UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: PACIFIC INTERNATIONAL SKYDIVING CENTER, LTD.

FAA Order No. 2017-3

FDMS No. FAA-2014-1116[1]

Served: December 26, 2017

DECISION AND ORDER

Complainant Federal Aviation Administration ("FAA" or "Agency") and Respondent Pacific International Skydiving Center ("Pacific") have filed cross-appeals from the Initial Decision of Administrative Law Judge Douglas M. Rawald ("ALJ").[2] The ALJ found that Pacific committed three violations of 14 C.F.R. § 105.17(a), which provides that no person may conduct a parachute operation into or through a cloud, and the ALJ assessed a civil penalty of $4,125. Initial Decision at 23-24.

Pacific argues on cross-appeal as follows:

(1) The ALJ lacked subject-matter jurisdiction;

(2) 14 C.F.R. § 105.17(a)[3] is unconstitutionally vague;

(3) Pacific did not conduct any "parachute operations";

(4) The three videographers did not fall into or through clouds; and

(5) Pacific is not liable for its independent contractors' actions.

Pacific's Appeal Brief at 7, 11, 29, 50, 67.

FAA argues on cross-appeal as follows:

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[1] Generally, materials filed with the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[2] The ALJ's Initial Decision is attached.

[3] Pacific mistakenly refers to regulations in the Code of Federal Regulations as statutes. *See, e.g.*, Pacific's Appeal Brief at 2, 5, 11, 68.

(1) The ALJ's civil penalty of $4,125 is too low and should be raised to $16,500;

(2) The ALJ should have found that Pacific committed residual violations of 14 C.F.R. § 91.13(a), which prohibits any person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

FAA's Appeal Brief at 9, 14.

I. Standard of Proof, Burden of Proof, and Issues on Appeal

To prevail, "the party with the burden of proof shall prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence." 14 C.F.R. § 13.223. Generally, the Agency bears the burden of proof, except in the case of an affirmative defense. 14 C.F.R. § 13.224(a) & (c). The Agency bears the burden to prove the appropriateness of a civil penalty. *National Power Corp.*, FAA Order No. 2016-3 at 2 (Sept. 30, 2016).

In any appeal from an ALJ's 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 [ALJ] committed any prejudicial errors that support the appeal." 14 C.F.R. § 13.233(b).

II. Facts

Pacific is a parachuting center at Dillingham Airfield in Honolulu, Hawaii. 1 Tr. 142. In its parachuting operations, it uses two aircraft, one with registration number N900SA and the other with registration number N989BW.[4] In addition, it is uncontested that Pacific operates a drop zone at Dillingham Airfield. *See* Pacific's Appeal Brief at 54, where Pacific refers to "Respondent drop zone owner or operator." A drop zone "means any pre-determined area upon which parachutists or objects land after making an intentional parachute jump or drop."

[4] N900SA and N989BW are owned by Sky-Med, Inc., which does business under Pacific's name at Dillingham Airfield. Exh. A-44 at 7.

14 C.F.R. § 105.3. Pacific operates under the General Operating and Flight Rules in 14 C.F.R. Part 91. 2 Tr. 173.

Dillingham Airfield is near 4,000-foot high mountains and near the Pacific Ocean. 1 Tr. 225. Military aircraft, civil aircraft, and hang gliders use Dillingham Airfield. 1 Tr. 224-25. The hang gliders mostly operate without radios. 1 Tr. 183. All these pose hazards, especially to those conducting parachute operations into or through clouds. 1 Tr. 224-25.

At issue in this case at the outset were eight flights during which Pacific allegedly jumped into or through clouds. Initial Decision at 2. One flight occurred on December 8, 2013, another flight occurred on January 5, 2014, three flights occurred on March 22, 2014, and three flights occurred on March 25, 2014. *Id.* On each of these dates, a Pacific aircraft took off with the following on board: parachutists, a pilot, videographers, and tandem instructors. *Id.* at 3. The parachutists (including the videographers and tandem instructors) jumped from the aircraft and landed in Pacific's landing or drop zone. *Id.* The ALJ found that on one of the dates – March 25, 2014 – on three separate flights, three videographers jumped into or through clouds in violation of Section 105.17(a). *Id.* at 23. The ALJ did not find any violations on the other flights – the flights that occurred on December 8, 2013, January 5, 2014, and March 22, 2014. *Id.* at 12, 13. The ALJ assessed a civil penalty of $4,125 ($1,375 per violation for three violations). *Id.* at 24.

III. Pacific's Cross-Appeal

A. Subject-Matter Jurisdiction

On cross-appeal, Pacific argues that subject-matter jurisdiction is lacking because the civil penalty sought in the Complaint ($55,000) exceeds the ALJ's jurisdictional limit ($50,000). Pacific's Appeal Brief at 13.

"When a statute conditions federal court jurisdiction on the satisfaction of an amount in controversy requirement, the failure to meet that specified amount divests the federal courts of subject matter jurisdiction." *Schultz v. General R.V. Center*, 512 F.3d 754, 755 (6th Cir. 2008).

Lack of subject-matter jurisdiction cannot be waived. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001).

Lack of subject-matter jurisdiction is an affirmative defense. *Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). The Rules of Practice provide that "[a] party who has asserted an affirmative defense bears the burden of proving the affirmative defense." 14 C.F.R. § 13.224(c). Thus, Pacific bears the burden of proving its affirmative defense of lack of subject-matter jurisdiction.

The procedural events in this case, as summarized by the ALJ, are as follows:

- On March 27, 2014, the FAA sent Pacific a Notice of Proposed Civil Penalty (NPCP) seeking $22,000 in Case No. 2014WP130012 for the flights that occurred on December 8, 2013 and January 5, 2014.
- On October 30, 2014, the FAA sent Pacific a second NPCP, which sought $33,000 in Case No. 2014WP130023 for the flights that occurred on March 22, 2014 and March 25, 2014.
- On December 18, 2014, the FAA sent Pacific a Final Notice of Proposed Civil Penalty (FNPCP). The FNPCP sought a civil penalty of $55,000 – which was $22,000 for Case No. 2014130012 and $33,000 for Case No. 2014WP13002.
- On December 29, 2014, Pacific requested a single hearing for the two cases.
- On January 7, 2015, the FAA filed its Complaint. Like the FNPCP, the Complaint sought $55,000, which was $22,000 for Case No. 2014WP130012 and $33,000 for Case No. 2014WP130023.

ALJ's Order Denying Pacific's Motion to Dismiss at 2.

U.S. District Courts have exclusive jurisdiction of a civil penalty action that the Administrator initiates if the amount in controversy is more than $50,000 and if the violation was committed by an individual or small business concern [5] on or after December 12, 2003. 49 U.S.C.

[5] The FAA agrees that Pacific is a small business concern. 1 Tr. 14.

§ 46301(d)(4)(A)(iii); 14 C.F.R § 13.16(b)(3). If the amount in controversy is $50,000 or less, however, U.S. District Courts do not have jurisdiction. *Id.* Instead, any penalties are imposed administratively, by an ALJ or the Administrator. 49 U.S.C. § 46301(d)(2);[6] *see also* 14 C.F.R. § 13.16(i) (providing for a hearing) and § 13.16(j) (providing for an appeal).

Therefore, jurisdiction depends on the amount in controversy when the Administrator or FAA *initiates* the civil penalty action – "A civil penalty action is initiated by sending a NPCP to the person charged with a violation...." 14 C.F.R. § 13.16(f).

Under the regulation, the dispositive amount for determining jurisdiction is the amount in the *NPCP* – not the amount in the *Complaint,* as Pacific urges. Pacific's Appeal Brief at 14. When the FAA initiated these cases by sending out the NPCPs, each NPCP sought a civil penalty below $50,000 (Initial Decision at 3), and therefore, the U.S. District Courts lacked jurisdiction. [7] The ALJ was correct that this case was properly before him, as it is before me as the Administrator.[8]

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[6] *See also* 49 U.S.C. § 46301(d)(8)(C), which also applies here. This provision states: "The maximum civil penalty that the Administrator may impose under this subsection is $50,000 if the violation was committed by an individual or small business concern on or after Dec. 12, 2003."

[7] In *Continental Airlines*, FAA Order No. 1990-12 at 4-5 (Apr. 25, 1990), the Administrator held there was no evidence that Complainant deliberately separated the case from others or did so to avoid the $50,000 jurisdictional limit. The Administrator further held there was no requirement that Complainant had to consolidate in one action all cases involving the same subject that may have been initiated at or about the same time simply because they involved the same respondent. That Complainant could have consolidated the cases does not mean it was improper for Complainant to handle the cases separately.

[8] FAA Order No. 2150.3B ¶ 6-5 (Oct. 1, 2007) states:

> Legal counsel may initiate separate Enforcement Investigation Reports (EIRs) in one legal enforcement action provided consolidating these EIRs does not change the jurisdictional forum of any one of the EIRs. For example, if there are three separate EIRs regarding unrelated inspections proposing to assess civil penalties of $30,000 each against a small business concern, legal counsel cannot combine them into a single civil penalty action because that would change the forum from the DOT Office of Hearings to a U.S. district court. Once complaints have been filed, legal counsel may move to consolidate the cases for litigation purposes.

B. Vagueness

On cross-appeal, Pacific argues that 14 C.F.R. § 105.17(a), which provides that "No person may conduct a parachute operation into or through a cloud" is unconstitutionally vague. Pacific's Appeal Brief at 7, 13, 67. Pacific likewise argues that the definition of "parachute operation" in 14 C.F.R. § 105.3 is vague. *Id.* at 7, 13, 71.

"Parachute operation" means:

> the performance of all activity for the purpose of, or in support of, a parachute jump or a parachute drop. This parachute operation can involve, but is not limited to, the following persons: parachutist, parachutist in command and passenger in tandem parachute operations, drop zone or owner or operator,[9] jump master, certificated parachute rigger, or pilot.

14 C.F.R. § 105.3. The definition of "parachute operation" includes the term "parachute jump," which is defined as: "a parachute operation that involves the descent of one or more persons to the surface from an aircraft in flight when an aircraft is used or intended to be used during all or part of that descent." *Id.*

Pacific argues that its vagueness arguments are outside the FAA decisionmaker's scope of review. Pacific's Appeal Brief at 69-70. The FAA decisionmaker has held that he or she may decline to consider certain constitutional challenges, such as challenges to the rules of practice as a whole, when the Federal Courts of Appeals constitute a more appropriate forum to resolve such challenges. *American Airlines*, FAA Order No. 1999-1 at 7 (Mar. 2, 1999). However, the FAA

In the instant case, it would have been better practice to wait until after the filing of the Complaint to move to consolidate the individual cases, but as the ALJ stated, the statute overrides FAA Order No. 2150.3B.

[9] The ALJ notes that the definition of "parachute operation" contains a typographical error. It should read "drop zone owner or operator," rather than "drop zone *or* owner or operator." Initial Decision at 15; 64 Fed. Reg. 18302, 18310 (Apr. 13, 1999).

decisionmaker has found it both "necessary and appropriate to consider constitutional claims of vagueness." *Id.* Thus, Pacific's vagueness arguments will be considered here.

Pacific has the burden to prove that 14 C.F.R. § 105.17(a) and § 105.3 are not valid limits on its activities because they are too vague. *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 506 n.7 (5th Cir. 2001), stating that it was Ford Motor Company, which challenged a law as vague, who bore the burden of proving that the law was not a valid limit on economic activity.

Pacific contends that 14 C.F.R. § 105.17(a) and § 105.3 are unconstitutionally vague. It has been written: "A civil statute [or regulation] is not impermissible ... unless its commands are 'so vague and indefinite as really to be no rule or standard at all.'" *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 614 (2nd Cir. 1996) (citing *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). Further: "When evaluating a void for vagueness challenge, a court will require only a reasonable degree of certainty and will demand less precision for a regulation governing business, rather than First Amendment, activities." *Trans States Airlines*, FAA Order No. 2005-2 at 10 (citing *Throckmorton v. NTSB*, 963 F.2d 441, 445 (D.C. Cir. 1992)). The regulations at issue in this case do not involve the First Amendment and therefore demand less precision. If a respondent receives fair warning, as in the instant case, the regulation is not unconstitutionally vague. *USAir*, FAA Order No. 1996-25 at 8 (Aug. 13, 1996).

Pacific does not dispute that it is a drop zone owner and operator. Pacific's Appeal Brief at 54. Pacific knew that it was conducting parachute operations, for it wrote a letter to the FAA stating that it intended to conduct a series of parachute operations at Dillingham Airfield from January 16, 2014 through December 16, 2015. Exh. A-4. The regulations are reasonably clear as applied. Pacific had fair warning that it was not to conduct its parachute operations into or through clouds.

C. Parachute Operations

On cross-appeal, Pacific argues that it did not conduct any "parachute operations" and therefore it did not violate 14 C.F.R. § 105.17(a). Pacific's Appeal Brief at 7. However, the preponderance of the evidence supports the finding that Pacific did conduct parachute operations within the meaning of the regulation. Pacific performed activity "for the purpose of and in support of the parachute jumps" within the meaning of 14 C.F.R. § 105.3. Pacific's aircraft were flown, Exh. A-44, and the following were involved: parachutists; parachutists in command; passengers in tandem; parachute operations; drop zone owners or operators; jump masters; certificated parachute riggers; or pilots. Initial Decision at 15. Individuals jumped from Pacific's aircraft and descended into Pacific's drop zone. *Id.* at 3. Mr. Guy Banal, the general manager, president, and owner of Pacific, admitted that either he or one of his managers communicated with the pilots during all parachute activities. 2 Tr. 232.

As stated above, Pacific wrote a letter to the FAA stating it would be conducting parachute operations at Dillingham Airfield from January 16, 2014 to December 16, 2015. Exh. A-4. Thus, Pacific knew it was conducting "parachute operations" at the time of the violations. Drop zone operators control all business operations at the drop zone, including the pilots' actions. 2 Tr. 173. When Mr. McCowan, the FAA's skydiving expert, was asked how it works – whether he controlled the pilot in his own parachuting operation, Mr. McCowan replied, "Yes, we had radio communication with the pilot, with the aircraft. If something were to change on the ground, as [sic] clouds moving in or wind picking up, and mainly the wind picking up, we could call the pilot and tell him to not drop the jumpers." Initial Decision at 16 n.85, citing Tr. 173-74. Mr. Banal or a manager communicated with the pilots during all parachute activities. 2 Tr. 232. Thus, the ALJ's finding that Pacific conducted parachute operations is supported by the preponderance of the evidence.

D. Three Alleged Violations

On cross-appeal, Pacific argues that the ALJ erred in finding that three Pacific videographers jumped into or through clouds in March 25, 2014. Pacific's Appeal Brief at 6.

The ALJ found Pacific's videographers used GoPro-brand consumer video cameras to film the jumps. Initial Decision at 12. There are three videos allegedly showing a Pacific videographer jumping into or through clouds. The first, Exhibit A-33, is Bei Wu's March 25, 2014 jump. *Id.* at 13. It shows a Pacific videographer jumping through clouds from about the 00:53 time mark until about the 1:05 time mark. *Id.* The FAA skydiving expert, Mr. McCowan, testified that the video showed the videographer falling through clouds because "he continues to go through the cloud as his main parachute is opening." 2 Tr. 43-44.

The second video showing a Pacific videographer jumping into or through clouds is Exhibit A-35, Liyun Liu's March 25, 2014 jump. Initial Decision at 13. This GoPro video shows the videographer descending into a cloud as the video reaches the 00:50 mark. *Id.* Mr. McCowan testified that the videographer went into a cloud and the ground could not be seen at the 00:51 time mark. 2 Tr. 150—51.

The third and final GoPro video showing a Pacific videographer jumping into clouds is Exhibit A-38, Joel Galino's March 25, 2014 jump. Initial Decision at 12. This video shows the videographer descending into a cloud beginning at the 00:54 time mark. *Id.* Mr. McCowan testified that the videographer fell through the cloud. *Id.* He further testified: "[H]e is deploying his canopy as he is coming out of the bottom of [the cloud]." 2 Tr. 64.

The ALJ found the FAA's expert, Mr. McCowan, a skydiving expert, to be credible but he found that Pacific's expert, Mr. Sanders, a videography expert, was not convincing and seemed to "stretch" to find reasons why the footage did not show videographers descending into or through clouds. Initial Decision at 15. Further, the ALJ found that Mr. Sanders was biased because: (1) he was a longtime friend of Pacific's owner; (2) he parachuted at Pacific without cost for many years; and (3) Pacific paid him $500 per hour for his testimony. *Id.* at 11.

"Expert testimony is evaluated on the basis of its logic, depth and persuasiveness." *Ventura Air Services*, FAA Order No. 2012-12 at 19 (Nov. 1, 2012). In addition, "[t]he FAA decisionmaker reviews an ALJ's evidentiary rulings, including decisions as to the admission and use of expert

testimony, for an abuse of discretion." *Airborne*, FAA Order No. 2016-1 at 9 (Apr. 14, 2016). The ALJ did not err in crediting Mr. McCowan's expert testimony and in discounting Mr. Sanders' expert testimony. Thus, there was no abuse of discretion.

E. Independent Contractors

On cross-appeal, Pacific argues that it is not responsible for the actions of its independent contractors (*i.e.*, its pilots, tandem instructors, and videographers) because, according to Pacific, they decided on their own when and if jumping would occur. Pacific's Appeal Brief at 4-5.

As the ALJ wrote, it is undisputed that the pilots, tandem instructors, and videographers were independent contractors, but that does not necessarily mean that Pacific is free from liability. "[A] principal generally is not responsible for an independent contractor's acts or omissions." *FedEx,* FAA Order No. 2002-20 at 6 (Aug. 5, 2002). However, there are many exceptions. *Id.* Generally, the exceptions "reflect special situations where the employer is in the best position to identify, minimize, and administer the risks involved in the contractor's activities." *Id.*, quoting *Wilson v Good Humor*, 757 F.2d 1293, 1301 (D.C. Cir. 1985).

Here, the ALJ correctly concluded that Pacific conducted the parachute operations. As the skydiving center and drop zone operator, Pacific controlled and directed the parachuting activities. 2 Tr. 173, 191. As the ALJ stated, Pacific conducted parachute operations during the alleged violations, making it independently liable. Initial Decision at 16. Further, as stated above, Mr. Banal, the general manager, president, and owner of Pacific, admitted that either he or one of his managers communicated with the pilots during all parachute activities. 2 Tr. 232.

IV. FAA's Cross-Appeal

A. Sanction Amount

On cross-appeal, the Agency argues that the $4,125 civil penalty assessed by the ALJ for three violations of Section 105.17(a) (i.e., $1,375 per violation for each of the three violations) is too

low and that it should be increased to $16,500 (i.e., $5,500 per violation for each of the three violations). *See, e.g.*, FAA's Appeal Brief at 6.

As stated above, the FAA has the burden of proving that the civil penalty is appropriate. *National Power Corp.*, FAA Order No. 2016-3 at 2 (Sept. 30, 2016). Under the sanction guidance for a non-certificated small business concern like Pacific, the minimum range is $550 to $2,199 per violation, the moderate range is $2,200 to $4,399 per violation, and the maximum range is $4,400 to $11,000. FAA Order No. 2150.3B, Appx. B at B—6. As the ALJ noted, "the Sanction Guidance Tables in FAA Order No. 2150.3B do not specify which range would apply to parachuting cases." Initial Decision at 22 n.121. The FAA sought a civil penalty of $5,500, which is in the lower end of the maximum range, for each of the parachute operations due to the high degree of hazard of Pacific's actions, Pacific's carelessness, and several violations. FAA's Closing Argument at 14-15.

It bears repeating that parachuting into clouds, especially near Dillingham Airfield, is extremely dangerous. 1 Tr. 182-83; 1 224-25. Parachutists may collide with military aircraft, civil aircraft, and gliders (the latter of which do not have radios). *Id.* Other hazards to a parachutist jumping through clouds are the 4,000-foot high mountains on one side and the Pacific Ocean on the other. 1 Tr. 225.

The ALJ correctly concluded that Pacific's parachute operations through clouds showed a high level of carelessness and were an aggravating factor. Pacific intensified the problem by quoting a customer on its website as follows: "[t]he coolest part was falling through the cloud." Exh. A-19 at 5.

The ALJ found only one mitigating factor – that Pacific's pilots were independent contractors. Initial Decision at 23. As a drop zone operator, Pacific was liable for ensuring that parachute operations were conducted in conformity with Section 105.17(a). Initial Decision at 16. Further, the ALJ found, nothing indicated that Pacific delegated its duties as a drop zone operator to its pilots. *Id.* at 18. The ALJ incorrectly found the pilots' independent contractor status to be mitigating.

The ALJ inappropriately relied on the *Fedele* case, FAA Order No. 1998-3 (Mar. 12, 1998) to determine that the appropriate range for Pacific's violations of Section 105.17(a) should be in the minimum range of $550 to $2,199. *Fedele* is distinguishable, however. Mr. Fedele was an individual parachutist who jumped only a single jump. *Fedele*, FAA Order No. 1998-3 at 1-2. In contrast, Pacific owns a parachuting concern, 1 Tr. 142, and engaged in multiple jumps, Initial Decision at 2.

"The Administrator has both the authority and duty to impose the agency's sanction guidance on appeal." *Warbelow's Air Ventures*, FAA Order No. 2000-3 at 20 (Feb. 2, 2000). The Administrator need not remand this case to the ALJ for a revised determination of the civil penalty but may decide the civil penalty on appeal. *Mole-Master*, FAA Order No. 2010-11 at 9 (Jun.16, 2010).

The FAA is correct that under the totality of the circumstances (including the multiple aggravating factors and the absence of mitigating factors), a total civil penalty of $16,500 (i.e., $5,500 per violation for three violations) is consistent with the sanction guidance and is appropriate. The $4,125 civil penalty imposed by the ALJ is insufficient to deter future violations by a parachuting enterprise like Pacific. A $16,500 civil penalty, however, would suffice to deter Pacific and other parachuting operations from committing future violations of 14 C.F.R. § 105.17(a).

B. Violations of 14 C.F.R. § 91.13(a)

On cross-appeal, the Agency argues that the ALJ should have found, in addition to the three violations of 14 C.F.R. § 105.17(a), that Pacific committed residual (or derivative) violations of 14 C.F.R. § 91.13(a). FAA's Appeal Brief at 14. Section 91.13(a) prohibits any person from operating an aircraft "in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13(a).

As the National Transportation Safety Board (NTSB) has stated, an independent violation of

Section 91.13(a) requires a higher threshold of evidence than a residual charge. *FAA v. Hollabaugh*, NTSB Order No. EA-5609, 2011 WL 7025300 at *3 (Dec. 21, 2011). The Administrator need not follow NTSB precedent, but may do so if such precedent is persuasive, which it is here. *Richardson & Shimp*, FAA Order No. 1992-49 at 9 n.13 (July 22, 1992).

Rather than attempting to establish independent violations of Section 91.13(a), the FAA sought a finding of residual (or derivative) violations. FAA's Appeal Brief at 14. It has been held that "[a]bsent extraordinary circumstances, a residual or derivative violation of Section 91.13(a) is established once certain operational violations are proven." *Ventura Air*, FAA Order No. 2012-12 at 23. Such operational violations include operating an aircraft that is not in compliance with airworthiness directives, operating an unairworthy aircraft, or deviating from an air traffic control instruction. *Id.* at 24. As the NTSB has stated:

> A residual violation is one that flows solely from a respondent's violation of another, independent regulation. A residual violation has no effect on sanction. ... [T]he finding of a violation of an operational provision ..., without more, is sufficient to support a finding of a "residual" or "derivative" Section 91.13(a) violation.

FAA v. Richard, NTSB Order No. EA-4223, 1994 WL 393358 at *6 n.17, quoted in *Rushmore Helicopters*, FAA Order No. 2012-8 at 12 (Oct. 11, 2012).

Thus, in this case, the ALJ's finding of three violations of Section 105.17(a), an operational provision that prohibits conducting parachute operations into or through clouds, was sufficient to support findings of residual (or derivative) violations of Section 91.13(a). *Ventura Air*, FAA Order No. 2012-12 at 23. But as noted above, residual violations do not increase the sanction. "A separate sanction ... is not justified for [a] residual violation, given that the residual violation is not based on any independent event." *GoJet Airlines, LLC*, FAA Order No. 2012-5 at 16 (May 22, 2012).

V. Conclusion

Based on the foregoing, I grant the Agency's cross-appeal, deny Pacific's cross-appeal, and impose a civil penalty of $16,500.[10]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[10] 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 (2016). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

SERVED: March 7, 2017

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

In The Matter Of:	)	
	)	Docket No. FAA-2014-1116
Pacific International Skydiving Center	)	
	)	Case Nos. 2014WP130012 &
	)	2014WP130023
Respondent	)	

INITIAL DECISION

1. Pertinent Procedural History

On March 27, 2014, the Complainant served the Respondent a Notice of Proposed Civil Penalty in the amount of $22,000 in Case No. 2014WP130012, followed by a second Notice of Proposed Civil Penalty on October 30, 2014, in the amount of $33,000 in Case No. 2014WP130023. On December 18, 2014, the Complainant served the Respondent a Final Notice of Proposed Civil Penalty for both Case No. 2014WP130012 and Case No. 2014WP130023.

On December 29, 2014, the Respondent filed a Request for Hearing in both cases. On January 7, 2015, the Complainant timely filed its complaint,[1] to which the Respondent filed a timely answer on January 13, 2015.

On January 22, 2015, Chief Administrative Law Judge Yoder assigned this case to an Administrative Law Judge and then subsequently reassigned it to the undersigned judge on March 26, 2016. A prehearing conference was held on May 17, 2016.

On July 1, 2016, the undersigned judge provided notice that a hearing would be held in Honolulu, HI, beginning on December 13, 2016.

On November 12, 2016, the Respondent requested that the undersigned judge issue subpoenas for ten witnesses. While the undersigned judge initially issued the requested subpoenas on November 16, 2016, the subpoena for FAA Safety Inspector, Curtis Whaley, was subsequently quashed on December 1, 2016.

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[1] The complaint sought a $55,000 civil penalty, comprised of $22,000 for Case No. 2014WP130012 and $33,000 for Case No. 2014WP130023. *See* Complaint.

The undersigned judge conducted a hearing from December 13 to 15, 2016, in Honolulu, HI. Don Bobertz appeared on behalf of the Complainant; Robert L. Feldman appeared on behalf of the Respondent.

At the start of the hearing, the Respondent orally moved to dismiss the case due to a lack of subject matter jurisdiction. After the hearing, the parties submitted briefs regarding this issue. On January 24, 2017, the undersigned judge issued an Order Denying the Respondent's Motion to Dismiss.[2]

The parties submitted written posthearing briefs pursuant to 14 C.F.R. § 13.231(c) on February 6, 2017.

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 conducted parachute operations into or through clouds in violation of 14 C.F.R. § 105.17(a)[3] in the vicinity of Dillingham Airfield, Waialua, Hawaii, on the following eight occasions:

Date	12/08/2013	1/05/2014	3/22/2014	3/25/2014
Number of Flights	1	1	3	3
Airplane Civil Registration Number	N900SA	N989BW	N989BW	N989BW

The Complainant further alleges these actions were careless or reckless, so as to endanger the life or property of others, in violation of 14 C.F.R. § 91.13(a).

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.[4] 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."

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[2] Also at the start of the hearing, the Complainant orally moved to amend the complaint. In particular, Complainant's counsel stated that he "wanted to issue an amended complaint to separate the cases back into their original form where there's two separate cases." Transcript Volume 1 at 13. The undersigned judge's Order Denying Respondent's Motion to Dismiss rendered the Complainant's motion to amend the complaint moot.

[3] Notably, the Complainant did not allege a violation of 14 C.F.R. § 105.17(b), dealing with flight visibility and/or cloud clearance restrictions when conducting parachute operations.

[4] *See* 14 C.F.R. §§ 13.224(a) and (c).

4. Background

The Respondent is the owner/operator of the two subject aircraft, N900SA and N989BW, which were used to conduct parachute operations at Dillingham Airfield. On the dates in question, the subject aircraft ascended into the skies with parachutists onboard who subsequently jumped from the aircraft and descended to the landing zone operated by Respondent at Dillingham Airfield. All personnel onboard the planes, to include the pilots, videographers and tandem instructors, were independent contractors affiliated with the Respondent or customers of the Respondent. At issue in this case is whether any of the parachutists descended into or through the clouds, and if so, whether the Respondent is liable for such activity.

5. Did Individuals Descend Into or Through Clouds?

Pursuant to 14 C.F.R. § 105.17(a), "No person may conduct a parachute operation ... into or through a cloud." To support its allegations that parachutists descended into or through clouds on each of the alleged dates, the Complainant presented testimony of two FAA inspectors, an expert in the area of skydiving, and an alleged eyewitness. The Complainant also submitted into evidence video footage filmed by the eyewitness, Frank "T.K." Hinshaw, on the four dates in question (hereinafter referred to collectively as the "Hinshaw videos")[5] and in-person video footage obtained from the Respondent in the course of discovery (hereinafter referred to collectively as the "GoPro videos").[6]

Kyle Bartler, a principal operations inspector at the Honolulu Flight Standards District Office, investigated the alleged December 8, 2013 and January 5, 2014 violations.[7] Edward Santa Elena, who at the time served as a principal operations inspector at the Honolulu Flight Standards District Office, investigated the alleged March 22 and 25, 2014 violations.[8] Both Mr. Bartler and Mr. Santa Elena admitted that they did not personally see any parachutists jump into or through a cloud on the dates in question, but instead relied solely upon the videos and declarations provided by T.K. Hinshaw as evidence to support the allegations.[9] The question of whether the parachutists did indeed skydive into or through the clouds therefore can only be resolved by examining the credibility of the statements of T.K. Hinshaw (the sole eyewitness),

[5] *See* Agency Exs. A-5, A-7, A-14 and A15.
[6] *See id.* A-32 through 35 and A-38.
[7] *See* Transcript Volume 1 at 37-38.
[8] *Id.* at 94.
[9] *Id.* at 65 and 126.

the Hinshaw videos, and the GoPro videos.

a. Credibility of T.K. Hinshaw's statements

In support of the Complainant's allegations, T.K. Hinshaw testified that on each of the alleged dates he witnessed the Respondent's plane carry parachutists into the sky and then saw those parachutists descend through the clouds. T.K. Hinshaw further provided video footage from parachute jumps that occurred on the four dates in question, as well as declarations to authenticate the video footage.[10]

As background, T.K. Hinshaw testified that he has, in the past, helped his father's company, Skydive Hawaii, which also operates out of Dillingham Airfield.[11] While working with Skydive Hawaii, he claimed he observed parachutists affiliated with the Respondent violating safety regulations by violating the restrictions regarding parachuting through or near clouds. T.K. Hinshaw further testified that in 2013 he learned the FAA "wanted to crack down on skydivers jumping through clouds," and he explained that he began recording the Respondent's parachute activities after his complaints to the Honolulu Flight Standards District Office did not stop this behavior.[12] When probed, T.K. Hinshaw admitted that he based his conclusion that parachutists went into or through clouds on the fact that when looking up at the sky, he could not see the plane through the cloud cover, but he later saw the parachutists.[13] This conclusion, however, does not withstand scrutiny. As discussed more below, the Respondent's expert, Tom Sanders, provided detailed testimony regarding the flaws with the Hinshaw videos, many of which apply to T.K. Hinshaw's view from the ground. The distance between the ground and the jumpers, the change in size of the subject jumper during freefall versus after parachute deployment, the angle from the ground, and the multiple layers of clouds would all impact the reliability of what T.K. Hinshaw viewed from the ground.

Regardless of the substance of his testimony, however, T.K. Hinshaw's bias against the Respondent eviscerates the credibility of his declarations provided to the FAA and his testimony

[10] *See* Agency Exs. A-6, A-8 and A-16.
[11] Transcript Volume 1 at 140.
[12] *Id.* at 143.
[13] *See id.* at 292-293 for the following exchange: Judge Rawald: "So it sounds to me the central assumption you were making as you were watching the parachutists was that, if you could not see the starting point, the plane, and then you could see the parachutists, they must have passed through a cloud, is that right?" The witness: "That's correct. If you're looking straight up and you can't see the aircraft and then a parachutist appears below the cloud, then to me that is indicative of ..." Judge Rawald: "So when I'm watching the video and I hear you say, he's through the cloud, the basis for that was because you could not see the plane but you could see the parachutist at some point afterwards?" The witness: "Correct."

at the hearing, as well as his statements as recorded in the Hinshaw videos. Most importantly, T.K. Hinshaw's father, Frank Hinshaw, is the owner and operator of Skydive Hawaii, which is the Respondent's main competitor at Dillingham Airfield. This close familial relationship with the Respondent's direct competitor provides a significant impediment to the persuasiveness of his testimony.[14] Further, the competition created animosity between the two companies, which one of the FAA's investigators, Mr. Bartler, acknowledged.[15] Rather than address these concerns, T.K. Hinshaw instead refused to discuss his hostile relationship with the Respondent and its employees and independent contractors by asserting his Fifth Amendment right to refrain from answering questions regarding allegations of his threatening behavior.

Guy Banal, the owner of Pacific International Skydiving Center, explained that individuals employed by the Respondent were compelled to file a police report after reading several Facebook posts in which T.K. Hinshaw threatened the employees' livelihood, as well as their safety.[16] Mr. Banal's testimony was corroborated by several other witnesses and a police report.[17]

Darryl Green, an independent contractor for the Respondent, discussed an incident where T.K. Hinshaw walked past the Respondent's building at Dillingham Airfield while making a throat-slashing gesture directed towards everyone in the office.[18] Feeling threatened, Mr. Green filed a report with the Honolulu Police Department.[19] After reading threatening Facebook posts authored by T.K. Hinshaw, Greg Meyer, an independent contractor for the Respondent, filed a report with the Honolulu Police Department and Dillingham airport security.[20] Mr. Meyer feared for his own safety, as well as the safety of his roommates and his dog, because T.K. Hinshaw knew he lived "across the street from the airport" at the time.[21]

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[14] *See In re Alphin Aircraft, Inc.*, FAA Order No. 1997-9 at 11 (Decision and Order, Feb. 20, 1997) (The Administrator noted that the Administrative Law Judge found a witness's "testimony 'inherently less persuasive' than that of other witnesses because he [was the Respondent's President]").
[15] *See* Transcript Volume 1 at 81.
[16] *See* Transcript Volume 2 at 214-219. A July 31, 2014 declaration signed by Mr. Banal, which accompanied a letter to the Honolulu Police Department, details not only the threatening Facebook posts authored by T.K. Hinshaw, but also an instance of physical violence by T.K. Hinshaw. *See* Respondent's Ex. R-16. Excerpts from the subject Facebook posts were attached to the letter. *See id.*
[17] *See* Respondent Ex. R-16.
[18] *See* Transcript Volume 2 at 244-46.
[19] *See id.* at 246; *see also* Respondent's Ex. R-16 at 31.
[20] *See* Transcript Volume 2 at 253-254.
[21] *See id.*

Roxanne Stanley[22] also provided testimony regarding T.K. Hinshaw's threatening Facebook posts, stating that in addition to multiple threats to shut the Respondent down, T.K. Hinshaw posted a message threatening to "break into our home and … [k]ill us and our pets, anybody who worked for Pacific Skydiving Center."[23] After witnessing the throat-slashing gesture discussed by Mr. Green, Mrs. Stanley filed a report with the Honolulu Police Department.[24] Bryan Stanley testified that T.K. Hinshaw's Facebook posts made him feel unsafe because he viewed T.K. Hinshaw as "extremely unstable," detailing that he has seen him:

> go on tirades on the field, attack people over flying drones over our planes, flying drones at our skydivers, firing his own employees for being friends with other skydivers on Facebook, coming out on the deck at me as I'm leaving and screaming and yelling and flipping me off and yelling obscenities at my wife.[25]

Regarding a Facebook post where T.K. Hinshaw referenced "already spill[ing] their blood once," Mr. Stanley described an incident where both T.K. Hinshaw and his father physically pushed individuals associated with the Respondent to the ground.[26]

Given T.K. Hinshaw's bias against the Respondent as his father's main competitor, his history of threatening and aggressive behavior towards the Respondent and its personnel, his refusal to respond to questions regarding these allegations impacting his credibility, and his flawed basis for determining whether parachutists had descended through clouds, the undersigned judge gave no weight to T.K. Hinshaw's testimony, declarations, and statements as recorded within the Hinshaw videos.[27]

b. The Hinshaw videos

T.K. Hinshaw explained that he filmed the Respondent's parachute operations on days it appeared they were going to "jump skydivers through poor conditions," stating that he filmed most of these videos from Skydive Hawaii's operations area at Dillingham Airfield.[28] In filming the Hinshaw videos, T.K. Hinshaw testified that he used a Sony HDR CX-150, which he

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[22] Following the completion of Mrs. Stanley's testimony, Mr. Frank Hinshaw, who up to this point had been seated in the courtroom listening to the proceedings, left the courtroom and directed verbal obscenities towards Mrs. Stanley. *See id.* at 267-272.
[23] *Id.* at 257.
[24] *See id.* at 258-259.
[25] *Id.* at 274-275.
[26] *See id.* at 275-276.
[27] In contrast, the key witness in the only other skydiving case addressed by the Administrator was found credible because he did not have an "axe to grind." *In re Fedele*, FAA Order No. 1998-3 at 4 (Decision and Order, Mar. 12, 1998).
[28] Transcript Volume 1 at 144-148. The red "A" noted on Agency Ex. A-56 marks T.K. Hinshaw's location when filming the videos he submitted to the FAA.

described as a small handheld camera, with a flip-out screen and a single record/stop button that records in 3.1 megapixel stills up to 1080 resolution.[29] T.K. Hinshaw acknowledged that he did not save the video footage on the original memory cards; instead, he copied the footage to his computer hard drive and then burned CDs to submit to the FAA investigators.[30] With respect to his filming technique, T.K. Hinshaw testified that he did not rely on the view finder/flip screen, instead looking up at the sky himself, with the camera in front of him.[31]

Little weight is afforded to the footage in the Hinshaw videos, as their value is limited in determining whether the parachutists actually descended into or through a cloud. In examining this evidence, it is important to keep in mind the Administrator's statement in *Fedele* that the evidence "must be examined in light of the safety regulations."[32] To avoid committing a regulatory violation in *Fedele*, the skydivers needed a hole in the clouds of "at least 4,000 feet," which was wider than the 3,200 foot long airport runway.[33] Examining the unbiased eye witness's testimony in *Fedele* that there were no patches of blue sky over the airport in light of the regulatory requirement for a skydiver to "be surrounded, at all times, by an opening in the clouds with a horizontal diameter of at least 4,000 feet," the Administrator found it more probable than not that a violation occurred.[34] In the case at hand, however, the evidence must establish that a parachutist more likely than not descended into or through a cloud, as opposed to failing to have the appropriate level of cloud clearance. This then requires a greater level of specificity that the videos fail to provide.

In weighing the evidence, the undersigned judge first considered that the evidence itself was created by a person whose extreme bias has already been discussed. T.K. Hinshaw admitted that the CDs submitted to the FAA did not contain the original footage and that the original footage has since been recorded over. There is then no way to verify whether the footage, as submitted into evidence, was altered before it was provided to the FAA.

More concerning, however, are the inherent limitations of this type of ground footage, even if

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[29] Transcript Volume 1 at 148-149.
[30] *See id.* at 156-157 and 161. The undersigned judge overruled the Respondent's objection to the admission of these videos under the best evidence rule, noting that while this may raise an issue as to the videos credibility, 14 C.F.R. § 13.222 states that an "Administrative Law Judge shall -- which is mandatory -- admit any or all documentary or demonstrative evidence introduced by a party but shall … exclude irrelevant, immaterial or unduly repetitious evidence." *Id.* at 163-164.
[31] *See id.* at 173-174.
[32] *Fedele*, FAA Order No. 1998-3 at 5.
[33] *Id.*
[34] *Id.*

it was unaltered. Mr. Santa Elena discussed the sky conditions at the jumping altitude as recounted by one of the pilots, who reported that jumps were delayed until sky conditions cleared.[35] Further, the Respondent's expert, Mr. Sanders,[36] provided detailed testimony regarding the flaws of the footage contained in the Hinshaw videos. In addition to holding an expert skydiving license and logging over 7,000 camera jumps, Mr. Sanders is familiar with Dillingham Airfield from flying out of there almost daily and is known for his freefall skydiving camera work, having shot feature film skydiving for 38 years.[37]

Mr. Sanders described the Sony CX-150 camera used by T.K. Hinshaw as amateur and not adequate for accurately filming skydiving activities.[38] Mr. Sanders discussed that the lower-quality lens and single chip contained in T.K. Hinshaw's camera would distort the image "giv[ing] you a look of not being sharp, as if it was out of focus or there was something obscuring it in between," thus negatively impacting the detail, color, contrast and clarity of the footage.[39] The use of auto-focus, given the distance between the camera and the objects being filmed, also affected the quality of the Hinshaw videos, resulting in blurry, as opposed to sharp, images.[40] Mr. Sanders discussed the effect a camera lens zoom would have on the image portrayed and indicated that the inability to see a parachutist could be due to the fact that the parachutist was not in the frame.[41]

According to Mr. Sanders, the moisture, salt spray and volcanic ash present in the air at Dillingham Airfield would also negatively impact the quality of footage contained in the Hinshaw videos.[42] Mr. Sanders explained that a careful look at the Hinshaw video footage

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[35] Recalling his investigation, Mr. Santa Elena stated the following: "I recall Randy saying that it -- the weather, it was cloudy over the field but he waited until it wasn't -- he waited until it was clear before he released the jumpers." Transcript Volume 1 at 127.

[36] Mr. Sanders was admitted as an expert in the area of skydiving, as well as videography of and during skydiving. *See* Transcript Volume 2 at 287.

[37] *See id.* at 282, 284 and 286. The extent of Mr. Sanders's credentials can be found in his resume, which was admitted as Respondent Ex. R-24.

[38] *See* Transcript Volume 2 at 298 and 304.

[39] *Id.* at 303-304 and 307-308.

[40] *See id.* at 344-345.

[41] For an example, see the following exchange from Mr. Feldman's examination of Mr. Sanders regarding exhibit A-5 at time mark 5:48: Q: "Do you see a jumper there?" A: "I see a black dot, which could be a jumper under a parachute, but I can't confirm that it is just a skydiver in freefall." Q: "Well, let's back up here. Okay. At 5:47, you don't see him, do you?" A: "no." Q: "Why not?" A: "He is out of frame." Q: "He is out of frame? What does frame mean?" A: "He is down below and he has to tilt the camera down to pick him up. There he is." *Id.* at 317-318.

[42] *See id.* at 323.

reveals "a lot of blue" sky that "is not being shown as clearly" due to the poor camera quality,[43] explaining that the camera "miss[ed] a lot of detail" and did not pick up all the blue sky present during filming.[44] With respect to the blue sky, Mr. Sanders also noted that the inferior quality of the video monitor at the courthouse displayed more grey than when compared to what he saw when he viewed the same footage on a higher resolution monitor at home.[45]

The distance between the videographer on the ground and the jumpers, as well as the change in size of the subject jumper during freefall versus after parachute deployment, also decreased the reliability of the Hinshaw videos. Mr. Sanders explained:

> if you exit at 14,000 feet, that's almost 3 miles, you can't just look up at 3 miles and see a solo skydiver falling. You just don't see him. They are falling 200 feet a second. They get bigger and bigger and bigger and bigger for a minute, but they don't get really big until they open a parachute. And that's when -- that's the only time in all of the ground angle view videos that I see anything is when the parachute opens.[46]

With respect to the angle and resulting visibility of a parachutist during parachute deployment, Mr. Sanders stated:

> the fact that it is happening so high in the sky, that a skydiver in freefall shot from an angle, might only be a 2 foot high object. But during deployment, the skydiver gets pulled upright, which is going to be 5, 6 to 6 foot tall with 12 to 15 foot lines and a 300 square foot parachute. So now all of a sudden we have something that is, you know, a mile and a half to 3 miles up in the sky and now we can see it because it has grown in size, because the parachute got opened.[47]

The reliability of the Hinshaw videos is also decreased as a result of the camera angle and zoom utilized, as well as the multiple layers of clouds present during the subject jumps. Mr. Sanders generally opined that the Hinshaw videos appeared to be filmed from a 30-degree angle, as opposed to straight up (which would have provided a more accurate depiction of the parachutists' activities). He explained that with multiple cloud layers, ground footage could seem to portray an individual parachuting into or through a cloud, when in reality the cloud was between the parachutist and the camera. Regarding cloud coverage at Dillingham Airfield, Mr. Sanders noted that on a typical day there are "clouds at every layer and they are blowing at different speeds at every layer,"[48] and explained that when filming from the ground looking up:

> you can't tell where the clouds are. They are stacked together from an angle. If he is zooming in, it's not a sufficient angle to judge when somebody is falling downward if they are going through

[43] *Id.* at 331.
[44] *Id.* at 307.
[45] *See id.* at 309-310.
[46] *Id.* at 330.
[47] *Id.* at 313.
[48] *Id.* at 311.

> [a cloud] or not ... They are opening their parachute a mile high in the sky and they start at almost 3 miles high in the sky and all we are seeing is a black dot out here. I don't know what is straight above him. I don't know if there is a cloud in front and they are falling behind the wall in the back. I have no idea from the ground what is going on.[49]

Mr. Sanders went on to emphasize that when reviewing the Hinshaw videos:

> There is no way to know that they have gone through a cloud from this kind of a shot. There isn't even any way to know that this is all the blue that is out there. This is only from this one point of view on the ground at whatever focal length lens he has zoomed out to. It doesn't mean anything.[50]

Overall, Mr. Sanders concluded that "[n]one of the ground camera angles would be accurate ... [n]one of them are looking straight down and that's what we are trying to find is where they are falling," and that, in his opinion, none of the videos shot from the ground depict a skydiver going into or through a cloud.[51]

Mr. Sanders's testimony regarding the unreliability of the Hinshaw videos, is supported by the GoPro videos. Comparing jumps filmed in the GoPro videos to the same jumps filmed in the Hinshaw videos revealed patches of blue skies, while the Hinshaw videos appeared to depict much more cloud coverage.[52] The GoPro videos vividly exhibit the limitations in using the Hinshaw videos to determine whether a particular parachutist went into or through a cloud.

Admissions of T.K. Hinshaw and the government's expert, Mr. McCowan, also support the testimony of Mr. Sanders. T.K. Hinshaw admitted that weather conditions can change in the five to seven minutes it takes to ascend to the altitude for skydiving, and that the angle of a camera can make it appear that a parachutist is descending into or through a cloud, when in reality they are not.[53] After viewing video footage that appeared to depict parachutists descending into or through clouds, both T.K. Hinshaw and Mr. McCowan were able to deny any descent through

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[49] *Id.* at 320.
[50] *Id.* at 321.
[51] *Id.* at 310 and 312.
[52] For example, comparing the Hinshaw video depiction of the first flight and subsequent parachute jump in A-14 with GoPro video footage of the same jump in A-32 reveals patches of blue sky amongst the clouds that was not visible in the ground footage. *Compare* Agency Ex. A-14 and A-32. Similarly, ground footage from A-15 depicts jumpers that may be descending through the clouds beginning at the 1:07 time mark. GoPro video footage of the same jump depicted in A-33 reveals several patches of blue skies that are not visible from the ground footage in A-15. *Compare* Agency Ex. A-15 and A-33.
[53] *See* Transcript Volume 1 at 260-261; *see id. at* 245-246 for the following exchange: Judge Rawald: "depending on where you're standing and the angle you're looking at, is it possible that you could look up and think that someone's going through a cloud when, in fact, they could be going through an opening, if your angle was such that it could allow that? Is that possible?" The witness: "It's possible..."

clouds on those occasions, based upon personal knowledge.[54]

In evaluating Mr. Sanders's testimony, the undersigned judge considered its "logic, depth, and persuasiveness."[55] In addition to Mr. Sanders's extensive knowledge of the weather and parachuting conditions at Dillingham Airfield and his experience as a videographer, he provided an in-depth and logical analysis of the flaws with respect to the Hinshaw videos. He comprehensively discussed numerous factors that decrease the reliability of the Hinshaw videos. Additionally, his analysis was supported by footage from the GoPro videos, as well as admissions from T.K. Hinshaw and Mr. McCowan. Mr. Sanders's persuasiveness was negatively impacted by his long-term friendship with Mr. Banal, as well as the fact that he has skydived for free with the Respondent for 14 years and received compensation of $500 an hour for his testimony. However, with regard to the Hinshaw videos, any limitation in Mr. Sanders's persuasiveness is far outweighed by the detailed and logical analysis he provided regarding the flaws of the Hinshaw videos.

In contrast, the testimony of the government expert, Mr. McCowan, does not provide a sufficient basis to accord the Hinshaw videos additional weight. While Mr. McCowan has a great deal of skydiving experience and was recognized as an expert in the field of skydiving, he has not conducted a lot of camera jumps nor does he have expertise in the area of filming skydiving operations.[56] Upon viewing the Hinshaw videos, Mr. McCowan testified that based upon his years of experience, he concluded parachutists descended into or through the clouds on the eight occasions alleged by the complainant.[57] His opinion, however, was based upon the fact that the video depicts images of parachutists below the clouds, who were not visible prior to that.[58] The flaws in this analysis were highlighted by the testimony of Mr. Sanders and

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[54] *See id.* at 268-275 for T.K. Hinshaw's explanation of why the parachutists in exhibit R-12 did not jump into or through clouds, despite the appearance they did. *See* Transcript Volume 2 at 108-115 for Mr. McCowan's explanation that while video footage in R-25 appeared to depict him and his fellow jumpers descending through a cloud, none of the jumpers actually went through a cloud.

[55] *Alphin*, FAA Order No. 1997-9 at 12 (citing *In re Valley Air Services, Inc.*, FAA Order No. 1996-15 at 7 (Order Denying Reconsideration, May 3, 1996))(stating that logic, depth, and persuasiveness are the criteria for evaluating expert testimony).

[56] *See* Transcript Volume 2 at 5-15. In addition to owning a parachute operating center in Wilmington, OH for ten years from the mid-70s to mid-80s and logging about 10,240 parachute jumps, Mr. McCowan holds a commercial multi-engine pilot rating, with about 3,500 flight hours. Mr. McCowan began skydiving in 1967 as a member of the Army airborne unit, and continues to skydive today, primarily performing exhibition jumps. He has never, however parachuted at Dillingham Airfield.

[57] *See id.* at 16-22; 24-26; 33-37; 39-40; 45-48 and 52-55.

[58] An example of this admission can be found in the following exchange: Judge Rawald: "So what characteristic do you see that has them coming out of the clouds? The fact that they were there when they weren't there before?"

unrebutted by Mr. McCowan.

c. The GoPro videos

The Complainant submitted video footage obtained from the Respondent in discovery that was filmed with GoPro cameras worn by its videographers during some of the parachute jumps in question.[59] Great weight is afforded to the GoPro videos with respect to the videographers wearing the cameras, because the footage accurately portrays what occurred with respect to the videographers.[60] With respect to filming skydiving, Mr. Sanders stated that "[y]ou really need to get in the sky,"[61] and specified that "you can't tell what somebody is falling through accurately unless you are the person doing it or you are right above them," later clarifying that "[s]traight below would work."[62] Footage from three of the GoPro videos provide reliable, probative and substantial evidence to conclude that, more likely than not, the videographer in each video parachuted into or through a cloud.

The GoPro video provided for the March 25, 2014 jump of Joel Galino depicts the videographer descending into a cloud beginning at the 00:54 mark.[63] The GoPro camera depicts nothing but clouds at the 00:54 mark until the 00:58 mark, with moisture collecting on the lens at the 00:56 mark. While the videographer is looking out towards the tandem jumpers for the beginning of the video, he appears to shift his view more downwards at the 00:50 time mark, at which time a large cloud is visible below him. After viewing this footage, Mr. McCowan, the government's expert in skydiving, opined that the videographer went through a cloud, stating:

> The video photographer did go through the cloud. You can see the moisture on the lens. You can see the cloud through his camera as he is going through the cloud. And he is deploying his canopy as he is coming out of the bottom of it.[64]

Mr. McCowan testified further that "[t]hat's typical on a lens of going through moisture, you will get condensation on the lens," and stated that he was basing his opinion on "multiple videos …

The Witness: "Again, yes, sir. They are pretty much in full flight now, so the canopies are opening and they are coming through the cloud now." Judge Rawald: "Okay. Once again, you are saying coming through the cloud, but I want to understand what characteristic are you seeing in the image that tells you they are coming through the cloud?" The Witness: "Again, they were not there prior." Judge Rawald: "Okay." The Witness: "Now they are." *See id.* at 48.

[59] Agency Exs. A-32 through 35 and A-38.

[60] Because the tandem parachutists were not wearing the GoPro cameras, the angle, distance and cloud coverage issues raised regarding the reliability of the ground footage remain, thus rendering the GoPro footage of less value when ascertaining whether or not any of the tandem parachutists descended into or through a cloud.

[61] Transcript Volume 2 at 286.

[62] *Id.* at 322 and 324.

[63] Agency Ex. A-38.

[64] Transcript Volume 2 at 64.

[he had] seen before."[65]

The GoPro video provided for Bei Wu's March 25, 2014 jump also depicts the videographer descending into a cloud.[66] The GoPro video depicts nothing but clouds beginning at the 00:53 mark until approximately the 1:01 mark. The videographer glances down at the 00:51 time mark revealing the clouds below him. While the videographer glances back up at the tandem jumpers quickly, he redirects his view back downward at the 00:53 time mark, at which point the ground is blocked by clouds. The footage continues to show nothing but clouds until the 1:05 time mark. After viewing this footage, Mr. McCowan opined that "[t]he video photographer did go through the clouds," explaining that "there is a cloud below him as he is in freefall and as he gets to the cloud, he opens his main parachute, which stands him up and he continues to go through the cloud as his main parachute is opening."[67]

GoPro footage from Liyun Liu's March 25, 2014 jump also depicts the videographer descending into a cloud.[68] The videographer looks straight down at the 00:48 mark based upon the view of the ocean and ground. At this point a cloud is in view, and as the video continues to the 00:50 mark, the videographer appears to descend through the cloud. In addition to opining that the videographer in this video went into or through a cloud, Mr. McCowan stated that at the 00:51 mark you "can't see the ground."[69]

Although the GoPro video from Jonathan Fenell's jump displayed some clouds in the sky, the footage does not depict either the videographer or tandem parachutists being filmed going into or through a cloud.[70] While Mr. McCowan testified that the footage depicted the videographer "going … through a cloud,"[71] he admittedly relied upon "the haze" in the footage, explaining that it is "part of the cloud."[72] Mr. McCowan went on to testify that at the 00:47 mark "you can see the cloud all around [the videographer]," explaining that the tandem master starts "to disappear as the cameraman is going through the cloud."[73] However, a review of the footage indicates that the videographer appears to be looking out towards the tandem jumpers until the

[65] *Id.* at 65.
[66] Agency Ex. A-33.
[67] Transcript Volume 2 at 43-44.
[68] Agency Ex. A-35.
[69] Transcript Volume 2 at 150-151.
[70] Agency Ex. A-32.
[71] Transcript Volume 2 at 96.
[72] *Id.* at 97.
[73] *Id.* at 100-101.

00:48 time mark, at which point the ground and ocean are visible. Given the fact that the videographer filming Mr. Fenell appears to first look down at the 00:48 mark, at which time the ground and ocean are visible, the preponderance of the reliable, probative and substantial evidence does not support a finding that the videographer descended into or through a cloud in this video.

Mr. Sanders's testimony that the videographers depicted in exhibits A-33, A-35, and A-38 did not descend into or through the clouds is not convincing. When initially asked whether the jumper in exhibit A-33 went into or through a cloud, Mr. Sanders responded "[n]ot a cloud that would obscure your view of the ground with your eyes, no."[74] When questioned about the caveat contained in his answer regarding obscuring the view of the ground, Mr. Sanders subsequently opined that the jumper did not go through a cloud, but his explanation regarding moisture in the air was not convincing.[75]

Mr. Sanders opined that the videographer in exhibit A-35 did not descend through a cloud, stating:

> There's no time that the camera looks straight down. It's always looking out in front. It's always looking out in front. It's also the tandems are clearly opening up in the drier air and they're open above. The -- the camerapeople here are opening at cloud level. So, there's lots of moisture on the lens as well.[76]

Despite Mr. Sanders assertion that the videographer never looked down, footage indicates that he looked down around the 00:49 time mark. The footage at this point depicts mostly clouds, with some ground and ocean to the right; as the footage continues, the view is completely obscured by clouds, indicating the videographer went into a cloud. With respect to the videographer in exhibit A-38, Mr. Sanders opined "I believe they did not go through a cloud, that their lens fogged as they hit the moisture layer."[77]

With respect to the GoPro videos, Mr. Sanders's testimony is not logical, deep or

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[74] Transcript Volume 3 at 64.

[75] *See id.* at 65-66 for the following exchange: Judge Rawald: "So, he could be going through a cloud, but it wouldn't be enough to obscure his vision?" The Witness: "No, I think there is ... there's moisture in the air." Judge Rawald: "Okay." The Witness: "And I also think that the camera is nowhere near what our eyes are." Judge Rawald: "Okay." The Witness: "And so, I think and I've had this happen to me many times where my ringsight will fog up, my lens will fog up, but I can see through it and there's water vapor, but I've never lost sight of the ground." Judge Rawald: "So, in your opinion, did he go through a cloud, or did he not go through a cloud?" The Witness: "No."

[76] *Id.* at 66.

[77] *Id.* at 67.

persuasive.[78] Compared to the detailed explanation of flaws with the Hinshaw videos, Mr. Sanders appeared to stretch to find reasons to explain why the footage did not depict parachutists descending into or through clouds, relying primarily on the theory that moisture in the air can cause a camera lens to fog up and including caveats in his testimony. This attempt to stretch logic appears in large part due to Mr. Sanders's bias in favor of the Respondent. As previously mentioned, Mr. Sanders is a longtime friend of Mr. Banal and has been allowed to skydive for free with the Respondent for the past 14 years. He was also compensated at a rate of $500 an hour for his testimony. In the case of the GoPro videos, then, Mr. Sanders's bias combined with the lack of depth or logic to his testimony limit the credibility of his testimony.

Accordingly, the undersigned judge finds that a preponderance of the reliable, probative, and substantial evidence supports a finding that on March 25, 2014, three parachutists affiliated with the Respondent descended into or through clouds.[79]

6. Is the Respondent a Responsible Party Under the Applicable Regulations?

A violation of 14 C.F.R. § 105.17(a) occurs, *inter alia*, when a person, including a corporation,[80] conducts a parachute operation "into or through a cloud." A parachute operation is defined as:

> the performance of all activity for the purpose of, or in support of, a parachute jump or a parachute drop. This parachute operation can involve, but is not limited to, the following persons: parachutist, parachutist in command and passenger in tandem parachute operations, drop zone or owner or operator, jump master, certificated parachute rigger, or pilot.[81]

The definition of parachute operation contained in 14 C.F.R. § 105.3 appears to contain a typographical error, and was intended to read, "drop zone owner or operator," as opposed to "drop zone or owner or operator."[82]

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[78] *Alphin*, FAA Order No. 1997-9 at 12.
[79] *See* Agency Ex. A-33; A35 and A-38.
[80] *See* 14 C.F.R. § 1.1.
[81] 14 C.F.R. § 105.3.
[82] A notice of proposed rulemaking dated April 13, 1999 proposed, *inter alia*, to define previously undefined terms, including "parachute operation." Parachute Operations, 64 FR 18302 (Proposed Apr. 13, 1999) (to be codified at 14 C.F.R. Parts 65, 91, 105, 119). A brief discussion of the proposal indicated that the "term 'parachute operation' would be added and defined as any activity involving the use of a parachute for a controlled descent to the surface," with the actual proposed amendment defining parachute operation as: "any activity that includes a parachute jump or a parachute drop. This activity involves, but is not limited to, the following persons: parachutist, tandem parachute operation, drop zone owner or operator, certificated parachute rigger, pilot, or appropriate FAA personnel." *See id.* The undersigned judge recommends that this typographical error be corrected in a future rulemaking by removing the "or" between "drop zone" and "owner," so that it reads "drop zone owner or operator."

The Respondent is a drop zone operator at Dillingham Airfield.[83] In support of this finding, the Respondent authored a letter to the Honolulu Control Facility declaring its intent to "conduct a series of parachute operations at Dillingham Airfield … from January 16, 2014 through December 16, 2015."[84] When discussing his ten years as a drop zone operator, Mr. McCowan explained that he controlled all business operations at the drop zone, including the pilots' actions.[85] Similarly, in maintaining an onsite office at Dillingham Airfield, where either Mr. Banal or a manger was present during all parachute activities, the Respondent controlled the drop zone, as well as communication with its pilots.[86]

As a drop zone operator, the Respondent is independently liable for ensuring parachute operations are conducted in accordance with the clear language of the regulation. In its posthearing brief, the Respondent pointed to a National Transportation Safety Board (NTSB) case, *Administrator v. Foss*, for the proposition that liability is limited to the parachutist and the pilot in command.[87] Importantly, NTSB cases "are not binding on the Administrator."[88] Additionally, the NTSB's reliance upon the FAA Administrator's brief in that case, which described a theory of "dual responsibility" for both the pilot and the parachutists during skydiving operations, did not discuss the role or responsibility of the other parties referenced in the current regulations. Of note, *Foss* dealt with 14 C.F.R. §105.29,[89] which prohibited making a "parachute jump," and has since been replaced with 14 C.F.R. § 105.17, which, as previously discussed, prohibits conducting a "parachute operation," an act that was defined to include the actions of a drop zone operator. Because *Foss* did not address the role of other parties and in light of the change in the regulations since *Foss*, the NTSB's decision cannot be interpreted to

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[83] A "drop zone" is a pre-determined area where parachutists land after making an intentional parachute jump. *See* 14 C.F.R. § 105.3.

[84] Agency Ex. A-4.

[85] When asked "did you control the pilot in any way once he took off for a flight to drop skydivers?" Mr. McCowan replied: "Yes, we had radio communication with the pilot, with the aircraft. If something were to change on the ground, as clouds moving in or wind picking up, and mainly the wind picking up, we could call the pilot and tell him to not drop the jumpers." Transcript Volume 2 at 173-174.

[86] *See id.* at 232 for the following exchange with Mr. Banal: Q: "And I think you mentioned that you frequently talk to the pilots on the radio?" A: "Not frequently. Only when the manager is not around. He is in charge for that now. But, yes, I do sometimes. I take the radio to see if there is any information, I will give the information what I can see from the ground, but --" Q: "And you mentioned if you are not around, there is a manager there that could--" A: "Yes, there is a manager, yes." Q: "-- and that manager, assistant manager is speaking frequently to the aircraft when you are not there?" A: "They will. We need to have a radio to communicate to the plane all the time."

[87] *Administrator v. Foss,* NTSB Order No. EA-4631 (Opinion and Order, Feb. 17, 1998).

[88] *In re Wendt*, FAA Order No. 1993-9 at 2 (Decision and Order, Mar. 24, 1993) (*citing In re Terry & Menne*, FAA Order No. 1991-12 at 3 n.6 (Decision and Order, Apr. 10, 1991)).

[89] *See* 14 C.F.R. § 105.29 (1998).

stand for the proposition that pilots and parachutists currently have "exclusive responsibility" for violations committed during a parachute operation. A look at the relevant regulatory language governing parachute operations directs that drop zone operators, among others, have a role and responsibility to ensure regulatory compliance during parachute operations.[90]

Accordingly, the undersigned judge finds that a drop zone operator, such as the Respondent, can be held liable for parachute operations that result in a parachutist descending into or through a cloud in violation of 14 C.F.R. § 105.17(a).

7. Affirmative Defense: Personnel Were Independent Contractors

In addition to denying any violations occurred, the Respondent asserted that it cannot be held liable for the actions of its independent contractors. Under 14 C.F.R. § 13.224(c), the burden of proof shifts to the party asserting an affirmative defense.[91]

It is not disputed that the pilots, tandem instructors and videographers that participated in the subject parachute activities were independent contractors.[92] In support of its argument, the Respondent relied upon the Administrator's holding in *Federal Express* that:

> The general rule encompasses the notion that employers should not be held responsible for activities they do not control and, in many instances, lack the knowledge and resources to direct … The exceptions, in the main, reflect special situations where the employer is in the best position to identify, minimize, and administer the risks involved in the contractor's activities.[93]

However, the Respondent's reliance is misplaced, as *Federal Express* is distinguishable from this case. In applying an agency theory of liability in *Federal Express*, the key question was "whether Federal Express *offered* or *accepted* hazardous materials," or whether they "were responsible for *Scharff's* improper offer or acceptance of hazardous materials in air transportation."[94] In comparison, the key question in the case at hand is whether the Respondent conducted parachute operations during any of the alleged violations, as opposed to whether the Respondent controlled the actions of its independent contractors. As the drop zone operator, the Respondent conducted parachute operations during each of the alleged violations, thus rendering

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[90] *See* 14 C.F.R. §§ 105.3 and 105.17(a).
[91] *See* 14 C.F.R. § 13.224(c).
[92] Mr. Banal's testimony to this fact was supported by 1099s, contracts and waivers. *See* Transcript Volume 2 at 191-192; *see also* Agency Exs. A-41 through A-51.
[93] *See In re Federal Express Corp.*, FAA Order No. 2002-20 at 6 (Decision and Order, Aug. 5, 2002) (finding the Respondent was not liable for the actions of its independent contractors because an exception to the general rule of non-liability for independent contractors was not presented) (*citing Mini Mart v. Direct Sales Tire Co.*, 889 F.2d 182, 184 (8th Cir. 1989)).
[94] *Federal Express Corp.*, FAA Order No. 2002-20 at 5.

it independently liable under the regulations. No evidence or testimony presented indicates that the Respondent delegated any of its duties as a drop zone operator to any independent contractors. In fact, Mr. Banal admitted that either himself, or a manager, were present during parachute activities, maintaining communication with the pilots.[95]

Accordingly, the Respondent was not absolved from its liability under the applicable regulations by the fact that the pilots in command and the parachutists affiliated with the Respondent were independent contractors.

8. Alleged Violations of 14 C.F.R. § 91.13(a)

The Complainant also alleged the Respondent committed residual violations of 14 C.F.R. § 91.13(a), which prohibits the operation of "an aircraft in a careless or reckless manner so as to endanger the life or property of another."[96] While the Complainant's expert, Mr. McCowan, testified regarding the hazards of parachuting into or through clouds, the undersigned judge notes that the issue at hand involves Part 105 violations for parachute operations, as opposed to Part 91 violations dealing with the operation of an aircraft. Despite the inherent dangers associated with the reckless behavior of parachuting into or through clouds, there is no evidence that the aircraft involved in this case were operated in a careless or reckless manner. Unlike the case at hand, cases in which the Administrator has upheld violations of 14 C.F.R. § 91.13(a) have involved clear instances of careless or reckless aircraft operation.[97] Accordingly, the undersigned judge finds the Complainant failed to prove by a preponderance of the reliable, probative, and substantial evidence that the Respondent committed any violations of 14 C.F.R. § 91.13(a).

9. Civil Penalty Amount

As previously explained, the undersigned judge has determined that the Respondent committed three violations of 14 C.F.R. § 105.17(a) on March 25, 2014. The remaining issue is the appropriate civil penalty to be assessed against the Respondent for these violations.

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[95] *See* Transcript Volume 2 at 232.

[96] The Complainant stated that it did not consider these residual violations when assessing the proposed civil penalty amount. *See* May 19, 2016 Prehearing Conference Report.

[97] *See In re Fenner*, FAA Order No. 1996-17 (Decision and Order, May 3, 1996) (upholding a violation of 14 C.F.R. § 91.13(a) when an airplane flew too close to a helicopter, resulting in a near mid-air collision). *See also In re Rushmore Helicopters, Inc.*, FAA Order No. 2012-8 (Decision and Order, Oct. 11, 2012) (upholding a violation of 14 C.F.R. § 91.13(a) when a helicopter flew with duct tape covering the fuel filler port, leading to the risk of fuel contamination and fire); *In re GoJet Airlines, LLC*, FAA Order No. 2012-5 (Decision and Order, May 22, 2012) (upholding a residual violation of 14 C.F.R. § 91.13(a) after the complainant established the Respondent operated an unworthy aircraft).

In its posthearing brief, the Complainant explained that it sought $11,000 per violation in Case No. 2014WP130012 and $5,500 per violation in Case No. 2014WP130023.[98] The Complainant argued for the lower civil penalty assessment for the alleged violations in Case No. 2014WP130023 because it viewed these violations, which allegedly occurred on March 22 and 25, 2014, as less egregious and dangerous than the alleged violations in Case No. 2014WP130012 due to the decreased cloud cover.[99] Applying the Complainant's proposed civil penalty of $5,500 per violation for the three established March 25, 2014 violations would result in a civil penalty of $16,500.

The burden of justifying the proposed civil penalty falls upon the Complainant.[100] In attempting to meet this burden, the Complainant did not, however, provide testimonial evidence about how the proposed civil penalty amount was assessed. The Complainant did submit into evidence FAA Order No. 2150.3B, which, in Paragraph 4 of Chapter 7, provides mitigating and aggravating factors to consider when assessing a civil penalty.[101] Other than describing the alleged violations as operational, reckless and possibly intentional,[102] the Complainant never explained how it considered these factors in assessing its proposed civil penalty. Therefore, the Complainant's requested civil penalty deserves no deference, but does set the ceiling for considering the appropriate penalty in this case.

A civil penalty of $5,500 per violation would fall within the maximum range as described in the sanction guidance.[103] In its posthearing brief, the Complainant stated that the civil penalty assessment focused on the degree of hazard associated with conducting parachute operations into or through clouds.[104] Relying upon testimony provided by T.K. Hinshaw and Mr. McCowan, the Complainant contended that parachuting into or through a cloud poses several hazards, including colliding into another parachutist, glider or plane, or landing in the nearby mountains or oceans,

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[98] Pursuant to 49 U.S.C. § 46301(a)(5) and 14 C.F.R. § 13.305(a)(3), the Respondent is subject to a civil penalty not to exceed $11,000 for each of the alleged violations.
[99] Complainant's Closing Argument at 15.
[100] *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).
[101] *See* Agency Ex. A-1 at 9-14.
[102] Complainant's Closing Argument at 15.
[103] The civil penalty ranges contained in Appendix B of FAA Order No. 2150.3B contain three different proposed ranges for minimum, moderate or maximum violations, and specifically notes that "the middle of each recommended sanction range would be for a single violation without aggravating or mitigating factors." Agency Ex. A-1 at 33. The sanction range dealing with small businesses that do 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 id.* at 37.
[104] Complainant's Closing Argument at 15.

instead of the designated drop zone.[105] While acknowledging that a midair collision is unlikely, the Complainant emphasized the high risk of death or serious injury if a collision occurred.

Conversely, the Respondent argued in its posthearing brief that the civil penalty sought by the Complainant is excessive and not supported by the relevant guidance, because the Respondent did not act in a careless or reckless manner.[106] The Respondent asserts that if any penalty is assessed, it should be $550 per violation, which, in light of the undersigned judge's findings, would result in a total civil penalty of $1,650.[107] To support its position, the Respondent notes its clean history, with no violations of 14 C.F.R. § 105.17(a), as well as its compliance with the Complainant's investigation. The Respondent cited to the portion of FAA Order No. 2150.3B dealing with multiple violations that states:

> [o]f particular importance in determining an appropriate sanction for numerous multiple violations is the degree of the alleged violator's culpability for the multiple violations. A lower degree of culpability is present when the alleged violator neither knew nor was likely to discover the continuing violations.[108]

The Respondent focused on the fact that it was not the pilot or parachutist during any of the alleged violations, reiterating the difficulties of ascertaining whether or not a parachutist descended through the clouds from the ground. During the hearing, Mr. Banal stated that due to the variable weather at Dillingham Airfield, an aircraft needs to ascend to the jump point altitude in order to determine "whether or not to drop its jumpers."[109] In addition to reminding the pilots of the prohibition of jumping into or through clouds, both verbally and through signage in the planes, Mr. Banal testified that he has threatened to terminate the contracts of any individuals that break the rules.[110] While Mr. Banal testified that he supports a pilot's decision to call off a run, stating that his aircraft have descended with loads of jumpers on board "because it was too cloudy to conduct parachute jumping operations," he reiterated his contention that the final decision of whether or not to jump is between the pilot and the parachutist, more so with the latter.[111]

An appropriate civil penalty must reflect the totality of the circumstances surrounding the

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[105] *See* Transcript Volume 1 at 183 and 224 and Transcript Volume 2 at 69-70.
[106] Respondent's Closing Argument at 12.
[107] A $550 civil penalty is the bare minimum contained in the FAA's Sanction Table. *See* Agency Ex. A-1 at 37.
[108] *Id.* at 16.
[109] Transcript Volume 2 at 192-193.
[110] *See id.* at 194-195; 204-206.
[111] *See id.* at 206-207; 209-210.

violation,[112] 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.[113] 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.[114]

While the undersigned judge is not expressly required to follow the provisions of FAA Order No. 2150.3B,[115] it does provide guidance.[116] Further, the Administrator has stated that "similar criteria should be considered in assessing civil penalties in non-hazardous materials types of cases"[117] 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.[118]

The undersigned judge considered all the pertinent factors to assess a civil penalty that will deter future violations by the Respondent and the parachuting industry as a whole. In considering the relevant factors, it is important to note that the Respondent did not raise an affirmative defense of financial hardship regarding its ability to absorb a sanction. Also, 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.[119]

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[112] *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).
[113] *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).
[114] *See* Agency Ex. A-1 at 9-14.
[115] *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).
[116] *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).
[117] *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).
[118] 49 U.S.C. § 46301(e). *See also* 14 C.F.R. § 13.16(c).
[119] *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* Agency Ex. A-1 at 10.

Relying on decisional law to ensure consistent sanctions, the undersigned judge looked to *Fedele*, where the Administrator assessed a $500 civil penalty against an individual parachutist who violated the regulatory imposed cloud clearance requirements.[120] This holding supports a finding that the civil penalty assessed in this case should fall within the applicable minimum sanction range of $550-$2,199 for each established violation, as opposed to the Complainant's request that it be within the maximum range.[121] To establish the appropriate civil penalty amount within the minimum sanction range, the undersigned judge weighed the relevant mitigating and aggravating factors.

While the Respondent is liable under the regulations as the drop zone operator, and admittedly always had personnel present at Dillingham Airfield during parachute operations, all personnel on the plane were independent contractors. The Respondent could communicate with the pilot and parachutists via radio, but could not forcibly prevent an illegal skydiving operation once the plane was in the air. This then lessens the Respondent's culpability.

The Respondent took steps to minimize the possibility that the parachutists would descend through the clouds by posting copies of the pertinent regulations in its aircraft and holding meetings to discuss regulatory compliance. Further, Mr. Banal threatened to suspend or fire any violators. However, Mr. Banal admittedly never fired or suspended anyone related to the violations that occurred on March 25, 2014.[122] Notably, case law directs that "[s]imply reviewing procedures and preexisting responsibilities with employees after an incident does not justify a reduction of a reasonable civil penalty."[123]

The violations in the subject case were not self-reported by the Respondent. Further, the Respondent in fact advertised this type of illegal activity as the Respondent's website contained a client testimonial that referenced parachuting through a cloud.[124] This thereby increases the

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[120] *Fedele*, FAA Order No. 1998-3 at 1.
[121] *See* Agency Ex. A-1 at 37. Notably, the Sanction Guidance Tables in FAA Order No. 2150.3B do not specify which range would apply to parachuting cases. *See* Ex. A-1 *generally*.
[122] *See* Transcript Volume 2 at 224-225.
[123] *Air Carrier*, FAA Order No. 1996-19 at 12 (*citing In re Airport Operator*, FAA Order No. 1991-41 at 7 (Decision and Order, Oct. 31, 1991) (holding that the action of reminding tenants of their existing responsibilities alone does not warrant a reduction in sanction)); *c.f. In re Detroit Metropolitan-Wayne County Airport*, FAA Order No. 1997-23 at 5 (Decision and Order, June 5, 1997) (noting that the "Administrator has indicated that a civil penalty may be reduced on the basis of corrective action, but only where there is sufficient, specific evidence of swift or comprehensive action that is positive in nature, such as sending employees to special training, or instituting programs to ensure compliance with the safety regulations").
[124] A customer review from Johnny Z. on the Respondent's website included the following statement: "The coolest part was falling through the cloud ..." Agency Ex. A-19 at 5.

Respondent's culpability.

In considering the degree of hazard or nature of the violation, the undersigned judge notes that while the probability of harm resulting from parachuting into or through a cloud is low, if harm did occur, it would most certainly result in death or serious injury.[125] With respect to the extent of the violation, by committing multiple violations, the Respondent increased the probability of this danger occurring.

In sum, the violations in the case at hand fall within the minimum civil penalty sanction range. Aggravating factors such as the risk of death or serious harm, the fact that this conduct occurred on multiple occasions, and the use of the illegal activity as a marketing tool, support a civil penalty towards the higher end of the minimum range. However, the mitigating factors, in particular the Respondent's decreased degree of control and culpability, support a civil penalty towards the lower end of the minimum range. Accordingly, in light of all the circumstances, a civil penalty in the middle of the minimum range, in the amount of $1,375 per violation, is appropriate.

Therefore, pursuant to 14 C.F.R. § 13.205(a)(9), **IT IS HEREBY FOUND:**[126]

1. On March 25, 2014, the Respondent committed three violations of 14 C.F.R. § 105.17(a) by conducting parachute operations into or through the clouds.
2. The Complainant failed to prove by a preponderance of reliable and probative evidence the remaining violations alleged within the complaint.

[125] Similar to the testimony offered in this case, the Administrator previously stated "[j]umping through or too near clouds is dangerous … [s]kydivers could collide with each other or with aircraft in the area; they could also land in water and drown." *Fedele*, FAA Order No. 1998-3 at 5.

[126] 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."

AND ORDERED:

The Respondent shall pay a civil penalty in the amount of $4,125.[127]

DOUGLAS M. RAWALD
Administrative Law Judge

Attachments:

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

[127] 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-2014-1116
(Civil Penalty Action)

Appendix A: Complainant's Exhibits

A-1: FAA Order 2150.B
A-2: N900SA Aircraft Records, Blue Ribbon Copy
A-3: N989BW Aircraft Records, Blue Ribbon Copy
A-4: Pacific FAR 105.25 Notification to FAA 2-16-14
A-5: TK Hinshaw Videos, 12-8-13
A-6: TK Hinshaw Declaration Re 12-8-13
A-7: TK Hinshaw Videos, 1-5-14
A-8: TK Hinshaw Declaration Re 1-5-14
A-9: N900SA In-Flight Worksheet 12-8-13
A-10: N900SA Aircraft Flight Record 12-8-13
A-11: N989BW In-Flight Worksheet 1-5-14
A-12: N989BW Aircraft Flight Record 1-5-14
A-13: Hinshaw email Transmittal of 3-25-14 YouTube Video to HNL FSDO
A-14: TK Hinshaw Videos, 3-22-14
A-15: TK Hinshaw Videos, 3-25-14
A-16: TK Hinshaw Declaration Re 3-22-14 & 3-25-14 Flights
A-17: N989BW In-Flight Worksheet 3-22-14
A-18: N989BW In-Flight Worksheet 3-25-14
A-19: Pacific Skydiving Website
A-20: Discovery, Complainant's First Set of Discovery to Respondent served 3-13-15
A-21: Discovery, Respondent's Answers to Interrogatories served 4-13-15
A-22: Discovery, Complainant's Second Set of Discovery to Respondent served 5-21-15
A-23: Discovery, Response to Complainant's Second Set of Discovery to Respondent served 6-4-15
A-24: Subpoena & Cover Letter to Respondent dated 8-21-14
A-25: Respondent's Response to Subpoena Duces Tecum faxed 9-15-14
A-26: Respondent's Supplemental Response to Subpoena Duces Tecum, 11-5-14
A-27: Pacific Jumper Lists, 1-5-14
A-28: Pacific Jumper Lists, 12-8-13
A-29: Jumper Lists & Waivers, 3-22-14
A-30: Jumper Lists & Waivers, 3-25-14
A-31: DSC06244 (3-22-14 Pacific Photo of Jonathan Fenell)
A-32: 3-22-14 Pacific Video of Jonathan Fenell Jump
A-33: 3-25-14 Pacific Video of Bei Wu Jump
A-34: 3-25-14 Pacific Video of Bei Wu Landing

A-35: 3-25-14 Pacific Video of Liyun Liu Jump
A-36: GOPR2143 (3-25 Pacific Photo from Liyun Liu Photos)
A-37: G0025877 (3-25-14 Pacific Photo of Galino 1)
A-38: 3-25-14 Pacific Video of Joel Galino Jump
A-39: G0065943 (3-25-14 Pacific Photo of Galino 2)
A-40: G0075952 (3-25-14 Pacific Photo of Galino 3)
A-41: Pacific 1099s
A-42: Dasilva, Marcelo, Waiver, Contracts, 1099
A-43: Maynard, James, Waiver, Contract, 1099
A-44: Meyer, Greg (Colorado), Waiver, Contracts, 1099
A-45: Nascimento, Manuel Antonio (Tony), Waiver, Contracts, 1099
A-46: Pacheco, Randy, Waiver, Contracts, 1099
A-47: Rewa, Piri, Waiver, Contracts 1099
A-48: Richards, Gerry, Pilot Contract, 1099
A-49: Soverns, Reno, Waiver, Contract, 1099
A-50: Suvosrov, Victor, Waiver, Contracts, 1099
A-51: Wolfaardt, Johann, Waiver, Contracts, 1099
A-52: Resume, Expert W Paul McCowan
A-53: AirNav_PHDH - Dillingham Airfield
A-54: Hawaiian_Islands Sectional Chart
A-55: AC_105-2E
A-56: Google Earth Overview of Dillingham Field

Appendix B: Respondent's Exhibits

R-1: [*Withdrawn*]
R-2: [*Withdrawn*]
R-3: FAA Order 8900.1
R-4: [*Withdrawn*]
R-5: [*Withdrawn*]
R-6: Jump Recap Sheets
R-7: [*Not Offered*]
R-8: [*Not Offered*]
R-9: [*Not Offered*]
R-10: [*Not Offered*]
R-11: [*Not Offered*]
R-12: Video from SD HI Aircraft POV Cam
R-13: [*Withdrawn*]
R-14: Deposition of Danny Billman
R-15: AWP-1-20140911-01-Deely King Pang – Dennis King – Final Response_2014_09_26
R-16: Dennis King letter to HPD
R-17: EIR 2014WP130012 – 2013-12-08 – 2014-01-05
R-18: EIR 2014WP130023 – 2014-03-22 – 2014-03-25
R-19: Facebook Posting as of 2015-05-04 – See p.22
R-20: IMG_3970 – Cloud Clearance Notice in Aircraft 1
R-21: IMG_3872 – Cloud Clearance Notice in Aircraft 2
R-22: [*Withdrawn*]
R-23: Skydive Hawaii_Old_Skydiving_First time Jumpers – IKORS
R-24: Tom Sanders Resume
R-25: Paul McCowan Skydiving video
R-26: Video camera manual excerpt