



Issue Date: 18 June 2009

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CASE NO.: 2009 AIR 2  
In the Matter of

**HENRIQUE DE PAIVA**  
Complainant

v.

**NETJETS AVIATION, INC.**  
Respondent

Appearances: Mr. Henrique De Paiva, *Pro Se* (representing himself)  
For the Complainant

Mr. Gregory R. Talbot, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER –**  
**APPROVAL OF MOTION FOR SUMMARY DECISION &**  
**DISMISSAL OF COMPLAINT**

This case arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121 (“AIR 21” or “the Act”), as implemented by 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee participated in a proceeding relating to any violation or alleged violation of any order, regulations, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a)(2) and (4).

**BACKGROUND**

On July 7, 2008, Mr.<sup>1</sup> De Paiva filed an AIR 21 complaint with the Regional Administrator, Occupational Safety and Health Administration (“OSHA”), alleging that the Respondent terminated his employment on April 8, 2008 because he reported on March 2, 2008 that he was scheduled to operate an aircraft after numerous hours on duty without having an

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<sup>1</sup>While serving as a second in command pilot for the Respondent, Mr. De Paiva held the title of First Officer.

adequate meal. When he was granted time to eat, the flight was delayed. Mr. De Paiva was also dealing with other stress that day. Subsequently the company terminated his employment for being unavailable for duty. Mr. De Pavia noted that the FAA's Aeronautical Information Manual ("AIM") states that a pilot should not fly as a crew member when he has conditions that would make him unable to meet the standards of his medical certificate. The AIM also indicates that proper nutrition will help prevent acute fatigue and a pilot should consider delaying a flight until stress difficulties are resolved. Other FAA regulations require a pilot to evaluate his stress and fatigue levels and delay flight if necessary. Mr. De Paiva had also filed numerous union grievances in the past regarding the company's process for providing pilot meals. Asserting that he satisfied all the requirements for relief under the AIR 21 employee protection provisions, Mr. De Paiva sought reinstatement, full back pay, and compensatory damages.

On September 5, 2008, the Regional Administrator discussed Mr. De Paiva's AIR 21 complaint on the basis that it had no merit. Mr. De Paiva filed an appeal with the Office of Administrative Law Judges ("OALJ") on October 15, 2008.<sup>2</sup>

Pursuant to a Notice of Hearing, dated October 24, 2008, I set a hearing date of December 9, 2008. However, I approved several continuance requests to permit completion of the arbitration process. On April 10, 2009, I received a Motion for Summary Decision from the Respondent, which included the arbitration hearing transcript and multiple documents. On May 1, 2009, Mr. De Paiva filed an objection to the summary decision motion and also indicated that an arbitration decision had been rendered.

## **I. SUMMARY DECISION MOTION**

### **Respondent's Motion for Summary Decision**

Based on the testimony provided in the arbitration hearing and related documentation, a summary decision in favor of the Respondent dismissing Mr. De Paiva's AIR 21 complaint should be granted because the undisputed facts establish Mr. De Paiva did not engage in protected activities and his employment termination was not based on any protected activity.

According to the Respondent, the "fatal flaw" in Mr. De Paiva's AIR 21 complaint is the absence of any AIR 21 protected activity. During the course of his activities on March 2, 2008, Mr. De Paiva neither provided any information to his employer relating to a violation of an order, regulation, or standard of the FAA nor stated to the company that he could not safely operate the aircraft. Specifically, Mr. De Paiva was provided 30 minutes to obtain a meal before a scheduled flight and never indicated to the company that the allotted time was insufficient. Similarly, Mr. De Paiva's "crew food" grievances between April 2006 and August 2007 were

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<sup>2</sup>In its Motion for Summary Decision, the Respondent raises an issue on whether Mr. De Paiva's appeal of the Regional Administrator's adverse determination to OALJ was timely. According to the USPS website, and based on the certified mail number on the Regional Administrator's September 5, 2008 denial letter to Mr. De Paiva, the correspondence was received on September 12, 2008 in Fort Meyers, Florida. Since Mr. De Paiva's response was postmarked October 8, 2008, his appeal to OALJ is timely under 29 C.F.R. § 1979.106(a), having been filed within 30 days of receipt of the Regional Administrator's denial decision.

essentially minor reimbursement claims for missed meals and did not definitively or specifically implicate aviation safety.

Even if a determination were made that Mr. De Paiva engaged in a protected activity, “there is no evidence” that the Respondent terminated his employment based on such activity. Instead, the Respondent terminated Mr. De Paiva’s employment due to his intentional and avoidable unavailability for duty, his purposeful delay of a flight, and extremely unprofessional conduct toward customers. Additionally, Mr. De Paiva’s earlier food grievances played no role in the company’s termination decision.

### **Complainant’s Response**

Mr. De Paiva expressed “some disagreement” with the Respondent’s Motion for Summary Decision because “some facts” were not placed into evidence in the arbitration proceeding that relate to his AIR 21 complaint, for example, FAA regulations and AIM. As a result, the arbitration proceedings did not address the issues raised in his AIR 21 complaint, in particular, his protected activity. Mr. De Paiva requests “that these issues be addressed prior to a Judgment.”

### **Discussion**

Under 42 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR 21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR 21 was a contributing factor in the unfavorable personnel action alleged in the complaint. Accordingly, to establish a violation of AIR 21, a complainant must prove by a preponderance of the evidence three elements: a) protected activity; b) unfavorable personnel action; and, c) contributing factor.

With that adjudication process in mind, I note that an administrative law judge may grant a motion for a summary decision without an evidentiary hearing only if there is no genuine issue as to any material fact based on the documentation presented. 29 C.F.R. §§18.40 and 18.41 (emphasis added).

With its motion asserting no genuine issue of material fact exists, the Respondent attached the transcript from the arbitration proceedings which contained the testimony of the Complainant and other parties relevant to the present proceedings. The Respondent also included numerous documents which included Mr. De Paiva’s grievances regarding missed meals.

In his response to the summary decision motion, Mr. De Paiva neither identified any evidence in the Respondent’s submissions to which he disputed nor presented any contrary evidence to establish a genuine issue as to a material fact. Instead, he raised two principal points. First, some of the evidence supportive of his protected activity and complaint were not placed into the arbitration record. However, the only two items of missing evidence that Mr. De Paiva noted were the FAA regulations and AIM. While the arbitration proceedings may not have included those documents, Mr. De Paiva cited and quoted relevant portions of the FAA

regulations and manual in his complaint before OSHA, which is part of the record before me. Since the Respondent has not challenged the accuracy of Mr. De Paiva's quotes, and I may take judicial notice of regulation and manual, I do not believe significant evidence is missing in the current record.

Second, Mr. De Paiva notes that the arbitration proceedings did not directly address the unique issues associated with his AIR complaint. Understandably, since the arbitration proceeding was conducted under the union contract and focused on the employment relationship between the two parties and the company's adverse employment action, the issues of whether Mr. De Paiva engaged in AIR 21 protected activities and was entitled to whistleblower protection under AIR 21 were not addressed. Nevertheless, Mr. De Paiva's objection on this basis does not identify any specific material fact regarding the events of March 2, 2008 and his earlier grievances to which a genuine issue exists as required by 29 C.F.R. § 18.40(c). Additionally, as subsequently adjudicated in detail, I will address the relevant AIR 21 issues.

Upon review of the record, I notice some disagreement on whether voices were raised during the March 2, 2008 exchange between Mr. De Paiva and Mr. Fancey. However, even from their different perspectives, both Mr. De Paiva and Mr. Fancey acknowledged that their conversation was confrontational and essentially agreed on the topics they discussed. Further, to the extent Mr. Fancey's complaint to the Respondent may have supported the termination decision, a factual determination of whether his version or Mr. De Paiva's recollection is more accurate is not particularly relevant in the proceeding before me for two reasons. First, determining their exact words does not alter the fact that the Respondent received a complaint about Mr. De Paiva's behavior from Mr. Fancey, a customer's representative. Second, regardless of which account is correct, since Mr. De Paiva presented his version of the exchange to the Pilot Review Board ("PRB")<sup>3</sup> prior to the termination action, the PRB and the Respondent had an opportunity to consider both accounts prior to reaching a decision to terminate Mr. De Paiva's employment. Consequently, the exact words spoken by Mr. De Paiva and Mr. Fancey are not material facts in determining whether Mr. De Paiva can establish entitlement to the employee protection provisions of AIR 21.

In summary, while the parties clearly disagree on whether the facts currently in the record establish Mr. De Paiva's entitlement to employee protection under AIR 21, I find no genuine dispute exists regarding the material facts relating to the events of March 2, 2008 and Mr. De Paiva's earlier missed meals grievances. Accordingly, the Respondent's Motion for Summary Decision without an evidentiary hearing is approved under 29 C.F.R. § 18.40(d) and I will proceed with a Summary Decision under 29 C.F.R. § 18.41.

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<sup>3</sup>In response to a complaint the company received about Mr. De Paiva's actions on March 2, 2008, a PRB was convened and conducted a hearing on March 17, 2008. Subsequently, based on the PRB's recommendations, the Respondent terminated Mr. De Paiva's employment on April 8, 2008.

## II. SUMMARY DECISION—AIR 21 COMPLAINT

### Issues

1. Whether Mr. De Paiva engaged in protected activities under the Act.
2. If Mr. De Paiva engaged in protected activities, whether those protected activities were contributing factors in the decision by NetJets Aviation, Inc. (“NetJets”) to terminate his employment on April 8, 2008.
3. If Mr. De Paiva’s protected activities were contributing factors in the decision to terminate his employment, whether NetJets has established by clear and convincing evidence that it would have terminated Mr. De Paiva’s employment on April 8, 2008 in the absence of the protected activities.

### Evidence Discussion

I will rely on the following evidence, submissions, statements, and documents in rendering this summary decision. Mr. De Paiva’s July 7, 2008 AIR 21 complaint (CX 1),<sup>4</sup> the December 9 and 10, 2008 arbitration hearing record (RX A), conducted under the NetJets Pilots Collective Bargaining Agreement (“CBA”) (AJX 1), with associated exhibits (AJX 2 to AJX 4, ARX 1 to ARX 21, and ACX 1 to ACX 18), and the Respondent’s additional exhibits, RX B to RX G.

### Summary of Testimony and Documentary Evidence<sup>5</sup>

Sworn Testimony of Mr. Korey Carroll  
(TR, p. 26 - 74)

Mr. Carroll has been the tactical manager for NetJets for the past five years; he’s worked for the company a total of ten years. NetJets is a company that sells fractional ownership in aircraft, maintains the aircraft, and provides air crews, who are “pretty much the front line customer service people.” In return, the fractional owners have a window of opportunity for access to the aircraft in a short of amount of time. As the tactical manager, Mr. Carroll supervises two other supervisors and fifteen flight coordinators and assists with issues the flight coordinators can’t handle or resolve on their own. Some issues involve crew duty, rest, and food. The crews typically communicate with Blackberry text messages.

As set out in the Flight Operations Manual (“FOM”), P1.10, (ARX 2), the company provides a pilot four meals a day while he or she is on duty with 35 meal selections spread out over breakfast, lunch, and dinner. The pilot places the meal orders the night before his or her

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<sup>4</sup>The following notations appear in this decision to identify specific evidence: CX – Complainant exhibit; RX – Respondent exhibit; TR – transcript of arbitration hearing, AJX – arbitration joint exhibit; ARX – arbitration Respondent exhibit; and, ACX – arbitration Complainant’s exhibit.

<sup>5</sup>While I have reviewed the entire record, I have only summarized the relevant portions.

duty day, either by Blackberry or phone. Pilots understand that failure to place an order the night before can delay a meal up to six hours.

Most problems with crew meals are caused by schedule changes which delays food orders, the inability to deliver food at the fixed base operator (“FBO”) location, and un-edible food. In those situations, under the 2007 CBA, a pilot may be reimbursed \$20, plus delivery charges for a “denied” meal. Prior to changes in 2005 when the meal selections were set at 25, the pilots could order whatever they wanted. Some pilots didn’t like the meals change which restricted their choice.

On March 2, 2008, Mr. Carroll became aware of an issue with Mr. De Paiva when a flight coordinator indicated that he could not be located. In response, Mr. Carroll attempted to contact Mr. De Paiva and he informed the company’s assistant chief pilot (“ACP”) that Mr. De Paiva could not be located. Later, that day, Mr. Carroll prepared a chronological report of the events (ARX 3), which is a normal procedure when a crew member issue arises that might affect a trip. Since 2006, Mr. Carroll has prepared a dozen or more of these summaries.

March 2, 2008 was the last day of Mr. De Paiva’s five day tour. According to the crew member duty record, ARX 4,<sup>6</sup> on the first day of his tour, he traveled by airline from Fort Meyers to Stewart Newburgh field (“Stewart”). He remained on standby at the hotel the next day and did not fly. The next day he flew to New Jersey and then to Florida and then to White Plains, New York. On March 1, 2008, Mr. De Paiva returned to Stewart. Although Mr. De Paiva was not scheduled to fly on March 2, 2008 and was going to return home to Florida by airline, he was assigned around eight o’clock in the morning for a flight as second in command, with Captain Gardner as pilot in command (“PIC”) from Stewart to Saginaw, Michigan, and then to Naples, Florida. When he was rescheduled that morning, Mr. De Paiva placed a meal order for a salmon filet dinner, a chicken salad sandwich, and a tuna salad sandwich. Since Captain Gardner had been scheduled to fly on March 2, she placed a meal order for a Greek salad and tuna salad sandwich the night before.

In response to Mr. De Paiva’s food order, the company attempted to arrange delivery in Saginaw but the carters could not accommodate the order, so the food was “pushed” to Naples for delivery. When Mr. De Paiva was informed of the problem around 10:00 a.m., he responded that he would have to get the food himself in Saginaw, which is a common practice. In response, the flight coordinator annotated the flight schedule to show Mr. De Paiva would be going out to get some food for 30 minutes, which is the standard period of time to obtain food. The record contains no indication that Mr. De Pavia requested more than 30 minutes. Usually, requests for additional time are approved. The aircraft arrived in Saginaw around 1:20 p.m. and was scheduled to depart for Naples at 2:15 p.m. The flight actually left at 3:21 pm.

On March 3, 2008, based on internet search, Mr. Carroll prepared multiple maps, ARX 5, showing routes and distances to available restaurants near the Saginaw airfield FBO, marked “AvFlight.”

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<sup>6</sup>The times are set out record are “Zulu” or GMT time. AJX 4 contains a conversion chart and I have converted the testimony Zulu times to local times.

Mr. Carroll was not consulted by any labor relations personnel about a disciplinary response.

He submitted his maps, ARX 5 and the crew log summary, ARX 3 to his boss, Mr. Steve Wenz, vice president of crew support.

Mr. Carroll attempted to call Mr. De Paiva on his Blackberry on March 2, 2008. The phone rang but there was no answer. Mr. Carroll did not leave a voice message because other people, the flight controllers and acting chief pilot, were trying to contact Mr. De Paiva and Mr. Carroll just wanted to see if he could get through directly to Mr. De Paiva.

When Mr. De Paiva received the flight re-assignment on March 2, 2008, he promptly responded and within a couple of minutes ordered his meals. Consistent with company practice, upon his request for release time, the request was immediately granted. The company did not place any restrictions on where he could eat. The company did not give Mr. De Paiva any information about the Saginaw area. He did not have ARX 5. ARX 5 shows TGI Fridays is a 12 minute drive from the FBO (DOW Chemical appears to have their own hanger).

Captain Lynn Gardner  
(TR, p. 75 – 108)

Captain Gardner has been with NetJets since May 2000 and currently is a captain on a Citation 10. She has flown three or four tours with Mr. De Paiva. On March 2, 2008, she met Mr. Rick De Paiva at the Citation service center at the Stewart airport. At that time, they were scheduled to reposition the aircraft, depart to Saginaw, pick up seven passengers, and fly to Naples. The aircraft was coming out of maintenance but not released yet. While they were waiting for the release documentation, Mr. De Paiva called the company flight controllers to order food. Eventually, they taxied the aircraft to the other side of the field, where Captain Gardner got fuel and prepared the plane for departure. They finally departed for Saginaw about 30 minutes late but made up some time en route.

During the flight, they called ahead to see if Mr. De Paiva could get a vehicle to obtain food because he wasn't going to be able to get his ordered lunch at Saginaw. Upon landing, Captain Gardner met the Dow receptionist and explained that Mr. De Paiva would be coming in to take the vehicle in a few minutes to get something to eat. She then ordered fuel and service for the aircraft. Mr. De Paiva left the aircraft about 10 minutes after landing. Eventually, the manager of the Dow flight department came out and told Captain Gardner that Mr. De Paiva had gone to get something to eat. However, he asked if the plane would depart on time since Mr. De Paiva was driving to get something to eat. Captain Gardner replied that she was staying with the aircraft and would do her best to make sure the airplane was ready so they could depart when Mr. De Paiva returned. After she helped the Dow flight attendant get oriented, Captain Gardner introduced herself to the passengers and told them the flight would depart when Mr. De Paiva returned. The "lead" passenger, Mr. Kepler later came out to the aircraft and expressed his concern about the departure time. He was worried that Mr. De Paiva would not be back in time to depart on time.

Captain Gardner then got a call from the NetJets account coordinator who asked how long the delay would be. Captain Gardner estimated 30 minutes because she hadn't talked to Mr. De Paiva about his current location. She then paged Mr. De Paiva and asked for an estimate on when he'd be arriving. About 20 minutes later, he paged that he was on his way. In the meantime, Captain Gardner loaded the passengers, conducted a safety briefing, and prepared for start up. When Mr. De Paiva arrived, he joined Captain Gardner in the cockpit and they departed for Naples.

Earlier in the day, Captain Gardner offered Mr. De Paiva either one of her meals, tuna sandwich or a salad, but he declined, saying the meals were hers and that he needed to get his own food. En route to Saginaw, Mr. De Paiva indicated that he had a safety issue. Having eaten a very early breakfast, he was hungry and needed something to eat. They then made arrangements. He coordinated to have a vehicle so he could get something to eat. Mr. De Paiva indicated that he wanted to go have a sit-down meal, but given the 30 minute time frame, Captain Gardner was not sure if he would do that.

Mr. De Paiva did not report his need to eat as a safety issue to the company. Captain Gardner believed they had "taken it into consideration as a crew" by making arrangements for the vehicle. She believed 30 minutes would be sufficient to address his needs.

On the night of March 2, 2008, after her arrival in Naples and at the request of the ACP, Mr. Mark Mundy, Captain Gardner prepared a report and a timeline of the day's activities, ARX 6. Subsequently, she reviewed her report and timeline with the members of the PRB. The italics portions of ARX 7 reflect her answers to the PRB's questions. However, she doesn't recall stating the Mr. De Paiva told her that he was going to use the vehicle to get food to take on the trip.

According to the e-mail record, ACX 1, Captain Gardner asked Mr. De Paiva at 2:13 p.m. on March 2, 2008 to advise when he was on the way back to the aircraft. Mr. De Paiva responded with "k" which means ok. At 2:56 p.m., Mr. De Paiva emailed that he was leaving Fridays and would return in 20 minutes.

Mr. De Paiva had already obtained a 30 minute release from the company when she offered him one of her meals. Then, they called ahead to make sure Dow Chemical had a vehicle available. Mr. De Paiva was polite when he asked for the vehicle. When Captain Gardner entered the Dow facility upon arrival, she confirmed a vehicle would be provided to Mr. De Paiva. Later, a Dow employee came out to the aircraft and indicated that Mr. De Paiva made a fuss in the hanger. The employee was upset with Mr. De Paiva's demeanor. The individual stated that he was upset because Mr. De Paiva had been abrupt with him and made statements in front of the passengers that he would be leaving to get something to eat and the flight might be delayed. Captain Gardner apologized if there was any misunderstanding but noted they had called ahead for a vehicle so he could get something to eat. The employee responded that based on what Mr. De Paiva said, the flight was going to be late.

When Mr. De Paiva departed the aircraft in Saginaw, Captain Gardner assumed he would be gone for 30 minutes. She has no personal knowledge of what the Dow Chemical

representative and Mr. De Paiva said in the hanger. When Mr. De Paiva returned to the aircraft, Captain Gardner just wanted him to immediately sit in his seat so they could depart. He followed her instructions.

Mr. De Paiva had “excellent” pilot skills. He performed his duties well and Captain Gardner enjoyed flying with him. She never observed, nor was aware of, any below standards customer service provided by Mr. De Paiva. She never received any complaints from customers about his service or conduct as a pilot.

Captain Gardner had never been in Saginaw but she hoped 30 minutes would be sufficient and assumed that Mr. De Paiva would be gone that long. Since they had 45 minutes, Captain Gardner believed they could still take off on time.

Upon arrival in Naples, while unloading the baggage, Mr. De Paiva would have had an opportunity to apologize to the passengers. During the flight, Captain Gardner told Mr. De Paiva to stay in his seat. She indicated that the passengers were upset and it wouldn't be productive for him to go back into the passenger compartment.

In particular, the lead passenger, Mr. Kepler, was upset. Mr. Kepler initially came out to the aircraft and asked if she was aware of Mr. De Paiva's location and how late they were going to be. The second time he came out to the aircraft, Mr. Kepler stated that he was very disappointed in Mr. De Paiva's professionalism and commented that Mr. De Paiva might not be suitable; he was worried about the safety of the flight. Captain Gardner advised that since Mr. De Paiva had eaten, he would be safe. If Captain Gardner believed Mr. De Paiva posed a risk to flight safety, she would have immediately made a report to the company. However, she had no concern about his ability to safely operate the aircraft.

Mr. Paul Fancey  
(TR, p. 109 – 155)

Mr. Fancey works for the Dow Chemical flight department at Hanger 5, located on the Saginaw Airport, next to the FBO buildings. The flight department manages, maintains, and flies four jets for the company. At the facility, Mr. Fancey supervises the technical staff and conducts operations in the absence of the Director of Operations. He has been with the company's flight department since 1980 and in his present position since 1996.

Occasionally, Dow Chemical uses NetJets for supplemental airlift when one of the company planes is unavailable due to maintenance or they need additional flights they can't manage. Mr. Fancey had contact with NetJets pilot crews prior to March 2008.

On March 2, 2008, Mr. Fancey was notified that a NetJets aircraft would be arriving in Saginaw. The company had a senior management meeting in Naples, Florida and the other four Dow Chemical jets were already committed. The NetJets flight was scheduled to depart at 2:15 p.m. Prior to the jet's arrival, the crew called on the hanger radio frequency and asked if they had a vehicle for a crew member to go and get something to eat.

The NetJets aircraft arrived about an hour before the scheduled departure. Although the captain came in first, Mr. Fancey did not have any contact with the crew until Mr. De Paiva came in around 1:30 p.m. Mr. De Paiva requested the company van. Since there was only 45 minutes before the departure time, Mr. Fancey offered to go to Burger King or Subway instead. Mr. De Paiva replied that he didn't eat that type of food and said he needed something like TGI Friday's or Bennigan's because NetJets had been unable to provide his ordered meal. He wanted a rib dinner. Mr. Fancey then noted that those types of restaurants were at least a half an hour away and that he wouldn't make the flight time if he went there. Mr. De Paiva replied that if he couldn't use the van, he would get a cab. Since the facility didn't have any cabs, Mr. Fancey knew that it would take up to an hour to get a cab. Although Mr. Fancey did not want Mr. De Paiva to leave, he didn't believe he had an option other than to give Mr. De Paiva the van keys in order to get the aircraft departed as soon as possible. When Mr. De Paiva asked for directions, Mr. Fancey tried to convince him that it was better if he didn't leave and Mr. Fancey go instead. But Mr. De Paiva insisted on a map, so Mr. Fancey drew a quick map to TGI Friday's. Over the course of their conversation, Mr. Fancey noted the scheduled 2:15 p.m. departure time and indicated Mr. De Paiva was not going to make the departure. Depending on traffic, it takes 20 to 25 minutes to drive to Friday's. When Mr. De Paiva left, Mr. Fancey knew the flight wouldn't leave at 2:15 p.m.

Also during their conversation, Mr. De Paiva told Mr. Fancey that his need to eat was a safety issue. Mr. Fancey didn't consider his safety concern valid since Mr. Fancey was willing to go get food for Mr. De Paiva.

Mr. Fancey was "flabbergasted" by Mr. De Paiva's actions. "I've never had anyone do this to us before." Both Dow Chemical and other NetJets flight crews understand that they need to do whatever is required to make the departure time, even if it means grabbing a Subway and eating something they don't necessarily enjoy. Initially, Mr. Fancey thought Mr. De Paiva was just going to get some take-out food, so he'd only be 5 to 10 minutes late. After Mr. De Paiva left, Mr. Fancey instructed his scheduler to contact NetJets and tell them that Mr. De Paiva was not going to make the scheduled trip departure and ask if they can get another airplane. Later, the scheduler told him that NetJets did not have another aircraft. At that time, Mr. Fancey returned to trying to get one of the company's jet repaired.

The passengers for the flight were two senior vice presidents, including Mr. Kepler who's in charge of IT, and their spouses. They arrived around 2:00 p.m. Because Mr. Fancey believed Mr. De Paiva was going to get take-out, he thought the flight would only be delayed 10 to 15 minutes. Around 2:30 p.m., the other vice president, who is usually easy-going, became very irritated and asked Mr. Fancey what was going on. Mr. Fancey was unable to give him a departure time. He had never seen the vice president that upset. The vice president indicated that maybe they needed to rethink their contract with NetJets. Mr. Fancey also heard the passengers express concern that maybe they shouldn't discuss the situation with the co-pilot since it might upset him and become a safety issue.

Mr. Fancey also called Detroit where one of the Dow Chemical aircraft was standing by to fly the CEO down to Naples. Mr. Fancey asked the operations personnel to ask the CEO when he arrived whether they could fly up to Saginaw to pick up the passengers there. A short

while later, Mr. Fancey was advised that the CEO was flying up to Saginaw. However, when Mr. Fancey went out to the NetJets aircraft, he saw the captain loading the passengers. Mr. Fancey told the captain that he could have another aircraft in Saginaw in 20 minutes and he asked the captain if she believed the co-pilot was competent and safe to fly. The captain indicated that she had no concerns and that Mr. De Paiva would be back in 10 minutes. So, Mr. Fancey had the CEO aircraft fly on to Naples.

Around 3:30 p.m., Mr. De Paiva returned and asked to use the restroom. Not wanting to upset him, Mr. Fancey just took the van keys back. Mr. Fancey then went back out to the aircraft and asked the captain again whether Mr. De Paiva was safe to fly. She restated yes, Mr. De Paiva was okay.

The flight departed some time after 3:30 p.m. At least one of the vice presidents had to reschedule a meeting in Naples.

Prior to Mr. De Paiva's arrival, Mr. Fancey was not aware that an employee had already told Mr. De Paiva that a vehicle would be available, but he was not surprised that the conversation had occurred. They make a company van available to who ever needs it. The first thing he said to Mr. De Paiva was that there wasn't enough time for him and he offered to go pick something up. He offered Subway because it's only 10 minutes away and that's normally what crews do when they are tight on departure time. They'll take the food with them and eat after take off.

In rejecting fast food, Mr. De Paiva indicated that he needed something more substantial. When he left, Mr. De Paiva did not indicate that he was going to get a sit down meal. Mr. De Paiva was aware that he wouldn't make the scheduled departure time.

The map Mr. Fancey provided was probably a rental car map on which he marked the restaurant's location

When Mr. De Paiva returned, he thanked Mr. Fancey and appeared calm and professional.

A few days later, Mr. Fancey's director asked him to prepare a written statement about the events of March 2, 2008. That summary was incorporated into a letter Mr. Flanagan prepared, ARX 8.

In Mr. Fancey's opinion, Mr. De Paiva destroyed the trust that had taken years to develop between Dow Chemical and NetJets by not showing any concern whatsoever about the passengers on March 2, 2008. His action led the vice president to indicate they needed to rethink their contract with NetJets. Mr. De Paiva could have had food brought to him within 10 minutes.

In his second exchange with the captain, she indicated that Mr. De Paiva was trying to prove a point and would be very happy that he did. She had no concerns about his ability to fly.

Mr. James Christiansen  
(TR, p. 157 – 177)

Mr. Christiansen is the president of NetJets. The company sells fractional shares of aircraft and provides worldwide flight services within 4 to 10 hours notice. NetJets pilots serve two functions. First, they operate the aircraft safely. Second, they are the company's ambassadors with customers. The aircrew is responsible for interfacing with the customer and being involved directly with them. It's a hands-on and direct relationship.

Mr. Christiansen first became aware of the problems on March 2, 2008 when his executive vice president for flight operations informed him they had an issue with a Dow Chemical account flight. Subsequently, he received a call from Mr. Flanagan, the Director of Aviation at Dow Chemical. Mr. Flanagan stated that the NetJets aircrew had engaged in totally unacceptable behavior. One of the pilots was abusive, demanded a vehicle and went off to get something to eat to a restaurant of his choice even though the Dow Chemical people made every attempt to get him something to eat locally and explained there would be a problem because he would not make it back in time for his flight. The pilot was gone for quite a period of time. Mr. Flanagan considered the behavior unprofessional and he had never seen anything like it.

Mr. Christiansen apologized profusely and indicated that he would look into the situation and take an appropriate course of action. However, Mr. Christiansen was not involved in the personnel action regarding Mr. De Paiva. Eventually, Mr. Eric Lambert, vice president of flight operations, briefed him about the investigation of the incident and PRB's recommended termination. Mr. Christiansen agreed with the recommendation. Mr. Christiansen had the authority to block the recommended action. Prior to accepting the recommendation, Mr. Christiansen did not review Mr. De Paiva's work history.

Mr. Christiansen is aware that NetJets provides retraining for employees for various things.

Mr. David Robbins  
(TR, p. 177 – 251)

Mr. Robbins is the Assistant Director of Operations Flight Support for NetJets and chairman of PRB. In that capacity, he supervises 150 individuals in flight and international flight operations, dispatch, meteorology, and flight review. He also manages the policies and processes of flight planning and supports the Director of Operations in day-to-day operations.

The PRB is an investigatory and review body that looks into incidents involving crew members that could lead to discipline. The PRB consists of Mr. Robbins, as chairman, and two other chief pilots. During an investigation, the PRB will gather crew member reports and conduct interviews of company personnel, witnesses and other individuals. Whenever the PRB requests a captain's or crew member's report, the pilot union is notified. The union attends the PRB proceedings. After collecting information, the members of PRB deliberate, prepare a report, and make recommendations. The report and recommendations are then sent to the vice president of operations, Mr. Lambert. The vice president either agrees or disagrees with the

recommendations, and confers with the executive vice president of operations, Mr. David McGee. The PRB procedures are set out in the flight operations handbook, Section 1.36, ARX 9. Since his appointment in January 2007, Mr. Robbins has conducted 75 to 80 PRBs.

In early March 2008, Mr. De Paiva's chief pilot, Mr. David Cimarolli, requested that the PRB conduct a review. Prior to the request, Mr. Robbins was aware that a flight had been delayed due to a crew food issue, which caused a serious service disruption for the customer. During its investigation, the PRB, consisting of Mr. Robbins and Chief Pilots Koenig and Hyman, consulted the crew support group and established a time line regarding the food order and response. The entire tour period was reviewed and statements from Mr. De Paiva, ARX 10, and Captain Gardner, ARX 6, were obtained. The PRB also investigated the available food options around the Saginaw airport and Dow Chemical facility. Other reviewed documents included ARX 3 and ARX 5.

Next, the PRB interviewed Mr. De Paiva and Captain Gardner. A union representative and an employee from labor relations were also present. Mr. Robbins prepared notes regarding these two interviews, ARX 7 and ARX 11, to which the other two PRB members concurred. After the interviews, since Mr. De Paiva mentioned that he raised a safety concern regarding food, the PRB decided to contact the NetJets safety department to see if Mr. De Paiva had raised a safety issue or filed a safety complaint regarding the incident through the safety channel.

On March 18, 2008, the PRB issued its final report, ARX 12. During the course of its investigation, the PRB did not consider any previous grievances filed by Mr. De Paiva. The only comment about past grievances was made by the labor relations employee who commented the incident was more of an issue than he originally believed and was not similar to crew food issues seen in recent grievances. The labor relations employee did not mention the name of any grievant. Although everyone in NetJets management was aware of a number of general crew food grievances, Mr. Robbins was not aware of any particular, individual grievance since he is not involved in that process.

When the PRB interviewed Mr. De Paiva, they had a set of questions prepared in advance and then asked follow-on questions. The only portions of ARX 7 and ARX 11 that are verbatim appear within quotation marks. The interview summaries also don't include every question asked and answer given that day. The PRB did not review the actual e-mail exchange between Mr. De Paiva and Captain Gardner. Based on the interviews, the PRB assumed Mr. De Paiva did not provide an estimated time back to the airport facility.

Since Mr. De Paiva had acknowledged that the Dow Chemical personnel had offered assistance in getting food, and in order to avoid further straining relationships, the PRB did not interview the Dow Chemical individuals. The only Dow Chemical allegations that the PRB knew about involved the delayed flight and the inability to locate Mr. De Paiva.

While the PRB may not have known the exact timing of the exchanges between Mr. De Paiva and Captain Gardner during the flight to Saginaw, the PRB was aware that the crew meal she offered to Mr. De Paiva was identical to the crew meal he ordered but the company was unable to provide; and, he declined that offer prior to arriving in Saginaw.

The PRB considered both Captain Gardner and Mr. De Paiva to be truthful witnesses, even though there was some discrepancy on whether Mr. De Paiva planned to use the vehicle to get food to take on the flight or he intended to go have a full meal at a sit down restaurant. Additionally, the PRB was not as concerned about the availability of food. Instead, the PRB focused on “why Mr. De Paiva had consciously made decisions in advance not to either accept or gain access to food but instead was rather bent on procuring ground transportation of his choosing and going to a restaurant of his choosing. It was less of a food issue and more of a behavioral issue.”

The PRB also considered obtaining vehicle transportation from Dow Chemical to be improper. According to the Flight Operations Manual (“FOM”), Dow Chemical does not provide any FBO support. Contact for services is made to the FBO next door. While Dow Chemical may have graciously provided vehicles in the past, NetJets pilots are not suppose to ask Dow Chemical for vehicle support.

Mr. De Paiva told the PRB that the exchange with the Dow Chemical employee had escalated and stressed him out and that he needed a break to decompress. However, the PRB was distressed by Mr. De Paiva’s statement that he decided to go out and get a sit-down meal prior to even arriving in Saginaw. Notably, when Mr. De Paiva called from the aircraft, rather than making arrangements to have food provided, he instead asked for a vehicle, which is consistent with his early statement that he was predetermined to get in a car and go somewhere to get food prior to arriving in Saginaw. He could have obtained food assistance from the same person he asked for the car or he could have contacted the FBO for assistance in getting food. In other words, once Mr. De Paiva became aware that the company could not provide his ordered meal in Saginaw, Mr. De Paiva had an opportunity even before leaving Stewart and lots of options to arrange for food in Saginaw, “instead of sticking with I need a car, I need to leave, I need to go to a restaurant.”

The PRB was also concerned that Mr. De Paiva decided to get into a car to find a restaurant in an unfamiliar area when he believed he was so stressed that he couldn’t operate an aircraft. Even though the Dow Chemical employee may have given him directions, he also indicated other restaurants were closer and offered to go get food for Mr. De Paiva, which Mr. De Paiva refused.

Mr. Robbins acknowledged that Mr. De Paiva had a 30 minute release to obtain food. However, he used 15 to 20 minutes just procuring the vehicle. “He continued to make poor choices along the way because he knowingly and willingly deviated from the 30 minutes timeline and never told anybody.”

Regarding Mr. De Paiva’s disparaging remarks about NetJets, the PRB reached that conclusion based on Mr. De Paiva acknowledgment during the interview, which may not have been summarized, that he made statements to the Dow Chemical personnel that NetJets did not use proper planning of flight and had not provided him with food that he needed to make the flight, this was a recurring problem, and he felt entitled to the food he ordered. The PRB believed those comments “casts NetJets in a disparaging light.”

Mr. Robbins acknowledged that the FOM required a crew member to inform a customer of a flight safety issue which might include NetJets' inability to provide food if it affected flight safety. The PRB did not take the position that it was inappropriate for Mr. De Paiva to tell Dow Chemical personnel that he needed to eat and that it was a matter of safety.

The PRB considered other disciplinary actions regarding pilots who had engaged in similar misconduct, including one case of unavailability, which led to a letter of warning, ACX 2. However, the PRB concluded that "there had never been a case that involved so many different facets of crew member willful disregard and poor behavior, and poor decision making."

NetJets complies with customer requests and does not assign individual pilots to particular owners. Nothing precluded NetJets from not assigning Mr. De Paiva to Dow Chemical flights. Mr. Robbins has also talked to other pilots about customer service complaints.

The PRB had no other complaints from other customers about Mr. De Paiva's level of customer service. The identity of Dow Chemical as the customer in this case did not have any bearing on the PRB's decision and recommendation.

Mr. Eric Lambert  
(TR p. 252 – 327 )

Mr. Lambert is a vice president and Director of Operations for NetJets. In that capacity, he manages day-to-day flight operations and serves as a senior leadership team member for the executive vice president of flight operations.

Mr. Lambert first became aware of an issue with Mr. De Paiva in the afternoon of March 2, 2008 when he received an e-mail from Mr. De Paiva's chief pilot, Mr. Cimarolli. Later, in the evening, he received an e-mail from the executive vice president indicating that the situation needed to be reviewed. As a result, he requested crew reports the next day. He also heard from the vice president of owner services who had received a written report from Mr. Flanagan of Dow Chemical about the events of March 2, 2008, ARX 8.

Subsequently, Mr. Lambert placed a follow-up call with Mr. Flanagan. Dow Chemical was extremely upset at the manner Mr. De Paiva handled himself. They expressed very serious concerns about his demeanor, inappropriate behavior toward their employees, and erratic behavior which cast doubt on flight safety. Senior leadership members were on the flight and raised questions about continuing their contract with NetJets. Mr. Lambert took notes of the conversations, ARX 17. In response, NetJets did not make any commitment to take action against Mr. De Paiva since they did not have his side of the incident. Mr. Lambert committed to getting back to Mr. Flanagan by March 18<sup>th</sup>.

Mr. Lambert then met with Mr. Robbins and asked the PRB to review the incident. He had no involvement in the PRB proceedings.

At the conclusion of the PRB proceedings, Mr. Lambert read their report and recommendation, in addition to the crew member reports, a timeline report, Mr. Flanagan's report, a detailed report about local area restaurants and his telephone notes. Mr. Lambert then agreed with PRB's recommendation to terminate Mr. De Paiva's employment because:

it was the most egregious display of inappropriate behavior toward an owner that in my ten years in the office, I'd been witness to, in addition to not complying with the mission, vision, values of NetJets, the guidance we have in the flight operations manual, and also casting doubt on the safety of our flight operations, none of these are acceptable behavior.

After he made his decision, Mr. Lambert briefed the executive vice president, Mr. McGee, who agreed with the PRB result. Mr. McGee then discussed the findings and recommendation with Mr. Christiansen. Mr. Lambert also advised the union representative of the termination decision, ARX 18. Mr. De Paiva was then issued a termination letter, AJX 2.

Typically, Mr. Lambert will consider a pilot's work history. However, in Mr. De Paiva's situation the PRB did not present that information and Mr. Lambert did not believe his work history was relevant. Mr. Lambert was aware that no record of prior discipline was present in this case. Likewise, Mr. Lambert did not ask the PRB whether other pilots' disciplinary actions had been considered. Mr. Lambert is aware of other disciplinary actions taken against other pilots for unavailability, such as the case in ACX 3, which involved a warning letter for refusal to fly. Similarly, in the cases summarized in ACX 4 and ACX 5, the pilots received warning letters for unavailability. In ACX 6, ACX 7, and ACX 8, the pilots received suspensions. In ACX 9, the pilot did not receive any discipline. ACX 10 to ACX 14 are other unavailability disciplinary cases.

Mr. Lambert received Mr. De Paiva's apology letter around March 3 or 4, 2008.

On March 4, 2008, Mr. Lambert reported that Mr. Flanagan was comfortable with the way NetJets was handling the situation, ARX 17. However, Mr. Lambert did not talk to Mr. Flanagan about the level of discipline. Instead, Mr. Lambert was referring to NetJets' intent to investigate the matter.

When Mr. Lambert summarizing the PRB results, Mr. Lambert was unaware that Mr. De Paiva informed Captain Gardner of his estimated return time.

Mr. De Paiva's comments to Dow Chemical employee about NetJets inability to provide him food is disparaging because it casts doubt on the company's operations and it was not a concern for Dow Chemical. Crew members are expected to use tact.

Mr. Lambert also noted that because Mr. De Paiva was on-call for March 2, 2008, he should have ordered meals to be prepared the night before in case his duty assignment changed. By his actions, Mr. De Paiva pushed the crew food obligation onto Dow Chemical. Mr. Lambert explained:

Well, when we have a crew member that walks in and demands to go get food, demands a rental car, demands to do so or he's going to get a cab and – tells employees there he's going to get a sit-down meal, he's pushing that obligation off on them. He's making this situation – instead of being our problem, it's making it their problem.

What Mr. Lambert expected Mr. De Paiva to do was to first work with Saginaw FBO around the corner. Second, to the extent he needed to work with Dow Chemical personnel, there were eight restaurants within four minutes which could have provided food.

Regarding his characterization of Mr. De Paiva's interaction with the Dow Chemical personnel as rude, discourteous, and pompous, Mr. Lambert relied on Mr. Flanagan's statements as well as Mr. De Paiva's admission that they deserved better service than he provided and that he tarnished the image of NetJets and made poor decisions.

The casting doubt on flight safety statement relates to Mr. De Paiva's statement to the Dow Chemical employee that eating food prior to departure was a safety issue coupled with Mr. De Paiva's decision to drive a car in an unfamiliar area when he's too famished and incapacitated to operate an aircraft.

Before the discharge action, Mr. Flanagan advised Mr. Lambert that Mr. De Paiva is never to return to the Dow Chemical facility. However, the NetJets no fly list is used to ensure certain pilots are not crewed with other certain pilots. It has nothing to do with the owners. At the same time, on occasions, NetJets has restricted specific crew members from flying particular owners.

In deciding the appropriate level of discipline, Mr. Lambert considered that the customer in this case was Dow Chemical. Since the size of their contract is substantial, Mr. Lambert "took into account that the contract was in jeopardy."

Had Mr. Lambert considered the other discipline cases, ACX 3 through ACX 12, they would not have influenced his decision in Mr. De Paiva's case. Those other incidents "did not deal with a crew member acting in an inappropriate manner towards an owner. There's a distinct difference. Had they have, the outcome would have been the same."

Mr. De Paiva's representation to the Dow Chemical employee was not necessarily inappropriate, "It's not what he said. It's how he said it, all right."

Captain John Kagel  
(TR, p. 334 – 344)

Captain Kagel was the union representative at Mr. De Paiva's PRB on March 17, 2008 and witnessed the interviews of Mr. De Paiva and Captain Gardner. He recalls Mr. De Paiva stating that he received Captain Gardner's food offer after he obtained the 30 minute release and declined because he needed something more substantial. Mr. De Paiva also attempted to arrange for food prior to departing Stewart. Initially, Mr. De Paiva did not make any statement about

where he decided to go eat. When the PRB asked him when he decided to get a sit-down meal, Mr. De Paiva replied that he was distraught about the situation and needed to break away to be able to fly safely and the confrontation with the Dow Chemical employee was the last straw.

After Mr. De Paiva's testimony, Captain Kagel shared with the PRB his observation that having eaten with Mr. De Paiva, Captain Kagel believed he had a high metabolism. It was fairly obvious that if he had not eaten for a few hours, he was probably unsafe to fly. At that point, the labor relations representative commented that Mr. De Paiva had filed more crew food grievances than anyone else. Captain Kagel objected to the comment, indicating it was inappropriate to bring up contract-protected rights in a disciplinary proceeding.

Mr. Troy Beynon  
(TR, p. 344 – 347)

Mr. Beynon prepared a summary of Mr. De Paiva's grievances since January 2006, ACX 15.

Mr. Henrique De Paiva  
(TR, p. 351 - 429)

Mr. De Paiva was hired as a NetJets pilot on August 23, 2004 to fly the Citation 10, CE 750. At the time of his discharge, he was a first officer in the Citation 10. During his employment, he also served as a member of the pilots' union contract compliance committee, which assisted pilots in understanding the contract, and was also a pilot to pilot representative, assisting pilots with contract information.

The company never raised any performance issues with Mr. De Paiva. He never failed a check ride or oral examination.

On the night of March 1, 2008, Mr. De Paiva did not order food for the next day because he already had an airline reservation to travel home. He planned to eat a hot breakfast at the hotel the next day and then get some additional food at the airport before flying home. However, when he had breakfast at 7:00 a.m. on the Sunday morning, March 2, 2008, only cereal was available. So, he had two boxes of cereal and a cup of coffee. Later that morning, he was advised on his Blackberry of a schedule change. He was assigned to take an aircraft from Stewart to Saginaw and pick up "the Dow folks" and fly them to Naples. At the time of his reassignment, Mr. De Paiva ordered his meals. When he was advised that the food would be delivered in Saginaw, Mr. De Paiva asked the flight controller if the delivery could be made at Stewart before his departure since he only had a light breakfast and was hungry. However, the caterer was too far away. So, Mr. De Paiva agreed to take the flight but indicated that he'd be "really hungry" when he arrived in Saginaw. However, the company later informed him that his food could not be delivered in Saginaw because the FBO could not get food. As a result, his meals would be delivered in Naples (ACX 16). At the time, Mr. De Paiva was schedule to arrive in Naples between 4 and 6 p.m. In response, Mr. De Paiva requested to be released to eat because he would have gone over 12 hours without a full meal and would be unsafe to fly. The company then advised him that he was released for 30 minutes from 1:00 p.m. to 1:30 p.m.

Mr. De Paiva declined Captain Gardner's offer of her salad. Mr. De Paiva had been flying with Captain Gardner for awhile and the salads she ordered "didn't smell right." And, since he had been released to eat, he didn't want to take her food.

While en route to Saginaw, in accordance with the FOM, Mr. De Paiva contacted the Dow Chemical flight operations, explained his food problem and asked if he could borrow a car to get food. The Dow Chemical representative replied that she had a car for him.

As Mr. De Paiva previously explained to the Pilot Review Board, while he initially contemplating getting food to go, Mr. De Paiva decided to go get a sit down meal after his conversation with Mr. Paul Fancey at the Dow Chemical hanger.

When he initially arrived at the Dow Chemical hanger and asked for the car keys, a female employee told him that he couldn't have them which was frustrating since he was pressed for time. Then, Mr. Fancey approached Mr. De Paiva. As Mr. De Paiva attempted to explain his food situation, Mr. Fancey didn't seem to care at all about the fact that Mr. De Paiva needed to eat. Since he was a NetJets pilot, Mr. De Paiva tried not to argue, but he was "very, very adamant" about needing to eat. Mr. Fancey indicated that "might" be able to have some food brought in. However, Mr. De Paiva said to himself, "'might' ain't going to cover safety." When Mr. De Paiva indicated that he needed to eat, Mr. Fancey responded that he couldn't guarantee food. "As things escalated," Mr. Fancey asserted Mr. De Paiva didn't understand the situation and stated "no, no, this flight can't be late." By Mr. Fancey's "intonation, the tone of his voice," Mr. De Paiva concluded Mr. Fancey did not understand that Mr. De Paiva needed food to operate just like a plane needs fuel to fly. Mr. Fancey indicated that either a Subway or Burger King was nearby and he would have someone drive him there, but Mr. De Paiva told Mr. Fancey that he needed a "substantial" and "nutritious" meal since he had a very light breakfast that morning. He was also embarrassed at the moment. He never had an owner talk to him that way. Mr. Fancey continued not to care; all he was concerned about was being on time.

Embarrassed by Mr. Fancey's rude and condescending words, Mr. De Paiva decided that he needed to disengage, "recollect my thoughts, and take my 20, 30 minute break that was given me by the company and eat and decompress and then move on to assume my duties." He was so "flustered and hungry and embarrassed" by Mr. Fancey that Mr. De Paiva concluded he was not safe to act as a crew member. Eventually, Mr. Fancey gave Mr. De Paiva the car keys and asked what kind of food he wanted. Mr. De Paiva replied a "square" meal at some place like Friday's or Bennigan's. When Mr. Fancey pressed him on the type of food, feeling some stress, Mr. De Paiva said "ribs" as a knee jerk reaction. Having never been to Saginaw, Mr. De Paiva asked for a map and Mr. Fancey gave him a rental car map and circled the location of Friday's. Mr. Fancey accompanied him to a minivan, Mr. De Paiva thanked him, and Mr. Fancey replied, "ok." During their conversation, Mr. De Paiva did not raise his voice or swear. Mr. De Paiva made a "mistake" when he didn't contact the NetJets on-duty ACP about his problem with Mr. Fancey. He should have contacted the company then.

On his way to the restaurant, Mr. De Paiva got lost for about 10 minutes and then he drove another 14 to 15 minutes to the restaurant. During this time, although the company did not

contact him, Mr. De Paiva did not contact the company, which he now acknowledges he should have. The restaurant was not crowded when he arrived at around 2:20 p.m.; his order was taken right away. Mr. De Paiva had a Caesar salad and steak fajitas.

Mr. De Paiva did not order the meal to go because:

I've never been in this area. I don't think it's safe to eat and drive and there was residual snow in the area. I live in Florida, so snow's not the friendliest place but the main thing was I didn't want to eat and drive and I also wanted to decompress and take a break. And, subconsciously, maybe that's why I didn't contact the company. I wanted to disengage and take a break.

Based on his restaurant receipt time stamps (ACX 17), Mr. De Paiva spent about 29 minutes eating his meal at Friday's and departed at 2:52 p.m. During this period, he received a correspondence from Captain Gardner and responded. Mr. De Paiva's drive back to the airport took approximately 15 minutes.

After he returned the van, thanked Mr. Fancey, and washed up in the bathroom for two minutes, Mr. De Paiva returned to the aircraft. The passengers were seated, the contract flight attendant was in place and Captain Gardner was in the cockpit. As he boarded, he asked Captain Gardner if she was ready to depart. When she said "yes," he closed the cabin door. Usually, the first officer briefs the passengers before flight. When Mr. De Paiva asked Captain Gardner if he should give the briefing, she told him to take his seat because she wanted to get going. "I had intentions of apologizing to the passengers at that point in time, but I complied with her request." He did not go back to speak to the passengers later because he was required to be in the cockpit as a crew member and with eight passengers and a cabin attendant, the cabin was "pretty tight." Additionally, Mr. De Paiva perceived that Captain Gardner wanted him to stay out of sight. She was disappointed that the flight was late and didn't talk very much to Mr. De Paiva. She indicated that the ACP had called her and that the company was upset the flight was late. When the aircraft arrived in Naples, he helped with the passenger's luggage. However, he did not apologize to the passengers because his perception of Captain Gardner's demeanor was "stay out of sight, just do your job, and don't say anything."

Because he felt bad about the situation, Mr. De Paiva sent an apology letter (ACX 18) to company executives to let them decide if they wanted to send the apology to the Dow Chemical passengers.

In retrospect, while he's never experienced this type of situation in his three and a half years of flying, Mr. De Paiva believes that he should have involved the company "when things kind of started escalating with Mr. Fancey, right then and there, I should have called the ACP." At the same time, "subconsciously, I think I was trying to disengage altogether. In my mind, I've got to get this flight done but I've got to be safe and I need a lot of food, I eat a lot." He now knows that he should have updated the company that he was running late and included them in the process. Regarding his exchange with the owner, again as he stated to the PRB, Mr. De Paiva never raised his voice; he did not use profanity; and, he was not condescending. He also didn't make disparaging remarks about NetJets, he was simply trying to explain to Mr. Fancey

that the company tried to provide food but was unable to furnish food due to logistical issues. Mr. De Paiva was not trying to make a point. He just needed to eat as a safety issue and then “unfortunately” because of the escalation with Mr. Fancy, he had to sit down and decompress.

Mr. De Paiva was prepared to return to flying for NetJets because it’s a great company and job.

For about eight months starting in 2005, Mr. De Paiva was an assistant chief pilot at NetJets. He voluntarily relinquished that position.

In the morning of March 2, 2008, when Mr. De Paiva discovered that the company planned to deliver his food order in Saginaw, he tried to get it changed to the New Jersey airport that he was initially going to; it was not okay with him to wait for food till Saginaw. Eventually, when the food was not going to be provided at Saginaw, Mr. De Paiva was informed that the schedule was revised to release Mr. De Paiva for 30 minutes from 1:00 to 1:30 p.m. However, their departure from Stewart was delayed 40 minutes due to maintenance. Nevertheless, Mr. De Paiva was aware from the morning of March 2, 2008 that the flight was scheduled to leave Saginaw for Naples at 2:15 p.m. Although he was disappointed about not being able to eat in Stewart, he was fit for flight. Having never been to Saginaw, the thirty minutes “food line” in the schedule was “acceptable” and “satisfactory”; he planned to get something to go. On one other occasion, the 30 minutes had been sufficient.

While in-flight to Saginaw, Mr. De Paiva informed Captain Gardner that he was going to get something to eat. She replied, “okay.” Mr. De Paiva then contacted the Dow Chemical representative and confirmed that he was going to have a car. He was thinking about obtaining nutritious food in Saginaw. He didn’t ask the representative where he could get food within 30 minutes. At that point, he was not concerned about getting food within 30 minutes and he told Captain Gardner that he would do the best he could. She offered him a salad but it didn’t look good and would not have been sufficient.

When the aircraft arrived in Saginaw at about 1:20 p.m., Mr. De Paiva was aware that the plane was scheduled to leave in 55 minutes. Due to their delay in leaving Stewart due to maintenance, he was already into 20 minutes of the allotted 30 minute food line. At that point, he should have asked the company for an update. However, since he knew the company was already aware that he needed to eat, he assumed they knew that he’d be late. Before leaving to get something to eat, Mr. De Paiva was at the aircraft for about 10 minutes as he waited for Captain Gardner to return from talking to the Dow Chemical people. He finally entered the airport facility around 1:35 p.m.

When Mr. Fancy approached after the female refused to give him the car keys, Mr. De Paiva asked for the keys. Mr. Fancy declined stating that Mr. De Paiva couldn’t go anywhere. At this point, safety, not the aircraft’s departure time was his principle concern – “safety was priority which meant food.” After about five minutes, Mr. Fancy offered to get some fast food for Mr. De Paiva. Their exchange lasted at least ten minutes before he obtained the vehicle keys.

Since during flight, above 10,000 feet, crew member may eat in the cockpit, Mr. De Paiva could have eaten during the flight, as he has on other occasions. However, he needed to eat before departing because of two conditions. First, he didn't have any food in his system. Second, he was flustered and embarrassed by Mr. Fancy's reaction and needed to decompress. Had he taken food to go and not decompressed and something happened during take-off such as an engine fire or blown tire, "I would knowingly act as a required crew member [while] knowing that I have a medical deficiency." He could not do that. Had NetJets provided food, he would have consumed it prior to departure.

Mr. De Paiva arrived at the restaurant after the aircraft's scheduled departure time. It did not occur to him to call anyone and let them know the flight would be delayed because "at the time, my primary concern was disengaging and eating." As he left the restaurant at 2:56 p.m., he emailed Captain Gardner and indicated that he be back at the airport in 20 minutes.

During his conversation with Mr. Fancy, Mr. De Paiva indicated that if he didn't get the keys, he would go rent a car or get a taxi. He wasn't angry at that point, just frustrated. Mr. De Paiva was trying to convey that he had to eat and it was a no-go situation.

While he was at the restaurant, no company representative tried to contact him.

Mr. De Paiva's concern about a medical deficiency related to his not eating. According to Mr. De Paiva:

If you're not nourished, if you're not hydrated, you can't perform as efficient or as normal mental skills or motor skills a person that you have to [sic]. When you get in that plane, when you sit down in the cockpit, you need to be fit for flight duty and what that means is rested and nourished.

Consequently, Mr. De Paiva's medical deficiency was his malnourished state.

#### Mr. De Paiva's Air 21 Complaint Statement (CX 1)

As a NetJets pilot, Mr. De Paiva was required to have a valid medical certificate under 14 C.F.R. 135 and 14 C.F.R. 91, Subpart K. A pilot is also required to evaluate his stress and fatigue levels and delay flight if necessary to avoid knowingly operating aircraft in violation of 14 C.F.R. § 91.13, which prohibits the operation of an aircraft in a careless and reckless manner.

Mr. De Paiva filed numerous union grievances regarding the process pilots use to acquire meals while on duty.

#### FAA Regulations (CX 1)

Title 14 C.F.R. § 91.13(a) No person may operate an aircraft in a careless or reckless manner.

Title 14 C.F.R. § 61.53(a) states that a person holding a medical certificate issued under Part 67 shall not act as a pilot in command or as a flight crew member while the person “knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for pilot operation.”

FAA Aeronautical Information Manual  
(CX 1)

Section 8-1-1(a) states that all pilots must possess a valid medical certificate to exercise the privileges of their airman certificates. As a caution, the regulation indicates FAA regulations prohibit a pilot possessing a current medical certificate from performing crewmember duties while the pilot has a known medical condition that would render the pilot unable to meet the standards of the medical certificate.

Section 8-1-1(e)(1-3) identifies fatigue as “one of the most treacherous hazards to flight safety,” since it may not become apparent until after serious errors are made. In particular, coordination and alertness can be reduced by acute, or short-term fatigue due to many everyday living conditions, including long periods of mental strain and lack of sleep. Such acute fatigue “is prevented by adequate rest and sleep, as well as regular exercise and proper nutrition.” Chronic, or long-term fatigue, develops when a person does not have enough time for full recovery between bouts of acute fatigue. At this point, “judgment becomes impaired so that unwarranted risks may be taken.”

Section 8-1-1(f)(1) and (2) notes that “stress from the pressures of everyday living can impair pilot performance.” In particular, “stress and fatigue (see above) can be an extremely hazardous combination.” When “more than usual difficulties are being experienced, a pilot should consider delaying flight until these difficulties are resolved.”

2007 NetJets’ Pilots’ Collective Bargaining Agreement  
(AJX 1)

Section 20.7, *Crew Meals*, establishes that on-duty crew members are entitled up to 4 crew meals on a 24 hours basis. The union and company will develop a regular menu consisting of 7 substantially different meal options, including a vegetarian option. Up to 20 “pre-ordered” crew meals may be utilized a year in lieu of individual crew meals. Crew members are required to place their crew meal orders by the end of the preceding duty period. If a meal is not ordered the preceding duty period, a delay of up to 6 hours between the order and delivery may occur.

Termination Letter  
(AJX 2)

On April 8, 2009, Mr. Eric Lambert signed a letter, immediately terminating Mr. De Paiva’s employment with NetJets. The basis for the termination decision was Mr. De Paiva’s unavailability for duty as scheduled, violations of FOM section 1.3, NetJets vision, mission, and

values, 5.1.1, Owner/Passenger, 5.5.8, Dow Chemical – Saginaw procedures and P1.6.1, public conduct of NetJets’ crew members.

### Chronology (ARX 1)

In the evening of March 1, 2008, Captain Gardner places a food order. At 1:00 a.m., March 2, 2008, Captain Gardner and Mr. De Paiva are placed on duty at hotel from 7 to 8 the next morning with airline home in the afternoon. Prior to 10:00 a.m., both crew members are directed to fly from Stewart to Saginaw to Naples. At 10:26 a.m., Mr. De Paiva requests and the company approves a 30 minute food break in Saginaw. Their flight arrives in Saginaw at 1:21 p.m. Mr. De Pavia demands a car and leaves for Fridays’ to get ribs at 1:30 p.m. Passengers arrive at 1:55 p.m. Mr. De Paiva’s location unknown at 2:15 p.m. scheduled departure time. Mr. De Paiva notifies Captain Gardner at 2:56 p.m. that he will return in 20 minutes. At 3:15 p.m., Mr. De Paiva enters aircraft. Flight departs at 3:21 p.m. and arrives in Naples at 5:51 p.m. Dow Chemical meeting in Naples had been scheduled to begin at 5:45 p.m.

### NetJets Flight Operations Manual (ARX 2, ARX 13 to ARX 16, and RX C)

Section 1.3 sets out the company’s vision, mission, and values. To meet its vision to be a world leader in fractional aircraft ownership, NetJets’ mission is to provide owners with a “superior air transportation experience.” The company’s associated values include a level of safety second to none, treatment of owners as if they were the sole owner which “begins with top-notch **SERVICE**,”<sup>7</sup> and crew members serving as the company’s ambassadors.

To ensure “superior” transportation, Section 5.1.1 and P1.6.1 require NetJets owners, their quests, and passengers to be “treated with the greatest respect and courtesy.” As a result, the NetJets specifically “requires that the crew keep passengers informed at all times of any issues or situation affecting the safety and/or progress of their flight.” Employees are also expected to exhibit “the highest level of courtesy and respect” to customers and the general public.

Section 5.5.8 sets out the operations procedures for the Dow Chemical facility at Saginaw. Crews are required to contact the Dow Chemical hanger prior to arrival. Under normal circumstances, catering is “always sent” to the FBO, located next to the Dow Chemical hanger.

Under P1.10, NetJets provides crew meals on a 24 hour basis. Crews are required to order meals by the end of the preceding duty day.

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<sup>7</sup>Emphasis in original.

Flight Operations Report  
(ARX 3)

At 10:15 a.m., Mr. De Paiva advised that his ordered meal has been pushed to Naples. At 10:23 a.m., Mr. De Paiva was advised the he was released for 30 minutes in Saginaw for food.

At 1:40 p.m., the company was notified by Dow Chemical employee that Mr. De Paiva insisted on leaving to get food which was 25 minutes away. They would not be able to make the 2:15 p.m. scheduled departure. At 3:00 p.m., Captain Gardner estimated a departure time of 3:20 p.m.

Restaurant Summary  
(ARX 5)

Several restaurants, fast food establishments and a deli are located within two and a half miles of the Saginaw FBO (AvFlight). TGI Friday's is almost 10 miles away.

Captain Gardner's Report, March 2 and 3, 2008  
(ARX 6)

On March 1, 2008, Captain Gardner was scheduled to fly the next day as second in command. Mr. De Paiva was scheduled to fly home by airline. At 9:30 a.m. the next morning, they were rescheduled to fly from Stewart to Saginaw to Naples. Prior to departure, Mr. De Paiva requested an opportunity to obtain food in Saginaw; he was given a 30 minute release. Although they arrived late in Saginaw at 1:21 p.m., Captain Gardner felt "confident" that Mr. De Paiva could get something to eat with "minimal" delay to the flight. He left in a Dow Chemical vehicle for food at approximately 1:30 p.m. At the scheduled departure time of 2:15 p.m., "it became obvious" that the flight would be delayed. Mr. Kepler, the lead passenger, had a very important meeting to attend in Naples at 5:45 p.m. The departure delay placed his meeting in jeopardy. At 2:33 p.m. Captain Gardner paged Mr. De Paiva, asking him to let her know when he was returning. Mr. De Paiva acknowledged. At 2:55 p.m., Mr. De Paiva advised he'd return in 20 minutes and that he had gotten lost on the way to the restaurant. The owner boarded the aircraft several times to discuss Mr. De Paiva's absence and questioned the level of flight crew professionalism and expressed concern about the mental state of Mr. De Paiva. He wasn't sure if he wanted to take the flight for safety reasons. Captain Gardner assured him that she would be flying and Mr. De Paiva was capable of handling his duties. Captain Gardner called the ACP to determine if the company had any other options. The aircraft departed at 3:21 p.m. and arrived in Naples at 5:48 p.m. Captain Gardner did not question Mr. De Paiva about the length of delay in obtaining food prior to or during the flight in order to avoid a confrontation.

Captain Gardner PRB Interview Notes, March 17, 2008  
(ARX 7)

Captain Gardner has flown three tours with Mr. De Paiva. Captain Gardner had seen Mr. De Paiva eat a crew meal on board the aircraft or in the cockpit. "We all do that as a normal course of action." On March 2, 2008, she offered food to Mr. De Paiva but he declined. She

was aware that Mr. De Paiva had been given a 30 minute block of time in Saginaw to obtain food. He planned to get a car and find some food to take on the trip. Captain Gardner was unaware of any details of his plan. When they arrived, after Captain Gardner spent 10 minutes in the hanger, Mr. De Paiva went inside and apparently asked for a crew car to get food. Subsequently, a Dow Chemical employee came out to the aircraft and indicated that Mr. De Paiva had raised a fuss in the hanger in front of three people and left in a car that he demanded. The employee indicated that there was no way Mr. De Paiva would have enough time to get back to enable the flight to leave on time. According to the employee, Mr. De Paiva stated that he need to go to Friday's for ribs and that he had a safety issue continuing the flight until he had taken the time necessary to get the type of food he wanted. The Dow Chemical personnel had offered food but Mr. De Paiva was insistent on going to get ribs at Friday's. Captain Gardner assured the Dow Chemical employee that she would be flying. In loading the catering supplies, the Dow Chemical flight attendant offered to set aside some food for the crew. Captain Gardner declined since she already had her meals and Dr. De Paiva had already gone. In the meantime, Captain Gardner prepared the aircraft for flight. Captain Gardner tried to call Mr. De Paiva but he did not answer. Instead, he replied to an e-mail she sent indicating the passengers were ready and asking when he was going to return. He responded, "K." Mr. De Paiva left around 1:30 p.m. and returned to the aircraft right before the 3:21 p.m. departure. Concerned about distraction from duties, and though she was upset, Captain Gardner did not discuss the situation with Mr. De Paiva. Mr. De Paiva asked what she told the company, and Captain Gardner replied that no one knew where he was and whether he was alright. She also told him that the Dow Chemical personnel thought that he was unsafe.

Mr. Flanagan's Letter  
(ARX 8)

On March 3, 2008, Mr. John Flanagan, Director of Corporate Aviation for Dow Chemical Company wrote a letter to Mr. Richard Wrona, Vice President of Owner Services at NetJets. After thanking Mr. Wrona for years of excellent service and recognizing the difficulty of the hiring process, Mr. Flanagan advised that Mr. De Paiva was "an extremely poor performer that represents NetJets in the worst of light." "Within one hour," Mr. De Paiva "single handedly attempted to destroy the trust that has taken our organizations years to build together." Mr. Flanagan believed that it was in NetJets' best interests to terminate his employment. Mr. De Paiva demonstrated complete disregard for the customer, with condescending and disrespectful interaction with Dow Chemical personnel. His behavior and disregard for their agenda caused customers to express concern for their safety.

Specifically, when Mr. De Pavia entered the Dow Chemical hanger at 1:30 p.m., he demanded in a condescending tone a vehicle and map, stating he wanted to go to a TGI Friday's for ribs. Mr. De Paiva was advised there was insufficient time to go to that restaurant considering the scheduled 2:15 p.m. departure. Although local eateries were within a five minute drive of the hanger, Mr. De Paiva declared them unacceptable because he needed to consume ribs. According to Mr. De Paiva, his need to eat was a safety issue. He had requested a meal from NetJets and they refused to order the catering as he requested. "Pilot's demeanor presented the fact that he was trying to make a point; his concern for meeting the departure times and customer needs were not considered." He had no interest in listening to the concern of the

Dow Chemical personnel. “His personal agenda took preference over customer needs.” Since Mr. De Paiva indicated that he would take a cab if a vehicle wasn’t provided, the Dow Chemical employee believed he had no choice and furnished the vehicle to minimize the impact on the scheduled departure. Mr. De Paiva “had solely decided to delay the flight without any concern for the passengers of Dow Chemical.” When he returned 65 minutes after the scheduled departure time, Mr. De Paiva showed little concern and “seemed please to have proved a point.”

Flight Operations Handbook  
(ARX 9)

Under Section 1.36, the PRB by a majority vote may clear a pilot or recommend discipline consisting of the following alternative or cumulative sanctions: verbal reprimand, letter of reprimand, suspension, termination, re-training, or other.

Mr. De Paiva’s March 4, 2008 Crew Report  
(ARX 10)

Since Mr. De Paiva had been scheduled to return home by airline on March 2, 2008, he did not order crew food the night before. The next day, when reassigned to fly from Stewart to Saginaw to Naples, Mr. De Paiva ordered his meal and asked for delivery in Saginaw since he had eaten an early breakfast. At 10:06 a.m., prior to departure, Mr. De Paiva was advised that catering was unavailable in Saginaw and the FBO was unable to get anything; as a result, his food would be in Naples. Mr. De Paiva then requested to be released in Saginaw to obtain food. Eventually, he was given a 30 minute break, scheduled for 1:00 to 1:30 p.m. When 25 minutes out from Saginaw, Mr. De Paiva placed the requisite pre-arrival call. At that time, he asked for a vehicle to obtain food and the Dow Chemical personnel indicated a car would be available. Upon landing, and after Captain Gardner had returned from inside the hanger, Mr. De Paiva “was given a vehicle and map.” Since he was unfamiliar with the rural location, the manager marked the location of Friday’s. On the way, Mr. De Paiva made a wrong turn and got slightly lost. The trip took longer than expected and he did not see any other restaurants on the way. “I promptly ordered food, was served, and decided to eat it there, which I now realize was a poor decision.” He paid his bill “prior to my last three bites and e-mailed Capt. Gardner that I was on my way, per her request and as a heads up.” Upon his return, he thanked the Dow Chemical personnel, proceeded to the aircraft and departed. In conclusion, Mr. De Paiva stated, “I was released to obtain food, I tried to keep the Company, hanger Manager, and my Capt. all informed about the situation. In retrospect, I feel awful that the Owner was inconvenienced, I also would like to offer him/them an apology.”

Mr. De Paiva PRB Interview Notes, March 17, 2008  
(ARX 11)

Shortly before departing Stewart, Mr. De Paiva became aware that his food would not be delivered in Saginaw. Captain Gardner offered a meal, but he declined. He did not make arrangements to have food delivered to Dow because he was going to need to go somewhere and get a full meal at a sit down restaurant. NetJets complied with the CBA crew food provision by giving him a 30 minute break when they were unable to deliver food in Saginaw. Mr. De Paiva

has previously eaten in the cockpit. When he arrived, Mr. De Paiva advised the Dow Chemical personnel that he needed a car to get a decent meal since NetJets was unable to find a way to deliver food to him. Mr. De Paiva never used a threatening, condescending or demanding tone with the Dow Chemical employees. However, the “man in the hanger” didn’t understand why Mr. De Paiva was not willing to just go to Burger King or somewhere close. Mr. De Paiva tried to explain that he needed a “real” meal and asked for the location of a Friday’s or Bennigan’s. The individual did not understand what Mr. De Paiva was trying to do, he just kept saying Mr. De Paiva would never return in time. Although the Dow Chemical personnel offered to go get food, Mr. De Pavia declined because he needed to go and take a break and the time necessary to get nourishment. At that point, Mr. De Paiva was not safe to fly, he needed to go get a real meal. He probably decided that before leaving Stewart. Upon arrival, he was really hungry. Mr. De Paiva decided not to call ahead for a take out meal because by then he needed a break and needed to sit down and relax and eat his food. Upon his arrival at Friday’s, Mr. De Paiva decided not to order food to go because the restaurant was empty and he believed he could eat there just as fast. He also needed a break and was really hungry. He ordered salad and steak fajitas. He refused Captain Gardner’s offer of food and the option of closer restaurants because Mr. De Paiva wanted to have time to eat the food he ordered. Mr. De Paiva had contact with Captain Gardner by e-mail. NetJets never called him. Mr. De Paiva had a safety issue on March 2, 2008 but the customers deserved better service than he gave them. He realizes he tarnished the image of NetJets and acknowledges that he should have been more proactive in taking care of his food situation. Although he was just hungry and fatigued, if he had called in fatigue, none of the events would have happened.

#### PRB Report of Investigation and Disposition Summary (ARX 12 and ARX 18)

On March 18, 2008, the PRB completed its Report of Investigation on Mr. De Paiva’s unavailability for duty on March 2, 2008. After examining the crew reports, conducting interviews, and summarizing the events of March 2, 2008, the PRB highlighted that that Mr. De Paiva: a) did not return to the aircraft within the 30 minutes as briefed in his timeline which substantially delayed the owner’s flight, b) did not make NetJets aware of his duty status, and c) was demanding, disrespectful, and unprofessional during his interactions with Dow Chemical personnel. The PRB recommended termination as the disciplinary action.

In light of the PRB findings and report of investigation, Flight Operations management determined the March 2, 2008 incident presented few, if any, safety of flight considerations. Although the incident involved crew food, the principle issue was Mr. De Paiva’s failure to be available for duty as briefed, as well as his highly unprofessional interaction with Dow Chemical employees.

#### Summary of Telephone Conference Call (ARX 17)

On March 4, 2008, NetJets executives conducted a telephone conference call with Mr. Flanagan who reported that on March 2, 2008 Mr. De Paiva was extremely demanding and disrespectful to everyone he had contact with. As examples, Mr. Flanagan indicated that when

Dow Chemical employees offered to get him something from a local restaurant or give him a ride, Mr. De Paiva insisted that he was going to go get something to eat and he demanded a car. He also demanded a map and directions to Friday's or Bennigan's. Then, upon his return to the airfield, Mr. De Paiva further delayed the flight by using the bathroom for 15 minutes. After witnessing his behavior and disregard for their agenda, the Dow passengers expressed significant concern for their safety and the lead passenger indicated they would have to re-think their contract with NetJets. In contrast, Captain Gardner was the "consummate professional" and worked very hard to diffuse the situation. She assured the Dow personnel by indicating that she would be conducting the flight and it was safe to continue.

Blackberry Text Messages  
(ARX 19, ACX 1, and ACX 16)

At 10:07 a.m., NetJets advised that catering was unavailable at Saginaw and the FBO was unable to get anything. As a result, the order was being moved to Naples.

At 10:12 a.m., Mr. De Paiva replied that he'd obtain the food himself at Saginaw. At 11:08 a.m., Mr. De Paiva advised NetJets that he needed to be released upon arrival at Saginaw to obtain food.

At 10:41 a.m., Mr. De Paiva requested the schedule be adjusted for a "release" to eat at Saginaw.

At 11:00 a.m., Mr. De Paiva indicated the aircraft had been released from maintenance and that he was still looking for the schedule change.

At 11:58 a.m., Mr. De Paiva received notice that he was scheduled to eat from 1:00 p.m. to 1:30 p.m.

At 2:31 p.m., Captain Gardner asked Mr. De Paiva to advise when he was on the way back to the aircraft.

At 2:32 p.m., Mr. De Paiva replied, "K."

At 2:56 p.m., Mr. De Paiva advised that he was leaving Friday's and would be back in about 20 minutes. He also noted that he got lost going to the restaurant.

Other NetJets Disciplinary Cases  
(ARX 2 to ARX 14)

1. Since the pilot took an earlier flight home on the last day of his tour without advising NetJets, he was unavailable for duty. Letter of warning was issued.
2. The pilot refused a flight on the last duty day by claiming to be sick after expressing an unwillingness to drive three hours to get to the flight location. Letter of warning was issued.

3. Instead of arriving at the FBO as assigned, the pilot checked into hotel without company authorization which led to a significant delay of owner's aircraft. Letter of warning and three day suspension without pay were issued.

4. Since the pilot took an earlier flight home on the last day of his tour without advising NetJets, he was unavailable for duty. Suspension for three days was issued.

5. The pilot did not remain within 100 miles of home and thus unable to be available for an assigned flight. When questioned about his location, the pilot gave a condescending answer. Suspension for seven days was issued.

6. The pilot unavailable on his assigned duty day which required costly rescheduling. Suspension for three days was issued.

7. The pilot was unavailable on his assigned duty day which lead to the loss of two revenue flights. Letter of warning was issued.

8. After refusing an assignment for several reasons and then agreeing to take the flight, the pilot called and said he was too tired to fly, which caused NetJets to ferry another aircraft to the owner's location. The record does not contain any type of corrective action.

9. The pilot declined to start his duty tour because a flight bag strap was broken. The record does not any type of corrective action.

10. The pilot could not be reached for assignment. Letter of warning was issued.

11. Contrary to instructions, both pilots left the aircraft to obtain food, which caused the early-arriving owner to find no one present. Letters of warning were issued.

12. The pilot could not be reached for a schedule change which required NetJets to substitute a larger and more expensive plane. Three day suspension was issued.

13. The pilot was hunting and unavailable for duty. Letter of warning was issued.

#### Receipts (ACX 17)

Mr. De Paiva placed his order at Friday's at 2:19 p.m. He paid his bill at 2:52 p.m.

#### Letter of Apology (ACX 18)

On March 3, 2008, Mr. De Paiva signed a letter of apology addressed to Mr. Kepler at Dow Chemical. He apologized for the delay and his failure to provide the expected level of service. Mr. De Paiva acknowledged that he exercised poor judgment in regards to his nutritional needs prior to flight.

Grievances  
(ACX 15, ARX 20, and RX D)

From 2005 to 2008. Mr. De Paiva filed 50 grievances. Of that number, 22 grievances involved crew food.

April 16, 2006 Mr. De Paiva alleged that Section 20.7(A) of the CBA involving crew food had been violated because the selections of pre-ordered meals at his duty location did not include a dinner selection, which he wanted. As a remedy, Mr. De Paiva sought a cessation of pre-ordered meals, 2 hours of overtime for the time he had to take to obtain food and the time associated with filing the grievance, and \$30.00 in expenses. Although he initially declined the grievance settlement of \$20.00, Mr. De Paiva was eventually paid \$20.00, the average cost of a dinner meal.

April 17, 2006 Mr. De Paiva alleged Section 20.7(A) had been violated because only breakfast selections for the pre-ordered meals at his duty location were available. He then flew a four hour flight without food. As a remedy, Mr. De Paiva sought a cessation of pre-ordered meals, 2 hours of overtime for the time he had to take to obtain food and file the grievance, and \$30.00 in expenses. Although Mr. De Paiva appealed the settlement offer of \$10.00, and asserted a second meal was missing, he was eventually paid \$10.00 in July 2006, the average cost of a breakfast meal.

April 27, 2006<sup>8</sup> Mr. De Paiva alleged Section 20.7(A) had been violated because no breakfast selections were available in the pre-ordered meals cooler. As a result, he departed without any breakfast. As a remedy, Mr. De Paiva sought a cessation of pre-ordered meals, 2 hours of overtime for the time he had to take to obtain food, and \$30.00 in expenses. Although Mr. De Paiva declined the settlement offer of \$15.00, he was eventually paid \$15.00 in July 2006, the average cost of a lunch meal.

May 7, 2006<sup>9</sup> Mr. De Paiva alleged a violation of Section 20 because no food was available at the pre-order location, even though he placed a food order the night before. As a result, he departed without food. As a remedy, Mr. De Paiva sought a cessation of pre-ordered meals, 2 hours of overtime for the time he had to take to obtain food and file the grievance, and \$30.00 in expenses. Although he declined the settlement offer of \$15.00, Mr. De Paiva was eventually paid \$15.00.

May 8, 2006 Mr. De Paiva alleged a violation of Section 20.7, which permits more than one meal to be order at a time because his second order for lunch placed the night before was not actually placed by the company. Additionally, no food arrived. As a remedy, Mr. De Paiva sought 2 hours of overtime for the time he had to take to obtain food and file the grievance, and \$30.00 in expenses. Although he declined the settlement offer of \$15.00, Mr. De Paiva was eventually paid \$15.00.

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<sup>8</sup>Mr. De Paiva filed duplicate grievances for this incident; apparently one was sent by fax.

<sup>9</sup>Mr. De Paiva filed two separate grievances for this incident. The second grievance involving no breakfast or lunch choices was withdrawn.

May 25, 2006 Mr. De Paiva alleged a violation of Section 20.7(c)(ii) because the food he ordered the night before was never ordered or delivered at his duty location the next day. As a remedy, Mr. De Paiva sought 2 hours of overtime for the time he had to take to obtain food and file the grievance, and \$30.00 in expenses. Although he declined the settlement offer of \$15.00, Mr. De Paiva was eventually paid \$15.00.

June 15, 2006 Mr. De Pavia alleged a violation of Section 20.7 which permits pilots to order additional meals because he was not allowed to order more than 3 meals a days. Mr. De Paiva sought \$15.00 and \$20.00 towards lunch and dinner, plus two hours of overtime. The grievance board denied the grievance in December 2006 because Mr. De Paiva had been released from duty; consequently, the company was not obligated to provide the requested additional meal.

June 15, 2006 Mr. De Paiva alleged a violation of Section 20.7 because he received the wrong breakfast meal (B6 rather than B2). Mr. De Paiva requested \$10.00 and two hours of overtime. The company determined that delivering the wrong meal was not a contract violation. Mr. De Paiva disagreed. Eventually, in November 2006, the parties settled the grievance and Mr. De Paiva received \$10.00.

June 16, 2006 Mr. De Paiva alleged a violation of Section 20.7 because he was denied a second lunch order. Mr. De Paiva requested \$15.00 and two hours of overtime. The company determined that limiting the number of meals a crewmember can order was not a contract violation. Mr. De Paiva disagreed. Eventually, in January 2007, the parties settled the grievance and Mr. De Paiva received \$15.00.

June 16, 2006 Mr. De Paiva alleged a violation of Section 20.7 because he was limited to ordering three meals. Mr. De Paiva requested \$15.00 and two hours of overtime. The company concluded that limiting the number of meals a crewmember can order was not a contract violation. Mr. De Paiva disagreed. Eventually, in December 2007, the grievance board determined a contract violation had occurred because in light of Mr. De Paiva's flight schedule for that day, his meal request was reasonable. As a result, Mr. De Paiva received \$15.00.

July 3, 2006 Mr. De Paiva alleged a violation of Section 20.7 because his pre-ordered food was not made available by the caterer and the company did not release Mr. De Paiva for breakfast. Mr. De Paiva requested \$10.00 and compliance with Section 20. The company offered, and Mr. De Paiva accepted, \$10.00.

July 15, 2006 Mr. De Paiva alleged a violation of 20.7 because after his schedule was changed his ordered breakfast was not carried forward to his new location and he had to depart without food. Mr. De Paiva requested \$10.00. The company offered, and Mr. De Paiva accepted, \$10.00.

July 16, 2006 Mr. De Paiva alleged a violation of Section 20.7 because his pre-ordered food was not present upon his arrival in Miami, the caterer had no record of a food order, and he

departed without food. Mr. De Paiva requested \$15.00. The company offered, and Mr. De Paiva accepted, \$15.00.

August 2, 2006 Mr. De Paiva alleged a violation of Section 20.7 because he was denied a Cobb salad request when the manager did not have enough time to fill the order. Mr. De Paiva requested \$15.00. In January 2007, the parties reached an agreement and Mr. De Paiva received \$15.00.

August 15, 2006 Mr. De Paiva alleged a violation of Section 20.7 because his order for two lunches was denied. Mr. De Paiva requested \$30.00 for the two lunches. The company denied the grievance because none of the contractual conditions that permitted additional meal orders were present in Mr. De Paiva's case. Mr. De Paiva disagreed. In December 2006, the grievance board concluded a contractual violation occurred, but only awarded one lunch payment of \$15.00.

November 22, 2006 Mr. De Paiva alleged a violation of Section 20.7 because the company did not select a meal for him according to his profile. Mr. De Paiva requested \$10.00 and the cost of delivery. In November 2007, as part of a global settlement, the company paid \$30.00.

March 19, 2007 Mr. De Paiva alleged a violation of Section 20.7 since his breakfast order did not arrive. Mr. De Paiva requested \$10.00, the cost of delivery and one hour of overtime to file and complete the grievance. In November 2007, the company paid \$30.00.

August 4, 2007 Mr. De Paiva alleged a violation of Section 20.7 because no food was provided. He requested \$50.00. In November 2007, the company paid \$30.00.

August 31, 2007 Mr. De Paiva alleged a violation of Section 20.7 because no food was delivered. Mr. De Paiva requested \$60.00. In November 2007, the company paid \$30.00.

Affidavit – Mr. D. Richard Meikle  
(RX F)

Mr. Meikle is the NetJets' vice president for safety. According to Mr. Meikle, Mr. De Paiva did not file a company safety report or raise a safety concern relating to an alleged safety of flight issue on March 2, 2008 or his alleged inability to safely operate an aircraft.

Affidavit – Mr. Mark Okey  
(RX G)

Mr. Okey is the NetJets' vice president for labor contract compliance. Mr. Okey noted that new crew meal provisions were implemented in early 2006 and very unpopular with the pilots. For the rest of 2006 and the early part of 2007, the company experienced an extraordinary amount of crew food grievances, nearly 900, alleging the company failed to deliver the exact meals ordered or failed to deliver orders. Most of the grievances were settled for between \$10.00 to \$30.00. Contract negotiations in 2007 lead to new crew food provisions which provided

enhanced menus and a new crew meal deviation resolution process. Subsequently, the crew food grievances ceased.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As previously noted, to invoke the employee protection provision of AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity; suffered an unfavorable personnel action; and, his protected activity was a contributing factor in the employer taking the unfavorable personnel action. Since Mr. De Paiva suffered the ultimate unfavorable personnel action, termination of his NetJets' employment on April 8, 2009, the two remaining requisite elements for invocation of AIR 21 employee protection are protected activity and contributing factor.

### **Issue No. 1 - Protected Activity**

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polysar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997).

The implicit purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving or relating to violations of any federal law or FAA order, regulation, or standard concerning air carrier safety, also affects the scope of protected activity. 49 U.S.C. 42121 (a) (1). The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because "[a] narrow hyper-technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). Such statutes have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in nuclear and environmental acts. See S. Kohn, *The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Finally, internal complaints are generally covered under the employee protection provisions. *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995). According to the

Secretary, an internal complaint should be a protected activity because the employee has taken his or her concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec’y Apr. 27, 1987) (order of remand). The report may be made to a supervisor, or through an internal complaint or quality control system, or to staff member responsible for the subject matter. *Williams v TIW Fabrication & Machining, Inc.* 88-SWD-3 (Sec’y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec’y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec’y Jan. 13, 1993).

Turning to the specific AIR 21 provisions, 49 U.S.C. 42121(a)(1) – (4) sets out four types of protected activity. First, the employee “provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” Second, the employee “has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” Third, the employee “testified or is about to testify in such a proceeding.” And, fourth, the employee “assisted or participated or is about to assist or participate in such a proceeding.”

Considering the above stated principles, an AIR 21 protected activity under 49 U.S.C. 42121(a)(1) has three components. First, the employee’s information must involve a purported violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least “touch on” air carrier safety. Second, the complainant’s belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his information or safety concern to either his employer or the Federal Government.

Since Mr. De Paiva’s case does not involve any complaint associated with an AIR 21 proceeding, his alleged AIR 21 protected activity falls within the first category – providing information regarding a violation of an order, regulation, standard of the FAA or Federal provision relating to air carrier safety.

In his written AIR 21 complaint, Mr. De Paiva alleged two principal protected activities: that he presented numerous grievances to NetJets about crew food; and, on March 2, 2008, he requested a release to obtain food because he was scheduled to operate an aircraft after numerous hours on duty without having an adequate meal. Additionally, based the evidence in the record, Mr. De Paiva’s case involves one other possible protected activity associated with his determination that he needed rest due to stress prior to proceeding with his crew duties.

### Crew Food Grievances

From April 2006 through August 2007, Mr. De Paiva filed approximately 20 grievances involving NetJets' purported violations of the CBA concerning the provisioning of crew food. In five of those grievances, Mr. De Paiva indicated that he had to fly without food due to NetJets failure to provide crew food as required by the CBA.

Upon review of Mr. De Paiva's multiple crew food grievances from April 2006 through August 2007, I find no allegation in any of the grievances that the various asserted contractual violations of Section 20 of the CBA involved a violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety. Even on the five occasions when Mr. De Paiva flew without company-provided food, Mr. De Paiva gave no indication in his grievances that those situations posed a risk to aviation safety. Apparently, he determined on those five flights, as he also did on his flight from Stewart to Saginaw on March 2, 2008, that even in the absence of food he remained fit to safely perform his duties as first officer on a Citation 10. While, as discussed below, I find some situations involving crew nourishment may certainly relate to FAA regulations regarding fitness to fly, Mr. De Paiva gave no indication to NetJets in any of his grievances that those specific events involved a violation of an FAA or aviation safety standard, the first requisite element for an AIR 21 protected activity. Accordingly, since I find Mr. De Paiva's crew food grievances filed with NetJets from April 2006 through August 2007 were not protected activities under AIR 21.

### Request for Release to Obtain Food

On March 2, 2008, when Mr. De Paiva became aware that his pre-ordered meals of a salmon filet dinner, a chicken salad sandwich, and a tuna salad sandwich would not be delivered to either Stewart, his initial point of departure, or Saginaw, his intermediate stop, he informed the company's flight controller that he needed to obtain food in Saginaw himself and requested a release from duty. He also advised Captain Gardner en route to Saginaw that since he had eaten an early breakfast, his need to obtain food had become a safety issue. That is, in the interest of aviation safety he needed to eat in order to continue as a crew member beyond Saginaw on March 2, 2008.

In considering the required elements for an AIR 21 protected activity, I first find that Mr. De Paiva's request for a break to obtain food certainly "touched" on an aviation safety standard in this case. While Mr. De Paiva's inclusion of aviation safety in his conversation with Captain Gardener did not include a specific reference to a violation of an FAA regulation, order, or standard, I nevertheless find his communications regarding his need to eat prior to continuing flight operations to be a protected activity because his nourishment requirement related to his ability to comply with the FAA AIM Section 8-1-1(a) and 14 C.F.R. § 61.53, which require a crew member to have valid medical certificate and not to fly when his or her physical condition renders the person unable to satisfy the requirements of his or her aviation medical certificate.

Next, due to a combination of events, Mr. De Paiva's request to obtain food shortly after his arrival in Saginaw at 1:00 p.m. prior to continuing as a NetJets crew member and his stated concern about the impact of his nourishment on flight safety were objectively reasonable. In the

early morning of March 2, 2008, prior to his duty schedule change, Mr. De Paiva consumed only a light and sparse breakfast. Then, due to logistical issues, NetJets informed Mr. De Paiva's that his preordered meals could not be delivered until his arrival in the late afternoon at Naples, Florida. Consequently, by the time Mr. De Paiva arrived in Saginaw, over 12 hours had elapsed since his last full meal.

Finally, although Mr. De Paiva did not advise the NetJets flight controller that the issue of his nourishment has risen to the level of a safety concern, he clearly communicated that concern to Captain Gardner during their flight to Saginaw. Although Captain Gardner was not a direct supervisor of Mr. De Paiva, she was serving as the pilot in charge of the NetJets flight on which Mr. De Paiva was crewed. In that position, Captain Gardner was ultimately responsible for the safe operation of the aircraft and its crew on behalf of NetJets. As a result, I find her assigned position sufficient to establish that Mr. De Paiva presented an internal concern about aviation safety to his employer when he expressed to Captain Gardner an aviation safety concern related to his need to obtain food in Saginaw in order to remain fit to continue as a crew member.

Accordingly, I find that Mr. De Paiva engaged in a protected activity under AIR 21 on March 2, 2008, when he requested a release to obtain food in Saginaw and advised Captain Gardner that his need to obtain food in Saginaw had become a safety issue.

#### Rest Due to Stress

On March 2, 2008, while initially intending to obtain some take-out food, after his confrontation with Mr. Fancey at the Dow Chemical facility, Mr. De Paiva determined that he needed a "break" or rest due to stress before he continued with his first officer duties on the scheduled flight out of Saginaw. In order to correct that deficiency by decompressing, Mr. De Paiva drove to TGI Friday's and spent 45 minutes in the restaurant ordering and eating his food. As a result, the flight from Saginaw to Naples was delayed.

Again, returning three elements of an AIR 21 protected activity, Mr. De Paiva's concern that his stress rendered him unfit to fly arguably touched on the provisions of FAA AIM Section 8-1-1(f)(1) and (2) that indicate stress can impair a pilot's performance such that flight should be delayed until the stress difficulties are resolved. However, as set out below, I find Mr. De Pavia has failed to prove either the objective reasonableness of his stress concern or, more significantly, the requisite communication to his employer of his stress-related aviation safety concern.

Although the FAA standards make an individual crew member responsible for ensuring his or her fitness to fly, whistleblower adjudication principles require a person's safety concern to be objectively reasonable. In Mr. De Paiva's case, the record contains insufficient probative evidence to establish his conclusion that his stress level had risen to the point that he needed to decompress during a sit down meal was an objectively reasonable safety concern. Turning first to Mr. De Paiva's testimony about his stress situation, his explanation loses some probative value considering other conflicting evidence in the record. When Mr. De Paiva texted Captain Gardner around 2:58 p.m. that he was returning to the aircraft and provided a reason for the delay, he only indicated that he got lost going to the restaurant and did not mention a stress problem. Then,

when he returned to the cockpit he only asked Captain Gardner about how the company had responded without mentioning his need to take a stress break. Two days later, in his March 4, 2008 crew report, Mr. De Paiva made no reference to his need to take a break due to stress. Instead, Mr. De Paiva attributed much of the delay to his unfamiliarity with the area, “the trip took longer than expected,” and simply stated the he “promptly ordered food, was served, and decided to eat it there,” which he acknowledged was a “poor decision” rather than a necessary decision due to aviation safety. In response to the PRB query why he didn’t call ahead to Dow Chemical to arrange for a take-out meal, Mr. De Paiva indicated that by then he needed a break to sit down, relax, and eat his food. He also indicated to the PRB that he decided not to order take-out food upon arrival at TGI Friday’s when he noticed the restaurant was empty.

Finally, in terms of the remaining record, insufficient evidence exists to establish that Mr. De Paiva’s duty day and associated responsibilities produced sufficient stress to endanger his ability to safely comply with FAA regulations regarding fitness to fly. While I have considered that Mr. De Paiva had a confrontation with Mr. Fancy that may have lasted up to ten minutes about his need to go to a sit down restaurant to get food, I find the nature and intensity their exchange did not rise to level that would render Mr. De Paiva unfit for flight duty absent being able to have a sit down meal of Caesar salad and steak fajitas.

The third critical element for an AIR 21 protected activity, communication of a safety concern to the employer, is also absent. Specifically, Mr. De Paiva never communicated his need to take a decompress break due to stress for the purposes of flight safety to Captain Gardner, any other representative of NetJets on March 2, 2008. When Mr. De Paiva departed the Dow Chemical hanger, neither NetJets nor Captain Gardner had any indication that he was going to eat his food in a restaurant due to his need to relieve duty-impairing stress. As noted above, even during his subsequent text correspondence to Captain Gardner, Mr. De Paiva did not mention any stress-related safety issue.

### **Issue No. 2 – Contributing Factor**

Having engaged in at least one protected activity and suffered an unfavorable personnel action, to invoke employee protection under AIR 21, Mr. De Pavia must also prove by a preponderance of the evidence a connection between his March 2, 2008 protected activity and the termination of his employment on April 8, 2008. That is, Mr. De Paiva must prove that his assertion of a need to obtain food in the interest of aviation safety prior to his continuing to serve as a crew member at Saginaw was a contributing factor in his employment termination by NetJets. The Courts have defined “contributing factor” as “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

Additionally, for the sake of completeness, even though his crew food grievances and need for a decompression break were not protected activities, I will also address whether Mr. De Paiva can prove whether either of these actions were contributing factors in his employment termination.

### Request for Duty Release to Obtain Food

Since the PRB proceedings which led to his termination occurred within a few days of his March 2, 2008 protected activity, circumstantial evidence based on temporal proximity provides some evidence that Mr. De Paiva's request for a release to get food for safety reasons was a contributing factor to the adverse personnel action. However, upon consideration of the entire record, I conclude the preponderance of the probative evidence outweighs the temporal proximity evidence and establishes that his protected activity was not a contributing factor to his employment termination. NetJets based its employment termination action on Mr. De Paiva's choices and actions that occurred after his duty release request had been approved, and not the request itself.

According to Mr. Carroll, NetJets crew support manager, when Mr. De Paiva submitted his request mid-morning on March 2, 2008 for a schedule change at Saginaw for a release to obtain food, NetJets provided the company's standard and common response when ordered meals are not available, a 30 minute duty release. The record contains no evidence that NetJets flight operations managers were upset by Mr. De Paiva's request or considered his release to be out of the ordinary or unexpected. Similarly, Captain Gardner was not upset about Mr. De Paiva's request to eat for safety reasons. To the contrary, she offered to help rectify the problem by offering one of her meals to him. And, even though the aircraft arrived late into Saginaw, Captain Gardner remained unconcerned by Mr. De Paiva's request in part because she believed they could still make their scheduled departure time if she prepared the aircraft and handled the passengers while Mr. De Paiva took his 30 minutes to get food. And, based on at least one prior experience, Mr. De Paiva also believed the allotted 30 minutes would be sufficient. Thus, up through Mr. De Paiva's departure from the aircraft just after 1:30 p.m., all the parties, Mr. De Paiva, Captain Gardner, and the NetJets flight operations, believed the 30 minute release was a satisfactory response to Mr. De Paiva's legitimate request to obtain food in Saginaw.

Mr. De Paiva started providing the non-protected basis for his employment discharge during his exchange with Mr. Fancey when he declined to consider any option for obtaining a meal other than his taking a Dow Chemical vehicle to a restaurant, such as TGI Friday's. He refused Mr. Fancey's offer to go get a meal for him even though Mr. De Paiva had never been to Saginaw and was unfamiliar with the local area. He was uninterested in obtaining any food less than a restaurant sit-down meal. He was unmoved by Mr. Fancey's statement that going to TGI Friday's would cause an inordinate delay in the flight's departure and continued to demand a vehicle. And, in response to Mr. Fancey's resistance to his decision to go to TGI Friday's, Mr. De Paiva indicated that he would take cab if Mr. Fancey did not provide a vehicle.

By these actions, Mr. De Paiva elevated his nutritional needs well above the level required by aviation safety, and disregarded the customer's need for as prompt a departure as safely possible. In particular, considering that two of the three meals Mr. De Paiva ordered that morning from NetJets were sandwiches, both his singular pursuit of a meal at TGI Friday's or Bennigan's upon his arrival at Saginaw and his refusal to even consider less than optimal, but nevertheless sufficient, food choices that were available closer to the airfield were unreasonable and adversely impacted the customer service provided to the Dow Chemical passengers.

Further, in contravention of procedures for Saginaw set out in Section 5.5.8 of the FOM, Mr. De Paiva placed the burden of providing logistical support for his meal at Saginaw on the customer, Dow Chemical, rather than the FBO located next door. As a result, a customer, rather than the designated FBO, became responsible for helping Mr. De Paiva obtain a meal NetJets had been unable to provide. Mr. De Paiva's inappropriate decision to place partial responsibility on Dow Chemical personnel to provide his meal transportation was further aggravated by his statement that he would get a cab if Dow Chemical didn't provide him with a vehicle, which would have further delayed their flight.

After Mr. De Paiva left the Saginaw airport, he literally fell off the radar for over hour, well beyond his allotted 30 minutes. By the time he arrived at TGI Friday's a little before 2:12 p.m. and decided to eat at the restaurant, Mr. De Paiva could reasonably have been expected to know that a) the Dow Chemical flight would not take off at 2:15 p.m. as scheduled; and, b) his approved 30 minute duty release would not be sufficient. Yet, contrary to his assertion in his March 4, 2008 crew report, Mr. De Paiva did not try to keep NetJets and Captain Gardner "informed about the situation." Instead, though he had communication access via his Blackberry, Mr. De Paiva failed to advise either Captain Gardner or NetJets of his situation and his continued unavailability for duty beyond the approved 30 minutes. During the course of his meal at TGI Friday's, Mr. De Paiva continued to fail to provide any information about his status or furnish an update until nearly another 45 minutes later when he informed Captain Gardner that he'd return in 20 minutes.

While Mr. De Paiva observed that no one from NetJets tried to contact him during this time, Sections 5.1.1. and P1.6.1 clearly placed the communication responsibility on Mr. De Paiva as soon as he became aware that the approved 30 minute duty release was insufficient and he needed more time. Specially, the company manual states that in order to provide "superior" service, a crew member must keep passengers informed "at all times" of "any issues" affecting the progress of their flight. Mr. De Paiva's failure to advise Captain Gardner and NetJets of his delay prevented them from promptly advising an important customer of a lengthy departure delay. Additionally, his silence until 2:56 p.m. about an estimated time for his return to the airfield caused Dow Chemical to initiate action to divert the CEO of Dow Chemical and his aircraft to Saginaw to pick up the waiting passengers.

NetJets' business involves providing direct, prompt and personal air transportation service to its aircrafts' fractional owners/customers; one of its stated values is to provide "top-notch **SERVICE**." On March 2, 2008, the customer adversely affected by Mr. De Paiva's failure to provide NetJets' top-notch service, Dow Chemical, happened to be the holder of a substantial contract with NetJets. Not only did Dow Chemical vehemently object to Mr. De Paiva's failure to provide the expected level of customer service, the company was reconsidering whether to continue its contract with NetJets. At the arbitration hearing, Mr. De Paiva observed that Mr. Fancy, the Dow Chemical representative, showed no concern for his need to eat and only cared about an on-time departure. Mr. De Paiva indicated that he never had an owner speak to him that way. However, Mr. De Paiva's focus on the customer's representative's failure to understand his needs is backwards from the NetJets mission, vision, and values which emphasize crew member focus on the customer's needs.

Finally, other than Captain Gardner, all the individuals who were aware of Mr. De Paiva's actions on March 2, 2008, highlighted his behavior and choices in adverse terms that had no connection with Mr. De Paiva's aviation safety concerns. Mr. Fancey, Dow Chemical flight department, noted Mr. De Paiva's failure to show any concern for the needs of the Dow Chemical passengers. Mr. Kepler, Dow Chemical vice president, was very upset by Mr. De Paiva's unprofessionalism and questioned his suitability as a pilot. Mr. Flanagan, Dow Chemical Director of Corporate Aviation, indicated Mr. De Paiva demonstrated a complete disregard for his customer and concluded Mr. De Paiva had "single handedly attempted to destroy" the trust developed between Dow Chemical and NetJets, placing their contract in jeopardy. Mr. Robbins, chairman of the PRB, had never seen a case involving "so many different facets of crew member willful disregard and poor behavior and poor decision making." Mr. Lambert, NetJets vice president and Director of Operations, concluded Mr. De Paiva's case was "the most egregious display of inappropriate behavior toward an owner" that he'd witness in his ten years in office. And, Mr. Christiansen, NetJets president, considered Mr. De Paiva's behavior unprofessional and he had never seen anything like it.

As Mr. De Paiva's highlighted, in previous NetJets pilot disciplinary cases, termination of employment has not been the usual response for a pilot's voluntary unavailability for duty. Instead, the most severe penalty imposed by NetJets for an unavailability violation has been a seven day suspension. However, the preponderance of the evidence demonstrates a significant and aggravating distinction is present in Mr. De Paiva's case which warranted employment termination rather than suspension – total failure to provide the requisite customer service to the Dow Chemical passengers on March 2, 2008.

In summary, the preponderance of evidence establishes that Mr. De Paiva's interaction with Dow Chemical personnel and Mr. Fancey, the choices he made in obtaining his mid-day meal, and his unavailability for duty beyond the allotted 30 minutes, coupled with a failure to communicate, rather than his protected activity of requesting a meal break, led to the adverse personnel action.

#### Crew Food Grievances

Regarding Mr. De Paiva's crew food grievances, very little evidence exists indicating they may have been a contributing factor. Since several months had elapsed between Mr. De Paiva's last crew food grievance in August 2007 and his April 2008 termination, circumstantial evidence related to temporary proximity is limited. Additionally, although a labor relations representative mentioned Mr. De Paiva's grievance history, the individual grievances were not presented to the PRB and record contains no evidence that the PRB took into consideration his previous crew food grievances in reaching their conclusions and termination recommendation. Similarly, the senior executives who concurred with the PRB employment termination recommendation did not consider Mr. De Paiva's prior crew food grievances.

#### Rest Due to Stress

Finally, for essentially the same reasons previously discussed regarding his food break protected activity, I find Mr. De Paiva's need to take a break due to stress was not a contributing

factor in the termination decision. Instead, Mr. De Paiva's failure to communicate with Captain Gardner and NetJets about his duty status beyond the allotted 30 minutes duty break, coupled with his interaction with Mr. Fancey and his process in obtaining food caused NetJets to sever its employment relationship with him.

### Summary

In its April 8, 2008 termination letter to Mr. De Paiva, NetJets indicated the action was based on his act of voluntarily making himself unavailable for scheduled duty in a situation that could have been avoided and unacceptable behavior to a customer, in violation of Section 1.3 (vision, mission, and values), 5.1.1 and P1.6.1 (treatment of passengers and public conduct), and 5.5.8 (Dow Chemical operations procedures) of the company's FOM. Upon review of the entire record, I find the preponderance of the evidence establishes that Mr. De Paiva's crew food grievances, request for food release on March 2, 2008 and his need for a stress break were not contributing factors to the company's decision to terminate his employment.

### CONCLUSIONS

Finding no genuine issue of material fact, I conclude approval of the Respondent's Motion for Summary Decision is appropriate.

Mr. De Paiva has established that he engaged in an AIR 21 protected activity on March 2, 2008 when he requested a duty release to obtain food to ensure his fitness to continue his flight duties. However, his crew food grievances filed in 2006 and 2007 were not protected activities since he did not present them as aviation safety violations. Similarly, Mr. De Paiva's determination that he needed additional time to decompress due to stress prior to resuming flight duties on March 2, 2008 was not a protected activity because it was not objectively reasonable and he did not communicate his concern to the Respondent. Additionally, the preponderance of the evidence establishes that none of these activities were contributing factors in NetJets' decision to terminate Mr. De Paiva's employment. Accordingly, having failed to prove all the requisite elements for employee protection under AIR 21, Mr. De Paiva's complaint must be dismissed.

### ORDER

The Motion for Summary Decision is **APPROVED**. The discrimination complaint of Mr. HENRIQUE DE PAIVA against NETJETS AVIATION, INC., brought under the employee protection provisions of AIR 21 is **DISMISSED**.

**SO ORDERED:**

**A**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: June 17, 2009  
Washington, DC

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).