Served: September 26, 1996

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

Issued by the Department of Transportation
on the 26th day of September, 1996

Application of **VALUJET AIRLINES, INC.** for a redetermination of its fitness and an exemption from the 45-day note requirement of 14 CFR 204.7	**Docket OST-96-1548**

FINAL ORDER

Summary

By this order, we finalize the tentative findings set out in Order 96-8-45, issued August 29, 1996, and find ValuJet Airlines, Inc., fit, willing, and able to resume its certificated air carrier operations.

Background

Under Subtitle VII of Title 49 of the United States Code (the "statute"), any company proposing to provide air transportation operations as an air carrier must first be found "fit, willing, and able" by the Department to conduct the services proposed. 49 U.S.C. 41101. Once a carrier is certificated, the statute requires that the carrier remain fit in order to retain its authority. 49 U.S.C. 41110(e). Pursuant to 14 CFR 204.7, if a carrier ceases operations under its certificate authority, it may not resume operations until its fitness to do so has been redetermined by the Department.

ValuJet began air transportation operations in October 1993. On May 11, 1996, ValuJet Flight 592 crashed in the Florida Everglades killing all 110 persons aboard.[1] Following the May 11 accident, the Federal Aviation Administration (FAA) accelerated and intensified a Special Emphasis Review of the carrier's operations which had begun in February 1996. This review led to a June 1996 Consent Order under which ValuJet agreed to suspend its operations and provide the FAA with information demonstrating its qualifications to hold FAA operating authority. The carrier worked with the FAA through the summer to correct all of its safety-related problems. The FAA determined that ValuJet is qualified and capable of

[1] The National Transportation Safety Board (NTSB) continues to investigate this accident.

exercising the privileges of the holder of a Part 121 air carrier operating certificate and, on August 29, returned the carrier's FAA operating certificate to it.

Concurrent with its attempts to resolve its FAA problems, on July 15, the carrier filed an application in Docket OST-96-1548 requesting that the Department redetermine its fitness to resume its air carrier services. Two parties, the Association of Flight Attendants (AFA), the union which represents ValuJet's flight attendants, and Wildlife-in-Need, Inc., and Raymond Moore (Wildlife/Moore), objected to grant of ValuJet's application.

After reviewing the application and the objections, on August 29, 1996, the Department issued Show Cause Order 96-8-45. In that order, we tentatively found ValuJet to be "fit, willing, and able" to resume its operations. That order gave interested parties seven (7) calendar days (or, through September 5) to file objections to our tentative findings and conclusions; replies to any objections filed were due four (4) calendar days thereafter (or, by September 9).

Summary of Pleadings

Twenty answers were filed within the seven-day answer period. Answers in opposition to the Department's tentative findings were filed by AFA and Wildlife/Moore as well as 14 other parties.[2] Four answers supporting the Department's findings were filed.[3] ValuJet and thirty-three other parties filed replies to the above answers.[4]

AFA argues that the Department erred in making its tentative findings. In general, the union reiterates its overall position that ValuJet is *per se* unfit with Messrs. Robert Priddy, ValuJet's Chairman of the Board, and Lewis Jordan, ValuJet's President and Chief Operating Officer, involved, and renews its contention that, at a minimum, an oral evidentiary hearing must be held to determine their managerial competence and compliance disposition.[5] Specifically, AFA maintains that, in reviewing ValuJet's fitness, the Department has applied the wrong legal standards and has failed to follow its own regulations. In this regard, AFA contends that the Department (1) failed to hold Messrs. Jordan and Priddy responsible for ValuJet's past safety problems,[6] (2) violated its own regulations in accepting an incomplete application from ValuJet,[7] and (3) improperly abdicated to the FAA the Department's own statutory

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[2] With the exception of an answer filed by The Transportation Trades Department for the AFL-CIO, all of the respondents are individuals filing in their own capacity and not representing any specific organizations.

[3] All of these commenters are individuals.

[4] With the exception of ValuJet and a group called Voices Involved with ValuJet Attendants, all of these commenters are individuals. Almost all of the replies were filed in support of ValuJet.

[5] AFA continues to question the competence of David Gentry, formerly Vice President for Maintenance, and it also questions the competence of ValuJet's current Director of Maintenance, Salvatore D'Amico.

[6] Instead, AFA argues, the Department established "for the first time, a standard for managerial competence and compliance disposition which holds a key officer responsible for the acts of the corporation only when there is direct evidence of the key officer's individual misconduct." AFA objection at p. 2 (emphasis in original)

[7] In this regard, AFA states that because ValuJet failed to provide the identities of and resumes for the individuals holding the positions of Director of Aircraft Vendor Maintenance Administration and Director of Flight Administration and Training (or

responsibility for determining an applicant's compliance disposition and managerial competence. It further argues that the Department did not consider material undisputed facts that demonstrated that Messrs. Jordan and Priddy are managerially incompetent and not compliant,[8] and that our conclusion that ValuJet is fit is based upon erroneous findings of fact.[9]

In addition to challenging our decision in Order 96-8-45, AFA raises two new issues which it contends relate to ValuJet's fitness. In this regard, AFA provided a declaration from Susan Clayton, President of AFA's Local Executive Council 57, alleging that she has been told by others that ValuJet management (1) ordered ValuJet employees to make false entries into flight attendant training records in anticipation of an FAA inspection of those records,[10] and (2) targeted union members for disciplinary action because of their union activities. Ms. Clayton also stated that several flight attendants have told her that they felt coerced into signing petitions supporting ValuJet. AFA notes that falsification of legally required records constitutes criminal behavior under 18 U.S.C. 1001 and that its claims relative to the company's actions toward union members are a violation of the Railway Labor Act.

AFA also has questioned the Department's handling of certain *ex parte* communications. AFA notes that the Department received letters from members of Congress or other parties not formally a part of this proceeding, and that, although these letters were placed in the public record on September 6, they were received by the Department much earlier.[11] AFA asserts that, in delaying their placement in the public record, it and other interested parties were denied an opportunity to review and comment on them.[12] AFA also questions the extent to which these letters may have influenced the Department's decision in this case and contends that the letters, and the way that the Department handled them, raise a presumption

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Maintenance Cost and Control, it failed to supply all of the information on key personnel required by the Department's rules. Moreover, AFA argues that ValuJet's failure to supply an affidavit attesting that all of its aircraft meet the safety requirements mandated by the FAA constitutes a serious deficiency in its appplication. Hence, AFA argues that our tentative findings of fitness are in violation of our rules.

[8] As evidence of its claims, AFA states that ValuJet (1) failed to fill certain personnel positions, (2) submitted false information and withheld material information about its former Vice President of Maintenance, David Gentry, and (3) made material misrepresentations to the Department and withheld other critical information which it subsequently provided only in response to AFA's demands.

[9] To this end, AFA states that (1) our finding that ValuJet had made positive changes on its own without having been specifically required to do so by the FAA is not supported by the evidence in this proceeding, (2) our finding that the management team is fit is erroneous, (3) we cannot rely on the carrier's cooperation with FAA after its shutdown to establish compliance disposition, (4) we erred in finding the carrier's participation in the FAA's self-disclosure program to be evidence of its compliance disposition, (5) David Gentry, the carrier's former Vice President of Maintenance, was not qualified for his position, and (6) we erred in not examining further the other legal complaints filed against ValuJet (and Messrs. Jordan and Priddy), and in determining that the carrier's consumer practices were not cause for concern.

[10] Ms. Clayton identified two individuals--Mimi Halperin and Vince Castillo--who purportedly were ordered to and did falsify FAA records. Ms. Clayton averred that Mr. Castillo told her this was the case. Ms. Halperin is a current ValuJet employee; Mr. Castillo is a former employee of the airline.

[11] For instance, AFA refers to a letter from Senator Sam Nunn dated August 2, 1996.

[12] AFA states that it requested copies of such letters on August 16, but was told to file a Freedom of Information Act (FOIA) request for them.

of improper Congressional influence over the Department's decisionmaking process.[13] Thus, AFA argues that a hearing must be held to resolve not only the issue of ValuJet's fitness,[14] but also whether the Department violated any laws or rules which govern such *ex parte* communications.

Wildlife/Moore also reiterates its earlier claims that ValuJet's past safety history under Messrs. Priddy and Jordan demonstrates that the carrier is unfit to operate under their management in the future. It states that an oral evidentiary hearing is required because certain material issues of fact are in dispute. Specifically, Wildlife/Moore states that a hearing is needed to determine whether Messrs. Jordan and Priddy "engaged in negligent behavior through benign neglect, poor judgment or reckless disregard for the safety of ValuJet."[15] In this regard, it contends that Messrs. Jordan's and Priddy's management record mirrors that of Edward J. Averman, Jr., as described in *Universal Airlines Fitness Report*, Orders 81-11-84, and 81-10-28.[16] It also contends that the Department ignored the June 1996 Consent Order ValuJet entered into with the FAA.

Christina Merrick, another objector and a former employee of ValuJet, asserts (1) that the pilot of the ValuJet aircraft that crashed in the Everglades kept a journal of the management and maintenance problems she encountered while working at ValuJet, (2) that on many occasions pilots were told not to record maintenance problems with aircraft under threat of their jobs, and (3) that she saw many inexperienced people in the "front seat" of ValuJet aircraft carrying paying passengers.[17]

Gene A. Nelson filed an answer asserting that ValuJet's management places corporate profits above public safety and arguing that ValuJet should not be allowed to resume operations until

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[13] On September 4, AFA requested that the Department's Inspector General investigate the Department's handling of this correspondence as well as its handling of the evaluation of ValuJet's fitness. By letter dated September 10, the Acting Inspector General advised AFA that she declined to institute such an investigation. In a pleading filed September 12, AFA states that it has renewed its request for the IG to investigate the issue of *ex parte* communications in this proceeding.

[14] AFA also argues that, if the Department issues a final decision finding ValuJet fit, the effectiveness of that decision should be stayed to allow AFA to seek judicial review of such decision.

[15] Wildlife/Moore Answer at p. 3. It argues that the Department cannot simply accept written declarations of Messrs. Priddy's and Jordan's concern for safety as evidence of fact and that a hearing is needed to determine (1) why ValuJet's past performance was so "inept," and (2) whether Messrs. Jordan and Priddy created an "unsafe corporate environment because of risk-taking or negligence." Wildlife/Moore Answer at p. 3. AFA also argues that a hearing is needed for similar reasons.

[16] Wildlife/Moore notes that an Administrative Law Judge of the former Civil Aeronautics Board (CAB) found that Mr. Averman "did not intend to operate Imperial (predecessor of Universal) aircraft with incompetent crews; but, he tolerated, and perhaps created through benign neglect, if nothing else, an operation in which employee performance was substandard and the attendant risk to passengers was substantially increased," and that there were "serious deficiencies in Imperial's operations and maintenance practices, about which Imperial's management should have been aware." Wildlife/Moore contends that Messrs. Jordan and Priddy should have been aware of ValuJet's deficiencies.

[17] Other than identifying the pilot of Flight 592, Ms. Merrick did not provide names of individuals or any other specific information relative to the charges in her objection.

the criminal investigation into the circumstances involved in the May 11 crash is complete.[18] In a similar vein, Richard P. Kessler, Jr., questions whether the FAA and the Department are doing enough to enhance the safety of crew and passengers when there is smoke in the cockpit and cabin of an aircraft and argues that ValuJet should be compelled to require certain equipment and procedures to enhance safety in such conditions.

For the most part, the remaining objectors state their positions that ValuJet placed profit over safety, raise some of the same issues as did AFA and Wildlife/Moore, and call for the Department to order the removal of Messrs. Jordan and Priddy before allowing the carrier to operate again.[19] Three objectors question whether the seven-day answer period provided for in the show-cause order showed a Department bias toward ValuJet. One objector argues that the Department should deny ValuJet the authority to resume operations so that it can set an example for future airline applicants, especially low-fare carriers.

Of the four answers in support of the Department's tentative decision in Order 96-8-45, two were filed by ValuJet flight attendants who stated that they disagreed with AFA's position and that AFA was not acting in the best interest of ValuJet flight attendants. Another supporting pleading contended that ValuJet should be one of the safer airlines due to increased FAA surveillance. The remaining answer was filed by an individual who commented on having enjoyed previous flights on the carrier and wants to see ValuJet operate again.

ValuJet filed a reply to the above objections, as did several other parties. Many of the replies were filed by ValuJet pilots who voiced their support for the carrier and stated that they were never under any pressure from ValuJet management or personnel to fly unsafe or non-maintained aircraft. Two parties filed replies opposing the carrier's resumption. One of the opposing parties was Sharri Denise Daw, a former ValuJet flight attendant who was injured in one of the company's accidents. Ms. Daw states that she has first hand knowledge of maintenance problems with the carrier's aircraft and that ValuJet should not be allowed to resume operations under current management.[20] The remaining reply alleged that the pilot of Flight 592 was not qualified and contends that ValuJet was operated only as a "cash cow" for top management that sacrificed safety for money.

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[18] Dr. Nelson, who indicates that he has a PhD. in biophysics and is a freelance journalist, also provided a copy of an article he had written for a trade publication noting his opinion on what may have happened with regard to the oxygen canisters placed on that plane and numerous other news articles that have been written about ValuJet's accident and past problems that he believes illustrate his position. Dr. Nelson contends that ValuJet had some responsibility for the oxygen canisters being on the plane and thus ValuJet should not be too quick to place the blame for this accident on SabreTech. Dr. Nelson also contends that the Department's rules require that there be a Director of Vendor Maintenance Administration and Director of Cost and Control and questions how ValuJet can prevent a future disaster without filling these positions.

[19] The Transportation Trades Department of the AFL-CIO notes that the carrier has retained almost the same management team under which the airline exprienced its past problems and requests a hearing to determine the managerial competence of ValuJet's management team as a whole.

[20] Ms. Daw states that ValuJet's maintenance problems may have stemmed from the fact that ValuJet's "maintenance records of Aircraft 908 had to be interpreted from Turkish to English and it is my belief that the interpretations were done in a haphazard manner."

In its response to opposing pleadings, the carrier asserts that (1) the evidence before the Department clearly establishes ValuJet's fitness and that of Messrs. Jordan and Priddy and other ValuJet management officials to resume operations, and (2) none of the objectors have provided evidence to demonstrate that the Department's tentative findings are erroneous or that an oral evidentiary hearing is required to resolve any material issues of decisional fact. ValuJet also asserts that the objections of AFA and Wildlife/Moore for the most part simply rehash information filed in their earlier objections, information that was discussed and dealt with in Order 96-8-45.

ValuJet further states that AFA's contention that the Department ignored its own precedent and applied improper legal standards in reaching this determination is simply wrong. In this regard, ValuJet asserts that, in tentatively establishing that Messrs. Jordan and Priddy are fit to manage the carrier, the Department examined the record in this case more broadly than just reviewing whether either of these individuals had intentionally encouraged or negligently permitted ValuJet to operate in an unsafe manner, and did so in a manner consistent with Department precedent.

With respect to arguments that its application was deficient or that the carrier attempted to mislead or hide information from the Department, ValuJet points out that the Department reviewed these claims and disposed of them in the show-cause order.[21] Likewise, ValuJet argues that the following issues raised by AFA and/or other objectors were properly discussed and addressed in the show-cause order: (1) that the Department relied incorrectly on the FAA's assessment of ValuJet's conduct and cooperation in reaching its decision, (2) that the record does not show that ValuJet made positive changes on its own, (3) that ValuJet's participation in the FAA self-disclosure program is not evidence of the carrier's compliance posture, (4) that the Department did not properly investigate and pass judgment upon the merits of investigations and lawsuits (other than FAA matters) currently pending against the carrier or its personnel, and (5) that ValuJet's consumer record is deficient.

ValuJet also denies the allegations relative to the two new issues raised by AFA: (1) the alleged falsification of flight attendant training records at the instruction of ValuJet

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[21] For instance, ValuJet notes that the two positions which AFA asserts are key personnel, and that were not filled at the time of issuance of Order 96-8-45 -- the Director of Vendor Maintenance Administration and Director of Maintenance Cost and Control -- are not, in fact, "key personnel" as defined in 14 CFR 204.2, and thus, the carrier is not required to file information on these individuals. ValuJet states that neither of these positions conveys any oversight responsibility to the individuals holding them and notes that the position of Director of Maintenance of Cost and Control has been reclassified as Manager of Budget and Controls and is not a position that involves the supervision of maintenance work. ValuJet also notes that AFA renews its complaints about the qualifications of David Gentry, the company's former Vice President of Maintenance and now Director of Special Projects. ValuJet states that the Department properly rejected AFA's arguments in the show-cause order. To the extent that AFA now specifically questions the qualifications of Salvadore D'Amico, the carrier's Director of Maintenance, ValuJet argues that Mr. D'Amico has extensive relevant experience and that the FAA has found him to be qualified for his position. ValuJet also states that it will only be operating aircraft approved by the FAA but that it will provide an affidavit to that effect if the Department so requires.

management, and (2) the alleged violations of the Railway Labor Act by ValuJet's management personnel. ValuJet argues that the declaration provided by Susan Clayton consists of "wild conjecture unsupported by any evidence."[22] In support of its position, ValuJet provided sworn declarations by two ValuJet employees, Joan Auch (Vice President-Inflight) and Mimi Halperin, denying the allegations made by Ms. Clayton and AFA.

ValuJet also argues that the allegations of Christina Merrick should be given no weight whatsoever, contending that Ms. Merrick is a disgruntled former employee of ValuJet.[23] Similarly, ValuJet states that Ms. Daw could not possibly have had the first hand knowledge that she claims.[24]

Finally, ValuJet states that there is no evidence that the letters recently placed in the public docket reveal impermissible Congressional influence on the Department's decisionmaking process. The carrier states that the record in this case is extensive, that the Department's analysis of it has been thorough, and that the show-cause order was well-reasoned.

Decision

After reviewing the information before us, we have decided to finalize the tentative findings in Order 96-8-45 and find ValuJet fit to resume its air transportation operations.

In Order 96-8-45, we tentatively concluded that ValuJet and its management team had the managerial competence and compliance posture to oversee the company's operations and that the company had adequate financial resources to allow it to resume its air transportation services. While AFA, Wildlife/Moore and the other objectors do not dispute the Department's findings with regard to the company's finances, they do take issue with our tentative conclusions about the company's fitness with respect to its management capability and compliance disposition, particularly as it concerns the fitness of its two senior officials, Lewis Jordan and Robert Priddy.

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[22] ValuJet Reply at p. 24.

[23] In this regard, ValuJet states that Ms. Merrick was selected for pilot training in early 1994, but was asked to resign after only two months because she could not successfully complete the necessary flight training. The carrier further states that her allegations about inexperienced pilots are belied by the fact that, as a trainee, she never flew other than with a check airman. The carrier also cited a letter to the Department from the mother of the captain of Flight 592 denying the accuracy of Ms. Merrick's claims regarding her daughter.

[24] ValuJet states that Ms. Daw has not been back to work at ValuJet since the June 1995 accident in which she was involved and that, at the time of the accident, she had had no prior experience in the airline industry. As to alleged problems with the translation of maintenance records, ValuJet states that Ms. Daw was not involved in translating such records and thus could not possibly have had first hand knowledge of the translation process or of related maintenance issues. Moreover, ValuJet notes that, in its report, the NTSB found that the sole probable cause of the June 1995 accident was the actions of maintenance and inspection personnel in Turkey before ValuJet acquired the aircraft and that the aircraft was certificated and operated in accordance with applicable federal regulations.

To find ValuJet fit, we must determine whether it will have the managerial skills and technical ability to conduct its proposed operations and whether it will comply with the federal statutes governing airline operations and with the regulations imposed by federal and state agencies. See, e.g., *ATX, Inc. Fitness Investigation*, Order 94-4-8 at 2 (April 5, 1994). We find that ValuJet satisfies these standards.

Since AFA and other objectors are largely concerned with the safety of ValuJet's planned operations, the relationship between our fitness requirements and the FAA's safety responsibilities is relevant to our decision. While a company's ability to conduct safe operations is an essential element in our determination of its fitness to hold certificate authority, it is the FAA that is primarily responsible for ensuring the safety of an airline's operations, and the regulations adopted and enforced by the FAA specifically address the operating practices found necessary by that agency for airline safety. *See, e.g., Air Line Pilots Ass'n v. CAB*, 643 F.2d 935, 938, 939 (2d Cir. 1981). Furthermore, as we stated in the show-cause order, we have never found an airline unfit due to the involvement of an individual whose compliance disposition and managerial competence are questioned solely on safety grounds unless the FAA has agreed with that finding. The FAA has conducted a thorough investigation into ValuJet's proposed operations and has concluded that the company, under its current management, will operate in compliance with FAA requirements. To the extent that ValuJet's managers require FAA approval, the FAA has approved them. Order 96-8-45 at 12. The FAA does not disagree with a finding that ValuJet is fit and has authorized ValuJet to resume operations, subject to ValuJet's agreement that it will not operate more than fifteen aircraft without prior FAA approval.[25]

In our judgment, the record demonstrates that ValuJet under the management of Messrs. Jordan and Priddy does meet the managerial competence and compliance disposition elements in our fitness test. First, as we stated in the show-cause order, the background and experience of ValuJet's management qualify them to oversee the airline's operations -- all of them have directly relevant experience in their respective areas of responsibility, and none of them has been judged to have violated safety rules or other laws or regulations. Order 96-8-45 at 10. In addition, the FAA has advised us that the airline's management has cooperated fully with that agency to solve ValuJet's safety-related problems, that the airline took steps on its own initiative to improve its safety practices, and that the airline has complied with all of the requirements set forth in the June 1996 consent agreement between the FAA and ValuJet.[26] It is also relevant that the airline's operations were financially successful and that it offered low-fare services that many consumers found attractive, as shown by several of the comments submitted in this proceeding. In these circumstances, particularly given the FAA's

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[25] The FAA will also closely monitor ValuJet's operations after it resumes operations to ensure that the agency's safety requirements are being met.

[26] AFA's contention that we cannot rely on the carrier's cooperation with the FAA after its shutdown as evidence of its compliance posture is erroneous. We can and we routinely do rely on such evidence. How a carrier responds to issues raised by the FAA with respect to safety matters is critical to any assessment of its compliance disposition.

satisfaction with the airline's current operational plans and structure, we find that ValuJet satisfies the managerial competence and compliance disposition elements in the fitness test.

In arguing that ValuJet will not be fit, at least as long as it is managed by Messrs. Jordan and Priddy, AFA and other objectors rely in large part on ValuJet's shortcomings before its suspension of operations. According to these objectors, since ValuJet, at that time, allegedly chose to operate in a manner that contributed to safety violations, the Department cannot now find the airline fit as long as the same managers oversee the airline's operations.[27]

In making its arguments, however, AFA overstates the impact under our fitness standard of past operational problems at an airline.[28] Our fitness standards are designed to protect consumers against undue risk and to promote high standards in the airline industry. The fact that certain executives presided over an airline's operations during a period in which the airline experienced problems does not, in itself, make the airline unfit under their management. Thus, there have been a number of cases where an airline was shut down by the FAA for non-compliance with FAA regulations, but subsequently resolved its shortcomings with the FAA, and we have allowed that airline to resume operations with the same management. *See, e.g., Kiwi International Airlines*, Order 95-2-42 (February 21, 1995); *Express One International*, Order 95-8-27 (August 18, 1995).[29]

Aside from its specific allegations of misconduct, which are discussed below, AFA primarily argues that we have created a new fitness standard whereby an airline manager will be held responsible for the airline's conduct only when there is direct evidence of the manager's personal misconduct, an argument based on our finding that AFA had not shown that Messrs. Jordan and Priddy had intentionally encouraged or negligently permitted ValuJet to operate in an unsafe manner. Order 95-8-45 at 12. This argument is based on a misreading of the show-cause order. We do hold an airline's management responsible for its failings, just as we credit them with efforts to cure any shortcomings and to bring the airline into full compliance with the FAA and other legal requirements. As we stated in the show-cause order, we recognize that Messrs. Jordan and Priddy are ultimately responsible for ValuJet's past problems. However, we also found that these individuals, together with the rest of ValuJet's management team, had taken corrective actions, including actions taken at their own initiative that had not

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[27] AFA also makes specific allegations about criminal misconduct and other violations which are addressed later in this order.

[28] In a late filing, AFA pointed out that the Department of Defense (DOD) put ValuJet in a nonuse status from the DOD Air Transportation Program in May and gave the carrier the opportunity to reapply. We were aware of this development and the action is not inconsistent with Valujet ceasing all operations. As discussed above, ValuJet has shown that it is safe to operate and has received its FAA recertification.

[29] In addition, we note that in the *Universal Airlines Fitness Investigation* case cited by Wildlife/Moore as a basis for removing Messrs. Jordan and Priddy or for holding a hearing on their fitness, the former CAB's decision to deny certification to Universal Airlines was not based on the fact that the carrier had compliance problems. Rather, the CAB denied certification of the company based on the fact that its principal executive officer would not be available to the carrier on a full-time basis.

been required by the FAA.[30] Thus, while the airline had had significant shortcomings, it had also made substantial--and, according to the FAA, successful--efforts to cure those problems.[31] Despite AFA's challenges to our other findings, it has not disputed our finding that the management has taken these steps.

This case accordingly does not present the circumstances where we have found an airline or applicant unfit because of its control by management who were directly responsible for the past troubles of that airline (or another airline). For example, in *ATX*, the Department's most thoroughly litigated fitness case, we found a proposed new airline unfit because of the involvement of an officer--Frank Lorenzo--who had been responsible for the poor performance of other airlines for an extended period of time. Order 94-4-8 (April 5, 1994), *aff'd*, *ATX, Inc. v. DOT*, 41 F.3d 1522 (D.C. Cir. 1994). The facts in that case are sharply different from the facts here.

The record in *ATX* showed that the principal airlines previously controlled by Mr. Lorenzo--Eastern Air Lines and Continental Air Lines--had had continuing safety problems that were never redressed by Mr. Lorenzo. Indeed the airlines' safety problems became worse during his tenure. Among other things, Eastern had pressured pilots to fly aircraft that they considered unsafe. The airline had also adopted policies that discouraged mechanics from performing adequate maintenance. Order 94-4-8 at 26-29. Mr. Lorenzo, moreover, was unable to identify any action he had ever taken to improve safety at the airlines he controlled. *Id.* at 54-55. Furthermore, the evidence showed that Mr. Lorenzo could not be fully relied upon to carry out his legal obligations, and this direct evidence of personal unreliability indicated that ATX could not satisfy the compliance disposition element of the fitness standard. *Id.* at 58-63.

Of equal importance, moreover, we found no evidence of any change in Mr. Lorenzo's attitude since he left Eastern and Continental, *Id.* at 8:

> In other cases we have recognized tangible evidence that individuals whose previous conduct had prompted us to take adverse action against an airline had rehabilitated their conduct and merited our renewed confidence, at least to some degree. Here, we find no such evidence. To the contrary, the method he chose to adopt, personally and through counsel, in prosecuting this application gives no reason

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[30] We noted, for example, that the airline's management has implemented systems that should provide substantial protection against the recurrence of safety problems. Order 96-8-45 at 13.

[31] To a large extent, ValuJet's previous problems stemmed from its rapid growth in size. ValuJet's future growth will be limited by the FAA, since the airline has agreed not to increase its fleet beyond 15 aircraft without prior FAA clearance. Moreover, we will also monitor the carrier's growth. In this regard, we are imposing a requirement that ValuJet also notify us of any plans to increase its fleet beyond 15 aircraft to afford us an opportunity to review the impact of any growth on its continued fitness.

> to expect a more positive attitude toward our processes and regulations.

The kinds of factual circumstances that caused us to deny ATX's application are not present here. The record instead shows, as we explained in the show-cause order, that ValuJet's management recognizes the importance of improving the safety of the airline's operations. Moreover, as also discussed below, there is no evidence in this case that ValuJet officials have deliberately or negligently violated FAA regulations or adopted policies that made such violations likely. The evidence does show that these officials have been taking action to eliminate the airline's past shortcomings both before and after ValuJet's shutdown, and the FAA sees no reason to doubt that they will comply with FAA requirements in the future.

AFA has raised two new issues relative to ValuJet's fitness which, if true, could have potentially serious ramifications on ValuJet's fitness. Specifically, AFA charges that ValuJet's management (1) ordered the carrier's employees to make false entries into flight attendant training records, and (2) targeted union members for disciplinary action because of their union activities. In support of its contentions in this regard, AFA has provided a declaration from the President of AFA's Local Executive Council 57, Susan Clayton, stating that she obtained this information from current or former ValuJet employees.[32] In particular, Ms. Clayton claims that Vince Castillo, a former ValuJet employee, told her that he and Mimi Halperin, a current ValuJet employee, had been instructed to falsify records. ValuJet has denied both of these charges and has provided sworn statements from employees in support of its denial.

The allegations that ValuJet may have falsified FAA records is a serious matter and one that is directly within our jurisdiction. ValuJet filed a sworn declaration from Joan S. Auch, its Vice President-Inflight, who supervised Mr. Castillo and Ms. Halperin, denying that she has ever asked anyone to falsify a training record. The carrier also filed a sworn declaration from Mimi Halperin denying that she had ever been instructed to or had falsified ValuJet flight attendant training records.

Department and FAA staff interviewed Mr. Castillo by telephone and he followed up with his own sworn declaration denying that he ever made the statements Ms. Clayton and AFA attribute to him. Mr. Castillo also stated that during his employment with ValuJet he "was never asked by any employee of the carrier or anyone else to falsify any ValuJet flight attendant training or any other type of records," and at no time during his employment did he "falsify any ValuJet flight attendant training or other types of records." He further stated that, to his knowledge, no other employee of ValuJet was ever asked to falsify flight attendant training or other types of records or actually did falsify such records.[33] The FAA has also

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[32] AFA also alleges that flight attendants have been coerced into signing petitions to recall Ms. Clayton.

[33] On the day after we put Mr. Castillo's declaration in the docket of this proceeding, AFA moved for permission to submit the declaration of David Borer, Esquire, which repeats the allegations made in Ms. Clayton's affidavit based on his own telephone conversation with Mr. Castillo. Mr. Borer is AFA's General Counsel. We will grant the motion. His allegations are also contradicted by Mr. Castillo's declaration.

advised us that it has no information indicating that ValuJet falsified flight attendant training records.[34]

The evidentiary basis does not exist to deny ValuJet effective authority because of these allegations. The thorough FAA investigation of ValuJet and the Congressional hearings concerning ValuJet have not uncovered recordkeeping falsifications by the carrier. As far as we know, our Office of Inspector General (IG) has found no evidence of criminal misconduct in its investigations. While AFA has submitted sworn statements from two people indicating that Mr. Castillo told them that criminal activities occurred, we are not willing to hold up ValuJet's fitness determination when we have sworn statements from the individuals involved explicitly denying that such activity occurred.[35] However, we remain seriously concerned over the conflicting declarations and have referred the matter to the IG for investigation. Should this investigation result in the discovery of information that indicates that falsification of records did actually take place, we will take appropriate action at that time.

In addition, Ms. Clayton's declaration charges that ValuJet has violated the Railway Labor Act. AFA also asserts that the Department did not give proper consideration to the underlying allegations in other pending investigations and lawsuits filed against ValuJet -- including, for example, investigations into the May 11 accident and lawsuits filed as a result of that accident, and lawsuits filed against ValuJet or pending investigations of the carrier in connection with alleged violations of Secruities and Exchange Commission rules -- to determine if those claims have merit. AFA argues that the Department's determination to issue its decision and wait until events unfold is inappropriate and inconsistent with the Department's past practice. We disagree.

AFA's contentions that we should investigate the various charges concerning ValuJet's alleged failure to comply with other laws reflect a misunderstanding of the scope of a fitness proceeding. This fitness proceeding is not the proper venue to resolve AFA's claims. While we consider judgments by courts and agencies that an airline or its management have acted wrongfully, as well as indictments of airline officials, we do not investigate allegations of illegal conduct that can or will be resolved by the courts or other agencies. Moreover, the existence of pending litigation does not indicate that a carrier is unfit. *See, e.g., Petition of Air Line Pilots Ass'n*, Order 88-12-30 (December 14, 1988) at 7. In particular, we should not adjudicate charges that a firm has violated the Railway Labor Act, for this Department could not properly resolve such charges. Instead, allegations that a firm has violated that statute should be decided by the courts and the National Mediation Board, the bodies that have the

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[34] We are placing a copy of the FAA's statement in the docket.

[35] The Department also finds it troubling that AFA, the union representing ValuJet's flight attendants, did not, or was unable to, present the testimony of any flight attendant who felt that his or her training records were altered, or that he or she did not receive FAA-required training, but was still allowed to work by ValuJet. This failure, together with the fact that the FAA did not find evidence of any falsified training records, leads us to believe that AFA's hearsay allegations cannot outweigh the declarations provided by ValuJet and Mr. Castillo. We further note that there is no indication that the alleged falsification of records is tied to Messrs. Jordan or Priddy, the principal targets of AFA's concern.

responsibility for deciding such matters. *Air Line Pilots Ass'n v. CAB*, 643 F.2d 935, 941 (2d Cir. 1981).[36] Similarly, we do not have the expertise to decide whether ValuJet has violated the securities laws or the authority to determine the cause of the Everglades crash. In addition, the on-going investigations of those matters are non-public proceedings, we do not have access to the evidence obtained thus far by the agencies conducting the investigations, and the preliminary results of the investigations would likely be inconclusive.[37]

There is also no evidentiary basis to deny ValuJet effective authority because of the allegations of Christina Merrick, a former ValuJet trainee. ValuJet has convincingly refuted her testimony. ValuJet states that she was selected for pilot training in January 1994 but was asked to resign two months later because she could not successfully complete her training. As a trainee she flew only with check airmen. Her statements about the quality of ValuJet's pilots accordingly are entitled to no weight. Ms. Merrick further alleged that the captain of Flight 592 kept a journal listing numerous operating deficiencies at the airline. ValuJet has submitted a letter from the captain's mother stating that neither she nor the captain's husband knew of any such journal and that her daughter had confidence in the safety of ValuJet's aircraft.

Despite the weight to be given ValuJet's response, both the Department and FAA staff have made numerous unsuccessful attempts to interview Ms. Merrick regarding her allegations. As requested by Ms. Merrick in a voice mail message, we sent her a letter setting forth the specific information we needed from her to substantiate her claims. We received a facsimile response which did not contain the names of any pilots or any other corroborative information supporting her allegations regarding ValuJet having failed to record maintenance problems.[38] Ms. Merrick also provided no further substantive information regarding an alleged journal. In its investigation of the matter, the FAA learned that Captain Kubeck had submitted various incident reports during her time of employment with ValuJet, which her husband believed constituted the supposed journal of the management and maintenance problems she encountered while working at ValuJet that was reported in the press. The FAA has investigated the incident reports and found no violations of the Federal Aviation Regulations or the management and maintenance problems alleged by Ms. Merrick.[39]

We disagree with AFA's contention that we did not consider material undisputed facts relative to the managerial competence and compliance disposition of Messrs. Priddy and

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[36] *See*, for example, Order 94-10-36, issued October 26, 1994, wherein the Department declined to investigate charges filed against American Airlines by two former flight attendants alleging that American violated the Railway Labor Act.

[37] In a late filing, AFA claims that ValuJet misled the SEC regarding ownership of certain shares of its stock, basing its claim on a recent SEC submission by ValuJet. Based on our review, there does not appear to be any misrepresentation, although the SEC filing may contain some out-of-date information which was correct on the date cited for the information in the filing. In any event, the issue is subject to SEC jurisdiction, and AFA can pursue the matter before that agency.

[38] Ms. Merrick states in her response that she needs more time to compile such information. The FAA continues to be interested in any evidence that she may have in support of her allegations, and Ms. Merrick has been asked to contact the FAA directly with any such information.

[39] As noted above, we are placing a copy of the FAA statement in the docket.

Jordan. As evidence, AFA renews its claims that David Gentry, the carrier's Director of Special Projects, was not qualified for his former positions of Vice President of Maintenance and Vice President of Heavy Maintenance and claims that ValuJet misled us about his qualifications. AFA is correct that ValuJet's initial information relative to Mr. Gentry incorrectly indicated that his last position at Northwest was as Acting Director, Support Shops, when, in fact, he was Hangar Systems Crew Chief when he left that carrier,[40] and AFA makes much of the fact that, for the 20 months prior to leaving Northwest, he served in non-managerial positions. AFA's contention is that Mr. Gentry is incompetent, that Messrs. Jordan and Priddy should have known he was incompetent, and the fact that they did not, coupled with the fact that ValuJet incorrectly described his prior employment, is evidence that Messrs. Jordan and Priddy are incompetent. There is no logical basis to prompt a suspicion that this mistake in ValuJet's initial information was anything but an oversight, and any confusion that it may have created has no substantive bearing on our finding about ValuJet's fitness.

As we stated in Order 96-8-45, Mr. Gentry served as the carrier's Director of Maintenance at the time of its initial certification, an FAA-required position, and the FAA found Mr. Gentry qualified for that position. We note that, as ValuJet expanded, it added additional maintenance management personnel, including Salvatore D'Amico (Director of Maintenance, August 1995), Robert Zoeller (Vice President of Technical Operations, December 1995), and now Mr. Jensen (Senior Vice President for Maintenance and Engineering, July 1996). Moreover, it should be noted that Mr. Gentry presently serves as Director of Special Projects and has no oversight responsibilities. Thus, we no longer consider Mr. Gentry to be a key manager at ValuJet.

AFA also contends that Mr. D'Amico is not qualified to oversee the carrier's operations because he was ValuJet's Director of Maintenance during the period when ValuJet was experiencing its serious maintenance discrepancies.[41] As we noted earlier in this order, the fact that an individual held a key position with an airline during a time when the carrier was experiencing regulatory compliance problems does not in and of itself make him or her unfit for their position. Mr. D'Amico has not been directly cited by the FAA for violations of the Federal Aviation Regulations. More importantly, the FAA continues to find him qualified to hold his FAA-required position, and as we noted in Order 96-8-45, ValuJet has taken other steps to strengthen its maintenance program.

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[40] Information filed by ValuJet indicates that Mr. Gentry worked for Northwest between October 1986 and August 1993 and held the following positions while there: (1) Senior Manager/Support Shops (1986-1989), Acting Director, Support Shops (1989-1992), Training Technical Coordinator (1992), and Hangar Systems Crew Chief (1992-1993).

[41] In this regard, AFA notes that Mr. D'Amico has been Director of Maintenance since August 1995 and that, in March 1996, ValuJet acknowledged to the FAA that it should have done a better job of repairing maintenance discrepancies. AFA further notes that Mr. D'Amico was still the carrier's Director of Maintenance in June 1996 when ValuJet entered into its Consent Order with the FAA.

We also disagree with AFA's contention that ValuJet's participation in the FAA's self-disclosure program is not evidence of its compliance disposition. Although AFA argues that ValuJet did not fully participate in that program, the FAA has advised us that the carrier did. The FAA's self-disclosure program is an important tool in allowing the FAA to fully oversee and respond to matters involving the safety of an air carrier's operations. A carrier's willingness to advise the FAA when it has done something wrong, or believes that it has, is a strong sign that the carrier is concerned about safety matters.

We do not agree with AFA that the record demonstrates that ValuJet had not acceptably addressed the concerns the FAA had raised in its February 1996 letter. The FAA has advised us that it considered the actions ValuJet stated that it had taken, or would take, in its March 5, 1996, reply to that letter to be responsive to the issues raised by the FAA and, moreover, that the carrier had been achieving reasonable progress toward resolving those concerns in the period prior to the issuance of the FAA's Consent Order.[42]

AFA also claims that ValuJet misled the Department when it advised us on August 20 that it had provided all information relative to key personnel, and then produced a revised organizational chart on August 23 that showed a significant number of new positions not included in its initial organizational chart. We note that there were no positions on that chart that are specified as key management personnel under our rules for which ValuJet had not already provided background information.[43] As a positive and more relevant matter, ValuJet materially changed its maintenance organization in the process of working with the FAA, and ValuJet fully informed us of these changes when they became firm. As we stated in our show-cause order, we find that these changes reflect a positive response by the carrier on safety issues. On the basis of the above, we have no reason to conclude that ValuJet misled the Department about the status of its key personnel.

We also take issue with AFA's contention that we have violated our own rules by not requiring ValuJet to identify and provide us with background information relative to the individuals holding the positions of Director of Aircraft Vendor Maintenance Administration and Director of Maintenance Cost and Control, as well as an affidavit attesting that all of the carrier's aircraft meet the safety requirements of the FAA.

AFA is correct that 14 CFR 204.3 sets out certain information that an applicant for authority to resume operations should provide in support of its fitness, including information on key personnel who are defined in 14 CFR 204.2. As already noted, the two positions at issue are not specifically included within the definition of 14 CFR 204.2. As discussed at length in

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[42] Moreover, many of the instances of improper maintenance and maintenance recordkeeping contained in the Consent Order and cited by AFA as evidence of ValuJet's failure to carry out the steps listed in its March 5 letter occurred before or soon after March 5, 1996.

[43] 14 CFR 204.2 defines "key personnel" as officers, directors, chief executive officer, chief operating officer, president, vice president(s), the directors or supervisors of operations, maintenance, and finance, and the chief pilot, as well as any part time or full time advisors or consultants to management. In addition, we generally consider the chief inspector and director of safety to be key personnel.

Order 96-8-45, ValuJet has already provided information on all personnel holding the positions of vice-president or higher, all technical positions required by the FAA, and certain other positions as well. The positions cited by AFA report to persons whose qualifications were discussed in the show-cause order. Thus, we do not consider the carrier's application to be incomplete in this respect.[44]

We also disagree with AFA's argument regarding the affidavit concerning the safety certification of ValuJet's fleet. ValuJet's fleet has undergone intense scrutiny over the past months. The FAA would not have returned the carrier's certificate if its aircraft did not meet the FAA's safety requirements. Thus, we do not find the noted affidavit regarding aircraft to be critical to an assessment of ValuJet's fitness at this time.[45]

AFA further asserts that ValuJet's poor consumer complaint record in the first six months of 1996 confirms its unfitness. We disagree. The Department's Aviation Consumer Protection Division (ACPD) has again advised us that ValuJet's consumer practices do not show a lack of fitness. That office is aware of the fact that the number of consumer complaints filed with respect to ValuJet increased during 1996. However, it would expect to find some increase in this area with any carrier that was expanding and then contracting as ValuJet was and undergoing the increased FAA inspections and review of its operations that the carrier experienced during this time. In addition, during 1996, ValuJet continued to cooperate fully with the ACPD in resolving consumer complaints.

We find without merit AFA's charges that the $20,000 civil penalty paid by ValuJet in connection with a violation of certain of the Department's advertising rules is further evidence that the carrier cannot comply with rules and regulations. Virtually every major U.S. air carrier has paid civil penalties for advertising violations and a single consent order such as that agreed to by ValuJet in settlement of a case cannot alone be the basis for a negative compliance disposition finding.

Finally, to the extent not otherwise discussed above, none of the other issues raised by the objectors leads us to conclude that ValuJet or its personnel are not fit.[46] To the contrary, we

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[44] In a late filing, AFA claims that ValuJet continues its practice of not updating its application by failing to apprise the Department of the recent filing of a lawsuit against the carrier by the Metropolitan Airport of Nashville, a case the Department was aware of from press coverage. We note that the lawsuit was filed after the issuance of Order 96-8-45. We do not view the filing or the failure to bring the lawsuit to our attention as evidence of a lack of compliance disposition on the part of ValuJet.

[45] We also note that it is our practice not to require non-operating applicants to provide such an affidavit until such time as the company submits the documents (including proof of FAA authority) needed to have its operating authority made effective. Thus, we are not concerned that the noted affidavit was not included with ValuJet's application. We will, however, require ValuJet to provide the Department with such an affidavit prior to resuming its air transportation operations.

[46] We note that some of the filers in this case have addressed issues that are more properly the purview of the FAA rather than matters relevant to our fitness process. This includes, for example, some of the issues raised by Dr. Nelson relative to the oxygen canisters shipped on Flight 592, and Mr. Kessler's concerns about

(Footnote continued on next page)

believe that the record before us indicates that ValuJet is fit to resume its air transportation operations.

Procedural Issues

AFA and other objectors contend that our procedures have not given them a fair opportunity to present their views and to obtain an impartial consideration of their arguments. As discussed below, we find these procedural claims to be without merit.

A. Congressional Communications

AFA contends that the Department's consideration of ValuJet's application has been tainted because of communications from members of Congress and other officials that allegedly urged us to approve ValuJet's application and thereby improperly put pressure on the Department. AFA bases this contention in large part on the failure of the Department's staff to place copies of the correspondence in the public docket of this proceeding immediately after the letters' receipt. According to AFA, under the Court's decision in *ATX, Inc. v. DOT*, 41 F.3d 1522 (D.C. Cir. 1994), these alleged procedural violations can only be cured through the holding of a formal hearing on ValuJet's application.

We find AFA's allegations of impropriety entirely without merit.

Based on an extensive search by the Department, AFA's claims of unfairness appear to concern only one letter from a member of Congress asking us to act expeditiously on ValuJet's recertification once the Department has determined that operational safety is assured.[47] That letter, which was dated August 2, was placed in the docket of this proceeding by September 6 and thus has been available for public inspection while the Department has continued to consider the filings of objectors in the docket.[48] Also on September 6, and on various dates thereafter, a large volume of letters principally from private citizens were placed in the docket.[49] A review of these letters indicates that few of them directly address the application at hand. Also, while some of these letters were from public officials (Governors

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additional safeguards for passengers and crew members for dealing with smoke in the cockpits and cabins of aircraft. To the extent that this is the case, we will refer these issues to the FAA for that agency's consideration.

[47] During this search, we sought out every letter sent to the Secretary concerning ValuJet or the Everglades crash in any way and every letter sent to the FAA that might concern the ValuJet fitness process. Although our search was thorough, it is possible that one or more letters to a Department employee concerning ValuJet and the fitness proceeding might not have been found; however, the decisionmaker was neither aware of any such letter(s) nor considered it(them) in any way in this proceeding.

[48] On September 26, the Department received a second Congressional letter regarding our fitness proceeding. That letter, which was dated September 24, urges the Department to complete its review process expeditiously and allow ValuJet to resume operations.

[49] Approximately 480 letters have been placed on the docket as a result of a search for all correspondence relating to ValuJet.

and members of Congress), these letters, with one exception, did not address the Department's fitness process.[50]

As AFA contends, at least some of these letters should have been put in the docket sooner than they were. The delay resulted because it was the practice of the office that handles the Secretary's incoming correspondence to refer such letters to the FAA for reply on the assumption that the letters concerned the FAA's review of ValuJet.[51] Copies of the letters were sent to the Office of the Assistant Secretary for Transportation Policy, since that office works with the FAA on matters involving aviation safety policy and the air traffic control system, although it is not responsible for fitness cases. None of the letters addressing our fitness process were sent to the Assistant Secretary for Aviation and International Affairs, who decides airline fitness cases and whose staff is responsible for advising him on such cases.[52] When the staff members responsible for fitness cases learned of the letters the Department had received commenting on ValuJet, the staff obtained copies of the letters and placed them in the docket.[53] Thus, contrary to AFA's complaint, there was no deliberate effort to withhold the letters from public review, and the letters relevant to ValuJet's application to resume operations in fact never were seen by the Assistant Secretary for Aviation and International Affairs or his staff until AFA raised this issue. We regret the delay in making the letters available, but we note that no harm has been done, since the letters are now public and they had no substantive effect on the proceeding because they were not considered by the decisionmaker in this case.[54]

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[50] In addition to the August 2 Congressional correspondence which addressed the application at issue, 34 other Congressional letters, including constituent referral letters, which in some way mentioned ValuJet, were received by the Department and the FAA. These letters included (1) expressions of regret over the ValuJet May 11 accident, (2) suggestions for various FAA standards or search and rescue procedures, (3) comments on FAA oversight, and (4) inquiries about the FAA recertification of ValuJet. An in-depth review of these 34 letters indicates that only two of them were direct Congressional inquiries regarding the FAA recertification process and that neither of these letters urged the FAA to allow ValuJet to resume operations without first resolving the FAA's safety concerns. One of these other letters was only recently received; that letter, which was dated September 24, urged us to complete our review process expeditiously and allow ValuJet to resume operations.

[51] Those letters that were not referred to the FAA were sent to various branches of the Department, including the Federal Highway Administration, the Office of the Inspector General, and the Office of Intelligence and Security.

[52] Our review of the letters placed in the docket indicates that only five of these letters were ever referred to the Office of the Assistant Secretary for Aviation and International Affairs. Further, of these five letters, none were related to the question of ValuJet's fitness and, in fact, three, including one from a member of Congress, did not contain any specific reference to ValuJet and may not properly belong in the correspondence/*ex parte* section of this docket.

[53] As stated in its pleadings, AFA wrote to the Secretary on August 16, 1996, inquiring about Congressional correspondence. This letter, which we note was itself an *ex parte* contact, was also erroneously forwarded to the FAA for response, along with the Congressional correspondence noted above about which AFA complains.

[54] AFA improperly failed to submit its complaint about Congressional pressure in its original response to the show-cause order issued August 29, 1996. That order expressly required all objections to our tentative decision to be filed seven days after that order's issuance, or by September 5, 1996. AFA instead submitted its complaint one week after the due date for objections to the show-cause order, stating that the complaint was late-filed because the evidence was not available when AFA filed its original objection, a claim based on the delay in placing the Congressional letters in the docket for this proceeding. It appears, however, that AFA was aware of the letters' general content when it filed its original objection, for (from a memo AFA requested the

Furthermore, AFA has mischaracterized the letters as demands for prompt approval of ValuJet's application. While the letter dated September 24 does make this request, the sole Congressional letter relevant to this process that was received by the Department during the initial review process asked only that we not unduly delay a final decision and specifically stated that ValuJet should not be allowed to resume operations until the Department and the FAA were convinced that the airline would operate safely.

Given the nature and timing of the Congressional letters relevant to ValuJet's application for the restoration of its certificate authority, there is no similarity between this case and the Congressional communications discussed by the Court of Appeals in the ATX case. As the Court pointed out in that case, "At least 125 House and Senate members eventually wrote to Secretary Peña either jointly or individually to declare their opposition to [ATX's founder and principal officer, Frank Lorenzo]." A number of members of the House Committee on Public Works and Transportation, the committee that oversees this Department and aviation legislation, joined in letters opposing ATX's application; among the members opposing the application were the Chairman of the full committee and the Chairman of the Aviation Subcommittee. In addition, two members of Congress introduced bills designed to keep Mr. Lorenzo from reentering the airline business, and a Congressman testified at the hearing on ATX's application. *ATX, Inc., v. DOT*, 41 F.3d 1522, 1524-1525, 1526 (D.C. Cir. 1994). Nothing similar has occurred in this case.

B. Oral Evidentiary Hearing

We normally act on requests for certificate authority through show-cause procedures which give interested persons the opportunity to comment on the application and to present their arguments on why an application should be granted or denied. As we explained in the show-cause order, neither the statute nor our regulations require the holding of a formal hearing on certificate applications. Order 96-8-45 at 6. In this case, we tentatively concluded that we could decide the fitness issues presented by ValuJet's request to resume operations without a formal hearing. The docket in this proceeding contains numerous pleadings from ValuJet, AFA, and other interested persons, and ValuJet's operations have been the subject of FAA investigations and Congressional hearings. Nonetheless, we gave commenters an opportunity to demonstrate why an oral evidentiary hearing should be held in this case.[55]

AFA and a number of the other objectors contend that we should hold a formal hearing. They primarily base their demand for a hearing on the existence of factual disputes, such as the dispute over the veracity of the claims by Ms. Clayton and Mr. Borer that Mr. Castillo had told them that ValuJet had ordered him to falsify company records and that he had done so.

Department's Inspector General to investigate the alleged Congressional pressure, the delayed placement of the letters in the docket, and other alleged problems in this proceeding.

[55] In order to increase the opportunity for public comment on ValuJet's application, we have accepted as comments letters from individuals that would not normally be accepted as pleadings.

As discussed above, Mr. Castillo and the other ValuJet employee named in the AFA declarations have submitted declarations denying those allegations.

We recognize that AFA and other objectors disagree with our factual findings. However, that does not require us to hold a formal hearing.[56] We hold formal hearings in fitness cases when the factual issues cannot be adequately resolved through show-cause procedures. After considering all of the evidence submitted by the parties, we conclude that the existing record has enabled us to resolve the factual disputes and find that ValuJet satisfies the fitness requirement. We note as well that the objectors primarily contend that the airline will not operate safely but that the FAA is satisfied that the airline will comply with all applicable FAA regulations. Other factual disputes alleged by AFA, such as the asserted Railway Labor Act violations, involve issues that we cannot resolve in fitness cases. Although AFA also asserts that the Congressional letters relating to ValuJet require the holding of a formal hearing, we have determined that AFA's complaints about improper Congressional pressure are without merit. Those complaints accordingly do not make a hearing necessary or appropriate.

C. Answer Period

Several objectors have stated that the seven-day answer period provided for in the show-cause order was not sufficient time for the public to comment on ValuJet's fitness. In this case, we believe it was. Our rules provide that a carrier that wishes to resume service must file notice with the Department at least 45 days prior to the date on which it intends to resume service; that notice is to be accompanied by information supporting the carrier's fitness to do so. To the extent that a carrier wants to resume service on less than 45 days' notice, it must seek an exemption from the 45-day notice requirement.

ValuJet filed its notice of intent to resume service on July 15 and at the same time requested an exemption to the extent necessary to allow it to resume service prior to the end of the 45-day notice period. As required, that application was filed in the Department's Public Docket Section and notice of the application was placed in the Federal Register. Under our rules, interested persons had 15 days to file objections to ValuJet's application.[57] The Department's show-cause order was not issued until August 29, which was 45 days after the carrier had filed its application.[58] During this extended period of time, the Department received numerous pleadings from AFA, all of which have been accepted and considered in this proceeding.

Although the Department typically affords interested persons 15 days to comment on its tentative decisions in fitness proceedings, we have the ability to provide a longer or shorter

[56] Although we find that the record shows that ValuJet is fit, our concern, discussed earlier, over the conflict between various declarations, and any possibility that record falsifications may in fact have occurred, have prompted us to request the Inspector General to investigate this matter.

[57] Only two parties--AFA and Wildlife/Moore--filed an objection to the application.

[58] Thus, contrary to the complaint of at least one objector, the Department did not authorize ValuJet to resume operations prior to the end of the 45-day period.

period where circumstances warrant.[59] As stated in the show-cause order, we believe the shortened answer period was warranted here. In Order 96-8-45, we noted that ValuJet had resolved all of the safety issues raised by the FAA, and we noted that objecting parties had already had 45 days to file their comments--three times the 15-day answer period normally afforded in exemption proceedings. Moreover, although the Department's order only provided for a seven-day answer period, we have accepted and placed in the docket all correspondence submitted relative to this matter, as well as later pleadings from AFA, and have considred all late filings properly made to the docket. On this basis, we believe that the Department has provided more than ample opportunity for public comment on ValuJet's fitness and see no reason to delay issuance of our final order in this proceeding any longer.

Request for Stay

On September 12, AFA filed a motion requesting that the Department stay the effectiveness of any decision finding ValuJet fit to allow AFA an opportunity to seek a stay and review of the Department's action in the courts.[60]

AFA argues that a stay is warranted in this case because (1) AFA believes that it has presented a substantial case which demonstrates that ValuJet is unfit with Messrs. Priddy and Jordan involved and AFA believes its position will be upheld on review, (2) AFA's members will be irreparably harmed if ValuJet is permitted to fly, (3) no other party, including ValuJet, will be harmed by a stay, and (4) a stay is in the public interest.

On September 18, ValuJet responded that AFA's motion should be denied. In support of its position, ValuJet argues that AFA has not come close to demonstrating that the Department should grant a stay. ValuJet argues that (1) the Department's show-cause order thoroughly reviewed AFA's claims and more than satisfies the applicable judicial standard of review,[61] (2) AFA has offered no evidence to suggest that the May 11 accident resulted from improper actions of ValuJet or that ValuJet is likely to experience a similar accident in the future,[62] (3) ValuJet's reputation and goodwill would be diminished significantly if it were prevented from operating during the pendency of a judicial appeal and, furthermore, ValuJet could suffer serious financial difficulties if it is not able to resume operations in the near future,[63] and (4) the public would be deprived of the services of a carrier which two agencies--the FAA and the

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[59] Indeed, where warranted, we have in the past granted oral approval or issued a final order in continuing fitness cases without any subsequent comment period.

[60] AFA notes that, as a matter of procedure, it must first ask for a stay from the Department before seeking judicial relief.

[61] ValuJet also states that AFA's claim that this proceeding has been tainted by impermissible Congressional influence is baseless.

[62] ValuJet also states that a majority of its flight attendants do not agree with AFA's positions on ValuJet's fitness.

[63] ValuJet states that it would lose in excess of $10 million for each month it is precluded from operating and that, unless it can point to the prospect of resuming operations in the near future, it could also risk being declared in default by certain bank lenders.

Department--have evaluated and concluded is fit and qualified to conduct the operations it proposes.

In ruling on requests for stays, including emergency stays of its orders and decisions, the Department attempts to apply the same standards as the courts. *See, e.g.*, Order 90-2-23, *Application of Discovery Airways, Inc.*, served February 13, 1990.[64] In determining whether a stay should be granted, we consider whether the moving party has established that: (1) it is likely to prevail on the merits; (2) it is likely to suffer irreparable harm if a stay is not granted; (3) the issuance of a stay will not substantially harm other parties; and (4) the issuance of a stay will not be contrary to the public interest. *Discovery Airways, en passim*. As shown below, a consideration of these factors shows that AFA has failed to make a sufficient showing under any of these standards that would justify a stay pending review.

A. Likelihood of Success on the Merits

AFA asserts that it has demonstrated that it has a substantial case on the merits because of its alleged showing that ValuJet is *per se* unfit as long as Messrs. Jordan and Priddy are managing the airline. ValuJet argues that AFA has made no such showing.

We do not think that AFA has shown any likelihood of success on the merits. We have given AFA and others ample opportunity to comment on ValuJet's application, and we have carefully considered the evidence presented by the parties as well as the FAA's evaluation of the airline's ability to comply with FAA regulations. We conclude that ValuJet under the management of Messrs. Jordan and Priddy does satisfy the statutory fitness requirement. We have found no merit in AFA's many different challenges to the airline's fitness.

Given our careful analysis of the record and the detailed findings made by this order, we conclude that AFA is unlikely to succeed on the merits if it seeks judicial review of this order. In addition, since Congress has delegated to us the responsibility of making fitness determinations, our judgment will be entitled to deference. *Air North America v. Dept. of Transportation*, 937 F.2d 1427, 1431-1433 (9th Cir. 1991). Congress has also stated that a reviewing court may not reverse our factual findings when they are supported by substantial evidence. 49 U.S.C. 46110(c). Our analysis must be reviewed under the arbitrary and capricious standard, a "highly deferential" standard which bars a court from substituting its judgment for that of the agency. *Association of American Railroads v. ICC*, 978 F.2d 737, 740 (D.C. Cir. 1992), citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under these circumstances, we find that AFA has not presented a substantial case on the merits against our determination that ValuJet is fit.

B. Irreparable Injury

[64] Under the courts' rules, the filing of a stay request with the agency is normally a prerequisite for the filing of a request for judicial stay of an agency decision. Federal Rules of Appellate Procedure, Rule 18. Since AFA could reasonably expect that a decision finding ValuJet fit would be made effective immediately, AFA properly filed its request for a stay with us while we were still considering whether ValuJet is fit.

In order to obtain a stay, a movant must show that it will be irreparably injured if the agency action is not stayed pending review. In our judgment, AFA has entirely failed to show any likelihood of irreparable injury to itself or its members if ValuJet resumes operations.

AFA has based its claims of irreparable injury on its assumption that ValuJet will not operate safely and that a crash is likely. AFA summarily presents its irreparable injury claim as follows: "AFA's members will be irreparably harmed if ValuJet is permitted to fly when it is not fit to do so. The potential severity of another ValuJet crash is enormous, as the May 11 tragedy in the Everglades taught us." In response, ValuJet contends that AFA has failed to show that any harm will occur and points out in particular that the FAA has concluded that ValuJet can operate safely.

The courts have held that speculative claims of potential harm do not satisfy a movant's obligation to demonstrate irreparable injury. The courts have held that "the injury must be both certain and great; it must be actual and not theoretical." Indeed, "[t]he movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

AFA's injury claims fall far short of meeting this standard. Since the FAA has concluded after an extensive investigation that ValuJet is in compliance with FAA regulations, there is no reason to believe that ValuJet's operations will create a significant risk of accidents causing injuries or deaths. ValuJet had no fatal accidents during its history, except for the Everglades crash, whose cause is still under investigation, the FAA has since strengthened its oversight of the airline, and the airline itself has taken a number of steps to ensure the safety of its operations. The FAA, moreover, will limit the size of the airline's fleet to fifteen aircraft, pending further review, and will maintain a heightened level of surveillance over the airline. In these circumstances, we see no likelihood that ValuJet's operations will pose a significant risk for the airline's employees and passengers.

To support its injury claims, AFA relies heavily on a case staying an agency's grant of a license to operate a nuclear power plant, *Ohio ex rel. Celebreeze v. NRC*, 812 F.2d 288 (6th Cir. 1987). There the court held that the catastrophe that could result from a nuclear power plant accident satisfied the petitioner's requirement to show irreparable injury. 812 F.2d at 291. We find that decision inapplicable here. First, the petitioner in that case made a substantial showing that the agency had granted the license without properly complying with the requirements for ensuring adequate evacuation plans in case of a nuclear accident. 812 F.2d at 291. Here, in contrast, the FAA has concluded that ValuJet will comply with FAA safety requirements and AFA has made no showing that the FAA erred at all, let alone in a potentially catastrophic way. The harm caused by an airline accident, while tragic, would involve far less harm than could result from a nuclear power plant accident. Thus, particularly in light of the FAA's decision to return the airline's operating certificate, the *Celebreeze* decision does not support AFA's irreparable injury claim.

C. Harm to Other Parties

AFA contends that no party, including ValuJet, would be legally harmed by a stay. According to AFA, the economic loss that would be incurred by ValuJet if it could not resume operations soon is not a relevant harm, since the delay assertedly stems from the alleged decision by the airline's management to operate in a way that compromised safety. In response, ValuJet asserts that a stay would cause substantial harm to itself, its employees, and its customers.

We conclude that the stay sought by AFA would cause substantial harm to others. First, ValuJet has shown that a stay will significantly injure the airline. ValuJet alleges that a stay would damage its reputation and goodwill. Furthermore, the airline asserts that a stay will cost it $10 million each month that it is unable to operate, since it would have on-going expenses but no revenue. ValuJet further contends that it could default under its loan agreements if it is unable to show that it will be able to resume operations in the near future.

We do not agree with AFA's argument that any economic harm suffered by ValuJet is irrelevant, since the harm would essentially be self-inflicted. This argument assumes that ValuJet chose to minimize the importance of safety before it suspended operations. We do not agree with that assumption, although we recognize that the airline did not take adequate steps to ensure its compliance with FAA requirements and to maintain the highest level of safety. The airline since then, however, has taken substantial steps to bring itself into compliance with FAA requirements, as confirmed by the FAA's return of ValuJet's operating certificate. Having done so, the airline's past shortcomings cannot make the airline's potential losses from a stay irrelevant.

A stay would also further harm ValuJet's employees, who would continue to be deprived of employment as long as the airline is unable to resume operations. We have received comments from a number of such employees supporting both the airline's application to resume operations and the airline's management.

Finally, those consumers who wish to use ValuJet's low fare services will be injured by a stay, since there would be no ValuJet flights. While other airlines offer low fares, most of ValuJet's markets were dominated by high-fare airlines, and its service was attractive to many travellers, several of whom have filed comments urging us to allow the airline to begin flying again.

D. Public Interest

In arguing that a stay will promote the public interest, AFA focuses on the need for careful deliberation on an airline's fitness when that airline was shut down on safety grounds. In that regard AFA complains about the seven-day period established for the filing of objections to the show-cause order.

AFA's public interest argument misconstrues the history of this proceeding, since the public has had ample opportunity to comment on ValuJet's fitness. Although objectors had seven

days to respond to the show-cause order, they had a much longer period to comment on ValuJet's application, which was filed more than six weeks before the show-cause order's issuance. AFA itself filed voluminous comments on the application before we issued the show-cause order, and it has filed additional pleadings after the expiration of the seven-day period for submitting objections to the order.

We find that the public interest will be injured by a stay. First, as shown, the FAA has concluded that ValuJet can operate safely and has returned the airline's operating certificate to it. In view of the FAA's conclusions, the grant of a stay would not promote airline safety. A stay would, however, deny the public the opportunity to use airline services that many consumers found attractive. A stay would also prevent the entry into the airline business of a competitor whose services would promote low fares.

ACCORDINGLY,

1. We find that ValuJet Airlines, Inc., is fit, willing, and able to resume its certificated air carrier operations.

2. We deny the motion of the Association of Flight Attendants requesting that the Department stay the effectiveness of its final decision in this docket pending disposition of its planned application for emergency stay in the courts.

3. We grant all motions for leave to file otherwise unauthorized documents filed by parties to this proceeding.

4. We direct Valujet Airlines, Inc., to file the aircraft certification affidavit required by 14 CFR 204.3(n)(3) prior to resuming its certificated air carrier operations.

5. We direct ValuJet Airlines, Inc., to notify the Department in writing at least 45 days prior to instituting any change in its operations which would increase the number of aircraft it operates beyond 15.[65] Thereafter, ValuJet Airlines, Inc., shall provide such notice of any further change in operations which would increase its fleet size beyond that authorized by the Department.

6. We direct ValuJet Airlines, Inc., to provide copies of any future findings against it in connection with the Association of Flight Attendants' lawsuit and/or its shareholder suits. In addition, we direct ValuJet to advise us if any current or future criminal investigations results in charges against the carrier or any of its key personnel and to provide us a copy of any findings by the NTSB relative to the May 11, 1996, accident.[66]

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[65] Such notice should be submitted to the Office of Aviation Analysis.

[66] These documents should be submitted to the Office of Aviation Analysis.

7. We will serve a copy of this order on the persons listed in Attachment A to this order.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

Attachment A

SERVICE LIST FOR VALUJET AIRLINES, INC.

Berl Bernhard, Joseph L. Manson
William C. Evans, Russell E. Pommer
Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
Suite 701
901 - 15th Street, N.W.
Washington, D.C. 20005

Lewis H. Jordan, Pres. & COO
Steven E. Markhoff, General Counsel
ValuJet Airlines, Inc.
Suite 126
1800 Phoenix Boulevard
Atlanta, Georgia 30349

David Borer & Edward J. Gilmartin
Association of Flight Attendants, AFL-CIO
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036

Wildlife-in-Need, Inc. and Raymond J. Moore
c/o Jonathan L. Alpert
R. Christopher Rodems
Alpert, Barker & Calcutt, P.A.
P. O. Box 3270
Tampa, Florida 33601-3270

Mr. David R. Harrington, Mgr
Air Transportation Division, AFS-200
Office of Flight Standards
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Mr. John Cassady
Deputy Chief Counsel, AGC-2
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Mr. Richard Birnbach, Mgr.
Field Programs Div, AFS-500
Office of Flight Standards
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Manager
Flight Standards District Office
P. O. Box 20636
Atlanta, Georgia 30320

Eddie L. Thomas
Assistant Chief Counsel, ASO-7
Federal Aviation Administration
Southern Region Headquarters
P. O. Box 20636
Atlanta, Georgia 30320

W. Michael Sacrey, Mgr.
Flight Standards Div., ASO-200
Federal Aviation Administration
Southern Region Headquarters
P. O. Box 20636
Atlanta, Georgia 30320

Mr. Tim Carmody, Actg. Dir.
Office of Airline Information, K-25
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Mr. Richard A. Nelson
Official Airline Guide
2000 Clearwater Drive
Oak Brook, Illinois 60521

Mr. Jim Zammar, Dir. Rev. Acctg.
Air Transport Association
1301 Penn. Ave., N.W., Ste 1100
Washington, D.C. 20004

Mr. Allan Muten, Asst. Treas.
Airlines Reporting Corp.
1530 Wilson Blvd, Ste 800
Arlington, Va. 22209

Thomas E. Craig II
P. O. Box 336
Odon, Indiana 47562

Dr. Kent A. Schneider
9700 Misty Cove Lane
Gainesville, Ga. 30506

Jennifer Bell
2401 Ohio Dr., #402
Plano, Tx. 75093

B. Jack Watkins & D. Ann Watkins
5113 pemberton Dr.
The Colony, Tx. 75056

James & Deborah Landrum
2308 Skipwith Dr
Plano, Tx 75023

Edward Wytkind, Exec. Dir.
Transportation Trades Dept. of AFL-CIO
400 N. Capitol St., N.W., Ste 861
Washington, D.C. 20001

Dr. Gene A. Nelson
1820 E. Petrs Colony Rd, Ste 5004
Carrollton, Tx 75007-3726

Raymond & Mary Jeandron
Ann S. Blue
KPMG Peat Marwick L.L.P.
3500 One Shell Square
New Orleans, La. 70139

Stanley Cushing
902 Quail Forest Cove
Austin, Tx. 78758

Christina Merrick
13691 Gavina Ave., #494
Sylmar, Ca. 91342

J.E. Jacobs
340 Goode Road
Conyers, Ga. 20208

Andrea Beck
31931 Donnelly
Garden City, Mi. 48135

Mildred Rutledge
2416 N. Ola Rd.
McDonough, Ga. 30252

Warren Engelke
5239 Rosser Rd.
Stone Mountain, Ga. 30087

Dean Howard Stanton
P. O. Box 608
Niceville, Fl. 32588-0608

Capt. Stephen J. Leonhardt
464 Victoria Rd.
Woodstock, Ga.

Maj. Alan L. Bedsole
1235 Bayshore Dr.
Valparaiso, Fl.

David L. McCloskey
1723 English Ivey Lane
Kennesaw, Ga. 30144

Larry C. Beam
2381 Perch Ct.
Marietta, Ga. 30060

Gregory Straessle
4109 Brookview Dr
Atlanta, Ga. 30339

Joseph E. Pitts
2030 Glen Gate Ct.
Cumming, Ga. 30131

Allison Beach
Voices Involved with ValuJet Attendants
146 Pine Crest
Monroe, Ga. 30655

Paul Zielinski
55 Mosby Woods Dr.
Newnan, Ga. 30265

Robert & Paula Marshall
2701 Arbor Summitt
marietta, Ga. 30066

Charles Fahn
8402 West Sample Rd.
Coral Springs, Fl. 33065

Victor & Suzi McPherson
8125 Dogwood Train
Cumming, Ga. 30131

Ron Burkhart
25 Park Timbers Dr.
Sharpsburg, Ga. 30277

C. G. Parramore
1125 Byrnwyck Rd.
Atlanta, Ga. 30319

Charles Green
9151Branch Valley Way
Roswell, Ga. 30076

Mark Peterson
1420 Land O Lakes Dr.
Roswell, Ga. 30075

James Range
5743 Brookstone Walk
Acworth, Ga. 30101

David L. Browning
206 Gleneagles Point
Peachtree City, Ga. 30269

Ronald Moss
2800 Spalding Drive
Dunwoody, Ga. 30350

Susan Rogers
4070 Northside Dr., N.W.
Atlanta, Ga. 30342

H. Wills
198 Deep Step Rd.
Covington, Ga. 30209-7104

Steven C. Wood
13 Doranne Ct.
Smyrna, Ga. 30080

Veronice Lawrence, Jr.
223 Katherine Place
Ft. Walton Beach, Fl.

John Regan
500 Hawthorne Dr
Fayetteville, Ga. 30214

Sherri Denise Daw
1514 Pine Log Road
Conyers, Ga. 30207

Robert P. Kessler, Jr.
Macey, Willensky, Cohen,
Wittner & Kessler, L.L.P.
Ste. 600 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Ga. 30303-1229