UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 20th day of April, 2007

Jet Choice I, LLC

Violations of 49 U.S.C. §§ 41101 and 41712

Docket OST 2007-26781

Served April 20, 2007

CONSENT ORDER

Summary

This consent order concerns unauthorized air transportation operations by Jet Choice I, LLC, (JC1). The company, which represented itself as providing aircraft management services, engaged in unauthorized air transportation aboard aircraft belonging to various leasing companies that were either wholly owned or otherwise controlled by JC1's owner. This order directs JC1 to cease and desist from such future unlawful conduct and assesses JC1 a compromise civil penalty of $250,000.

Applicable Law

Citizens of the United States[1] are required under 49 U.S.C. § 41101 to hold economic authority[2] from the Department, either in the form of a "certificate of public convenience and necessity" or an exemption[3] from the certificate requirement, in order to engage directly or indirectly in air transportation. From the standpoint of the requirements of section 41101, the holding out of service, as well as the actual operation of air service, constitutes

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[1] A "citizen of the United States" includes a partnership each of whose partners is an individual who is a citizen of the United States or a corporation organized in the United States that 1) meets certain specified numerical standards regarding the citizenship of its president, officers and directors, and holders of its voting interest and 2) is under the actual control of citizens of the United States. 49 U.S.C. § 40102(a)(15).

[2] This authority is separate and distinct from any safety authority required by the Federal Aviation Administration.

[3] Exemptions, for example, may take the form of direct air carrier authority as an air taxi pursuant to 14 CFR Part 298 (limited to aircraft originally designed for 60 passenger seats or less) or indirect air carrier authority as an air freight forwarder pursuant to 14 CFR Part 296.

"engaging" in air transportation.[4] "Air transportation" is the transportation of passengers or property by air as a common carrier between two places in the United States or between a place in the United States and a place outside of the United States or the transportation of mail by air.[5] In the context of aviation, a "common carrier" is a person or other entity that, for compensation or hire, holds out and/or provides to the public transportation by air between two points.[6]

A holding out can occur by direct means[7], by indirect means[8], or by reputation[9]. A carrier that limits its holding out and/or provision of air service to a defined class or segment of the public (e.g., country music stars, baseball teams, or high net-worth individuals) is a common carrier nonetheless if it indicates a willingness to serve all within the class.[10] Whether air service is or has been "held out" is determined by an objective analysis of the carrier's conduct rather than by the carrier's characterization of the nature of its operations or by any motive the carrier ascribes to its operations.[11]

Engaging in air transportation without the proper economic authority (i.e., a certificate or an exemption) from the Department violates 49 U.S.C. § 41101. Under Department enforcement case precedent, violations of section 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.[12]

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4 Prior to 1994, when Title 49 of the United States Code was recodified and simplified, 49 U.S.C. § 41101 stated that no carrier could "engage" in air transportation without appropriate authority. Although the wording of section 41101 now states that what is prohibited is "providing" air transportation without authority, Congress made clear when it recodified Title 49 that in doing so it did not intend any substantive change to the statute. Act of July 5, 1994, Pub. L. 103-272, § 6(a), 108 Stat. 745, 1378.

5 49 U.S.C. §§ 40102(a)(5),(a)(23), and (a)(25).

6 *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516, 522-23 (5th Cir. 1993).

7 E.g., *Airmark Aviation, Inc., Violations of 49 U.S.C. § 1371,* Order 92-2-14 (Feb. 11, 1992)(carrier obtained charter customers through a sales presentation given by the carrier's president).

8 E.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2005-3-39 (Mar. 30, 2005)(carrier *inter alia* performed sub-service for direct air carriers that were licensed to engage in air transportation and transported the cargo of an air freight forwarder that was engaging indirectly in air transportation pursuant to 14 CFR Part 296); *IDM Corporate Aviation Services, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2007-2-6 (Feb. 5, 2007)(carrier provided lift to customers obtained by an air charter broker acting as the carrier's agent).

9 E.g., *Principal Air Services, LLC, and David C. Bernstein, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2006-7-13 (Jul. 11, 2006)(by serving a number of customers, carrier engaged in a course of conduct that evinced a willingness to provide passenger air transportation to the public); see also *Southeast Airlines, Enforcement Proceeding,* 32 C.A.B. 1281, 1285 (1961) citing *Transocean Air Lines, Inc., Enforcement Proceeding,* 11 C.A.B. 350, 353 (1950).

10 *Woolsey,* 993 F.2d at 524 n.24; *Intercontinental, U.S., Inc., Enforcement Proceeding,* 41 C.A.B. 583, 601 (1965).

11 *Southeast Airlines,* 32 C.A.B. at 1285; *M & R Investment Co., Inc.,*33 C.A.B. 1, 14 (1961).

12 E.g., *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2003-12-23 (Dec. 29, 2003).

Background

JC1 is a citizen of the United States for aviation licensing purposes. It is also a Minnesota limited liability company that was organized on January 13, 2003, and specializes in aircraft management services. JC1 has never owned or leased any aircraft in its own right. Since its inception, JC1 has been wholly owned by the same individual. Also on January 13, 2003, a second Minnesota limited liability company, Jet Choice II (JC2), was organized. At that time, it, too, was wholly owned by the same individual who owned and continues to own JC1. JC2, which has no employees, leases, through its agent, JC1, (see discussion of the JC1/JC2 management agreement, below) seven Dassualt Falcon aircraft from nine separate aircraft holding companies, each of which owns either an undivided or a half-share in one aircraft. Five of the aircraft holding companies are ultimately 100% owned by the owner of JC1. Together, these five companies[13] own a whole or a part stake in six of the seven aircraft that JC2 leases. Prior to November 2006, neither, JC1, its owner, JC2, nor any of the aforementioned aircraft holding companies held effective economic authority from the Department to engage in air transportation.[14]

JC1 and JC2 entered into a management agreement that was signed for JC1 by its owner in his capacity as JC1's president and for JC2 by the same individual in his capacity as JC2's president. (At the time, this individual held a 100% ownership stake in both companies and served as the sole governor on JC2's board of governors.) The nature of the agreement was such that it gave JC1 plenipotentiary power over JC2. For example, JC1 agreed to provide JC2 with "key executives to serve as managers of [JC2] to oversee all of the day-to-day finances and operations of the company… ." The agreement *inter alia* empowered certain JC1 employees deemed "key executives" to enter into "any and all contracts" on behalf of JC2 relating to the purchase, sale, or lease of aircraft by JC2, to "employ, schedule, and provide" flight crews for any aircraft owned or leased by JC2, to arrange for the "hangaring, maintenance, and insurance" of these aircraft, to market and sell "Membership Units" in JC2, to determine the "appropriate purchase price" for said units, and to "directly bill and collect hourly usage, monthly service, and incidental fees" from JC2 members. The management agreement also specified that JC2 would "retain operational control as well as possession, command, and control of all aircraft," rather than JC2's members in their individual or personal capacities.

In return for JC1's services pursuant to the management agreement, JC2 agreed to pay JC1 "all hourly usage, monthly service and incidental fees collected from [JC2's] Members" that

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[13] Minnesota Choice Aviation, Inc., (owns 100% of one Falcon 10); Minnesota Choice Aviation II, LLC, (owns 100% of one Falcon 50); Minnesota Choice Aviation III, LLC, (owns 100% of one Falcon 900); Minnesota Choice Aviation IV, LLC, (shares ownership of one Falcon 50 with another otherwise unrelated company); and Minnesota Choice Aviation V, LLC, (shares ownership of one Falcon 20 and one Falcon 50 with two otherwise unrelated companies).

[14] On June 2, 2005, JC1 registered with the Department as an air taxi pursuant to 14 CFR Part 298. On November 2, 2006, JC1 received an Air Carrier Certificate and 14 CFR Part 135 Operations Specifications from the FAA. A carrier's DOT economic authority does not become effective until the carrier also receives effective FAA safety authority for the type of operations proposed.

remained after JC2 paid the rent on its leases with the nine aforementioned aircraft holding companies. JC1 does not provide aircraft management services to any company other than JC2 and JC1 has no operating revenue other than that which it collects from JC2 or receives directly from JC2's members.

In the execution of JC1's marketing responsibilities pursuant to the JC1-JC2 management agreement, JC1 arranged sponsorships of public events, including a golf tournament and a charity auction, at which air services under the name "Jet Choice" were offered. JC1 also sought prospective customers for partially refundable "membership units" in JC2 through a "Jet Choice" Internet website and through brochures touting, *inter alia*, "the benefits associated with owning your own plane without all of the hassles [of owning your own aircraft]." Since then, JC2's membership has grown to include a number of high net-worth individuals and various companies, at least one of which is a major professional sports franchise.

To obtain a "membership unit" in JC2, prospective members needed only to make a "capital contribution" that entitled them, depending on the amount of their payment, to 50, 100, 150, or 200 "annual hours" on one of the various Falcon aircraft leased by JC2. Prospective members could also have purchased fractions of membership units. The only requirements for membership were the ability to pay the "capital contribution" and a willingness to otherwise abide by the terms of the membership agreement.

Upon acquiring a membership unit, new members were required to pay directly to JC1 a mandatory "monthly service fee" and an "hourly pilot fee" based on actual flight hours used. Purchase of a whole or a fraction of a "membership unit" in JC2 did not confer an ownership or leasehold interest *in an aircraft* (those interests were retained ultimately by the owner of JC1 and the other owners of the aircraft holding companies), but rather merely the *right to travel* on-board an aircraft for a specified number of hours per year.[15]

Conclusion

We conclude that JC1 held out and provided air transportation without economic authority in violation of 49 U.S.C. §§ 41101 and 41712. In simple terms, JC1, utilizing JC2 and the various commonly owned and/or controlled aircraft holding companies provided air transportation to the members of JC2.

Where more than one person or entity are involved in providing the elements of air transportation, we examine the relationship between the parties, with particular focus on the *indicia* of common control or coordination of action.[16] In the instant case, the sources of the

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[15] We note that the relationship between JC2's members and JC2 appears to incorporate certain fundamental characteristics of a fractional ownership program without meeting all of the requirements applicable to such operations as set forth in 14 CFR 91.1001, *et seq*. This issue and whether, as a practical matter, JC1, JC2, JC2's members in their individual capacities, or some other entity exercised operational control over the flights carrying JC2's members are matters falling under the purview of the Federal Aviation Administration.

[16] E.g., *Agro Air Associates, Inc. and Trans International Crew Leasing, Inc., Violations of Section 401 of the Federal Aviation Act Enforcement Proceeding,* Order 91-2-6 (Feb. 7, 1991)(related companies, both of which lacked economic authority, acted jointly in order to provide pilots and aircraft for common

pilots, aircraft, and support services were commonly controlled. With respect to the one aircraft used that was not wholly or partially owned by the owner of JC1, its use was nonetheless indirectly controlled through the JC1-JC2 management agreement. We note that JC2 has no employees and that the "key personnel" of JC1 were vested with plenipotentiary powers to enter into "any and all contracts" on behalf of JC2, including all aircraft leases. Thus, JC1 controlled every component of the transportation services that JC2's members consumed, including the aircraft on which they traveled. Accordingly, JC1 was an air carrier.

On the question of whether JC1 held out air transportation to the public, its solicitations at various public events unambiguously constituted a direct holding out to the public of air transportation, as did the advertisement of JC2 "membership units" by JC1 on the Internet and through brochures. The fact that JC2's membership may have been drawn solely from wealthy individuals and companies is immaterial to our analysis, as a carrier's status as a common carrier is not altered by the fact that it limits its marketing and services to a class or segment of the general public. Moreover, even if it did not directly hold out, JC1 transported a large number of entities, i.e., JC2's members, thereby engaging in a course of conduct that evinced a willingness to provide passenger air transportation to the public and, as such, constituted a holding out of common carriage via reputation. Although JC1 has argued that it did not hold out via reputation (or in any other manner), the number of customers that JC1 served far exceeds any reasonable interpretation of the boundaries of private carriage for hire under relevant precedent.[17]

Mitigation

JC1 notes that, throughout this matter, it has cooperated with the Office of Aviation Enforcement and Proceedings (Enforcement Office). JC1 states that any violation of the Department's economic licensing requirement was inadvertent and that there is no evidence suggesting that JC1 engaged in deliberate or evasive conduct in an effort to circumvent government regulations. JC1 points out that, prior to the Department's investigation, it had applied for an air taxi registration pursuant to 14 CFR Part 298 and had begun the process of obtaining the requisite safety authority from the Federal Aviation Administration. Moreover, after being contacted by the government regarding possible legal problems with the operations of JC1 and JC2, JC1 states that, for a period of time, all flights for JC2

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carriage operations in a manner tantamount to a wet lease, thereby violating the licensing requirement of section 401 of the Federal Aviation Act, now recodified as 49 U.S.C. § 41101).

[17] In what it termed "a close one," the Civil Aeronautics Board (CAB), which held jurisdiction over aviation economic licensing prior to the Department, deemed as private certain air service operations by Part 125 operators Zantop International Airlines (Zantop) and Air Traffic Service Corporation (ATSC) that involved transporting cargo pursuant to contracts with the three major American automobile manufacturers, plus a *de minimus* level of non-automotive related traffic. *Automotive Cargo Investigation*, 70 C.A.B. 1540, 1554 (1976). Aside from the very small number of customers served by Zantop and ATSC, the CAB's decision in this case appeared predicated substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide service equivalent to that needed by the "Big Three." *Id*. at 1553. Today, by contrast, there are numerous duly licensed common carriers with the capability to provide air transportation service similar if not equivalent to that which JC1 provides.

members were performed by third-party licensed Part 135 air taxi operators at the personal expense of JC1's owner.

Decision

The Enforcement Office views seriously the violations of the Department's licensing requirements by Jet Choice I, LLC. After a careful examination of all of the available information, including that provided by the carrier, the Enforcement Office continues to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and Jet Choice I, LLC, have reached a settlement of this matter. Without admitting or denying the violations described herein, Jet Choice I, LLC, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 by engaging in air transportation directly or indirectly, and to the assessment jointly and severally of $250,000 in compromise of potential civil penalties otherwise assessable. Of this total amount, $125,000 shall be paid under the terms described below. The remaining $125,000 shall be suspended for 15 months following the date of issuance of this order and then forgiven, unless Jet Choice I, LLC, violates this order's cease and desist, reporting, or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Jet Choice I, LLC, may be subject to further enforcement action. This compromise is appropriate in view of the nature and extent of the violations in question and serves the public interest. Moreover, it creates a deterrent to future air transportation operations without appropriate economic authority by Jet Choice I, LLC, as well as by other similarly situated entities.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of the order as being in the public interest.

2. We find that Jet Choice I, LLC, violated 49 U.S.C. § 41101, as described above, by engaging in air transportation without appropriate economic authority.

3. We find that by engaging in the conduct described in paragraph 2, above, Jet Choice I, LLC, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

4. We order Jet Choice I, LLC, and all other entities owned or controlled by, or under common ownership with Jet Choice I, LLC, and their successors and assignees to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712.

5. We order Jet Choice I, LLC, to submit to the Office of Aviation Enforcement and Proceedings on the one-year anniversary of the date of issuance of this order a sworn statement from a responsible company official that Jet Choice I, LLC, has not engaged in scheduled passenger operations or operations using large aircraft as defined in 14 CFR Part 298. Said statement shall include a list of the dates, times, and routes of all Jet Choice I, LLC, operations in the preceding 12 months and specifying the aircraft type used to perform those operations.

6. We jointly and severally assess Jet Choice I, LLC, a compromise civil penalty of $250,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of this total amount, $42,000 shall be due and payable on May 16, 2007, $42,000 shall be due and payable on September 16, 2007, and $41,000 shall be due and payable on January 16, 2008. The remaining $125,000 shall be suspended for 15 months following the date of issuance of this order and then forgiven unless Jet Choice I, LLC, violates this order's cease and desist, payment, or reporting provisions, in which case the entire unpaid amount shall become due and payable immediately and Jet Choice I, LLC, may be subject to additional enforcement action for failure to comply with this order. Failure to pay the penalty as ordered shall also subject Jet Choice I, LLC, to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order.

7. We order Jet Choice I, LLC, to pay the compromise civil penalty assessed in ordering paragraph 6, above, by wire transfers through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfers shall be executed in accordance with the instructions contained in the Attachment to this order.

This order will become a final order of the Department ten days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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