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.
_____/

DEFENDANT FLORIDA WEST'S MOTION FOR CONSENT TO ENTER PLEA OF NOLO CONTENDERE

Defendant, Florida West International Airways, Inc. ("FWIA" or "Company"), by and through counsel, respectfully requests the Court's consent to enter a plea of *nolo contendere* to the indictment in the captioned case. The investigation and prosecution of this case has been pending for almost five years. FWIA provides the following information in support of this request.

I. THE INVESTIGATION AND INDICTMENT OF FLORIDA WEST

FWIA is a small air cargo business located in Miami, Florida. The Company currently employs approximately 80 local employees, and leases two planes used to provide charter service to other airlines.

On June 27, 2007, FWIA's modest Miami offices were raided by several dozen federal agents, who spent the day on-site seizing documents, copying electronic data, and interviewing employees. At the conclusion of the search, the government agents served an extremely broad grand jury subpoena on the Company.

For over three years following the June 27th raid, FWIA incurred substantial costs and suffered business disruption in complying with the subpoena and dealing with the Department of Justice. During that time, the Company suffered a series of financial and business setbacks as the recession hit the air cargo business. In 2007, Florida West operated regularly scheduled cargo service between Miami and three locations in Central and South America. But the impact of the economic downturn combined with the escalating cost of fuel forced the Company to restructure in 2009 and transition to a charter service in order to survive as a going concern. This change in business model led the Company to lay off over 20 employees.

On December 2, 2010, the government indicted Florida West and its former employee, Rodrigo Hidalgo.[1] In order to investigate and defend against the charges set out in the indictment, FWIA has incurred substantial legal and other costs. On several occasions, FWIA, through counsel, has provided the government with detailed financial data detailing the Company's precarious financial condition, in an effort to demonstrate that this prosecution threatens the continued viability of FWIA and setting out the limited ability of the Company to pay any fine should the government prevail.

In August 2011, FWIA participated in a two day evidentiary hearing before Magistrate Judge Torres concerning the issue of whether the Company and Hidalgo were immune from prosecution based on Hidalgo's secret affiliation with another airline, which previously had entered into a plea agreement with the government. Preparation and participation in this hearing, and the extensive post-hearing briefing, was time consuming and costly.

Since the Court granted Hidalgo's motion to dismiss, the government has increased considerably the economic pressure on FWIA. Fully aware of the details and stresses of FWIA's

[1] No other similarly situated airline has been charged, or convicted, for these or related offenses.

present financial condition, the government has engaged in a "scorched earth" prosecution that appears to be designed to bring the Company to the brink of financial run.[2]

For example, in a motion filed on March 9, 2012, the government sought to expand this case considerably by seeking to introduce Rule 404(b) evidence of Hidalgo and, by extension, Florida West's alleged participation in a purported two month conspiracy involving shipments from Miami to South America. D.E. 228. As outlined in Florida West's opposition, the government's motion was untimely, as it failed to file the motion by the June 20, 2011 deadline for pre-trial motions set by the Judge then presiding over the case. D.E. 233. The government had given no notice to the defense in the 15 months post-indictment that it intended to file the motion until two days before filing.

The government's data dump of documents related to these new 404(b) allegations, combined with the discovery in the underlying matter, amounts to more than 3.7 million documents. In order to investigate these new allegations properly and prepare a defense, significant new investigation would be required, including witness interviews in foreign countries, possible Rule 15 depositions, and review and analysis of the new documents and data. FWIA's counsel estimates that investigation of these new allegations, disclosed 15 months after indictment, would cost more than $100,000. Although Florida West opposes the motion on several grounds, if the Court were to grant it, the defense would be compelled to seek a further delay in the trial of this case so that it could complete its investigation of these new allegations. Such delay would only increase the cost to defend this case.

[2] The Government has devoted considerable resources to pursuing this case against Florida West, including the active involvement of at least seven (7) federal prosecutors, most based in Washington, DC and none of them located in Miami.

In addition, despite the government exhaustive search of FWIA's premises almost five years ago, and FWIA's production of thousands of documents and gigabytes of electronic data in response to the government's subpoena, the government took the highly unusual step on March 2, 2012, of serving a trial subpoena on an indicted defendant, seeking thousands of documents that the government knew could only be retrieved by hand in a very time consuming and costly fashion. The government then filed a motion to compel, seeking an order requiring FWIA to produce these documents on a rolling basis months in advance of trial. D.E. 231. As outlined in Florida West's opposition, an order requiring the Company to comply with the government's subpoena would be unduly burdensome and time consuming and would "sacrifice trial preparation for subpoena compliance." D.E. 235 at 4.

In an attempt to ameliorate the cost and expense of trying this case, defense counsel asked the government earlier this month whether it would agree to a bench trial instead of a jury trial. But just minutes after receiving the request, government counsel informed FWIA that the government would oppose a bench trial. *See* Ex. 1 (email exchange between Kirby Behre and Mark Krotoski dated April 17, 2012). A bench trial would have greatly reduced the length of the trial, thereby helping to lessen some of the financial pressure on FWIA associated with the defense of this case.

Given these facts, FWIA can no longer afford to mount a defense in this case. The government's motion to admit 404(b) evidence, its trial subpoena, and its refusal to agree to a non-jury trial have increased dramatically the cost to defend this case. It appears to the defense that government took these steps in efforts to wear Florida West down financially.

II. BASIS FOR NOLO CONTENDERE PLEA

A federal criminal defendant may plead guilty, not guilty, or, with the consent of the court, *nolo contendere*. The plea of *nolo contendere* has the effect of a guilty plea, *United States v. Norris*, 281 U.S. 619, 622 (1930), and has no bearing on the sentence to be imposed, *United States v. AEM, Inc.*, 718 F. Supp. 2d 1334, 1336 (M.D. Fla. 2010). By pleading *nolo contendere*, a defendant admits the well-pleaded and essential elements of the offense charged for the purposes of the case. *Lott v. United States*, 367 U.S. 421, 426 (1961). The difference between a guilty plea and a plea of *nolo contendere* is that a plea of *nolo contendere* is "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." *North Carolina v. Alford*, 400 U.S. 25, 35-36 n.8 (1970). A defendant who pleads *nolo contendere* sacrifices certain rights, including the right to a jury trial, the right to confrontation, the right against self-incrimination, and the right to require the government to prove its case. Fed. R. Civ. P. 11(b)(1); *see also U.S. v. Broome*, 628 F.2d 403, 404 (5th Cir. 1980). However, a *nolo contendere* plea benefits the court and the parties by saving considerable time and resources that protracted litigation and trial would require. *See AEM, Inc.*, 718 F. Supp. 2d at 1337; *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451, 459 (N.D. Tex. 1957).

Before accepting a plea of *nolo contendere*, courts consider the parties' views and the public interest in the effective administration of justice. Fed. R. Crim. P. 11(a)(3). "While the view of the Government as to whether a *nolo contendere* plea should be accepted by the court is important, Rule 11(a)(3) does not make acceptance contingent upon Government consent." *AEM, Inc.*, 718 F. Supp. 2d at 1336. Rather, Courts consider a variety of factors including (1) whether the deterrent effect of the conviction will be diminished (2) whether the government will lose any opportunity to recover assets from the defendant (3) whether there is a representative of

the corporate defendant with first hand knowledge of facts sufficient to constitute a factual basis on which a guilty plea could be accepted and (4) whether the plea will undermine the public's confidence in the criminal justice system. *Id.* at 1336-39. Courts also consider the length, cost, and complexity of the anticipated trial. *Id.* at 1337; *Safeway Stores, Inc.*, 20 F.R.D. at 458. In this case, the factors weigh heavily in favor of accepting a *nolo contendere* plea from FW.

Accepting FWIA's plea of *nolo contendere* is appropriate and justified in this case. . First, as a practical matter, there is no FWIA corporate representative with first hand knowledge of the facts sufficient to acknowledge the factual basis on which a guilty plea could be accepted. Mr. Hidalgo's alleged conduct was done without the knowledge of any other current FWIA employee who could serve as a corporate representative for the purpose of entering a guilty plea. Second, the nolo conviction, the indictment itself and the cost of defense, and any fine that the court may decide to impose, will serve as sufficient deterrent to a Company with no prior criminal history, particularly where the individual whose conduct the government seeks to impute to the company has not worked for FWIA for several years.

The plea of *nolo contendere* will neither undermine the public's confidence in the criminal justice system nor the government's ability to recover assets from the Company. Instead, FWIA's decision not to contest the facts, promotes the public interest in the effective administration of justice by assuring the government of a conviction without incurring additional taxpayer expenses

Numerous antitrust defendants facing prosecution in this Circuit (and the Fifth Circuit prior to the creation of this Circuit) have been permitted to enter *nolo contendere* pleas. *See, e.g., United States v. Goodman*, 850 F.2d 1473, 1474 (11th Cir. 1988); *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 678 (5th Cir. 1981); *In re J. Ray McDermott & Co.*, 622

F.2d 166, 168 (5th Cir. 1980); *United States v. Wells Fargo Armored Service Corp.*, 587 F.2d 782, 783 (5th Cir.1979) (per curiam); *In re South Central States Bakery Prods. Antitrust Litig.*, 462 F. Supp. 388, 389 (J.P.M.L. 1978) (per curiam). In addition, trial courts in other circuits frequently accepted *nolo contendere* pleas in antitrust cases. *See, e.g., United States v. Haversat*, 22 F.3d 790, 792 (8th Cir. 1994); *United States v. Prescon Corp.*, 695 F.2d 1236, 1238 (10th Cir. 1982); *United States v. American Bag & Paper Corp.*, 609 F.2d 1066, 1067 (3d Cir. 1979) (per curiam); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389 (10th Cir. 1976); *Massachusetts v. First Nat. Supermarkets, Inc.*, 116 F.R.D. 357, 358 (D. Mass. 1987); *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (Opt-Out Cases), 1981 WL 2136, at *1 (S.D. Tex. Apr. 15, 1981); *In re Admission Tickets*, 302 F. Supp. 1339, 1341 (J.P.M.L. 1969) (per curiam).

A *nolo contendere* plea is appropriate under the unique circumstances of this case. As the Court has noted, the imputation of Hidalgo's conduct to Florida West is not at all a foregone conclusion in light of Hidalgo's secret, simultaneous employment by another airline. *See* Report & Recommendation D.E. 191at 51("While we agree that Florida West may have a compelling *defense* to criminal liability based on this argument [of non-imputation based on Hidalgo's dual employment] …."); *aff'd* at D.E. 219. While undersigned counsel believes that FWIA has a substantial and strong defense to the charges based upon the government's inability to impute the conduct of Hidalgo to FWIA, the issue of liability is unsettled at least until all of the facts are developed at trial and the court applies the law to those facts. But FWIA cannot wait for a trial to settle that issue, because, as the government now has postured this case, a trial may bankrupt the Company. Thus, FWIA's decision not to contest the facts, as opposed to admitting the imputation, fits squarely within the *nolo contendere* doctrine of serving the public interest in the

effective administration of justice. Therefore, FWIA respectfully requests that this Court permit Florida West to enter a plea of *nolo contendere*.

DATED: this 26h day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26h day of April, 2012, the foregoing was filed electronically using the ECF system.

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