



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

**Issued by the Department of Transportation
on the 6th day of December, 2006**

**Thomas Kolfenbach, individually, and
Southeast Airlines, Inc.**

**Violations of 49 U.S.C. § 41712, and 14 CFR
Parts 380 and 212**

Docket: OST 2006-23528

Served: December 6, 2006

CONSENT ORDER

This consent order concerns violations of certain consumer protection provisions of the Department's Public Charter regulations during 2004 by Southeast Airlines, Inc. (Southeast), an airline that sold Public Charter flights directly to the public. Southeast, under the direction and control of then President and CEO Thomas Kolfenbach, failed to properly maintain escrow accounts and improperly used and handled charter participant funds, in violation of 14 CFR Parts 380 and 212. These activities also constituted an unfair and deceptive practices in violation of 49 U.S.C. § 41712. This order directs Southeast and Mr. Kolfenbach to cease and desist from future similar violations and directs Southeast to pay a compromise civil penalty of \$500,000. The order further directs Mr. Kolfenbach to refrain from involvement in any air carrier or Public Charter operations for ten years.

Southeast was a Largo, Florida-based air carrier authorized to engage in charter air transportation using large aircraft. Part 212 of the Department's rules, 14 CFR Part 212, governs the conduct of direct carriers, such as Southeast, that operate charter flights, including Public Charter flights pursuant to Part 380 of the Department's regulations, 14 CFR Part 380. A primary purpose of both Parts 212 and 380 is the protection of consumers' funds through the required use of financial security arrangements, including escrowing of charter participant payments. Pursuant to Part 212, a certificated air carrier may operate a Public Charter program as a principal responsible to charter participants, provided it complies with all the requirements of Part 380, in particular those related to proper escrowing of charter participant payments. 14 CFR 212.7(b)(2). Those provisions in Part 380 also require, among other things, that a Charter Operator, such as Southeast,

deposit participant payments in an escrow account and provide refunds of their money within 14 days of the cancellation of a flight. 14 CFR 380.32(k).

In 2003 Southeast filed a public charter prospectus that, as amended, covered daily flights, primarily between Fort Lauderdale and New Windsor, NY and several other cities along the Atlantic Seaboard and in the Midwest. Southeast operated as the Public Charter operator and the direct air carrier for these flights. Southeast abruptly ceased operations on November 30, 2004, apparently due to financial problems. As a direct result of this termination, the travel plans of thousands of passengers were disrupted. In addition, hundreds of passengers were temporarily stranded mid-trip and had to find alternate means to return home.

At the time Southeast ceased operations without warning, it simply closed its doors and elected not to process refunds. Indeed, with only limited exceptions, the Office of Aviation Enforcement and Proceedings (Enforcement Office) was unable to contact any of Southeast's principals, officers, or other employees and could not obtain an accounting of how many charter participants were stranded by Southeast's actions, how many charter participants had paid for trips they had not yet taken and for which they were therefore due a full refund, and how much money was collected from charter participants that should have been placed in the depository account established by Southeast as required by Part 380.¹

Based on the Enforcement Office's investigation of this matter, Southeast failed to properly deposit all participant payments into its depository account, as required by the Department's regulations and failed to provide necessary participant information to Valley National Bank, of New York, its depository bank.²

The violations and consumer harm attributable to Southeast's failure to provide Valley National Bank the necessary charter participant information as required by Department regulations was compounded by Southeast's use of a "voucher" system, in lieu of refunds. Southeast initiated a voucher system whereby passengers who could not make their scheduled travel date could receive a voucher from Southeast that could be used toward a future flight any time within a year of the participant's originally scheduled travel date. However, Southeast failed to ensure that the funds from these participants who permitted Southeast to retain their payments in return for future charter transportation remained in a depository account as required by the Public Charter regulations. (14 CFR 380.34 and 380.35) Instead, at the time Southeast certified to Valley National Bank that it had completed a particular flight, it was paid all funds remaining in the depository account associated with that flight, including the payments of

¹ Staff of the Department's Enforcement Office have had limited contact with Southeast's Vice President of Administration and Legal, an attorney whose law practice is in Virginia.

² Valley Bank is the subject of a separate investigation regarding its compliance with Department regulations in connection with this matter.

participants who were initially associated with the flight but had accepted a voucher and had yet to travel.³

As a result of Southeast's failure to deposit and maintain charter participant funds in its escrow account, participants were either unable to obtain refunds from the depository bank or suffered inconvenience and delay in obtaining refunds. In this latter regard, some passengers did not receive refunds until one year after Southeast ceased operations and virtually all of the passengers were forced to obtain refunds through credit card chargebacks or through claims filed against Southeast's security instrument at United Bank and Trust Company of Florida. By engaging in the conduct described above, Southeast violated 14 CFR 212.7(b)(2) and 380.32(k), 380.34 and 380.35, and engaged in an unfair and deceptive practice and unfair method of competition in violation of 14 CFR 380.27 and 49 U.S.C. § 41712.

In mitigation, Southeast asserts that it was forced out of business by a combination of factors beyond its control. Southeast claims that it did respond to passengers' queries of how to obtain alternate means of transportation after the shutdown, and how to obtain refunds. Southeast states that it gave detailed instructions to its passengers on its website on how to make alternative travel arrangements, how to claim refunds, and how to contact a representative of the airline. Southeast states that it also contacted other carriers to request their assistance in carrying passengers and a number of passengers received alternative air transportation for a \$25.00 fee.

Southeast asserts that several members of Southeast's staff remained in the corporate offices for over a week after the cessations of flight operations and were available to respond to passengers inquiries with one staff member having all incoming faxes routed to his personal fax machine so that there would be no interruption or cessation of communications. Southeast maintains the position that all of Southeast's passengers eventually received refunds. Southeast further asserts that Valley National Bank contributed to the carrier's problems by failing to properly account for passenger funds in Southeast's escrow account.

Mr. Kolfenbach asserts that he was unaware that not all of the passengers' payments were properly deposited in the escrow account, or that payments from passengers who received vouchers did not remain in the escrow account. Mr. Kolfenbach states that he relied on his staff to attend to those functions. As to Southeast's failure to make passenger records available to the Enforcement Office, Mr. Kolfenbach states that the reservations system vendor repossessed its computers and reservations system software, including Southeast's reservations and passenger data, immediately after the Southeast shut down, completely precluding Southeast from contacting passengers or processing refunds. Southeast claims that, following that repossession of its computer and reservation system materials, and a

³ While it may be possible that some participants who were provided vouchers were not actually entitled to a refund but were instead provided a voucher as a goodwill gesture, Southeast's failure to maintain accurate records or to provide assistance in locating such records after its abrupt shutdown has prevented the Enforcement Office from determining whether this occurred and there is no evidence that such is the case.

few days after the airline ceased operations, a burglary of the corporate offices occurred and the reservations department computers were stolen, among other things.

The Enforcement Office has carefully considered the facts in this case, including the information provided by Southeast Airlines, Inc. and Mr. Kolfenbach, but continues to believe that enforcement action is warranted. Southeast Airlines, Inc. and Mr. Kolfenbach, in order to avoid litigation and without admitting or denying the alleged violations, agrees to the issuance of this order, which includes a compromise civil penalty assessment of \$500,000 against Southeast Airlines, Inc. This order also directs Southeast Airlines, Inc. and Mr. Kolfenbach to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR Parts 212 and 380. It further directs Mr. Kolfenbach to refrain from involvement in any air carrier or Public Charter operations for ten years from November 30, 2004, the date of Southeast Airlines, Inc.'s cessation of service. This compromise assessment and the accompanying cease and desist provisions are appropriate considering the nature and extent of the violations described herein and serves the public interest as a deterrent to future unauthorized air transportation transactions by Southeast Airlines, Inc. and Mr. Kolfenbach as well as by other similarly situated companies and persons.

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 Southeast Airlines, Inc. violated 14 CFR Parts 212 and 380 by failing to properly maintain Public Charter escrow accounts and improperly using and handling participant funds;
3. We find that Southeast Airlines, Inc. violated 14 CFR 380.34 by failing to keep an accurate accounting of passengers who received vouchers for future transportation and maintain those passengers' funds in its escrow account;
4. We find that Southeast Airlines, Inc. violated 14 CFR 380.34(k) by failing to issue air charter participants refunds within 14 days after the cancellation of its charter flights;
5. By engaging in the conduct described in ordering paragraphs 2, through 4 above, Southeast Airlines, Inc. engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
6. We order Southeast Airlines, Inc. and Thomas Kolfenbach, as the individual in control of Southeast, Inc., and all other entities owned or controlled by or under the common ownership with Southeast Airline, Inc. and Thomas Kolfenbach, and their successors and assignees to cease and desist from further violations of 14 CFR Parts 212 and 380 and 49 U.S.C. § 41712;

7. We order Thomas Kolfenbach to refrain from involvement in any air carrier or Public Charter operations, on behalf of himself or any other person or entity, until November 30, 2014; and
8. Southeast Airlines, Inc. is assessed \$500,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 through 5 above. Payment shall be made within 15 days of the date of the service date of this order. Payment 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. Failure to pay the penalty as ordered will subject Southeast Airlines, Inc. to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

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)

*An electronic version of this document is available
on the World Wide Web at
<http://dms.dot.gov/general/orders/aviation.html>*