UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: ROBERT M. RITER d/b/a RITER AVIATION

FAA Order No. 2019-1

FDMS No. FAA-2017-0086

Served: May 15, 2019

DECISION AND ORDER

Complainant Federal Aviation Administration ("Agency") filed an appeal from the Initial Decision issued by the Department of Transportation's Office of Hearings.[1] As found in the Initial Decision, Respondent Robert M. Riter, doing business as Riter Aviation, operated two flights as commercial operations without an appropriate certificate and without an appropriate operations specification.[2] The Office of Hearings assessed a civil penalty of $5,700.[3]

The Agency argues on appeal that the civil penalty is too low and should be raised to $11,000.[4] For the reasons discussed below, I grant the Agency's appeal and assess Riter a civil penalty of $11,000.

I. Standard of Review

In any appeal from an initial decision, the FAA decisionmaker considers only: "(1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the administrative law judge committed any prejudicial errors that support the appeal."[5]

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[1] The Initial Decision, served on November 26, 2018, is attached.

[2] Initial Decision at 3-6.

[3] *Id.* at 17.

[4] Agency's Appeal Brief at 16.

[5] 14 C.F.R. § 13.233(b) (2018).

II. Factual Background

Neither party has appealed the material factual findings regarding two flights conducted in April 2013. As the Initial Decision explains:

> It is undisputed that, during the relevant time period, the Respondent did business as Riter Aviation, and was the co-owner of the subject aircraft, a Cessna 172 airplane, N3483E. During that same time, the Respondent did not hold an air carrier or operator certificate authorizing it to operate as an air carrier or commercial operator, nor did it hold operating specifications appropriate for an air carrier or operator certificate. On April 26, 2013, Marco Toninato piloted the subject aircraft on a flight from Torrance, California, to Henderson Executive Airport near Las Vegas, Nevada. Mr. Toninato also flew the same airplane from Henderson Executive Airport to Torrance on April 28, 2013. During both of these flights, Daniel Pitts and Erwin Morales were on board the subject aircraft.[6]

The Initial Decision contains further findings that, in exchange for $660 from Mr. Pitts, the Respondent authorized the use of his aircraft and arranged for the pilot.[7] Upon landing in Las Vegas, Mr. Pitts paid $660 plus a tip to the pilot, Mr. Toninato.[8] The arrangement proceeded as planned until the return trip, when "shortly after departing, the subject aircraft experienced difficulties ascending and then crash landed."[9]

III. Issues on Appeal and Discussion

The decision below correctly concluded that, in two separate flights, Riter acted as a direct air carrier or commercial operator without an appropriate certificate or appropriate operations specifications, in violation of 14 C.F.R. § 119.5(g) (2013).[10] The Office of Hearings determined

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[6] Initial Decision at 2-3 (citations omitted).

[7] *Id.* at 5.

[8] *Id.* at 5-6.

[9] *Id.* at 6.

[10] Initial Decision at 16. The regulation in effect during the relevant period states,

> § 119.5 Certifications, authorizations, and prohibitions.
> ...
> (g) No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may

that the Table of Sanctions[11] does not directly address this particular type of violation.[12] In its view, the most analogous violation described in the table concerned an "[o]peration for compensation or hire when a valid commercial pilot certificate had not been issued."[13] This table entry, however, provides for a certificate action (suspension or revocation) against the pilot, but contains no civil penalty range. The Office of Hearings filled this gap by deriving the civil penalty range from the full range of possible penalties, i.e., from $550 to $11,000 per violation.[14] Relying on guidance contained in FAA Order No. 2150.3B, the Office of Hearings calculated the appropriate sanction by starting in "the middle of each recommended sanction range," and then considered whether aggravating or mitigating factors applied.[15] After finding neither aggravating nor mitigating factors, the Office of Hearings assessed a civil penalty of $5,700.[16]

The Agency appeals the amount of the assessed civil penalty. It asserts two principal errors, which pose the following questions in this appeal:

> (1) The civil penalty statute states that a "separate violation occurs ... for each flight involving the violation." 49 U.S.C. § 46301(a)(2) (2012). The Initial Decision did not expressly assess a penalty for each separate flight. Should the penalty be increased to address both flights?
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> (2) In the absence of a clearly applicable entry in the sanctions table, precedent establishes that table entries for analogous violations provide an appropriate method for determining a penalty. Riter acted as a commercial operator and without operations specifications, but the Initial Decision used by analogy a penalty entry applicable to a pilot who does not possess a commercial pilot

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operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

14 C.F.R. §119.5 (2013). The regulation remains unchanged. *See* 14 C.F.R. § 119.5 (2019).

[11] The tables are found in FAA Order 2150.3B, "FAA Compliance and Enforcement Program," at Appendix B.

[12] Initial Decision at 16.

[13] *Id.* at 16 (citing FAA Order No. 2150.3B at B-24 (Fig. B-3-h(1)(g))).

[14] Initial Decision at 16, n.117.

[15] *Id.* at 16-17.

[16] *Id.* at 17.

certificate. Does another penalty range, specifically applicable to commercial operations contrary to operations specifications, provide a better analogy?

Riter defends the Initial Decision on the merits of these issues, but further, raises due process concerns by asserting that the Complaint did not give adequate notice as to these issues.

A. The Civil Penalty Must Address Both Flights as Separate Violations

The Agency argued below and now on appeal that the two separate flights constituted two separate violations.[17] Riter, however, asserts that the Complaint did not provide sufficient notice that two violations were at issue.[18] Riter relies primarily on a sentence in the introductory paragraph of the Complaint that states, "Respondent was advised through a Final Notice of Proposed Civil Penalty dated February 10, 2017, that the FAA proposed to assess a civil penalty in the amount of $11,000 for **a** violation of 14 C.F.R. § 119.5(g)."[19]

Contrary to Riter's position in this appeal, the Complaint specifically alleged two flights, and thereafter, repeatedly referred to "flights" in subsequent averments.[20] After these specific averments, the Complaint continued:

> 7. *At all times mentioned herein*, neither you nor Riter Aviation held an air carrier or operator certificate authorizing you or Riter Aviation to operate as an air carrier or commercial operator.
>
> 8. *At all times mentioned herein*, neither you nor Riter Aviation held operating specifications appropriate for an air carrier or operator certificate.[21]

The Complaint, therefore, squarely[22] set forth the charge that Riter conducted *both* mentioned flights without the proper certificate and without the proper operations specifications. Further,

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[17] Agency's Post-hearing Brief at 12; Agency's Appeal Brief at 12-13.

[18] Riter's Reply to Agency's Appeal Brief at 2-3.

[19] *Id.* at 3 (emphasis added by Riter).

[20] Complaint ¶¶ II.3 - 6.

[21] Complaint ¶¶ II.7 and II.8 (emphasis added).

[22] The plain language of the Complaint compels this conclusion, but further support lies in the long-established principle that "administrative pleadings are very liberally construed." *Nat'l Realty & Const. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1264 (D.C. Cir. 1973).

the Complaint expressly sought a civil penalty of $11,000, which remains the amount sought in this appeal.[23] Under these circumstances, the Complaint provided "the fundamental elements of ... notice and an opportunity to be heard," and provides no reason to restrict the penalty to one flight.[24]

Turning to the merits of whether the penalty should account for both flights, the applicable statute leaves no room for doubt or argument. It states plainly that a "separate violation occurs ... for each flight involving the violation."[25] Although an Initial Decision need not have applied the sanctions table with mathematical precision,[26] the record demonstrates the Office of Hearings did not account for the two flights as separate violations.[27] Based on the statute, the penalty should account for both flights.

B. The Appropriate Sanction Range Was Not Used

The Agency's sanction guidance is contained in FAA Order No. 2150.3B, "FAA Enforcement and Compliance Program" (Oct. 1, 2007). An administrative law judge ("ALJ") presiding over an FAA civil penalty case is not an agency employee, but "[n]onetheless, concerning matters of agency law and policy, administrative law judges are subject to the agency."[28] When the Administrator reviews an ALJ's sanction determination, the Administrator may reverse the initial

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[23] Complaint at ¶ III.3.

[24] *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

[25] 49 U.S.C. § 46301(a)(2) (2012); *accord In re Conquest Helicopters, Inc.* FAA Order No. 1994-20 at 2 (June 21, 1994).

[26] As a matter of policy, "the Administrator does not encourage the use of a mathematical formula to set a civil penalty." *In re Mole-Master Services Corporation*, FAA Order No. 2010-11, at 12, n.13; *see also* FAA Order No. 2150.3B, at 7-9.

[27] As explained above, the Office of Hearings started with the midpoint of the penalty range for a single violation. *See supra* notes 14-16 and accompanying text. That range is between $550 and $11,000, with the mid-point at $5,775. Without a detailed explanation other than finding no mitigating or aggravating factors, the Office of Hearings assessed the round figure of $5,700 as the civil penalty. Initial Decision at 17. Had the Office of Hearing recognized each flight as a separate violation, the assessed civil penalty would have been closer to $11,000.

[28] *In re Northwest Airlines, Inc.*, FAA Order No. 90-37 at 8-10 (Nov. 7, 1990); *see also In re Schuman Aviation Co.*, FAA Order No. 2016-2 at 9 (Aug. 24, 2016).

decision if it does not comply with Agency sanction policy as set forth in the Order.[29] Indeed, if a civil penalty assessed in an initial decision is not consistent with the sanction guidance, the Administrator on appeal has "both the authority and duty to impose the agency's policy on appeal."[30]

The Table of Sanctions included in Order No. 2150.3B reflects the FAA's assessment of the nature, circumstances, extent, and gravity of each general type of violation, albeit based on the premise that the violation is a single, first-time, inadvertent violation.[31] When the Table of Sanctions does not list the specific violation at issue, the Administrator looks to analogous violations in the table to guide the assessment of a civil penalty.[32]

The Agency argued below, and now on appeal, that the most analogous penalty guidance is in table entry B-1-c(3), under the general heading of "Operations Specifications."[33] That entry lists the violation as, "Operation contrary to ops specs – likely potential or actual adverse effect on safe operation."[34] The Office of Hearings rejected this table entry on the ground that "the Respondent could not operate contrary to something it did not hold."[35] The Initial Decision relied instead upon table entry B-3-h(1)(g), *i.e.*, "Operations for compensation or hire when a valid commercial pilot certificate had not been issued."[36] Comparing the formatting and text of these table entries reveals their differences most readily:

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[29] *In re Schuman Aviation Co.*, FAA Order No. 2016-2 at 9 (Aug. 24, 2016) (quoting *Northwest Airlines, Inc.*, FAA Order No. 90-37 at 8-10 (Nov. 7, 1990).

[30] *In re Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 at 20 (Feb. 2, 2000).

[31] FAA Order 2150.3B at 7-7; *see also In re Schultz*, FAA Order 89-5 at 12 (Nov. 13, 1989).

[32] *In re Air Charter, Inc.*, FAA Order No. 2013-1 at 9 (May 14, 2013).

[33] Agency's Appeal Brief at 7.

[34] FAA Order 2150.3B, at B-12, entry B-1-c(3).

[35] Initial Decision at 16.

[36] Initial Decision at 16.

1. U.S. AIR CARRIERS, U.S. COMMERCIAL OPERATORS, PART 125 OPERATORS AND PART 129 OPERATORS.

...

Fig. B-1-c. Operations Specifications	Civil Penalty	Certificate Action
...		
(3) Operation contrary to ops specs – likely potential or actual adverse effect on safe operation.	Moderate to Maximum	

...

3. INDIVIDUALS AND GENERAL AVIATION – OWNERS, PILOTS, REPAIR STATIONS, PILOT SCHOOLS, MAINTENANCE PERSONNEL.

Fig. B-3-h. Other Flight Violations	Civil Penalty	Certificate Action
(1) Certification and qualification		
...		
(g) Operation for compensation or hire when a valid commercial pilot certificate had not been issued.		90-day Suspension to Revocation.

Several aspects of this case demonstrate that table entry B-1-c(3) (advocated by the Agency) provides the better analogy to the present violation. First, the Initial Decision found that Riter acted as a commercial operator[37] in violation of 14 C.F.R. § 119.5(g), which states, "No person may operate as ... a commercial operator without ... an appropriate certificate and appropriate operations specifications." Table entry B-1-c(3), appropriately, pertains to commercial operators. Second, table entry B-1-c(3) also pertains to flights that are "contrary to" operations specifications,[38] unlike B-3-h(1)(g). The Initial Decision discounted this aspect of the regulatory violation by noting that Riter "could not operate contrary to something it did not hold."[39] However, conducting operations "contrary to" operations specifications is hardly different from conducting operations "without" operations specifications. Indeed, such hair-splitting does not diminish the value of using B-1-c(3) as *an analogy* because both articulations address operations

[37] Initial Decision at 16.

[38] Operations specifications are distinct from the certificate. *See* 14 C.F.R. § 119.7(b) (2018).

[39] Initial Decision at 16.

that are not authorized by any operations specifications. Third, and finally, B-1-(c)(3) actually provides guidance on *a civil penalty*, whereas B-3-h(1)(g) prescribes *a certificate action*. Recognizing that the point of this exercise is to find a suitably analogous violation for guidance on the *civil penalty* range, a violation that actually recommends a civil penalty is more analogous. I conclude, therefore, that entry B-3-c(3) is the most appropriate analogy to use in this matter.[40, 41]

Having established that B-1-c(3) provides the best analogy, the last issue to consider is Riter's emphatic contention that the "Complaint makes **no** mention of safety" and reliance on B-1-c(3) is a "belated 'safety' theory."[42] The argument demonstrates a fundamental misunderstanding of the regulatory violation and the purpose of operations specifications. An operation without the required operations specifications—in violation of 14 C.F.R. § 119.5(g) as alleged in the Complaint—is inherently an operation without approved safety standards tailored to the particular commercial operator.[43] Thus, the Complaint gave notice that safety was at issue when

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[40] Assuming for the sake of argument that table entry B-3-h(1)(g) and the associated certificate action range provided the most appropriate analogy, the Office of Hearings did not apply the analogy correctly. Viewed as a whole, the sanctions table provides some relatively short suspension periods lasting 7, 15, or even 30 days. Higher durations of 60, 90, 120, and 180 days are also provided. The most severe certificate action is revocation. Table entry B-3-h(1)(g) provides for a "90-day Suspension to Revocation," and clearly does not advise lesser suspensions like 7 days. In other words, the table entry advises that relatively severe certificate actions are appropriate, and it certainly does not suggest using the entire range of possible certificate actions. This point was lost when the Office of Hearings translated the certificate action guidance into civil penalty guidance. Specifically, the Initial Decision states, "[T]he undersigned judge must consider the entire range when determining the appropriate civil penalty." Initial Decision at 16 (emphasis added). That "entire range," as also explained in the Initial Decision, started at the low-end of $550 for minimum violations. *Id.* at 16, n.117.

[41] I also have considered whether table entry B-3-c(2) is appropriate. That entry is for mere "technical noncompliance" with operations specifications and provides a civil penalty in the "minimum" range. Entry B-3-c(2) has been used, for example, for matters easily remedied through simple amendments to existing operations specifications. *See e.g., In re Shuman Aviation Co., LTD.*, FAA Order No. 2016-2 at 4 (August 24, 2016) (adding an airport to an existing list of permissible airports). The present circumstances are not mere technical violations given *the complete absence* of an appropriate certificate and operations specifications.

[42] Riter's Reply to Agency's Appeal Brief at 5.

[43] *See* 14 C.F.R. § 119.7 (2013); *see also* Hearing Transcript 221 to 222. Operations specifications have been required since 1953 and inherently pertain to safety. FAA Order 8900.1, "Flight Standards Information Management System (FSIMS), Vol. 3, Chap. 18, at ¶ 3-677. "[T]he safety standards established by regulation should usually have a broad application that allows varying acceptable methods of compliance. The OpSpecs [i.e., operations specifications] provide an effective method for establishing safety standards that address a wide range of variables. In addition, OpSpecs can be adapted to a specific certificate holder or operator's class and size of aircraft and type and kinds of operations. OpSpecs can be tailored to suit an individual certificate holder or operator's

it averred the violation §119.5(g) generally, and more specifically, when it expressly stated that neither Riter "nor Riter Aviation held operating specifications appropriate for an air carrier or operator certificate."[44]

C. The Errors in Assessing the Penalty are Prejudicial

The two errors discussed are prejudicial. Applying the most analogous violation to both flights increases the amount of the appropriate civil penalty to assess in this matter. Specifically, the recommended sanction for B-1c(3) ranges from "Moderate to Maximum," which equates to $2,200 to $11,000 for small business concerns and has a midpoint of $6,600.[45] Recognizing that Riter conducted two flights, an appropriate sanction could be $13,200 even before considering the alleged aggravating factors regarding the degree of hazard or the deliberate nature of the violation.[46, 47] By regulation, however, I am constrained by the amount sought in the Complaint, which in this instance is $11,000.[48]

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needs. Only those authorizations, limitations, standards, and procedures that are applicable to a certificate holder or operator need to be included."

[44] Complaint at §§ II.8 and III.1.a.

[45] FAA Order 2150.3B, at B-12.

[46] The regulatory constraint also renders moot the Agency's well-taken argument that the Office of Hearings erred when it refused to apply aggravating factors based on: (1) Riter's allegedly deliberate violations of the regulation, and (2) the degree of hazard posed by conducting operations without the necessary certificate or operations specifications. Agency's Appeal Brief at 13-15.

[47] *See e.g., In re Shuman Aviation Co.*, FAA Order No. 2016-2 at 4 (multiple flights, sanctioned identically).

[48] 14 C.F.R. § 13.16(j); *In re Mole-Master Services Corp.*, FAA Order No. 2010-11 at 12 (June 16, 2010).

IV. Conclusion

The Office of Hearings assessed an unreasonably low civil penalty that did not conform to the applicable law, precedent, and public policy. I therefore reverse the sanction determination in part and assess a civil penalty of $11,000.*

DANIEL K. ELWELL
ACTING ADMINISTRATOR
Federal Aviation Administration

* This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2018). *See* 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in FAA civil penalty cases).

SERVED: November 26, 2018

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

In The Matter Of:	)	
	)	Docket No. FAA-2017-0086
Robert M. Riter	)	
d/b/a Riter Aviation	)	
	)	Case No. 2013WP190073
Respondent	)	

INITIAL DECISION

1. Pertinent Procedural History

On April 7, 2015, the Complainant served the Respondent a Notice of Proposed Civil Penalty in the amount of $22,000 for alleged violations of 14 C.F.R. §§ 119.5(g) and (k). On February 10, 2017, the Complainant served the Respondent a Final Notice of Proposed Civil Penalty in the amount of $11,000 for an alleged violation of 14 C.F.R. § 119.5(g).

On February 22, 2017, the Respondent filed a Request for Hearing, which the Complainant received on February 28, 2017. On March 6, 2017, the Complainant timely filed its complaint, to which the Respondent filed a timely answer on April 6, 2017.

On April 16, 2018, the undersigned judge provided notice that a hearing would be held in Los Angeles, California, beginning on September 18, 2018. At the hearing, Charles Raley appeared on behalf of the Complainant; David Shaby and Christopher Harshman appeared on behalf of the Respondent.

The parties submitted written posthearing briefs pursuant to 14 C.F.R. § 13.231(c) on October 24, 2018.

Based upon the evidence presented at the hearing and the applicable law, the undersigned judge has come to the following decision.

2. Summary of Complainant's Allegations

The Complainant alleges that the Respondent flew passengers for compensation on April 26, 2013, from Torrance, California, to Henderson, Nevada, and then back to Torrance on April 28,

2013.[1] The Complainant further alleges that, because the Respondent did not hold an air carrier or operator certificate authorizing it to operate as an air carrier or commercial operator, or operating specifications appropriate for an air carrier or operator certificate, the Respondent's actions violated 14 C.F.R. § 119.5(g).[2]

For this alleged violation, the Complainant seeks a civil penalty of $11,000.[3]

3. Standard of Proof

The pertinent regulations at 14 C.F.R. § 13.224(a) and (c) place the burden of proof on the agency, except in the case of an affirmative defense, at which time the burden shifts to the party asserting the affirmative defense. In accordance with 14 C.F.R. § 13.223, the burden of proof in a civil penalty action is a "preponderance of reliable, probative, and substantial evidence." Because circumstantial evidence can be reliable, probative, and substantial,[4] a party may use circumstantial evidence to sustain its burden of proof.[5]

4. Background

It is undisputed that, during the relevant time period, the Respondent did business as Riter Aviation, and was the co-owner of the subject aircraft, a Cessna 172 airplane, N3483E.[6] During that same time, the Respondent did not hold an air carrier or operator certificate authorizing it to operate as an air carrier or commercial operator, nor did it hold operating specifications appropriate for an air carrier or operator certificate.[7] On April 26, 2013, Marco Toninato piloted the subject aircraft on a flight from Torrance, California, to Henderson Executive Airport near Las Vegas, Nevada.[8] Mr. Toninato also flew the same airplane from Henderson Executive Airport to Torrance on April 28, 2013.[9] During both of these flights, Daniel Pitts and Erwin

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[1] *See* Complaint at 2.
[2] *See id.*
[3] *See id.* at 2-3.
[4] *See In re America West Airlines*, FAA Order No. 96-3 at 31 (Decision and Order, Feb. 13, 1996) (referring to certain circumstantial evidence as "strong").
[5] *See In re Continental Airlines, Inc.*, FAA Order No. 90-12 at 20 (Decision and Order, Apr. 25, 1990). *See also In re Florida Propeller & Accessories, Inc.*, FAA Order No. 97-32 at 7 (Decision and Order, Oct. 8, 1997) (noting that the use of circumstantial evidence in cases involving allegations of improper repair is not unusual, given the time it takes to discover such violations.).
[6] *See* Answer at 1 and Exs. A-7 and A-32 at 1.
[7] *See* Answer at 1-2.
[8] *See* Exs. A-1 at 2-3, A-3 at 1, A-5 at 1, A-6, A-27, and A-32 at 1-2; Respondent's Ex. A at 12; and Hearing Transcript at 57.
[9] *See* Exs. A-1 at 2-3, A-3 at 1, A-5 at 1, A-6, A-27, and A-32 at 1-2; Respondent's Ex. A at 12; and Hearing Transcript at 57.

Morales were on board the subject aircraft.[10]

5. Key Issues

According to 14 C.F.R. § 119.5(g): "[n]o person may operate as … a commercial operator without … an appropriate certificate and appropriate operations specifications." Because the Respondent admits that it did not hold an air carrier or operator certificate authorizing it to operate as an air carrier or commercial operator, there remains only two questions: 1) did the Respondent operate the aircraft during the flights in question, and, if so, 2) was the operation commercial in nature.

6. The Respondent operated the subject aircraft during the April 26 and 28, 2013 flights.

According to 49 U.S.C. § 40102(a)(35), operation of an aircraft includes "causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft." Similarly, the Federal Aviation Regulations provide that:

> Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13 of this chapter) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).[11]

Over time, the Administrator has broadly construed the term operate, holding that "[n]either the statutory nor the regulatory definition of the term 'operate' contains any language indicating that in order to have 'operated' an aircraft, a person must have authorized the pilot's *particular use or manner of use* of the aircraft."[12] Relying upon the Federal Aviation Administration's statutory duty to promote air safety, the Administrator elaborated that "[w]hile aircraft owners may not be liable for *all* infractions committed in their aircraft, they can be held liable for infractions committed by a pilot who had permission to use their aircraft."[13]

With respect to authorization, "the presumption is that the owner authorized use of the aircraft, absent some evidence to the contrary."[14] In the case at hand, the Respondent contends it leased the plane to Mr. Toninato and Mr. Pitts in a cost-sharing arrangement.[15] Even if that were

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[10] *See* Exs. A-1 at 3, A-3 at 1, and A-4 at 1; Respondent's Ex. A at 12; and Hearing Transcript at 76 and 152-153.
[11] 14 C.F.R. § 1.1.
[12] In re *Fenner*, FAA Order No. 96-17 at 6 (Decision and Order, May 3, 1996) (holding that the owner of the aircraft was the operator of the aircraft, and therefore responsible for violations committed by another pilot who had permission to fly the aircraft). *See also In re Gatewood*, FAA Order No. 2000-1 (Decision and Order, Feb. 3, 2000) (finding the owner of an aircraft to have also been the operator, where he authorized an individual to fly the aircraft).
[13] *Fenner*, FAA Order No. 96-17 at 7.
[14] *Fenner*, FAA Order No. 96-17 at 6.
[15] *See* Hearing Transcript at 259-266.

the case, the law requires a finding that the Respondent, as the owner of the subject aircraft who authorized Mr. Toninato to fly the aircraft, operated the aircraft on April 26 and 28, 2013.

7. The Respondent operated these flights for compensation, and so they were commercial.

a. *National Transportation Safety Board ("NTSB") case law defines "for compensation or hire" broadly.*

The pertinent regulations define a commercial operator as a "person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons ...."[16] Thus, if the April 26 and 28, 2013 flights were conducted "for compensation or hire," such operation would have been commercial in nature. The NTSB has broadly construed the term "for compensation or hire" to include an intent to charge for services.[17] While NTSB holdings are not binding upon the Administrator, the undersigned judge may decide to follow persuasive NTSB precedent.[18] There is good reason to follow this precedent in the case. Specifically, the Administrator case law has been silent on this issue, so the NTSB precedent provides the industry accepted understanding of the term.[19]

b. *The preponderance of the reliable, probative, and substantial evidence proves that the flights were for compensation or hire.*

Mr. Pitts contacted Mr. Riter on April 26, 2013 to obtain pricing for a last-minute trip he planned to Las Vegas for himself and Mr. Morales.[20] Mr. Pitts initially called the Respondent's cell phone at 10:43 am and again at 10:48 am; during these calls he spoke to Mr. Riter about the cost for a flight from Torrance, CA, to Las Vegas, NV, that same day.[21] Mr. Pitts followed up these calls with a text message to the Respondent's cell phone at 10:51 am, stating "Hi Robert, this is Daniel. I was looking for a flight for tonight at 8 to las (*sic*) Vegas. You quoted me 460

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[16] 14 C.F.R. § 1.1.

[17] *See In re Southeast Air, Inc., et al.*, NTSB Order No. EA 1825 (Opinion and Order, Aug. 26, 1982) (finding an intent to charge for services performed demonstrates that an operation was conducted for compensation or hire, even where money was never exchanged).

[18] *In re Richardson & Shimp*, FAA Order No. 92-49 at 9 n. 13 (Decision and Order, July 22, 1992).

[19] This NTSB precedent has been applied by other Administrative Law Judges in FAA civil penalty proceedings. For example, citing to the NTSB's holding in *Southeast*, Administrative Law Judge Kolko found a "flight was undertaken in exchange for payment," even where no funds were actually tendered, where the Respondent's "actions show[ed] an intent to exact a charge for the services" performed. *In re Conquest Helicopters, Inc.*, 1993 WL 13036579 (Initial Decision of Administrative Law Judge Burton S. Kolko, May 19, 1993) (*appealed* on amount of civil penalty only).

[20] *See* Hearing Transcript at 51-54.

[21] *See* Hearing Transcript at 58-60 and Ex. A-19 at 1 and 2.

..."[22] In a subsequent text to Mr. Riter at 11:34 am, Mr. Pitts wrote "Would we be able to put the pilot up for the two days in Vegas near the air port (*sic*)? This would save us a car rental back."[23] Mr. Riter wrote back at 12:44 pm, stating "Marco [Toninato] is all set to take you. Give Marco an extra 200 for motel/food and he will bring you back on Sunday whenever you want ... He is going to call you now."[24] After talking with Mr. Toninato, Mr. Pitts texted the Respondent's cell phone at 1:57 pm, asking "does this 460 rate include wet?"[25] In response, Mr. Riter wrote at 2:00 pm, "Yes...total of $660 for everything."[26] Mr. Pitts agreed to this price when he wrote back one minute later: "Cool."[27] Therefore, Mr. Pitts and Mr. Riter agreed that Mr. Pitts would pay $660 for both flights, the April 26, 2013 flight from Torrance to Las Vegas and the return flight on April 28, 2013.[28]

Mr. Pitts and Mr. Morales arrived at the Torrance airport the evening of April 26, 2013, for the flight to Las Vegas.[29] They boarded the plane and Mr. Toninato flew them to the Henderson Executive Airport.[30] Upon landing, Mr. Pitts paid Mr. Toninato $660 in cash for the trip, plus

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[22] Ex. A-15 at 1.
[23] Ex. A-15 at 1.
[24] Ex. A-15 at 2. During the hearing Mr. Riter denied sending this message to Mr. Pitts, and speculated that someone else, most likely Mr. Toninato, sent this message. *See* Transcript at 270-271. As will be further explained below, the undersigned judge does not find this denial credible.
[25] Ex. A-15 at 2-3. By asking if the quoted price was "wet," Mr. Pitts explained that he was inquiring whether the quoted price included fuel for the aircraft. *See* Hearing Transcript at 63 and 128-129. Mr. Pitts's understanding was that a wet rate would include the price of fuel. *See* Hearing Transcript at 130-131. The Respondent's counsel argued, without introducing evidence, that "wet versus dry rates" are typically used when one is renting an aircraft, thus Mr. Pitts's inquiry regarding whether the rate was "wet" is dispositive in establishing he rented the plane. *See* Respondent's Posthearing Brief at 5. However, case law dictates a finding that flights conducted for compensation or hire can include a discussion of whether the terms are "wet." The NTSB has held that "obtaining ... both a flightcrew and an airplane from the same source (a wet lease) is usually considered conclusive evidence of carriage for compensation or hire." *In re Platt*, NTSB Order No. EA-4012 (Opinion and Order, Nov. 3, 1993) (*citing In re Poirier*, NTSB Order No. EA-2512 (Opinion and Order, Mar. 30, 1987)). This precedent has been applied by other Administrative Law Judges in FAA civil penalty proceedings. For example, relying upon the NTSB's finding in *In re Tommy Hue Hix*, NTSB Order No. EA-4825 (Opinion and Order, Feb. 25, 2000), which cited to *Platt*, Administrative Law Judge Goodwin found a wet lease to constitute "an offer of air transportation to the general public," and where the lessor controls the operations of the aircraft, it is in effect "undertaking a charter operation." *In re Don Bessette Aviation, Inc.*, FAA-2005-20640 and FAA-2005-20641 (Initial Decision of Administrative Law Judge Richard C. Goodwin, June 5, 2006).
[26] Ex. A-15 at 3.
[27] Ex. A-15 at 3.
[28] Mr. Morales corroborated the existence of this agreement in his email to the assigned FAA investigator. *See* Ex. A-6 (in a May 1, 2013 email to Mr. Rucker discussing the subject flights, Mr. Morales wrote: "Daniel made the arrangements and spoke to the owner of the plane. The deal was to pay $460 plus $200 for the pilot ...").
[29] *See* Hearing Transcript at 74-75 and 152 and Ex. A-16 at 1.
[30] *See* Hearing Transcript at 76-77 and 153.

some additional money as a tip for Mr. Toninato's services.[31]

After landing, Mr. Toninato mentioned the possibility of using a Seneca, a faster plane, for the return flight and said he would ask Mr. Riter about the cost of such a switch.[32] Mr. Toninato texted Mr. Pitts on April 27, 2013 to inform him that Mr. Riter said using the Seneca would cost an extra $200.[33] Finding this price increase to be too expensive, Mr. Pitts declined making a change and stated "Let's please just stay with Cessna. Can u pick us up at 4?"[34] Mr. Pitts and Mr. Morales met Mr. Toninato at the Henderson Executive Airport on April 28, 2013, and boarded the subject aircraft for their return flight to Torrance, CA.[35] Shortly after departing, the subject aircraft experienced difficulties ascending and then crash landed.[36]

As discussed in detail above, Mr. Pitts and Mr. Riter agreed that Mr. Pitts would pay $660 for Mr. Toninato to fly them in the Cessna on April 26, 2013 from Torrance to Las Vegas and then back to Torrance on April 28, 2013. After Mr. Toninato flew Mr. Pitts and Mr. Morales to the Henderson Executive Airport, Mr. Pitts paid Mr. Toninato the agreed upon amount plus a gratuity for his piloting services. The flights in questions were therefore operated for compensation or hire, which in turn makes them commercial.

The Respondent asserts that it never received any cash from Mr. Pitts.[37] Even if that were the case, the April 26 and 28, 2013 flights were still operated for "compensation or hire" because Mr. Pitts agreed to pay the Respondent $660 for the flights.[38]

8. Significant Credibility Determinations

In coming to the decision in this case, the undersigned judge made the following significant credibility determinations.

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[31] *See* Hearing Transcript at 78-79, 149, 155-156, 164-166, and 219. *See also* Ex. A-27 (in which Mr. Toninato acknowledged receiving cash from Mr. Pitts). Mr. Pitts's bank statement documents a withdrawal of $840 on April 26, 2013, which he testified was to cover the cost of the charter flight and some expenses in Las Vegas. *See* Hearing Transcript at 79-80 and Ex. A-20 at 3. This was consistent with Mr. Pitts's text message to the Respondent's cell phone before the initial flight, asking, "can I pay everything in cash?" *See* Hearing Transcript at 63 and Ex. A-15 at 3.

[32] *See* Hearing Transcript at 155.

[33] *See* Ex. A-16 at 3 ("Just spoke with rob (*sic*) with the Seneca to come pick you up will be 200 more …").

[34] Ex. A-16 at 5. *See also* Hearing Transcript at 82 and 157.

[35] *See* Hearing Transcript at 82-83 and 158.

[36] *See* Hearing Transcript at 84-85 and 159 and Exs. A-1 at 3, A-3 at 1, and A-4 at 1.

[37] *See* Hearing Transcript at 267. Contrary to this assertion, Mr. Toninato had previously explained that he gave the money to Mr. Riter. *See* Ex. A-27 (in which Mr. Toninato wrote: "I recived (*sic*) from Daniel Pitt (*sic*) the money on cash and gave all of those money to Robert Riter.").

[38] *See Conquest*, 1993 WL 13036579 (finding that even though no funds were exchanged, the "flight was undertaken for payment" given the Respondent's intent to charge for its services) (*citing Southeast*, NTSB Order No. EA 1825).

a. Mr. Pitts's testimony regarding the agreement to charter the subject flights is credible.[39]

Mr. Pitts's testimony regarding his agreement with Mr. Riter to charter the subject flights has remained consistent over time, is substantiated by the documentary evidence, and was corroborated by another witness.

First, Mr. Pitts has consistently stated that he chartered the Respondent's aircraft for the flights on April 26 and 28, 2013. In his initial statement to the Henderson Police Department immediately following the crash, Mr. Pitts explained that he "hired Marco [Toninato] of Robert Ritter (*sic*) Aviation to fly [him and Mr. Morales] roundtrip from Torrance airport to Henderson private."[40] Notably, he made this statement immediately following the crash, when he likely would not have had time to fabricate a story.[41] Further, in a journal prepared a few weeks after the accident, Mr. Pitts wrote that during an April 26, 2013 phone call with Mr. Riter, he "asked how much it would cost to have a plane chartered from Torrance airport to Henderson Nevada airport near (Las Vegas) for that same evening around 7 or 8pm departure."[42]

In his December 14, 2016 deposition, Mr. Pitts explained that, after deciding to go to Las Vegas for the weekend on April 26, 2013, he called Mr. Riter that same day to inquire about chartering a plane.[43] Mr. Pitts called and spoke to Mr. Riter from his office phone the morning of April 26, 2013 to discuss pricing, prior to texting Mr. Riter on April 26, 2013 to confirm.[44] Mr. Pitts stated that, while the initial quote was $460 for a one-way flight, Mr. Riter suggested he pay the pilot, Mr. Toninato, an extra $200 to make it a round trip.[45] In addition to paying $660 for both flights, Mr. Pitts gave Mr. Toninato an $80 tip.[46] This account is consistent with Mr. Pitts's testimony at the hearing.

Second, the documentary evidence in the record corroborates Mr. Pitts's account of the

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[39] Mr. Alukonis, the aviation safety inspector who examined the Respondent's case and recommended enforcement for operational violations, testified on cross-examination that his opinion on the case would likely differ if Mr. Pitts's testimony regarding the agreement was not credible. *See* Hearing Transcript at 225-226 and 233. Accordingly, examining Mr. Pitts's credibility regarding his testimony about the agreement to charter the subject flights is essential to deciding this case.

[40] Ex. A-3 at 1.

[41] In a September 4, 2013 letter responding to Mr. Alukonis's letter of investigation, the Respondent's attorney wrote: "It is our belief that immediately after the accident, these individuals [to include Mr. Pitts] began to falsify and mislead officials conducting the investigation." *See* Ex. A-32 at 1.

[42] Ex. A-22 at 1. *See also* Hearing Transcript at 97-99 and Ex. A-23 at 1.

[43] *See* Respondent's Ex. A at 14-16.

[44] *See* Respondent's Ex. A at 159-161.

[45] *See* Respondent's Ex. A at 68.

[46] *See* Respondent's Ex. A at 64.

events leading up to him chartering the subject aircraft for the subject flights. Mr. Pitts's office telephone records document that Mr. Pitts called the Respondent's cell phone, which had a number ending in 0759,[47] on April 26, 2013 at 10:43 am and 10:48 am.[48] Mr. Pitts testified that he knew he was talking to Mr. Riter during these phone calls, as he recognized his voice.[49] The logs from Mr. Pitts's cell phone document incoming and outgoing phone calls to and from Mr. Pitts cell phone that match up with the text messages and are consistent with his description of the timeline for April 26th and 28th. Specifically, the phone log indicates that after Mr. Riter texted Mr. Pitts at 12:44 pm on April 26, 2013, stating "[Mr. Toninato] is going to call you now."[50] The phone records show that Mr. Toninato called Mr. Pitts at 12:45 pm and then Mr. Pitts called Mr. Toninato at 12:55 pm.[51] Following these phone calls, Mr. Pitts texted Mr. Riter the following: "Great thanks Robert I spoke with [Mr. Toninato]."[52] In addition to corroborating Mr. Pitts's testimony regarding chartering the subject flights, the logs for Mr. Pitts's cell phone match up with the times depicted on the screen shots of the text messages Mr. Pitts exchanged with both Mr. Riter and Mr. Toninato, establishing that the exhibits submitted by the Complainant are a complete record of the text messages exchanged between the parties during the relevant time period.

Third, and lastly, Mr. Morales's testimony and his statements to Mr. Rucker, the aviation inspector that investigated the April 28, 2013 crash,[53] corroborate Mr. Pitts's description of the agreement. Mr. Morales admittedly never spoke to Mr. Riter, but discussed the cost of the flight, as well as a suggested gratuity for Mr. Toninato, with Mr. Pitts.[54] Mr. Morales also confirmed

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[47] *See* Hearing Transcript at 67, 245, and 285 and Ex. A-25 at 1.
[48] *See* Ex. A-19 at 1 and 2.
[49] *See* Hearing Transcript at 71. Similarly, during his December 14, 2016 deposition, Mr. Pitts stated that Mr. Riter "has a very distinct voice." *See* Respondent's Ex. A at 37. Despite the argument of counsel, the Respondent provided no credible evidence that Mr. Pitts would confuse Mr. Riter's voice with that of Mr. Toninato, a foreign student from Italy, who came over to the United States to attain his pilot license and build flight time. *See* Hearing Transcript at 241. These calls all occurred on the same day, and close in time to each other, making it more likely than not that Mr. Pitts would not confuse Mr. Riter's voice with that of Mr. Toninato. After two phone calls with Mr. Riter at 10:43 am and 10:48 am, Mr. Pitts spoke to Mr. Toninato less than two hours later. *See* Exs. A-17 at 2 and A-19 at 1 and 2. Mr. Pitts spoke to Mr. Toninato again at 12:55 pm and 1:06 pm, prior to speaking with Mr. Riter at 3:10 pm. *See* Exs. A-17 at 2 and A-19 at 3 and 4.
[50] Ex. A-15 at 2.
[51] *See* Exs. A-17 at 2 and A-18 at 3.
[52] Exs. A-15 at 2.
[53] *See* Hearing Transcript at 171.
[54] *See* Hearing Transcript at 148-149.

that Mr. Pitts paid Mr. Toninato for both flights upon landing at Henderson Executive Airport.[55]

The Respondent's counsel correctly notes several inconsistencies with Mr. Pitts's testimony, which does make Mr. Pitts's overall testimony less than fully credible.[56] However, these inconsistencies do not outweigh the evidence that bolsters the credibility of Mr. Pitts's testimony regarding the central issue of whether there was an agreement and compensation for the flight.

b. Mr. Riter's testimony that he did not author the text messages on April 26, 2018, is not credible.

Mr. Riter testified that he never communicated with Mr. Pitts on April 26, 2013, either by phone or text, regarding the flight from Torrance to Las Vegas.[57] Mr. Riter opined that Mr. Toninato was using the Respondent's cell phone to communicate with Mr. Pitts.[58] The only support the Respondent provided for this assertion was the testimony of Mr. Bundt and Mr. Edling, both of whom testified that they had regularly witnessed flight instructors and students use the Respondent's cell phone.[59] However, neither Mr. Bundt nor Mr. Edling saw Mr. Toninato use the Respondent's cell phone on April 26, 2013.[60]

Importantly, the tone and style of the text messages sent from the Respondent's cell phone differs from those sent from Mr. Toninato's cell phone.[61] It is unlikely that Mr. Toninato would

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[55] *See* Hearing Transcript at 156 (Mr. Morales testified that the cost for both flights was "600-something" and that they gave Mr. Toninato about $80 gratuity). Consistent with this testimony, Mr. Morales wrote in a May 1, 2013 email to Mr. Rucker, "Daniel made the arrangements and spoke to the owner of the plane. The deal was to pay $460 plus $200 for the pilot and we ended up giving the pilot $280 because he was nice. The money was given to Marco [Toninato] (our pilot) at the time of arrival in Las Vegas." Ex. A-6 at 1.

[56] *See* Respondent's Posthearing Brief at 2-7. For example, Mr. Pitts stated that handwritten notes found on his phone bill were made about one week following the April 28, 2013 accident, an impossibility given the bill is dated May 23, 2013. *See* Hearing Transcript at 69-70. Also, although Mr. Pitts initially testified that he believed his logbook [Ex. A-14] was complete, he later acknowledged that a February 26, 2012 flight with Muthu Pandian was not included in his logbook. *See* Hearing Transcript at 33-34, 42-43, 106, and 143. Finally, Mr. Pitts described a conversation with Mr. Riter during his introductory flight wherein Mr. Riter offered him a job flying charter flights. *See* Hearing Transcript at 39. This story defies common sense as it seems highly unlikely Mr. Riter would offer such a job to a student pilot with very little flying experience.

[57] *See* Hearing Transcript at 271 and 286-287.

[58] *See* Hearing Transcript at 270 and 285-289.

[59] Mr. Bundt testified that "any number of flight instructors and students have access to [the Respondent's] cell phones." Hearing Transcript at 314. Mr. Edling testified that he had seen Mr. Toninato use the Respondent's cell phone ending in 0759 to make both phone calls and send text messages on multiple occasions. *See* Hearing Transcript at 329.

[60] *See* Hearing Transcript at 314-315 and 333.

[61] *Compare* Exs. A-15 and A-16. The text messages sent from the Respondent's cell phone capitalize names, for example "Marco" (*See* Ex. A-15 at 2), whereas the text messages from Mr. Toninato's phone did not capitalize names, such as "rob" (*See* Ex. A-16 at 3). The text messages sent from the Respondent's cell phone contain spacing after punctuation and begin new sentences with a capital letter, whereas the text messages from Mr. Toninato's phone do not have spacing following punctuation and new sentences are often started with a lowercase letter.

have changed his tone and writing style if he were using the Respondent's cell phone, lending further support to a finding that Mr. Riter authored the text messages sent from the Respondent's cell phone on April 26, 2013.

Mr. Riter went so far as to say that he was not even present at Torrance airport on April 26, 2013, and so could not have authored the messages.[62] However, Mr. Riter failed to provide any documentation to support this assertion and none of the witnesses corroborated his absence on the date in question. Further, Mr. Riter's alleged absence would be inconsistent with his testimony that it was a busy weekend at the terminal.[63]

Two additional issues raise doubt regarding Mr. Riter's assertion that the Respondent's students and flight instructors had access to the Respondent's cell phone ending in 0759. Mr. Riter acknowledged that the cell phone ending in 0759 was the number listed on the Respondent's business brochure, but failed to adequately explain why he would allow nonemployees access to this business line.[64] Additionally, Mr. Riter admittedly sent the May 1 and 3, 2013 text messages regarding reimbursement to Mr. Pitts from the 0759 number.[65] However, Mr. Riter failed to explain why he would discuss such business matters on a phone that was openly available for use by all students and flight instructors.

As discussed in detail above, the preponderance of the reliable, probative, and substantial evidence demonstrates it is more likely than not that Mr. Riter was the person communicating with Mr. Pitts, both on the phone and via text message, on April 26, 2013.

c. *Mr. Riter's assertion that the flights in question were not for compensation or hire is not credible.*

Mr. Riter testified that the Respondent never offered charter flights, with the exception of one year beginning in 2012, when it held a letter of authorization to conduct whale watching tours.[66] Notably, the Respondent did not provide a copy of its alleged letter of authorization. Mr. Riter further admitted the legitimacy of an April 20, 2010 Yelp review where an individual discussed his or her charter flight experience with Riter Aviation.[67] This flight would have taken place two

[62] *See* Hearing Transcript at 271 and 295.
[63] *See* Hearing Transcript at 289 (while explaining why he did not have possession of the Respondent's cell phone ending in 0759 on the weekend in question, Mr. Riter stated: "[i]t was a busy weekend and [the 0759 phone] was bouncing with the different pilots.").
[64] *See* Hearing Transcript at 285 and Ex. A-25.
[65] *See* Hearing Transcript at 272-273, 289-292, and 294 and Ex. A-15 at 6-7.
[66] *See* Hearing Transcript at 238-239.
[67] *See* Hearing Transcript at 278-281 and Ex. A-12.

years before the Respondent received this alleged letter of authorization. Additionally, while the Yelp review initially described a whale watching tour, the remainder of the review described a second flight to Santa Barbara for a wedding proposal.[68] In his testimony, Mr. Riter stated he did not charge a fee for this flight, elaborating that he did not even prorate the fuel charge.[69] However, Mr. Riter failed to provide any evidence to support this assertion, while the plain text of the review makes clear this second flight was a charter. Mr. Riter's denials, then, lack credibility.

At the hearing, Mr. Riter contended that he rented the subject aircraft to Mr. Toninato who had entered into a cost-sharing agreement with Mr. Pitts.[70] Mr. Riter did not provide any documentary evidence to support this assertion, such as a copy of a rental agreement. He further testified that, remarkably, he did not have a formal rental agreement for pilots to sign when renting one of his planes.[71] The existence of this cost-sharing arrangement was also never mentioned by Mr. Toninato during the investigation.[72]

Mr. Riter claimed that Mr. Pitts had a history of renting aircraft from the Respondent, pointing to the name "Dan" and "Daniel", with no last name or further identifying information, in a logbook for one of the Respondent's aircraft.[73] Mr. Riter testified that Mr. Pitts was the only person named "Dan" or "Daniel" who had rented from the Respondent.[74] However, the Respondent failed to provide any evidence to support this assertion beyond Mr. Riter's testimony. The Respondent's logbook itself lists no years, simply months and days that are chronological in order, though oftentimes the day and month are reversed in order.[75] Further, the

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[68] *See* Ex. A-12.
[69] *See* Hearing Transcript at 279-281.
[70] *See* Hearing Transcript at 262-266 and 273-274. This story has changed over time. In a May 2, 2013 email to Mr. Rucker, only four days after the plane crash, Mr. Riter wrote: "I rented the plane to Marco [Toninato] and Daniel [Pitts] to fly to Las Vegas, NV on Friday..." Ex. A-7 at 1. In a September 4, 2013 response to the letter of investigation issued by Mr. Alukonis, Mr. Riter's attorney wrote that Mr. Toninato, Mr. Pitts, and Mr. Morales had rented the subject aircraft. *See* Ex. A-32 at 1. At the hearing, Mr. Riter testified that he was only renting the aircraft to Mr. Toninato, as he was the only licensed pilot. *See* Hearing Transcript at 273-274. During the hearing, Mr. Riter unconvincingly tried to explain the discrepancy in stating who rented the aircraft. *See* Transcript at 274-275 (in which Mr. Riter explained that you have to respond to FAA inspectors "within hours if not a day" so he was trying to respond quickly and be as accurate as possible, so in his email he listed Daniel Pitts because he was allegedly prorating the price with Marco Toninato).
[71] *See* Hearing Transcript at 307-308.
[72] *See* Hearing Transcript at 180 and Ex. A-9.
[73] *See* Hearing Transcript at 253-256 and Respondent's Ex. J.
[74] *See* Hearing Transcript at 254-256.
[75] *See* Respondent's Ex. J.

Respondent's logbook does not identify the aircraft it pertains to.[76] The three entries listing "Dan" or "Daniel" do not seem to match up with Mr. Pitts's logbook, which he testified was complete, with the exception of one missing flight.[77] During examination, Mr. Pitts explicitly denied making the flights on the dates referenced in the Respondent's logbook.[78] Given these limitations, the Respondent's logbook provides little reason to credit Mr. Riter's assertions.

A final concern with the credibility of Mr. Riter's assertion that the flights were not for compensation or hire comes from his actions after the plane crash. Mr. Riter initially agreed to reimburse Mr. Pitts and Mr. Morales some of their expenses related to staying in Las Vegas for an additional night following the accident, as well as a rental car to return to Torrance the next day.[79] On May 1, 2013, Mr. Riter texted Mr. Pitts to confirm his desire to reimburse him some of the expenses incurred related to the April 28, 2013 crash, and followed up on May 3, 2013 to obtain an address to which to send the money.[80] Mr. Riter's offer to reimburse some of the expenses incurred by Mr. Pitts and Mr. Morales is inconsistent with the idea that Mr. Pitts had rented the plane from Mr. Riter and would have been liable for any problems incurred as renters.

9. The Respondent's raised affirmative defense of laches does not absolve it from liability.

The Respondent argued that it was prejudiced because the alleged events occurred in April 2013 and the complaint was not served until March 2017, nearly four years later.[81] The Respondent contends that because of this delay, as well as its presumption that the case had been closed, it discarded records that would have helped it in this case.[82] The Respondent also argues that, during the intervening years, two witnesses had moved out of the country and were not available for the hearing.[83]

The Federal Aviation Regulations state that, to be timely, a notice of proposed civil penalty must be issued within two years of the alleged violation(s).[84] The Complainant met this two-year

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[76] *See* Respondent's Ex. J.
[77] *Compare* Ex. A-14 *with* Respondent's Ex. J. *See* Hearing Transcript at 33, 41-44, and 121-122.
[78] *See* Hearing Transcript at 45-47.
[79] *See* Hearing Transcript at 92-93 and 272.
[80] *See* Hearing Transcript at 272-273, 294, and 296-297 and Ex. A-15 at 6-7.
[81] *See* Answer at 2.
[82] *See* Respondent's Posthearing Brief at 7.
[83] *See* Respondent's Posthearing Brief at 7.
[84] *See* 14 C.F.R. § 13.208. *See also* 55 Fed. Reg. 27548, 27553 (Jul. 3, 1990, Discussion of Final Rule) (making it clear that "the critical event which must be taken by the agency" to commence the civil penalty action for purposes of the statute of limitations is the "issu[ance of] a notice of proposed civil penalty within two years from the date of the alleged violations."

statute of limitations by filing the Notice of Proposed Civil Penalty on April 7, 2015, which was within two years of the alleged violations on April 26 and 28, 2013. While the complaint was not served until approximately 23 months later, the Respondent can only obtain relief through a defense of laches if it proves that the agency's delay caused it prejudice, such as "a loss of evidence or witnesses supporting [its] position."[85] In the case at hand, the Respondent failed to do so.

Mr. Riter stated that he discarded several records related to this case because he thought the case was closed after receiving a May 19, 2015 email from Mr. Rucker stating: "no violations had occurred and that the case was closed."[86] However, Mr. Riter's decision to discard business records based upon this email was misplaced. Mr. Rucker was the "initial responding inspector"[87] at the April 28, 2013 crash, and his "FAA Accident/Incident Report" stated: "This file is being handed over to an operations inspector for possible enforcement action."[88] Mr. Rucker investigated the aircraft's airworthiness while an operations inspector[89] looked into possible violations related to the passenger statements that "they had paid the flight school aircraft owner a fee for the aircraft" and cash to the pilot "for his services."[90] Mr. Rucker explained that his May 19, 2015 email only meant to indicate he had closed his portion of the case, as he found no mechanical or airworthiness issues with the subject aircraft.[91] Further, Mr. Rucker's email was a reply to an email from Mr. Riter that only asked about Mr. Rucker's investigation, and made no mention of the subsequent investigation by Mr. Alukonis or the recent Notice of Proposed Civil Penalty sent to the Respondent.[92]

When the Federal Aviation Administration issued a Notice of Proposed Civil Penalty to the

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[85] *See In re Carroll*, FAA Order No. 90-21 (Decision and Order, Aug. 16, 1990) (finding that because the Respondent failed to support its assertion that the FAA's delay prevented him from "collecting or recollecting evidence that would have aided his defense" it failed to demonstrate he was prejudiced by the delay.) (*citing Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982)).

[86] *See* Hearing Transcript at 258 and Ex. A-8 at 1.

[87] Hearing Transcript at 171

[88] Ex. A-1 at 3.

[89] Mr. Alukonis was the aviation safety inspector who examined the Respondent's case for operational violations, and issued two Letters of Investigation to the Respondent, dated August 5 and 21, 2013. *See* Hearing Transcript at 209-210 and 213-214 and Exs. A-30 and A-31. Mr. Riter admittedly received both Letters of Investigation, and Mr. Alukonis received a response from the Respondent's attorney dated September 4, 2013. *See* Hearing Transcript at 214, 300, and 304-306 and Ex. A-32.

[90] Hearing Transcript at 175.

[91] *See* Hearing Transcript at 186.

[92] *See* Ex. A-8 at 1(Mr. Riter's May 18, 2015 sought "a complete copy of [Mr. Rucker's] investigation to include notes, interviews, and everything pertaining to this case.").

Respondent on April 7, 2015, it documented its determination that the Respondent violated specific Federal Aviation Regulations and provided a point of contact for discussions regarding the case.[93] Mr. Riter was therefore on notice about the enforcement action and should have acted to preserve any records he thought pertinent.[94] Mr. Riter seemingly never attempted to contact the person listed in the Notice of Proposed Civil Penalty, but instead emailed Mr. Rucker, an investigator he had not spoken to since 2013. Accordingly, Mr. Riter did not act reasonably if he discarded business records that could have been pertinent to this matter, and cannot now claim prejudice based upon his decision.

Similarly, the Respondent's counsel's argument that two of witnesses moved overseas[95] and so were not available for the hearing does not establish prejudice to support a defense of laches. The Respondent's counsel was aware of the need to contact these international witnesses at least as early as July 25, 2017.[96] Despite these acknowledged concerns, the Respondent waited over a year before requesting subpoenas for these witnesses on August 1, 2018.[97] The undersigned judge granted these requests on August 27, 2018.[98] At a September 6, 2018 prehearing conference, the Respondent stated that it had not pursued serving its subpoena on Mr. Pandian, as it believed it could "try [its case] without him."[99] At this same prehearing conference, the Respondent admitted it had yet to serve its subpoena request upon Mr. Toninato, or discuss the possibility of a obtaining a stipulation regarding his possible testimony with the Complainant.[100] The Respondent ultimately did not serve its subpoena on Mr. Toninato and proceeded with the hearing without his testimony, despite the undersigned judge's willingness to entertain possible alternatives.[101] In light of this, the Respondent cannot now claim prejudice.

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[93] The Notice of Proposed Civil Penalty was signed by Staff Attorney Craig Wm. Black and specifically stated: "Please direct all communications to us regarding this proposed action at the address appearing above" and included Mr. Black's contact information. *See* Respondent's Ex. C at 3.

[94] Mr. Riter had also received two Letters of Investigation from Mr. Alukonis, to which his attorney replied. *See* Hearing Transcript at 304-305 and Ex. A-32. Further, Mr. Riter signed an April 25, 2015 letter entitled "Reply to Notice of Proposed Civil Penalty Report Number 2013WP9190073." *See* Respondent's Ex. C at 5-6.

[95] The Respondent's counsel stated that at the time of the hearing Mr. Toninato resided in Italy and Muthu Pandian resided in Bangalore, India. *See* Posthearing Brief at 7.

[96] *See* July 25, 2017 Prehearing Conference Transcript at 7-8 (the undersigned judge notified the Respondent's counsel that it would be the Respondent's duty to "effectuate" the subpoena "through a federal court"). During this same prehearing conference, the trial was set for over one year later, the week of September 17, 2018, as confirmed in the undersigned judge's July 26, 2017 Prehearing Conference Report, to allow such coordination.

[97] *See* Respondent's Request for Subpoenas.

[98] *See* Order Granting Respondent's Request for Subpoenas.

[99] *See* September 6, 2018 Prehearing Conference Transcript at 6-7.

[100] *See* September 6, 2018 Prehearing Conference Transcript at 6-7.

[101] *See* September 6, 2018 Prehearing Conference Transcript at 12.

10. Civil Penalty

Because the Respondent violated 14 C.F.R. § 119.5(g), the undersigned judge must determine the appropriate civil penalty to be assessed against the Respondent, if any.

The Complainant sought a civil penalty of $11,000, the maximum authorized by law, for the alleged violation.[102] The burden of justifying the proposed civil penalty falls upon the Complainant.[103] In attempting to meet this burden, the Complainant provided minimal testimonial evidence about how the proposed civil penalty amount was assessed.[104] Additionally, the Complainant submitted into evidence excerpts of FAA Order No. 2150.3B.[105]

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violation,[106] while providing enough "bite" to serve as a deterrent to both the current violator and the industry as a whole in order to promote the goal of safety.[107] Paragraph 4 of Chapter 7 of FAA Order No. 2150.3B provides a non-exhaustive list of mitigating or aggravating factors and elements that may be considered:

> a. nature of the violation; b. whether the violation was inadvertent or not deliberate; c. certificate holder's level of experience; d. attitude of the violator; e. degree of hazard; f. action taken by employer or other authority; g. use of a certificate; h. violation history; i. decisional law; j. ability to absorb sanction; k. consistency of sanction; l. whether the violation was reported voluntarily; and m. corrective action.[108]

While the undersigned judge is not expressly required to follow the provisions of FAA Order No. 2150.3B,[109] it does provide guidance.[110] Further, the Administrator has stated that "similar criteria should be considered in assessing civil penalties in non-hazardous materials types of

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[102] *See* Complaint at 2-3.

[103] *See In re Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 7 (Decision and Order, Nov. 7, 1990) (finding the FAA bore the burden of justifying the amount of the civil penalty it sought.).

[104] Inspector Alukonis testified to the dangers that can occur when a company acting as a commercial operator does not hold the appropriate certificate, and discussed the fact that the Respondent did not voluntarily report this incident, nor did it present proof of any corrective action. *See* Transcript at 221-223.

[105] Ex. A-35.

[106] *See In re Ventura Air Services, Inc.*, FAA Order No. 2012-12 at 26 (Decision and Order, Nov. 1, 2012); *In re Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (Decision and Order, Nov. 6, 2008).

[107] *In re Toyota Motor Sales, USA, Inc.*, FAA Order No. 1994-28 at 11 (Order and Decision, Sept. 30, 1994); *In re Charter Airlines, Inc.*, FAA Order No. 1995-8 at 28 (Decision and Order, May 9, 1995).

[108] FAA Order No. 2150.3B at 7-4 through 7-9 (the excerpt provided by the Complainant did not contain paragraph 4 of chapter 7 of FAA Order No. 2150.3B).

[109] *See Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (finding that because administrative law judges are not agency personnel, they are not expressly required to follow the guidance provided in FAA Order No. 2150.3A.).

[110] *In re Air Carrier*, FAA Order No. 1996-19 at 7 (Decision and Order, June 4, 1996) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 8).

cases"[111] to the following statutorily required factors in considering a civil penalty involving hazardous materials violations:

> (1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and (3) other matters as justice may require.[112]

The undersigned judge considered all the pertinent factors to assess a civil penalty that will deter future violations by the Respondent and the industry as a whole. In considering the relevant factors, it is important to note that the Respondent did not provide evidence of financial hardship regarding its ability to absorb a sanction.[113]

As previously explained, the Respondent acted as a direct air carrier or commercial operator without appropriate certificate or appropriate operations. The Complainant argued that the Respondent's misconduct falls under "[o]peration contrary to ops specs – likely potential or actual adverse effect on safe operations."[114] However, this is not the appropriate sanction category because the Respondent could not operate contrary to something it did not hold.[115] In fact, the sanction guidance tables in Appendix B of FAA Order No. 2150.3B do not appear to offer a recommended civil penalty range for the violation in this case. The most similar listed violation, operation "for compensation or hire when a valid commercial pilot certificate ha[s] not been issued," does not specify a civil penalty range.[116] Accordingly, the undersigned judge must consider the entire range when determining the appropriate civil penalty.[117] The civil penalty

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[111] *In re Luxemburg*, FAA Order No. 1994-18 at 6 (Order and Decision, June 22, 1994) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 12 n. 9).

[112] 49 U.S.C. § 46301(e). *See also* 14 C.F.R. § 13.16(c).

[113] In its posthearing brief, the Respondent's counsel argued that the Respondent "has no ability to pay a sanction." *See* Posthearing Brief at 11. However, the Respondent failed to provide any documentary evidence to support its contention of financial hardship. The Administrator has held that the burden of proof to establish an inability to pay shifts to the Respondent, who has "sole control of [its] financial information." *See In re Lewis*, FAA Order No. 91-3 at 10 (Decision and Order, Feb. 4, 1991) (finding the Respondent's failure to submit evidence to support its claim of financial hardship barred the administrative law judge from reducing the civil penalty on the basis of financial hardship.). The Administrator has found "an unsworn and unsubstantiated statement by a respondent is insufficient evidence of inability to pay," explaining that a respondent must provide records to establish "inability to pay [to] include pay stubs, leases, tax returns and other such records as a reasonable person would accept as reliable and probative on the issues of income and expenses." *In re Conquest Helicopters, Inc.*, FAA Order No. 94-20 at 4 (Decision and Order, June 22, 1994) (*citing In re Giuffrida*, FAA Order No. 92-72 at 4-5 (Petition for Reconsideration Granted, Dec. 21, 1991)).

[114] *See* Ex. A-35 at 4 (Fig. B-1-c(3)).

[115] As mentioned above, the Respondent admittedly did not hold operating specifications appropriate for an air carrier or operator certificate.

[116] *See* FAA Order No. 2150.3B at B-24 (Fig. B-3-h(1)(g)).

[117] The sanction range for a small business concern that does not hold a certificate, such as the Respondent, details a civil penalty range of $550-$2,199 for minimum violations, $2,200-$4,399 for moderate violations, and $4,400-$11,000 for maximum violations. *See* Ex. A-35 at 3.

guidance specifically notes that "the middle of each recommended sanction range would be for a single violation without aggravating or mitigating factors."[118]

Contrary to the Complainant's counsel's arguments,[119] there is no aggravation to consider in this case. While committing a violation due to an inadvertent mistake may be mitigating,[120] the absence of such a mistake is not aggravating. Further, Mr. Rucker confirmed that the accident was a result of the aircraft being overweight,[121] not the Respondent's lack of a commercial certificate. There is little evidence in the record that proper certification would have avoided such a result. So, although the aircraft crashed, the crash was not caused by the regulatory violation, and is not an aggravating factor.

Similarly, contrary to the Respondent's contention,[122] there is no mitigation to consider in this case. While the Respondent emphasized its violation free history and compliance with the FAA's investigation, these behaviors are considered normal, and as such, are not mitigating factors.[123] Further, the goal of the Federal Aviation Regulations is to promote air safety, so any violation has an inherent risk, and as such the lack of recklessness does not constitute mitigation. Similar to the above discussion of intentionality, recklessness serves as an aggravating factor,[124] but the absence of recklessness is not then mitigating.

Accordingly, in light of all the circumstances, a civil penalty in the amount of $5,700 is appropriate for the Respondent's violations of the FAA's regulations.

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[118] *See* FAA Order No. 2150.3B at B-2.

[119] *See* Complainant's Posthearing Brief at 12.

[120] *See in re Flight Unlimited, Inc.*, FAA Order No. 92-10 at 6-7 (Decision and Order, Feb. 6, 1992) (upholding the administrative law judge's determination that the inadvertent nature of the Respondent's violation constituted a mitigating factor.). *See also Offshore Air*, FAA Order No. 2001-4 (affirming a holding that while the Respondent's reliance upon outdated information provided by the FAA did not absolve it from liability for failing to randomly drug test the regulatory required percentage of its employees, it did constitute a "mitigating factor in determining the appropriate penalty.").

[121] *See* Hearing Transcript at 204.

[122] *See* Respondent's Posthearing Brief at 9-11.

[123] *See Toyota Motor Sales, USA, Inc.*, FAA Order No. 1994-28 at 7-8 (*citing In re TCI Corp.*, FAA Order No. 1992-77 at 20 (Decision and Order, Dec. 22, 1992) (finding a violation free history to be the "norm" that will not mitigate an otherwise reasonable civil penalty)). When discussing the "Attitude of the Violator," FAA Order No. 2150.3B states: "[a] good compliance attitude is the norm and does not warrant a reduction in sanction." *See* FAA Order No. 2150.3B at 170.

[124] FAA Order No. 2150.3B states: "[v]iolations that involve careless or reckless conduct in violation of 14 C.F.R. § 91.13 may warrant more severe sanctions." The order goes on to define reckless as "conduct that demonstrates a gross, or even callous or flagrant, disregard for safety." *See* FAA Order No. 2150.3B at 7-4.

Therefore, pursuant to 14 C.F.R. § 13.205(a)(9), **IT IS HEREBY FOUND**:[125]

1. The Respondent entered into a contract to fly Daniel Pitts and Erwin Morales from Torrance, California, to Henderson, Nevada, on April 26, 2013, and then back on April 28, 2013.
2. The Respondent conducted these flights in air commerce for compensation or hire, without appropriate certificate and appropriate operations specifications, in violation of 14 C.F.R. § 119.5(g).

AND ORDERED:

The Respondent shall pay a civil penalty in the amount of $5,700.[126]

DOUGLAS M. RAWALD
Administrative Law Judge

Attachments:

1. Service List
2. Appendix A: Complainant's Exhibits
3. Appendix B: Respondent's Exhibit

[125] Pursuant to 14 C.F.R. § 13.233(a), "A party may appeal the initial decision, and any decision not previously appealed pursuant to §13.219, by filing a notice of appeal with the FAA decisionmaker. A party must file the notice of appeal in the FAA Hearing Docket using the appropriate address listed in §13.210(a). A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party."

[126] 14.C.F.R. § 13.232(d), governing an order assessing a civil penalty states: "Unless appealed pursuant to §13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted."

Docket No. FAA-2017-0086
(Civil Penalty Action)

SERVICE LIST - BY U.S. MAIL

ORIGINAL & ONE COPY

Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591
Attention: Hearing Docket Clerk, AGC-430
Wilbur Wright Building—Suite 2W1000[127]

ONE COPY

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The Honorable Douglas M. Rawald, *Administrative Law Judge*
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U.S. Department of Transportation
1200 New Jersey Avenue, S.E. (E11-310)
Washington, DC 20590
TEL: 202-366-5121 Staff Assistant
FAX: 202-366-7536

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[127] Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.

Appendix A: Complainant's Exhibits

A-1 FAA Accident Report

A-2 FAA Registry for aircraft N3483E

A-3 Daniel Pitts's Witness Statement to Henderson Police Department, dated April 28, 2013

A-4 Erwin Morales's Witness Statement to Henderson Police Department, dated April 28, 2013

A-5 Marco Toninato's Witness Statement to Henderson Police Department, dated April 28, 2013

A-6 Erwin Morales email to Gary Rucker, dated May 1, 2013

A-7 Robert Riter email to Gary Rucker, dated May 2, 2013

A-8 Email chain between Gary Rucker and Robert Riter

A-9 Marco Toninato email to Gary Rucker, dated May 6, 2013

A-10 Gary Rucker Inspector Statement, dated May 5, 2013

A-11 NTSB Preliminary Report

A-12 Yelp Reviews of Riter Aviation

A-13 Email Correspondence Between Daniel Pitts and Robert Riter, from January to February 2012

A-14 Daniel Pitts's Pilot Logbook

A-15 Text Messages Between Daniel Pitts and Robert Riter

A-16 Text Messages Between Daniel Pitts and Marco Toninato

A-17 Call Records from Daniel Pitts's Cell Phone

A-18 Log of Text Messages sent and received by Daniel Pitts's Cell Phone

A-19 Records of Outgoing Calls from Daniel Pitts's Work Phone

A-20 Daniel Pitts's Bank statement for April 24, 2013 to May 23, 2013

A-21 Receipts from Daniel Pitts for expenses after April 28, 2013 accident

A-22 Journal of Daniel Pitts

A-23 Exhibits from Deposition of Daniel Pitts on December 14, 2016

A-24 Multi-System Access Tool report regarding Robert Riter

A-25 Riter Aviation brochure

A-26 Multi-System Access Tool report regarding Marco Toninato

A-27 Marco Toninato's statement to Mr. Alukonis, undated

A-28 Order of Suspension, dated November 1, 2013

A-29 Letter Acknowledging Receipt of Mr. Toninato's Private Pilot Certificate, dated December 11, 2013

A-30 Letter of Investigation, dated August 5, 2013

A-31 Letter of Investigation, dated August 21, 2013

A-32 Response to the Letter of Investigation, dated September 4, 2013

A-33 Logbook Entries for one of the Respondent's Aircraft

A-34 *[Withdrawn]*

A-35 Excerpts from FAA Order No. 2150.3B

Docket No. FAA-2017-0086
(Civil Penalty Action)

Appendix B: Respondent's Exhibit

A	Transcript from Daniel James Pitts's Deposition on December 14, 2016
B	Transcript from Erwin Jose Morales's Deposition on December 14, 2016
C	Notice of Proposed Civil Penalty, dated April 7, 2015, and reply, dated April 25, 2015
D	Declaration of Benjamin Bundt, dated August 15, 2016
E	*[Withdrawn]*
F	NTSB Accident Narrative
G	Airman Details Report for Daniel James Pitts
H	Declaration of Mark Edling, dated August 16, 2016
I	*[Withdrawn]*
J	Pages from Flight Log
K	Daniel Pitts's Billing Information
L	*[Withdrawn]*
M	*[Withdrawn]*
N	*[Withdrawn]*
O	*[Withdrawn]*
P	*[Withdrawn]*
Q	Enforcement Investigative Report