



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 9th day of November, 2009

**Roni Herskovitz, Individually, and
Ultimate Fares, Inc.**

Docket OST 2009-0002

**Violations of 49 U.S.C. § 41712 and
14 CFR 257.5(d), 399.80(f) and 399.84**

CONSENT ORDER

This consent order constitutes a settlement of the above-captioned matter between the Office of Aviation Enforcement and Proceedings (Enforcement Office) and Ultimate Fares, Inc., (Ultimate Fares) and Roni Herskovitz (with Ultimate Fares, "Respondents"). The order directs Ultimate Fares to cease and desist from further violations of 49 U.S.C. § 41712 and 14 CFR 257.5, 399.80, and 399.84 and assesses Ultimate Fares a \$600,000 civil penalty in compromise of penalties otherwise due and payable for the violations described below. It also separately directs Mr. Herskovitz, in his personal capacity, to cease and desist from further violations of 49 U.S.C. § 41712 and 14 CFR 257.5, 399.80, and 399.84 and assesses Mr. Herskovitz, in his personal capacity, a \$30,000 civil penalty in compromise of penalties otherwise due and payable for the violations described below. Lastly, this order prohibits Mr. Herskovitz personally for a period of not less than 12 months from holding any ownership interest in and from having, except as an air travel consumer, any direct or indirect involvement, remunerative or otherwise, with a ticket agent or an agent of an air carrier or foreign air carrier that arranges, sells, advertises, or holds out air transportation on the Internet.

Applicable Law

Ultimate Fares is a travel agent that sells air transportation, primarily through its Internet website. Engaging in such conduct makes Ultimate Fares a "ticket agent" pursuant to 49

U.S.C. § 40102¹ and, therefore, subjects it to the Department's jurisdiction, including the prohibition on unfair and deceptive practices and unfair methods of competition in 49 U.S.C. § 41712 and the requirements of 14 CFR 257.5, 399.80, and 399.84.

In 14 CFR 399.80(f), the Department has stated that, as a matter of policy, it regards certain types of conduct by ticket agents to be unfair and deceptive practices or unfair methods of competition, including "misrepresentations as to fares and charges for air transportation and services connected therewith." Under 14 CFR 399.84, the Department's full-fare advertising rule, fare advertisements by air carriers or their agents must state the full price to be charged the consumer. Long-standing enforcement case precedent² allows taxes and fees collected by carriers and other sellers of air transportation, such as passenger facility charges (PFCs) and international departure taxes, to be stated separately in advertisements, so long as the charges are levied by a government entity, are not *ad valorem* in nature, i.e., not assessed as a percentage of the fare price, are collected on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full-fare to be paid.³ Thus, *ad valorem* taxes, such as the U.S. Federal transportation excise tax (FET)⁴ and service fees charged by travel agents⁵, as well as any other carrier or agent-imposed fee must be included in the advertised fare. Fare advertisements that include only general statements regarding the existence of additional taxes and fees do not allow consumers to calculate the full-fare to be paid and, therefore, do not comply with section 399.84 or the Department's enforcement case precedent and constitute an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712. When such advertisements are caused to be published by a ticket agent, they also violate section 399.80(f) and constitute a separate and distinct violation of section 41712.⁶

¹ 49 U.S.C. § 40102(a)(45) defines a ticket agent as "a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for air transportation."

² The Department has issued over 100 cease-and-desist orders enforcing section 399.84 in this manner. *Notice of Proposed Rulemaking: Price Advertising*, 70 Fed. Reg. 73693, Dec. 14, 2005; OST dockets 2006-23528, 2007-26781, 2008-0031, and 2009-0001.

³ See, e.g., *Cheap Seats, Inc.*, Order 2002-10-21; *Notice Regarding Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet*, January 18, 2001, at <http://airconsumer.ost.dot.gov/rules.htm>.

⁴ The FET is currently assessed at 7.5% of the base ticket price. In practice, this means that, for example, a \$100 ticket would cost a consumer a total of \$107.50 (assuming no other taxes and fees applied) and would therefore be required to be advertised at the first point at which it was seen by consumers as costing \$107.50. The \$7.50 FET could not lawfully be displayed separately from the base ticket price and placed in the fine print of an advertisement or, in the case of an Internet purchase, added to the base ticket price at a later point in the transaction process under either a strict reading of 14 CFR 399.84 or the enforcement case precedent discussed above.

⁵ A limited exception exists for service fees, which, under an exemption issued to Orbitz, may be listed separately so long as a total price, including all taxes, fees, and other charges, appears on the same screen with the fare. *Orbitz, Inc.*, Order 2001-12-7.

⁶ See, e.g., *Grand Casinos, Inc.*, Order 2005-5-15.

In Internet advertising displays, the full-fare may be stated on the first screen that provides fare quotes in response to a consumer inquiry, or the existence of permissible separately-stated additional charges may be prominently disclosed with a clearly presented hyperlink to take the consumer directly to a page showing the amounts of those charges. A search path on a website cannot, as Respondents' search path did as explained below, require consumers, after viewing fare quotes displayed in response to their inquiry, to go to a subsequent booking page to find the full-fare.⁷

Section 257.4 of the Department's code-share disclosure rule states that the holding out or sale of scheduled passenger air transportation involving a code-sharing arrangement is an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712 unless, in conjunction with that holding out or sale, the advertiser follows certain requirements, including those of 14 CFR 257.5(d). The specific terms of section 257.5(d), covering disclosure requirements in printed advertisements, including those published through the Internet, require that such advertisements "prominently disclose that the advertised service may involve travel on another carrier," "clearly indicate the nature of the service in reasonably sized type," and "identify all potential transporting carriers... by corporate name and by any other name under which that service is held out to the public."

Procedural Posture

On April 1, 2009, the Enforcement Office served a formal complaint and notice of enforcement proceeding on Ultimate Fares and Roni Herskovitz. The complaint alleged that, since at least March 2008, on Respondents' Internet website, Respondents had failed to disclose the nature and amount of taxes and fees applicable to airfares to be charged to consumers on the first page on which such airfares were shown, thereby rendering consumers unable to determine the full-fare to be paid without taking additional steps in the transaction process. The complaint also alleged that, since at least March 2008, on the first page in which airfares were shown, Respondents failed to include in those airfares the *ad valorem* FET, thereby making the airfares appear at first impression to be much lower than they actually were. These failures constituted violations of the Department's air fare advertising rules, 14 CFR 399.80 and 399.84 and the statutory prohibition against unfair and deceptive practices and unfair methods of competition, 49 U.S.C. § 41712.

On July 24, 2009, the Enforcement Office served a First Amended Enforcement Complaint on Respondents that *inter alia* incorporated and re-alleged the aforementioned violations and alleged further violations of sections 399.80 and 399.84, including Respondents' repeated failure on their website 1) to disclose, on the first page in which airfares were shown, the "service fee" that they charged in addition to airfares, and 2) to

⁷ See, e.g., *In the Matter of Hobbit Travel, Inc.*, OST Docket 2003-15034, Order 2003-6-16, (Issued June 10, 2003, by Administrative Law Judge Burton S. Kolko).

include that service fee in those airfares. In addition, the First Amended Enforcement Complaint alleged that, since at least June 2009, on their Internet website, Respondents failed to provide the appropriate disclosure of code-sharing arrangements. These failures violated the Department's code-share disclosure rule, 14 CFR 257.5, and constituted a separate and distinct violation of 49 U.S.C. § 41712.

Facts and Conclusions

Ultimate Fares was incorporated in Nevada in 2006. At all times since then, Roni Herskovitz has been the sole owner, officer, and director of Ultimate Fares. Mr. Herskovitz has been and continues to be heavily involved in the day-to-day marketing, management, and operations of the company. Internal to Ultimate Fares, Mr. Herskovitz makes all significant decisions affecting the company. Considering these facts, Mr. Herskovitz is the animating force behind Ultimate Fares.⁸ In such instances, the Department has found individuals who made "day-by-day decisions" on behalf of corporate entities to be personally liable for the unlawful conduct of those entities.⁹

Since at least March 19, 2008, until on or about September 1, 2009, Respondents' sold air transportation to consumers on their website by guiding consumers through a three-step, three-page search path, consisting of a first page on which consumers entered their desired itinerary ("itinerary in-put page" or IIP), a second page on which consumers were presented with a selection of flights (with flight number and carrier) matching their desired itinerary ("search results page" or SRP), and a third page on which consumers entered their credit card information, booked, and authorized purchase of a flight chosen from those listed on the search results page ("booking/authorization page" or BAP).

At all times relevant to this matter, Respondents failed to comply with the airfare advertising requirements of 14 CFR 399.80(f) and 399.84 in three respects. First, since at least March 19, 2008, until on or about September 1, 2009, on the SRP page of their website, the first point in which airfares were shown to consumers, Respondents failed to include in such fares the *ad valorem* FET. Second, since at least March 19, 2008, until on or about September 1, 2009, on the SRP page of their website, the first point in which airfares were shown to consumers, Respondents also excluded from those fares their own

⁸ Personal responsibility for corporate liability may attach when an individual's conduct amounts to an "animating force" that causes the violation of a statute and accompanying regulations. *Citronelle-Mobile Gathering, Inc., v. Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App. 1987), cert. denied, 484 U.S. 943 (1987).

⁹ See, e.g., *Tropical Airways, Inc., and Larry Singh*, Order 87-12-43.

A consent order issued by the DOT Deputy General Counsel in an aviation enforcement case becomes an "action of the Department" 10 days after its service date unless a timely petition for review is filed or the Department takes review of its own initiative. 14 CFR 385.32. See also *American Airlines, Inc.*, (concerning violations of 49 U.S.C. §§ 40127, 41310 and 41712) OST Docket 2003-15046, Order Denying Motion of American Airlines, Inc., to Dismiss (August 21, 2003) (recognizing Enforcement Office consent orders as Department precedent).

agent-imposed "service fee." Third, with regard to taxes and fees that may properly be stated separately from the advertised fare, from at least March 19, 2008, until on or about April 22, 2009, Respondents failed to disclose the nature and amount of such taxes and fees on the SRP page or to disclose their existence via a prominent and clearly presented hyperlink that took the consumer directly to a page showing the amounts of those charges. Rather, during this period, Respondents' website disclosed the full fare to consumers, with all additional charges, only after consumers had selected from among a list of flights, specifying the carrier and flight number, on the SRP page and had received a final fare quotation on the BAP page.

Additionally, since at least June 2009, until on or about September 1, 2009, Respondents failed to disclose on their website the existence of any code-sharing arrangement that was applicable to the flights they offered for sale, as required by 14 CFR 257.5(d). With respect to those flights, Respondents also failed to disclose the corporate names of the actual operators and any other names under which the flights were held out to the public. The result was that consumers who booked a flight conducted pursuant to a code-sharing arrangement on Respondents' website, unless they sought additional information about their flight elsewhere, had no idea who was actually operating the aircraft on which they were traveling.

As described in this section, Respondents' conduct violated 14 CFR 257.5(d), 399.80(f), and 399.84, and, in so doing, constituted separate and distinct violations of the statutory prohibition on unfair and deceptive practices and unfair methods of competition, 49 U.S.C. § 41712.

Mitigation

Mr. Herskovitz does not agree that he is personally liable for the alleged unlawful conduct of Ultimate Fares in this case but has agreed to the provisions of this Order as a part of an overall compromise and settlement. Neither Mr. Herskovitz nor Ultimate Fares was aware of any actual consumer confusion or "deception" relating to the issues raised by the Department in this enforcement action. With regard to the final pricing issue, Ultimate Fares believed it was in compliance with 49 U.S.C. § 41712 and 14 CFR 399.84 because the full price that a consumer would have to pay to the airline for air tickets on Ultimate Fares' website was disclosed to the consumer prior to the consumer finally selecting and agreeing to pay for that flight. Furthermore, with respect to the code-share issues, Respondents state that all information relating to this issue was obtained through a GDS and displayed without modification. Thus, Respondents assert that any violation of code-sharing rules was certainly unknown to them and unintentional.

Decision

After careful examination of the facts, including those provided by Ultimate Fares, Inc., and Roni Herskovitz, the Office of Aviation Enforcement and Proceedings continues to

believe that enforcement action is warranted. In order to avoid further litigation, the Enforcement Office and Ultimate Fares, Inc., and Roni Herskovitz, individually, have reached a settlement of this matter.

Without admitting or denying the alleged violations, Ultimate Fares, Inc., agrees to the issuance of this order and to cease and desist from future violations of 49 U.S.C. § 41712, 14 CFR 399.80(f), 14 CFR 399.84, and 14 CFR 257.5(d) and to the assessment of a civil penalty of \$600,000 in lieu of civil penalties otherwise due and payable, which amount shall be due and payable 30 days after the date of issuance of this order. The Department and Enforcement Office agree to look solely to Ultimate Fares for payment of this penalty and not to Roni Herskovitz.

Without admitting or denying the alleged violations, Roni Herskovitz, agrees to the issuance of this order and to cease and desist from future violations of 49 U.S.C. § 41712, 14 CFR 399.80(f), 14 CFR 399.84, and 14 CFR 257.5(d) and to the assessment of a civil penalty of \$30,000 against him individually in lieu of civil penalties otherwise due and payable. Of this amount, Roni Herskovitz shall pay \$15,000 under the schedule set forth in ordering paragraph 9, below. The remaining \$15,000 shall become due and payable if, within 12 months of the date of issuance of this order, Roni Herskovitz violates the cease and desist or payment provisions in this order, in which case the entire unpaid portion of the civil penalty shall become due and payable immediately, and Roni Herskovitz may be subject to additional enforcement action for failure to comply with this order.

Without admitting or denying the alleged violations, Roni Herskovitz, in his individual capacity, further agrees to cease and desist for a period of not less than 12 months from the date of issuance of this order from holding any ownership interest in and from having, except as an air travel consumer, any direct or indirect involvement, remunerative or otherwise, with a ticket agent¹⁰ or an agent of an air carrier¹¹ or foreign air carrier¹² that arranges, sells, advertises, or holds out air transportation¹³ on the Internet.¹⁴

¹⁰ For purposes of this prohibition, the term "ticket agent" shall have the same meaning as in 49 U.S.C. § 40102(a)(45).

¹¹ For purposes of this prohibition, the term "air carrier" shall have the same meaning as in 49 U.S.C. § 40102(a)(2).

¹² For purposes of this prohibition, the term "foreign air carrier" shall have the same meaning as in 49 U.S.C. § 40102(a)(21).

¹³ For purposes of this prohibition, the terms "air transportation" shall have the same meaning as in 49 U.S.C. § 40102(a)(5).

¹⁴ The Department has, in the past, prohibited individuals from engaging in certain types of activities pertaining to air transportation. See, e.g., *Principal Air Services, LLC and David C. Bernstein, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2006-7-13 (Jul. 11, 2006)(prohibiting company owner/president from involvement with operators of aircraft under 14 CFR Part 125); *In the Matter of Ascend Aviation Group, LLC, et al, Enforcement Proceeding*, DOT Docket 2004-17486-47, Order Granting Default Judgement (Aug. 23, 2005) (ordering individual to "permanently cease and desist from marketing or other involvement in air transportation operations"); *Robert O. Nay, et al, Enforcement Proceeding, Robert O. Nay, Emerald Tours, Ltd. (Virginia), World Classics, Ltd., and Emerald Tours, Ltd. (Illinois) Enforcement*

These compromise assessments are appropriate considering the nature and extent of the violations described herein and serve the public interest as a deterrent against future violations by ticket agents of the Department's airfare advertising and code-share disclosure rules and are designed to provide reasonable assurances against future violations by these Respondents.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.11(d).

ACCORDINGLY,


1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that, as ticket agents, Roni Herskovitz in his personal capacity and Ultimate Fares, Inc., violated 14 CFR 399.80(f) by advertising airfares on an Internet website that failed to state the entire price to be paid for the advertised air transportation, as described above;
3. We find that, as agents for air carriers, Roni Herskovitz in his personal capacity and Ultimate Fares, Inc., violated 14 CFR 399.84 by advertising airfares on an Internet website that failed to state the entire price to be paid for the advertised air transportation, as described above;
4. We find that, as ticket agents, Roni Herskovitz in his personal capacity and Ultimate Fares, Inc., violated 14 CFR 257.5(d) by failing to disclose code-sharing arrangements in air transportation, as described above;
5. We find that by engaging in the conduct and violations described in ordering paragraphs 2, 3, and 4, above, Roni Herskovitz in his personal capacity and Ultimate Fares, Inc., also violated 49 U.S.C. § 41712;
6. We order that Ultimate Fares, Inc., and its successors, affiliates, and assigns, and Roni Herskovitz and all other entities owned, controlled, or managed by him to cease and desist from further similar violations of 49 U.S.C. § 41712, 14 CFR 257.5(d), 14 CFR 399.80(f) and 14 CFR 399.84;

Proceeding, DOT Docket 45663, Initial Decision of Administrative Law Judge Ronnie A. Yoder (Nov. 18, 1991), rev'd in part on other grounds, Order 92-9-48 (Sep. 28, 1992) (ordering company president in his personal capacity to cease and desist from operating public charters for a period of five years); *Orien L. Dickerson, and Independent Air, Inc., Violations of Section 411 of the Federal Aviation Act and 14 CFR Part 207*, Order 92-8-1 (Aug. 3, 1992) (ordering company vice president in his personal capacity to refrain from "gainful involvement" with air carriers, travel agents, or public charter operators for 18 months).

7. We assess Ultimate Fares, Inc., a compromise civil penalty of \$600,000 in lieu of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2, 3, 4, and 5, above, which amount is due and payable within 30 days of the date of issuance of this order;
8. We order Roni Herskovitz to cease and desist for a period of not less than 12 months from the date of issuance of this order from holding any ownership interest in and from having, except as an air travel consumer, any direct or indirect involvement, remunerative or otherwise, with a ticket agent or an agent of an air carrier or foreign air carrier that arranges, sells, advertises, or holds out air transportation on the Internet;
9. We assess Roni Herskovitz in his personal capacity a compromise civil penalty of \$30,000 in lieu of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2, 3, 4, and 5, above, which amounts shall be due and payable as follows:
 - a. \$15,000 shall be due and payable in 10 equal installments to be paid on the first business day of each month starting in December 2009 and ending in September 2010; and
 - b. The remaining \$15,000 shall become due and payable if, within 12 months of the issuance of this order, Roni Herskovitz violates the cease and desist provisions in ordering paragraphs 6 and 8, above, or the payment provision in ordering paragraph 9(a), above, in which case the entire unpaid portion of the civil penalty shall become due and payable immediately, and Roni Herskovitz may be subject to additional enforcement action for failure to comply with this order; and
10. We order Roni Herskovitz, to pay the compromise civil penalty assessed in ordering paragraph 9 by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay any portion of the penalty as ordered shall subject Roni Herskovitz to the assessment of interest, penalty, and collection charges under the Debt Collection Act.

This order will become a final order of the Department 30 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:



RICHARD C. GOODWIN
U.S. Administrative Law Judge

(SEAL)

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