



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 12th day of November, 2004

Blue Moon Aviation, LLC

**Violations of 49 U.S.C. §§ 41101
and 41712**

Docket OST 2004-16943

Served November 12, 2004

CONSENT ORDER

This consent order concerns unauthorized air carrier operations by Blue Moon Aviation, LLC, (Blue Moon). Blue Moon has engaged in air transportation as an indirect air carrier without economic authority. Blue Moon's unauthorized service violated the certificate requirements of Title 49 of the United States Code and constituted an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712. This consent order assesses a compromise civil penalty of \$60,000 and directs Blue Moon to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712.

Pursuant to 49 U.S.C. §§ 41101 and 41102, citizens of the United States¹ may not engage in air transportation unless they hold a certificate of public convenience and necessity² authorizing them to provide air transportation as an air carrier. An "air carrier" means a citizen "undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). "Air transportation" includes the transportation of passengers or property by aircraft as a common carrier for compensation between two places in the United States or between a place in the United States and a place outside of the United States.³ Common carriage, in the context of air service, consists of the holding out or

¹ A "citizen" includes a person, partnership, corporation, or association. 49 U.S.C. § 40102(a)(15).

² A carrier may also operate small aircraft as an air taxi under the exemption authority of 14 CFR Part 298. Carriers engaged in air transportation must also be certificated by the Federal Aviation Administration under 14 CFR Parts 135 or 121. 14 CFR 119.1.

³ 49 U.S.C. §§ 40102(a)(5), (a)(23), and (a)(25).

provision of air transportation to the public for compensation or hire.⁴ From the standpoint of the requirements of § 41101, the holding out of service, as well as the actual operation of air service, constitutes “engaging” in air transportation.⁵ Violations of § 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

Blue Moon is the lessee of an Airbus 319 aircraft, but has no economic authority itself to hold out or to provide, directly or indirectly, air transportation using this or any other aircraft. Nevertheless, from its inception in December 2003 until May 2004, Blue Moon engaged in significant indirect air carrier service pursuant to an “aircraft management and charter services agreement” with Frontier Airlines, Inc. (Frontier), requiring, among other things, that Frontier place Blue Moon’s aircraft on its Part 121 Operating Certificate and operate it exclusively for charter flights “arranged and sponsored by” Blue Moon. The agreement also required Frontier to provide flight crews and flight dispatch services in exchange for a monthly management fee and reimbursement of all direct costs, while granting Blue Moon total authority over the use of the aircraft, as well as sole responsibility for soliciting, marketing, and scheduling of any single entity charter business using the aircraft, and for invoicing and collecting monies associated with those charters. In addition, under the agreement, Blue Moon was responsible for procuring substitute service if the A-319 was unavailable and for arranging and paying for, either directly or through reimbursement to Frontier, all air operating services associated with the use of the aircraft (other than the dispatch and provision of the crew), including fuel, catering, and ground handling services, and airport fees.

With respect to marketing, Blue Moon held out air transportation in its own right and not as an agent of Frontier or any other properly certificated entity primarily through direct personal solicitation by its owner and president. The company also held out air transportation in its own right on its Internet website, which invited potential customers to request quotes for “executive charter” aboard an A-319, which bore only Blue Moon’s livery. The website also included a statement that Blue Moon was “pleased to operate Airbus A310 Executive aircraft.” Although the website made reference to Frontier as an “affiliate” and “operating partner” of Blue Moon, through the site Blue Moon falsely created the impression that it was the airline providing the advertised service.

Blue Moon’s efforts resulted in the procurement of a number of contracts for air transportation, ranging from single flights to operations over an entire professional sports season. Blue Moon entered into these contracts as a principal. In accordance with its

⁴ See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *MSG Flight Operations, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-7-3 (Jul. 6, 2004); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (Dec. 29, 2003).

⁵ Order 2001-9-6. Prior to 1994, when Title 49 was recodified and simplified, 49 U.S.C. § 41101 stated that no carrier could “engage” in air transportation without appropriate authority. Although the wording of § 41101 now states that what is prohibited is “providing” air transportation without authority, Congress made clear when it recodified Title 49 that in doing so it did not intend any substantive change to the statute. Act of July 5, 1994, Pub. L. 103-272, § 6(a), 108 Stat. 745, 1378.

responsibilities under its arrangement with Frontier, Blue Moon collected and held all of the monies paid by consumers who ultimately were provided air transportation using the A-319 that Blue Moon leased and then paid Frontier to operate. Blue Moon did not act as an agent for Frontier or for the ultimate charter customers that Frontier transported. Therefore, the Office of Aviation Enforcement and Proceedings (Enforcement Office) believes that Blue Moon held out its services as an air carrier without the required Departmental economic authority.

We are particularly concerned about Blue Moon's operations because its arrangement bypassed the protections put in place by the Department to afford the public a measure of financial protection where charter flights are involved. With respect to single-entity charters using large aircraft, Department rules require a direct air carrier that engages in charter air transportation to maintain a bond, in an unlimited amount, to guarantee performance of all charter flights for which it has contracted, or to maintain an escrow account into which it must deposit immediately all payments received for charter flights until after the flight has been operated.⁶ Blue Moon, however, entered into numerous contracts for charter air transportation and it received payments for charter trips, none of which money was escrowed or protected by a bond under Department rules while in Blue Moon's possession. The Enforcement Office believes that Blue Moon's operations were not only unlawful, but posed an unacceptable risk to the public's funds of the kind that 49 U.S.C. § 41101 and Department regulations, where followed, are designed to minimize.⁷

In mitigation, Blue Moon states that it marketed and arranged single-entity charter transportation with a good faith belief that it was doing so in full compliance with all applicable aviation laws and regulations, that any noncompliance was inadvertent, and that Blue Moon has already revised its business practices to achieve full compliance. It further asserts that every flight it booked was not only confirmed and operated by Frontier, a direct air carrier that was fully certificated under 49 U.S.C. §41102 and 14 CFR Part 121, but also that all customers were well aware of the fact that Blue Moon was making the arrangements for flights that would be operated by Frontier. Blue Moon also avers that its customer contracts, Internet website content and other promotional materials fully disclosed that Blue Moon itself is not an air carrier and that it never attempted to mislead the public into believing that it is an air carrier, and that the vast majority of its business was derived through pre-existing relationships with parties who were well aware of Blue Moon's status. In addition, Blue Moon states that it has not encountered any instances in which a member of the public was in fact misled or harmed in any way by its activities.

Upon becoming aware of and fully understanding the Enforcement Office's concerns, Blue Moon states that it immediately shut down its website and refrained from soliciting and/or contracting with any additional customers, in strict adherence to the Department's

⁶ This rule is specified in 14 CFR 212.8. Similar protections exist for public charter flights, with the authorized indirect air carrier required to have a bond or other security arrangement and to escrow payments from charter participants until payment is made to the airline's own escrow account. 14 CFR 380.34.

⁷ Frontier's involvement in this matter was the subject of a separate consent order. *Frontier Airlines, Inc., Violations of 49 U.S.C. § 41712 and 14 CFR Part 212*, Order 2004-8-20 (Aug. 8, 2004).

guidance. Blue Moon states that it has cooperated fully with the Department's investigation into its marketing and arranging of single entity charters, and that Blue Moon has taken prompt and effective action to modify its marketing efforts, redesigned its website, and restructured its business relationship with Frontier. Further, Blue Moon represents that all charter customers now contract directly with Frontier and that all monies received are properly escrowed in accordance with the Department's regulations. Lastly, Blue Moon states that it will no longer directly enter into a contract to provide single entity charter air transportation unless duly authorized to act as an agent by a certificated Part 121 carrier or the entity to be flown.

The Enforcement Office views seriously Blue Moon's violations of the Department's licensing requirements. We have carefully considered the facts of this case and continue to believe enforcement action is necessary. In this connection and in order to avoid litigation, the Enforcement Office and Blue Moon have reached a settlement of this matter. Without admitting or denying the violations described above, Blue Moon, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 by engaging in air transportation directly or indirectly and to the assessment of \$60,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, \$30,000 shall be paid under the terms described below. The remaining \$30,000 shall be suspended for one year and then forgiven, unless Blue Moon violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Blue Moon may be subject to further enforcement action. The Enforcement Office believes that this compromise is appropriate in view of the nature and extent of the violations in question, serves the public interest, and creates an incentive for all companies that desire to be involved in air transportation to comply fully with the Department's licensing requirements.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of the order as being in the public interest;
2. We find that Blue Moon Aviation, LLC, violated 49 U.S.C. § 41101, as described above, by engaging in air transportation as an air carrier without appropriate economic authority;
3. We find that by engaging in the conduct described in paragraph 2, above, Blue Moon Aviation, LLC, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. Blue Moon Aviation, LLC, and all other entities owned and controlled by, or under common ownership and control with Blue Moon Aviation, LLC, and its successors and assignees, as well as the owners and officers of all such companies, are ordered to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712;

5. Blue Moon Aviation, LLC, is assessed \$60,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of the assessed penalty amount, \$15,000 shall be due and payable within 30 days of the issuance of this order and \$15,000 shall be due and payable within 90 days of the issuance of this order. The remaining \$30,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless Blue Moon Aviation, LLC, violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Blue Moon Aviation, LLC, may be subject to further enforcement action. Failure to pay the penalty as ordered will subject Blue Moon Aviation, LLC, to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible enforcement action for failure to comply with this order; and

6. Payment of the civil penalty described above shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the attached instructions.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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