



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

**Issued by the Department of Transportation
On the Sixth day of November, 2012**

Mauiva, LLC

**Violations of 49 U.S.C. §§ 41101 and 41712
and 14 CFR Part 380**

Docket OST 2012-0002

Served November 6, 2012

CONSENT ORDER

This consent order concerns violations during 2011 and 2012 of the Federal aviation economic licensing statute and of certain consumer protection provisions of the Department of Transportation's Public Charter regulations by Mauiva, LLC, a Public Charter operator. On its website, Mauiva held out service in a manner that could confuse the public into believing it was a direct air carrier, in violation of 49 U.S.C. § 41101. On its website and in Groupon and Living Social advertisements, Mauiva also failed to disclose the name of the direct air carrier operating its charter flights and failed to properly reference its operator-participant contract, in violation of 14 CFR 380.30. In addition, Mauiva failed to properly handle certain charter participant funds in violation of 14 CFR 380.34. These activities constituted unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. This order directs Mauiva to cease and desist from future violations of these statutes and Federal regulations and assesses the carrier a compromise civil penalty of \$50,000.

Applicable Law

I. Economic Authority Requirement

In order to engage directly or indirectly in air transportation, citizens of the United States¹ are required to hold economic authority from the Department pursuant to 49 U.S.C. § 41101, either in the form of a “certificate of public convenience and necessity” or in the form of an exemption from the certificate requirement such as that applicable to indirect air carriers² functioning as Public Charter operators under 14 CFR Part 380. “Air transportation” includes the transportation of passengers or property by air as a common carrier between two states 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.³ In the context of aviation, a “common carrier” is a person or other entity that, for compensation or hire, holds out to and/or provides the public with transportation by air between two points.⁴

An entity that does not have economic authority may not hold out air transportation. Similarly, an entity granted an exemption from the certificate requirement may not hold itself out in a manner that creates the impression that it possesses a certificate of public convenience and necessity. Such conduct would constitute “engaging” in air transportation as a certificated air carrier and would therefore violate 49 U.S.C. § 41101.⁵

In addition, violations of 49 U.S.C. § 41101 constitute violations of 49 U.S.C. § 41712, which prohibits carriers from engaging in unfair and deceptive practices and unfair methods of competition.

¹ A “citizen of the United States” includes a corporation or association organized in the United States that 1) meets certain specified 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 An entity or person who is not a direct air carrier, but who, in his or her own right, solicits members of the public to purchase air transportation is an “indirect air carrier.”

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

⁴ *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516, 522-23 (5th Cir. 1993).

⁵ From the standpoint of the requirements of section 41101, the holding out of air service, as well as the actual operation of air service, constitutes “engaging” in air transportation. 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.

II. Public Charter Regulations

Public Charter operators must comply with 14 CFR Part 380, which is designed to prevent economic harm to charter passengers. This regulation requires Public Charter operators to disclose certain information when advertising their service to the public. In particular, under section 380.30(a), all solicitation materials for a Public Charter, e.g., e-mail solicitations and website advertisements, must include the name of the charter operator and the name of the direct air carrier. Under section 380.30(b), solicitation materials that state a price per passenger must also include either 1) a statement referring to the operator-participant contract for further information about the conditions applicable to the charter, or 2) the full text of the operator-participant contract.

In addition, 14 CFR Part 380 requires Public Charter operators to safeguard charter participants' funds prior to their trips. Specifically, under section 380.34, charter participants' funds must be deposited into an escrow account at a designated depository bank that will maintain a separate accounting for each charter group. One purpose of this requirement is to ensure that passenger funds paid toward a given flight are not used for other flights for which there may be insufficient funds. *See Liberty State Bank v. BankAmerica Nat'l Trust Co.*, 1996 WL 343048 (S.D.N.Y.).

Violations of 14 CFR Part 380 also constitute violations of 49 U.S.C. § 41712, which prohibits carriers from engaging in unfair and deceptive practices and unfair methods of competition.

Facts and Conclusion

Mauiva conducts Public Charter service in the northeastern and western United States, and between Florida and the Caribbean. For a period of time in 2011, Mauiva's website, www.mauivaircruise.com, contained references that could have led consumers to believe that Mauiva was the direct air carrier operating the advertised flights in violation of 49 U.S.C. § 41101. For example, Mauiva referred to "our aircraft" and "our fleet" and provided photos of an aircraft in Mauiva livery. During the same period, Mauiva's website failed to state the name of the direct air carrier operating the advertised flights, thus violating 14 CFR 380.30(a) and adding to consumers' potential confusion as to the operator of the advertised flights.⁶

Until August 2011, the website, which provided per-person prices for the available flights, also failed to reference or provide the text of the applicable operator-participant contract, in violation of 14 CFR 380.30(b). In August 2011, the operator-participant contract was added to the website, but was placed on a page titled "Terms" (subsequently changed to "Terms and Conditions"), which also included the terms and conditions of website use and the website's privacy policy. The Department believes that such placement is misleading because consumers may infer that the "Terms" link leads to a landing page containing only information pertinent to their use of the website, and not the operator-participant contract itself. Because of its opaque placement, the August 2011 posting of the operator-participant contract did not satisfy the notice requirement of 14 CFR 380.30(b).

⁶ The operator-participant contract, which was not posted on Mauiva's website until August 2011, did state the name of the direct air carrier.

In the summer of 2011, Mauiva conducted an advertising campaign through Living Social, which sends solicitations by e-mail to its subscribers. The Living Social e-mails contained details of flights offered by Mauiva, as well as a link to a website that contained further information. The e-mails and the website advertised per-person prices. In violation of 14 CFR 380.30(a), these solicitations did not state the name of the direct air carrier. In violation of 14 CFR 380.30(b), these solicitations did not reference the operator-participant contract.

In January 2012, Mauiva conducted an advertising campaign through Groupon, which sends solicitations by e-mail to its subscribers. The Groupon e-mails contained details of flights offered by Mauiva, as well as a link to a website that contained further information. The e-mails and the website advertised per-person prices. In violation of 14 CFR 380.30(a), these solicitations did not state the name of the direct air carrier. In violation of 14 CFR 380.30(b), these solicitations did not reference the operator-participant contract.

In addition, for a substantial period of time, in violation of 14 CFR 380.34, certain charter participant funds were deposited into Mauiva's operating account rather than its escrow account. The Department takes very seriously this violation because by depositing charter participant funds into an operating account when the use of an escrow account is required, a Public Charter operator places those consumers' funds in jeopardy. An under-funded escrow account could result in charter participants' inability to receive refunds for cancelled flights.

The violations described above also constitute violations of 49 U.S.C. § 41712, which prohibits unfair and deceptive practices and unfair methods of competition.

Mitigation

By way of mitigation and explanation, Mauiva states that it is a new company attempting to bring an innovative product, the "air cruise," to the market. To succeed, Mauiva states that it must make customer satisfaction its highest priority and believes it has done so, as Mauiva is aware of no consumer complaints. Mauiva believes that every Mauiva passenger has received what he or she purchased.

Mauiva states that it is a new company involved in several lines of business. Through its subsidiary Mauiva Airlines LLC, a Part 298 air taxi, Mauiva states that it is in the process of acquiring aircraft and hiring personnel to build up its charter business. According to the company, the aircraft the Department viewed on Mauiva's website is owned by Mauiva Aircraft LLC, operated by Mauiva Airlines, and listed on the latter's DOT air taxi registration and FAA operating authority. Unfortunately Mauiva placed language on its Public Charter (AirCruise) website that it says was more appropriate for its combined corporate website. However, upon receiving an inquiry from the Department, Mauiva states that it immediately modified its Public Charter website to better delineate between its lines of business and made other changes to address the Department's concerns.

Further, in the course of analyzing its records to respond to the Department's inquiry, Mauiva states that it discovered that its credit card merchant bank was inadvertently transferring certain

passenger funds into Mauiva's operating account rather than its Public Charter escrow account. Mauiva states that it immediately contacted the merchant bank and corrected the situation. Additionally, Mauiva states that it immediately transferred from its operating account to the escrow account all passenger funds that should have been deposited there. And, lastly, Mauiva states that it fully disclosed the matter to and has otherwise cooperated with the Department.

Decision

The Department takes compliance with the Federal aviation statutes and regulations very seriously. The Office of Aviation Enforcement and Proceedings (Enforcement Office) has carefully considered the information provided by Mauiva but continues to believe that enforcement action is warranted. While Mauiva neither admits nor denies the violations alleged in this order, the Enforcement Office and Mauiva have reached a settlement of this matter in order to avoid litigation. Mauiva consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Part 380, and to the assessment of \$50,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the Department's advertisement requirements.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Mauiva, LLC, violated 14 CFR 380.30(a) by failing to disclose the name of its direct air carrier in its advertisements;
3. We find that Mauiva, LLC, violated 14 CFR 380.30(b) by failing to make reference to its operator-participant contract in advertisements that included per-passenger prices;
4. We find that Mauiva, LLC, violated 14 CFR 380.34 by failing to deposit charter participant funds into an escrow account;
5. We find that Mauiva, LLC, violated 49 U.S.C. § 41101 by holding itself out as a direct air carrier;
6. We find that by violating 14 CFR Part 380 and 49 U.S.C. § 41101, as described in ordering paragraphs 2, 3, 4, and 5, above, Mauiva, LLC, engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;

7. We order Mauiva, LLC, and all other entities owned or controlled by, or under common ownership and control with Mauiva, LLC, and its successors, affiliates, and assignees, to cease and desist from future violations of 49 U.S.C. § 41101 and 14 CFR 380.30 and 380.34. Failure to comply with this cease and desist provision shall subject Mauiva, LLC, and its successors, affiliates, and assignees to further enforcement action;
8. We assess Mauiva, LLC, \$50,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2, 3, 4, 5, and 6, above. Of this penalty amount, \$8,500 shall be due and payable within 30 days of the date of issuance of this order; \$8,500 shall be due and payable within 60 days of the date of issuance of this order; and \$8,000 shall be due and payable within 90 days of the date of issuance of this order. The remaining portion of the civil penalty amount, \$25,000, shall become due and payable if, within one year of the date of issuance of this order, Mauiva, LLC, violates this order's cease and desist provisions or fails to comply with this order's payment provisions, in which case Mauiva, LLC, may become subject to additional enforcement action for violation of the order; and
9. We order Mauiva, LLC, to pay the penalty through Pay.gov to the account of the U.S. Treasury. Payment shall be made in accordance with the instructions contained in the attachment to this order. Failure to pay the compromise penalty assessment as ordered shall subject Mauiva, LLC, to an assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with 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:

SAMUEL PODBERESKY

Assistant General Counsel for
Aviation Enforcement and Proceedings

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