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.
_____/

GOVERNMENT'S OPPOSITION TO DEFENDANT FLORIDA WEST'S MOTION TO ENTER A PLEA OF *NOLO CONTENDERE*

The government strongly opposes the motion of defendant Florida West International Airways, Inc. ("Florida West" or "defendant") for the Court's consent to enter a *nolo contendere* plea under Fed. R. Crim. P. 11(a)(3). D.E. 249 ("Defendant's Motion"). As set forth below, this request for judicial blessing of a special windfall in the criminal justice process is rare in criminal antitrust cases, would be unfair to more than twenty corporations that have already pled guilty in the air cargo investigation and been sentenced to pay substantial criminal fines, and would be wholly contrary to the public interest in the fair administration of justice. In fact, leniency applicants, who must admit participation in the collusion, cooperate with the government fully, and pay restitution to victims, never have this opportunity. *See* Section I(B) (page 5-7), *infra*.

As with any other corporate antitrust defendant, Florida West should either elect to enter a traditional guilty plea or proceed to the trial it requested. No exceptional circumstances exist to justify a *nolo* plea for this defendant. The criminal justice process can address any of the post-conviction issues raised by Florida West, as it regularly does with other corporate defendants. Florida West offers no basis or circumstance to warrant the special treatment it seeks.

In this investigation, twenty-one airlines have already entered guilty pleas to charges of price fixing in the air cargo and passenger transportation industry. By pleading guilty, each company made a *prima facie* admission of liability that could be used against them in civil damages cases. *See* Section I(B) (page 5-7), *infra*. Florida West, while no differently situated from any legally relevant perspective asks this Court to give it special treatment.

During August 2002 through at least February 14, 2006, Florida West "entered into and participated in a conspiracy to suppress and eliminate competition by fixing and coordinating certain components of cargo rates, including peak season, security, and fuel surcharges, for international air shipments from Colombia to Miami, Florida." Indictment ¶ 8. For several years, Florida West substantially benefitted from its active participation in the price-fixing conspiracy. In fact, Florida West's revenue figures provide a conservative, preliminary estimate that the conspiracy affected at least $75 million of its commerce. *See* Exhibit 1 (Florida West revenues). After reaping these benefits, Florida West now seeks to evade a criminal conviction and its consequences and the trial that it requested.[1] If a *nolo* plea is permitted, it will trivialize and reduce the unlawful conduct to a modest fine and what courts have recognized to be a "slap on the wrist." *See* note 22, *infra*; *see also* note 24, *infra* (discussing the volume of commerce).

If the motion for a *nolo* plea is appropriately denied and the case resolves before trial (by final plea discussions),[2] the traditional plea agreement offers the best way to resolve most, if not all, remaining issues, including a waiver of appeal. In contrast, as shown by cases cited by

[1] *See* Hearing Transcript, at 35:10-25, 45-46, 47-48 (Feb. 10, 2012) (defense counsel suggesting he has a stronger case for trial based on the non-imputation defense and requesting a trial date after September 2012).

[2] As Florida West has noted in other recent briefs, Florida West and the government have already discussed sentencing issues in the context of U.S.S.G. § 8C3.3, which provides a process, as part of a plea agreement or after a trial conviction, to address any issues of its inability to pay that can be supported and established. In fact, at its own expense, the government retained an expert to review and assess Florida West's financial information. However, the information is outdated. Since last year, Florida West has declined government requests to provide updated information. *See* Defendant's Motion Exh. 1 (D.E. 249) (emails summarizing status). At sentencing, Florida West will have to submit sufficient proof to the Court and probation to verify the details about its financial condition.

Florida West, a *nolo contendere* plea agreement may result in more, not less, litigation on contested sentencing and other issues and a likely appeal. Alternatively, the trial requested by Florida West remains the appropriate forum to determine guilt or innocence.

DISCUSSION

I. *Nolo Contendere* Pleas Are Presumptively Disfavored Absent Exceptional Circumstances, Particularly In Antitrust Cases

Pleas of *nolo contendere* "are generally looked upon with disfavor and should be accepted only in the most exceptional circumstances." *United States v. Brighton Bldg. & Maintenance Co.*, 431 F. Supp. 1118, 1121 (N.D. Ill. 1977) (rejecting two *nolo* pleas in criminal antitrust case). This is particularly true in antitrust cases. Since the 1990s, exceedingly few *nolo* pleas have been entered in antitrust cases. *See* page 8-9 and note 20, *infra*.

A *nolo* plea is not the same as a traditional guilty plea, as it avoids many of the consequences of a guilty plea. Instead, it is simply "an appeal for mercy," *Hudson v. United States,* 272 U.S. 451, 454 (1926), or a "prayer for leniency." *North Carolina v. Alford*, 400 U.S. 25, 35-36 n.8 (1970). A *nolo* plea "is an implied admission relevant *only* to the criminal proceeding in which the plea is asserted …. [whereas] a plea of guilty is an express admission against interest and is admissible in any subsequent proceeding." *United States v. Mapco Gas Prods., Inc*., 709 F. Supp 895, 897 (E.D. Ark. 1989) (emphasis added). Consequently, under Fed. R. Crim. P. 11(a)(3), a *nolo* plea should be accepted by the Court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice. Absent a compelling or exceptional reason, a request for a *nolo* plea should be denied.[3] No such reason exists in this case.

[3]*See, e.g., Brighton Bldg. & Maintenance Co.*, 431 F. Supp. at 1121 (no exceptional circumstances and rejecting nolo pleas in criminal antitrust case); *United States v. Faucette*, 223 F. Supp. 199, 202 (S.D.N.Y. 1963) (noting a *nolo* plea "should not be granted in the absence of exceptional circumstances"); *United States v. Chin Doong Art*,

A. Florida West Is Not Entitled To Several Windfall Benefits That Would Result From A *Nolo* Plea

To place its motion in context, Florida West effectively seeks a number of windfall benefits that are not provided to other antitrust corporate defendants, including the twenty-one corporations that already pled guilty and paid significant fines in this investigation. The windfall benefits include (1) avoiding any admission or determination of guilt while retaining the ability to deny participation in the nearly four-year price-fixing conspiracy;[4] (2) barring the introduction of the *nolo* plea in any other criminal or civil proceeding;[5] (3) avoiding any collateral estoppel effects that typically result from a conviction by plea or trial;[6] (4) avoiding the antitrust-specific statutory *prima facie* price-fixing showing,[7] (5) reducing the possibility of treble damages

---

193 F. Supp. 820, 822 (E.D.N.Y. 1961) (in rejecting a *nolo* plea, noting that it may be warranted only when there are truly "exceptional" circumstances present).

[4] As the Supreme Court has noted, "the [*nolo*] plea itself does not constitute a conviction nor hence a 'determination of guilt.' It is only a confession of the well-pleaded facts in the charge." *Lott v. United States*, 367 U.S. 421, 426 (1961); *see also Alford*, 400 U.S. at 35-36 n.8 (1970) (noting "the plea of *nolo contendere* has been viewed *not* as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency") (emphasis added); Fed. R. Evid. 410 Advisory Committee Notes (1972) (noting the "principal traditional characteristic of the *nolo* plea, i.e., *avoiding the admission of guilt* which is inherent in pleas of guilty") (emphasis added).

[5] *See* Fed. R. Crim. P. 11(e)(6) (noting that evidence of "a plea of *nolo contendere*" is "not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions"); Fed. R. Evid. 410(a)(2) ("In a civil or criminal case, evidence of" a *nolo contendere* plea "is not admissible against the defendant who made the plea or participated in the plea discussions"); *see also United States v. Dorman*, 496 F.2d 438, 440 (4th Cir.), *cert. denied*, 419 U.S. 945 (1974) ("[U]nlike a plea of guilty, a plea of *nolo contendere* is not admissible against the defendant in a subsequent civil action."); Fed. R. Evid. 803(22) (noting that while other final judgments of conviction are admissible as an exception to the hearsay rule, a *nolo contendere* plea is not).

[6] *See United States v. Norris*, 281 U.S. 619, 622 (1930) (noting that a *nolo* plea "does not create an estoppel"); *Hudson v. United States*, 272 U.S. 451, 455 (1926) (same); *see also Doherty v. American Motors Corp.*, 728 F.2d 334, 337 (6th Cir. 1984) (a *nolo* plea "does not bind the defendant in a civil action for the same wrong"); *Faucette*, 223 F. Supp. at 202 (noting "one of the principal reasons why the defendant seeks leave to plead *nolo contendere* here is to avoid any estoppel against him"); *see also Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp.*, 487 F.2d 161, 168 n.12 (3rd Cir. 1973) ("We recognize that convictions following pleas of *nolo contendere* are not entitled to the same evidentiary position as convictions following not guilty pleas and that even where violation of the antitrust laws is established, civil plaintiffs must prove that they were injured by the violation."); Note, *Nolo* Pleas in Antitrust Cases, 79 Harv. L. Rev. 1475, 1476 (1966) (noting "a conviction based on a plea of *nolo* may not be used in later civil cases") (hereinafter "*Nolo* Pleas in Antitrust Cases").

[7] Under Section 5 of the Clayton Act, 15 U.S.C. § 16, a final criminal antitrust judgment provides "*prima facie* evidence against" the defendant "in any action or proceeding brought by any other party" and provides "an estoppel

envisioned by Congress;[8] and (6) avoiding adverse corporate publicity from the disclosure of further details about the price-fixing conspiracy in a trial or by admission of guilt.[9] Florida West does not offer any valid reason why it should be granted special treatment over other antitrust defendants. The standard criminal justice process is effectively designed to address all issues raised by Florida West.

B. A *Nolo* Plea Undermines Distinct Antitrust Criminal Enforcement Efforts Including Under The Antitrust Division Corporate Leniency Program

The primary cases cited by the defendant do not involve antitrust cases or were decided years before significant antitrust statutes or enforcement policies were adopted to deter, identify, and punish *per se* unlawful Sherman Act violations.[10] This is significant because congressional

---

as between the parties thereto." This is a unique public policy balance struck by the Congress. *See United States v. David E. Thompson, Inc*., 621 F.2d 1147, 1150 n.4 (1st Cir. 1980) (Section 5 of the Clayton Act "makes a criminal judgment in an antitrust case *prima facie* evidence in a subsequent civil action. Generally, pleas of *nolo* do not have such an effect."); *see also Nolo* Pleas in Antitrust Cases, *supra* note 6, at 1481 ("*Prima facie* evidence of an antitrust violation is of particular importance in price-fixing cases, because of the great difficulty in proving that the defendant conspired to fix prices.").

[8] Under 15 U.S.C. § 15, Congress has determined that private civil actions may result in treble damages. Civil treble damages helps deter the *per se* illegal conduct at issue in this case. *See also United States v. Standard Ultramarine and Color Co.*, 137 F.Supp. 167, 170-72 (S.D.N.Y. 1955) (in rejecting *nolo* plea, noting the prospect of recovering treble damages serves "as a deterrent against a repetition of the offense and to serve as a warning to potential violators" and reviewing the legislative history, noting the congressional determination on the importance of private treble damage cases to augment criminal enforcement and how these policies are undermined by a *nolo* plea).

[9] *Standard Ultramarine*, 137 F.Supp. at 169 (in rejecting a *nolo* plea in an antitrust prosecution, noting the "plea would avoid trial with its attendant expense and adverse publicity in the event of conviction" which was advantageous to the defendant but not in the public interest); *see also Nolo* Pleas in Antitrust Cases, *supra* note 6, at 1477 ("It is, to some extent, face-saving. A corporation may hope to preserve its public image by offering a [*nolo*] plea that most people will not understand at all and that others will consider a settlement that leaves guilt undetermined.").

[10] In fact, many of the defense cases merely note in passing the fact that a *nolo* plea was entered but do not describe the unique circumstances or factors which were presented in the case. *See* Defendant's Motion, at 6-7 (citing *United States v. Goodman*, 850 F.2d 1473, 1474 (11th Cir. 1988) (noting solely the fact that a nolo plea was entered but not the underlying rationale); *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 678 (5th Cir. 1981) (noting solely the procedural fact of *nolo* pleas); *In re J. Ray McDermott & Co.*, 622 F.2d 166, 168 (5th Cir. 1980) (same, considering whether to disclose grand jury materials to a federal agency); *In re South Central States Bakery Prods. Antitrust Litig.*, 462 F. Supp. 388, 389 (J.P.M.L. 1978) (per curiam) (same, considering whether to transfer six civil antitrust cases); *Massachusetts v. First Nat. Supermarkets, Inc.*, 116 F.R.D. 357, 358 (D. Mass. 1987) (same); *In re Corrugated Container Antitrust Litigation, M.D.L.* 310 (Opt-Out Cases), 1981 WL 2136, at *1 (S.D. Tex. Apr. 15, 1981) (same); *In re Admission Tickets*, 302 F. Supp. 1339, 1341 (J.P.M.L. 1969) (per curiam) (same)).

objectives and enforcement policy goals unique to the antitrust laws are not considered in the defense cases.[11] A *nolo* plea in this case would undermine these carefully balanced policies adopted over the past few decades.

In particular, a *nolo* plea would undermine the enforcement objectives of the Antitrust Division's Corporate Leniency Program that encourage self-reporting of anti-competitive conduct and punish wrongdoers. Under this program, the first corporate conspirator that self-reports an antitrust crime and cooperates fully and truthfully with the government in its investigation may avoid prosecution but remains subject to other potential civil consequences.

The program has been effective in identifying otherwise secret conspiratorial conduct. For example, since the current version of the Leniency Program was implemented in August 1993, the Antitrust Division has seen a nearly twenty-fold increase in leniency applications. More than $5 billion in criminal fines have been collected from corporate defendants since FY1996 through early 2010, and over 90 percent of this figure is tied to investigations assisted by leniency applicants.[12]

The policy is carefully designed to impose heightened fear of detection, transparency in enforcement policies, and severe sanctions.[13] The Corporate Leniency Program has become a

---

[11] Other courts have noted the significance of several of these antitrust policies. *See generally Mapco Gas Prods., Inc.*, 709 F. Supp at 899 (rejecting *nolo* plea in antitrust prosecution); *United States v. B. Manischewitz Co.*, 1990 WL 86441 at *7-*8 (D. N.J. 1990) (same); *United States v. Yonkers Contracting Co.*, Inc., 697 F.Supp. 779, 784 (S.D.N.Y. 1988) (same); *United States v. H & M, Inc.*, 565 F. Supp. 1, 3 (M.D. Pa. 1982) (same); *Brighton Bldg. & Maintenance Co.*, 431 F. Supp. at 1121 (same); *United States v. Binney & Smith, Inc.*, 1980 WL 1988 (N.D.OH 1980) (same); *Standard Ultramarine*, 137 F. Supp. At 172 (same); *see also Brighton Bldg. & Maintenance Co.*, 431 F. Supp. at 1119-22 (same). Even these cases rejecting *nolo* pleas in antitrust cases were decided before the Corporate Leniency Program in 1993.

[12] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," at 3, at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010) (hereinafter "The Evolution of Criminal Antitrust Enforcement"), available at http://www.justice.gov/atr/public/speeches/255515.pdf.

[13] *See generally* Frequently Asked Questions Regarding The Antitrust Division's Leniency Program And Model Leniency Letters (November 19, 2008), available at: http://www.justice.gov/atr/public/criminal/239583.pdf. The

model for cartel enforcement agencies around the world. Florida West did not avail itself of this program.

To allow Florida West now to enter a *nolo* plea and potentially be rewarded with a better result than amnesty applicants are afforded under the program – which requires admission of participating in the collusion, payment of restitution, cooperation in the investigation and often at their own great expense – would not only be highly inequitable, but also undermine the Corporate Leniency Program, considered the Division's "most effective investigative tool."[14]

II. Relevant Public Interest Factors Strongly Militate Against A *Nolo* Plea

In this case, several relevant public interest factors strongly militate against allowing Florida West to enter a *nolo* plea. These factors include: (A) the serious nature of the *per se* unlawful antitrust offense charged; (B) the underlying facts and duration of the charged conduct; (C) other antitrust violations committed by the defendant; (D) the effect a *nolo* plea would have in undermining deterrence and respect for the law; and (E) the views and policy of the Department of Justice opposing this and other *nolo* pleas. Additionally, none of the factors relied upon by Florida West ultimately support a *nolo* plea.

A. The Serious Nature Of The *Per Se* Unlawful Antitrust Offense Charged

The serious nature of the antitrust offense charged strongly militates against permitting a *nolo* plea.[15] The charged price-fixing violation, under Section One of the Sherman Antitrust Act, 15 U.S.C. § 1, is well-recognized as *per se* unlawful because of its "pernicious effect on

---

policy of the Antitrust Division is to maintain strict confidentiality as to the identity of leniency applicants and recipients.

[14] The Evolution of Criminal Antitrust Enforcement, at 3, note 12 *supra*.

[15] *See, e.g., H & M, Inc.*, 565 F. Supp. at 3; *Manischewitz Co.*, 1990 WL 86441 at *3; *Standard Ultramarine*, 137 F.Supp. at 172 (in rejecting *nolo* plea, in considering "the nature of the claimed violations," noting the price-fixing conspiracy was "a *per se* violation, deemed one of the more serious infractions of the law").

competition and lack of any redeeming virtue."[16] Consequently, because of the adverse and harsh impact of price-fixing on competition and consumers, justification evidence is inadmissible at trial and sentencing.[17]

Congress enacted the Sherman Act to promote competition, protect consumers, and punish and deter *per se* unlawful conduct such as the price fixing in this case. Since 1890, the antitrust laws reflect a unique balance of public policy interests to promote criminal enforcement in conjunction with civil private actions resulting in damages. Congress has encouraged the use of a criminal antitrust conviction to establish a *prima facie* showing of a price-fixing violation and civil actions seeking treble damages. *See* notes 7-8, *supra*. As part of this enforcement trend, Congress has increased the penalties and consequences of violations. In 1974, Congress elevated Sherman Act convictions from misdemeanors to felonies.[18] In 2004, Congress increased the maximum corporate fine for antitrust corporate defendants from $10 million to $100 million.[19] A *nolo* plea would undermine these finely balanced public policies.

Over the past few decades, *nolo* pleas are virtually non-existent in antitrust cases. The defense implicitly acknowledges the rarity of antitrust *nolo* pleas, as the most recent antitrust

[16] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" including "price fixing, division of markets," and bid rigging); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

[17] *See, e.g., Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 647 (1980) ("It is no excuse that the prices fixed are themselves reasonable"); U.S.S.G. § 2R1.1 cmt. Background (noting price-fixing agreements are "so plainly anticompetitive that they have been recognized as illegal *per se*, i.e., without any inquiry in individual cases as to their actual competitive effect").

[18] *See* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (establishing violations of the Sherman Act as felonies, increasing the maximum fine to $1 million for corporations and $100,000 for individuals, and increasing the maximum period of incarceration term from one to three years).

[19] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 665-66, 668 (2004).

case it cites was charged twenty years ago.[20] The government has identified only one antitrust case since 2000 that resulted in a *nolo* plea, which is unique and readily distinguishable.[21]

The *per se* unlawful price-fixing offense in this case should not be minimized by a *nolo* plea that allows Florida West to walk away with a result that may be viewed as a mere "slap on the wrist" and result in several undeserved windfall benefits.[22]

B. The Underlying Facts and Duration of the Charged Conduct

In considering the underlying facts and duration of the conspiracy,[23] Florida West's participation in the price-fixing conspiracy during nearly four years was pervasive, egregious, and unjustifiable. As charged in the Indictment, during every year that it operated its Colombia-to-Miami air cargo route through at least February 14, 2006, Florida West conspired to increase the rates it charged its customers, including peak season, security, and fuel surcharges. During this period, Florida West and its major conspirators controlled some 70 percent of the air cargo market out of Colombia. This market power allowed the conspirators to control air cargo prices

[20] *See* Defendant's Motion For A Nolo Plea, at 7 (citing *United States v. Haversat*, 22 F.3d 790, 792 (8th Cir. 1994) (noting both defendants "pleaded *nolo contendere* to the charges on August 20, 1992.")) (D.E. 249). All of the defense antitrust cases involved charges brought before the current Corporate Leniency Policy was instituted in August 1993. *See* Section I(B) (page 5-7) (describing Leniency Program), *supra*. Cases cited by the defense before 1974 involved misdemeanors. *See* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974) (increasing Sherman Act violations to felonies).

[21] In *United States v. Alaska Brokerage International, Inc.*, No. CR 06-11 JLR (W.D.Wa. 2006), at the time that the *nolo* plea was accepted, Alaska Brokerage had not been operating for at least six months and was in bankruptcy. The corporate defendant was, in effect, a sole proprietorship, and the individual who had conspired to rig bids on behalf of the corporation had pleaded guilty before the corporate defendant *nolo* plea was entered.

[22] Courts have noted that *nolo* pleas in antitrust cases are tantamount to a mere "slap on the wrist" for the criminal conduct. *See, e.g., United States v. H & M, Inc.*, 565 F. Supp. 1, 3 (M.D. Pa. 1982) (in rejecting *nolo* plea in antitrust case, noting given "the *per se* nature of the alleged activities, the alleged degree of defendants' culpability and the harm caused to the public warrants more than a 'slap on the wrist,' which is often the public view of a *nolo* plea"); *Standard Ultramarine*, 137 F.Supp. at 172 (in rejecting *nolo* plea in antitrust case, noting it would result in a mere "slap on the wrist").

[23] *See, e.g., H & M, Inc.*, 565 F. Supp. at 3; *Manischewitz Co.*, 1990 WL 86441 at *3; *Standard Ultramarine*, 137 F.Supp. at 172 (in rejecting *nolo* plea, in considering "how long persisted in" the conduct, noting the price-fixing conspiracy "extended over a nine-year period," was "a *per se* violation," and the volume of commerce was "substantial" as "$30,000,000 out of a total national sales volume of $80,000,000").

for shipping flowers destined for the United States, the primary entry point for which was Miami.

Colombia provides most of the flowers sold by florists and in supermarkets in the United States year-round. The largest part of all Colombian flower sales in the United States occur on two holidays – Valentine's Day and Mother's Day – and demand for flower shipments increases shortly before these holidays. Florida West colluded to fix "peak season" surcharges on the shipments of those holiday flowers and to increase other surcharges, such as fuel surcharges. Florida West participated in the conspiracy through at least Valentine's Day 2006. *See* Indictment ¶ 8. The volume of commerce affected by Florida West's involvement was at least $75 million in sales on the Colombia-to-Miami route alone, which constituted approximately half of the net revenues earned by the company over the conspiracy period. *See* Exhibit 1.[24]

At trial, the evidence will show that from the moment it began to carry air cargo from Colombia to Miami, Florida West conspired with its major competitors to increase prices to its customers. It also entered agreements to eliminate customer discounts and to manipulate the timing of price increases to pre-empt customers from exercising their ability to shift demand to lower-cost competitors, even for a few days. To ensure that revenues from this conspiracy on

[24] In stark contrast to the defendant's portrayal of itself as a "small air cargo business," Defendant's Motion, at 1, the $75 million in revenues of Florida West during the charged conspiracy were substantial and are hardly reflective of a small company. Exhibit 1 shows the defendant's net revenues earned during the conspiracy on various routes. The $75 million in revenues constitutes the *minimum* volume of commerce involved, as it reflects only the company's northbound sales from Colombia to Miami and does not include any portion of its 2006 revenues, including the lucrative Valentine's Day peak season. If the revenues on the southbound Miami-to-Colombia route that was the subject of activity described in Indictment ¶ 11(d) are considered, the volume of commerce increases to over $90 million.

Under U.S.S.G. § 2R1.1(b)(2), the volume of commerce used is "the volume of commerce done by him or his principal in goods or services that were affected by the violation." The volume of commerce affected is that which the conspiracy "acts upon or influences negotiations, sale prices, the volume of goods sold, or other transactional terms" even when the conspirators fall short of their specific goals or targets. *United States v. SKW Metals & Alloys, Inc.*, 195 F. 3d 83, 90 (2d Cir. 1999). The Eleventh Circuit applies a presumption that all sales during the conspiracy were affected by the conspiracy. *United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001).

northbound routes would not be undermined by lower rates on the southbound leg of the roundtrip route, on which there was considerable excess capacity, Florida West and its competitors also encouraged competitors to fix their southbound rates. Indictment ¶ 11(d). Furthermore, after Florida West commenced service from Medellin, Colombia to Miami, it agreed with its competitors to allocate customers and to maintain their respective market shares. Florida West persistently and blatantly eliminated competition for air cargo services between Miami and Colombia during the nearly four years it participated in the conspiracy.

Florida West participated in this conspiracy through its officers, employees and agents.[25] Among others,[26] this included Rodrigo Hidalgo, its highest ranking commercial officer, and Clara de Bedoya, an agent retained and authorized to act as its sales manager in Colombia. While Florida West now contests its responsibility for Hidalgo's illegal actions, as well as the actions of those who reported to him, Hidalgo served as the defendant's Vice President of Sales and Marketing throughout the indictment period. *See* Exhibit 2 (organizational chart listing commercial department). As Florida West has summarized, his duties included "establish[ing] pricing structure" and "manag[ing] the whole sales … department." *See* Exhibit 3 (Florida West's description of Hidalgo's job responsibilities). Clara de Bedoya was in charge of the sales office handling Florida West's business in Colombia as a General Sales Agent ("GSA").

---

[25] Florida West apparently now intends to argue that it cannot or should not be held liable for the acts of its top commercial officer (and other commercial agents), to whom it entrusted the operation of its key commercial activity during the indictment period, the same activity that forms the basis of the indictment. Criminal liability for a corporation is established through agents acting on behalf of the company. Corporate liability focuses on:

> Whether the agents' acts or omissions were committed within the scope of their employment is a question of fact. To be acting within his employment, the agent first must have intended that his act would have produced some benefit to the corporation or some benefit to himself and the corporation second.

United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

[26] *See* United States' Partial Response To Defendant's Request For A Bill Of Particulars (D.E. 177) and Government's Response To Defendant's Request For A Bill Of Particulars. (D.E. 248).

Hidalgo was aware that his actions on behalf of Florida West were in violation of United States law. For example, before a conspiracy meeting held in Bogota in 2004, Hidalgo told a co-conspirator that they should hold the meeting in Colombia because their conduct was against United States law. *See* FBI 302, at 4 (dated July 29, 2009) (provided in discovery on January 13, 2011). In carrying out the conspiracy, Florida West and its co-conspirators issued announcements and notifications to customers in accordance with the agreements reached, charged cargo rates and surcharges in accordance with those agreements, communicated among themselves and with others to implement and monitor the agreements reached, and accepted payments at collusive and noncompetitive rates and surcharges. In short, Florida West's price-fixing conduct was long-running, purposeful, and affected tens of millions of dollars of commerce. This serious conduct should not be trivialized by a *nolo* plea.

C. Other Antitrust Violations Committed By Florida West

As another relevant factor recognized by the courts in antitrust cases,[27] Florida West has engaged in other price-fixing conduct. Specifically, Florida West conspired with its competitors to suppress and eliminate competition by agreeing to impose an increased fuel surcharge on air cargo shipped from the United States to locations in South and Central America following Hurricanes Katrina and Rita from around late September 2005 through at least November 2005. *See* Exhibit 4 (pretrial notice of 2005 price-fixing conspiracy) (D.E. 224). Based on Florida West's other price-fixing conduct, a *nolo* plea is inappropriate.

[27] *See, e.g., B. Manischewitz Co.*, 1990 WL 86441 at *3 (in rejecting *nolo* plea, noting "prior [antitrust] violations" as a factor); *American Bakeries Co.*, 284 F. Supp. 864, 868 (considering "prior antitrust violations of defendants" as a factor), *reconsideration*, 284 F. Supp. 871 (D. Mich. 1968)..

D. A *Nolo* Plea Would Undermine Deterrence and Respect For the Law In Other Antitrust and Criminal Cases

The sanction of a *nolo* plea in this case would undermine deterrence and respect for the law in other criminal antitrust cases.[28] In this case, a *nolo* plea will enable Florida West and its agents to avoid accepting responsibility for this pervasive price-fixing conspiracy.[29] A *nolo* plea also will send the wrong message that price-fixing conduct may be met with a nominal fine, which may be considered by would-be price-fixers as an acceptable business risk for engaging in *per se* unlawful conduct. As already noted, in antitrust cases in particular, a *nolo* plea reduces the deterrent effect of the plea in another critical way by inhibiting the victims' ability to recover damages in civil damages actions. *See* notes 7-8, supra.[30]

In rejecting *nolo* pleas in other antitrust case, the courts have noted the impact in undermining deterrence in antitrust cases. For example, as the court in *United States v. Standard Ultramarine and Color Co.* noted, "to grant the [*nolo*] motion is virtually to rule that a defendant

---

[28] *See, e.g.*, *Standard Ultramarine*, 137 F.Supp. at 172 (in rejecting *nolo* plea, concluding a *nolo* plea would undermine deterrence and "would tend to diminish rather than increase respect for law"); *see also Brighton Bldg. & Maintenance Co.*, 431 F. Supp. at 1119 (in rejecting a *nolo* plea in a criminal antitrust case, noting "the actual undermining, of the deterrent effect of the antitrust laws of the United States if the tendered pleas are accepted"); *Chin Doong Art*, 193 F. Supp. at 822 (in rejecting a nolo plea, noting that "[t]he Court cannot permit its action with respect to a [*nolo*] plea of this type to breed contempt for law enforcement."); *see generally Nolo* Pleas in Antitrust Cases, *supra* note 6, at 1480 ("If a court's acceptance of a *nolo* plea tends substantially to inhibit the deterrence of violations, the effect on deterrence should be a central concern of the court.").

[29] Here, Hidalgo, who as Florida West's Vice President of Sales and Marketing performed many of the conspiratorial acts on behalf of defendant, cannot be criminally prosecuted because this Court has ruled that he is covered by the non-prosecution provisions of the LAN Cargo Plea Agreement (not because of any determination that he did not engage in the price-fixing conspiracy). *See* Report and Recommendation, at 38-39 (D.E. 191, 219). Clara de Bedoya, who acted for and on behalf of Florida West in Columbia, is a foreign national and is not subject to the jurisdiction of the Court.

[30] *Standard Ultramarine & Color Co.*, 137 F. Supp. at 173; *see also Thompson*, 621 F.2d at 1150-51 ("Entry of the [*nolo*] plea in this antitrust case would have deprived the victims of the conspiracy of a significant opportunity in subsequent civil actions to benefit from the government's efforts. It is therefore almost inconceivable that the district court could have found acceptance of the *nolo* plea to be in the public interest when the prosecution was prepared and willing to go to trial.") (footnote omitted); *H & M, Inc.*, 565 F. Supp. at 3 (same); *Brighton Bldg. & Maintenance Co.*, 431 F. Supp. at 1120 (same); *American Bakeries Co.*, 284 F. Supp. at 869 ("To routinely accept nolo pleas where there is high potential of a treble damage action would make a mockery of Section 5 — any guilty defendant might avoid serious private actions by pleading the magic words.").

in an antitrust proceeding is entitled to plead *nolo* contendere as a matter of right." 137 F.Supp. at 173. Such a message would undermine the ability to prosecute the antitrust laws in future large investigations of this type and would undermine the Antitrust Division's Corporate Leniency Program, which has been successful in prosecuting these secret crimes. *See* Section I(B), *supra*.

The primary case cited by the defendant, *United States v. AEM, Inc.*, 718 F. Supp.2d 1334 (M.D.FL 2010), which is not an antitrust case, is readily distinguishable. In *AEM*, significant penalties were imposed. The primary defendant, who controlled the corporate defendants and was responsible for the fraud, was sentenced to serve 270 months in prison. A $200 million forfeiture judgment was entered against all of the defendants. A receiver was appointed as president to oversee the corporate defendants before the indictment was filed. The corporations had already ceased operations. Unlike *AEM*, no admission or determination of guilt of Florida West or its officers and agents will be made in this multi-year price-fixing conspiracy, nor will Florida West pay a substantial fine for its actions, if a *nolo* plea is accepted.

E. Department Of Justice Policy Opposes *Nolo* Pleas

Before a *nolo* plea may be considered, the court should consider the views of the Department of Justice, which provides a national law enforcement perspective.[31]

Under the United States Attorneys' Manual, the Department of Justice long has disfavored the disposition of criminal cases by means of *nolo* pleas as contrary to the public interest.[32] Antitrust Division prosecutors are not authorized to support a *nolo* plea unless

[31] *See, e.g., H & M, Inc.*, 565 F. Supp. at 3 (considering "the view of the Attorney General"); *Manischewitz Co.*, 1990 WL 86441 at *3 (considering "the position of the government"); *Standard Ultramarine & Color Co.*, 137 F. Supp. at 172 (noting the views of the Attorney General should be considered.); *see also AEM, Inc.*, 718 F. Supp. 2d at 1333 ("the view of the Government as to whether a *nolo contendere* plea should be accepted is important").

[32] *See* United States Attorneys' Manual § 9-16.010 ("United States Attorneys may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing so has been

permitted by the Assistant Attorney General for the Antitrust Division or higher ranking officials. No authorization has been granted in this case.[33]

In this case, specific concerns about a *nolo* plea include the inequity that would result in allowing Florida West to escape criminal accountability and as the last corporate defendant in the investigation to avoid admission or determination of guilt. As already noted, a *nolo* plea would undermine the enforcement objectives of the Corporate Leniency Program designed to encourage self-reporting of anti-competitive conduct and punish wrongdoers. *See* Section I(B), *supra*.

II. Other Factors Relied Upon By Florida West Do Not Support Entry Of A *Nolo* Plea

None of the factors advanced by Florida West support a *nolo* plea.

A. Current Economic Condition of the Defendant

While the volume of commerce affected by the conspiracy was at least $75 million, Florida West now claims that its economic circumstances have changed. This argument is akin to a defendant in a *Ponzi* fraud scheme who enjoyed and spent the ill-gotten gains, only later to ask for the mercy of the court due to lack of remaining funds. In other antitrust cases, the courts

---

approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, Deputy Attorney General or the Attorney General."); *see also id.* § 9-27.500 ; *id.*§ 9-27.530.

[33] The basic objections of the Department were expressed by Attorney General Herbert Brownell, Jr., which are retained in the current Manual:

> One of the factors which has tended to breed contempt for the Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of *nolo contendere*. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty . . . . [A] person permitted to plead *nolo contendere* admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in this denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

have appropriately rejected this argument in considering *nolo* pleas given the importance in upholding the integrity of the process and enforcement of the laws.[34]

Florida West's current financial condition, if established, is relevant only to the appropriate amount of its corporate fine, based on its ability to pay, as part of the sentencing process under U.S.S.G. § 8C3.3. The government has engaged, at its own expense, an independent third-party expert to review relevant data from Florida West. Florida West has been asked for any updated financials, but none have been provided. *See* note 2, *supra*. The company's financial position has no bearing on whether a *nolo* plea should be entered.

B. A Corporate Representative Can Enter a Plea of Guilty for the Defendant Consistent with Fed. R. Crim. P. 43 and Settled Practice

Contrary to Florida West's claim that it lacks a representative with first-hand knowledge of the facts to support a guilty plea,[35] Defendant's Motion, at 6 (D.E. 249), Fed. R. Crim P. 43(b)(1) provides that a corporate defendant can be represented in any proceeding by counsel.[36]

---

[34] In rejecting a *nolo* plea, one court appropriately disregarded this factor:

> The court is not convinced that defendants have presented special circumstances justifying acceptance of a *nolo* plea. They cite no cases supporting their argument that the court should consider the economic circumstances of individual defendants in deciding whether to accept a *nolo contendere* plea. Common sense dictates against consideration of this factor. *Defendants who may have been in an economic position to bring about the alleged anti-competitive activity should not later be allowed to avoid the defense of such claims because of potential economic sacrifices*.

H & M, Inc., 565 F. Supp. at 2 (emphasis added); *see also Standard Ultramarine*, 137 F.Supp. at 170 ("The suggestion that the Government forego its right, and indeed its duty, to uphold the *integrity of our laws* because of the *heavy cost of prosecution falls of its own weight.* Cost of enforcement in terms of manpower and money is of little consequence when necessary to assure decent respect for, and compliance with, our laws."); see generally *Mapco Gas Prods., Inc*., 709 F. Supp at 899 (noting "it is incumbent upon this Court to administer criminal justice fairly and impartially and without regard to one's economic, social or political standing in the community").

[35] Florida West seeks to apply this factor from the unique facts from the *AEM* case, which involved corporate defendants that had ceased to operate and were taken over by a Receiver. *AEM*, 718 F.Supp.2d at 1334. These unique circumstances do not apply here.

[36] *See also* Benchbook for U.S. District Court Judges § 2.02, at 77 (4th ed.) (requiring only that a court determine a corporate representative entering a plea is an authorized employee or representative, empowered by the board of directors to enter the plea, that a valid board resolution to enter the plea was passed, and that the organization is financially able to pay the fine), available at: http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk.pdf/$file/Benchbk.pdf.

Corporate guilty pleas, including those in this air transportation investigation, routinely are entered with a corporate representative – often a general counsel or chief financial officer – who had no personal involvement or "first hand knowledge" of the illegal activity in the sense that Florida West now argues is required. Rather, the required capacity and knowledge to act on behalf of the corporation can be obtained by corporate officers and directors as the result of investigation. Indeed, Mansour Rasnavad, the current Chief Executive Officer of Florida West and Florida West's majority owner throughout the pendency of the investigation and litigation in this matter, could serve as the corporate representative. He has access to all the discovery materials. Knowledge from such sources is more than sufficient for a corporate representative to enter a guilty plea.

C. The Trial Will Not Be Lengthy, Complex, or Expensive

1. Economical Presentation Of Trial Evidence

The anticipated eleven-day trial[37] will be short in contrast with the expected two-month trial contemplated in *AEM*, cited by the defense, and provides no basis to allow a *nolo* plea. Despite Florida West's contentions that a bench trial would proceed more efficiently than a jury trial in this matter and its insinuation that the government's preference for a jury trial is somehow improperly motivated,[38] the government's case in chief will cover the same issues, and presumably the defense case would involve the same evidence elicited on cross-examination or through its own case, whether the finder of fact is a jury or the Court. Finally, as noted by the

---

[37] As the United States previously advised, its case in chief will take approximately eight full trial days. *See* Hearing Transcript, at 40:18-19 (Feb. 10, 2012). This includes the presentation of evidence concerning Florida West's participation in an uncharged price-fixing conspiracy in October 2005, which will be based in part on witnesses who already will be called to testify at trial on the charged conduct. In fact, comparable evidence was admitted in an economical manner in the related trial last year.

[38] The United States, like any other party, has a right to have a jury determine the facts, under U.S. Constitution, Article III, Section 2, and Fed. R. Crim. P. 23.

court in *AEM*, cited by the defendant, "Courts, however, should be vigilant in ensuring that that expediency does not diminish the integrity of the judiciary." *AEM, Inc.*, 718 F.Supp.2d at 1137-38; *see also* note 34 (citing other cases), *supra*.

2. A *Nolo* Plea Will Likely Entail Additional, Unnecessary Litigation

An antitrust plea agreement normally resolves all sentencing issues and includes a waiver of appeal. In contrast, a *nolo* plea necessarily will result in more litigation on a host of issues, such as the amount of the volume of commerce, the period of years in which any fine should be paid, the amount of time in which Florida West should remain under supervision of the Court and probation office, and other related issues. To make a fair and accurate evaluation of the appropriate sentence for Florida West, the company will have to provide further documents about its financial condition to the probation office and the government. A sentencing hearing likely will involve significant argument, evidence, and testimony from experts regarding the accuracy and import of this data, in addition to the affected volume of commerce and the defendant's ability to pay a fine. An appeal may follow from such an order, as occurred in the *nolo* plea cases cited by the defendant.[39]

D. Other Unsupported Or Irrelevant Issues

Florida West makes additional arguments that appear designed to seek sympathy from the Court or mischaracterize the record. For example, defense counsel also argues that the

[39] *See* Defendant's Motion, at 7 (citing *United States v. Haversat*, 22 F.3d 790, 792 (8th Cir. 1994) (after two *nolo* pleas were entered, the defendants and government appealed sentencing issues, including the volume of commerce); *United States v. Prescon Corp.*, 695 F.2d 1236, 1238 (10th Cir. 1982) (after two corporations entered *nolo* pleas, petitions for a writ of mandamus were filed to vacate the sentences and the sentence was reversed on appeal); *United States v. American Bag & Paper Corp.*, 609 F.2d 1066, 1067 (3d Cir. 1979) (per curiam) (appeal on *nolo* plea agreement after district court added interest on the unpaid fine which was to be paid over ten years); *United States v. Wells Fargo Armored Service Corp.*, 587 F.2d 782, 783 (5th Cir. 1979) (per curiam) (appeal from the entry of the *nolo* plea and challenging the indictment); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976) (after *nolo* pleas, on appeal challenging court's subject matter jurisdiction and sentence; remanding case to consider fines)).

preparation for and litigation related to its motion to dismiss, which was denied, "was time consuming and costly." Defendant's Motion, at 2. The cost to Florida West of litigating its own motion to dismiss is simply irrelevant to whether it should obtain a *nolo* plea.

Florida West, without any support, claims the government in preparing for trial seeks "to bring the Company to the brink of financial ruin" and that eight months before trial the government filed a Rule 404(b) motion (which is substantially more notice than is normally provided or required) as part of this alleged strategy. Defendant's Motion, at 2-3.[40] Not surprisingly, this claim is unsupported and based on mere conjecture and posturing. As the Eleventh Circuit has noted, since Florida West has requested a trial, the government must prepare to meet its high burden given the defendant's stated desire to present its non-imputation defense.[41] While Florida West may choose to mischaracterize trial preparation as "scorched earth" tactics, Defendant's Motion, at 3 (D.E. 249), the government must prepare to address the contested issues within the normal course of preparing for trial.

Defense counsel again misrepresents that the government has provided a "data dump of documents related to these new 404(b) allegations." Defendant's Motion, at 3 (D.E. 249), Defense counsel fails to inform that it expressly requested and was provided additional information about Florida West's 2005 price-fixing conduct. Since the defense has received early notice and discovery, including the entire trial transcript from *United States v. Cabeza et al*., 10-cr-20790-UU (SDFL) in which a small portion concerned the Rule 404(b) evidence, it is

[40] The Rule 404(b) motion was filed in compliance with the Court's Order of February 14, 2012, which explicitly provided: "On or before March 12, 2012, parties may file additional motions in this matter." (D.E. 222.) Eight months' notice is more than sufficient notice under case law, practice and Fed. R. Evid. 404(b). *See* Government's Rule 404(b) Reply Brief, at 5-9 (citing established case law and practice) (D.E. 238)

[41] *See, e.g., United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir.) ("A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue."), *cert. denied*, 516 U.S. 954 (1995).

difficult to the claim that further investigative efforts will "cost more than $100,000." Defendant's Motion, at 3.

The defense inaccurately claims that the government has seven prosecutors assigned to the case. Defendant's Motion, at 3 n.2. In fact, the three undersigned attorneys are the only assigned attorneys. Florida West has the extensive resources of an international law firm and has used a number of attorneys over the past five years. In the end, the number of attorneys on either side of the case has no bearing on whether a *nolo* plea should be granted.

Finally, defense counsel notes again that the government has requested relevant price documents in Florida West's exclusive possession pursuant to Fed. R. Crim. P. 17(c). Defendant's Motion, at 4. These documents are directly relevant to issues at trial and sentencing, particularly in light of the defendant's non-imputation defense. *See also* Defendant's Motion, at 7 (noting continued belief in the "strong defense to the charges based upon the government's inability to impute the conduct of Hidalgo to FWIA"). Since each of the *United States v. Nixon* factors has been met, which Florida West has not effectively disputed,[42] the subpoena for pretrial production is warranted.

CONCLUSION

For the foregoing reasons, because the request for a *nolo* plea is wholly contrary to the public interest in the administration of justice, Florida West's Motion should be denied. This is not a rare or exceptional antitrust case for which a *nolo contendere* plea should be permitted. The government also respectfully requests a ruling on pending motions, including the motion for

[42] The subpoena expressly notes that Florida West "need not produce any documents previously produced to the United States pursuant to the grand jury subpoena issued to the Company." *See* Rule 17(c) Motion, Exhibit 4 (D.E. 231). Florida West claims that the government "served an extremely broad grand jury subpoena on the Company." Defendant's Motion, at 1. However, Florida West never fully produced the requested materials which are standard in price-fixing cases.

pretrial production of relevant pricing records under Fed. R. Crim. P. 17(c). (D.E. 231, 242)

Dated: May 10, 2012

Respectfully submitted,

/s/

MARK L. KROTOSKI (Special Bar No. A5501681)
NANCY H. MCMILLEN (Special Bar No. A5501548)
CARSTEN M. REICHEL (Special Bar No. A5501549)
Nancy.McMillen@usdoj.gov
U.S. Department of Justice, Antitrust Division
450 Fifth Street, N.W., Suite 11300
Washington, DC 20530
Telephone: (202) 307-6694
Facsimile: (202) 514-6525

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2012, a true and correct copy of the foregoing:

GOVERNMENT'S OPPOSITION TO DEFENDANT FLORIDA WEST'S MOTION TO ENTER A PLEA OF *NOLO CONTENDERE*

was electronically filed with the Clerk of the Court using CM/ECF and served on all appropriate parties through that system.

/s/Carsten M. Reichel
CARSTEN M. REICHEL