

ORDER 93-7-26

ISSUED JULY 15, 1993
(VETO CONTROL; SUPERMAJORITY
TRANSFER RESTRICTIONS

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Order 93-7-26

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

SERVED JUL 15 1993.

Issued by the Department of Transportation
on the 15th day of July , 1993

In the matter of the cancellation of the
operating authority issued to

WRANGLER AVIATION, INC.

Docket 49038

for failure to meet the citizenship
requirement of section 101(16) of the
Federal Aviation Act

ORDER TO SHOW CAUSE

By this order to show cause, the Department tentatively finds pursuant to section 401(r) of the Federal Aviation Act ("Act"), that Wrangler Aviation, Inc. ("Wrangler") fails to meet the U.S. citizenship requirements of section 101(16) of the Act. We tentatively propose to cancel Wrangler's authority unless it restructures itself to meet those requirements within 120 days from the date of an order finalizing our tentative findings and conclusions set forth herein.

Background

Wrangler¹ is a section 401 and 418 certificated all-cargo carrier based in Greensboro, North Carolina, that was purchased by Wrexham Aviation Corporation ("WAC"), a newly formed Delaware corporation, in October 1990. The Department instituted an informal 401(r) review of Wrangler on November 13, 1990.²

¹ In January 1991, Wrangler registered as "Tradewinds International Airlines" and is currently operating under that name.

² At that time, the Department requested detailed information regarding the continuing fitness and citizenship of the carrier under its new ownership and management. Wrangler filed responses to our information request on December 13, 1990 and January 18, 1991. Subsequently, additional written and oral information requests and submissions were made.

On November 28, 1990, Profit Freight Systems ("Profit") filed a petition seeking a continuing fitness investigation centered on alleged foreign ownership of Wrangler in Docket 47291. Subsequently, on January 19, 1991, Profit filed a third-party complaint in Docket 47389 alleging (1) that Wrangler had engaged in unauthorized operations by being under foreign control and (2) that related companies engaged in unauthorized foreign freight forwarder operations by doing business in the United States without having registered as required by Part 297 of the Department's regulations.³

On December 31, 1991, the Department issued a notice dismissing the Profit petition and third-party complaint with respect to seeking a continuing fitness investigation based on the alleged foreign ownership of Wrangler.⁴ We noted that an informal review of the foreign ownership issue was already underway by the Air Carrier Fitness Division of the Office of the Assistant Secretary for Policy and International Affairs and the Office of the Assistant General Counsel for International Law, and stated that an informal fitness review was generally more appropriate and efficient than an enforcement or formal proceeding to resolve citizenship issues. In addition, we stated that if a more formal proceeding were required to resolve any fitness or citizenship issues, we would institute such a proceeding.

In December 1991, the carrier underwent a significant change in management.⁵ On January 22, 1992, Wrangler filed for Chapter 11 bankruptcy.

In April 1992, we informed Wrangler by letter that the citizenship problem could not be resolved without the purchase of a major equity interest by a *bona fide* independent U.S. citizen. We offered to defer instituting formal action if Wrangler took certain steps. We are placing the letter in this Docket.⁶

On February 17, 1993, Wrangler filed with the bankruptcy court its first amended disclosure statement for its first amended plan of reorganization. On May 7, 1993, the bankruptcy court filed an order confirming Wrangler's first amended plan of reorganization. The basis for our order here is the revised management structure, approved by the court.

³ 14 CFR Part 297.

⁴ We dismissed only that portion of the third-party complaint that alleged foreign ownership of Wrangler.

⁵ Changes in the ownership of the carrier's corporate parents also occurred at that time and subsequently.

⁶ Subsequent discussions and correspondence with Wrangler proposing remedies to the citizenship issues and certain short-term remedies made by the carrier did not adequately address our concerns discussed below.

I. Wrangler Structure

Stockholders

At the time of the Wrangler purchase by WAC and unchanged by the reorganization, stock in WAC was held as follows:⁷

Stockholder/Nationality	Class	Shares	Percent of Shares
Robert D. Faia (U.S.)	A	80	20*
Swirnow Airways Corp. (U.S.)	A	220	55
ASPAC, USA, Inc. (Singapore)	B ⁸	100	25

* Mr. Faia's interest may have been acquired by Swirnow Airways as explained below.

Robert Faia was President, Chief Executive Officer and Director of Wrangler. On December 20, 1991, Mr. Faia's employment by Wrangler was terminated. Wrangler and WAC are now in litigation with Mr. Faia arising out of Mr. Faia's termination as an officer and director of both companies. Although no change in Mr. Faia's stock ownership occurred at that time, we were subsequently informed that Mr. Faia's interest in WAC was being acquired by Swirnow Airways. We have no evidence that this acquisition was actually completed.

Swirnow Airways, based in Baltimore, is owned one-third each by Richard Swirnow, David Swirnow,⁹ and Stuart Hettleman. Although all are U.S. citizens, as discussed below, there are numerous business relationships between the Swirnow interests and the Singapore Interests. Indeed, Stuart Hettleman is the Class B director on the WAC Board.

ASPAC (Singapore) is a holding company incorporated in Delaware and is 100-percent owned by Wrexham Investments, Inc., another holding company incorporated in Delaware. Wrexham Investments, Inc. is 90 percent owned by Wrexham Holdings PTE Limited, a holding company for air freight and aviation companies that is based and registered in Singapore.¹⁰ Wrexham Holdings PTE Limited is owned by Parkway Holdings Limited ("Parkway"), a Singapore corporation involved in the businesses of real estate development and air freight.¹¹

⁷ All stock is voting stock.

⁸ The Class B shares owned by ASPAC, the foreign concern, differ from the Class A shares only in that the Class B holder is entitled to elect one-third of the directors regardless of how many shares of each class are issued and outstanding at any time.

⁹ David Swirnow is Richard Swirnow's son.

¹⁰ The Swirnow Family Trust owns a 10-percent interest in Wrexham Investments.

¹¹ ASPAC, Wrexham Investments, Wrexham Holdings, and Parkway will be referred to as the "Singapore Interests."

Directors

After Wrangler's reorganization, the Board of Directors of Wrangler are Richard Swirnow, Stuart Hettleman, and Rick Faieta.¹² The corporate officers are Richard Swirnow, President and Treasurer; Stuart Hettleman, Senior Executive Vice President and Secretary; Rick Faieta, Executive Vice President; Larry Scheevel, Senior Vice President; Sheila Swanson, Vice President and Controller; and Victoria J. Tyler, Assistant Secretary. Wrangler's most recent submission regarding the management of WAC lists directors of that company as Richard Swirnow and Thomas Marudas (Class A directors) and Stuart Hettleman (Class B director).¹³

Acquisition Financing

The overwhelming majority of the funds obtained to purchase Wrangler and finance its operations have been supplied or guaranteed by the Singapore Interests.¹⁴ The Singapore Interests continued to fund Wrangler's operation during its Chapter 11 bankruptcy proceeding. Under Wrangler's plan of reorganization, WAC, which loaned it funds pre-petition, will convert a portion of its debt to stock in the reorganized Wrangler.¹⁵ WAC will be given a promissory note for the remaining debt. WAC will continue to have its indebtedness secured by Wrangler's assets. Harborview Corporation Limited I ("HCLI"), which is controlled by the Singapore Interests, loaned Wrangler \$3 million during the Chapter 11 reorganization and holds the senior lien on Wrangler's assets.¹⁶ WAC subordinated its lien to that of HCLI's post-petition loan.

Business Associations

The information submissions indicate that there are numerous past and present business relationships between Messrs. Swirnow and Hettleman, who own two-

¹² Originally, the Boards of Directors of Wrangler and WAC were identical. They included Richard Swirnow, Stuart Hettleman, and Thomas Marudas.

¹³ Submission of January 29, 1992.

¹⁴ From Wrangler's initial information filings, it appears that over 98 percent of the original funding was so supplied. Although we were later informed informally that this may be overstated, and U.S. investors may have contributed as much as 10 percent of the funds, our tentative finding would not be altered by this information.

¹⁵ WAC's claim will be satisfied by (1) issuance and delivery to WAC by reorganized Wrangler of one share of common stock of reorganized Wrangler for each \$1 for the first \$3,00,000 of WAC's secured claim of \$11,679,897.50 as of January 31, 1992, plus accrued interest for indebtedness incurred pre-petition, and (2) issuance by reorganized Wrangler of its promissory note for the balance of the indebtedness owed as of the effective date of the plan with interest to accrue at the rate of prime as defined by First Union National Bank plus one percent with interest to be secured monthly, for a term of 48 months from the effective date of the plan of reorganization.

¹⁶ HCLI will also be referred to as the Singapore Interests.

thirds of Swirnow Airways (the majority shareholder of WAC), and the Singapore Interests.

Two primary projects in which the Swirnow and Singapore Interests have joined forces are a major real estate development project in Baltimore known as Harborview and a program of airport development projects (primarily related to cargo handling facilities) known as Airport Systems. Harborview is owned 51-percent by Singapore Interests and 49 percent by Swirnow interests. Richard Swirnow and the Singapore Interests entered into an employment agreement providing that Mr. Swirnow would remain as President of or consultant to the Harborview projects, as appropriate, for the duration of the development.

In May 1990, Swirnow Airways invested \$150,000 in the Airport Systems group of companies, most of which appear to be controlled by the Singapore Interests. Companies in which Richard Swirnow holds a direct interest are: (1) PKWY/Swirnow Airways, Inc.,¹⁷ (2) Airport Systems G.P. Inc.,¹⁸ and (3) Parkway Airport Systems Limited Partnership.¹⁹

In addition, Wrangler's filings indicate other past and present employment of Messrs. Richard Swirnow and Stuart Hettleman by companies owned and controlled by the Singapore Interests. Mr. Hettleman is both the ASPAC (Singapore) representative on the WAC and Wrangler Boards and a one-third owner of Swirnow Airways. Prior to October 17, 1990, Mr. Richard Swirnow was a director and President of Wrexham Investments (Singapore) and Stuart Hettleman was a Vice President and Secretary. Prior to the same date, Mr. Richard Swirnow was a director, Vice President and Chief Operating Officer of ASPAC, USA (Singapore).

Thus, Swirnow Airways (55 percent owner of WAC) is two-thirds owned by persons (Richard Swirnow and Stuart Hettleman) who have invested in, been employed by, and served as the U.S. representatives of companies controlled by Singapore Interests in other business dealings.

Corporate Governing Documents/Relationships

The foreign investors have veto control over certain corporate actions requiring an 80-percent affirmative vote of stockholders. These "supermajority vote" actions include modification or termination of a general agency agreement with

¹⁷ Swirnow Airways owns 20 percent of this company and the Singapore Interests own 80 percent.

¹⁸ Swirnow Airways owns 19.99 percent, the Singapore Interests own 80 percent, and Anthony Costello owns .01 percent.

¹⁹ PKWY/Swirnow Airways, Inc. is the general partner and owns 1 percent, 79 percent is owned by the Singapore Interests, 15.2 percent is owned by the B. Roberta Swirnow Trust, 2.6 percent is owned by Swirnow Airways, and 2 percent is owned by the Swirnow Charitable Foundation, Inc.

Wrexham Cargo Marketing Corporation.²⁰ Wrexham Cargo Marketing Corporation is 80-percent owned by the Singapore Interests and 20-percent by Mr. Faia.²¹ Mr. Richard Choo, a Singapore citizen and President of ASPAC (Singapore), is a Director and President of Wrexham Cargo Marketing Corporation. Its marketing subsidiaries, Caribbean Air Services ("CAS") and Caribbean Freight Services ("CFS"), account for about 73 percent of Wrangler's cargo business. It is difficult to distinguish the assets and business of Wrangler and these firms. For example, CAS and CFS have operated out of Wrangler offices, Wrangler employees have been used to conduct the business of the Wrexham Cargo Marketing Corporation, and Wrangler assets have been transferred to the Wrexham Cargo Marketing Corporation companies.

On January 22, 1992, CFS, d/b/a CAS, filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code. CAS filed its disclosure statement and plan of reorganization on June 16, 1992. Under the original agency agreement between Wrangler and CAS, Wrangler was to receive its cost plus five percent from CAS. Under this arrangement, CAS owed about \$5.7 million to Wrangler on the former's petition date. However, under the CAS plan of reorganization and disclosure statement, after payment of ground freight, CAS will receive a seven-percent commission on net sales with the balance paid to Wrangler. Under this new arrangement, it is anticipated that the reorganized CAS will generate sufficient profit to make certain annual payments to a group of unsecured creditors (not including Wrangler) as required by the CAS plan of reorganization.

The Board of Directors of the reorganized CAS are Richard Swirnow, Stuart Hettleman, and Thomas N. Marudas. The corporate officers are Richard Swirnow, President and Treasurer; Stuart Hettleman, Executive President; Larry Scheevel, Executive Vice President; Sheila Swanson, Vice President and Comptroller; and Victoria J. Tyler, Assistant Secretary.

In addition, the Singapore Interests control who can own stock in WAC. The Singapore Interests (through ASPAC, USA (Singapore)) have the right to purchase the shares of other shareholders on the first through tenth anniversaries of a Buy-Sell Agreement or upon their death or disemployment.

²⁰ They also have supermajority voting requirements for amending the certificate of incorporation, approving mergers and acquisitions, approving voluntary liquidation, sale, or transfer of all or substantially all of the corporation's assets.

²¹ In December 1991, Wrexham Cargo Marketing Corporation, Wrangler, CAS, and CFS sought a declaratory judgment that CAS and CFS are wholly owned subsidiary corporations of Wrexham Cargo in a civil action. Mr. Faia, among others, is contesting its ownership and claims, among other things, that CAS and CFS stock was never conveyed to Wrexham Cargo Corporation or Wrangler and that 100 percent of the CAS and CFS stock is owned by Gary Kruse.

Tentative Decision

The Department tentatively proposes to revoke Wrangler's section 401 and 418 certificates for failure to comply with the citizenship requirements of the Act unless it restructures itself to comply within four months of issuance of the final order. Interested parties will have an opportunity to show cause why we should not adopt as final our tentative finding.

Section 101(16) requires that, to qualify as a U.S. air carrier, the president and two-thirds of the board of directors and other managing officers are U.S. citizens and that at least 75 per cent of the voting interest is owned or controlled by U.S. citizens. The Department and the Civil Aeronautics Board have always interpreted section 101(16) to require a carrier to be under the actual control of U.S. citizens as well.²² Although Wrangler meets the numerical limits of the citizenship requirement, we tentatively find that it is currently under foreign control.

The Department does not use "check list" standards in determining the citizenship of a carrier, but rather, we examine the totality of circumstances unique to the particular transaction in the context of the control standard.²³ In this case, most of the financing came from the Singapore Interests or from loans guaranteed by them. Moreover, the pervasive relationship with the Swirnow Interests provides ample means for the Singapore Interests to exert control over Wrangler. In addition, the Singapore Interests have veto control over substantive management decisions as indicated by the "supermajority vote" provisions of WAC's certificate of amendment of the certificate of incorporation. This includes the right to prevent termination of Wrangler's general agency agreement with Wrexham Cargo Marketing Corporation, a Singapore Interest. Moreover, the Singapore Interests' control is further illustrated by the Buy-Sell Agreement, which allows the Singapore Interests to buy out the U.S. investor at certain set intervals.

Wrangler states that every director and officer of WAC and Wrangler is a U.S. citizen. However, Mr. Swirnow and Mr. Hettleman have or have had pervasive financial and employment relationships with the Singapore Interests. Indeed, Mr. Hettleman as a nominee of the Singapore Interests has been characterized as providing "the pivotal leadership in all aspects of the reorganization effort, devoting a full time effort to the management of the Debtor's business."²⁴ Therefore, we conclude that at least two out of three current members of the Board of Directors, as well as the President, must be considered as "foreign," for

²² *In the Matter of the Acquisition of Northwest Airlines By Wings Holdings, Inc.*, Orders 89-9-51 and 91-1-41, issued September 29, 1989 and January 23, 1991, respectively.

²³ *In the Matter of the Acquisition of Northwest Airlines, Inc.*, Order 91-1-41, issued January 23, 1991, at 9.

²⁴ Wrangler's First Amended Disclosure Statement at 7.

purposes of our control analysis, and it is the same foreign interest providing most of the financing. It is not enough to satisfy the citizenship requirement that the President and two-thirds of the directors are U.S. citizens, if there is a substantial threat of foreign influence. Adding Mr. Faieta to the Board of Directors has done nothing to resolve the foreign control problem if Mr. Swirnow and Mr. Hettleman both remain on the Board and have picked Mr. Faieta. Therefore, the nomination of Mr. Faieta by the nominee of the Singapore Interests and by those considered as foreign under our control standard, would lead us to consider Mr. Faieta as under the indirect influence of the Singapore Interests under our control precedent.²⁵

In addition, the extent of the Singapore Interests overt ability to exercise control over business decisions combined with a 25-percent voting equity interest raises serious concerns. In July 1992, Wrangler informed us that Swirnow Airways and the Singapore Interests would enter into an agreement that the Buy-Sell Agreement as to them is void and of no force. However, a copy of the executed agreement has not been submitted to us. In addition, in June 1992, Wrangler informed us that Swirnow Airways and the Singapore Interests had elected to amend the Certificate of Incorporation to delete the 80-percent affirmative vote requirement for certain corporate actions without Mr. Faia's involvement. We have not received proper evidence of the amendment as promised. Moreover, in view of our tentative finding that the Singapore Interests have the ability to control the company, through their *de facto* relationship with the Swirnow interests, the revision to those agreements and corporate governance documents alone would not be sufficient to render Wrangler a U.S. citizen.

Wrangler has also stated that it is contemplating an initial public offering. However, Wrangler has not offered any details of or concrete steps in planning this initial public offering.

In any event, the facts surrounding the purchase and reorganization of this carrier as they stand now are sufficient to render a tentative decision. Therefore, we tentatively propose to revoke Wrangler's authority to operate unless it restructures itself to meet the U.S. citizenship requirements of section 101(16) of the Act within four months of the issue date of the final order.

ACCORDINGLY,

1. We tentatively find that Wrangler is not a U.S. citizen within the meaning of section 101(16) of the Act and that its section 401 and 418 authority should be canceled at which time it must cease all air transportation operations, unless, within 120 days of the issuance of a final order in this proceeding, Wrangler has presented evidence that it has been restructured to meet the citizenship requirement of section 101(16) of the Act;

²⁵ *Hutchinson Auto and Air Transport Co., Inc.*, Order 91-8-15, issued August 8, 1991, at 17.

2. We direct any interested person having objections to the issuance of an order making final any of the proposed findings and conclusions set out in paragraph 1 above to file such objections in Docket 49038 with the Documentary Services Division, C-55, Department of Transportation, 400 7th Street, SW, Washington, DC 20590, and serve them on all persons listed in Attachment A no later than 30 days after the service date of this order; answers to objections will be due within 15 days thereafter;
3. We will accord full consideration to the matters and issues raised in any timely and properly filed responses before we take further action;
4. We will serve a copy of this order on the persons listed in Attachment A; and
5. We will publish a summary of the show-cause order in the Federal Register.

By:

Patrick V. Murphy
Acting Assistant Secretary for Policy
and International Policy

Attachment A

SERVICE LIST FOR WRANGLER AVIATION, INC.

Mr. Richard Swirnow
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112 East 25th Street
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Mr. Richard P. Taylor
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