

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-20864-CR-SCOLA
15 U.S.C. § 1

UNITED STATES OF AMERICA

v.

FLORIDA WEST INTERNATIONAL AIRWAYS, INC.,

Defendant.

**FLORIDA WEST'S RESPONSE TO GOVERNMENT'S
MOTION FOR CLARIFICATION**

Florida West International Airways, Inc. ("FWIA" or "Company") respectfully replies to the Government's "Motion for Clarification" filed late on Tuesday night. As this Court is well aware, the government has made clear that it reflexively opposes both the Company's motion to enter a *nolo* plea, as well as this Court's indication that it is inclined to grant the motion. It should therefore come as little surprise that the government's "clarification" motion seeks to manufacture issues where none exist and raise issues that have nothing to do with the motion and relate instead to sentencing.

Furthermore, it is improper and inaccurate for the government to cast aspersions on the Company's financial records, an issue that has nothing to do with the *nolo* plea. The fact that the government is upset that the Court has indicated its inclination to grant the *nolo* plea provides no basis for the government to lash out at the Company with claims of "irregularities" in an apparent attempt to "poison the well" before the sentencing process.

To be clear, FWIA has provided the government with the exact documentation and information about the Company's financial condition that the government said it wanted. In

addition, the Company has gone far beyond what was discussed with the Court at the June 1st hearing. It has provided written answers to questions the government has raised and it made the Company's CEO and CFO available last month for a telephone conference of more than one hour at which they answered questions from the government's accountant in full. Furthermore, the accountant confirmed on that call that he had all the documents he needed.

Despite this extensive cooperation, and the Court's admonition that it expected the government to act in "good faith and try to come up with a reasonable number,"¹ it is readily apparent now that no answers the Company can provide will satisfy the government. At this late stage, enough is enough. This case should proceed to the sentencing phase. The Company is prepared to provide the probation office with the exact same documents and information it has provided to the government. The Company has no doubt that an independent body with no axe to grind will have little difficulty in providing the Court with an accurate assessment of the Company's financial condition to aid it at sentencing. As the Court has recognized, the sentencing process also will allow the parties to argue mitigating or aggravating factors and allow the Court to reach its own determination as to the appropriate sentence.²

The Company responds briefly to two points raised in the government's motion.

Corporate Resolution

On July 3rd, this Court issued an Order requiring FWIA to "file a corporate resolution authorizing corporate change of plea." (Dkt. 268). The Company did exactly that three days later filing a corporate resolution permitting the company's counsel to enter the plea of *nolo contendere*. (Dkt. 269). The government, however, now takes the position in its Motion that more is required before *this* Court can accept the *nolo* plea.

¹ See June 1 Hearing Transcript at 37.

² See *id.* at 37-38.

FWIA notes that the Court itself has raised no objections or suggested that the Company's filing fails to satisfy its Order and believes that the resolution it submitted is sufficient. It is often the case that counsel enters the plea on behalf of a corporation for a corporate entity.³ Regardless, the Company attaches a second corporate resolution authorizing its CEO to enter the *nolo* plea next Monday. *See* Exhibit. 1. This disposes of the government's attempt to manufacture an issue where none exists.

Financial Records

When the issue of financial records was raised with the Court at the June 1st hearing, it was in the context of providing updates of company financial information of the type the government had received previously. Indeed, the Court specifically referenced it as "updates basically" and the government did not state anything to the contrary. *Tr.* at 36. Since that time, the Company not only has provided detailed financial documentation and information about the Company's financial condition, but gone further. To be clear:

- On June 2nd, the government forwarded a list of requested documents.⁴ The company produced a five inch binder of the requested documents on June 6th⁵ to the extent they existed.⁶
- On June 8th, the government sent a letter including 20 written questions which the Company answered by letter of June 12th.

³ For example, the ABA Guidelines provide that "[a] plea of guilty or *nolo contendere* should be received only from the defendant personally in open court, **except when the defendant is a corporation, in which case the plea may be entered, with due corporate authorization, by counsel or a corporate officer.** *See* ABA Criminal Justice Guidelines Standard 14-1.1 (emphasis added) (available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blkold.html).

⁴ This is the same list that the government attached as Exhibit 1 to its filing.

⁵ A single page of 2010 information was provided to the government six days later, but this had no material impact on assessing the Company's current financial condition.

⁶ For example, the government sought a copy of the Company's general ledger for the years 2010, 2011 and through May 2012. At the time, the Company only had such records available through March 2012, and so it produced 27 months worth of general ledger records. In addition, the Company produced a copy of its 2010 tax return, but previously had obtained an extension to file its 2011 tax return until September and therefore did not have that available. Finally, the government sought "forecasts" for future years. The Company simply does not operate in this fashion as it is a small business with a single customer and therefore operating in great economic uncertainty.

- On June 22nd, the Company arranged a conference call at the government's request at which the Company's CEO and CFO were available to be interviewed by the government's accountant. At the conclusion of the more than one hour call, the government's accountant said he had no further questions and that he had all the documents he needed for the government's evaluation.⁷
- Since June 22nd, the Company has provided additional responses to yet further government questions.

Despite this extensive cooperation that has gone far beyond what the Court both ordered, and likely envisioned, the government is never satisfied. Since first providing the records on June 6th, the government's three lawyers handling this matter have sent almost 10 letters, raising questions that frequently have nothing to do with the Company's current financial condition in July 2012 or indeed that reflect an understanding of the Company's business. FWIA is a small business with fewer than ten administrative staff. It is dependent upon one main customer which brings inherent uncertainty of its future prospects that is only compounded by the weak economy. To expect the Company to have detailed future budgets and forecasts misapprehends the nature of the business.

Again, the Company is prepared to provide the probation office with the exact same information and access to company executives that it has provided to the government. The Company believes that an independent party will be able to provide this Court with an assessment of the Company's financial condition to aid it at sentencing. This Court said at the June 1st hearing about sentencing that it was "not going to make a protracted proceeding." Tr. at 38. FWIA agrees. The parties know the issues relevant to the sentencing process and should discuss at next Monday's hearing how to move to prompt resolution of this matter.

⁷ Although the government and its accountant claim that he provides "independent" analysis, the Company has serious questions about the accountant's independence in light of certain facts discovered in the public record. The Company has advised the government of its concerns in a letter, but has yet to receive a written response.

DATED: This 18th day of July, 2012.

Respectfully submitted,

/s/ Kirby D. Behre

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2012, the foregoing was filed electronically using the ECF system.

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