

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	Civil Action No.: 1:08-cv-01164
<i>Plaintiff,</i>	)	
	)	Judge: Hon. Richard W. Roberts
v.	)	
	)	Deck Type: Antitrust
SIGNATURE FLIGHT SUPPORT	)	
CORPORATION, <i>and</i>	)	Date Filed: December 5, 2008
	)	
HAWKER BEECHCRAFT SERVICES,	)	
INC.,	)	
<i>Defendants.</i>	)	

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

The United States opposes the emergency motion by Defendant Signature Flight Support Corporation ("Signature") for a stay pending disposition of its motion for partial relief from its obligations under the Final Judgment entered in this case on October 29, 2008.

Signature consented to entry of the Final Judgment to resolve competitive concerns arising from its agreement to acquire the fixed base operations ("FBO") of defendant Hawker Beechcraft Services, Inc. ("Hawker") at seven U.S. airports for \$128.5 million. As part of its settlement obligations under the Final Judgment and Hold Separate and Preservation of Assets Stipulation and Order ("Hold Separate") – which allowed Signature to close the Hawker asset acquisition – Signature agreed to use its best efforts to expeditiously divest the FBO operations

of either Signature or Hawker at the Indianapolis International Airport (“IND”).¹ Signature represented that such divestiture “can and will be made and that [Signature] 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.”² Signature, having closed its Hawker acquisition, has now moved the Court to extend the timing of the divestiture obligation for a full year (“Modification Motion”),³ claiming that the offers it has received for the divestiture assets are lower than it had expected. The United States will oppose the proposed modification as unwarranted and contrary to both the public interest and Signature’s prior representations. (The United States’ opposition to the Modification Motion is due December 15, 2008.) The United States also plans to petition the Court, pursuant to Section V of the Final Judgment, for the appointment of a trustee to carry out the divestiture.

Signature’s current emergency motion seeks a stay pending a decision on the Modification Motion in order “to avoid the risk of Signature being held in violation of the Final Judgment while the Court determines the [Modification Motion].” (Sig. Stay Mem. at 1-2). But the United States has already represented to Signature that it will not pursue contempt proceedings during the pendency of Signature’s Modification Motion. Signature’s proposed

¹ The Hawker FBO assets purchased by Signature at the other six airports did not compete with Signature FBO operations and therefore divestitures were not needed at those other airports. Signature assigned a value of approximately 80 percent of the purchase price to the assets at those other six airports.

² Hold Separate [Docket # 1] § IV.F. See also, Final Judgment [Docket #14] § IV.A (“Defendants agree to use their best efforts to complete the required divestitures as expeditiously as possible.”) (hereinafter “FJ”).

³ Defendant Signature Flight Support Corporation’s Motion for Partial Relief From and Modification of Judgment [Docket #17].

order would go well beyond the claimed purpose of protecting Signature from contempt and essentially suspend the Final Judgment's divestiture requirements, including the appointment of a trustee pursuant to Section V of the Final Judgment to accomplish the divestiture. Such a stay is unwarranted – it would place Signature's private interest in obtaining more money ahead of the public interest and frustrate the Final Judgment's goal of "a prompt and certain divestiture . . . to assure that competition is not substantially lessened." (FJ at 1).

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. 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 civil antitrust 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 eliminate this competition at IND, creating 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.⁴

The Final Judgment calls for a “prompt and certain” divestiture and states that Signature must use “best efforts” to accomplish the divestiture “as expeditiously as possible.” (FJ, 1 & IV.A.). The deadline for Signature itself to accomplish the divestiture is the later of ninety days after the Complaint was filed or five days after notice of entry of the Final Judgment. (FJ at § IV.A.). If the divestiture does not occur by that date, the United States can petition the Court for the appointment of a trustee to effect the divestiture. (FJ, § V.)

The Final Judgment does not set any floor or ceiling on the price that the defendant can obtain for the divestiture assets. If a trustee is appointed, the Final Judgment provides that the trustee shall have the power to sell the assets “at such price” as is obtainable upon a reasonable effort and that the defendants cannot object to a sale “on any ground other than the trustee’s malfeasance.” (FJ, § V.B-C.) The Final Judgment stresses that “timeliness is paramount.” (FJ, § V.D.)

The possibility of hardship in terms of accomplishing the divestiture was specifically anticipated and acknowledged. Signature represented in the Hold Separate “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.”⁵ The Court signed and entered the Hold Separate

⁴ 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.

⁵ Hold Separate at § IV.F. This representation is also reflected in the Final Judgment. FJ at 2 (final “whereas” clause).

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.

B. Signature's Efforts to Accomplish the Divestiture

Signature elected to divest the Hawker FBO facilities at IND. 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, 2008.⁶ 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.

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 and has not asked the Indianapolis Airport Authority to approve the proposed sale at its

⁶ The United States has the authority to grant Defendants one or more extensions of the period for divestiture 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.)

December 5 meeting.⁷

On November 17, Signature notified the United States that it wanted 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.

ARGUMENT

I. Signature's Request For a Stay Is Much Broader Than the Rationale It Provides

Signature seeks an order from the Court staying the "execution and enforcement" of Section IV.A. of the Final Judgment.⁸ It claims that a stay is needed to avoid contempt, but its proposed order would stay all of Section IV.A. and, since the divestiture obligation is the heart of the Final Judgment, in effect the Final Judgment itself. Signature claims that the stay must be in place before December 10, 2008, or it will be exposed "to the choice of risking being held in contempt for non-compliance with the Final Judgment, or proceeding with the sale and incurring a \$20 million loss relative to the price allocated to the Hawker Beechcraft FBO at Indianapolis under the parties' Asset Purchase Agreement." (Sig. Stay Mem. at 2). But under the Final

⁷ The Indianapolis Airport Authority had informed Signature that the December 5 meeting may likely be its last meeting this year. By failing to finalize an agreement that can be presented to the Airport Authority at the December 5 meeting, Signature has all but guaranteed that the divestiture cannot occur in 2008.

⁸ Section IV.A. states: "Defendants are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter or after five (5) calendar days after notice of entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. If pending state or local regulatory approval is the only remaining matter precluding a divestiture after the 90-day period, the United States will not withhold its agreement to an extension of the period. Defendants agree to use their best efforts to complete the required divestiture as expeditiously as possible."

Judgment, Signature has had an obligation to use its best efforts to sell the Divestiture Assets from entry by the Court of the Hold Separate on July 18, 2008. Indeed, if Signature has not been using its best efforts to divest during this entire period, it has already violated the Final Judgment.⁹

Neither Signature's obligation to divest nor its exposure to civil contempt arise on December 10, 2008. December 10 is simply the date when Signature will lose its right to sell the Divestiture Assets and the United States will have the right to seek appointment of a trustee (which the United States plans to do). (FJ, § V.A.) Tellingly, Signature has offered no rationale (except, indirectly, its interest in getting more money for the assets) for staying the appointment of a trustee and the accomplishment of the divestiture.

II. Signature Cannot Meet the Legal Requirements For a Stay

In support of its motion for a stay pursuant to Fed. R. Civ. P. 62(b),¹⁰ Signature argues that it satisfies the four requirements that govern whether a stay can be granted under Fed. R. Civ. P. 62(c), which it maintains should be applied to its motion. Those factors are that it is likely to prevail on the merits of the underlying motion, that it is likely to be irreparably harmed

⁹ See e.g., United States vs. Cal Dive International, Inc., et al., Civil No. 1:05CV02041 (EGS)(D.D.C.), Petition by the United States for an Order to Show Cause Why Respondents Cal Dive International, Inc. and Helix Energy Solutions Group, Inc. Should Not Be Found in Civil Contempt at ¶17, filed November 26, 2007 (alleging Cal Dive engaged in "a course of conduct that frustrated the prompt and certain divestiture called for by the Final Judgment," including Cal Dive's failure to use best efforts prior to the deadline for Cal Dive to have completed the required divestiture). Cal Dive consented to pay \$2 million as part of a civil settlement to resolve the alleged violation.

¹⁰ As support for its argument that Fed. R. Civ. P. 62(b)(4) provides authority for the Court to enter the stay, Signature cites one case that is completely inapposite to the facts at hand: In Fleming, Zulack & Williamson, LLP v. Info. Super Station, LLC, 215 F.R.D. 5 (D.D.C. 2002), the movant sought vacation of the judgment as invalid and argued that it had been fraudulently entered. Signature does not challenge the validity of the Final Judgment; indeed, it consented to its entry only five months ago.

absent a stay, that others will not be harmed if a stay is entered, and that the public interest would be served by entering a stay. Signature cannot satisfy any of those conditions.

A. Signature Is Not Likely to Prevail on Its Modification Motion

Signature bears a heavy burden to justify modification over the objection of the United States. In a case involving the review of a proposed modification to an antitrust consent decree where not all the parties had consented to the modification, the U.S. Court of Appeals for the District of Columbia Circuit, quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), described the applicable legal standard:

“Modification of a consent decree *may* be warranted when changed factual conditions make compliance with the decree substantially more onerous.” Id. [at 374] (emphasis added). “*Ordinarily*, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.” Id. at 385, 112 S.Ct. at 761 (emphasis added). “*If it is clear* that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a *reasonable* effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).” Id. at 385, 112 S.Ct. at 761 (emphasis added).

United States v. Western Elec. Co., Inc., 46 F.3d 1198, 1204 (D.C. Cir. 1995). See also, 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)); United States v. Caterpillar, Inc., 227 F. Supp. 2d 73, 80 (D.D.C. 2002); United States v. Baroid Corporation, et al., 130 F. Supp. 2d 101, 103-104 (D.D.C. 2001); United States v. Motorola, Inc., Civ. No. 94-2331 (TFH) (D.D.C. March 16, 1999).

Signature cannot meet the required test for modification by arguing that the current and "unforeseen" financial climate has caused it to receive bids that are lower than it anticipated. In

consenting to the terms of the Final Judgment and the Hold Separate five months ago, Signature agreed to divest the IND FBO assets within a set timeframe and at no minimum price, and it also agreed to the appointment of a trustee if the divestiture was not completed within that timeframe. It cannot now argue that it should be relieved of its obligation to sell the assets within the time period set by the Final Judgment simply because the bids it has received are not to its liking.

Signature argues that the downturn in the economy is to blame for the low bids it has received for the assets. Regardless of the cause for the low bids, Signature agreed to sell the assets at no minimum price. Therefore, the amount of money it now may or may not make on the sale is irrelevant, and the company cannot point to its disappointment as a justification for seeking to have this Court relieve it of its obligations -- especially after specifically representing that it would not “raise [a] claim of . . . hardship . . . or difficulty of compliance as grounds for asking the Court to modify” the Final Judgment.

The divestiture mandated by the Final Judgment continues to be workable, as evidenced by the bids Signature received. Signature does not argue that the divestiture cannot be accomplished -- just that the price is not to its liking. The public interest that was served by the Final Judgment when it was entered by this Court less than six weeks ago continues to warrant the sale of the former Hawker facility to preserve FBO competition at IND. And in any event, there certainly have not been changed circumstances justifying the extraordinary step of modifying an agreed order submitted to this Court just weeks ago.

B. Signature Will Not Be Irreparably Harmed by the Absence of a Stay

As Signature acknowledges, it received two bids for the former Hawker facility but has not finalized the sale because it is dissatisfied with the bids. Signature’s only damage from

proceeding with the divestiture, or from having a trustee appointed to proceed with the divestiture, is that it will receive less money than it would like. Signature has provided no evidence 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. It will simply make less money.

C. The Public Interest Will Be Harmed by a Stay

Signature argues that the Hold Separate is adequate to protect competition during the duration of the stay. The Hold Separate, however, is designed to preserve competition for a minimal period of time until the divestiture is completed. The Hold Separate is not meant as a replacement for the competition provided by two independent companies. As the U.S. Court of Appeals for the District of Columbia Circuit has noted, serious competitive concerns may arise with the continued use of a hold separate. FTC v. Weyerhaeuser Company, et al., 665 F.2d 1072, 1086 (D.C. Cir. 1981).¹¹

The public interest in competition at IND would be served by a prompt divestiture of Hawker's FBO to an independent firm with the incentive and the ability to compete vigorously with Signature. In contrast, delaying that sale will jeopardize competition at IND and will only benefit Signature's private monetary interest.

¹¹ See also, F.T.C. v. PPG Industries, Inc., 798 F.2d 1500, 1509 (D.C. Cir. 1986); Consolidated Gold Fields, PLC, et al. v. Anglo American Corporation of South Africa Limited, et al., 713 F. Supp 1457, 1466-1468 (S.D.N.Y. 1989); Antitrust Division's Merger Remedy Guidelines at page 29, <http://www.usdoj.gov/atr/public/guidelines/205108.htm>.

CONCLUSION

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

Dated: December 5, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Angela L. Hughes', written over a horizontal line.

Angela L. Hughes (DC Bar #303420)
Michelle Livingston (DC Bar #461268)
Trial Attorneys
U.S. Department of Justice
Antitrust Division
Transportation, Energy, and
Agriculture
450 5th Street, NW; Suite 4100 North
Washington, D.C. 20530
Telephone: 202/307-6410
Facsimile: 202/307-2784
Email: angela.hughes@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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 5, 2008

**ORDER DENYING DEFENDANT SIGNATURE FLIGHT SUPPORT CORPORATION'S
EMERGENCY MOTION TO STAY PENDING DISPOSITION OF ITS MOTION
FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT**

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

SO ORDERED.

Date: _____

RICHARD W. ROBERTS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, I caused a copy of the United States' Memorandum of Points and Authorities in Opposition to Defendant Signature's Emergency Motion to Stay Pending Disposition of its Motion for Partial Relief From and Modification of Judgment and a draft Order Denying said motion to be served on Defendants by electronic mail

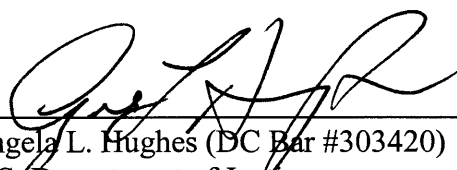
For Defendant Signature Flight Support Corporation

Gordon L. Lang, Esq.
Nixon Peabody LLP
401 9th St. N.W., Suite 900
Washington, D.C. 20004
Telephone: 202/585-8319
Facsimile: 202/585-8080
Email: glang@nixonpeabody.com

For Defendant Hawker Beechcraft Services, Inc.

Richard Park, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202/639-7064
Facsimile: 202/639-7003
Email: richard.park@friedfrank.com

Peter Guryan, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004-1980
Telephone: 212/859-8477
Facsimile: 212/859-4000
Email: peter.guryan@friedfrank.com



Angela L. Hughes (DC Bar #303420)
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4100 - North
Washington, DC 20530
Telephone: (202) 307-6410
Facsimile: (202) 307-2784
Email: angela.hughes@usdoj.gov