Hold Separate provide in pertinent parts:

AND WHEREAS, the ***essence of this Final Judgment is prompt and certain divestiture of certain assets*** by the defendants to assure that competition is not substantially lessened; (FJ at p. 1)

AND WHEREAS, ***defendants have represented*** to the United States that the divestitures required below can and will be made, and ***that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;*** (FJ at p. 2)

If defendants have not divested the Divestiture Assets within the time period specified . . . defendants shall notify the United States . . . . Upon application of the United States, ***the Court shall appoint a trustee . . . to effect the divestiture*** of the Divestiture Assets. (FJ, § V.A.)

After the appointment of a trustee becomes effective, only that trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States ***at such price and on such terms as are then obtainable upon reasonable effort by the trustee*** . . . . (FJ, § V.B.)

Defendants ***shall not object to a sale by the trustee on any ground other than the trustee's malfeasance.*** (FJ, § V.C.)

The compensation of the trustee . . . shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but ***timeliness is paramount.*** (FJ, § V.D.)

Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made and that defendants later will raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein. (HS, § IV.F.)

B. Signature's Efforts to Accomplish the Divestiture

Signature elected to divest the Hawker FBO facilities at IND, which includes not only the current facility but also the rights to the new Hawker FBO facility that has been approved by the Indianapolis Airport Authority. The original divestiture period was set to expire on November 4, 2008, but Signature requested an extension from the United States, stating that final bids were due

on November 7, 2008. Signature represented to the United States that Signature could select a final bidder the following week and submit that company's name to the United States for review, and that the sale could be completed shortly after the Indianapolis Airport Authority approved the transaction at its December 5, 2008 meeting (assuming approval of the purchaser by the United States). Based on these representations, on November 3, 2008, the United States granted an extension of the period for divestiture until December 10, 2008.[4]

As Signature informed the Court in its Modification Motion, on November 7, 2008, Signature received two final bids for the former Hawker FBO facility. The amounts of the bids were comparable, though both were significantly below the preliminary bids those companies had given Signature. Signature has not submitted the name of a prospective purchaser to the United States for evaluation pursuant to Section IV.H. of the Final Judgment. Signature did not ask the Indianapolis Airport Authority to approve the proposed sale at its December 5 meeting.[5]

On November 17, Signature requested that the United States agree to a modification of the Final Judgment to extend the period for divestiture one year to December 10, 2009 in the hopes that more time would result in higher bids for the former Hawker facility. The United States

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[4] The United States has the authority to grant Defendants one or more extensions of the divestiture period for a total of sixty additional days. The last date for divestiture under the Final Judgment, assuming the maximum number of extensions, is January 5, 2008. (FJ, § IV.A.) The purpose of this provision is to give defendants additional time to complete a divestiture. As Signature is not taking the steps necessary to complete divestiture, granting additional time under Section IV.A. of the Final Judgment beyond December 10, 2008 would be inappropriate. The United States intends to move shortly for appointment of a trustee.

[5] The Indianapolis Airport Authority will next meet on December 19, 2008. The Authority will not meet again until January 16, 2009. Unless Signature finalizes a contract to sell the former Hawker facility in time for the Authority to consider it at the December 19 meeting, the divestiture cannot occur before the latter half of January.

refused to consent to the proposed modification.

ARGUMENT

When parties disagree over proposed modifications to a consent decree in an antitrust case, the party seeking modification must show that a "significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." United States v. Baroid Corporation, 130 F. Supp. 2d 101, 104 (D.D.C. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) & United States v. Western Elec. Co., 46 F.3d 1198, 1202-03 (D.C. Cir. 1995)). Signature cannot meet this "stringent standard." Id. at 103. In effect, Signature is seeking the "extraordinary remedy" of allowing it "to escape commitments voluntarily made and solemnized by a court decree." NLRB v. Harris Teeter Supermarkets, 215 F.3d 32, 35 (D.C. Cir. 2000) (quoting Twelve John Does v. District of Columbia, 861 F.2d 295, 298 (D.C. Cir. 1988)). Such a request should be "approached with caution." United States. v. Caterpillar, Inc., 227 F. Supp. 2d 73, 80 (D.D.C. 2002).

I. No Unanticipated Change in Circumstances Warrants Modification of the Decree

To rely on changed circumstances to justify modification, the moving party must show that the changed circumstance was not one that was anticipated, or should have been anticipated, at the time the parties signed the consent decree. Western Elec., 46 F.3d at 1204. To permit otherwise "would be contrary to standard principles of contract interpretation which, as directed by the Supreme Court and Court of Appeals, must underlie this Court's analysis." Baroid, 130 F. Supp. 2d at 105. In entering this decree Signature should have anticipated the "business risks which are fairly to be regarded as part of the dickered terms." Id. (quoting E. Allen Farnsworth, Farnsworth on Contracts § 9.6, at 552-58 (1990)).

The terms of the Final Judgment clearly reflect the bargain made between Signature and the United States whereby Signature would be allowed to close its acquisition, provided that it consented to a prompt and certain divestiture of the IND assets to resolve the competitive concerns of the United States.[6] The parties, when entering into the proposed Final Judgment, anticipated that Signature would not obtain any particular price for the divestiture assets and that Signature could potentially suffer "hardship" relating to the fulfillment of its divestiture obligation. The terms of the Final Judgment reflect this understanding: Signature specifically agreed that the divestitures "can and will be made" and that it would not later raise a claim of "hardship" before this Court. HS, § IV.F.; FJ, at p. 2. Moreover, Signature agreed that if it could not sell the assets in a set time frame, a trustee would be appointed whose objective would be to divest the assets as quickly as possible. FJ, § V.D. ("timeliness is paramount"). The trustee would have the authority to divest the assets at any price that was "obtainable upon a reasonable effort by the trustee." FJ, § V.B. Signature agreed not to object to the price the trustee obtained; rather, it limited its ability to object solely to the "trustee's malfeasance." FJ, § V.C.

Signature, however, asserts that it is entitled to extraordinary relief because the "financial meltdown" was unanticipated. Sig. Mod. Mem. at 6. But this is not the relevant issue. The changed circumstance about which Signature complains is the low price it will receive for the divestiture assets. As stated above, it was plainly anticipated that the price could be low.[7] The

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[6] Had Signature not agreed to a divestiture with the time limits and trustee provisions set forth in the decree, the United States could have pursued preliminary and permanent injunctions against Signature's acquisition of Hawker's FBO assets. Signature avoided such litigation as part of the bargain it reached with the United States.

[7] Having anticipated this circumstance, Signature bears a "heavy burden" to convince the Court that a modification is still justified. Western Elec., 46 F.3d at 1204.

reason for the low price is immaterial. See General Elec. Co. v. Metals Resource Group Ltd., 293 A.D. 2d 417, 418, 741 N.Y.S. 2d 218 (2002) (contractual obligations were not excusable due to financial loss when contract contemplated such disadvantage even if the precise causes of that loss were not specified). A change in market circumstances – which is what Signature claims has caused the expected lower price – would not allow a party to excuse performance under a contract.[8] It should certainly not be an excuse to delay performance under the agreed-upon Final Judgment and leave the Hawker assets in limbo, increasing the risk of diminished competition at IND.

Not surprisingly, Signature cites no authority supporting its aggressive position. The only case it relies upon (Sig Mod. Mem. at 8) is a decree in which the Department of Justice agreed – ***in the decree*** – to provide ExxonMobil more time to make required improvements to a specific refinery as a result of hurricane damage which had already occurred. That decree offers no support for Signature's argument. The additional time was provided to ExxonMobil because performance of the decree requirements was physically not possible on the schedule set for its

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[8] See Resources Invest. Corp. v. Enron Corp., 669 F. Supp. 1038, 1043 (D. Colo. 1987) ("Failure to predict market patterns will not provide a basis for relief under [claims based on impossibility and commercial impracticability]."); Neal-Cooper Grain Co. v. Texas Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974) ("[I]mpracticability will not be deemed an excuse unless the intervening circumstances are ones which the parties assumed would not occur . . . . The fact that performance has become economically burdensome or unattractive is not sufficient for performance to be excused.") (citing Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966)); see also, Mergentime Corp. v. W.M.A.T.A., 2006 WL 416177 at *76 (D.D.C., Feb. 22, 2006) ("Courts have held that the 'contractor assumes the risk of providing funds sufficient to perform the contract,' meaning that 'neither undercapitalization nor insolvency (actual or impending) will excuse a failure to perform.' . . . Thus, a 'contractor's financial difficulties are not a legitimate excuse for its failure to make progress.'") (citations omitted).

other refineries.[9] Divestiture of the former Hawker facility is not only possible, Signature has a final bid and draft contract from an interested purchaser. Signature simply does not like the amount of the bid.

II. Signature's Proposed Modification Is Not Reasonably Tailored to the Purported Change in Circumstances

Even if Signature were able to meet its burden of showing an unanticipated change in circumstances that justified a modification, it must further show that "[t]he proposed modification is suitably tailored to the changed circumstance." Baroid, 130 F. Supp. 2d at 104 (citing Rufo, 502 U.S. at 393). Accord, Western Elec., 46 F.3d at 1204.[10] Signature, however, has failed to show that its proposed modification of to give it another year to sell the Hawker facility is suitably tailored even to the changed circumstance it claims – the "financial meltdown." Signature has no basis to predict the speed or scope of the financial recovery nor the likelihood of obtaining bids more to its liking in another year. If Signature remains dissatisfied with the bids, it would have, under its reasoning, perfectly valid grounds to seek yet another extension.

And in the meantime, Signature would continue to own both FBO facilities at IND, thereby creating a significant risk of a lessening of competition during the proposed one-year extension period. Signature, pointing to one contract recently awarded to Hawker, asserts that the Hold Separate is sufficient to protect vigorous competition. Signature, however, fails to explain how the Hold Separate – designed to protect competition during the limited divestiture period set

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[9] United States, et al. v. Chalmette Refining, LLC, Civ. No. 05-4662 (E.D. La. 2005).

[10] In contrast to the modification at issue in Western Electric, Signature's requested modification would undermine the purpose of the decree as a whole, i.e., the prompt and certain divestiture of the overlap assets. See Western Elec., 46 F.3d at 1207 (granting waiver to permit acquisition that would not interfere with the objective of the decree).

forth in the Final Judgment – will suffice over the extended time that Signature wants to own both facilities at IND. Vigorous competition is particularly important given the planning and construction currently underway for the development of a new Hawker facility at IND. See F.T.C. v. Weyerhauser Co., 665 F.2d 1072, 1086 & n.36 (D.C. Cir. 1981) ("Hold separate orders will also be contraindicated where the acquired company was planning prior to the acquisition to embark on a new pro-competitive venture . . . .").[11]

Signature's argument that extending the divestiture deadline would help assure that a bidder is committed to operating long-term at IND is disingenuous at best. The decree provides for divestiture to an acquirer that in the United States' sole judgment has the "intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively" at IND, and the United States would not approve a buyer that was not committed to the market. In fact, Signature has told this Court that it has an interested buyer and has not suggested that the identity of the prospective buyer should raise concerns under the standards in the Final Judgment. Even if a satisfactory buyer were not immediately available, that problem would be addressed under the terms of the decree through the trustee provisions.

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[11] Signature asserts that Weyerhauser supports its position in that the Court of Appeals ultimately upheld the District Court's use of a hold separate instead of the preliminary injunction requested by the Federal Trade Commission pending its challenge of the underlying merger. Sig. Stay Reply Mem. at 9 n.3. Weyerhauser, however, is quite clear that hold separates are disfavored given the competitive issues that arise with their use and should only be used under limited circumstances. Weyerhauser, 665 F.2d at 1085-88. Here, the Hold Separate is designed to maintain the independence and viability of the assets to be divested during the short pendency of the divestiture period called for in the Final Judgment. It was not intended as a long-term device to preserve competition. See Antitrust Division's Merger Remedy Guidelines at page 29, http://www.usdoj.gov/atr/public/guidelines/205108.htm (providing reasons why a hold separate will not "entirely preserve competition" and "does not eliminate the need for a speedy divestiture"). Signature has not put forth the detailed facts that would be needed to justify the continued use of the Hold Separate on a long-term basis.

III. The Public Interest in Competition Is Served by a Prompt and Certain Divestiture

Signature's arguments on the public interest founder. Signature equates its interest in receiving more money with the public interest (Sig. Mod. Mem. at 8-9), but the public interest is not served by suspending defendants' obligations whenever outside events – i.e., an economic downturn or depressed demand for their product or services – make the terms of their agreements less attractive.[12] And while Signature stresses how unusual the current economic conditions are, permitting an extension of time to comply with decree requirements because of the state of the economy could likely lead to modification requests from defendants after every significant drop in the stock market. The same argument could be made currently by any of the defendants in the other filed antitrust consent decrees where the mandated divestitures have not been completed.

The public interest is served, however, by accomplishing the Final Judgment's goal of a prompt divestiture to protect competition. The divestiture mandated by the Final Judgment can be made, as seen by the fact that Signature has a bid from an interested buyer. The public interest that this Court determined is served by the Final Judgment only six weeks ago continues to warrant the sale of the former Hawker facility to preserve FBO competition at IND.[13] Moreover, it is only equitable that Signature fulfill its obligations under merger consent decree voluntarily

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[12] Signature has made no claim that the lower-than-expected sale price will result in lasting financial damage to the company or interfere with its ability to continue in operation.

[13] Signature argues that "the economic harm to Signature would be punitive: the loss from the divestiture would significantly exceed the fines that have been imposed on some defendants for price-fixing . . . and the loss would well exceed the normal range of fines imposed for civil contempt." Sig. Mod. Mem. at 8-9. This is a red herring. In some price-fixing cases, the criminal fines have been less than Signature's claimed loss if the divestiture proceeds and in others the criminal fines have been substantially greater. Neither the size of criminal price-fixing fines nor defendants' settlement payments in a civil contempt case, which may be calculated based on the profits obtained through their contempt action, are of any relevance here.

entered with the United States where Signature has already received the benefits of the agreement.

CONCLUSION

The United States respectfully requests that the Court deny Signature's Modification Motion.

Dated: December 15, 2008

Respectfully submitted,

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UNITED STATES OF AMERICA, *Plaintiff,* v. **SIGNATURE FLIGHT SUPPORT CORPORATION,** *and* **HAWKER BEECHCRAFT SERVICES, INC.,** *Defendants.*	**Civil Action No.: 1:08-cv-01164** **Judge: Hon. Richard W. Roberts** **Deck Type: Antitrust** **Date Filed: December 15, 2008**

ORDER DENYING DEFENDANT SIGNATURE FLIGHT SUPPORT CORPORATION'S MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT

Upon consideration of Defendant Signature Flight Support Corporation's Motion for Partial Relief From and Modification of Judgment, ("Signature's Modification Motion"), and the United States' Memorandum of Points and Authorities in Opposition to Signature's Modification Motion, Signature's Modification Motion is hereby DENIED.

SO ORDERED.

Date: _____

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RICHARD W. ROBERTS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2008, I caused a copy of the United States' Memorandum of Points and Authorities in Opposition to Defendant Signature's Motion for Partial Relief From and Modification of Judgment and a draft Order denying said motion to be served on Defendants by electronic mail

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