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

Issued by the Department of Transportation
On the 1st day of December 2005

Darby Aviation, Inc., d/b/a AlphaJet International

Violations of 49 U.S.C. § 41712

Docket OST 2005-20077

Served December 1, 2005

CONSENT ORDER

This consent order concerns violations by Darby Aviation, Inc., d/b/a AlphaJet International (Darby) of 49 U.S.C. § 41712, which prohibits air carriers from engaging in unfair and deceptive practices and unfair methods of competition. Darby entered into an arrangement with Platinum Jet Management, Inc., (Platinum) in which Darby allowed its Departmental economic authority to engage in air transportation to be exercised by Platinum, which the latter used as a façade to deceive consumers while engaging in air transportation as a direct air carrier without economic authority of its own.[1] By so doing, Darby facilitated Platinum's unlawful conduct and, thereby, itself engaged in an unfair and deceptive practice and unfair method of competition. Accordingly, this order directs Darby to cease and desist from such conduct and assesses it a compromise civil penalty $60,000.

Citizens of the United States[2] that engage directly or indirectly in air transportation[3] are required to hold economic authority from the Department under 49 U.S.C. § 41101, or an

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[1] Platinum's conduct in this matter is currently the subject of a separate investigation.

[2] A "citizen of the United States" includes a corporation 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).

[3] 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

exemption from that provision, such as those applicable to direct air carriers operating as air taxis under 14 CFR Part 298 or to indirect air carriers functioning as public charter operators pursuant to 14 CFR Part 380 or air freight forwarders under 14 CFR Part 296.

Darby is a direct air carrier that, at all times relevant to this order, held economic authority in the form of an air taxi registration under 14 CFR Part 298, together with safety certification from the Federal Aviation Administration (FAA) under 14 CFR Part 135. At least as early as November 2003, Darby entered into three separate charter management agreements (CMAs) with Platinum, the lessee of three Canadair Challenger aircraft. Under the CMAs, in return for monthly "certificate fees" of several thousand dollars, Darby placed on its FAA Part 135 operations specifications Platinum's three Challenger aircraft. Although Platinum did not possess economic authority in its own right to hold out or to provide, directly or indirectly, air transportation aboard these or any other aircraft, Platinum engaged in significant direct air carrier service facilitated under the three CMAs with Darby.[4]

Although the CMAs gave Darby the power to market and operate Platinum's aircraft for third-party charters, in practice, Darby permitted Platinum to perform these functions for itself independently of Darby, leading the Office of Aviation Enforcement and Proceedings (Enforcement Office) to conclude that Darby's activities under the CMAs chiefly comprised the collection of the monthly certificate rental fees. Clothed in Darby's operating authority, Platinum held itself out as the licensed operator of single-entity charter air transportation aboard the Challenger aircraft and, as a principal in its own right, entered into numerous contracts with charterers to provide such transportation. Moreover, a review of Platinum's conduct in fulfilling those contracts shows that it, rather than Darby, was the actual operator of the flights.[5]

The nature of Platinum's and Darby's activities became known during government investigations that followed the crash on take-off of one of Platinum's Challenger aircraft at Teterboro, New Jersey, on February 2, 2005. The accident flight, which purportedly was under Darby's operational control, was conducted without Darby's knowledge for a charterer that had contracted with Platinum under the reasonable expectation of receiving

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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.

[4] On May 26, 2005, the National Transportation Safety Board (NTSB) affirmed a March 23, 2005, FAA emergency order suspending Darby's Part 135 air carrier certificate on the grounds that Darby failed to maintain operational control of the aircraft that it ostensibly managed for Platinum. *Administrator v. Darby Aviation d/b/a AlphaJet* NTSB Order EA-5159. As of this date, the suspension has been lifted for air taxi operations with aircraft located at Darby's principal base of operations.

[5] For example, Platinum hired, employed, trained, and dispatched all of the pilots and flight attendants used aboard the flights that it had sold on its aircraft; Platinum performed or arranged and paid for the maintenance of the aircraft; Platinum kept the maintenance records on the aircraft; and Platinum provided scheduling and flight following for the aircraft. *Administrator v. Darby Aviation d/b/a AlphaJet* NTSB Order EA-5159.

the protections afforded consumers traveling on duly licensed air carriers—an erroneous belief enabled, in part, by Darby's conduct.[6]

In isolation, Platinum's behavior would have been extremely serious because it amounted to engaging in air transportation without a license. However, Platinum's behavior was particularly pernicious because it was done under the guise of lawful authority, a condition that would have been impossible without Darby's involvement. Thus, Darby bears some responsibility for Platinum's conduct. As a practical matter, Darby should have maintained operational control over the aircraft on its operations specifications to the satisfaction of the FAA and should have taken reasonable measures to prevent Platinum from engaging in air transportation without the requisite Departmental economic authority. Instead, Darby facilitated Platinum's unlawful conduct and, thereby, itself engaged in an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.[7]

In mitigation, Darby has assured the Enforcement Office that it has always enjoyed an excellent reputation for regulatory compliance, particularly in reference to the Birmingham FAA Flight Standards District Office (FSDO), which monitored Darby's day-to-day activities. Darby asserts that it did not enter into its initial arrangement with Platinum with the intent of facilitating unlawful conduct on the part of Platinum and it states that the addition of the Platinum aircraft to its operations specifications was approved by its FSDO.[8] Furthermore, Darby states that, based on contacts with its FSDO, it believed that it had taken the necessary and reasonable steps to ensure that Platinum would not be considered to be engaged in unauthorized operations. In this latter regard, Darby points out that, until such time as the Enforcement Office brought these matters to its attention, Darby's contact with DOT's Office of the Secretary had been limited to registering under Part 298. Darby states that it was unaware of the Department's regulatory jurisdiction in this area and the Department's position that Darby's relationship with Platinum could make Darby responsible for Platinum's conduct. Under these circumstances, Darby believes that it was not unreasonable to assume that the arrangement with Platinum, which appeared to Darby to satisfy the Birmingham FAA FSDO, would not run afoul of any Departmental requirement.

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[6] The Enforcement Office has been advised of civil litigation naming Platinum, Darby, and others arising out of the February 2, 2005, flight; Darby is defending that action. The Enforcement Office has also been advised that Darby has initiated a civil action against Platinum. We do not intend here to attempt to resolve these disputes or any other civil disputes arising out of the February 2, 2005, flight or Darby's relationship with Platinum.

[7] See, e.g., *Blue Moon Aviation, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-11-4 (Nov. 12, 2004) and *Frontier Airlines, Inc., Violations of 49 U.S.C § 41712 and 14 CFR Part 212*, Order 2004-8-19 (Aug. 18, 2004) (unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712 found where arrangement between a direct air carrier and non-air carrier entity marketing air transportation to the public was such that direct air carrier knew or should have known of the unlicensed entity's unlawful conduct.)

[8] The Enforcement Office has no evidence that Darby intentionally violated the economic requirements that are the subject of this order.

Also, after being contacted by the Enforcement Office, Darby states that it consulted with counsel, met in person with the Department to present the company's position and cooperated fully with the Enforcement Office's investigation of this matter. According to Darby, the costs associated with these efforts have been substantial. Moreover, as part of its response to the Enforcement Office, Darby claims that it did not profit from its arrangement with Platinum and, over the most recent three years, that it has suffered losses in connection with its air taxi operations. Darby requested the Enforcement Office to take these circumstances into account in arriving at this settlement.

The Enforcement Office has carefully considered all of the information provided by Darby, but continues to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and Darby have reached a settlement of this matter. Without admitting or denying the violations described above, Darby agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and to the assessment of $60,000 in compromise of potential civil penalties otherwise assessable. Of this amount, $30,000 shall be paid under the terms described below. The remaining $30,000 shall be suspended for 12 months following the service date of this order and then forgiven unless Darby violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately, and Darby may be subject to additional enforcement action. The Enforcement Office believes that this compromise assessment is appropriate in view of the nature and extent of the violations in question, serves the public interest, and establishes a deterrent to future similar unlawful operations by carriers in their arrangements with entities that lack appropriate economic authority that involve the sale of air transportation.

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 Darby Aviation, Inc., d/b/a AlphaJet International by facilitating unauthorized operations by Platinum Jet Management, Inc., as described above, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

3. We order Darby Aviation, Inc., d/b/a AlphaJet International and all other entities owned and controlled by or under common ownership and control with Darby Aviation, Inc., d/b/a AlphaJet International, and their successors and assignees to cease and desist from further similar violations of 49 U.S.C. § 41712;

4. We assess Darby Aviation, Inc., d/b/a AlphaJet International a compromise civil penalty of $60,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraph 2, above. Of this amount, $5,000 shall be due and payable on January 1, 2006, March 1, 2006, May 1, 2006, July 1, 2006, September 1, 2006, and November 1, 2006. The remaining $30,000 shall be suspended for 12 months after the service date of this order, and then forgiven unless Darby violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Darby may be subject to additional enforcement action. Failure to pay this penalty as ordered shall also subject Darby to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and

5. We order Darby Aviation, Inc., d/b/a AlphaJet International to pay the compromise civil penalty assessed in ordering paragraph 4 above, in accordance with the schedule of payments in that paragraph. Said payments shall be made by wire transfer 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. Failure to pay the penalty as ordered shall subject Darby Aviation, Inc., d/b/a AlphaJet International, 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.

This order will become a final order of the Department 10 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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