UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-cr-20864-SCOLA/BANDSTRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORIDA WEST INTERNATIONAL AIRWAYS, INC.,
LUIS AUGUST AFANADOR, and
JAIME LARA RUEDA, SR.,

Defendants.
_____/

FLORIDA WEST'S REPLY TO GOVERNMENT'S OPPOSITION TO CONSENT TO ENTER PLEA OF *NOLO CONTENDERE*

Florida West International Airways, Inc. ("FWIA" or "Company") respectfully replies to the Government's Opposition to FWIA's Motion for Consent to Enter Plea of *Nolo Contendere*. The Government opposes the Company's request to enter a *nolo* plea pursuant to Federal Rule of Criminal Procedure 11(a)(3) to resolve this case. It insists that the Company either plead guilty pursuant to a Government-authored plea agreement or proceed to a jury trial.

In taking this position, the Government ignores unique facts that more than justify a *nolo contendere* plea in this case; erroneously claims that a *nolo* plea is tantamount to a "slap on the wrist" that will result in less criminal exposure and a windfall for the Company; and claims that granting FWIA's request to plead in this case will undermine the Antitrust Division's cartel leniency program. Furthermore, the Government suggests several times that a guilty plea using a non-negotiable plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) is the preferred method for resolving this case. While (c)(1)(C) pleas may be part of the Antitrust

Division's unofficial office policy, such plea agreements are frowned upon by many courts because they remove all sentencing discretion from the court.

The Opposition is not well grounded in fact and law, and the Court should grant the defendant's request to enter a *nolo* plea to bring finality to this long-running investigation and prosecution of a small business.

I. THE UNIQUE FACTS OF THIS CASE JUSTIFY A *NOLO CONTENDERE* PLEA

A. The Government Ignores Critical Facts in Its Opposition That Justify a *Nolo* Plea

The Opposition creates the impression that this case is simply a run-of-the-mill corporate criminal prosecution that should be resolved pursuant to terms dictated by the Government without judicial involvement. The Opposition does so by ignoring fundamental facts that collectively create an extremely rare and unique fact pattern justifying a *nolo* plea here.

1. The Court Has Ruled that Rodrigo Hidalgo Was Simultaneously Employed by Another Airline, Casting Serious Doubt on the Government's Imputation Allegation

Under well-established case law, an employee's conduct may be imputed to his employer if the employee acted within the scope of his employment and for the benefit of the company. *See, e.g.*, *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009). The unique facts of this case, as reflected in this Court's prior ruling, draw the application of this legal doctrine into serious question. Specifically, the Court's adoption of Magistrate Judge Torres' Report and Recommendation ("R&R") dismissing Rodrigo Hidalgo from the case establishes that many of Hidalgo's actions were at the direction of another employer and outside the scope of his employment with FWIA. D.E. 219. The R&R also raised serious questions as to whether any actions Hidalgo may purportedly have taken in aid of the alleged conspiracy were intended to benefit the Company. The weight of the R&R's factual findings led Magistrate Judge Torres to conclude that FWIA "may have a compelling *defense* to criminal liability" based

on the argument that Hidalgo's conduct during the indictment period cannot be imputed to FWIA. D.E. 191 at 51 (emphasis in original). Yet the Opposition ignores Hidalgo's simultaneous employment by another airline as a basis for a *nolo* plea. This unique fact alone distinguishes this case from all of the cases cited in the Opposition. In ignoring the prior ruling of this Court in the R&R, which is now part of the case record, the Government fails to address one of the principal reasons why a *nolo* plea is appropriate here.

2. No Other Company Alleged to Have Conspired with FWIA Has Been Charged or Convicted

The Government claims that permitting a *nolo* plea would be "unfair" to the "more than twenty" airlines that entered into deals using the Antitrust Division's favored plea agreement terms. Opp. at 1. But this statement is misleading at best. Apparently the Government is referring to international airlines, such as Singapore Airlines and Air France-KLM, which agreed to plea agreements in the Government's broad air cargo investigation. FWIA is not alleged to have conspired with any of these other airlines, and none of them are competitors of the Company or ship cargo on the same routes. FWIA is unaware of the reasons why any of these large, publicly-traded companies chose to reach plea agreements or the extent of any evidence the Government may have had supporting conspiracy claims. There is absolutely no indication that any of these other airlines faced a situation where a single employee is alleged to have engaged in wrongdoing while being secretly and simultaneously employed by another airline. The unique facts of this case render irrelevant comparison to plea agreements by other airlines.

What is striking, however, is that the Government fails to mention in its Opposition that FWIA was the *sole* corporate defendant indicted in either this or the related case of *United States v. Cabeza* (10-cr-20790) (S.D. Fla.), both of which involve cargo shipped between the United States and Columbia. Neither company that employed indicted defendants Luis Augusto

Afanador or Jaime Lara, Sr., was indicted by the Government.[1] In the *Cabeza* case, the Government elected to indict George Gonzalez, but not his employer Cielos, despite the fact that Gonzalez' conduct was presumably attributable to his employer. Similarly, Luis Soto was indicted in the *Cabeza* case, but his employer South Winds was not.[2]

The Government never has explained why it indicted FWIA while not indicting all other identically situated companies. It is this conscious inconsistency that is "highly inequitable," rather than the Government's comparison of FWIA to large airlines having nothing to do with this case. Opp. at 7. The Court should consider the unique circumstances of FWIA in deciding whether to permit the *nolo* plea and not compare it to unrelated airlines in unrelated markets with unrelated facts.

3. Hidalgo Denies the Allegations and Is No Longer Employed by FWIA

The Opposition also fails to acknowledge that, unlike other cartel cases that result in traditional guilty pleas, there are no witnesses the defense is aware of who have admitted to alleged cartel behavior on behalf of FWIA. Hidalgo steadfastly has maintained his innocence and the discovery in this case does nothing to resolve the issue of whether Hidalgo's conduct is imputable to FWIA. Furthermore, Hidalgo left the Company's employment over four and a half years ago.

The Government's claim that a corporate representative of FWIA could enter a plea based upon a review of the Government produced discovery ignores the fact that it does nothing to resolve the issue of whether Hidalgo's conduct can be imputed to the Company in light of his secret employment by another airline.

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[1] Lara and Afanador were employed by International Air Logistics and GLI, respectively, in Bogota. Neither has appeared before this Court.

[2] By the time Willy Cabeza, another defendant, had been indicted, his former employer Arrow Air had been forced to file for Chapter 11 bankruptcy.

4. There is no Corporate Representative with Firsthand Knowledge of the Facts Necessary to Support a Guilty Plea

Federal Rule of Criminal Procedure 11(b)(3) provides, "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." To find a factual basis for a guilty plea, the trial court must be presented with evidence from which it can reasonably find that the defendant is guilty. *United States v. Frye*, 402 F.3d 1123, 1128 (11th Cir. 2005). There is no similar requirement for a *nolo contendere* plea. *N. Carolina v. Alford*, 400 U.S. 25, 36 n.8. (1969); *Blohm v. Comm'r of Internal Revenue*, 994 F.2d. 1542, 1554 (11th Cir. 1993). A *nolo contendere* plea is appropriate here because the evidence is far from clear that Hidalgo's conduct can be imputed to FWIA. As a result, there is no corporate representative with firsthand knowledge of facts sufficient to constitute a factual basis of a guilty plea. *See United States v. AEM, Inc.*, 718 F.Supp.2d 1334, 1337 (M.D. Fla. 2010) (finding *nolo* plea appropriate when there was no representative with firsthand knowledge of facts constituting a basis for a guilty plea).

Contrary to the Government's contention, Mansour Rasnavad has no firsthand knowledge of the facts necessary for the acceptance of a guilty plea.[3] *See, e.g.*, June 27, 2007 DOJ Memo. of R. Hidalgo at 4 ("FL WEST's CEO has never checked with HIDALGO about meetings with competitor companies"); Nov. 18, 2010 DOJ Memo of J. Haubold Referencing FLX e-mail 00004465 ("Hidalgo insisted that Haubold direct all commercial matters related to FW to him, and not the owner of FW, Mansour"); Aug. 23, 2010 Stmt. by K. Behre at Evidentiary Hearing Tr. 226:11-17 ("I will admit that it's a very unique set of circumstances. It was not until two

[3] The Government's Opposition identifies Hidalgo and Clara de Bedoya as two individuals who allegedly acted on behalf of Florida West (Opp. at 11). However, Clara de Bedoya has stated that the only contact she had with Florida West was through Hidalgo. *See* May 25, 2011 Interview Notes of C. Bedoya.

months ago [i.e. the June 2, 2011 non-evidentiary hearing] that we learned that Hidalgo – there's no question, we moved for severance . . . . We had no idea Hidalgo was being paid like a secret agent to work for LAN."); D.E. 191 at 25-26 ("The emails clearly demonstrate that Haubold discussed Florida West issues with Hidalgo *and* LAN Cargo executives, but rarely (if ever) with Florida West's CEO Rasnavad.").

B. FWIA's Criminal Exposure Will Not Be Impacted by a *Nolo* Plea

The Opposition claims that permitting a *nolo* will allow the Company to reap "a special windfall," Opp. at 1, that a *nolo* plea is tantamount to a "slap on the wrist," Opp. at 9, footnote 22, and that FWIA will not "pay a substantial fine for its actions." Opp. at 14. These statements reflect a gross misunderstanding of the impact of a *nolo* plea versus a guilty plea.

First, the sentencing process and the application of the advisory Sentencing Guidelines are identical for *nolo* pleas, pleas of guilty, or conviction at trial. Under any scenario other than the one the Government advocates – a Government authored plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) – the Court retains full discretion to impose any penalty and fine it deems appropriate. To suggest that FWIA's entry of a *nolo* plea necessarily means that FWIA will not have to pay "a substantial fine" ignores this Court's broad sentencing discretion.

C. The Government's Reliance on Cases Where the Interest of Justice is Not Served by the Plea is Misplaced

In analyzing the cases cited by both parties, it is worth noting what the court in *Standard Ultramarine* said: "The various District Court rulings cited by the parties denying or granting motions for leave to plead *nolo contendere* cannot serve as precedents and are of little aid in the matter. In deciding whether the public interest will be better served by acceptance or rejection of the plea each case must be governed by its own facts." *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 172 (S.D.N.Y. 1955). With that in mind, the Government relies on

cases that apply inapplicable legal standards and lack the unique circumstances of this case. First, the "exceptional circumstances" standard stated by the Government has not been adopted by this Court.[4] Indeed, the Government fails to cite to a single case from the 11th Circuit either rejecting a *nolo* plea or stating that such pleas should be rejected as a matter of course. Instead, the Government relies on cherry-picked cases that imply that *nolo* pleas are outside the "standard criminal justice process." This conclusion is contrary to the Federal Rules of Criminal Procedure, which clearly authorize the acceptance of *nolo* pleas and contain no presumption against such pleas. The cases cited in FWIA's Motion demonstrate that pleas historically have been accepted by many trial courts, including in antitrust cases.

The cases the Opposition cites take unwarranted views against *nolo* pleas and are not representative of the body of law relating to such pleas. *See, e.g., United States v. Brighton Bldg. & Maintenance Co.*, 431 F. Supp. 1118, 1121 (N.D. Ill. 1977) (refusing to accept *nolo* pleas in "only in the most exceptional circumstances," despite statistical evidence indicating that such pleas were often accepted in antitrust cases when offered, and stating that "this court neither subscribes to nor wishes to promote such a trend if indeed it exists"); *United States v. David E. Thompson, Inc.*, 621 F.2d 1147, 1150 (1st Cir. 1980) (stating that it was the court's "practice to decline to accept an offer of a plea of *nolo* so long as the government does not consent to it"); *United States v. Dorman*, 496 F.2d 438, 440 (4th Cir. 1974) (involving a district judge that usually did not consent to *nolo contendere* pleas except in income tax evasion cases).

A review of the complete body of law on *nolo* pleas demonstrates the individualized approach taken by different courts reflecting the fact specific nature of the individualized cases. *See United States v. AEM, Inc.*, 718 F. Supp. 2d 1334, 1335-36 (M.D. Fla. 2010) ("Historically,

[4] Even if "exceptional circumstances" is the standard, the facts in this case are clearly rare and exceptional.

receptiveness to *nolo* pleas has varied greatly from court to court.). *Compare, United States v. Jones*, 119 F. Supp. 288, 290 (S.D. Cal. 1954) (taking the opposite approach and determining that such a plea should be accepted absent compelling reasons for not allowing it)" *with United States v. Bagliore*, 182 F. Supp. 714, 716 (E.D.N.Y. 1960) (taking a generally 'hostile' view regarding *nolo* pleas). *See also United States v. B. Manischewitz Co.*, Crim. No. 90-119, 1990 WL 86441, at *2 (D.N.J. May 23, 1990) ("The Notes [of the Advisory Committee on Rule 11] further indicate that some courts have held that such a plea should be rejected absent exceptional circumstances which appeal to the court's discretion. Other courts have held that the plea should be accepted absent compelling reasons to reject the plea. Other courts seem to take a middle of the road approach and hold that such pleas should not be accepted or rejected as a matter of course, but that the court should analyze the facts of each case and decide whether acceptance of the plea weighs in favor of the public interest.") (internal citations omitted).

Moreover, unlike the circumstances in the cases cited by the Government, the interest of justice is served by the *nolo contendere* plea in the unique circumstances of this case. *See B. Manischewitz Co.*, Crim. No. 90-119, 1990 WL 86441, at *6 (rejecting the *nolo contendere* plea of a corporate defendant that controlled a large portion of the market); *U.S. v. Yonkers Contracting Co.*, Inc., 697 F. Supp. 779, 782 (S.D.N.Y. 1988) (*nolo* plea not warranted where defendant (1) had not fired all implicated officers and (2) had annual revenues of around $40 million); *U.S. v. Binney & Smith, Inc.*, No. CR 80-49, 1980 WL 1988, at *2 (W.D. Ohio Dec. 17, 1980) (rejecting the *nolo contendere* pleas of two companies whose size and power in the relevant market was substantial); *U.S. v. Mapco Gas Products, Inc.*, 709 F. Supp. 895, 899 (E.D. Ark. 1989) (rejecting a *nolo contendere* plea on the basis that the impact of the alleged violations "was devastating and quite burdensome," given the extreme poverty of the geographic area

involved); *U.S. v. Chin Doong Art*, 193 F. Supp. 820, 822 (E.D.N.Y. 1961) (rejecting a *nolo contendere* plea where co-conspirators had already pled guilty); *U.S. v. H & M, Inc.*, 565 F. Supp. 1, 2 (M.D. Pa. 1982) (rejecting a *nolo contendere* plea where the alleged conspiracy occurred over a ten-year period).

II. A *NOLO CONTENDERE* PLEA WILL NOT UNDERMINE DOJ POLICY[5]

The Government's claim that a *nolo* plea by FWIA would undermine the Antitrust Division's policies regarding leniency is unpersuasive. The respondeat superior issues are so unique in this case that it is difficult to understand how this case involving a small business with limited financial resources could have a dramatic impact on the Antitrust Division's efforts in the future to convince corporations and individuals to seek leniency and plead guilty. The Opposition fails to assert *how* a *nolo* plea in this case would undermine policy. This case, like the others cited by both sides, is limited to its facts.[6]

The only informal government policy a *nolo* plea will implicate is the policy that would force FWIA to enter into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). Because these plea agreements restrict the discretion of the trial courts, they are rare and many courts frown upon their use. *See, e.g.*, *United States v. Seidman*, 483 F. Supp.

[5] The Government states that Florida West "inaccurately" claims that the government has seven prosecutors assigned to the case and states that only three attorneys are "assigned." Opp. at 20. But it is the Government that is mistaken. The court's docket in the case shows that eight lawyers have entered appearances for the government, seven of whom have argued to the Court during the various pretrial conferences and hearings. This number does not include other Government lawyers who have had active involvement in dealing with counsel for Florida West at various points post-indictment, including the two most senior personnel in the Antitrust Division's section prosecuting this case. The dedication of such a large number of prosecutors has allowed the government to pursue the "scorched earth" tactics outlined in Florida West's opening brief that helped force the Company to file the instant motion.

[6] The Government's policy against *nolo* pleas is completely contrary to the case law suggesting that *nolo* pleas should be evaluated on a case-by-case basis. The Court should not give great weight to the Government's opposition to a *nolo* plea in this case because that position is simply the result of a rigid application of its policy against *nolo* pleas.

156, 158 (D. Wis. 1980) ("At the outset, the Court would note that it never will accept a Rule 11(e)(1)(C) type plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty."); *In re Yielding*, 599 F.2d 251, 253 (8th Cir. 1979) (affirming the decision of a district judge to reject all (c)(1)(C) agreements); Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1953-54 (1992) (contending that the practice of using (c)(1)(C) agreements "is discouraged or prohibited in many jurisdictions"); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 321 (1983) ("Although Rule 11 allows a bargain fixing a particular sentence, with the consent of the judge, this option is rarely used."); Anthony V. Nanni, *An Overview of Criminal Enforcement by the Antitrust Division*, in *The Antitrust Division and the FTC Speak on Federal Antitrust Enforcement in the 90's* 157, 165-66 (P.L.I. 1990) ("The use of (c) agreements, however, is somewhat more limited than it otherwise would be because of the reluctance of some judges to accept that type of agreement."); David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 Fed. Sent. Rep. 339 (1996) ("Apparently judges are content to let the parties to a plea agreement guide the sentencing, but are unwilling to surrender complete control over the process."). In short, the Opposition disparages *nolo* pleas but advocates a frowned-upon resolution in its place.

III. CONCLUSION

In light of the foregoing, FWIA respectfully requests that the Court grant its Motion to enter a plea *of nolo contendere*. Such a plea promotes the public interest and the effective administration of justice and is an equitable solution to a case that has worn Florida West down for nearly five years.

DATED: This 21st day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2012, the foregoing was filed electronically using the ECF system.

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