

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
SIGNATURE FLIGHT SUPPORT CORPORATION, et al.,)
)
Defendants.)
)

Civil Action No. 1:08-cv-01164 (RWR)
Judge Richard W. Roberts

**DEFENDANT SIGNATURE FLIGHT SUPPORT CORPORATION'S
MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT**

Defendant Signature Flight Support Corporation (“Signature”) respectfully files this motion for partial relief from and modification of the July 18, 2008 Hold Separate and Preservation of Assets Stipulation and Order and the October 29, 2008 Final Judgment. Section IV.A of the Final Judgment (Docket No. 14) requires Signature to make divestiture of a Fixed Base Operations (“FBO”) facility at Indianapolis International Airport by the later of 90 days after the filing of the complaint or five days after the notice of entry of the Final Judgment. The later of those two dates was November 4—five days after the October 30 notice of entry. The government subsequently enlarged the time to make divestiture, pursuant to the same section of the Final Judgment, to December 10, 2008. (*See* United States’ Notice of Extension of Time For Divestiture, dated Nov. 4, 2008, Docket No. 15.) As more fully set forth in the attached Memorandum of Points and Authorities, the deadline for divestiture should be extended until December 10, 2009 because due to the current financial crisis and its destruction of the market

for FBOs, requiring Signature to sell the FBO by December 10, 2008 would no longer be equitable. The relief requested is provided for by Fed. R. Civ. P. 60(b).

WHEREFORE, Defendant Signature Flight Support Corporation respectfully requests that the Final Judgment be modified to extend the deadline for divestiture to December 10, 2009; and that this Court order such other and further relief as justice may provide.

Dated: December 2, 2008

Respectfully submitted,

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CERTIFICATION PURSUANT TO LCvR 7(m)

Undersigned counsel for Defendant hereby certifies, pursuant to LCvR 7(m), that a good faith effort was made to discuss the subject of this motion, and the relief requested herein, with counsel for the Plaintiff and counsel for Defendant Hawker Beechcraft Services, Inc. Defendant was unable to resolve these issues with the Plaintiff despite such effort. Plaintiff is aware that this motion is being filed. Defendant Hawker Beechcraft Services, Inc. is also aware that this motion is being filed and has advised that it takes no position on this motion.

/s/ Gordon L. Lang
Gordon L. Lang, Esq. (DC Bar # 932731)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2008, a true and correct copy of the foregoing Motion for Partial Relief From And Modification Of Judgment, with appended Exhibits, Memorandum of Points and Authorities, and Proposed Form of Order is served by electronic filing upon:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
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SIGNATURE FLIGHT SUPPORT)
CORPORATION, et al.,)
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Defendants.)
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Civil Action No. 1:08-cv-01164 (RWR)
Judge Richard W. Roberts

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT SIGNATURE FLIGHT SUPPORT CORPORATION'S
MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT**

Signature Flight Support Corporation (“Signature”) respectfully submits this Memorandum in Support of its Motion for Partial Relief from and Modification of the July 18, 2008 Hold Separate and Preservation of Assets Stipulation and Order and the October 29, 2008 Final Judgment. Section IV.A of the Final Judgment (Docket No. 14) requires Signature to make divestiture of a Fixed Base Operations (“FBO”) facility at Indianapolis International Airport by the later of 90 days after the filing of the complaint or five days after the notice of entry of the Final Judgment. The later of those two dates was November 4—five days after the October 30 notice of entry. The government subsequently enlarged the time to make divestiture, pursuant to the same section of the Final Judgment, to December 10, 2008. (*See* United States’ Notice of Extension of Time For Divestiture, dated Nov. 4, 2008, Docket No. 15.) The deadline for divestiture should be extended until December 10, 2009 because due to the current financial crisis and its destruction of the market for the sale of FBOs, applying the existing December 10,

2008 deadline is no longer equitable. Signature would incur a loss of about \$20 million— or more than 75%—on the FBO’s acquisition value.

I. FACTS

The facts upon which Signature relies are not in dispute. Signature owns and operates FBOs at more than sixty airports around the country. (Complaint ¶ 1, Docket No. 1.) FBOs provide flight support services, including fueling, ramp and hanger rentals, office space rentals, and other services, to general aviation customers. (*Id.*) Hawker Beechcraft Services, Inc. (“Hawker”) operated FBOs at seven airports in the United States. (*Id.*) Both Signature and Hawker operated FBOs at Indianapolis International Airport (“IND”). (*Id.*)

On or about February 21, 2008, Signature entered into a Sale of Line Service Business Asset Purchase Agreement with Hawker to acquire seven FBO’s from Hawker, including a facility at IND where Signature also operated an FBO. (*See* Complaint ¶¶ 1, 8.) Signature and Hawker allocated approximately \$25.9 million of the purchase price to Hawker’s IND FBO pursuant to the Asset Purchase Agreement. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 4.)

On July 3, 2008, the government filed its Complaint in this action and Signature, Hawker, and the United States entered into a Hold Separate and Preservation of Assets Stipulation and Order and proposed Final Judgment. The Court signed the Hold Separate on July 18 and the proposed Final Judgment on October 29. The orders require, among other things, the separate operation of the former Hawker FBO, and the divestiture of either that or the existing Signature FBO. Signature advised the Justice Department that it intended to sell the former Hawker FBO. (*See* Motion of the United States in Support of Entry of Final Judgment, Docket No. 12, at 3 n.2.) On November 4, 2008, the United States filed a notice with the Court granting Signature a thirty-six day extension of time for divestiture until December 10, 2008. (Docket No. 15.)

Signature has worked diligently to sell the former Hawker FBO. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 5.) But the United States, if not the world, has fallen into the worst financial crisis since the Great Depression. As the President, the Department of the Treasury, the Federal Reserve Board, and Congress have all recognized, credit markets have ground to a standstill; banks are not lending to each other, let alone to businesses. (*See* Exs. C-1 to C-15, Supporting Documentation Describing Fallout from the Financial Meltdown.) Business values have plummeted. (*See id.*) Major stock indices have fallen over 35% in just three months, and many lending corporations have fared worse. On Thursday, November 20, 2008, the S&P index was lower than any point since 1997. (*See* Ex. C-15, Jack Healy, *Markets Dive in Last Hour, Carving New Lows*, N.Y. Times, November 21, 2008.)

As a direct result of the financial crisis, the market for the sale of FBO's has completely collapsed. In September 2008, even after the crisis had begun, Signature received several preliminary bids for the former Hawker facility ranging up to \$20 million. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 6.) By November 2008, however, several potential bidders had dropped out and only two bidders submitted final bids to Signature in the amounts of \$5 million and \$7 million (and this with Signature providing financing). (*See id.*) The bidder who submitted the \$7 million bid subsequently reduced its bid to \$6 million in cash upon being informed that the Final Judgment precluded Signature from financing 50% of the purchase. (*See id.*) Thus, Signature's best current offer for the former Hawker IND FBO is \$6 million. If Signature were forced to sell now, it would suffer a more than 75% loss, nearly \$20 million, relative to the FBO's acquisition value. (*See id.*)

Furthermore, the remaining bidders have explained to Signature that the market turmoil, the degraded climate for operations, and the non-availability of commercial bank debt were

significant factors explaining their drastic valuation reductions from their initial preliminary bids. (See Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 7.) Both bidders have cited the uncertainty surrounding the bond financing for the new terminal at the FBO as a significant risk that led them to further reduce their valuations. (See *id.*)

Although the economic crisis is severe, the Hold Separate Order has preserved competition. (See Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 8; Ex. B, Declaration of Stephen W. Lee, dated November 30, 2008, at ¶ 5.) The former Hawker facility has operated independently since the Hold Separate Order, and recently won against the pre-acquisition Signature FBO facility, a four year military refueling contract at the Indianapolis International Airport. (See *id.*) Additionally, the Director of the Indianapolis International Airport, Mr. Robert Duncan, views the operation of the Hold Separate Order positively and does not object to Signature's proposal to extend the Divestiture deadline to December 10, 2009. (See Ex. B, Declaration of Stephen W. Lee, dated November 30, 2008, at ¶¶ 4, 5.)

II. THE APPLICABLE STANDARDS

Under the express terms of the Final Judgment this Court retains jurisdiction to enable any party to modify any provisions of the Final Judgment. (See Final Judgment p. 15, at section XII.) And under Rule 60(b) of the Federal Rules of Civil Procedure, “on motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding . . . [if] it is no longer equitable that the judgment should have prospective application” or for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5) and (6). As recognized by the Supreme Court, “[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous.” *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384 (1992); *System Fed’n No. 92, Ry v. Wright*, 364 U.S. 642, 647 (1961). The D.C. Circuit has

followed this Supreme Court precedent and granted modification of a consent decree pursuant to Fed. R. Civ. P. 60(b)(5) when it was “no longer equitable that the judgment should have prospective application.” *See, e.g., United States v. Western Elec. Co.*, 46 F.3d 1198, 1204 (D.C. Cir. 1995).

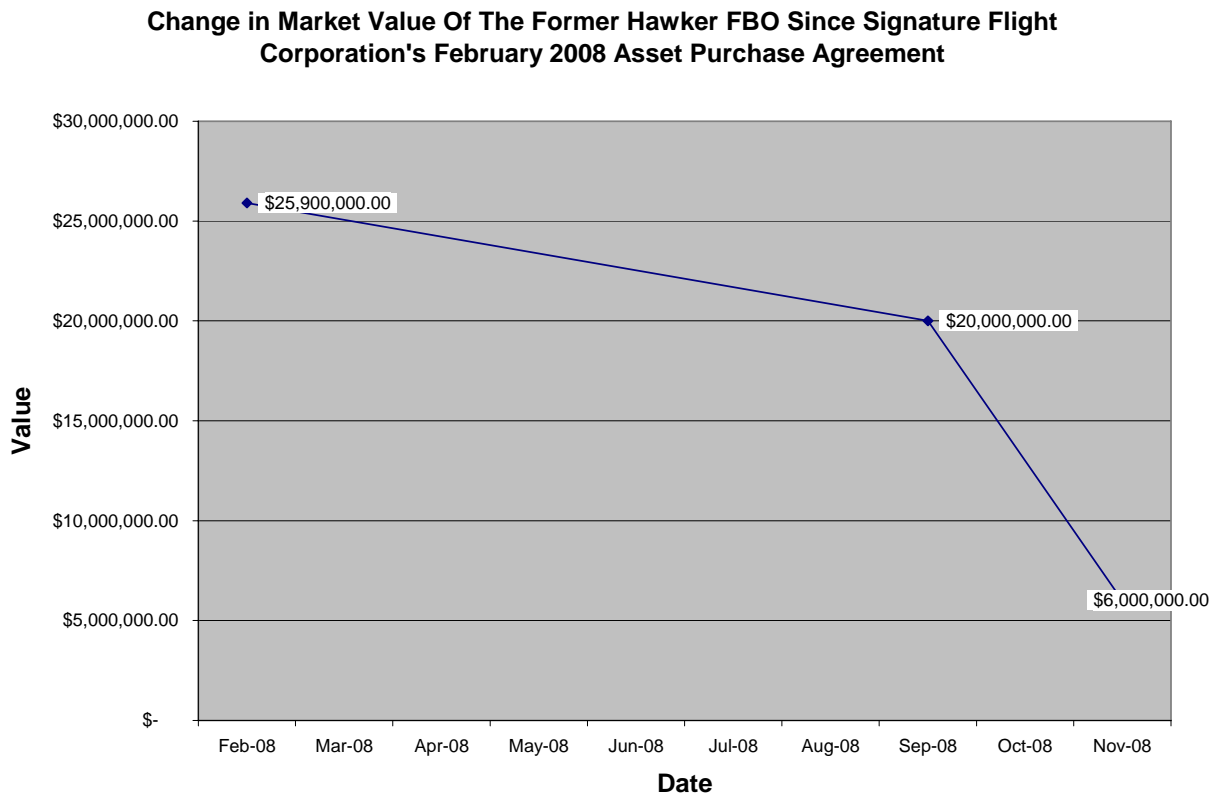
Moreover, modification is particularly appropriate when the parties did not anticipate the change in facts. “The focus of Rule 60(b)(5) is not on what was possible, but on what the parties and the court reasonably anticipated.” *United States v. Western Elec. Co.*, 46 F.3d at 1205. Finally, once a moving party has met its burden of establishing a change in fact warranting modification of a consent decree, the Court should determine whether the modification is “suitably tailored to the changed circumstance.” *See United States v. Western Elec. Co.*, 46 F.3d at 1204, *citing Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992).

III. MODIFICATION OF THE CONSENT DECREE IS PROPER DUE TO THE GLOBAL FINANCIAL CRISIS

A. Modification Is Proper Because A Significant And Unanticipated Change Of Factual Conditions Has Occurred

Rule 60 and the case law establish that an enlargement of time should be granted here. Due to the unforeseen change in facts—the global financial crisis—if Signature were required to divest now it would suffer a loss of about \$20 million, or a more than 75% loss, relative to the price allocated to the Hawker Beechcraft FBO at Indianapolis under the parties’ Asset Purchase Agreement in February 2008. (*See Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 6.*) As noted, pursuant to the Asset Purchase Agreement, the parties allocated \$25.9 million of the purchase price for the Hawker Beechcraft business to the IND FBO. (*See id.* ¶ 4.) By September 2008, after Signature knew it would be selling the IND FBO, it received preliminary bids ranging up to \$20 million. (*See id.* ¶ 6.) By November 2008, the highest monetary bid for the IND FBO was \$6 million, after several potential bidders dropped out and

remaining bidders drastically reduced their valuations as a direct result of the global financial meltdown. (*See id.*) If Signature is forced to sell the IND FBO by the December 10, 2008 divestiture deadline it will likely suffer a \$14 million loss relative to its best preliminary proposal from September 2008. The following chart summarizes the dramatic collapse in the market for the Former Hawker FBO:



The collapse of the FBO market as a direct result of the financial meltdown is unquestionably a significant change in factual conditions making compliance with the December 10, 2008 divestiture deadline substantially onerous.

There can also be no serious dispute that the breadth and scope of the financial meltdown was unanticipated by not only Signature but public officials and savvy market participants across the globe. (*See Exs. C-1 to C-15, Supporting Documentation Describing Fallout from the*

Financial Meltdown.) The parties never considered the possibility that such a broad-based financial collapse would occur in the final quarter of 2008. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 9.) Indeed, the depth and breadth of the collapse of the financial markets has caught the majority of public officials charged with monitoring the health of the economy as well as private financial experts by surprise. (*See* Exs. C-1 to C-15, Supporting Documentation Describing Fallout from the Financial Meltdown.) In short, the unanticipated financial meltdown makes it no longer equitable to enforce the December 10, 2008 divestiture deadline.

B. The Proposed Modification Is Suitably Tailored To The Changed Circumstances And Would Not Affect The Public's Interest

The proposed modification is tailored to the changed circumstance—the financial meltdown—because extending the divestiture deadline until December 10, 2009 would provide adequate time for more potential bidders to obtain financing and for the credit markets to recover. Furthermore, the remaining bidders have stated that their drastic valuation reductions are due to the significant uncertainty that they face in locking in a bond at reasonable financing rates. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 7.) With this uncertainty, new owners face the prospect of potential unlimited increases in rental costs, which translates into increased risk concerning the long-term viability of their operations at Indianapolis International Airport. Thus, extending the divestiture deadline until December 10, 2009 would help assure that a bidder is committed to operating long-term at Indianapolis International Airport. (*See id.*)

The public's interest is also advanced by granting the modification of the divestiture deadline. First, the Hold Separate Order has already guaranteed robust competition between the two FBOs at Indianapolis International Airport. As noted, the former Hawker FBO has operated

as a separate business since the Hold Separate Order and recently succeeded in winning, over Signature's legacy facility, an important four-year military refueling contract at Indianapolis International Airport. (*See* Ex. A, Declaration of M. Johnstone, dated November 24, 2008, at ¶ 8; Ex. B, Declaration of Stephen W. Lee, dated November 30, 2008, at ¶ 5.) The public is thus protected here by an existing hold separate order which has been shown to be working effectively. Furthermore, the Director of the Indianapolis International Airport, Mr. Robert Duncan, has expressed confidence in the operation of the Hold Separate Order and does not object to an extension of the divestiture deadline to December 10, 2009. (*See* Ex. B, Declaration of Stephen W. Lee, dated November 30, 2008, at ¶¶ 4, 5.)

Second, the public's interest is served by the relief sought since a grant modifying the divestiture deadline to December 10, 2009 is consistent with other governmental action. Secretary of the Treasury Paulson recently altered the Treasury's plan to buy mortgage assets from financial institutions in part to avoid the type of forced sale at depressed prices that would occur here without relief. (*See* Ex. C-8, Deborah Solomon, *Bailout's Next Phase: Consumers*, *The Wall Street Journal*, Nov. 13, 2008, <http://online.wsj.com/article/SB122650321703420903.html>.) And, albeit in different contexts, the Justice Department has previously agreed to provide flexibility in enforcing timelines governed by consent decrees in response to unusual events. For example, the Justice Department gave Exxon Mobil additional time to comply with a consent decree when a weather storm—as opposed to a financial storm—made compliance onerous. (*See* Ex. C-16, *U.S. Announces Clean Air Agreement With Exxonmobil*, October 11, 2005, http://www.usdoj.gov/opa/pr/2005/October/05_enrd_533.html.)

Finally, the public interest is served by modifying consent decrees that would have a punitive effect as a result of changed factual circumstances. Absent relief, the economic harm to

Signature would be punitive: the loss from the divestiture would significantly exceed the fines that have been imposed on some defendants for criminal price-fixing, (*see, e.g.*, Ex. C-18, Fresno, California, Electrical Contractor Pleads Guilty To Bid Rigging On Two E-Rate Funded School Technology Projects, *available at* http://www.usdoj.gov/atr/public/press_releases/2008/234543.htm (\$3.3 million criminal fine), and the loss would well exceed the normal range of fines imposed for civil contempt, (*see, e.g.*, Ex. C-17, Justice Department Settles Civil Contempt Claim Against Cal Dive International Inc. and Helix Energy Solutions Group Inc., *available at* www.usdoj.gov/atr/public/press_releases/2007/227959.htm (\$2 million settlement)).

Signature recognizes that it agreed in the Hold Separate order to “raise no claim of mistake, hardship, or difficulty of compliance” as grounds for asking the Court to modify the Final Judgment. (*See* Hold Separate And Preservation Of Assets Stipulation And Order, Docket No. 11, at Section IV.F.) Signature respectfully submits that the provision could not have been intended by either party to apply, however, to the unforeseen, and unforeseeable, financial crisis that has ensued. Furthermore, Rule 60(b) plainly gives the Court the power to modify its Orders.

Signature respectfully submits that the circumstances warrant a one year extension on the motion to make divestiture through December 10, 2009. Counsel for Signature is available, in person or by telephone, to discuss this motion with the Court and opposing counsel.

Dated: December 2, 2008

Respectfully submitted,

/s/ Gordon L. Lang

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