

Order 2006-2-10
Served: February 16, 2006



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

Issued by the Department of Transportation
on the 16th day of February, 2006

Servicios Aéreos Professionales, S.A.,

Formal Complaint for Fraud, Breach of Contract,
Misleading, False Representation and Warranties
against Embraer Aircraft, Embraer Finance Ltd.,
John Doe and Jane Doe which may be other
unknown persons at this moment and may be
responsible for the herein described actions

DOCKET OST-05-22601

ORDER DISMISSING COMPLAINT

On September 27, 2005, Servicios Aéreos Professionales, S.A., ("SAPSA"), filed a formal enforcement complaint against "Embraer Aircraft, Embraer Finance Ltd., John Doe and Jane Doe which may be other unknown persons at this moment and may be responsible for the herein described actions" (collectively "Respondents" or "Embraer") alleging, among other things, fraud and breach of contract.¹

In its Complaint, SAPSA, a Dominican Republic air carrier², alleges that Respondents committed fraud, false representation, falsification of records and other illegal acts in the sale of an EMB-120 aircraft to SAPSA. Specifically, SAPSA alleges at page 2 of its Complaint that Embraer "did not deliver the appropriate logbooks for the aircraft, the necessary airworthiness certificate, the necessary [aircraft] inspection, the necessary

¹ Department rules require that such complaints be filed pursuant to 14 CFR 302.400, et seq. Those procedural rules require that the complaint and all pleadings be served upon the Deputy General Counsel and the Assistant General Counsel for Aviation Enforcement and Proceedings. (Rules 404 and 402(e), respectively.) Neither the Complaint nor the Answer was served on Department staff as required. Therefore, we admonish both parties to comply with Department procedural rules in the future.

² SAPSA has exemption authority to engage in charter air transportation of persons and property between the Dominican Republic and the United States. (Notice dated March 10, 2005, Docket OST-97-3077).

records and equipment to place the aircraft in [sic] a Part 119/135 certificate and in the records provided made or caused to be made false and fraudulent or intentionally false entry in any record in violation of 43.12.” (This citation is a reference to 14 CFR 43.12, *Maintenance records: Falsification, reproduction, or alteration*). SAPSA also alleges that Respondents failed to comply with 14 CFR Part 25, and requests that the Department determine if Embraer has the qualifications to hold a manufacturer certificate issued by the Federal Aviation Administration (FAA).

On October 14, 2005, the Respondents filed an Answer in which they admitted that there was a sale of an aircraft to SAPSA, but denied the allegations in the Complaint.³ The Respondents argue first that the Complaint should be dismissed since it was filed in an improper forum. Embraer states that under 14 CFR 302.404(a), any person may file a complaint with the Assistant General Counsel about any violation of the “economic regulatory provisions of the Statute [49 U.S.C Subtitle VII] or the Department’s rules, regulations, orders, or other requirements.” (Answer at p. 6.) Respondents argue, however, that the Complaint should have been filed with the Administrator of the FAA pursuant to 14 CFR 13.5(a) since the only regulations alleged to be violated are administered by him or her. Respondents also state that the aircraft was sold “AS IS”, and that the allegations, if true, would constitute a contractual dispute between SAPSA and Embraer, and do not involve or relate to a violation of any Department or FAA regulations or orders. Lastly, Respondents argue that since the events surrounding the purchase of the aircraft took place in 1999, any enforcement proceeding based on violations that took place during or before that year would be barred by the five year statute of limitations on enforcement actions set forth in 28 U.S.C. §2462.

On January 17, 2006, Respondents filed a motion pursuant to 14 CFR 302.406(c)(2) in which they requested that the Deputy General Counsel dismiss the Complaint. Embraer argues that most of the Complaint consists of rambling accusations of fraud and deceit on the part of Embraer relating to a commercial dispute between the Respondents and SAPSA over which the Department has no jurisdiction or concern, and the remainder consists of vague and unsubstantiated allegations of a violation of FAA regulations. Respondents argue that the Complainant is engaging in a campaign of harassment and intimidation intended to bully Embraer into settling its commercial dispute with Complainant, which should not be allowed. In support thereof, Embraer alleges that counsel for SAPSA published a purported Department of Transportation “Legal Notice” in worldwide editions of the *Wall Street Journal*,⁴ which gives the false impression that

³ Respondents state that Embraer Aircraft Customer Services, Inc., was incorrectly named Embraer Aircraft in the Complaint. They also state that Marcelo Botelho Rodrigues is named in the heading of the Complaint, but not in the Caption. They ask that the Complaint be dismissed against him since service has not been made upon him in Brazil and there are no factual allegations in the Complaint that he violated any statute, or DOT or FAA regulation.

⁴ The “Legal Notice” was published in the U.S. edition of the *Wall Street Journal* on January 4 and the *Wall Street Journal* Asian and European editions on January 10, The “Legal Notices”, which are identical, state: “**BEFORE THE DEPARTMENT OF**

the Department published the notices and has instituted an enforcement proceeding against Respondents.

On January 23, 2006, SAPSA filed a Motion In Response to Respondents' Motion to Dismiss in which it asks that the motion to dismiss be denied. The Complainant denies that its representative submitted the Legal Notices to the *Wall Street Journal*, and claims that the Department is the proper forum to adjudicate the commercial dispute between the two parties. SAPSA argues that Respondents' motion is just the latest attempt to put pressure on the Department to end this proceeding and to prevent Complainant's case from being heard.

The Motion to Dismiss was filed with the Deputy General Counsel pursuant to 14 CFR 302.406(c)(2). In light of the action being taken here, that motion is now moot.

Specifically, by the authority delegated to me by 14 CFR 302.406(a)(b) and for the reasons set forth below, we find that institution of a formal proceeding against Respondents in this instance would not serve the public interest, and we dismiss the Complaint filed by SAPSA on September 27, 2005, instituting this proceeding.⁵

As a preliminary matter, we agree with Embraer that an enforcement proceeding before the Office of the Secretary of Transportation is an inappropriate forum to resolve the issues raised by SAPSA's Complaint. Subtitles I and VII of Title 49 establish a bifurcated system with respect to the regulation of air commerce and transportation by the Secretary of Transportation and the Administrator of the FAA. The Office of the Secretary of Transportation is charged with carrying out the economic regulation of air transportation while the Administrator of the FAA is charged with the aviation safety duties and powers over air commerce and transportation. As Respondents argue, third-party complaints filed with the Assistant General Counsel for Aviation Enforcement and Proceedings pursuant to 14 CFR 302.404(a) are for violations of the economic regulatory provisions of the Statute or related rules, regulations, orders or other requirements concerning the sale or provision of air transportation. Complaints relating to violations of the Statute or regulations or orders concerning the aviation safety duties and powers administered by the Administrator are to be filed with him or her under 14 CFR 13.5(a).

TRANSPORTATION, OFFICE OF THE SECRETARY, WASHINGTON, D.C., DOCKET: OST-2005-22601 The U.S. Department of Transportation investigates Embraer for Fraud, Perjury, Breach of Conduct, Misleading, False Representation and Warranties for illegally selling a non-airworthy pre-owned Embraer EMB 120ER Brasilia aircraft" to SAPSA, and then directs the reader to Docket OST-2005-22601 on the Department's website, www.dot.gov.

⁵ SAPSA supplemented its Complaint with various documents and filed an application to take depositions of certain Embraer executives. Respondents moved to strike the documents and objected to SAPSA's application for depositions. Since the underlying Complaint has been dismissed, all the other requests for relief are dismissed as moot.

SAPSA does not allege that the Respondents violated any economic Statute or rules, regulations, orders or other economic requirement under the jurisdiction of the Secretary of Transportation. It only alleges that Respondents violated 14 CFR 43.12 and Part 25. Both are under the jurisdiction of the FAA Administrator. Therefore, to the extent that SAPSA's Complaint alleges violations of any rules or regulations, it should have been filed with the Administrator pursuant to 14 CFR 13.5(a).

Furthermore, even if the Complaint was properly filed with the Secretary of Transportation, and it was not, it should be dismissed because we believe that the Department's enforcement authority and resources should be used to protect the public interest and not merely to resolve private grievances.⁶ Here the public was not harmed by Embraer's actions. The gravamen of SAPSA's Complaint, which it admits, is a commercial dispute between SAPSA and the Respondents over the sale of an aircraft. We will not launch or pursue an enforcement action solely to vindicate a private contract right. As the Supreme Court recognized, the Department has never "construed or applied [its authority] to displace courts as adjudicators in air carrier contract disputes" *American Airlines v. Wolens*, 513 U.S. 219, 231 (1995), and has neither the mandate nor the resources to remedy private wrongs (*Id.* at 234.) Under these circumstances, we believe that it is not in the public interest for the Department to attempt to resolve a dispute of this nature especially when it has been over five years since the events underlying the dispute took place and where an adequate remedy appears to be available elsewhere.⁷

Lastly, we must discuss the Legal Notices that were published in the worldwide editions of the *Wall Street Journal*. We agree that these notices give the false impression that the Department published them and that the Department instituted an enforcement proceeding against Respondents. The Department does not publish "Legal Notices" of ongoing investigation in newspapers of wide circulation. We admonish all persons appearing before the Department that they are bound by the Rules of Conduct for practicing before the Department set forth in 14 CFR Part 300. We consider the publication of any such notices by a party to a proceeding for whatever reason to be unprofessional conduct forbidden by Part 300.

Accordingly, we dismiss the Complaint of Servicios Aéreos Profesionales, S.A., against Embraer Aircraft, Embraer Finance Ltd., John Doe and Jane Doe, which may be other unknown persons at this moment and may be responsible for the herein described actions.

This order is issued under authority assigned in 14 CFR 302.406 and shall be effective as a final order of the Department within 30 days after it is served.

⁶ See, e.g., Orders 95-1-2, January 5, 1995; 94-10-36, October 26, 1994; 83-2-120, February 28, 1983; 80-5-11, May 1, 1980; and 79-12-173, December 26, 1979.

⁷ As noted in SAPSA's Motion In Response to Respondent's Motion to Dismiss, this matter apparently has been or is the subject of civil cases in New York and Puerto Rico. (Motion at pp. 5 and 6.)

BY:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

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