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

SIGNATURE FLIGHT SUPPORT CORPORATION'S REPLY MEMORANDUM ON MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT

In its Opposition, the government does not dispute the facts supporting Signature's motion:

- Since the filing of the Hold Separate Order and the then-proposed Final Judgment, the United States and the World economy have suffered the worst financial crisis since the Great Depression. (*See* Rule 60 Mem., Part III.)

- The unforeseen global financial crisis and economic crash have collapsed the market for the sale of FBOs. (*See* Rule 60 Mem., Part III.A.)

- If Signature were forced to sell the former Hawker FBO now, it would suffer a near forfeiture relative to the value that Signature and Hawker allocated to the FBO in the Asset Purchase Agreement. (*See id*.) (Indeed, as shown by the December 8, 2008 declaration of Signature's Corporate Development Director, after Signature made its motion and before the government filed its Opposition, the highest bidder dropped out, leaving Signature with one potential final bidder and a nearly 81% decline from the assigned pre-acquisition asset value. (*See* Ex. A to Reply to Motion to Stay, Docket No. 21, Declaration of Mark Johnstone, dated Dec. 8, 2008, at ¶¶ 6, 7.))

Nor does the government dispute that the Indianapolis International Airport Authority has concluded that the proposed enlargement of the divestiture date is reasonable and appropriate, (*see* Ex. B to Rule 60 Mem., Declaration of Stephen W. Lee, dated Nov. 30, 2008, at ¶¶ 4, 5.), or

offer any facts to support the government's theory that the Hold Separate and Preservation of Assets Stipulation and Order ("Hold Separate Order") would not protect competition until divestiture. Rather, the government's position, based on its interpretation of contract law, is that the financial meltdown and destruction of the market for the sale of FBOs is irrelevant: having agreed to the divestiture deadline under the consent decree, the government says, Signature can not obtain a modification to the divestiture timetable. The government's position is contrary to Fed. R. Civ. P. 60(b), the plain language of the Final Judgment, and the inherent power of the courts to modify the judgments before them. Signature's motion to enlarge the divestiture date to December 10, 2009 should be granted.

ARGUMENT

I. The Government's Contract Theory Does Not Bar Modification.

The gist of the government's opposition is that Signature understood that the former Hawker FBO could decline in value, and that under contract principles, having agreed to a divestiture timeline in the then-proposed Final Judgment, it is now stuck with it.

The government's argument fails. First, the decision on whether to modify the decree does not rest on contract law. The government's "contractual perspective" is not "an appropriate view of the district court's discretion." *United States v. Western Elec. Co.*, 46 F.3d 1198, 1205 (D.C. Cir. 1995). Although principles of contract law may aid the court in *interpreting* the terms of a consent decree, *United States v. Baroid Corp.*, 130 F. Supp. 2d 101, 104 (D.D.C. 2001), when one party asks the court to modify the terms of a decree, the decree is viewed as a judicial act, "subject to modification to the same extent as if it had been entered as a final judgment after a full trial," *Western Elec. Co.*, 46 F.3d at 1205. *See also David C. v. Leavitt*, 242 F.3d 1206, 1210 (10th Cir. 2001) ("[A] court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an

agreement by the parties purports to do so . . . . To hold otherwise would allow the parties, by the terms of their agreement, to divest a court of its equitable power or significantly constrain that power by dictating its parameters."); *Thompson v. United States Dep't of Hous. & Urban Dev.*, 404 F.3d 821, 832 n.6 (4th Cir. 2005) ("A court's inherent power to modify a consent decree . . . is not circumscribed by the language of the decree.") (citing authorities).[1]

Rather, the Court's authority to modify the Final Judgment is governed by Fed. R. Civ. P. 60(b)(5) and (6), as well as the express terms of the Final Judgment. Rule 60(b) authorizes the Court to relieve Signature from any provision of the Final Judgment "[i]f it is no longer equitable

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[1] Even if contract law applied, the cases cited by the government are inapposite. In *General Electric Co. v. Metals Resource Group*, 293 A.D. 2d 417, 418 (2002), obligations under a commodity swap contract were not excusable due to a financial loss that was not only foreseeable but "whose prospect induced the contract in the first instance." In *Resources Investment Corp. v. Enron Corp.*, 669 F. Supp. 1038, 1043 (D. Colo. 1987), a case involving a take-or-pay gas contract, the court declined to find commercial impracticability where the party seeking excuse "clearly contemplated the likelihood of changing economic conditions," based on an express contractual obligation assigning it the risk of significant changes in the market price for energy. In *Neal-Cooper Grain Co. v. Texas Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974), the court declined to excuse performance under a supply contract that became burdensome as a result of foreseeable circumstances, which the parties did not "assume[] would not occur." And *Mergentime Corp. v. WMATA*, No. 89-1055 (TFH), 2006 U.S. Dist. LEXIS 9771 (D.D.C. Feb. 22, 2006), involved a construction project where the court noted that a government contractors' undercapitalization or insolvency does not normally excuse performance because contractors assume the risk of providing funds sufficient to perform the contract.

Indeed, contract law cases excuse a party from performance after the party experiences greatly increased expenses caused by unanticipated facts that the parties assumed would not occur. *See, e.g., Whelan v. Griffith Consumers Co.*, 170 A.2d 229, 230 (D.C. 1961) ("The doctrine of frustration of performance . . . includes impracticability due to extreme or unreasonable difficulty or expense."); *see also Miller v. Mills Constr., Inc.*, 352 F.3d 1166, 1173 (8th Cir. 2003) (holding that performance may be excused where a party experiences greatly increased difficulty or expense "caused by facts not only unanticipated, but inconsistent with the facts that the parties obviously assumed would likely continue to exist."); Restatement (Second) of Contracts § 261 (1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged.")

that the judgment should have prospective application . . .” or for “any other reason that justifies relief.” *See, e.g., Gearhart v. Browner*, No. 91-2435, 1999 U.S. Dist. LEXIS 13834, at *4 (D.D.C. Sept. 2, 1999) (granting motion to modify existing consent decree pursuant to Fed. R. Civ. P. 60(b)(5) in which plaintiffs sought to extend the deadline in the decree). And the Final Judgment itself contains a broadly drawn retention of jurisdiction clause vesting the Court with authority “to modify any of its provisions” upon application by any party. (*See* Final Judgment, Docket No. 14, Section XII, at p. 15.) Under these provisions, and the inherent power of the federal courts, modification of a consent decree is proper 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); *see also Western Elec. Co.*, 46 F.3d at 1204, 1202 (affirming modification of an antitrust consent decree pursuant to Fed. R. Civ. P. 60(b)(5) when it was “no longer equitable that the judgment should have prospective application”; recognizing that the Court’s power in “equity to modify a decree of injunctive relief,” is “long-established, broad, and flexible.”)

Second, although the parties may have recognized that the value of the former Hawker FBO might *decline* before divestiture, Signature, and we respectfully submit, the government, did not anticipate the *world financial and economic free fall* that has struck here. (*See* Ex. A to Rule 60 Mem., Declaration of Mark Johnstone, dated Nov. 24, 2008, at ¶ 9; Ex. B to Rule 60 Mem., Declaration of Stephen W. Lee, dated Nov. 30, 2008, at ¶ 4; Exs. C-1 to C-15 to Rule 60 Mem., Supporting Documentation Describing Fallout From The Financial Meltdown; *see also* Ex. A-1, Letter from the CEO & President of Signature’s Preferred Bidder to Mark Johnstone, dated Dec. 16, 2008.) The problem for Signature is not, as the government would have it, of a “low price,” or that the divestiture is “less attractive” (Opp. at 7, 11), but of a wipe-out: a nearly

81% reduction from the value assigned in the asset purchase agreement, and a 75% decline from the highest initial bid of only a few months earlier. The changed circumstances since the filing of the then-proposed Final Judgment have been of kind, not degree. Those changes warrant relief. As the *Western Electric* Court stated:

> Rule 60(b)(5) does not foreclose modifications based on developments that, in hindsight, were things that "could" happen. If the rule were so restricted, it would never be successfully invoked: whatever actually occurs after entry of the decree is necessarily something that could have occurred. The focus of Rule 60(b)(5) is not on what was possible, but on what the parties and the court reasonably anticipated.

46 F.3d at 1202; *accord Evans v. Williams*, 206 F.3d 1292, 1298 (D.C. Cir. 2000) (holding that district court erred in not modifying judgment, and writing that it is sufficient that the parties did "not actually contemplate the changed circumstances.").

In an attempt to bolster its position, the government says that, prior to the government's grant on November 4, 2008 of a modest enlargement, (Docket No. 15), that Signature represented that final bids were due on November 7, and that Signature "could" select a final bidder and complete the sale thereafter. (Opp. at 5.) As a practical matter, Signature could not have represented that a sale *would* occur, because it could not know, for a fact, whether bids would actually be submitted. More to the point, as the government concedes, when the government granted the extension, Signature had not yet received the final bids. It had only received preliminary bids, the highest of which was $20 million. (*See* Ex. A to Rule 60 Mem., Declaration of Mark Johnstone, dated Nov. 24, 2008, at ¶ 6.) It is the final bids—the highest of which was $6 million—which led to this motion.

Finally, the government's argument fails for a simple reason: if having agreed to a provision in a consent decree bars a party from obtaining a modification due to changed circumstances, then no consent decree could ever be modified. Rule 60(b)(5)'s authority to

modify a final judgment when "applying it prospectively is no longer equitable" would be nugatory. But that is not the law. *See, e.g., Western Electric*, 46 F.3d at 1205 (affirming the modification of a consent decree where there was an unanticipated change of circumstances that rendered the decree substantially more onerous); *Thompson v. United States Dep't of Hous. & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005) (same). The changed circumstances here justify modification.[2]

II. The Relief Sought Is Suitably Tailored.

Contrary to the government's assertion, (Opp. at 9-10), the modification that Signature seeks is suitably tailored to the changed circumstances. Signature does not seek to eliminate its obligation to divest an Indianapolis FBO, nor to abrogate its responsibility to hold separate and preserve the former Hawker FBO. Signature only seeks, due to the financial and economic meltdown, to enlarge the time to make divestiture. The issue before this Court is not *whether* Signature must *divest*, but simply *when*.

The government argues that the Hold Separate Order will not adequately protect competition before divestiture, (*see* Opp. at 9-10), and that the extension will not help secure a committed buyer, (*see* Opp. at 10). As to the former, Signature has provided *evidence* by declaration that the Hold Separate Order has preserved competition between the legacy Signature FBO and the former Hawker FBO. (*See* Rule 60 Mem., Part III.B; Ex. A to Rule 60 Mem.,

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[2] The government faults Signature for not submitting to the Justice Department the name of a prospective purchaser under Section IV.H of the Final Judgment, and not seeking the approval of the Indianapolis Airport Authority. (Opp. at 5 & n.5.) But the short answer is, that despite Signature's best efforts, there is no deal to present. The top bidder withdrew its bid on December 8. (*See* Ex. A to Reply to Motion to Stay, Docket No. 21, Declaration of Mark Johnstone, dated Dec. 8, 2008, at ¶¶ 6, 7; Ex. A-1, Letter from the CEO & President of Signature Preferred Bidder to Mark Johnstone, dated Dec. 16, 2008.) Signature continues to work with its sole remaining bidder to secure a final bid package.

Declaration of Mark Johnstone, dated Nov. 24, 2008, at ¶ 8; Ex. B to Rule 60 Mem., Declaration of Stephen A. Lee, dated Nov. 30, 2008, at ¶¶ 4, 5.) Indeed, the Indianapolis International Airport Authority supports Signature's motion. (*See* Ex. B to Rule 60 Mem., Declaration of Stephen A. Lee, dated Nov. 30, 2008, at ¶¶ 4, 5.) By contrast, the government has provided no *evidence*—by affidavit or otherwise—that the Hold Separate Order has failed or will fail. And as to getting a committed buyer, Signature's high bidder withdrew its bid and stated that it had concerns about its long-term viability at the airport and needed to "preserve capital for the protection of [its] existing FBOs." (*See* Ex. A-1, Letter from the CEO & President of Signature Preferred Bidder to Mark Johnstone, dated Dec. 16, 2008.) An extension of the time for divestiture would help to alleviate such concerns.

It is correct, of course, that Signature can not know, for a fact, that the market for the sale of FBOs will be better in December 2009. But Signature represents to the Court and the government that it will take that risk: if its motion for modification is granted, it will not come back and ask for another extension.

III. An Extension Is In The Public Interest.

The government argues that a limited extension of time to make divestiture is not in the public's interest because, in its view, the Hold Separate Order may not protect competition until divestiture occurs. But, as discussed above, the only facts of record are to the contrary. Under the Hold Separate, the former Hawker FBO beat Signature in the competition for an important military refueling contract, and the Indianapolis International Airport Authority—which also is charged with protecting the public interest—supports the proposed modification. *See* Ind. Code § 8-22-3-28 ("The acquisition, establishment, construction, improvement, equipment, maintenance, control, and operation of airports and landing fields for aircraft under this chapter is a governmental function of general public necessity and benefit, and is for the use and general

welfare of all the people of Indiana, as well as of the people residing in the district.") The government's speculation about what might occur does not support a different result. Indeed, the federal government's response to the current economic crisis has been to avoid the forced sale of assets that the government is so intent on here. The proposed modification is in the public interest.

CONCLUSION

For the foregoing reasons, Signature respectfully requests that the Court grant Signature's Motion for Partial Relief From and Modification of Judgment and order that notwithstanding any other provision of the Hold Separate Order and Preservation of Assets Stipulation and Order and the Final Judgment, the time for Signature Flight Support Corporation to make divestiture under Section IV.A of the Final Judgment is enlarged to December 10, 2009.

Dated: December 22, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2008, a true and correct copy of the foregoing REPLY MEMORANDUM ON MOTION FOR PARTIAL RELIEF FROM AND MODIFICATION OF JUDGMENT is served by electronic filing upon:

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