UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: FROSTAD ATELIER, INC.

FAA Order No. 2013-5

FDMS No. FAA-2011-0294[1]

Served: September 5, 2013

DECISION AND ORDER[2]

I. Introduction

Complainant Federal Aviation Administration ("Complainant") has appealed the written initial decision of Administrative Law Judge ("ALJ") Richard C. Goodwin

[1] Materials filed in the FAA Hearing Docket (except for materials in security cases or materials under seal) are also available for viewing at the following Internet address: *www.regulations.gov*.

In the instant case, the ALJ sealed most of the docket in an order dated August 10, 2012. The ALJ explained that the sealed part of the docket "contain[ed] non-segregable safety and security related information, the withholding of which from public disclosure [was] consistent with the safety and security responsibilities of the FAA." (Initial Decision at 8 n.9.)

The ALJ wrote that his authority for sealing the docket was 14 C.F.R. Part 193 (entitled "Protection of Voluntarily Submitted Information") as well as 14 C.F.R. § 13.226(a) (authorizing an ALJ to order that any information in the record be withheld from public disclosure). (Initial Decision at 8 n.9.) The ALJ also stated that withholding the sealed portion of the docket was in the public interest. (*Id.*)

Subsequently, in his written initial decision, the ALJ wrote that the docket, including the post-hearing briefs, would remain sealed, for the reasons stated in his order sealing the docket. (Initial Decision at 8 n.9.) The ALJ, however, did not seal his written initial decision (a copy of which is attached), because, he wrote, nothing in it required withholding from public disclosure.

The instant decision of the FAA decisionmaker, the Administrator, is not sealed for the same reason.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

assessing Respondent Frostad Atelier,[3] Inc. ("Respondent") a $5,000 civil penalty for violations of the Hazardous Material Regulations ("HMR"), 49 C.F.R. Parts 171-178.[4] In its appeal brief, Complainant requests an increase in the civil penalty assessed by the ALJ to $37,500. This decision raises the civil penalty from $5,000 to $20,000.

II. Facts

Respondent is a small bronze casting foundry. (Exh. C-9;[5] Tr. 208-209.[6])

[3] "Frostad" is the owner's last name, while "Atelier" is from the French and means "workshop." *See* www.merriam-webster.com.

[4] Specifically, the ALJ found that Respondent violated the following regulations: 49 C.F.R. §§ 171.2(e) (no person may offer a hazmat for transportation in commerce unless it is properly classed, described, packaged, labeled, and in condition for shipment), 172.200(a) (offeror of hazmat must properly describe the hazmat on the shipping paper), 172.202(a)(1) (shipping paper must include the hazmat's identification number), 172.202(a)(2) (shipping paper must include the hazmat's proper shipping name), 172.202(a)(3) (shipping paper must include the hazard class or division number), 172.202(a)(6) (shipping paper must include the total net mass per package), 172.202(a)(7) (shipping paper must include the number and type of packages), 172.204(a) (offeror must certify that hazmat is offered according to this subchapter by printing one of two certifications) or (c)(1) (providing a certification that can be used in place of the certification required by (a)), 172.204(c)(2) (offeror for transportation by air must provide two copies of certification), 172.204(c)(3) (offeror must add to the required certification the statement "I declare that all of the applicable air transport requirements have been met"), 172.301(a) (offeror of non-bulk packaging must mark the package with the proper shipping name and identification number), 172.600 (no person may offer a hazmat unless emergency response information is immediately available for use at all times the hazmat is present and emergency response information, including the emergency telephone number, is immediately available to representative of a government agency responding to a hazmat incident or conducting an investigation involving a hazmat), 172.602(b)(3) (required information must be presented either (i) on a shipping paper; (ii) in another type of document that includes both the basic description and technical name of the hazardous material and the required emergency response information; or (iii) in a written notice to pilot-in-command or a dangerous cargo manifest), 172.604(a)(3) (offeror of hazmat must provide an emergency response telephone number), and 173.1(b) (shipment of hazmat that is not prepared according to this subchapter may not be offered for transportation and each hazmat employer must ensure that each hazmat employee is trained according to this subchapter's requirements and persons who offer hazmat for transportation must instruct their officers, agents, and employees having any responsibility for preparing hazmat for shipment as to applicable regulations in this subchapter).

The Appendix contains the text of these regulations.

[5] Exh. C-9 refers to Complainant's Exhibit 9. Similarly, Exh. R-1, R-2, etc. refer to Respondent's Exhibits.

[6] Tr. is used for citations to the transcript of the hearing.

Ms. Ronda ("Ronnie") Frostad was an owner, operator, and employee of Respondent. (*Id*.) Ms. Frostad testified that Respondent had "probably" six employees in 2010. (Tr. 251.)

Respondent is located in McClellan, California, where Ms. Frostad sculpts and produces bronze art sculptures for artists. (*Id.*) Respondent ships the sculptures by truck to their destinations, and Ms. Frostad and a small crew travel by air to install the sculptures. (Exh. C-9.) Ms. Frostad testified that they apply chemicals to the sculptures with heat from a propane torch through a process called "patinization." (Tr. 212.) Ms. Frostad and her employees wear protective gear, including gloves and a chemical respirator, when performing this work. (Tr. 259, 261.) Some of her employees – in particular, welders – wear leather outerwear, goggles, and face masks. (Tr. 262.)

Respondent orders chemicals from their manufacturers to use in its business. (Tr. 256-57.) The manufacturers enclose appropriate Material Safety Data Sheets ("MSDS") with each of Respondent's orders. (*Id.*)

On May 29, 2010, Ms. Frostad was returning from Springfield, Kentucky, where she and her crew of two employees had installed a sculpture of Abraham Lincoln at Springfield, Kentucky's new courthouse. (*Id*.; Tr. 9, 11, 209.) Ms. Frostad and her crew were ticketed passengers on Southwest Airlines ("Southwest") Flight No. 2409, departing Louisville, Kentucky, for Sacramento, California, with an aircraft change in Chicago. (Tr. 10-11.)

At the Louisville International Airport, Transportation Security Administration ("TSA") agents searched a bag checked by Ms. Frostad. They found an undeclared shipment of hazardous materials: a clear plastic zip-type bag containing a 16.4-ounce

cylinder of propane and an 8-ounce spray can of WD-40. (Exh. C-3, C-4, C-9.) The HMR classify both materials as hazardous. (Tr. 191.) There were no hazardous materials labels, markings, warnings, or other information required under the HMR on the bag. Respondent admitted that its employees had not taken the HMR-required training in the transport of hazardous materials by air. (Tr. 264.)

Signs warning about the transportation of hazardous materials by air were displayed at the airport. There was a large poster at a line through which all passengers go. This sign warned passengers about the dangers of packing hazardous materials, including flammable liquids and aerosols, in their luggage. The sign advised passengers that "You must declare your hazardous materials to the airline," and warned that "Violators of the [HMR] may be subject to civil penalty of up to $110,000 for each violation and in appropriate cases, criminal penalty of up to 10 years imprisonment." (Tr. 43; Exh. C-1 at 2.) Additionally, there were warning signs at each airline ticket counter and in each baggage well. (Tr. 43, 44.) Ms. Frostad testified, however, that she did not see any of the hazardous materials signs. (Tr. 263, 264.)

The proper shipping name for propane is "Liquid petroleum gas." (Tr. 165-170; Exh. C-7.) Propane's hazard class is 2.1 (flammable gas), and its identification number is UN 1075. The HMR prohibit shipments of propane on passenger aircraft. (Tr. 169; 49 C.F.R. § 172.101, Table of Hazmat; and Exh. C-7 at 5.) The correct label for propane is "FLAMMABLE GAS."

As for the WD-40, its proper shipping name is "Aerosols, flammable," its hazard class is 2.1 (flammable gas), and its identification number is UN 1950. (49 C.F.R. § 172.101, Table of Hazmat; Exh. C-6 at 3.) The correct label for the WD-40 is

"FLAMMABLE GAS." According to Complainant's witness, Pershameron Cartrice Dye, Manager of the FAA's Atlanta Hazmat Field Office (Tr. 125), WD-40 may be shipped by air under 49 C.F.R. § 173.306 (entitled "Limited quantities of compressed gases") if the quantity does not exceed 4 fluid ounces per container, but Respondent offered a container filled with 8 fluid ounces of WD-40 for shipment by air. (Tr. 162-163.)

Ms. Frostad testified at the hearing, and the ALJ found that "she generally was a credible witness." (Initial Decision at 4.) Ms. Frostad testified that she did not pack the propane and WD-40 and did not know that they were in the bag until after these materials were discovered by the TSA agents. She further testified that one of her employees, who was unfamiliar with flying and afraid of flying, packed the propane and WD-40. (Tr. 213-27, 260; *see also* Exh. C-9 at 1.) Ms. Frostad testified that she never supervises her employees when they are packing the baggage. (Tr. 221.)

Ms. Frostad further testified that she never travels with propane. (Tr. 215.) Her company policy was to purchase propane locally to avoid traveling with it. (*Id.*) As for the WD-40, Ms. Frostad denied ever using it outside of the foundry and was baffled as to why it was in her baggage. (Tr. 216, 226.) None of her employees told her that they were packing propane or WD-40. (Tr. 226.)

III. ALJ's Decision

After a hearing, the ALJ found that Complainant had sustained its burden of proof regarding the violations. The ALJ held that Respondent was responsible for the violations because: (1) the trip was on Respondent's behalf; (2) employers are liable for their employees' actions within the scope of employment; and (3) Respondent's

employee packed the hazardous materials as part of the completion of the job in Springfield.

The ALJ wrote that it was not necessary for Complainant to show that Respondent or its employee actually knew the contents of Ms. Frostad's luggage or the hazardous nature of the propane and WD-40. The ALJ pointed out that under the Federal hazardous materials transportation statute,[7] any person, including any corporation,[8] who "knowingly" violates the statute or a regulation issued under the statute is subject to a civil penalty. 49 U.S.C. § 5123(a)(1); *see also* 14 C.F.R. § 13.16(c) (to the same effect).[9] The ALJ stated that the evidence proved that Respondent had actual knowledge through an employee that it was offering the luggage containing the propane and WD-40 for air transport, and that such knowledge was sufficient to prove that Respondent had acted "knowingly."

The ALJ also wrote that the statute does not require knowledge of the law. Persons are liable even if they do not know that they are breaking the law, the ALJ wrote, citing *Riverdale Mills Corp.*, FAA Order No. 2003-10 at 5 (September 12, 2003) and *Smalling*, FAA Order No. 94-31 at 7 (October 5, 1994).

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[7] 49 U.S.C. §§ 5101-5127.

[8] The definition of "person" in the HMR includes corporations and companies. 49 C.F.R. § 171.8.

[9] Under the statute:

A person acts knowingly when –

> (A) the person has actual knowledge of the facts giving rise to the violation; or
> (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

Id.; see also 14 C.F.R. § 13.16(c)(1)-(3) (to the same effect).

The ALJ held that the various hazardous materials warning signs at the airport provided "ample warning" to passengers about the risks associated with travel with hazardous materials. The ALJ found it irrelevant that Ms. Frostad testified that she did not see the signs because there was no duty to warn.

The ALJ held that the $37,500 civil penalty sought by Complainant was too high and that $5,000 was appropriate instead. The ALJ stated that there was only a single underlying act, even though Complainant argued that for sanction purposes there were five separate violation groupings (involving required shipping papers, marking, labeling, emergency response information, and training). (Initial Decision at 8.) The ALJ stated that the proposed civil penalty would do little to advance the agency's policies of compliance and deterrence for this Respondent because Respondent does not need to be educated or lectured about the dangers of hazardous materials. The ALJ wrote:

> On the contrary, it [Respondent] is well aware of the risks broadly associated with chemicals. The very nature of its business warrants and compels such an awareness. Ms. Frostad testified that the company uses over one hundred different chemicals in casting. Employees performing their duties often must wear protective clothing (Tr. 256-62). Ms. Frostad, Respondent's owner and president, also testified that her business customarily bans the transport of these materials for reasons she well understands. It additionally is noteworthy when determining the penalty that Ms. Frostad credibly asserted that she was unaware that the propane and WD-40 had been packed in the company's luggage.

The ALJ also wrote that the proposed civil penalty was much greater than those that Complainant proposed in two other cases that the ALJ considered "roughly comparable":

> (1) *Kaden*, FAA Docket No. CP05NM0024, DMS No. FAA-2005-22081, in which Complainant requested a $3,750 civil penalty (but the ALJ assessed $3,000) for an attempted undeclared shipment of two items forbidden on passenger flights – two cylinders of liquefied petroleum gas (hazard class 2.1, flammable gases) and at least 25 "strike anywhere" matches

(hazard class 4.2, flammable solids).

(2) *Macaulay*, Docket CP02S00029, DMS No. FAA-2002-12591, in which Complainant sought a civil penalty of $3,750 for violations concerning a shipment of three 1-gallon cans of concrete sealer (hazard class 3, packing group III, flammable liquid). The violations involved shipping papers, marking, labeling, emergency response information, and packaging (the hazardous material leaked).

The ALJ stated that he viewed "with skepticism" the agency's request for a civil penalty 10 times the amount sought in *Kaden* and *Macaulay*, especially when the purpose of the sanction guidance was to increase the consistency of sanctions in various cases.

The ALJ did not accept Respondent's affirmative defense that it could not afford to pay the $37,500 civil penalty sought by Complainant because, he held, Respondent's evidence regarding its financial circumstances was insufficient to prove financial hardship. He noted, in particular, that Respondent's tax returns (for years 2009 and 2010) were not signed by an officer of the company.

The ALJ concluded by assessing a civil penalty of $5,000 for the violations alleged in the complaint. He explained that $5,000 was the minimum recommended by the FAA sanction guidance in hazardous materials cases for a business entity that committed one category of violations of the HMR. (Initial Decision at 9.)

IV. Appeal

Respondent has not appealed the finding of violations, but Complainant has appealed the sanction amount. On appeal, Complainant asks for an increase in the civil penalty from $5,000 to $37,500.

In 2010, when the violations occurred, the Federal hazardous materials transportation statute provided that the maximum civil penalty was $50,000 per violation for violations not involving death, serious illness, severe injury, or substantial destruction

of property. 49 U.S.C. § 5123(a)(1) (2010).[10] The minimum civil penalty for the training violation was $450, while the minimum civil penalty for the other violations was $250 per violation.[11] 49 U.S.C. § 5123(a)(1), (3).

Under the statute, the Administrator[12] must consider the following factors in setting the sanction amount:

> (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 that justice requires.

49 U.S.C. § 5123(c); *see also* 14 C.F.R. § 13.16(c) (to the same effect).

The agency has issued sanction guidance to implement the statute. This guidance is found in FAA Order No. 2150.3B, "FAA Compliance and Enforcement Program,"

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[10] Before the 2005 Amendments to the statute, the maximum civil penalty was $25,000. The 2005 Amendments, Pub.L. 109-59, § 7120(a)(1), which became effective on August 10, 2005, raised the maximum civil penalty to $50,000, except that in cases in which the violation results in death, serious illness, severe injury, or substantial destruction of property, the Secretary of Transportation could assess a civil penalty of $100,000 per violation.

The maximum civil penalty for violations involving hazardous materials was raised again in 2012. The 2012 Amendments, Pub.L. 112-141, § 33010(1)(A), which became effective on October 1, 2012, raised the maximum civil penalty per violation to $75,000, except in cases of violations resulting in death, serious illness, severe injury, or substantial property destruction, when the Secretary could assess a civil penalty as high as $175,000 per violation.

[11] Congress has also provided for periodic adjustments for inflation, to maintain the deterrent effect of civil penalties and promote compliance with the law. 28 U.S.C. § 2461 (note), as amended by Public Law 104-134 (April 26, 1996). Any applicable adjustments would be found in 14 C.F.R. Subpart H, entitled "Civil Monetary Penalty Inflation Adjustment." No such adjustments are present here.

[12] The FAA Administrator has the authority to enforce the statute and the HMR regarding the shipment of hazardous materials by air. 49 C.F.R. § 1.47(j) ("[t]he Federal Aviation Administrator is delegated authority to: …(j)(1) … carry out the functions vested in the Secretary by 49 U.S.C. § 5123 …, with particular emphasis on the transportation or shipment of hazardous materials by air").

Appendix C, "Sanction Guidance, Hazardous Materials Enforcement" (October 1, 2007).[13] The sanction guidance "provides agency personnel with a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria, including mitigating and aggravating circumstances, if any." FAA Order No. 2150.3B, Appx. C-2. The sanction guidance is "designed to promote better consistency so that similar penalties are imposed in similar cases." FAA Order No. 2150.3B, Appx. C-2.[14]

The sanction guidance requires agency personnel to do the following:

(1) *weigh the case* by answering certain questions to arrive at a weight of minimum, moderate, or maximum;

(2) *use the Matrix* to find the appropriate sanction amount *range*; and

(3) *consider any other pertinent factors*.

FAA Order No. 2150.3B, Appx. C, ¶¶ 2, 8 (emphasis added).

To determine the weight of the violations – whether minimum, moderate, or maximum – the sanction guidance instructs agency personnel to consider a number of factors, including the nature of the hazardous material involved. Propane and WD-40 are each in hazard class 2.1 (flammable gas). (Tr. 160-162, 166, 167; Exh. C-6 at 3; Exh. C-7 at 5.) Hazard class 2.1 materials fall within Risk Category "A," defined as:

> materials that when released in the confines of an aircraft can potentially have a catastrophic effect on the aircraft's ability to continue safe flight, resulting in a crash or emergency landing causing injury or death to

[13] The ALJ took judicial notice of this sanction guidance (Tr. 196), which was marked as Exh. C-10 but was not admitted. Presently, FAA Order No. 2150.3B, Appx. C, is available on the FAA's Web site at http://www.faa.gov/regulations_policies/orders_notices/.

The FAA published this sanction guidance in the Federal Register as "[FAA] Policy on Enforcement of the [HMR]: Penalty Guidelines," 64 Fed. Reg. 19443 (April 21, 1999).

[14] "Appx. C-2" refers to FAA Order No. 2150.3B, Appx. C, p. C-2.

passengers and flight crew, as well as persons on the ground.

(FAA Order No. 2150.3B, Appx. C, Figure C-2.) Risk Category "A" materials receive a maximum weight.

Under the sanction guidance, the quantity of hazardous material is also considered. If the package exceeded the authorized quantity limitations by a significant amount, then, under the guidance, a moderate or maximum weight, depending on the degree to which the limitation was exceeded, should be considered. The quantity limitation for the WD-40, as a compressed gas[15] (*see* 49 C.F.R. § 173.306, "Limited quantities of compressed gases"), was 4 fluid ounces, but Respondent offered 8 fluid ounces for shipment. (Tr. 162-163.)

The sanction guidance also recommends assigning a maximum weight if the package contained a forbidden material. (FAA Order No. 2150.3B, Appx. C at C-6.) Because propane was forbidden on passenger aircraft, a maximum weight should be considered for the propane-related violations. (*Id.*)

The hazardous materials sanction guidance includes recommended penalty ranges in a matrix for different categories of offenses, depending upon the violator's characteristics. The Matrix recommends the lowest sanction ranges for individuals, and higher penalty ranges for business entities. The Matrix recommends penalty ranges that are even higher for business entities that use or handle hazardous materials in their business. The weight of a particular violation determines whether a penalty at the bottom, middle, or top of the appropriate penalty range should be imposed.

The offense categories are as follows:

[15] Hazard class 2 materials are "Compressed Gases." (FAA Order No. 2150.3B, Appx. C-17.)

- Declared Shipment;
- Undeclared[16] Shipment within Hazmat Quantity Limitations;
- Undeclared Shipment - Hazmat Forbidden on, or Exceeds Quantity Limits for, Passenger Aircraft;
- Undeclared Shipment Forbidden on, or Exceeds Quantity Limits for, All Aircraft;
- Intentional or Deliberate Violation, or Other Significant Aggravation; and
- Violation Results in Death, Serious Illness, Severe Injury, or Substantial Destruction of Property.

(FAA Order No. 2150.3B, Figure C-1). Each offense category is divided further into subcategories of violations involving: (1) shipping papers; (2) labels; (3) markings; (4) packaging; (5) training; (6) emergency response information; (7) release into environment; and (8) other. (*Id.*)

The appropriate offense category in this case was Undeclared Shipment Hazmat Forbidden on, or Exceeds Quantity Limits for, Passenger Aircraft. This is because the shipment was undeclared, the propane was forbidden on passenger aircraft, and the WD-40 exceeded the quantity limits for passenger aircraft.

The following is the excerpt from the Matrix (FAA Order No. 2150.3B, Appx. C, p. C-2) for penalties for undeclared shipments of hazardous materials that are forbidden on or exceed quantity limits on passenger aircraft:

[16] It is well settled that undeclared or hidden shipments pose a special danger. *Envirosolve*, FAA Order No. 2006-2 at 14 (February 2, 2006), citing *Toyota Motor Sales*, FAA Order No. 1994-28 at 12 (September 30, 1994). They are thus deserving of higher sanctions.

OFFENSE CATEGORIES	A. Individual	B. Business Entity	C. Business Entity that uses or handles hazmat in the course of business	D. Business entity that regularly offers, accepts, or transports hazmat
III. Undeclared Shipment Hazmat Forbidden on, or exceeds qty limits for, Passenger Aircraft				
1. Shipping Papers	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
2. Labels	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
3. Markings	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
4. Packaging	-------	5,000-16,200	7,500-22,000	10,000-32,500
5. Training	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
6. Emerg. Response	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
7. Release into Environ.	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500
8. Other	500-5,500	5,000-16,200	7,500-22,000	10,000-32,500

As the excerpt from the Matrix above shows, when the violator is a business entity, the penalty range for each offense subcategory for undeclared shipments of hazardous materials that are forbidden on, or exceed the category limitations for passenger aircraft is $5,000 to $16,200. However, when the business entity uses or handles hazardous materials in the course of its business, the recommended sanction range for the same violation subcategories is $7,500 to $22,500.

The ALJ found only one violation, and he assessed a civil penalty of $5,000, which was at the very low end of the range for business entities. Complainant argues that the correct range is $7,500 to $22,500, and that a civil penalty at the very bottom of the range –$7,500 – is appropriate in this case for each of the five applicable violation

subcategories (shipping papers, markings, labeling, emergency response information, and training). Complainant does not state how it arrived at a proposed civil penalty of $37,500, but multiplying the minimum civil penalty of $7,500 by five violations leads to a total of $37,500. Complainant argues for a minimum civil penalty per violation ($7,500) even though the nature and amount of the materials, as discussed above, indicated that the case should be given a maximum weight.

The ALJ rejected Complainant's argument that there were five violations because, he said, there was only a single underlying act. According to the ALJ, "Complainant's calculation smack[ed] of 'piling on,' a policy the Administrator frowns upon in non-egregious circumstances such as these." As support, the ALJ cited *Carr*, FAA Order No. 1998-2 at 11-12 (March 12, 1998). *Carr*, however, held that "violation of general, introductory sections of the [HMR] should not necessarily count as separate violations for sanction purposes when violations of more specific regulatory requirements are proven." *Id.* at 12. In the instant case, Complainant has not sought a separate sanction for general provisions in the instant case. Thus, *Carr* is inapposite.

The *Mole-Master* case, FAA Order No. 2010-11 at 14 (June 16, 2010), however, is relevant. The respondent in *Mole-Master*, like the ALJ in the instant case, asserted that there was a "piling on" of violations by Complainant and that the violation was a single act of shipping materials. As the Administrator stated in *Mole-Master*:

> There was no piling on. Although this may have been a single event, it was not a single violation. Under the sanction guidance, Mole-Master violated six different categories of violations.

Id. The instant case also involved a single event, but there were five categories of violations (shipping papers, marking, labeling, emergency response information, and

training). Each violation required proof of a fact that the other did not, the test for multiplicity established by the U.S. Supreme Court. *Ball v. United States*, 470 U.S. 856, 861 (1985). Also, as Complainant points out, each of the five categories of violations (shipping papers, marking, labeling, emergency response information, and training) involve separate and distinct means of communication and are essential components of the regulatory scheme that has been developed to ensure safety in the transportation of hazardous materials. (Appeal Brief at 16-17.) Thus, the ALJ erred in finding only one violation for sanction purposes.

Under the statute, other factors affecting the sanction amount include the violator's ability to pay, any effect on the violator's ability to continue to do business, and any other matters that justice requires**.** 49 U.S.C. § 5123(c). "Determination of the appropriate penalty does not involve a simple mathematical formula … but instead requires the exercise of discretion and judgment." *Dominion Concepts, Inc.*, FAA Order No. 2005-4 at 5 n.15 (March 8, 2005).

Respondent has asserted an inability to pay and an inability to continue in business. Because Respondent's financial information was within its own control, Respondent bore the burden of proving any inability to pay or to continue in business. *Giuffrida*, FAA Order No. 1992-72 (December 21, 1992).

The ALJ rejected Respondent's affirmative defense of financial harm on the ground that Respondent had failed to show that the civil penalty would cause it grievous harm. According to the ALJ, Respondent did not show a nexus between the proposed civil penalty and a negative result. Also, the tax returns offered by Respondent were not signed by a company officer. The ALJ ruled that Respondent failed to prove that it was

unable to pay any penalty.

Respondent introduced its Federal tax returns for 2009 and 2010. (Exh. R-1 and R-2; Tr. 240.) Ms. Frostad testified that the 2009 and 2010 tax returns were true and correct copies of the returns that Respondent filed with the Federal government. (Tr. 230, 232, 241-242.) She testified that she knows that the 2010 return was filed by e-mail and she received a copy of it. (Tr. 232.) She has an accountant, and presumably the accountant filed the tax returns. She testified that to the best of her knowledge, the information in the 2009 and 2010 returns was correct. (Tr. 232, 242.) The ALJ held that she was a generally credible witness. (Initial Decision at 4.) Under the circumstances, the ALJ did not err in admitting the tax returns. Further, because the 2009 and 2010 tax returns are consistent with Ms. Frostad's testimony, they are entitled to some weight regarding the company's financial circumstances.

Ms. Frostad testified that Respondent did not make any money in 2009 or 2010, and that she has taken no salary since Respondent was incorporated in 1999. (Tr. 215, 241, 244, 251.) In fact, she testified that Respondent has ***never*** had a profitable year. (Tr. 251.) She also testified that if Respondent were ordered to pay Complainant's sought-after penalty of $37,500, the company would not be able to continue to operate. (Tr. 262.)

The ALJ correctly found that the evidence is insufficient to prove that a $37,500 civil penalty would force Respondent to go out of business. Respondent has operated at a loss since its inception and it has not yet gone out of business. For this reason, it is unclear that a $37,500 civil penalty would force it out of business. Ms. Frostad's conclusory, self-serving statement that the company would not be able to operate if it

were ordered to pay a $37,500 civil penalty is insufficient proof.

However, the tax returns, combined with Ms. Frostad's testimony, provide evidence that Respondent does not have the financial means to pay a civil penalty as high as $37,500. The tax returns showed that Respondent's costs of doing business exceeded its gross receipts in both 2009 and 2010. Additionally, the returns indicate that the company has no significant assets upon which it can draw to pay the $37,500 civil penalty appropriate under the Matrix and sought by Complainant.

The $37,500 civil penalty sought by Complainant was appropriate at the outset, but in light of the evidence described above regarding Respondent's financial situation, a somewhat lower civil penalty is warranted. A civil penalty of $20,000 will accomplish these purposes.[17]

Finally, the question is whether "any other matters that justice requires" compel further adjustment of the penalty. This category includes factors such as corrective action, including hazardous materials training for employees, if such an action is sufficiently swift and comprehensive. *Atlas Frontiers, LLC*, FAA Order No. 2010-10 at 13 (June 16, 2010). Respondent did not assert that it provided relevant training or that it took any other corrective action as affirmative defenses.

The ALJ stated that he would not assess Complainant's proposed sanction of $37,500 because Complainant proposed a far lower sanction – only $3,750 – in two cases that the ALJ thought were "roughly comparable." *Kaden*, FAA Docket No. CP05NM0024, DMS No. FAA-2005-22081, and *Macaulay*, FAA Docket No.

[17] The evidence that Respondent introduced demonstrated that Respondent's financial circumstances are challenging. However, Respondent did not provide evidence regarding the amount of a penalty that it can pay. The penalty assessed in this decision reflects both Respondent's limited means and the seriousness of the violations, and should not be deemed as a factual conclusion regarding Respondent's available financial resources.

CP02SO0029, DMS No. FAA-2002-12591.

In the first of the cases cited by the ALJ, *Kaden*, FAA Docket No. CP05NM0024, DMS No. FAA-2005-22081, Complainant requested a $3,750 civil penalty but the ALJ assessed $3,000 for an undeclared shipment of two cylinders of liquefied petroleum gas (hazard class 2.1, flammable gases) and at least 25 "strike anywhere" matches (hazard class 4.2, flammable solids). Both items are forbidden on passenger flights.

In the second case, *Macaulay*, FAA Docket CP02SO0029, DMS No. FAA-2002-12591, Complainant sought a civil penalty of $3,750 relating to an undeclared shipment of three 1-gallon cans of concrete sealer (hazard class 3, packing group III, flammable liquid). Respondent defaulted and the ALJ assessed a civil penalty of $3,750 as sought in the complaint.

Kaden and *Macaulay* are distinguishable from the instant case in at least several important respects. The respondents in those cases were individuals rather than businesses. The civil penalties for individuals are lower. Also, the cited cases are significantly older than the instant case. The alleged violations occurred in February 2000 in *Macaulay* and in April 2005 in *Kaden*. The maximum civil penalties in those cases, per violation, was $25,000, as opposed to the $50,000 maximum civil penalty in the instant case.[18]

[18] The amounts sought by Complainant in the other two cases and the sanctions actually imposed by the ALJ in those cases are not precedent binding upon the Administrator in subsequent cases. In contrast, decisions of the FAA Administrator are precedent in other civil penalty cases. The Rules of Practice provide that:

> A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding, or conclusion, order, ruling, or initial decision of an [ALJ] that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

Moreover, it is unnecessary to compare the cases. As previously held, "[a]bsent extraordinary circumstances, … past sanctions will not be grounds for reducing sanctions that fall within the parameters set by the sanction guidance." *Texas Army National Guard*, FAA Order No. 2012-3 at 6 (May 22, 2012), quoting *Tate and Partners*, FAA Order No. 2010-7 at 15 (June 15, 2010). The rationale for this is that "comparing sanctions [whether proposed or actual] across cases is not just difficult, but it is unworkable" because "there are simply too many variables in each case." *Tate*, FAA Order No. 2010-7 at 6 (June 15, 2010).

If an ALJ assesses a civil penalty that is not consistent with the guidance, the Administrator has both the authority and the duty to impose the agency's sanction guidance on appeal. *Warbelow's*, FAA Order No. 2000-30 at 20 (February 3, 2000). "[C]oncerning matters of agency law and policy, administrative law judges are subject to the agency." *American Airlines*, FAA Order No. 2002-16 at 7 (May 20, 2002), quoting *Northwest Airlines*, FAA Order No. 1990-37 at 8 (November 7, 1990).

The ALJ stated that the sanction amount suggested by Complainant would do little to advance the agency's policies of compliance and deterrence in this case, in part because Respondent is well aware, due to the nature of its business, of the risks associated with chemicals. However, Respondent failed to demonstrate awareness of the risks associated with offering hazardous materials for air transportation when it shipped the propane and WD-40. Respondent admitted that it had not trained its employees in the shipment of hazardous materials. The fact that the company was well aware of the risks associated with these hazardous materials makes the violation more egregious and warrants a more serious civil penalty.

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14 C.F.R. § 13.233(j)(3).

Conclusion

Complainant's appeal is granted in part. The civil penalty assessed by the ALJ, in the amount of $5,000, is too low. A civil penalty in the amount requested by Complainant – $37,500 – was perfectly appropriate at the outset because it was in the correct range and was not undermined by any case law. However, a $37,500 civil penalty is higher than necessary, in light of the evidence described above regarding Respondent's financial situation, and as a result, this decision assesses a civil penalty in the amount of $20,000. This amount appropriately reflects the sanction guidance, the statutory factors, and the totality of the circumstances. This amount will promote compliance and deter future violations by Respondent and others.[19]

[Original signed by Michael P. Huerta.]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[19] 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 Respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

APPENDIX

Section 171.2(e)[20] provides:

> (e) No person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter ….

Section 172.200(a) provides:

> (a) *Description of hazardous materials required.* … [E]ach person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

Sections 172.202(a)(1)-(3), (6)-(7) provide:

> (a) The shipping description of a hazardous material on the shipping paper must include:
>
> (1) The identification number prescribed for the material …;
>
> (2) The proper shipping name prescribed for the material …;
>
> (3) The hazard class or division number prescribed for the material …; and
>
> …
>
> (6) … the total net mass per package …;
>
> (7) The number and type of packages ….

Section 172.204(a) provides:

> (a) General. … [E]ach person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing … on the shipping paper … the certification contained in paragraph (a)(1) of this section or the certification … in paragraph (a)(2) of this section.
>
> (1) "This is to certify that the above-named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation." ….
>
> (2) "I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labelled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

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[20] All citations are to the January 1, 2009, edition of Title 49 of the Code of Federal Regulations (CFR), which was in effect at the time, as the violations occurred in May 2010 and the regulations were not revised again until October 1, 2010.

Section 172.204(c)(1) provided:

> (c) *Transportation by air*--(1) *General*. Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:
>
> I hereby certify that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked and labeled, and in proper condition for carriage by air according to applicable national governmental regulations.

Section 172.204(c)(2) provided:

> (c) … (2) *Certificate in duplicate*. Each person who offers a hazardous material to an aircraft operator for transportation by air shall provide two copies of the certification required in this section. ….

Section 172.204(c)(3) provided:

> (c) *Additional certification requirements*. … (3) [E]ach person who offers a hazardous material for transportation by air must add to the certification required in this section the following statement:
> "I declare that all of the applicable air transport requirements have been met."

Section 172.301(a) provided:

> (a) [E]ach person who offers a hazardous material for transportation in a non-bulk packaging must mark the package with the proper shipping name and identification number (preceded by "UN" or "NA," as appropriate) for the material as shown in the § 172.101 Table….

Section 172.600 provided:

> (c) *General requirements.* No person to whom this subpart applies may offer for transportation, accept for transportation, transfer, store or otherwise handle during transportation a hazardous material unless:
> (1) Emergency response information conforming to this subpart is immediately available for use at all times the hazardous material is present; and
> (2) Emergency response information, including the emergency response telephone number, required by this subpart is immediately available to any person who, as a representative of a Federal, State or local government agency, responds to an incident involving a hazardous material, or is conducting an investigation which involves a hazardous material.

Section 172.602(b)(3) provided:

(b) *Form of information.* The information required for a hazardous material by paragraph (a) of this section must be:

…

(3) Presented—

(i) On a shipping paper;

(ii) In a document, other than a shipping paper, that includes both the basic description and technical name of the hazardous material as required by §§ 172.202 and 172.203(k), the ICAO Technical Instructions, the IMDG Code, or the TDG Regulations, as appropriate, and the emergency response information required by this subpart (*e.g.*, a material safety data sheet); or

(iii) Related to the information on a shipping paper, a written notification to pilot-in-command, or a dangerous cargo manifest, in a separate document (*e.g.*, an emergency response guidance document), in a manner that cross-references the description of the hazardous material on the shipping paper with the emergency response information contained in the document. Aboard aircraft, the ICAO ''Emergency Response Guidance for Aircraft Incidents Involving Dangerous Goods'' and, aboard vessels, the IMO ''Emergency Procedures for Ships Carrying Dangerous Goods,'' or equivalent documents, may be used to satisfy the requirements of this section for a separate document.

Section 172.604(a)(3) provided:

(a) A person who offers a hazardous material for transportation must provide an emergency response telephone number, including the area code or international access code, for use in the event of an emergency involving the hazardous material. The telephone number must be—

…

(3) Entered on a shipping paper, as follows:

(i) Immediately following the description of the hazardous material required by subpart C of this part; or

(ii) Entered once on the shipping paper in a clearly visible location. This provision may be used only if the telephone number applies to each hazardous material entered on the shipping paper, and if it is indicated that the telephone number is for emergency response information (for example: ''EMERGENCY CONTACT: * * *).

Section 173.1(b) provided:

(b) A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. It is the responsibility of each hazmat employer subject to the requirements of this subchapter to ensure that each hazmat employee is trained in accordance with the requirements prescribed in this subchapter. It is the duty of each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

SERVED: JANUARY 14, 2013

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

FEDERAL AVIATION ADMINISTRATION, Complainant, v. FROSTAD ATELIER, INC. Respondent.	FAA Docket No. [To Be Assigned] (Civil Penalty Action) FDMS No. FAA-2011-0294

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1. Respondent violated §§171.2(e), 172.200(a), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3), 172.202(a)(6), 172.202(a)(7), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.301(a), 172.600 and 172.602(b)(3), 172.604(a)(3), and 173.1(b) as charged; and

2. Respondent is assessed a civil penalty of $5,000.

I. Background

This matter originated with the discovery by authorities of certain restricted substances in the luggage of a passenger preparing to board an aircraft.

On May 29, 2010, Ronda (Ronnie) Frostad, a ticketed passenger on Southwest Airlines, prepared to depart Louisville, KY for Sacramento, CA.[1] She was travelling

[1] Tr. 211. The Complaint stated the date as May 7, 2010. Complainant later served an erratum to the Complaint correcting the date of the incident to May 29, 2010. *See* Tr. 210.

on behalf of a company she owns and runs, Respondent Frostad Atelier, Inc., of McClellan and Sacramento, CA. ("Respondent" or "the company"). Respondent is a bronze casting foundry (Tr. 208-09; Exh. C-9, p. 1). Ms. Frostad and the two Respondent employees travelling with her were returning after completing a job that the company had been contracted to perform (Tr. 209-12).

Agents of the Transportation Security Administration ("TSA")[2] searched a bag checked by Ms. Frostad and found two substances inside warranting further examination: a 16.4-ounce can of propane and an 8-ounce container of an aerosol lubricant popularly known as WD-40 (Exhs. C-2 and C-4). They determined that both substances were classified as hazardous materials ("hazmats") under the Department's Hazardous Materials Regulations ("HMRs"), 49 C.F.R. §§171-180.

The HMRs are designed to facilitate proper handling of inherently dangerous goods and to alert first responders in the event of an incident. As such, hazardous materials offered for transportation by air must comply with detailed marking, labeling, packing, and informational requirements spelled out therein. Certain training obligations must be observed as well. 49 C.F.R. §172. Ms. Frostad's tender had been undeclared: that is, the luggage in question had contained no warning or notice of the hazardous nature of its contents. *Midtown Neon Sign Corporation,* FAA Order No. 96-26 (August 13, 1996), p. 2.

Based on the foregoing, the Complaint of the Federal Aviation Administration ("Complainant," "FAA," or "the agency") cited Respondent for the following fourteen HMR violations: §171.2(e), in offering hazardous materials for transportation improperly classed, described, packaged, marked, and labeled; §§172.200(a), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3),172.202(a)(6), and 172.202(a)(7), in offering hazardous materials for transportation without properly describing the material on shipping papers, including the failure to set out the materials' identification number, shipping name, hazard class or division, the total net mass per package, and the number and type of packages; §172.204(a) or (c)(1), in offering a hazardous material without certifying that the material was offered in accordance with applicable HMRs; §172.204(c)(2), in offering a hazardous material and failing to provide two copies of the certification; §172.204(c)(3), in offering a hazardous material and failing to add prescribed language to the certification; §172.301(a), in offering hazardous materials in a non-bulk package not marked with the proper shipping names and identification numbers; §§172.600 and 172.602(b)(3), in offering hazardous materials without providing emergency response information in the manner required; §172.604(a)(3), in offering a hazardous material without providing a 24-hour emergency response telephone number; and §173.1(b), in offering hazardous materials without instructing its agents and employees in preparing such goods for shipment. Complainant asked for a civil penalty under 49 U.S.C. §5123(a) of $37,500.

Respondent denied the charges. It raised several substantive defenses to liability and to mitigate or avoid the civil penalty sought. It also asserted that the imposition of a civil penalty would constitute a financial hardship for the company.

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[2] A witness asserted that the "S" in "TSA" stands for "Safety." This is incorrect. *See* Tr. 28.

I held a hearing in San Francisco, CA., on July 10, 2012. The parties have filed briefs and the matter is now ready for decision.[3]

Complainant bears the burden of proving its case. 14 C.F.R. §13.224. It also bears the burden of proving that the penalty it seeks is appropriate. *See, e.g., American Air Network,* FAA Order No. 2006-5 (February 10, 2006), 2006 WL 265369, p. 9 n. 19. Financial hardship may constitute grounds for a reduction of an assessment which is otherwise fitting. *Conquest Helicopters,* FAA Order No. 1994-20 (June 22, 1994), p. 3. The plea of inability to pay, however, is an affirmative defense. On that issue it is Respondent which assumes the burden of proof. 14 C.F.R. §13.224(c). As the Administrator has explained, this assignment of the burden is "reasonable and necessary" because the Respondent has control of its financial information. *Salvatore Giuffrida,* FAA Order No. 1992-72 (December 21, 1992), p. 2. Claims of such a nature must be substantiated to be credited. *See, e.g., Michael John Costello,* FAA Order No. 93-10 (March 24, 1993), 1993 WL 833110, p. 4.

II. Discussion and Findings and Conclusions

I find and conclude that Complainant has sustained its burden of proof on its allegations. Respondent is found in violation of each of the fourteen charges preferred against it. I will assess a civil penalty against Respondent of $5,000.

The facts which make up the charges are straightforward and may be briefly summarized. On May 29, 2010, the evidence showed, Ms. Frostad and two employees of the company were preparing to board Southwest Airlines at the Louisville International Airport in Louisville, KY. ("the Airport").[4] They had been working in the Louisville area on a job for Respondent and were returning home. Luggage Ms. Frostad had checked at Southwest's ticket counter was flagged by agents of the TSA. Inside the luggage the agents observed a Ziploc-type plastic see-through bag. Inside the bag they found an 8-ounce spray can of WD-40 and a 16.4-ounce cylinder of propane (Tr. 9-11, 30-31, 58-61, 65, 69-70, 76, 108; Exhs. C-2 and C-3, and C-9, p. 1).

Both substances are listed by the Department's HMRs as hazardous materials (Tr. 191; *See* §172.101 Hazardous Materials Table; *see also* Exh. C-7 and Tr. 164-70, 175, 179 (propane); Exh. C-6 and Tr. 157-61 (WD-40)). As noted, when such items are offered for shipment certain marking and labeling conventions must be observed. The HMRs require that propane be described as "Petroleum gases, liquefied, Hazard Class 2.1 (flammable gases)." The substance is assigned the United Nations ("UN") identification number known as UN 1075. This material is, as the parties stipulated, not permitted in passenger air transportation (Tr. 137, 152-53). The second hazmat found in Ms. Frostad's luggage, WD-40, is properly described for shipping purposes as "Aerosol, flammable, Hazard Class 2.1." Its assigned identification number is UN 1950. The correct label for both the propane and the WD-40 is "**FLAMMABLE GAS.**" (emphasis and caps in original). Respondent recognized that WD-40 also is considered a

[3] Complainant's Brief will be referred to as "Compl. Br."; Respondent's as "Resp. Br."; and Complainant's Rebuttal Brief as "Compl. Rebut. Br."

[4] The three-letter identifying code for the Airport is SDF. Tr. 82; *see, e.g.,* Exh. C-2, p. 5.

hazardous material (Tr. 152). *See also* table following §172.101 of the HMRs; §172.400; §172.417.[5]

The luggage had been undeclared. No labeling, marking, warnings or other information required under the HMRs were present (Tr. 170; *see* Initial Decision ("I.D."), p. 2). Nor had the company's employees undergone the HMR-required training in the transport by air of hazmats – a fact Respondent conceded (Tr. 264).

Ronda Frostad testified for Respondent Frostad Atelier, Inc. She generally was a credible witness. Ms. Frostad acknowledged that Respondent had offered the luggage in question for transport (Exh. C-9, p. 1). But in defense to the charges she insisted that she was not aware that the offending materials were in it. She did not pack them, she said. She asserted that she never travels with propane. It was used on the Louisville job, yes, but company policy is to purchase propane locally and to avoid travelling with it. The presence of WD-40 is a bigger mystery, Ms. Frostad insisted; while it is used at the foundry in California, Ms. Frostad denied using it on this job. One of the employees travelling with her packed the hazmats, she added (Tr. 213-27, 260).

These circumstances do not avail Respondent; they do not absolve it from legal responsibility stemming from the tender of the luggage. The trip manifestly was carried out on behalf of Respondent. Respondent, of course, had been hired in order to perform and had performed the work for which the travel had been undertaken. The airline tickets were purchased referencing the company address (Exh. C-2, p. 2). All matters involving the trip, including the tender, are properly the company's responsibility. In any event employers are vicariously liable for the actions of their employees acting within the scope of their employment (*see, e.g., Warbelow's Air Ventures, Inc.,* FAA Order No. 2000-3 (February 3, 2000), p. 5, *reconsid. den.,* FAA Order No. 2000-14, June 8, 2000, *pet. den.* 19 Fed.Appx. 606 (unpublished opn., September 20, 2001)). The offending materials were packed as part of the winding up of the job that had just been completed. The conduct underlying the charges, then, was within the scope. Ms. Frostad acknowledged also that the tools of the trade (which, the evidence showed, included both items under review) are the property of Respondent (Tr. 221-24). The circumstances described above show, I conclude, that Respondent is obligated to answer for the conduct of its employee and to accept responsibility for the consequences of the presence of the offending materials in Ms. Frostad's luggage.

It is not necessary to Complainant's proof to show that Respondent or one of its agents or employees actually knew what was inside Ms. Frostad's luggage. Nor is it necessary for the agency to demonstrate that Respondent or one of these individuals was aware that either or both of the offending items in fact were regulated or prohibited hazardous materials. The governing statute contains no such requirements. It subjects any person to a civil penalty who has "knowingly committed an act which is a violation . . ." "Knowingly" means only that a person (the definition of which includes a business) has actual knowledge of the facts giving rise to the violation (49 U.S.C. §5123(a)(1)). In this matter, it means that Respondent – through an agent

[5] Complainant's witness P. Cartrice Dye, a security specialist who reviewed the agency's investigative file, stated that WD-40 is permitted to be shipped by air in a quantity no greater than four fluid ounces, citing 49 C.F.R. §173.306. Tr. 162. The particular item at issue, however, was stored in an aerosol can of eight fluid ounces. Ms. Dye reiterated that the HMRs prohibit the movement of propane in air transportation in any quantity. Tr. 169.

or employee, of course -- knew that it was offering the luggage in question for air transport. This, of course, was proven. The statute also makes clear that knowledge of the law is unnecessary to a finding of violation; persons are liable even if they do not know they are breaking the law. *Riverdale Mills Corporation,* FAA Order No. 2003-10 (September 12, 2003), p. 5; *Scott H. Smalling,* FAA Order No. 94-31 (October 5, 1994), p. 7. Congress intended to prevent individuals from relying on ignorance of the law as an excuse in civil hazardous materials cases.[6]

Ms. Frostad also asserted that she failed to see any signs at the Airport warning passengers of such things as categories of restricted or prohibited hazardous materials, hazmats' associated risks and dangers, and the possible adverse consequences of attempting air transport of such substances (Tr. 263-64). The evidence showed that the Southwest Airlines area where passengers tender their checked baggage features a large poster board containing pictures and descriptions of items which may not be packed or brought aboard aircraft. The carrier also had posted notifications at the counter on either side of the baggage wells where passengers place their bags for tagging and weighing. The signs advise that violators are subject to fines of up to $110,000 (Tr. 42-47; Exh. C-1, p. 2).

The various signs provided ample warning to would-be passengers of the risks associated with travelling with hazmats. But Ms. Frostad's failure to spot any of them is in any event irrelevant to the charges. No duty to warn existed. The finding of violations is grounded simply on proof that Respondent offered the luggage containing the restricted or prohibited materials for carriage in passenger air transportation undeclared. The luggage failed to conform to pertinent HMRs.

Pursuant to the foregoing discussion, it is concluded that Complainant proved its case. Respondent is found in violation of the HMRs as charged in the Complaint: §§171.2(e), 172.200(a), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3),172.202(a)(6), 172.202(a)(7), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.600, 172.602(b)(3), 172.604(a)(3), and §173.1(b) (Tr. 191).

III. Penalty

I will assess against Respondent a civil penalty of $5,000.

A. Standards

In determining the amount of the penalty, the decisionmaker must consider "the nature, circumstances, extent, and gravity of the violation," and, with respect to the violator, "the degree

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[6] *Scott H. Smalling,* p. 7. The legislative history of the Hazardous Material Transportation Act confirms that Congress intended to impose civil penalties on persons who knew about the act constituting the violation but did not know about the law. The conference substitute explains that "a civil penalty may be imposed only upon proof that the defendant knowingly committed the act which constitutes the violation (*it is not necessary to show that he knew the act constituted a violation*) . . . (emphasis supplied)." S. Conf. Rep. No. 1347, 93rd Cong., 2nd Sess., *reprinted in 1974 U.S. Code Cong. & Ad. News* 7669, 7686; *see also TCI Corporation,* FAA Order No. 92-77 (December 22, 1992), pp. 8-9 n. 13.

of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business" and "other matters that justice requires" (49 U.S.C. §5123(c)).

The Administrator has provided policy guidance for agency employees to follow when recommending an appropriate civil penalty in hazardous-materials cases. The guidance is found in the agency's Penalty Guidelines ("the Guidelines"). The Guidelines have been published as FAA Order 2150.3B, Appendix C. They were marked (but not admitted) in this proceeding as Exhibit C-10, of which I took judicial notice (Tr. 196). (I will refer to it as "Exh. C-10" even though it was not admitted). The Guidelines assess all relevant statutory criteria, including mitigating and aggravating circumstances. They additionally aid Complainant's penalty determination through a Sanction Guidance Matrix ("the Matrix"). The Matrix sets out specific penalty ranges for each input, cross-referencing such pertinent factors as the respondent's size, the quantity of the violative material offered, the extent of the respondent's usual dealings with hazmats, the relative risk of harm posed by the substances involved, and any adverse consequences associated with the hazmats' transport.

The Guidelines are intended to indicate the Administrator's "general views" about the civil penalty ranges appropriate for different types of violations. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 (November 6, 2008), 2008 WL 4948488, p. 13. They are not binding. Each situation, being dependent on so many variables, is unique. "Evaluation of the case," the FAA has emphasized, "is based on the totality of the facts and circumstances."[7]

An administrative law judge ("ALJ") is not required to follow the guidelines. The guidelines are intended for agency personnel, and ALJs are not agency personnel. *Folsom's, supra,* p. 14. ALJs make decisions independently, and the ALJ determines (subject to agency review) whether a civil penalty is to be assessed, and if so, in what amount. The Guidelines nonetheless must be respected as an expression of agency sanction policy. They represent an effort to produce consistent results in similar cases. The Administrator has asserted the power to impose the agency's sanction policy on appeal if an ALJ assesses a civil penalty that is not consistent with the Guidelines. *Warbelow's, supra,* p. 20; *Northwest Airlines,* FAA Order No. 1990-37 (November 7, 1990), pp. 8-10.

B. Complainant's Position

Complainant seeks a civil penalty totaling $37,500. It calculated the sum as follows: first, by slotting the HMRs violated into five categories (shipping papers, labels, markings, training, and emergency response) and then by describing Respondent per the Guideline category "Business Entity that uses or handles hazmat in the course of business" (Exh. C-10, p. 14; Compl. Br., pp. 9-10). The Matrix suggests a range of $7,500 to $22,000 per violation category for this type of business entity found to have offered an undeclared shipment of a hazmat exceeding quantity limits or forbidden on passenger aircraft (Exh. C-12, Fig. C-1, *intersection of*

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[7] FAA Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines, 64 Fed.Reg. 19443, 19444, 1999 WL 226610 (F.R.) (April 21, 1999), also published on April 14, 1999, as Change 26, Appendix 6, to FAA Order 2150.3A. Order 2150.3B, effective October 1, 2007, updated and superseded the original guidelines. *See* 72 Fed.Reg. 55853. FAA Order 2150.3B may also be found at www.airweb.faa.gov and rgl.faa.gov. *See* Tr. 194.

Offense Category III and column C.; Compl. Br., p. 9; Compl. Rebut. Br., pp. 4-5). The agency does not explicitly state how it arrived at its suggested civil penalty; but multiplying the minimum amount per violation category suggested by the Matrix, $7,500, by the number of violation categories, five, leads to the total sought of $37,500.

C. Respondent's Position

Respondent offers the affirmative defense of inability to pay. It states that its financial circumstances justify a finding that no penalty be assessed. Respondent is "not in any position to pay," it argues. Any penalty would force the company "to cease doing business" (Resp. Br., pp. 3-4). Ms. Frostad testified that the company could not continue to operate if a civil penalty were levied in the amount sought (Tr. 252).

In support of its position, Respondent submitted company federal tax returns for the years 2009 and 2010 (Exhs. R-1 and R-2; Tr. 240). Ms. Frostad testified that in the year 2010 Respondent did not make any money. She did not take a salary in either 2009 or 2010 (Tr. 241, 244). She added that she has never taken a salary since founding the company in 1999 (Tr. 228-29, 251).

D. Determination

Weighing the appropriate penalty in this matter requires initially an evaluation of the violative act. Frostad intended to check luggage containing flammable gases. This conduct was highly dangerous. The degree of potential peril such an act posed to affected persons and to the aircraft itself is suggested by the fact that both substances – propane in any amount and WD-40 in the amount offered -- are banned from passenger air transportation under all circumstances.

The civil penalty must be substantial in order to appropriately reflect the unacceptable and significant risk of harm the offering of these hazardous materials brought to flight.

I do not accord validity to Respondent's affirmative defense of financial straits. The evidence supporting its argument simply is insufficient. Respondent fails to show how Complainant's proposed assessment would work the grievous consequences claimed. It did not fashion a nexus between the civil penalty amount suggested and the result feared. Another factor undermining the power of Respondent's argument is that neither tax return submitted in support is signed by any officer representing the company (Exh. R-1, p. 2; Exh. R-2, p. 1). Respondent, I conclude, failed to prove that it is unable to pay any assessment.

Matters in addition to the nature of the violative act must also be considered; and an evaluation of all the surrounding circumstances compels the finding that the civil penalty proposed is considerably greater than warranted. I conclude that an assessment of $5,000 most closely accounts for the situation as a whole.

There are several reasons for my determination. First, the agency's proposal is disproportionate to the nature of Respondent's behavior and to the policies sought to be advanced. The conduct complained of involved a single underlying act. To assert that the

penalty necessarily is grounded on five violation groupings, and then calculating the proposed assessment on that basis, fails to account for this fundamental fact. Complainant is not sufficiently appreciative of the Administrator's warning that deriving an assessment simply by multiplying the number of violations by the penalty recommended per sanction -- even a category minimum -- could result in a fine disproportionately severe. *Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 (February 3, 2000), pp. 20-21, *pet. for reconsid. den.*, Order No. 2000-14 (June 8, 2000). Complainant's calculation smacks of "piling on," a policy the Administrator frowns upon in non-egregious circumstances such as these. *Paul A. Carr,* FAA Order No. 98-2 (March 12, 1998), pp. 11-12.

The fine suggested also would do little to vindicate the agency's policies of compliance and deterrence for this Respondent. Frostad Atelier, Inc. is an entity which does not need to be educated or lectured about the dangers of hazardous substances. On the contrary, it is well aware of the risks broadly associated with chemicals. The very nature of its business warrants and compels such an awareness. Ms. Frostad testified that the company uses over one hundred different chemicals in casting. Employees performing their duties often must wear protective clothing (Tr. 256-62). Ms. Frostad, Respondent's owner and president, also testified that her business customarily bans the transport of these materials for reasons she well understands. It additionally is noteworthy when determining penalty that Ms. Frostad credibly asserted that she was unaware that the propane and WD-40 had been packed in the company's luggage. Against this background, a fine of the magnitude suggested clearly would do little to impress upon this company the agency's policies of compliance or deterrence.

Finally, it bears mention that the civil penalty suggested is much greater than the agency has sought in roughly comparable matters. In one case the agency asked for an assessment of $3,750 for the attempted undeclared shipment on a passenger-carrying flight of "strike-anywhere" matches and two cylinders of compressed gas. These are substances which are banned from passenger air transportation under all circumstances.[8] In another instance, the FAA sought a civil penalty in the same amount for the failure to properly mark, label, and package a shipment of three one-gallon cans of concrete sealer (*Berthan Macaulay*, Docket CP02SO0029 (DMS 12591)). *Kaden* and *Macaulay* are not unlike the instant case.

It is true, of course, that the agency has virtually unfettered discretion in suggesting civil penalty totals. Moreover, because each case presents a unique set of circumstances, comparisons with other proceedings can be elusive. But the request of the agency -- whose Guidelines are designed to produce consistent results in similar cases (*see* I.D., p. 6) – to seek a civil penalty *ten times* the amount sought in the referenced matters must, without additional justification, be viewed with considerable skepticism.

I have considered all other arguments advanced by both parties and reject them as without merit.[9]

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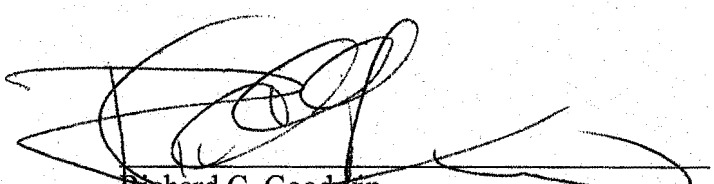
[8] *Todd Kaden,* FAA Docket No. CP05NM0024, Initial Decision of Administrative Law Judge Richard C. Goodwin, served June 22, 2006. The Respondent was found to have violated the HMRs as charged and was assessed a civil penalty of $3,000.

[9] Two more matters require attention. The first concerns the fact that the docket in this case has been sealed. *See* Order Sealing Docket served August 10, 2012. The docket, now including the briefs, will remain sealed for the

Weighing all the circumstances discussed above, I conclude that a civil penalty of $5,000 is warranted. The amount equals the minimum suggested by the Guidelines for a business entity committing one category of hazmat violation. Such an assessment best reflects the totality of the circumstances in the context of the statutory factors. The fine also will fittingly promote the agency's policies of compliance and deterrence for similarly-situated entities. It is substantial but not unduly punitive. In the circumstances it is appropriate.

Respondent Frostad Atelier, Inc. is hereby assessed a civil penalty of $5,000 for violations of the following HMRs: §§171.2(e), 172.200(a), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3),172.202(a)(6),172.202(a)(7), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.301(a), 172.600 and 172.602(b)(3), 172.604(a)(3), and §173.1(b).[10]



Richard C. Goodwin
Administrative Law Judge

Attachments – Service List

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reasons stated in the Order, but this Initial Decision, I hold, does not touch on any subject appropriate for withholding from public disclosure and, therefore, is not subject to that Order. The I.D. may be freely disseminated. The second matter concerns Complainant's Motion to Strike ("Motion") Respondent's Post Hearing Brief, dated December 17, 2012, on the grounds that the brief was one business day late. The Motion, failing to demonstrate any prejudice to Complainant, is denied.

[10] Any appeal from the Initial Decision to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus an additional 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to the Appellate Docket Clerk, Room 924-A, Federal Aviation Administration, 800 Independence Avenue, Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.

FDMS No. FAA-2011-0294
(Civil Penalty Action)

SERVICE LIST

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