

**U.S. Department of Labor**

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**Issue Date: 07 July 2017**

Case No.: 2015-AIR-00028

In the Matter of

**COLIN W. YATES**

Complainant

v.

**SUPERIOR AIR CHARTER LLC**

**d/b/a JETSUITE AIR**

Respondent

**DECISION AND ORDER GRANTING RELIEF**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21” or “the Act”) which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor (“DOL”) complaint procedure. Implementing regulations are at 29 CFR Part 1979. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed the arguments of the parties, and the applicable law.

**I. PROCEDURAL BACKGROUND**

On September 24, 2014, Complainant filed complaints of retaliation with the Occupational Safety and Health Administration (“OSHA”) under the Act, asserting that Respondent terminated him in retaliation for his email correspondence with a National Transit Safety Board (“NTSB”) accident investigator on June 26, 2013.

On May 18, 2015, OSHA dismissed Complainant’s complaint, finding that Respondent terminated Complainant “after he continued to unreasonably insist that the airplane could have safely landed under the same conditions.”

On June 18, 2015, the Department of Labor Office of Administrative Law Judges (“OALJ”) received Complainant’s objection to the Secretary’s finding. Consequently, on July 14, 2015 this case was assigned to me. On July 23, 2015 this Tribunal received Respondent’s reply to Complainant’s appeal of the Secretary’s findings.

On July 29, 2015, this Tribunal issued a Notice of Assignment and Conference Call. This Notice directed the parties to immediately begin the discovery process. This Tribunal further

issued a Notice of Hearing and Prehearing Order on August 25, 2015, which set the hearing to begin on January 11, 2016.

On December 3, 2015, the parties sent this Tribunal a “[Proposed] Stipulated Protective Order.” On December 4, 2015, this Tribunal issued a Protective Order, and directed the parties to respond with any objections. This Tribunal received no objections.

On December 4, 2015, Respondent filed a Motion for Summary Decision with accompanying exhibits. On February 26, 2016, Complainant filed his response to the Motion for Summary Decision with accompanying exhibits. This Tribunal denied the Respondent’s Motion on March 14, 2016.

On December 16, 2015 – after receiving multiple communications from both parties alleging, among other things, dilatory behavior and gamesmanship within the discovery process<sup>1</sup> – this Tribunal set a Motions Hearing to be held in Cherry Hill, New Jersey. A December 29, 2015 Order directed the parties to participate in a January 6, 2016 conference call to discuss the proposed Motions Hearing. On January 8, 2016, this Tribunal canceled the Motions Hearing after receiving the parties’ “Stipulation and Proposed Order Regarding Discovery Disputes and Order Setting Motion Hearing.”

Between January 14, 2016 and January 20, 2016, this Tribunal received communications from the parties requesting the appointment of a settlement judge. On January 22, 2016, Judge Adele Higgins Odegard was appointed as settlement judge. On April 8, 2016, this Tribunal received notice that the settlement judge proceedings were unsuccessful.

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<sup>1</sup> This Tribunal is resigned to note the demonstrated obstreperous behavior exhibited by both parties in this case. Such behavior is reflected in the following non-exhaustive list of docket items that required use of this Tribunal’s time and considered attention:

- Complainant’s November 20, 2015 Motion to Quash Respondent’s Subpoena;
- Complainant’s December 11, 2015 Motion (in part) to Compel Discovery;
- Complainant’s December 14, 2015 Motion to Compel Testimony;
- The parties’ January 7, 2016 “Stipulation and Proposed Order Regarding Discovery Disputes”;
- Complainant’s March 18, 2016 Motions to Quash Respondent’s Subpoenas and Compel Testimony;
- Complainant’s March 21, 2016 Motion for Sanctions and Request for Injunctive Relief;
- Complainant’s March 23, 2016 Motion to Compel Testimony;
- A third party’s March 24, 2016 Motion to Quash Subpoenas;
- Respondent’s four (4) Motions in Limine, dated April 22, 2016;
- Complainant’s four (4) Motions in Limine, also dated April 22, 2016;
- Complainant’s April 22, 2016 Motion to Strike; and
- Respondent’s May 16, 2016 Objection to Authenticity of Complainant’s Exhibits.

On May 10, 2016, this Tribunal issued a notice of hearing location, which set the hearing for May 23, 2016 through May 27, 2016 in Long Beach, California. At the conclusion of the hearing, this Tribunal set July 1, 2016 as the deadline for the submission of all post-hearing motions.

On September 8, 2016, this Tribunal received Respondent's motion to supplement the hearing record on the issue of front pay damages. On September 19, 2016, this Tribunal received Complainant's response to Respondent's motion to supplement the hearing record. On October 18, 2016, this Tribunal granted Respondent's September 8, 2016 Motion.<sup>2</sup>

This Tribunal received Respondent's brief on November 3, 2016; and Complainant's brief on December 5, 2016.<sup>3</sup> On February 16, 2017, this Tribunal admitted Complainant's Exhibit (CX)<sup>4</sup> 219 and gave the parties leave to file supplemental briefs on the issues of front pay and back pay. This Tribunal received Respondent's supplemental brief on March 16, 2017 and Complainant's supplemental brief on March 27, 2017.

## II. FACTUAL BACKGROUND AND EVIDENCE

### A. Brief overview of the factual background

This case involves an aircraft crash at Sedona airport in 2011 wherein the Complainant served as pilot monitoring. It also involves actions taken by Respondent two years later, including terminating Complainant's employment, following a June 2013 email that Complainant sent to the NTSB investigator who was conducting the investigation into the accident on the subject of the NTSB's findings.

### B. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.

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<sup>2</sup> This Tribunal further denied Complainant's October 28, 2016 motion for reconsideration of this Order.

<sup>3</sup> At hearing, this Tribunal specifically ordered that the briefs "shall be no longer than 50 pages." Tr. at 893. It is with great displeasure that this Tribunal recognizes Complainant's attorneys' decision to flaunt, with seeming alacrity, this Tribunal's mandate and expressed concern over the length of the parties' post-hearing briefs. Despite this, Complainant's attorneys chose to submit the first 24 pages, single spaced; and the remaining pages in what appears to be 1.5 spaced-type. Moreover, Complainant's attorneys decided to include some 97 single-spaced (and lengthy) footnotes that were provided in fine-print. One such cluster of footnotes, appearing on page 37 of Complainant's Brief, would add another 1.5 pages to Complainant's already tumescent brief if properly formatted per this Tribunal's direction. Complainant's counsels' decision to flaunt this Tribunal's desire to limit the parties' briefs is inexcusable and not only penalizes Employer (who substantially complied with this Tribunal's request), but also does a disservice to the Complainant who relies on counsel for the effective prosecution of his case. This Tribunal will further address Complainant's attorneys' actions—and any consequences deriving therefrom—when it adjudicates the attorneys' fees issue.

<sup>4</sup> CX represents Complainant's Exhibits, RX represents Respondent's Exhibits, and JX represents Joint Exhibits.

*Direct Examination*

Complainant testified that STA Jets (“STA” or “STA Jets”), a Part 135 air carrier, has employed him since January 1, 2016 where he serves as a captain piloting a Gulfstream G-IV. STA recently promoted him to Director of Safety where he manages many employees and conducts root cause analysis. At times, he works with the Director of Operations to work on procedural manuals such as the Gulfstream G-IV checklist. Complainant holds an Airline Transport Pilot (“ATP”) certificate<sup>5</sup> and he is also a certified flight instructor (“CFI”), a certified flight instructor of instruments (“CFI-I”), and is type rated in the Gulfstream G-IV, the Embraer Legacy 600, and the Phenom 100. He holds second-in-command (“SIC”) rating in the G-II, G-III and Lear 45. Tr. at 93.

While working for Respondent his pay varied. Captains were paid \$400 for each day they flew and captains received a bonus when they worked extra days; \$100 extra a day on day 18 and another \$100 extra on day 20 or 21. He worked an average of 18 to 22 days per month. CX 61 and CX 62 are Complainant’s W-2s, which Respondent produced. CX 61 shows \$56,342.50 in earnings through July 2013. CX 62 is the Complainant’s 401k retirement plan; Complainant participated in this plan while employed with Respondent. Although the document was dated September 6, 2012, Complainant recalled making contributions after this date. He was also contributing four percent of his earnings to a Roth individual retirement account. He further received medical insurance and dental insurance, and a \$10,000 life insurance plan from Respondent. Tr. at 96-99.

Respondent hired Complainant in March 2011 and Respondent paid for Complainant’s training in the Phenom 100 by CAE.<sup>6</sup> Tr. at 133-34. During this training Complainant reviewed copies of flight manuals, the quick reference handbook, the pilot operating handbook, the standard operating procedures, and “anything and everything” that would have to do with the Phenom 100. Embraer, the aircraft’s manufacturer, authored these manuals. He was also allowed to work on a software system called Opera. Tr. at 135. The students were shown how to perform calculations out of the manuals and with the Opera software; “[b]ut there were certain things you could calculate with Opera software that you could not calculate with manuals like second segment climb or runway distances and slopes.” Tr. at 135.

After earning his pilot-in-command (“PIC”) type rating for the Phenom 100, Respondent taught Complainant how to use its software, called JS Log Book. JS Log Book was intended to provide all of the performance data required for departure and landing, including all of the required V speeds.<sup>7</sup> As part of his training with Respondent, Complainant was assigned a check airman and flew with that person for two days. Tr. at 135-36. The check airman told Complainant that he needed to follow Respondent’s SOP, and fly the plane the way Respondent wanted it flown, not the way CAE wanted its students to fly the plane. “No matter what your

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<sup>5</sup> Complainant earned this certificate in 2010. Tr. at 106.

<sup>6</sup> This Tribunal understands CAE to refer to a private company that provides civil aviation training.

<sup>7</sup> V speeds are standard terms used to define airspeeds important or useful to the operation of each aircraft. See 14 C.F.R. § 1.2.

[V<sub>ref</sub>] speed,<sup>8</sup> you were approaching at 120 knots. If you went to flaps full, you approached at 115 knots. That was one of the biggest differences between what CAE was teaching and what [Respondent] had us do.” Tr. at 137. The other difference was the CRM process.<sup>9</sup> With Respondent, even with two pilots, you operated like a single-pilot operation with the pilot-flying making all of his own V speed call outs. The pilot monitoring issued radio calls and read the checklist. Tr. at 137. Respondent periodically sent Complainant back to CAE for recurrent training. Tr. at 167-68. CAE tested Complainant not only on flying but on his ability to calculate things like landing distances and other performance data. Complainant never failed any check ride or any other training event. Tr. at 169.

Complainant mentioned these differences to his check airman, who responded that Respondent operated this way due to the possibility that it might have to reposition the aircraft under Part 91.<sup>10</sup> Respondent felt, therefore, that it was better that the pilots were always flying in a single-pilot manner. Tr. at 138. When Complainant expressed his view that he thought the approach speed was fast, the check airman told him that the speed was set to aid in the single-engine missed approach procedure.

Mountainous airports like Aspen, Eagle, Truckee, Sun Valley, and even Sedona, are difficult airports to fly into, and one requires special training to fly into them. For these airports, one would land the Phenom 100 with the second degree of flaps. The reason is the aircraft would not have the power to complete a missed approach if one attempted a missed approach with full flaps. Tr. at 139-40.

After his initial indoctrination with Respondent, in April 2011, Complainant flew into the Sedona airport with another captain. When Complainant flew into Sedona the first time, on April 8, 2011, it was a visual approach. During that flight, the captain came in at 120 knots and chopped the throttle at the last minute and slowed down to near V<sub>ref</sub> speed. Once a pilot could make out the airport, the pilot would adjust the power to slow down to a speed near V<sub>ref</sub> so as to land the plane safely. Tr. at 142-43.

Prior to the May 25, 2011 accident in Sedona (“the Sedona incident”), Complainant had flown with the captain of the crashed plane “quite a few times.” Tr. at 143. The captain of that flight had around 20,000 hours of total flight time having previously worked at Delta airlines, and he accrued about 700 hours in the Phenom 100; very few pilots had more than 700 hours in the Phenom 100. He was a very knowledgeable pilot. Tr. at 144. Complainant estimated that he had completed between 1,000 to 1,200 flights working for Respondent. Tr. at 169.

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<sup>8</sup> This Tribunal understands this reference to be V<sub>ref</sub>, the reference landing speed of the aircraft. See 14 C.F.R. §§ 1.2 and 23.73. See also the FAA’s AERONAUTICAL INFORMATION MANUAL, OFFICIAL GUIDE TO BASIC FLIGHT INFORMATION AND ATC PROCEDURES, App. 3-5 (Apr. 3, 2014) which further describes V<sub>ref</sub> as “The reference landing approach speed, usually about 1.3 times V<sub>so</sub> plus 50 percent of the wind gust speed in excess of the mean wind speed.”

<sup>9</sup> This Tribunal understands CRM to mean the application of team management concepts in the cockpit where work is shared and verified between the flight crewmembers. See generally, FAA Advisory Circular (“AC”) 120-51E, *Crew Resource Management Training* (Jan. 11, 2004).

<sup>10</sup> Part 91 operations would consist of non-revenue flights such as repositioning flights or post-maintenance test flights.

On May 25, 2011, Complainant flew to Sedona in the Phenom 100. Complainant listened to the common traffic advisory frequency and made a radio call out to learn which runway was being used at Sedona. He noticed that aircraft were departing on what he later found out to be the downhill runway. In response to his call, somebody responded that the winds favored runway 21 but the uphill runway was situated in the opposite direction. So he told the captain that the uphill runway was runway 3 but the wind was favoring the opposite direction and aircraft were taking off from runway 21. The captain responded that they should probably go with the wind as they did not want to be in the way of traffic. Complainant agreed. Tr. at 146.

Air Traffic Control had kept them high, as is common at mountainous airports. This requires dropping the landing gear at a very high elevation so that way one can descend more rapidly because the airplane has more drag. Once cleared to approach, they immediately dropped the landing gear and started configuring the aircraft for landing. The terrain around the airport makes the approach “a little bit hairy.” Tr. at 147. They completed all of their descent and approach checklists. The captain called for the before-landing checklist. Going through the checklists when he called out  $V_{app}$ ,<sup>11</sup> which is the approach speed, the captain responded “ $V_{app}$ ish”. Tr. at 148. This was not the correct call out but Complainant knew exactly what the captain meant; if  $V_{app}$  is 120 knots and you are going 122, you are not really flying at  $V_{app}$ , you are “ $V_{app}$ ish.” “The only reason they were flying that fast was because [Respondent’s] SOP has you flying in at 120 knots.” Tr. at 214. The recommended procedure is to approach at plus or minus five knots of the target approach speed. Tr. at 149. When the aircraft landed “[w]e were definitely faster than  $V_{ref}$  by quite a ways. We were probably up in, you know, over 110 knots.” Tr. at 150. Complainant would have been a little concerned had the aircraft floated, but the captain planted the aircraft right on the runway and soon after that he hit the brakes; but the airplane immediately pulled off to the right really hard.<sup>12</sup> Tr. at 151. The captain exclaimed that the aircraft was really fighting him. The next time the captain applied the brakes hard, the aircraft went to the right again, but by this time the aircraft was far down the runway. The aircraft felt like it kept releasing the left wheel. A few hundred feet before the end of the runway the right wheel was in the dirt and then the aircraft came back to the left. The aircraft then hit the fence and “it just became like a bunch of banging and bashing and debris and you know, just an awful situation.” Tr. at 153. When the aircraft finally came to rest, they shut down the engines, and evacuated. Tr. at 154. It was not until he evacuated the aircraft that he noticed the pain in his back. He was transported to a hospital in Sedona and eventually to Flagstaff for care of two fractured vertebrae. Tr. at 155-56.

After being released from the hospital, Complainant returned to the Sedona airport to retrieve his personal effects and there he met with NTSB Investigator Joshua Cawthra who required a statement from him. Brian Coulter, Respondent’s Vice President of Operations, sat in on that meeting at Complainant’s request.<sup>13</sup> Cawthra asked Complainant the aircraft’s approach

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<sup>11</sup> This Tribunal understands this term as the aircraft’s target approach speed.

<sup>12</sup> Complainant also explained that the Phenom 100’s braking system was a brake-by-wire system. It did not work well. When the anti-skid would engage it would release individual wheels and it would make the aircraft “turn all over the place.” Tr. at 152.

<sup>13</sup> At the time of this interview, Complainant was under pain medication and was in a back brace. Tr. at 490-91.

speed. Complainant told him “No way. Not even close. We were really fast.” Tr. at 158-60. Complainant speculated that Coulter had to hear his statement because he was sitting right next to Complainant during the interview. Tr. at 161.

Complainant was on a leave of absence from Respondent following the accident until late August. Respondent put him to work performing administrative duties until October or November 2011. Tr. at 163. When he went back to flying the Phenom 100, given his experience with its braking performance, he did change the way he flew the aircraft where the airport had a short runway. He would brief the pilot he was flying with the manner in which he planned to fly,  $V_{ref}$  or  $V_{ref}$  plus 10:

like most people do way early in that approach rather than waiting to the last minute and chopping the throttles and then having to slow down to the near  $V_{ref}$ , I started flying the airplane more like [ $V_{ref}$ ] plus 10 on those approaches to landing in places where I knew that braking action, you know, it was a very, very critical situation.... I knew how important air speed was clearly after my – after breaking my back. And so a stabilized approach, how important it was and so I was not going to take the chance of this guess work of being 120 knots until the last minute and then chopping the throttle and then hoping to God that it slowed down to the exact speed.

Tr. at 165-66.

Complainant showed interest in the preparation of the NTSB factual report, because the accident had a huge impact on his life. He waited anxiously for that report<sup>14</sup> to come out to get some closure and he wanted to know exactly what happened. He had already told the investigator that they were fast on landing, yet the NTSB report only mentioned that the aircraft came in fast and unstable, so he had questions about that, including a lack of runway slope. He thought that the very generic findings were weak. He had questions about why the aircraft veered left and right so dramatically—a topic that has nothing to do with airspeed. He was concerned that nobody was going to learn from this accident. Complainant noted the drastic difference between the NTSB investigator’s calculations, which employed the Opera software as its reference—something Respondent did not use and was not included on Respondent’s aircraft—and how the NTSB found that, because they approached fast, the aircraft would need 5,600 feet to land. This raised more concerns in Complainant’s mind. He acknowledged “[n]o matter what, it’s pilot error.” But he began to question whether the slope of the runway had a bigger impact on the landing distance than the airspeed. So Complainant started to try to figure out various scenarios, using the books and documents he had available to explain the landing distance discrepancy. He used the 9,100 pound-figure as the aircraft’s weight (as reflected in the report) and looked at altitude and airspeed regardless of configuration to determine how much runway was required to land the plane safely. Based on the information he had available to him, it appeared that there was enough runway at Sedona to land safely. But he did not have the information to figure out what impact, if any, the slope of the runway had on the aircraft’s

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<sup>14</sup> Complainant later testified that “[a]fter you check [the NTSB website] for like a year-and-a-half and still never see anything, I think it’s appropriate to send an email and say, ‘Hey, what’s the holdup here?’”. Tr. at 502.

performance. “JS Log Book gave you information about the airport, the same information that I would get out of an AFD<sup>15</sup> – you know, approach plates and procedures and stuff.” But it did not provide any information about the slope of the runway. Complainant explained that environmental factors such as a runway’s slope and the wind direction impacted an aircraft’s required landing distance. Tr. at 170-75.

As a result, Complainant wrote to the NTSB investigator,<sup>16</sup> stating that he wanted to talk to the investigator about the report. *See* JX M. “The slope has a monster penalty on what’s going to happen to the airplane. Regardless of how you fly it, you’re going to use up way more runway.” Tr. at 176. One of the things that Complainant told the NTSB investigator was that information about the impact of slope on landing distance was not provided in the documents Respondent used to operate the aircraft. Tr. at 176-77. Complainant knew that the investigator had used the Opera software in his investigation because it was referenced in the report. Tr. at 176. Complainant also expressed concerns about the aircraft’s “awful” braking system. “[E]very single time you land that airplane, you ... were always guessing which way it was going to swerve when you got on the brakes. It almost reminded me of flying a tail dragger.” Tr. at 177. Complainant was aware of multiple brake failures occurring on Respondent’s Phenom 100 aircraft as well as elsewhere. Tr. at 178-79. It was so common that “it’s the first time ever and the only time I’ve ever been trained on an airplane where they actually train you to come in and land and use the emergency parking brake.” CAE taught Complainant this procedure. Tr. at 179. To make matters worse, the aircraft has no thrust reverser to help slow the airplane down; it has no lift dumping devices.<sup>17</sup> Tr. at 180. The Phenom 100’s braking system, when it did not have issues with brake releasing, would work fairly effectively. However, a lot of times, one would get variation where the anti-skid would release the brakes on either side and one would end up using a lot more runway. Tr. at 511-17.

Complainant thought that the investigator would welcome any information Complainant offered him if Complainant thought that there may be some differences in the calculations, but the investigator never provided a response – other than he would get back to Complainant about his concerns. Tr. at 173-74, 211; JX M.

CX 203 is Respondent’s SOP that was in effect on May 25, 2011. Tr. at 183-87. It contains the procedures to prepare for an approach. Section 2.9 of the SOP describes how Respondent wanted its pilots to land the Phenom 100. On May 25, 2011 the aircraft was on an instrument flight rules flight plan but then the pilot cancelled the planned approach and made a visual approach. Tr. at 188. After the May 25, 2011 accident the SOP changed “a lot.” Tr. at

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<sup>15</sup> This Tribunal understands this acronym to be the Airport Facility Directory (“AFD”). This is a pilot’s reference manual that provides comprehensive information on airports, large and small, and other aviation facilities and procedures. It describes such things as runway length, width, location of a wind sock, frequencies, traffic pattern altitude, airport elevation and what type of fuel is available at the airport. *See generally*,

[https://www.faa.gov/air\\_traffic/flight\\_info/aeronav/productcatalog/supplementalcharts/airportdirectory/](https://www.faa.gov/air_traffic/flight_info/aeronav/productcatalog/supplementalcharts/airportdirectory/).

<sup>16</sup> Complainant sent this email on June 26, 2013. Tr. at 203; JX M.

<sup>17</sup> There was some testimony about a modification to this aircraft where one added spoilers to increase dumping-lift following landing. However, Complainant testified that none of Respondent’s Phenom 100s had received this retrofit. Tr. at 180-82.

189. CX 204 is the revision to the SOP, dated December 15, 2011. In the new SOP the procedures and call-outs are not as passive. The revised SOP included specific call-outs for the pilot monitoring<sup>18</sup> (the pilot not manipulating the flight controls) to make. “[E]verybody noticed right away [] that the call out  $V_{ref}$  plus or minus will be made at least once prior to reaching 50 feet above the touchdown. And then also at the very, very bottom, you’ll see that it says, ‘Note: Speeds in excess of  $V_{ref}$  plus 10 at 50 feet above touchdown zone require a mandatory go around.’” Tr. at 192-93. Complainant also noticed new requirements for a speed call out if the aircraft was flying faster than  $V_{app}$  plus five knots. So, at 500 feet, the aircraft could fly at 120 knots, but the pilot is required to slow to  $V_{ref}$  (commonly 98-99 knots) at 50 feet above the runway. Complainant questioned whether that was really a stable approach, but that is how Respondent wanted its pilots to fly the aircraft. Tr. at 193. The SOP contained in CX 204 was definitely better than the earlier SOP, but the approach speed did not change between the two versions. Tr. at 194-95.

CX 2 is the before-landing detailed normal procedure. Only that portion of Section 2.9 pertaining to the before landing SOP was part of the NTSB report; it was missing the descent and approach portion of Section 2.9. Complainant found it curious that the report contained all the information about airspeed and an unstable approach, yet the information on the SOP about how Respondent required its pilots to fly the approach at 120 knots (no matter the  $V_{ref}$ ) was missing. Tr. at 196-99.

The day following Complainant’s June 2013 email to the NTSB investigator, Alex Wilcox, Respondent’s CEO, called Complainant. Wilcox told Complainant “[s]o I received your e-mail that you sent the NTSB. And I just don’t understand why you would do that.” Tr. at 204. Complainant responded that he had questions about the report. Wilcox replied “I don’t understand why you will not let this go. You know, this investigation is already – almost completely closed and it’s hurt us already so bad. You’re single-handedly going to take out this company with these types of actions. And we gave you your job back. We even upgraded you to Captain. You’re making plenty of money. Why would you do this?” Tr. at 204. Complainant told Wilcox that people needed to learn from this accident. Wilcox was upset about Complainant’s statement that the airplane had an awful braking system. Wilcox informed Complainant that he was suspended with pay until Coulter returned from vacation, so they could meet and talk about the email and what they were going to do. Tr. at 204-05.

Prior to the email, there had been no criticism of Complainant’s competency, performance, or abilities on the job. Complainant had not been told that he was supposed to communicate his concerns to the NTSB in a certain way. Tr. at 206. Complainant was “very surprised” that the NTSB investigator shared his email with Wilcox. Tr. at 207-08.

A few days after Wilcox’s call, Complainant had a meeting with Wilcox and Coulter. They immediately asked Complainant why he had sent the email and he told them of his concerns. He was asked if he felt like he could have stopped the plane crash and asked him questions about the crash. Complainant acknowledged that they could have been on speed or done a go around or Complainant could have said something to the captain, but they did not.

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<sup>18</sup> The manual uses abbreviations “PF” and “PM”. These abbreviations mean Pilot Flying and Pilot Monitoring. Tr. at 192.

They<sup>19</sup> asked him about how he came up with the calculations in his email to the NTSB investigator. Wilcox and Coulter expressed that Complainant was using some unrealistic calculations.<sup>20</sup> They even asked if there was anything that he could have done to prevent the crash and what he had learned from it. Wilcox and Coulter left the room and came back a short time later. When Wilcox entered he put a piece of paper and an envelope on the table. Wilcox told Complainant “There’s your last paycheck and we’re not going to be able to keep you here anymore.... [Y]ou are terminated as of now.” Tr. at 207-10. Following this meeting Complainant emailed Coulter about his pay. CX 79.

Prior to his termination with Respondent, Complainant tried to secure a position with Virgin America (“Virgin” or “Virgin America”). JX A, page 37<sup>21</sup>, is an email from Complainant to Virgin America acknowledging receipt of his email; however, Virgin America never got back to him about his application. Tr. at 102. Complainant stopped updating his applications “[b]ecause with the termination on my record, I figured that I would not have a chance of getting hired by Virgin America or any major airline.” Tr. at 103. The person that told Complainant to apply to Virgin told him to suspend his application because airlines would hold onto information from a completed application indicating that a pilot had been terminated, even if such termination was later reversed. Tr. at 104. Since 2013, Complainant has not submitted any further applications to Virgin America.

Complainant felt that no major airline would hire him if an employment termination appeared on his employment record. Since the day he first started getting into aviation, it had been Complainant’s ambition to work for a major airline. Tr. at 105. Complainant still wants to work for a major airline. Tr. at 106. Since his termination on July 2, 2013, he has only been able to fly charter planes. After Respondent terminated his employment, Complainant worked for Swift Aircraft Management (“Swift”). He started there in October 2013. JX ZB reflects that his salary at Swift was \$85,000 a year, and included medical and dental insurance. This is less than what he was earning with Respondents; he believed that he was making \$105,000 to \$110,000 while working for Respondent. And Swift did not provide a 401k retirement plan. To take the job at Swift, Complainant had to move to the Phoenix area; that move cost about \$4,000. Tr. at 107-12; CX 23.

Swift hired Complainant to fly the Phenom 100 and Legacy 600 aircraft. Complainant agreed that he had about 260 flight hours in the Phenom 100 aircraft while working for Swift following his termination of employment with Respondent. Tr. at 113. When asked about his concerns about the Phenom being an unsafe aircraft he responded:

I felt that if you operate [the Phenom 100] in a certain manner, it would be very unsafe. If you operated it in a manner that it’s really intended, then it would be safe.... And Swift, they didn’t go to the mountainous airports. We went from like Phoenix to LAX or Phoenix to Salt Lake City. And Phoenix to Seattle Boeing Field. And they also had a program ... which gave me incredible amount of performance data to be able to know what the airplane is really going to

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<sup>19</sup> Complainant later testified that Wilcox did the majority of the talking. Tr. at 212.

<sup>20</sup> Tr. at 213.

<sup>21</sup> Bates number 003626.

perform like when you go to the mountains, or anywhere, it gave me that data that ... to my understanding is required by the FAA that this data would be in the AFM but it's not in the AFM in the Phenom 100's manuals but this data is provided by APG, like slopes, second segment climb gradients, and all kinds of information. So that made me feel a lot more comfortable about flying this particular airplane.

Tr. at 113-14.

About six months into his employment with Swift the primary Phenom pilot got reassigned, so Complainant became Swift's primary pilot for the Phenom aircraft. So he was flying both the Phenom 100 and the Legacy 600 "very, very, very often." Tr. at 115. He found himself at times struggling with the differences between the two aircraft, especially going from single pilot to a crew environment. Complainant was flying the Phenom single pilot but flying the Legacy 600 under Crew Resource Management. Tr. at 116.

Complainant left Swift on good terms<sup>22</sup> and joined STA about six months later. Tr. at 124. During those six months, Complainant did contract flying, like sky diving, where he made \$14 a load.<sup>23</sup> Tr. at 124, 126. Complainant also applied for various positions.<sup>24</sup> See CX 63-CX 69. Complainant could not recall how much money he earned during this period. However, he also noted that he was doing contract work while he worked for Respondent as well. Tr. at 125. During this time period, Complainant could not afford to rent a private apartment so he moved back to California where he lived with a friend for free. Tr. at 125-26.

At STA, Complainant's starting salary was \$65,000 a year, the reason being he was hired as a first officer there, not as a captain. Tr. at 120-21; CX 52. STA operates a variety of aircraft and Complainant was hired to fly the Gulfstream G-IV. However, his employment was contingent on him earning his PIC rating in the aircraft; at that time he only held an SIC rating. Complainant obtained the PIC rating at his own expense; the cost was \$7,500. Tr. at 122; CX 72. Complainant now flies the Gulfstream G-IV at STA.

### *Cross-examination*

Respondent had Complainant review his resume. JX E. Prior to working for Respondent he was a contract pilot. As a flight instructor he earned \$50 an hour teaching. As a contract pilot he earned \$400 to \$500 per day. In 2010 Complainant earned around \$20,000 so when he joined Respondent in 2011 he was making a lot more money and he was able to obtain a type rating in

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<sup>22</sup> CX 58 is an email referencing a letter of recommendation from Swift's chief pilot. Tr. at 129 and 132-33.

<sup>23</sup> Complainant explained that "a load" was taking the skydivers to altitude for them to exit the plane and return to the airfield. Tr. at 127. Complainant also explained that he worked for such organizations as Angel Flight where a pilot donates their time to fly missions. The plane was provided for free and the pilots were able to accrue flight hours. Tr. at 127-28.

<sup>24</sup> Complainant estimated that he applied to twenty separate operations during this time period. Tr. at 130.

the Phenom 100; a rating paid for by Respondent that cost \$20,000. Complainant agreed that Respondent had made an investment in him. Tr. at 273-75 and 280-81.

Respondent is a Part 135 air carrier, meaning that the company's business is to carry passengers for hire. STA, the company Complainant currently works for, is also a Part 135 air carrier. An important aspect of a Part 135 operation is transporting its customers in a safe and efficient manner. Complainant agreed that he did CRM at the very beginning of his employment with Respondent, and received training on CRM at least three times: his initial training, training after the accident when Complainant was reinstated, and when Respondent upgraded Complainant to captain in November 2012. Tr. at 276-80. RX 18 is a copy of his training records at CAE. Those records indicate that Complainant was trained in performance data, ground operations, in-flight maneuvers, missed approaches, landings, and crew resource management ("CRM"). Tr. at 283-86. Overall, the CAE courses were comprehensive. Tr. at 288-91; *see also* RX 22 and RX 23. Prior to the CAE training, Complainant had not received training about Respondent's SOPs, but he received such training upon his return from CAE. Tr. at 287.

Respondent's Director of Safety told the pilots that they could come to him about any safety related issues; however, there were not programs like PRISM, or SMS Pro<sup>25</sup> where one could just go online and submit a report. And if there was, Respondent did not train Complainant on it. There was an intranet at the company and some of the components of that intranet included Respondent's safety management system. Tr. at 292. Complainant denied knowing that Respondent had a locked drop box entitled "Events and Hazard Reports." Complainant admitted that he never attended one of Respondent's safety meetings. Complainant did speak to James Wright about a couple of matters.<sup>26</sup> Wright told Complainant that he would relay Complainant's concerns to Wilcox and Coulter, but Complainant told Wright not to tell both of them about those matters. The matters he raised to Wright were why Respondent was still using an SOP that was for a single-pilot operation, and the other problem had to do with the high approach speed as listed in the SOP. Tr. at 291-301.

During Complainant's first flight into Sedona on April 8, 2011, he was the pilot monitoring. He did not recall exactly, but said "I'm sure we were somewhere around  $V_{ref}$  or slightly above Ref." Tr. at 303.

At the time of Complainant's flight into Sedona on May 25, 2011, he had about 60 or 70 flight hours in the Phenom 100. He served as the first officer and Hal Zajic served as captain. The accident occurred around 3:50 p.m. On or about June 24, 2013, the NTSB made their factual findings public. Tr. at 304; *see* RX 134. On June 26, 2013, Complainant acknowledged sending an email to the NTSB investigator. Complainant sent this email just a couple of hours after reading the NTSB report. Tr. at 307.

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<sup>25</sup> These are private industry air safety software programs that help air carriers monitor anomalies that could lead to increased risks. *See generally* [www.prism-safety.com](http://www.prism-safety.com) and [www.asms-pro.com](http://www.asms-pro.com). Wilcox testified that Respondent had a contract with PRISM. Tr. at 1033.

<sup>26</sup> Respondent designated Wright the pilot representative for the Phenom 100, in the summer of 2013.

Respondent's counsel directed Complainant to the NTSB factual findings. Tr. at 308; RX 134.<sup>27</sup> Complainant agreed that he thought the  $V_{ref}$  for the landing at Sedona was 97 knots. He also agreed that the aircraft's avionics display had the approach speed ( $V_{app}$ ) set to 120 knots, the approach climb speed ( $V_{ac}$ ) was set for 107 knots, and the landing reference speed ( $V_{ref}$ ) was set at 97 knots. Tr. at 309-11. Complainant further agreed that following was accurate:

The Unicom operator informed the flight crew that the traffic pattern was left, and that runway three was sloped uphill. Communications between the flight crew revealed that they discussed the runway slope and agreed it was not a factor.

Tr. at 312.

Complainant also acknowledged that the report states "[t]he BCU<sup>28</sup> operated normally with no anomalies noted." Tr. at 319. Complainant had no reason to disagree that the investigator tested the BCU. Complainant said he had no way of knowing differently, so he agreed with the following statement.

The aircraft's speed as it touched down was about 128 knots air speed, 123 knots ground speed, and an indicated air speed of 117 knots. During the aircraft's last 30 seconds of descent, the airplane's descent rate was approximately 1,374 feet per minute.

Tr. at 320.

As part of his duties as pilot monitoring, Complainant was supposed to monitor the aircraft's speed. The landing occurred using flaps in the 26-degree setting. Complainant had no reason to dispute this statement, either:

When using the indicated air speed of 124.5 knots when the airplane crossed 50 foot [sic] above ground level, according to data recorded by the FDR, and into a 3.5 knot head wind, the unfactored landing distance calculated by software Opera version 4.1 was found to be about 5,624 feet.

Tr. at 323.

On May 26, 2011, Cawthra, the NTSB investigator, interviewed Complainant. Cawthra's notes of that interview are located at RX 40. Tr. at 329. Complainant was in a brace and was still being treated with medication at the time of the May 26, 2011 interview. Tr. at 491. RX 45 and RX 43 are emails the Complainant wrote to the NTSB investigator on May 27, 2011 at the investigator's request. Tr. at 334-36. Complainant agreed that RX 43 did not discuss any of the topics that are in his June 26, 2013 email. Tr. at 337. Complainant maintained that he told the NTSB investigator during his meeting with him on May 26, 2011 that the aircraft was over

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<sup>27</sup> During the hearing an issue arose as to what version of the NTSB factual report was available to Complainant in June 2013. Complainant's copy of the version of the NTSB factual report he reviewed is located at CX 17. See Tr. at 324-28.

<sup>28</sup> This Tribunal understands BCU to mean Brake Control Unit. Tr. at 319.

speed, but never told him that it was an unstabilized approach. Tr. at 340-41. Complainant admitted that he did not call out speeds or tell the flying pilot to go around during the approach. Tr. at 341.

RX 4 is a document produced during discovery. It looked to Complainant that it was a draft of a document Complainant intended to send to the NTSB, possibly RX 43. Complainant did not believe, or recall, that he sent that document to either the FAA or OSHA. Tr. at 346-53. Complainant said that no emails exist between May 27, 2011 and June 26, 2013 where the NTSB investigator asked him for more information to supplement its investigation. Tr. at 355.

In the fall of 2011, Complainant was released from his medical leave and Respondent had him working at home in an administrative capacity, coming into the office once or twice. It was during this time that Respondent asked him to complete more CRM training. It was remedial training, not FAA-approved training. He was pretty sure that issuing call outs was a part of this training. The training covered Respondent's SOPs, including sections 2.8 and 2.9. Tr. at 358-66.

In October 2011, Complainant had two email exchanges with Hal Zajic, the captain involved in the Sedona incident. *See* RX 84 and RX 85. In RX 85, Captain Zajic wrote to Complainant that he just received a letter from the FAA proposing a three month suspension of his pilot certificates. Complainant was supportive of Captain Zajic and thought that the FAA had the burden to establish negligence because, at the time that letter was written, they did not know what had actually happened. Tr. at 368-75.

RX 94 is an email Complainant sent to Respondent's chief pilot on February 29, 2012 where Complainant recommended a colleague of Complainant's for a first officer position with Respondent. Complainant agreed that Respondent at that time was a good enough employer for him to refer a friend to be one of its employees. Tr. at 376.

RX 108 pertains to a diversion incident in an aircraft Complainant was flying due to electrical problems that occurred in-flight. Complainant was not disciplined for diverting or making the report. Tr. at 377-78.

RX 119 is an email Complainant sent to Respondent's Director of Operations, the Chief Pilot and the Director of Mission Control. The email concerned an issue with a dispatcher not being available to handle certain matters potentially resulting in departure delays. Tr. at 378-80. Complainant felt secure enough in his job that he could raise the issue to management.

Between March 2011 and July 2, 2013, Complainant did not raise in writing any complaints about the Phenom 100. Tr. at 381.

RX 123 is a May 18, 2013 email from Complainant to the NTSB investigator inquiring about when the investigation into the May 2011 accident would be complete. The investigator replied to his query on May 21, 2013. It was around this time that Complainant made an application to Virgin America. RX 125 is a June 6, 2013 email from Virgin America confirming

receipt of Complainant's application. Complainant did not hear further from Virgin America. Tr. at 382-87.

Complainant knew, prior to the June 26, 2013 email that the NTSB Factual Report was going to find pilot error; the aircraft came in fast on landing and he told the NTSB investigator as such the day after the accident when he gave his statement to the investigator. But when he saw the report "I saw some items in there that just blew my mind, like how much landing distance they said the aircraft was going to take up." The report contained nothing about the runway slope. Further, the NTSB's report used the Opera software and "they [came] up with this number that is almost double and out of runway distance.... So I wanted for [the investigator] to basically clarify to me how an airplane, doing 16 knots over [ $V_{ref}$ ] when it touch [sic] down is going to use up so much runway." The numbers he used for his email came from the QRH<sup>29</sup> or something he had on his iPad. When preparing the June 26, 2013 email to the NTSB investigator (JX M), he did not recall referencing the FAA advisory circular (RX 11) that he later brought with him to his meeting with Wilcox and Coulter on July 2, 2013. Tr. at 392-99.

Complainant denied that his motivation for sending the email to the NTSB investigator was his desperation to try to divert a negative finding because of his pending application with Virgin America. Tr. at 401. Complainant did disclose his accident to Swift and STA, and also disclosed that Respondent had terminated his employment. Tr. at 401-03.

In the June 26, 2013 email to the NTSB investigator, Complainant acknowledged that he was using facts to do his calculations that were not the facts present under the conditions of the May 25, 2011 flight. For example, one of his calculations used zero flaps. Complainant referenced certain documents in the QRH. He also made reference to the aircraft having awful brakes. Complainant acknowledged that he did not provide the NTSB investigator with any objective data to support his opinion about the brakes. He did provide his opinion to the investigator about the AFM and QRH, that their data could lead one to think that a pilot could land safely at that airport. The QRH does not have a slope component in it so he had to prepare his calculations with no slope component in them. Complainant agreed that one of the factors present during the landing was that the runway they landed on had a downhill slope. What Complainant was trying to communicate to the investigator was that the manuals at his disposal did not address the impact of the runway slope on the aircraft's performance. Complainant agreed that he and the captain made a determination that the runway slope was not a factor because they had no way to even make it a factor and to determine how it was going to effect the aircraft's landing performance because such data was not included in the QRH. He also agreed that for the conditions that existed the day of the accident, the runway slope would not have been a factor had the aircraft been at a proper  $V_{ref}$ . Tr. at 405-22.

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<sup>29</sup> This Tribunal recognizes the abbreviation QRH as an abbreviation for "Quick Reference Handbook." In general, the QRH contains all the procedures applicable for abnormal and emergency conditions in an easy-to-use format.

During the meeting Complainant had with Wilcox, prior to Respondent reinstating Complainant to flight duty,<sup>30</sup> Wilcox wanted to know why he had not called a go-around, and whether he would call a go-around next time, and whether Complainant had learned anything from the accident. Complainant told Wilcox that the aircraft should be on speed and that one really needs to pay attention to slope. Complainant said Wilcox responded with “Don’t worry about slope. You don’t have any information on that. Just watch your speed.” Wilcox concluded that if anything was questionable, Complainant needed to speak up. Tr. at 428-29.

There was one break during the July 2, 2013 meeting. Wilcox and Coulter told him that he needed to learn to take responsibility for his actions, that the aircraft should have been at air speed, and that Complainant never called for a go-around. But Complainant thought that there was more to the accident; namely, there should have been runway slope information available in the AFM or QRH. During the meeting, they saw that Complainant had a folder with him and demanded to see its contents. The folder contained an FAA advisory circular (RX 11). According to Complainant, the point of the circular is the FAA thinks that runway slope was a really big deal. Complainant clearly recalled that he mentioned to them that the runway slope was not taken into consideration in the report the way he felt it should be. Tr. at 429-36.

RX 127 is Respondent’s letter of termination concerning Complainant. The letters says the termination of employment was for cause. After his termination of employment, an issue arose concerning two days of Complainant’s pay; Coulter corrected the pay shortage. Tr. at 444-45; *see also* RX 129.

RX 145 is a statement Complainant wrote in 2015 in response to Coulter’s document provided to OSHA entitled “A Path to Understanding the Performance of Embraer Phenom 100 N224MD at Sedona.” Nowhere in Complainant’s statement did he write that he was sorry or took responsibility for the accident. Complainant’s written statement reiterated that “if somebody just uses the AFM, it could mislead a person to thinking that the aircraft could land [at Sedona].” Tr. at 437-44.

After Complainant’s July 2, 2013 termination of employment, his friend who had initially encouraged him to apply to Virgin America, now suggested that Complainant not continue to update his application for employment. This had the practical effect of Virgin America treating his application as dormant. Complainant acknowledged that Virgin America’s preferred applicants who possessed a college degree and an Airbus A320 type rating; Complainant had neither. When Complainant disclosed his accident to Swift and STA they hired him anyway. Complainant agreed that neither having a pilot error incident nor being fired from his former job were a factor in him getting a new job. And the incident is not included on Complainant’s resume. Tr. at 452-57. There was a six month gap in Complainant’s employment from the time of his termination of employment by Respondent and his employment with Swift. During these months Complainant did contract work for Elsinore Skydive and Threshold Aviation. Tr. at 458-61; *see also* JX ZL. Complainant did have a bizjet.com account (RX 150) but never received any employment from his account. Tr. at 470-73.

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<sup>30</sup> Counsel’s question referenced this meeting occurring 20 months prior, so this Tribunal assumes they were referring to a meeting around October 2011.

*Re-direct*

Complainant said he had no ability to examine the plane after the crash or its brake control unit. However, there were communications to Respondent's pilot community about braking issues, including communications authored by Wilcox. Complainant was aware that Respondent made a lot of revisions to the aircraft's braking system, "they even created a special SOP that addressed landing and using the parking brake, if necessary, that way people know how to operate it. Everyone knew that there had been multiple brake failures,..., it was definitely an apparent danger on this airplane that ... wasn't happening on other aircraft." The problems with the aircraft's landing characteristics were also well known. "We called it like the Phenom sway or the Phenom wag because it just – it was like a dog wagging its tail down the runway. Every time you would land, the plane would veer left and right." Tr. at 485-87. Complainant also noted that there is a difference between applying for a job with a Part 135 air carrier like Swift or STA versus applying to a major airline, like Virgin; a letter of termination does make a difference. Tr. at 503-04.

In response to this Tribunal's questions, Complainant said he currently made \$110,000 per year as of April 1, 2016. He flies 30 to 50 hours per month, all in the Gulfstream G-IV. His total flight time is about 4,700 flight hours. At STA, Complainant has access to the AFM, POH<sup>31</sup>, and QRH in the cockpit when operating the Phenom 100. It is common practice in the airline industry to hire onto a company where they provide the type rating and the pilot agrees to stay with the company for a period of time. Tr. at 510-13.

Complainant addressed RX 164 and RX 165. They are IRS forms 1099 from 2014 and 2015 from a firm called Clay Lacy. This is an aviation management company, a charter company that has almost every type of aircraft one could imagine; from a Boeing 737 to a Gulfstream. They also fly the Embraer Legacy 600. Complainant's relationship as a contract pilot for Clay Lacy began towards the end of 2014. In 2014 his income with them was \$9,000. In 2015 his income was \$5,000. Complainant's job application included reference to employment with Threshold Air. When asked about it, he stated that he could not recall working for them in 2014 or 2015 as a contractor, but probably worked for them in 2012. He definitely did not work for them in 2016 because his current company, STA, does not allow its pilots to fly as a contract pilot, except for maybe such things as flight instruction or Angel Flights or Humanitarian Airlift. When working for Respondent, Complainant was told by Coulter that as long as his other flights were not Part 135, he had no issue with Complainant conducting other flights. Swift did not care what kind of other flights he flew, but he was pretty busy there. Complainant reiterated that STA does not allow contract flying and if one wanted to, the pilot would have to get permission from the director of operations. Complainant never asked to moonlight at STA because he said "I've been really busy at STA Jets between being a director of safety and also being a captain." In 2013, Complainant worked for Skydive Elsinore and he guessed that he worked for them in 2014. He earned \$14 or \$15 each time he went up and let jumpers out of the airplane; the flying was more for building flight time.<sup>32</sup> Complainant stated

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<sup>31</sup> This Tribunal recognizes the abbreviation "POH" to stand for the phrase "Pilots' Operating Handbook."

<sup>32</sup> See also Tr. at 860.

that he provided all of his 1099s to Respondent's counsel. Going into 2016, he had no contract income whatsoever. Tr. at 842-61.

Michael Thomson (pp. 218-254)

Thomson has approximately 12,000 total flight hours<sup>33</sup> and holds eight different type ratings<sup>34</sup> in addition to commercial and helicopter certificates. He started flying in 1977. He started to work for Respondent in March 2013 and has worked for them for about six months. He was coerced to leave the company; eventually he did officially resign. He left Respondent because he felt that they were conducting unsafe practices. Thomson thought that Respondent was inappropriately using a Phenom 100. The aircraft's braking system was his biggest concern. The brake by wire system "seemed to be intermittent at best." The lack of a lift dump system exacerbated the braking problems. Thomson had flown with a couple of different pilots that had had as many issues as he did with the aircraft's braking system; they actually used the emergency/parking brake to stop the aircraft rather than use the pedals.<sup>35</sup> Tr. at 220. It was distressing not knowing what kind of braking action he would experience during landings. His worst experience with the Phenom 100 was the last landing he had in Van Nuys, California because when he landed he had no brakes, then he had a left brake, then a right brake and eventually he was able to stop the airplane. It was a normal approach, the aircraft was light; there was more than adequate runway. Thomson speculated that Respondent was aware of braking problems occurring on aircraft aside from the Phenom 100 because the brakes on multiple aircraft were "written up."<sup>36</sup> However, after a while, people began not to report the problem. "[I]n my last flight, the captain refused to write it up because he said, 'They're not going to find anything wrong with it and this is a waste of time.'" Tr. at 224.

CAE did not use the Phenom AFM in its pilot training program. It was the first time in his almost 40 year career that he had not been given an AFM during flight training. He went to CAE training in March 2013. Thomson was told by the CAE personnel that they did not provide it because Respondent did not use Opera, which contains Embraer's performance data. Tr. at 230. Thomson was able to look at an Embraer European flight manual for the aircraft. It is more like a Part 25<sup>37</sup> manual providing such information as second segment climb, and all the

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<sup>33</sup> Later Thomson testified that approximately one-half of his flight time was conducting Part 135 operations.

<sup>34</sup> Later, upon the Tribunal's questioning, Thomson said he had type ratings for the Phenom 100, Falcon 10, Citation 500, Citation 650 series, Citation 750 series, and the three variants of the Beach Jet Hawker 400 XP Diamond Jet. Tr. at 253.

<sup>35</sup> On almost all aircraft, the pilot steers the aircraft on the ground and brakes by using foot pedals.

<sup>36</sup> Pilots are required to make a log entry if there is a mechanical irregularity with the aircraft and the aircraft cannot thereafter operate until either a qualified mechanic clears the log entry and approves the aircraft for return to service, or the maintenance is deferred per an approved minimum equipment list. See 14 C.F.R. §§ 91.7(b), 91.213, 135.65, 43.7. Authorization of a minimum equipment list by a Part 135 operator is usually contained in D095 of its operations specifications. See generally, FAA Order 8900.1, Volume 4, Chapter 4 section 3, available at <http://fsims.faa.gov/PICDetail.aspx?docId=8900.1,Vol.4,Ch4,Sec3>.

<sup>37</sup> In general, aircraft are designed and manufactured under either 14 C.F. R. Part 23 or Part 25. Part 23 is the FAA design and certification standard for general aviation and smaller commuter aircraft while Part

performance data that is not required under Part 23. Tr. at 226-27. The Phenom 100 is a Part 23 aircraft. Tr. at 253. With the exception of his time working for Respondent, Thomson has never had a situation where the manufacturer's data was not used as a means of determining the performance characteristics of an aircraft. Tr. at 231.

During Thomson's exit interview with Coulter, he raised the issue of the aircraft's performance, including the braking system, and cultural problems in general, which created conflict with Respondent. They discussed how the SOPs were written essentially for a single-pilot because the pilot does everything and the co-pilot just responds "checked." Tr. at 228-29.

Thomson was shown the email to the NTSB investigator that Complainant drafted. Tr. at 232; JX M. What stands out as odd to him is the NTSB referencing Opera when Respondent did not use it for calculating performance. The email is communicating "where do they come up with the numbers to add the additional distance to the landing distance." In general, for every knot you are over  $V_{ref}$ , one can add 100 feet to the landing distance. Tr. at 233. So what this email is trying to show is that the distance penalty reflected in the NTSB calculations did not match the performance data available to the Respondent's pilots, including Complainant. Tr. at 233-34. On re-direct, Thomson said that CX 50 shows that the glideslope into the Sedona airport for both runways is 3.5 degrees. He stated that termination, regardless of the reason, is a "pretty good black eye" to move on from concerning a pilot's career. Tr. at 243-45.

On cross-examination, Thomson acknowledged that Respondent sued him because he left the company prior to acquiring 24 months of tenure in violation of his training contract. He had no flight time in the Phenom 100 prior to joining Respondent and had accumulated about 100 hours in the airplane while employed by Respondent. The AFM and QRH were on the Phenom 100 when he flew the aircraft. Thomson stated that only the captain could write up a discrepancy and he never served as a captain for Respondent. He acknowledged that he never filed an anonymous safety concern regarding the Phenom 100 brakes. Tr. at 235-43. He stated that if a pilot is in an accident due to the pilot's error, it could preclude that pilot from getting future jobs in aviation. Tr. at 245.

#### Reza Malek (pp. 255-272)

Malek is a professional pilot and has been flying for Alaska Airlines since September 2015. He holds a multi-engine ATP, single engine commercial license, and holds a CFI-I. He has approximately 5,600 hours total flight time and is rated in the Embraer 145, the CB500, the

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25 is the design and certification standards for transport category (a.k.a. large commercial) aircraft. All commercial airline aircraft and most newer corporate aircraft are developed following Part 25.

Part 23 design and certification standards are less stringent than Part 25. The primary differences between the two design standards is the ability of multi-engine Part 25 aircraft to takeoff and climb after one engine fails late in the takeoff roll. Like a single-engine aircraft, a twin-engine Part 23 aircraft that has suffered an engine failure on takeoff must essentially make a controlled descent to an emergency landing in all but the most ideal conditions. Another important enhanced safety feature of Part 25 aircraft is the increased system redundancy. Thus, a Part 25 aircraft retains much more operational capability after single or even multiple failures so that the aircraft can continue flying and ultimately land safely.

MBM 500 and the Boeing 737. He is currently a first officer at Alaska Airlines. Prior to that, he worked for Respondent for a little over two and one-half years. He met Complainant on his very first flight as an employee of Respondent. For that flight Complainant was the captain and he was the first officer. They flew together on multiple occasions after that. Having observed Complainant flying, he never had any question about Complainant's judgment, decision-making skills, or piloting ability. Complainant expressed a desire to move to the major airlines. When Malek left Respondent, he did so voluntarily.

John Rico (pp. 519-573)

Up until a month ago, Rico worked as a pilot. He lost his medical certificate so he was not currently flying. Rico started flying in 1995. He holds a commercial single-engine certificate, ATP and CFI, but the CFI is not current. He has approximately 8,000 hours total flight time with between 4,000 hours and 4,500 hours being in jets. He holds type ratings in the ERJ-170, ERJ-190, EMB-500,<sup>38</sup> EMB-505, ATR-42, and ATR-72. Rico worked for Respondent from November 2010 until February 2014, when he resigned to accept a position as a direct entry captain with Hawaii Island Air. His initial training with Respondent was administered by CAE where he was trained on the Phenom 100. The training materials consisted of the CAE flight manual and the Embraer QRH. CAE did provide training on the Opera software, but Respondent did not use it in its operations. Instead Respondent used its own software, JS Log Book. Tr. 519-24.

Rico started out at Respondent as a first officer but was promoted to captain after about six months. His first day of flying, after having received training, consisted of a flight with three legs.<sup>39</sup> The first two legs were uneventful. The third leg was uneventful until the landing, and on that leg the aircraft exited the runway at an excessive speed. This occurred at the Pomona airport in California. Wes Warner was the captain and flying pilot of that leg. The runway surface was dry to damp; not considered a wet runway.<sup>40</sup> They were on speed when the aircraft crossed into the airport boundary. When the aircraft touched down they had well over 3,500 feet of runway remaining.<sup>41</sup> A few seconds after landing he noticed that Captain Warner was fidgeting with the brakes – his feet were moving around. They were decelerating but not at a rapid-enough pace. With 1,000 feet of runway left he announced that and Captain Warner said he did not have any brakes. Rico transmitted on the tower frequency that the aircraft did not have brakes, and that they were going off the end of the runway and to roll crash-fire rescue. The aircraft exited the runway, veered to the left and came to a stop in the marsh. Aside from a small dent on the main landing gear door, the aircraft was not damaged and no one was injured. Tr. 524-27.

As this was his first flight in the aircraft, he had not seen the “fidgeting” of the brake pedals before. However, the CAE instructors informed him and his simulator partner that the Phenom 100 had a tendency of not maintaining a straight deceleration pattern. Of the other

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<sup>38</sup> The EMB-500 is the Phenom 100. Tr. at 523.

<sup>39</sup> The flight occurred on or about December 10, 2010. Tr. at 531.

<sup>40</sup> Rico later testified that about ten to fifteen minutes after the aircraft came to rest, it started to rain heavily. Tr. at 530.

<sup>41</sup> Tr. at 529.

aircraft he has flown, the Phenom 100's braking system is completely different and in his opinion is less reliable than other aircraft braking systems. Respondent's pilots came to refer to the Phenom 100's braking characteristics as the "Phenom Dance." Tr. at 527-28. Although Rico believed the NTSB conducted an investigation into the incident, neither the FAA nor the NTSB ever contacted him about it. Tr. at 531.

Aside from this incident, Rico has had other occasions where the Phenom 100's brakes failed. One incident occurred when he was taking his check ride out of John Wayne Airport to upgrade from first officer to captain. When he released the emergency parking brake, the brakes failed and when he went to slow the aircraft he had no brakes so he had to use the emergency parking brake to come to a complete stop. This occurred in April or May of 2011. Another time, while landing at Van Nuys, the brakes failed exiting the runway and they had to stop the plane using the emergency parking brake. This occurred late summer 2011. After landing in Burbank, California and taxiing to the fixed base operator, the aircraft lost brake pressure and he had to stop the aircraft using the emergency brake. This occurred in 2011 after the Van Nuys incident. In all, he had seven brake-related incidents in the Phenom 100 while working for Respondent. Tr. at 531-34.

Respondent used a program called JS Log Book as its primary source for performance calculations. The software did not take into account the effect of slope on an aircraft's landing distance. The flight crew would have the AFM, POH and QRH available to them when flying the aircraft. JS Log Book was on the iPad the company provided the pilots, but one would have to be within Wi-Fi range to use it and they did not receive them until well after he had become a captain. He became aware on several occasions that the performance data in JS Log Book differed from the performance information contained in the AFM or QRH for the Phenom 100. The first instance was a wet runway with standing water at Watsonville, California. A second instance was a wet runway at Sacramento Executive Airport. At Watsonville, he was the first officer. For the Executive flight, he relayed the information back to Respondent and that flight did not happen. Tr. at 535-37.

Rico has flown with Complainant a handful of times, flying into Torrance, John Wayne, and San Jose airport. He found Complainant to be professional, methodical and competent, and would have no problems having members of his family fly on an aircraft he piloted. Tr. at 537-38.

Rico understood that an incident or accident on a pilot's record, in combination with a termination of employment, has a significant impact on that pilot's ability to obtain employment with a major airline. It also has an adverse effect on the pilot's professional reputation. The pilot community is extremely small and well-connected. Tr. at 544. The termination of Complainant's employment caused him to become very depressed; Complainant "was upset, betrayed, felt betrayed by the company." Complainant told Rico that he felt distraught. It was Complainant's career goal to go to the major airlines. Tr. at 545-47.

After reviewing for the first time Complainant's June 26, 2013 email to the NTSB investigator (JX M), Rico understood that email to be addressing differences in Complainant's calculations than those attained by the NTSB. Rico agreed that the performance data that exists

in Opera is different than the performance data that exists in Respondent's AFM and QRH. Rico does not disagree with what Complainant wrote in that email. The Phenom 100's braking system, according to Rico, is "awful." Tr. at 552-53.

Rico was working for Respondent at the time of Complainant's termination from employment but was not at Sedona when the accident occurred, nor did he participate in the NTSB investigation. Tr. at 555.

On cross-examination, Rico said that an unstable approach could either increase landing distance or, upon landing, ultimately cause damage to the aircraft. He was also not aware that there was an audible warning regarding the sink rate prior to the landing. And in an unstabilized landing, one would definitely have a different performance outcome than reflected in the June 26, 2013 email to the NTSB, (JX M). Tr. at 557-58. The JS Log Book data is not predicated on data contained in Opera. Tr. at 563.

The backup brake in the Phenom 100 is an emergency parking brake. Other than turning in his reports of brake failures, Rico did not make any complaints to the FAA or any other regulatory agency regarding the Phenom 100. Tr. at 569-70.

In response to this Tribunal's questions, Rico said the role of the first officer in the Phenom is not a true second-in-command role. But the first officer is to assist the captain if the aircraft is outside of parameters or if anything is happening outside the aircraft environment. Tr. at 572.

Jason Vander Velde (pp. 576-95)

Vander Velde has worked for Virgin America since November 2011. He is currently a first officer. He holds ATP and flight instructor certificates, and holds type ratings in the EMB-500, ERJ-145, the Falcon-50 and A320. He has flown for 28 years and has around 12,000 total flight hours, 9,000 being in jets. He knows the Complainant having flown with him at the Elsinore Skydive drop zone. He first met the Complainant in 2008. Vander Velde went to work for Respondent in November 2009 and left in 2011. During his time with Respondent, he does not recall flying with Complainant but he did fly with him conducting Doctors Without Borders missions. Complainant is a competent pilot and he was attempting to help Complainant secure employment with Virgin America. He was kind of Complainant's mentor. Complainant was one of five pilots he tried to help; four of the five have been hired by Virgin America. Vander Velde stated that Complainant's skills are comparable to the skills of the four pilots he helped. Tr. at 576-82.

After the Sedona incident, Vander Velde discouraged Complainant from further pursuing his application at Virgin America. The FAA did not take certificate action against Complainant for this accident so he was comfortable recommending him to Virgin America. However once Vander Vale became aware that Respondent had terminated Complainant's employment he no longer encouraged him to apply. "It's very difficult to get a job with an airline when you have anything on your record, short of being an astronaut or a military pilot, it's extremely difficult. So I encouraged him not to do that until it got cleared up." The termination was the only reason

he encouraged Complainant not to continue to apply with Virgin America. Complainant took his advice but Complainant wanted to be a career pilot so he was upset. Tr. at 582-86.

On cross-examination, Vander Velde acknowledged that he was unaware of Virgin hiring a pilot after the NTSB undertook a crash investigation and found pilot error; however, he was aware of another pilot hired by Virgin that did not have a college degree. Further, being employed by a corporate outfit and being employed by a Part 121 air carrier are two different things. Tr. at 590-93.

Upon this Tribunal's questioning, Vander Velde stated there is a difference between the amount of errors one is allowed in a pilot's past between a Part 121 air carrier and a Part 135 air carrier. Once a pilot reaches the level of a Part 121 air carrier and then has a violation, whether they can keep their job depends on the severity of the infraction; Part 121 pilots tend to have more protections. Tr. 594-95.

Frank Delassantos (pp. 598-606)

Delassantos is currently employed by Respondent as a controller. He has worked for Respondent since 2013. He learned of Complainant's termination from employment when he cut Complainant's final check. CX 81 is an email sent to him on July 2, 2013 at 10:41 a.m. by Coulter. It is Respondent's practice to cut checks in advance for individuals whose employment may or may not be terminated. Out of the over 100 final checks that he has issued over a six year period, he could not recall any situation where, once a final check has been cut, that person has later been retained by the company. It is his understanding that once a final check is cut it is an indication that the employee is presumably leaving the company.

Brian Coulter (pp. 615-804)

Coulter has been Respondent's vice president of operations for eight years. He holds an ATP with type ratings in the Beech-1900, A320, Boeing 747, EMB-500, Citation CJ-3, and EMB-145. He has previously acted as a check airman on three different aircraft types. He worked for JetBlue as its Director of Flight Standards prior to joining Respondent. Tr. at 638-39, 723-24. During his first four and one-half years with Respondent he was a captain and check airman, and had flown just under 600 hours in the Phenom 100. Tr. at 743.

He works closely with Wilcox. He is familiar with the NTSB report pertaining to the May 25, 2011 accident at Sedona where the NTSB relied in part on the Opera software. He thought it was an appropriate use of the Opera software. Embraer provided data for the investigation. Coulter drafted the SOPs for Respondent. It would be fair to say that at the time of the accident the SOPs were considered passive SOPs in terms of call outs. In the SOP that was in effect at the time of the accident, the approach speed for the Phenom 100 with flap 2 configuration was 120 knots. Tr. at 616-18, 633.

On July 2, 2013, Coulter held a meeting with Wilcox and Complainant.<sup>42</sup> The purpose of that meeting was to discuss Complainant's June 26, 2013 email and the conclusions that were to be drawn from it. During this meeting, Complainant was adamant about the assertions he made in his email, and cited to abnormal and emergency procedures contained in the QRH. The parties discussed Complainant's calculation. At the end of that meeting Complainant's employment was terminated. Tr. at 618-21; *see* CX 162.

Coulter agreed that it was appropriate to provide the NTSB all available information. Coulter provided Sections 2.8 and 2.9 of the SOP, which is what the NTSB investigator asked for. He did not provide the investigator the approach speed information because he already knew that. The SOP says that acceptable limits for stabilized approaches at 1,000 feet and 500 feet was  $V_{app}$  plus 5 knots, with  $V_{app}$  being 120 knots for flaps two or three. He denied that this speed would result in an unstabilized approach. Tr. at 622-33.

CX 74 is the Phenom 100 SOP from Embraer. Respondent did not get its approach speed from this document. In Respondent's SOP, the pilot monitoring was responsible for calling out the airspeed if the flying pilot was more than 5 knots above approach speed. The call out speed in CX 74 is  $V_{ref}$  and the target approach speed is  $V_{ref}$ , which is different than that contained in Respondent's SOP. It is possible, depending on the weight of the aircraft, for Respondent to require an approach speed 20 knots over the aircraft's  $V_{ref}$  speed. In fact, it happens quite frequently and that was the case in the Sedona incident. CX 74 also states that for a stabilized approach, "The airplane speed is not more than  $V_{ref}$  plus 20 indicated air speed and not less than  $V_{ref}$ ." When pressed, Coulter denied that Respondent's SOP would not mandate a pilot to commit to an unstable approach at Sedona, nor did he think that a high approach speed was a factor in the accident at Sedona. Tr. at 633-40.

CX 93 is a report from Embraer about the incident at Pomona. Respondent was working with Embraer to share information with the NTSB. In that case, the NTSB told Respondent that it was not going to conduct an investigation because there was no accident or incident. The document provided to the NTSB did not include information concerning how runway slope could affect landing distance; the AFM does not contain data to allow one to calculate the effect of runway slope on the aircraft's landing distance. The document states that the unfactored landing distance for the aircraft is 2,860 feet.<sup>43</sup> The available runway at Pomona is 4,145 feet and the report says there was a  $V_{ref}$  overspeed of 5.7 knots. The report also detailed that the Opera software would have mandated 3,456 feet of dry runway given Complainant's aircraft's overspeed, and 4,320 feet if the runway was wet. Tr. at 643-49.

CX 118 is an email Wilcox sent to Embraer in connection with a Phenom 100 overrunning the runway at Pomona, California. CX 118 at page 13 of 29 contains the same unfactored landing distance as contained in CX 93. The Opera calculations are not contained in the report. Wilcox reviewed such calculations and stated "he didn't think the data was correct."

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<sup>42</sup> Coulter later testified that, prior to this meeting, he was on vacation and returned to the area on a Sunday night, June 30th. It was upon his return that he went to the NTSB website and read the docket which included the cockpit voice recorder transcript. Tr. at 743-44.

<sup>43</sup> Coulter did not specifically state what the unfactored landing distance was, but referred to it at CX 93, on page 10 of 22. Tr. at 645

Page 1 of this exhibit is an email from Wilcox where Coulter was copied. In that email Wilcox wrote “Remove slide 16 ‘Unfactored Landing Distances for  $V_{ref}$  Overspeed’ which represents information that was not available to the pilot and is potentially inconsistent with the POH.” Respondent omitted the Opera software performance calculations in the report it provided the NTSB. Tr. 649-53.

Coulter said Wilcox believed that the data in slide 16 was faulty due to “the erratic nature of the air speed, he didn’t feel that it was rational to have such large variations in air speed in such a short space of time.” When asked about Wilcox’s qualifications to make that determination, Coulter responded that Wilcox was a qualified pilot, but was not type rated in the Phenom 100. Tr. at 802-03.

In 2011, Frank Westbrook was Respondent’s chief pilot and was type rated in the Phenom 100. By Westbrook’s deposition testimony<sup>44</sup> (CX 178), Coulter believed that Westbrook thought that the Opera software data would be of interest to the NTSB. Tr. at 653-56.

CX 203 is Respondent’s SOP, which was in effect in May 2010. It contains a cockpit checklist. According to the SOP, the pilot monitoring is required to read aloud the checklist and the pilot flying is required to respond. Tr. at 659-60.

At Respondent, typically a supervisor is involved in the decision to discipline or terminate the employment of an employee. At the time of his termination from employment, Complainant’s supervisor was Westbrook. Generally, Wilcox does not involve himself in the decision to discipline or terminate the employment of a pilot. In other cases, Respondent provided an option to retrain prior to termination. And in other terminations, the reason provided in the termination letter was not just “for cause.” Not once has a final paycheck been cut for a pilot who was not fired.<sup>45</sup> More often than not, pilots are given the opportunity to resign instead of being terminated from employment. Pilots prefer to resign rather than be terminated from employment for tax and/or other individual reasons; when asked, Coulter was unsure of the tax benefits of resigning. Coulter agreed that termination potentially can impact one’s future employment opportunities. Tr. at 661-64.

While with Respondent, Complainant never failed any training and was promoted to captain, a decision made by Coulter and Westbrook. Tr. at 664. CX 80 is an email from Eric Sinnett, another pilot, to Coulter and Westbrook. Sinnett was a check airman that worked for Respondent whose judgment Respondent trusted. Sinnett recommended that Respondent promote Complainant to captain. Tr. at 666-68.

Coulter learned that Complainant sent his June 26, 2013 email to the NTSB during a telephone call with Wilcox; that call was followed by an email to that effect from Wilcox with Complainant’s email attached (JX N). After reviewing Complainant’s email, Coulter expressed

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<sup>44</sup> According to the transcript, Westbrook had been recently hospitalized and was not available to testify at the hearing. Tr. at 659.

<sup>45</sup> Q: Not once has a final paycheck been cut for a pilot who was not fired.

A: Correct.

Tr. at 662.

concerns about Complainant's emotional state, and questioned whether it was appropriate to include Complainant on the flight schedule; he thought Complainant was "lashing out." Coulter disputed that there were serious miscalculations in Respondent's manuals. He did not believe that Complainant referred to safety concerns when he raised his doubts about the trustworthiness of Respondent's manuals, or that the aircraft had an awful braking system, or whether the Phenom 100 should fly to airports like Sedona. He viewed Complainant's comments as his own opinion, rather than constituting true safety concerns, because safety concerns must be "about something that is material." The fact that Respondent did not let its pilots use Opera is not a safety concern, according to Coulter. Coulter acknowledged that he could not calculate the Phenom 100's landing distance using the AFM with the aircraft at 124 knots and a 1.9 degree downward sloping runway.<sup>46</sup> Tr. at 669-74.

JX X is the response Respondent provided to the NTSB investigator. Coulter drafted that response. Following Complainant's methodology he calculated a landing distance of 4,468 feet, but using Opera without including slope, one gets 4,576 feet; the numbers are close to one another. His concern was not that Complainant was coming up with numbers pretty close to what Opera generated, but with "a pilot who was using numbers that were inappropriate [in order] to come up with some other conclusion." Tr. at 675-78. In JX X, Coulter also addressed Complainant's assertions about the aircraft's braking system. The aircraft's brakes were more sensitive to use and Respondent had experienced some brake failures in the past; some 30 brake failures over a three year period. Two of the ten Phenom 100s Respondent owns have been involved in runway overruns and another Phenom 100 that it leased was involved in a runway overrun. Tr. at 679-84; *see also* CX 98.

CX 105 is an email from Respondent's then Director of Maintenance. In that email, the Director of Maintenance wrote that he was "uncomfortable" with the reliability of the Phenom 100's braking system. As a result, Respondent worked as hard as it could with Embraer to improve the aircraft's braking system. CX 106 is an email about a hydraulic failure that occurred on an aircraft in September 2013. The aircraft Respondent operates do not have the lift dumping retrofits. Each lift dumping kit costs between \$100,000 and \$300,000 depending on how one measures the cost. The Phenom 100 was not built with thrust reversers. Tr. at 685-90.

CX 85 is an email from the NTSB investigator, Cawthra; Coulter was a recipient of this email. CX 85 contained attachments and was provided to update Respondent on the investigation. Coulter reviewed those attachments as well as Cawthra's additional drafts. Coulter recalled having one or two telephone conversations with the NTSB investigator between the middle of 2011 and early 2013. Tr. at 691. He recalled the NTSB investigator sending Respondent a draft factual report. He testified Respondent and Embraer shared information with each other about the accident and remembered receiving data in 2011 from Embraer about performance numbers using Opera. When the cockpit voice recorder transcripts were released, the only new information and concern was the crew was not using the correct protocol which required a challenge to make sure that the aircraft's speed was actually correct. Instead, the

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<sup>46</sup> When this Tribunal asked to verify its understanding that the AFM does not contain information about runway slope for calculations, Coulter responded: "For dry and wet, that's correct. Contaminated runways had a correction but not for dry and wet." Tr. at 680.

captain responded to the call out with “ $V_{app}$ -ish” and Complainant should have repeated the challenge. Tr. at 701-03.

CX 33 is a 32-page extract from the Phenom 100’s AFM. Page 19 of 32 contains the definition of unfactored landing distances and it includes only zero slope information. CX 154 is a complete copy of the AFM. Tr. at 696-98.

The starting rate for a captain working for Respondent is \$400 per day. Pilots earn extra pay if they work a certain number of extra days. At day 17, 18 and 19 the pilot gets an extra \$100 a day and anything from 20 days and over they get an extra \$200 per day. A check airman doing check airman work gets \$100 a day and a supervisory pilot gets \$50 a day doing supervised flying. Tr. at 698-99.

Coulter believed that Rico and Vander Velde are competent pilots. Tr. at 700.

CX 112 is Rico’s July 10, 2011 statement concerning the brake failure incident. The term hand brake is jargon for the emergency parking brake. Tr. at 704-05.

CX 113 is a July 2011 email response from Wilcox to an email that Coulter sent to him concerning a loss of hydraulic pressure and it pertains to the incident described by Rico. Wilcox’s response indicates that there had been previous abnormal braking issues with the aircraft related to the hydraulics.

There existed a number of comments on forums about braking issues with the Phenom 100. Tr. at 709; *see* CX 125. CX 129 pertains to a brake failure that occurred on or around December 21, 2009. CX 134 concerns a brake failure that occurred October 28, 2011. CX 142 pertains to a brake failure that occurred on November 15, 2012 where the flight crew declared an emergency. Tr. at 710-12.

Coulter drafted a document entitled JetSuite Operational Enhancements. CX 110. The document was prepared after Complainant’s accident. Tr. at 715. In that document he discussed the active versus passive crew coordination as well as performance calculations; Coulter wrote:

[Respondent’s] experience has supported the commonly-held belief that these numbers are all but unobtainable except by the most talented pilots and more importantly, under ideal conditions.

Tr. at 714.

CX 5 is the Phenom 100 POH. It provides a definition of unfactored landing distance. “Unfactored landing distance is the actual distance [required] to land the airplane on zero slope, dry runway, from a point 50 feet above the runway threshold at  $V_{ref}$  to complete a stop using only the brakes as a deceleration device.” Tr. at 720-21.

Coulter and Wilcox were the only agents of Respondent involved in the decision to terminate Complainant’s employment. Tr. at 722.

In response to this Tribunal's questions, Coulter stated that the SOP includes both visual and instrument approach guidance. When using an instrument flight rules approach plate, they use Category B speed for a straight-in approach, and Category C for a circling approach. Opera is primarily designed as an engineering tool; there are a lot of parameters that, unless one is an engineer, one should not alter. Coulter further stated that it is easy to have changed parameters in Opera's background to arrive at figures that are not the same as what one would get if one compares such figures to the AFM. The AFM or POH does not contain information about the effect that runway slope or weather conditions have on landing distances of the Phenom 100. There are no airworthiness directives, service bulletins, or service letters that pertain to the Phenom 100's brakes. Tr. at 725-28.

On July 2, 2013, Coulter had a meeting with Complainant and Wilcox. Prior to the meeting he had a conversation with Wilcox. While he knew that terminating Complainant's employment was a possibility, they had not yet made that decision. So prior to the meeting, they had Delassantos issue a check so they were prepared if the decision was to terminate Complainant's employment. Tr. at 752.

During the meeting there were two breaks. During the first part of the meeting they discussed Complainant's email, particularly the portion that concerned pilot performance. Complainant argued that based on the data from QRH, the airplane should have stopped. Complainant brought with him an FAA advisory circular concerning the effects of slope on landing distance. Generally, Wilcox and Coulter disagreed with Complainant's calculations. The first segment of the meeting lasted 45 minutes to an hour. At that point Wilcox and Coulter went next door and talked about their conclusions. Wilcox and Coulter concluded that Complainant really did not understand how the performance data should have been applied. The parties discussed the configurations Complainant used for his calculations, such as using zero flaps. When Wilcox and Coulter returned, they attempted to elicit Complainant's understanding as to the duties of a pilot monitoring. Complainant was still adamant that the plane should have been able to stop. They talked about brakes and Complainant maintained that they must not have been working properly because the airplane should have stopped. They then took a second break and Coulter and Wilcox again went next door. They agreed to give Complainant one more opportunity to acknowledge his role in the accident. During this third segment of the meeting Wilcox asked a final question "Whether he thought there was anything [Complainant] could have done to prevent the accident." Complainant's response was something like "Yeah, and I could have won the lottery as well." Wilcox then told Complainant that he would no longer be able to work with Complainant because Wilcox had lost confidence in Complainant's ability to operate an aircraft. At no time during the July 2, 2013 meeting did Complainant take responsibility for the accident. Tr. at 729-34.

Zajic, the captain of the aircraft involved in the Sedona incident, was placed on administrative duties pending the outcome of the FAA investigation. The FAA made a finding against the captain, his license was suspended, and Respondent subsequently terminated his employment. Tr. at 732.

Coulter was present at Sedona the day after the accident and was present when Complainant gave his statement to the NTSB investigator. At that time, Complainant was obviously in some discomfort as he was in a back brace and had just left the hospital. There was mention of the aircraft's speed and that Complainant did not know what the speed was as the aircraft approached the runway. There was no mention about a sink warning to pull up. The statement contained in the NTSB investigator's report (RX 40) is consistent with what he heard the day after the accident. Tr. at 734-35.

Coulter was also present when the NTSB investigator interviewed one of the three passengers that was involved in the Sedona incident. RX 41 is the passenger's statement; he did not describe a stabilized approach. Tr. at 736. CX 44 contains Coulter's statement to the NTSB investigator. Tr. at 737. Coulter recalled that Respondent's pilots had flown into Sedona on ten prior occasions before the Sedona incident; none of the pilots in those previous flights had expressed difficulty with landing at the airport.<sup>47</sup> Tr. at 740.

RX 32 was a packet of information that Coulter was allowed to read while he was at Sedona. By 2013, there were 30 brake incidents of about 30,000 landings that he knew of concerning the Phenom 100 aircraft operated by Respondent. Since 2013, Respondent experienced three or four more brake incidents out of a total of about 55,000 total landings. Tr. at 741-42.

The Phenom 100 is a relatively new plane. Coulter first flew it in August or September 2008. It was designed for single pilot operations and the cockpit was very well laid out. It is certified under Part 23 as a normal category aircraft because the maximum takeoff weight is less than 12,500 pounds. Tr. at 742.

Coulter was involved in the 2014 investigation of the Sugarland overrun incident. Respondent learned during its investigation that the flight appeared to be normal until the latter stages of the approach. The aircraft's speed at 50 feet was more than 10 knots over  $V_{ref}$ . The co-pilot indicated that he had been distracted and was not monitoring the airspeed. Both crewmembers took responsibility for their actions. That flight crew was given the opportunity to be terminated from employment or resign. Tr. at 745-47.

CX 93 is an email concerning Embraer's draft report of the Pomona airport incident in 2010. One of Wilcox's concerns was the dotted trace on page 15 of the report,<sup>48</sup> which appeared to be erratic and he was not sure that it was accurate. The airport runway was wet and the METAR reported winds out of the southwest at 10 knots, one mile visibility, and rain and mist. The crew was Captain Warner and First Officer Rico. There was no NTSB investigation for the NTSB determined that the incident did not meet the qualifications for an investigation. The FAA also investigated the pilots but made no finding. Tr. at 747-50.

RX 118 is a series of emails, one being from Wilcox. Just prior to the Pomona incident Embraer had changed certain parameters for landing on wet runways; they increased the standard factor to 25 percent from 15 percent. This means that when calculating for a wet runway

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<sup>47</sup> However, this Tribunal notes that no evidence was presented on which runway those aircraft landed.

<sup>48</sup> Page 17 of 22. Tr. at 748.

distance one would use the dry landing distance and then add 25 (or 15) percent to it to get the needed runway distance for a wet runway. The aircraft at Pomona landed within tolerance for  $V_{ref}$ ; it landed at  $V_{ref}$  plus 5.7 according to the report. That crew tried to apply the main brakes but they did not appear to be having an effect so the crew tried the emergency brakes, which did not work either. Apparently, due to hydroplaning, there was no friction available to stop the plane. Tr. at 747-52.

Concerning the Sedona incident, after Complainant returned to duty following the accident, he was retrained. That training occurred in October 2011 and included training on the subject of CRM. CRM focuses on the “interactions between crew members, communication styles, advocacy, and accentuating the importance of communication between all crew members and dispatch and ground personnel.” Following his retraining, the Complainant flew Warner, a check airman, to ensure that Complainant was comfortable and ready to fly. Tr. at 752-53.

RX 1 is a document Coulter prepared in response to a request from OSHA. Tr. at 755.

RX 11 discusses a rule of thumb for landing distances and that it is not possible to accurately predict landing distance with a non-stabilized approach. In his discussion with Complainant on July 2, 2013, Complainant did not account for the unstabilized approach. With a negative runway slope, one factors an additional 10 percent of landing distance per one percent downhill slope. Therefore for a runway with a 1.9 degree slope, that would be an extra 19 percent one would add to the landing distance. During the July 2, 2013 meeting, Complainant failed to include this 1.9 degree slope in any of his calculations. Tr. at 756-62.

RX 145 is a document summarizing the July 2, 2013 meeting. In Complainant’s June 26, 2013 email he referenced a specific QRH page located at JX M. That page states that for landing “[c]onsiderations for uphill slope and occurrence of head wind should also be made,” during the landing procedure. Complainant did not discuss whether he took this information into consideration during the July 2, 2013 meeting. Tr. at 764-65.

CX 1 contains two pages from the Phenom 100’s AFM. The AFM includes  $V_{ref}$  and  $V_{ac}$  speeds.  $V_{ac}$  is the aircraft’s approach climb speed which is different from  $V_{ref}$  or  $V_{app}$ , and  $V_{ac}$  speed is generally 9 or 10 knots over  $V_{ref}$ . Tr. at 780-81.

RX 37 is the JS Log Book data that Complainant and his captain received prior to the May 25, 2011 flight. It makes reference to a 1.9 upslope and 1.9 downslope but from this document the crew had no way of calculating the effect of that slope on the runway landing distance. It also reflects that the  $V_{app}$  speed was 120 knots with a  $V_{ref}$  speed of 97 knots. Tr. at 782-83.

Landing over speed is generally considered pilot error, but for example, landing 5.7 knots over speed (at Pomona) was not considered pilot error, because it was within the 10 knots tolerance factored within the pilot’s procedure. Tr. at 783.

In CX 93, Wilcox was concerned with page 15<sup>49</sup> of the Embraer report concerning braking issues with the Phenom 100 that occurred December 20, 2010 in La Verne, California. So Wilcox asked Embraer to remove that page from their report (slide 16) because it was based on data which he thought was inaccurate. He did not know whether Wilcox told the NTSB that he thought that that data was faulty. CX 93, page 18 of 22, contains Opera calculations which show 4,320 feet of wet runway. Looking at CX 116, the data suggests there was something wrong with the runway but not the airplane at Pomona. Tr. at 784-90.

Coulter agreed that he testified during his earlier deposition that he saw Complainant as a competent pilot prior to June 2013. Tr. at 789-90. After the meeting on July 2, 2013, he lost confidence in Complainant's ability to operate safely and that is why he was terminated. He did not believe that he ever told the NTSB or the FAA that he had lost confidence in Complainant's ability to operate safely. Tr. at 795. Complainant's termination was based on his responses during that meeting, not on his email to the NTSB investigator. Tr. at 796-97.

CX 91 is the email inviting Complainant to the July 2, 2013 meeting. Tr. at 791.

Upon this Tribunal's questioning, Coulter acknowledged that Part 135 limits the airports that Part 135 operators can fly into; the aircraft should be able to land using 60 or 70 percent of the runway. And pilots are trained to aim for the touchdown markings which are located 1,000 feet beyond the start of the runway. The runways at Sedona airport are just over 5,000 feet long. According to the calculations using a  $V_{app}$  of 120 knots, in the perfect scenario, a pilot should have 300 additional feet of available runway at Sedona. And that calculation does not factor in runway slope. Given this particular airport, one would have to land right at the threshold of the runway in order to stop in the distance available, with only 300 feet to spare; "it's tough." Tr. at 797-802.

Since the Sedona accident, Respondent has not flown the Phenom 100 into Sedona; rather, it flies the CJ3 to that airport. Tr. at 804.

#### Shiv Bhalla (pp. 810 - 840)

Bhalla is currently a first officer for Compass Airlines<sup>50</sup> flying the Embraer 170 and 175. He holds an ATP and is type rated in the Embraer 170 and 175, and has about 2,700 flight hours total time; 1,040 being in jets. Bhalla wanted to make it clear that he was testifying pursuant to a subpoena. Tr. at 812-13.

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<sup>49</sup> Also identified as page 17 of 22.

<sup>50</sup> Bhalla expressed concern about coming to the hearing and testifying; specifically, as to how it might affect his employment with Compass or other airlines. He did not want Compass to serve as his final move, as he wants to eventually get a job with a major airline "and there are a lot of people that might know the management at [Respondent] that might, you know, put in negative words so to speak." Bhalla was particularly concerned about Wilcox, as he has seen Wilcox's emotional swings, especially in the office. "He accused me of personally trying to sabotage the company once before when I was sitting at a desk with a phone. And we had a mechanical failure on one of our other aircraft. I've seen him make whimsical decision. That's the biggest reason." Tr. at 835-39.

CX 42 is a declaration that he provided OSHA. Bhalla previously worked for Respondent as a flight scheduler which means he handled crew logistics. He met Complainant in this role and a friendship developed. Complainant helped him with some of his flight training and Complainant actually served as his flight instructor on one or two occasions. At some point he learned that Complainant no longer worked for Respondent. Following Complainant's termination of employment with Respondent, he helped him move from Phoenix, Arizona back to Newport Beach, California. After moving to California, Complainant "was quite literally moving from friend to friend, couch to couch, sometimes at his parents' house and sometimes he'd go to another friend's house." During this time, Complainant was a little upset as he did not have another job lined up. He thought the financial burden of the termination might have played into his affect as well. Bhalla discussed with Complainant the consequences of being terminated by Respondent to future employment. Complainant worried about whether he was ever going to be able to get a job at an airline. Complainant wanted to pursue the major airline track rather than the corporate aviation track. Complainant felt that, unless his termination of employment was "taken care of," he would be unable to secure employment with a major airline in the foreseeable future. Complainant had expressed to him that his professional reputation had been harmed by Respondent's actions. Tr. at 816-25.

Bhalla acknowledged that the declaration (CX 42) was prepared by Complainant's counsel; but he read it thoroughly before signing it. RX 162 contains a series of text messages between Complainant and himself. After leaving Respondent in August of 2012 or 2013, Bhalla went to work for Seaport Airlines out of Memphis, Tennessee where he started as a first officer, but later became a captain flying the Caravan and PC-12.<sup>51</sup> Bhalla worked for Respondent for about 16 or 18 months.<sup>52</sup> He left Seaport Airlines on December 24, 2014. RX-163 is his final pay document from Respondent before he left reflecting he made about \$20 per hour. When he was hired by Seaport Airlines he started at \$21 per hour and after he upgraded to captain he was making \$49 per hour. It actually worked out that his first year pay at Seaport Airlines was a pay cut, but was on par with Respondent once Bhalla was promoted to captain. Tr. at 825-31.

Bhalla did not attempt to apply for any work as a pilot for Respondent because of its scheduling, as he saw the time constraints that pilots dealt with on a daily basis. Secondly, he had no desire to fly the Phenom 100. Bhalla had seen so many mechanical issues with that aircraft. "The biggest thing was the brake failure issue." He was aware of incidents and accidents that occurred with that aircraft before he started working for Respondent and while working for Respondent. He spoke with pilots about their experiences with the plane. "[A]fter hearing these happen day in and day out and having seen what exactly corresponds in the office, it was just something where I knew that I just didn't want to do it." When this Tribunal asked what he meant by the statement "having seen what exactly corresponds in the office," Bhalla referred to an arbitrary 5,000 foot number for the length of a runway, but then there would be exceptions to this limitation that they called "owner trip" or something like that, provided certain pilots flew it or certain conditions were met. Tr. at 831-39.

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<sup>51</sup> These aircraft are single-engine turbo-prop aircraft.

<sup>52</sup> Tr. at 833.

Robert Briggs Ellingwood Hamel (pp. 868-888)

Hamel is the director of safety and security for Respondent. He is not a pilot. In the 1990s, he served five and one-half years in the Navy, initially studying nuclear propulsion, with the remaining four years as an aviation electronics technician in a helicopter squadron. After his military service, he returned to aviation as a private operator. After time and education in safety management systems, Respondent hired him in March 2010 to provide oversight of its safety management systems. He is a member of a variety of safety related organizations and holds an FAA Airframe and Powerplant certificate. Between 2011 and 2013, Hamel served as a safety manager for Respondent. During that time he reported to Wilcox, Respondent's CEO. Hamel believes that he has a great working relationship with Wilcox. He believes that Wilcox is very involved and that safety is important to him. It is not the normal practice for Respondent's operation to deny or reject a safety recommendation. Hamel has not seen Wilcox yell or fly off the handle in reaction to an employee of the company raising a safety concern. Hamel knew Bhalla, but only socially. Hamel performed a historical search of Respondent's system and found that Bhalla had documented one concern. It pertained to the temperature of the mission control room. As far as he knew, there was no implemented rule regarding not sending the Phenom 100 to any airport that had a runway less than 5,000 feet. Over the years that he has been a safety director, he had received no concerns from Respondent's pilots regarding the Phenom 100's braking system. Tr. at 869-79.

On cross-examination, Hamel acknowledged that during his deposition he testified that he could not recall one way or the other whether he ever heard pilots talk about concerns flying the Phenom 100. He further stated that he had no reason to question the veracity of Bhalla's testimony. Tr. at 881-83.

In response to this Tribunal's questioning, Hamel said he only performed very limited maintenance on the Phenom 100. He would not qualify as a potential director of maintenance for a Part 135 operation. It is his understanding the Respondent is part of the VDRP since 2010.<sup>53</sup> Tr. at 886-88.

Alex Wilcox (pp. 898-1089)

Wilcox has been Respondent's CEO since 2008. Prior to working for Respondent, he was a consultant for his own company for about a year. Prior to that he was the president and chief operating officer of Kingfish Airlines in India. He held that job for about one and one-half years. Prior to heading Kingfish Airlines, Wilcox was co-founder and director of airports at JetBlue. He started working at JetBlue in August 1998. At JetBlue he held various titles such as director of Western Region, and director of product development. He left JetBlue because of a very generous offer to start an airline in India. Prior to JetBlue, Wilcox was the director of product development at Virgin Atlantic Airways. Wilcox has been a private pilot since 1987 with a seaplane endorsement, but does not have an instrument rating. Tr. at 902-06.

To prepare for his testimony he re-read his depositions and reviewed a dozen or so emails that were made contemporaneous to the events in this matter. Those emails included

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<sup>53</sup> Voluntarily Disclosure Reporting Program. *See generally*, FAA Advisory Circular (AC) 00-58B.

Complainant's June 26, 2013 email to the NTSB investigator and his emails to the NTSB investigator, his emails to Coulter about Complainant's June 2013 email, emails from Coulter about that email, and emails from the NTSB investigator about that email. Tr. at 898-901.

Wilcox agreed that he has a responsibility to provide full and complete responses to the NTSB investigator's request for information. Tr. at 902.

CX 118 is an email Wilcox sent to Embraer in connection with a Phenom 100 overrun incident at Pomona, California. Coulter and Wilcox worked on that email together. Wilcox has significant experience with the type of data discussed in this email and he is familiar with the Phenom 100. However, Wilcox is not an engineer and he is not type rated in that aircraft<sup>54</sup>; Coulter serves as Respondent's technical expert on those matters.

Wilcox did not recall who wanted to remove slide 16. Wilcox remembered that he had a concern about the reliability of slide 16. Wilcox was sure that Coulter expressed his concerns about slide 16, "both the reliability of the information and the apples to oranges comparison it was making." However, he later stated that "Coulter never told me whether it was or was not a reliable slide." After being shown part of one of his depositions (CX 194), Wilcox acknowledged that he asked that slide 16 be removed from Embraer's report. Wilcox and Coulter reviewed the slide deck together, but Wilcox drafted the email. Wilcox agreed with the statement that "Coulter did not express an opinion as to whether Slide 16 should or should not be removed." But he acknowledged that during his deposition taken a couple of weeks prior to the hearing that he told Complainant's counsel that Coulter may have suggested removing Slide 16. Tr. at 907-26.

Every pilot at Respondent is responsible for analyzing performance data. Wilcox analyzes data to tell a customer whether or not Respondent can provide the requested service. Tr. at 928-29

Wilcox recalled Complainant's June 2013 email (JX M) and Complainant's assertions about performance. According to Wilcox, there was no viable performance data in that email. Wilcox's "definition of performance data is data that tells you whether you can or cannot do a thing, so by definition, there is no performance data in this email." Tr. at 932-33. He maintained that he was not a technical expert in performance data, but was qualified to interpret an email such as Complainant's June 2013 email. Tr. at 938.

On deposition (CX 171<sup>55</sup>), Wilcox stated that he was not qualified to understand Complainant's allegations. Wilcox factored this into his reasoning for suspending Complainant. Tr. at 938-39. Wilcox is not type rated in the Phenom 100. Tr. at 940. Prior to June 2013, Wilcox had a very positive relationship, albeit a minimal one, with Complainant. Tr. at 940-41.

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<sup>54</sup> See Tr. at 940.

<sup>55</sup> QUESTION: "Why was Colin Yates suspended?"

ANSWER: "I was concerned about his state of mind and I couldn't understand -- I wasn't qualified to . . . understand his allegations."

Wilcox acknowledged that after the Sedona incident Complainant was promoted to Captain and became mountain qualified. Further, on the date Complainant's employment was terminated, Chief Pilot Westbrook was not involved in the decision to terminate Complainant's employment. Wilcox admitted that he was not Complainant's first line supervisor nor was he in charge of evaluating his performance. Had Wilcox thought Complainant's promotion to captain was not appropriate for any reason, he would have stopped it. However, Wilcox also stated that he would not have been made aware of something like a promotion to captain. And he agreed that Respondent would not promote a pilot to captain if its agents thought the pilot was unfit for duty. Tr. at 941-44.

Wilcox agreed that it was likely that he communicated in writing with the NTSB Investigator more than twelve times about the Sedona incident, and had "[p]robably around a dozen" verbal communications with him, as well. He also had communications with FAA personnel about the accident. However he acknowledged that his oral communications to the NTSB investigator and FAA personnel were not disclosed in response to Complainant's discovery interrogatories. Tr. at 945-55; *see also* CX 162. He had no explanation for why his oral communications with the NTSB investigator were not included in the interrogatory responses. Tr. at 959. Wilcox stated that he and the NTSB investigator "had a number of conversations the day after the accident and the day after that. In the following weeks, as information was being collected, [the investigator] called from time to time to seek further information." In the six months following the incident, the investigator called him "maybe five or six times." Tr. at 955-56. Then Wilcox had one or two telephone calls with the NTSB investigator "[p]robably a week or two after [Complainant] sent the email."<sup>56</sup> In one of Wilcox's communications with the NTSB investigator he relayed that Wilcox was not qualified to respond to Complainant's email; "to the technical aspects of it." Tr. at 957. As Wilcox was at Sedona the day after the accident, he was familiar with it,

"[a]nd I know the odds that the icing conditions were minimal. And I also know the flaps were deployed on that landing. So one would not use an anti-ice on checklist when the anti-ice was not on. And one would not use a zero flap checklist when the flaps were deployed. Those checklists were inapplicable."

Tr. at 958.

In 2012, the NTSB investigator sent Wilcox his draft report. Wilcox did not have a conversation with the NTSB investigator prior to receiving Complainant's June 2013 email; the NTSB investigator forwarded Complainant's email to Wilcox. Following receipt of that email, Wilcox had some email exchanges with the NTSB investigator that evening. He also had a telephone conversation with the NTSB investigator a week or two later. Tr. at 969-71.

At some point in time Wilcox decided to ground Complainant pending Coulter's return so the two of them could discuss Complainant's email. Wilcox denied that he had come to any conclusion about discharging Complainant at that point. Tr. at 972-73. Wilcox found Complainant's allegations in the email difficult to understand and he was concerned about

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<sup>56</sup> However, later in his testimony, Wilcox was presented with JX N, and after reviewing the document his memory was refreshed that he spoke with the NTSB investigator on June 26, 2013. Tr. at 1014-15.

Complainant's state of mind. Tr. at 976. Wilcox was asked about his deposition and asked to explain the reasons he provided for Complainant's discharge at that time. Wilcox discussed a combination of Complainant's behavior at the meetings the day of Complainant's termination from employment, that Complainant "was shift," the words Complainant used, the fact that Complainant would not look him in the eyes, and his body language. "He struck me as desperate to make the accident not his responsibility." Tr. 985-95.

When Wilcox went into the meeting to discuss Complainant's email, he had reason to believe that it might end in Complainant's termination of employment. They discussed Complainant's calculations in the email. Wilcox acknowledged that one of the reasons he suspended Complainant was that he thought Complainant's calculations were gibberish. There were further discussions during this meeting concerning portions of the aircraft's manuals and checklists. They also discussed Opera. Tr. at 996-1000. Wilcox asserted that Complainant told him that there was no pilot error involved in the Sedona incident. Tr. at 1002.

The accident did have a negative impact on Respondent's business, but the NTSB investigation did not. Wilcox also denied being anxious about the investigation's outcome. Tr. at 1004-08. However, he was presented with CX 214, an email he sent to the NTSB investigator, and was asked to read the following into the record:

Hi [NTSB investigator]. Any update? I'm becoming anxious since I have a Board Meeting this Friday and I need to update them. My last meeting with them was when we last spoke, July 19<sup>th</sup>, and I told them we expected a report issued in two weeks and a further four weeks for review. It seems this didn't happen. This is negatively impacting our business at this point since we cannot talk about the incident and because several of our clients will not fly us again until the report is issued and behind us. Do we have a pair [sic] of getting this behind us at some point in the foreseeable future?

Tr. at 1005.<sup>57</sup> Wilcox also stated that the NTSB report did not absolve Respondent from any responsibility for the accident. However, when presented his deposition testimony at CX 171, he admitted that he previously had testified that the investigation had absolved the company. When pressed, Wilcox maintained that Respondent was absolved in the eyes of its customers. Tr. at 1009-12. Wilcox agreed that on "[a] small number of times" he had referred to Complainant as the pilot that crashed Respondent's plane. Tr. at 1021.

Wilcox agreed that Respondent does not make the Opera software available to its pilots. Tr. at 1036. Wilcox further acknowledged Complainant's assertions in his email (JX M), that: (1) Respondent's AFM data could mislead a pilot when performing calculations (*e.g.* the lack of information about sloped runways); (2) the aircraft had an awful braking system; and (3) the aircraft should not land at specific airports. However, he maintained his belief that such assertions did not rise to the level of valid safety concerns. Rather he found these statements to be matters consistent with training issues, and he maintained his opinion that the AFM did, in

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<sup>57</sup> Later in his testimony, Wilcox said "yes" in response to the question: "And you very much wanted to have that investigation concluded. Didn't you?" Tr. at 1069.

fact, include information about the effect of slope on the aircraft's landing performance. Tr. at 1038-45, 1064.

Wilcox acknowledged that he is not normally involved in decisions to discipline or terminate the employment of pilots. He questioned Complainant's judgment in not raising the concerns in his email internally and instead sending the email to the NTSB. Tr. at 1062-64. "Subsequent to receiving the e-mail, we took a very careful look. We ran every single statement to ground. We provided our response to the NTSB and determined that the allegations were baseless and that was it." Tr. at 1064-65.

C. Stipulated Facts

The parties proffered the following stipulated facts within their pre-hearing statements.

1. Respondent is an air carrier under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121.
2. Complainant was an employee of Respondent, protected under AIR 21.
3. Respondent hired Complainant as a First Officer in March 2011.
4. Other pilot positions with Respondent include Captain, Check Airman, and Chief Pilot.
5. Complainant's employment with Respondent was at-will.
6. The runway at the Sedona airport is 5,132 feet [long].
7. On June 24, 2013, the NTSB first released its Factual Report regarding the May 25, 2011 accident.
8. On August 29, 2013, the NTSB released a Probable Cause Report regarding the May 25, 2011 accident.
9. Complainant, the captain, and a passenger on the flight were each interviewed as part of the NTSB investigation.
10. The FAA also conducted an investigation into the May 25, 2011 accident.
11. Both Respondent's Chief Executive Officer Alex Wilcox and Respondent's Vice President of Operations Brian Coulter participated in the investigation as party representatives.
12. As investigation participants, Wilcox and Coulter were subject to the restrictions on the dissemination of investigative information in accordance with 49 C.F.R. § 831.13.
13. On June 26, 2013, Complainant sent Joshua Cawthra, NTSB Accident Investigator assigned to conduct the NTSB investigation, an email.
14. On that same date, Cawthra forwarded the email to Wilcox and Daniel Marimoto, an Embraer representative.
15. Wilcox forwarded the email to Coulter, who was on vacation at the time.
16. Wilcox and Coulter were the only officers and employees involved in making the termination decision.
17. Respondent's July 2, 2013 termination letter to Complainant states that his employment with Respondent was terminated "for cause."
18. Complainant began his employment with Swift Aircraft Management as a pilot on or about September 27, 2013 and resigned from that employment on or about October 22, 2014.

19. Complainant began his employment with Superior Transportation Associates, Inc. as a pilot on or about April 7, 2015.
20. Complainant's starting salary at STA was \$65,000 plus medical and dental benefits, and life insurance.
21. Complainant's annual salary at STA increased to \$100,000 [per year] on or about January 1, 2016.
22. Complainant is still employed as a pilot with STA.

D. Facts in Dispute

1. Complainant's Statement of Facts

In his brief, Complainant asserted that his career goal was to become a pilot for a major airline. *See* Tr. at 105-06, 180-81, Compl. Brief at 1. Respondent hired complainant in March 2011. Complainant completed his Phenom 100 type certification on March 23, 2011 and became a First Officer. Tr. at 290-91; *Id.* at 2. Respondent's fleet of Phenom 100 airplanes lacked spoilers and thrust reversers; spoilers became available in 2012. Tr. at 170, 224, 689, 727-28; Compl. Brief at 2. Respondent promoted Complainant within a year of his hire and qualified him to land in mountainous regions. CX 90; Tr. at 1141, 664; Compl. Brief at 3. Complainant attended annual training and recertifications and never failed a training course, specifically concerning his ability to calculate performance numbers. Tr. at 664; CX 178 at 25; Compl. Brief at 3.

Complainant was trained to use the OPERA software, but it was not available to Respondent's pilots for use within the cockpit. Tr. at 132-33, 284-86, 523, 728, 230, 679-80, 1075; Compl. Brief at 3. Respondent used a custom program called JS Logbook to calculate performance numbers; however, it did not include the effect of slope on landing distance. Tr. at 135-38, 174, 535, 782-83; CX 178 at 57; Compl. Brief at 4. Respondent never provided training to Complainant concerning accounting for slope in landing distance. Tr. at 509; Compl. Brief at 5.

The Phenom 100 is known to have poor braking function. *See, e.g.*, Tr. at 553, 709, 219-23, 681, 831-34, 531-34, 487, 528; Compl. Brief at 5-6. Respondent was aware of the Phenom 100's braking issues. *See, e.g.*, CX 105; CX 112; CX 113; JX F; JX G; JX H; Tr. at 881-82; Compl. Brief at 6.

On May 25, 2011, Complainant was involved in a crash of a Phenom 100 landing at Sedona airport; Sedona airport has a 5,132 foot long runway. *See e.g.*, Tr. at 494-95, 143-44, 304; CX 50; RX 38; Compl. Brief at 7. Prior to landing, Complainant stated that the plane's airspeed was "v<sub>app</sub>ish," meaning that the plane was approaching V<sub>app</sub>, which the SOP stated was 120 knots; the V<sub>ref</sub> was 97 knots. Tr. at 148-49, 214-15, 783; CX 2; CX 74; CX 198; Compl. Brief at 8 n. 20. The plane landed at 124.5 knots. *See, e.g.*, Tr. at 796; CX 198 at 6; Compl. Brief at 9. The pilot landed the plane at the 1,000 foot marker; the pilot had difficulty braking and the plane veered to the right before leaving the runway. *See, e.g.*, Tr. at 150-53; CX 198; Compl. Brief at 8.

The FAA and NTSB commenced investigations concerning the Sedona incident. Joshua Cawthra was the NTSB investigator. *See, e.g.*, RX 151; Tr. at 171; CX 178 at 49, 62; Compl. Brief at 8. On December 11, 2011 the FAA cleared Complainant of wrongdoing. *See, e.g.*, RX 141; Tr. at 87, 795; CX 166 at 98; Brief at 9. The NTSB did not release its report until June 26, 2013. JX M; Compl. Brief at 11.

Complainant reviewed the NTSB's report and noted that it referred to the AFM and OPERA software, relying on OPERA to calculate performance numbers based on the factual circumstances extrapolated after the Sedona incident. *See, e.g.*, CX 198; Tr. at 170-72, 509; Compl. Brief at 13. OPERA calculations accounted for the effects of runway slope, but such information was not accessible to Complainant based on the information at his disposal. *See, e.g.*, Tr. at 393-99; Compl. Brief at 13. Complainant emailed the NTSB investigator the same night to alert him to the fact that the information in the AFM and QRH differed and was less complete than the information contained in OPERA. *See* JX M; Compl. Brief at 13. Complainant also stated the aircraft "has an awful braking system and capabilities at best shouldn't be going to airports like this and should be equipped with lift dumping devices, and to top that off, they don't offer any information on how the performance will be affected by sloping runways nor does [Respondent] let their pilots use OPERA." *See id.* At hearing, Complainant explained his concerns related to the lack of slope in the AFM, especially when the FAA requires such data to be included in the AFM, and when it has such a "monster penalty."<sup>58</sup> *See, e.g.*, Tr. at 113, 170-73, 76, 206, 209, 415, 450; Compl. Brief at 13. Complainant attempted to illustrate through his own calculations his concerns regarding the discrepancy between the figures contained in the information available to him and OPERA. *Id.* Coulter agreed that Complainant's concern regarding sloping runways was a safety concern. Tr. at 674. Coulter stated that "you can't" calculate a landing distance using the AFM with a 124 knot overspeed and a 1.9% downward sloping runway. *Id.*; *see also* RX 1; CX 170 at 189, 219; Compl. Brief at 14.

Cawthra, the NTSB investigator, forwarded Complainant's June 26, 2013 email to a number of individuals, including Wilcox, Coulter, and an Embraer representative. JX N; Compl. Brief at 15. Wilcox emailed Coulter and acknowledged that Complainant's email raised safety concerns, but "questioned his judgement" in doing so. JX N; Compl. Brief at 15. Wilcox said that Complainant's email was "I suppose, understandable." *Id.* Wilcox suspended Complainant because of the allegations contained in his email to the NTSB. Tr. at 203-05; 976; Compl. Brief at 15. Respondent did not take any disciplinary action against Complainant for anything concerning the accident for two years after the accident occurred. *See, e.g.*, Tr. at 205, 1070; Compl. Brief at 16. On July 1, 2013, Complainant received an "end of duty assignment" email, which scheduled a meeting with Coulter and Wilcox to discuss the June 26, 2013 email and the contents contained therein. *See, e.g.*, Tr. at 791, 209, 609; CX 91; CX 170 at 76; Compl. Brief at 16. Prior to the meeting, Coulter asked Frank Delassantos to "prepare a final check" for Complainant. Tr. at 600; CX 81; Compl. Brief at 16. On cross examination, Delassantos agreed that "not once has a final paycheck been cut for a pilot who was not fired." Tr. at 662; Compl. Brief at 16.

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<sup>58</sup> This Tribunal specifically addresses this point in a footnote, *infra*.

During the July 2, 2013 meeting Coulter and Wilcox discussed the concerns raised in Complainant's June 26, 2013 email. *See, e.g.*, Tr. at 670-71, 729, 976, 996, 1076; Compl. Brief at 16-17. At the meeting, Complainant reiterated his concerns and was "adamant" in his defense. Tr. at 718-19; CX 182; Compl. Brief at 17. Complainant brought a copy of the FAA Advisory Circular, which provided guidance on how to account for slope, to show that slope was an important factor to take into account. Tr. at 40, 507; Compl. Brief at 17.

Complainant was terminated "for cause" after the meeting. CX 162 at 4; CX 206. Wilcox and Coulter were directly involved in the decision to fire Complainant. Tr. at 722; Compl. Brief at 18. They made their decision "due to Complainant's lack of basic knowledge required of a pilot and lack of accountability for his actions," as expressed in the July 2, 2013 meeting. CX 162 at 4; Compl. Brief at 18. Coulter provided Wilcox with a response to the concerns expressed in Complainant's June 26, 2011 letter, and forwarded it to Complainant on July 2, 2013. JX X. In that letter, Coulter agreed with Complainant's observations that the PH or QRH do not contain slope correction information and that OPERA was not available to Respondent's pilots. JX X; Compl. Brief at 18.

## 2. Respondent's Statement of Facts

In its brief, Respondent asserted that Complainant was hired in March 2011 and was trained as a Phenom 100 aircraft pilot. Tr. at 132-33; Resp. Brief at 8. His training included CRM training, Civil Aviation training, and additional training following the Sedona incident, and after Complainant was promoted to captain (in November 2012). *See, e.g.*, Tr. at 277-91, 377; RX 18; Resp. Brief at 8.

Complainant received information about expected landing airspeed ( $V_{ref}$ ) and approach airspeed ( $V_{APP}$ ) from a computer program called JS Log Book. CX 166 at 29-39; Resp. Brief at 9. If those airspeeds are breached, Complainant was trained to say something to the captain, including calling for a "go around." *See, e.g.*, CX 166 at 35-49; Tr. at 739-40; Resp. Brief at 9. At his disposal in the cockpit, Complainant had access to the Airplane Flight Manual (AFM), Pilot's Operating Handbook (POH), and the Quick Reference Handbook (QRH). Tr. at 513; Resp. Brief at 10. Respondent decided not to provide access to Opera, because it is an "engineering tool . . . so it was not a useful tool for pilots during flight operations." *See* Resp. Brief at 10 n.11.

By May 25, 2011—the day of the Sedona incident—Complainant had flown only 60-70 hours in the Phenom 100. *See* Resp. Brief at 10. Complainant was the First Officer and Hal Zajic was the Captain. Tr. at 304. Complainant acknowledges that the incident resulted, in part, due to an excessive approach and landing speed. Tr. at 321, 328, 499-500; Resp. Brief at 11. According to the NTSB investigation, the  $V_{app}$  was 120 knots and the  $V_{ref}$  was 97 knots. Tr. at 309-11; RX 134; Resp. Brief at 11. The plane touched down at 128 knots. "The Brake Control Unit (BCU) on the plane operated normally with no anomalies noted." *See, e.g.*, Tr. at 319-20; RX 134; Resp. Brief at 11. Complainant, Respondent, and Zajic were sued by the passenger involved in the May 25, 2011 crash; the lawsuit settled. *See, e.g.*, Tr. at 744-45; Resp. Brief at 12.

Cawthra served as the NTSB investigator concerning the Sedona incident. *See* Resp. Brief at 13. Cawthra and Complainant initially met the day after the Sedona incident, May 26, 2011. Complainant failed to mention anything about the “sink rate, pull up” warning that occurred during landing. Complainant said that “the brakes did not feel like they were one hundred percent effective and that the airplane was not stopping.” Tr. at 734-36; RX 40; Resp. Brief at 13. On May 27, 2011, Respondent drafted an email to Cawthra and, in part, said “[t]he plane would not slow down no matter what Hal [Zajic] did and then we flew off the end of the runway.” RX 43; Tr. at 737; Resp. Brief at 14. Yates did not tell Cawthra that there was an unstabilized approach, and he did not tell Cawthra that he did not call out speeds. Tr. at 338-41; RX 40; RX 43; Resp. Brief at 14. The FAA eventually suspended Zajic’s pilot’s license and Respondent fired him. Tr. at 732-33; Resp. Brief at 15. On December 11, 2014, the FAA inspector wrote to the Complainant informing him that the Agency “did not substantiate that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred” concerning his actions relating to the May 2011 Sedona incident. RX 141; RX 143; Resp. Brief at 15 n.16.

On May 18, 2013, Complainant emailed Cawthra concerning the status of the NTSB investigation into the Sedona incident. Coincidentally, at that time Complainant applied to work for Virgin America. Tr. at 385-386; RX 125; Resp. Brief at 15. To get a job with a major airline like Virgin, a pilot cannot have any NTSB findings of violations. Tr. at 595; Resp. Brief at 15-16.

On June 25, 2013, the NTSB released its final factual report regarding the Sedona incident. Tr. at 743-44; RX 134; Resp. Brief at 16. The NTSB found that pilot error, in the excessive approach speech, caused the crash, not “mechanical malfunction” of the airplane, including its braking components. RX 134; Resp. Brief at 16. Complainant emailed Cawthra on June 26, 2013. Tr. at 306-07, 404; JX M; Resp. Brief at 16. Complainant attempted to calculate various landing hypotheses and stated that the manuals contained miscalculations and insisted that the plane should have been able to stop. Cawthra never asked Complainant for the calculations contained in the email. Tr. at 425; JX M. Cawthra did not respond to the substance of the email, but forwarded Complainant’s email to Wilcox. Tr. at 399, 425; Resp. Brief at 16. Respondent observed that Complainant never took responsibility for the events surrounding the Sedona incident. Tr. at 425; JX M. Complainant also never adequately accounted for slope in the June 26 email, because they had “no way to figure out . . . how it was going to affect” the plane’s landing. Tr. at 420-21; JX M; Resp. Brief at 17. Complainant further did not provide support for his assertion that the Phenom 100 has an “awful braking system.” Resp. Brief at 17.

Respondent has numerous channels available for its employees to report safety concerns. Resp. Brief at 18. Robert Hamel is the Safety Manager and Director of Safety for Respondent. Respondent issues documents concerning safety on its intranet and through email. Tr. at 291-92. It has a program called PRISM, which allows employees to report anonymously. Tr. at 294. Complainant never used any of these channels to report his safety concerns. Tr. at 295-97; Resp. Brief at 18. Complainant did, however, complain about separate issues unrelated to the Phenom 100 during his employment. Tr. at 377-81; RX 108; RX 119; Resp. Brief at 19.

After receiving Complainant's email, Wilcox forwarded it to Coulter, who was on vacation. JX N. Wilcox and Coulter expressed concern for Complainant's emotional state. JX N; Tr. at 670-71. Wilcox decided to ground Complainant without pay until Coulter returned from vacation. Tr. at 972-73; Resp. Brief at 20. Wilcox was concerned about why Complainant included "inapplicable checklists in his email" like "anti-icing on" and a zero flap checklist. Tr. at 957-58; Resp. Brief at 19-20.

On July 1, 2013 Wilcox and Coulter viewed the documents available online, which included for the first time, the cockpit voice recorder transcript. Tr. at 743-44; RX 7; Resp. Brief at 20. According to Respondent, "it was clear from the CVR that Complainant failed to perform his job duties during the flight because he did not make the necessary speed callouts despite the unstabilized approach . . . as well as [Complainant's] failure to call for a go-round." Resp. Brief at 20; CX 181; RX 117. Notably, the pilots used the term "V<sub>app</sub>ish," rather than the correct term. Tr. at 703-04; Resp. Brief at 20.

Wilcox and Coulter did not decide to fire Complainant prior to the July 2, 2013 meeting, but they knew it was a possibility. Coulter requested Complainant's final paycheck prior to the meeting, which is required under California state law "if the decision was termination." Tr. at 752; Resp. Brief at 20. It is Respondent's practice to cut checks in advance for individuals who may or may not be terminated and Delassantos has previously cut checks for individuals who were not fired. Tr. at 70; 601-02; Resp. Brief at 20.

The July 2, 2013 meeting occurred at Respondent's Irvine, California office. Coulter and Wilcox discussed what, if anything, Complainant had learned from the Sedona incident; now that Complainant was a captain, safety was an even greater concern for Respondent. Tr. at 435-36. Coulter and Wilcox were worried about Complainant's commitment to safety and ability to use good judgment. Tr. at 443-44; RX 145; Resp. Brief at 21. Complainant maintained his belief that the plane should have landed safely, and that the crash was due to other issues aside from his own actions. Tr. at 729-30, 662, 1078. Complainant made calculations to prove that there was nothing he could have done to prevent the accident, but did not include runway slope into his calculations. Tr. at 1078-79, 762; RX 11; Resp. Brief at 21, 23. Based on their meeting with Complainant, Coulter and Wilcox believed that Complainant "did not understand how the performance data should be applied." Tr. at 730; Resp. Brief at 21. Coulter and Wilcox "talked to [Complainant] about the respective roles of the pilot flying and pilot monitoring and tried to see if he understood his duties as a pilot monitoring and what he was supposed to have done." Resp. Brief at 22. Complainant "showed no remorse during his July 2, 2013 meeting with Wilcox and Coulter." Resp. Brief at 22; Tr. at 321. Complainant made a "callous" response and Wilcox fired Complainant "because they had lost confidence in his ability to fly." Resp. Brief at 22; Tr. at 733-34. Respondent averred that the decision to fire Complainant "was based on the entire meeting Coulter and Wilcox had with him on July 2, 2013," not the contents of Complainant's June 26, 2013 email. Resp. Brief at 22-23; Tr. at 796-71. Coulter specifically responded to the assertions and calculations found in Complainant's June 26, 2013 email. JX X; JX Y; Tr. at 675-76, 1032; Resp. Brief at 24.

E. Summary of the Documentary Evidence<sup>59</sup>

In support of his case, Complainant presents the following evidence, as described below:

<b>Exhibit</b>	<b>Description</b>
CX 1	Selection from the Phenom 100 Airplane Flight Manual concerning landing distances.
CX 2	JetSuite's Standard Operating Procedures, including call-outs before landing.
CX 3	May 21, 2011 Email from Complainant to Frank Westbrook with Subject: "Flight Time."
CX 5	Selection from the Phenom 100 Pilot's Operating Handbook. This document provides information related to calculation of performance numbers for the Phenom 100.
CX 23	Invoices for moving costs.
CX 33	Selection from the Phenom 100 Airplane Flight Manual concerning landing reference speeds.
CX 42	Shiv Bhalla's February 12, 2015 declaration.
CX 50	Map and diagram of the Sedona, Arizona airport.
CX 51	Complainant's pay check for period 12/1/15-1/15/16.
CX 52	Complainant's employment offer from STA, dated April 7, 2015.
CX 53	Complainant's employment offer from Swift Aircraft, dated October 1, 2013.
CX 54	Complainant's 2015 W-2 from Superior Transportation Association.
CX 55	Complainant's 2013 tax documents.
CX 56	Complainant's 2014 tax documents.
CX 57	Complainant's paystub and expense payout sheet from Swift Aircraft, for pay period October 4, 2014 to October 17, 2014.

<sup>59</sup> The following exhibits were specifically admitted at hearing:

- CX 2, 3, 50-58, 79-81, 83-86, 88-91, 97, 99, 101, 103, 106, 154-64, 182, 186, 196, 197, 199-202, 205-07, 209, 210, and 212. Tr. at 37.
- CX 1, 5, 23, 33, 42, 50, 58, 61, 62-69, 72, 74, 80, 93, 95, 98, 106, 110, 112, 113, 116, 118, 123, 125, 129, 134, 142, 178, 203, 204. Tr. at 889 (this Tribunal inaccurately stated that CX 108, and 115 were admitted).
- CX 214. Tr. at 1037-39.
- CX 171; CX 194. Tr. at 1054.
- CX 166. Tr. at 1055.
- CX 170. Tr. at 1060.
- CX 105. Tr. at 1124.
- CX 218. Tr. at 1127.
- CX 219 was admitted by Order dated February 16, 2017.
- The Tribunal notes that CX 211 and CX 213 were not specifically admitted; there was no objection at hearing, so they are therefore ADMITTED.
- RX 1-159 (except RX 12 and RX 13). Tr. at 41, 47-48.
- RX 160-65. Tr. at 249, 968, 889.
- An Order dated October 18, 2016 admitted RX 166 through RX 175.
- JX A through JX ZL. Tr. at 33.

Exhibit	Description
CX 58	Ramiro Kuyvenhoven's (Swift) letter of recommendation concerning Complainant.
CX 61	Complainant's 2013 W-2 from Respondent.
CX 62	Complainant's 401k information.
CX 63	Complainant soliciting employment and attaching his March 2015 resume.
CX 64	Complainant soliciting employment and attaching his March 2015 resume.
CX 65	Complainant soliciting employment and attaching his July 2013 resume.
CX 66	Complainant soliciting employment and attaching his February 2015 resume.
CX 67	Complainant soliciting employment and attaching his February 2015 resume.
CX 68	Complainant soliciting employment and attaching his February 2015 resume.
CX 69	Complainant soliciting employment and attaching his March 2015 resume.
CX 72	Invoice for Complainant's Gulfstream IV type rating.
CX 73	NA
CX 74	Selection from Embraer's Standard Operating Procedures manual for the Phenom concerning descent procedure.
CX 79	Email dated July 5, 2013 from Brian Coulter to Complainant concerning how Respondent calculated his final check.
CX 80	Eric Sinnett's August 1, 2012 recommendation for work at Respondent.
CX 81	Email dated July 2, 2013 from Brian Coulter to Frank Delassantos asking Delassantos to prepare "a final check for [Complainant]."
CX 83-CX 86	Email dated June 7, 2011 from Joshua Cawthra, NTSB, to Alex Wilcox, Respondent's CEO, enclosing his on scene notes and other information concerning the accident at Sedona airport. Other emails to various individuals concerning the Sedona incident.
CX 88	Email dated December 21, 2012 from Embraer to Cawthra containing flight information concerning the accident.
CX 89	Email dated October 9, 2011 from Cawthra to various individuals concerning the Sedona incident.
CX 90	NA
CX 91	Email from "Flight Scheduling" to Complainant with Subject: "Duty Assignment for [Complainant] on July 2, 2012." The meeting was planned for 12:30pm that day.
CX 93	Email enclosing a PowerPoint presentation from Embraer titled "Phenom 100 500-0046 Dec. 20th, 2010 KPOC."
CX 95	Email dated October 31, 2013 regarding hydraulic issues on the Phenom 100 occurring in 2013.
CX 97	Email dated June 22, 2013 enclosing Respondent's "Operational Enhancements" concerning "Runway Safety Initiatives" which discussed the Phenom 100's braking system. Specifically noting "the Phenom 100 braking system has taken a lot of criticism over the past 2 1/2 years." Respondent worked with Embraer to improve the system. The changes worked to secure reliability and pilot confidence.
CX 98	Email dated February 12, 2013 concerning another incident where the Phenom 100's brakes failed at a landing in Albuquerque.

<b>Exhibit</b>	<b>Description</b>
CX 99	Email dated July 19, 2012 between Wilcox and Cawthra concerning, in part, the Sedona incident and Respondent's operational enhancements.
CX 101	Email dated June 20, 2011 concerning a Phenom 100 overrun at an airport in Brazil in which the brakes were involved.
CX 103	May 31, 2011 email concerning a video of the Sedona incident.
CX 105-06	Email dated March 2010 concerning a Phenom 100 "brake system failure at Mammoth Lakes Airport."
CX 108	NA <sup>60</sup>
CX 110	Document titled "JetSuite Operational Enhancements" concerning, in part, the Phenom 100's braking system.
CX 112	Email dated July 11, 2011 from a pilot to various individuals at Respondent concerning a brake failure on what is assumed to be a Phenom 100.
CX 113	Email from Brian Coulter to his "fellow pilots" concerning the July 11, 2011 brake failure.
CX 115	NA
CX 116	Respondent's "Data Analysis for N574JS KPOC 12/20/2010." Part of the conclusion was that there was "insufficient braking coefficient on the wet runway at [Brackett Field Airport]."
CX 118	Email dated January 6, 2011 from Wilcox to Embraer, saying "we are not certain of the reliability of the data." Enclosed a preliminary report concerning an overrun at Brackett Field on December 20, 2010 where the pilot "did not feel braking action."
CX 123	Email dated March 8, 2010 from Embraer to Wilcox concerning the Phenom 100 in which Embraer recommended operator contact maintenance whenever the "BRK FAIL CAS" message appears--this happened 5 times on "previous flights." Wilcox emailed Coulter and said that they need to retrain crews on ground v. air resets.
CX 125	Email dated November 2009 between Wilcox and Coulter concerning a forum post about "Recent Brake and Pressurization Incidents" on the Phenom 100. Wilcox presumed Embraer would issue "some kind of notice or response on these issues."
CX 129	Embraer Service Letter concerning a brake failure on a Phenom 100 that occurred in December 2009.
CX 134	Email dated October 28, 2011 from Respondent's Client Services concerning a Phenom 100 brake failure that occurred in Los Angeles.
CX 142	Email dated October 15, 2012 from an employee of Respondent to Coulter concerning a brake failure on a Phenom 100.
CX 154	Phenom 100's FAA Airplane Flight Manual dated December 12, 2008.
CX 155	Minutes from Respondent's Board of Directors' meetings concerning the Sedona incident.
CX 156	Phenom 100's Quick Reference Handbook dated December 1, 2008.
CX 157	Respondent's initial discovery disclosures, dated August 26, 2015.
CX 158	Respondent's responses to Complainant's first set of requests for interrogatories

<sup>60</sup> CX 108 was rejected from evidence. Tr. at 689.

<b>Exhibit</b>	<b>Description</b>
	and for the production of documents, dated October 29, 2015.
CX 159	Complainant's supplemental disclosures, dated November 5, 2016.
CX 160	Complainant's First Response to Complainant's Second Set of Interrogatories and Documents, and First Admissions, dated December 4, 2015.
CX 161	Respondent's Supplemental Responses to Complainant's First Set of Interrogatories, dated January 20, 2016.
CX 162	Respondent's Second Set of Supplemental Responses to Complainant's First and Second Requests for Interrogatories and For Production of Documents, dated January 20, 2016. Respondent's response to interrogatory 3 stated that Wilcox and Coulter terminated Complainant after talking to him on July 2, 2013, "due to Complainant's demonstrated lack of understanding of basic knowledge required of a pilot and lack of accountability for his actions, despite his failure to perform his job duties."
CX 163	Complainant's Third Set of Supplemental Disclosures, dated April 8, 2016.
CX 166	Complainant's November 9, 2015 Deposition Transcript.
CX 170	Coulter's February 10, 2016 Deposition Transcript.
CX 171	Wilcox's February 11, 2016 Deposition Transcript.
CX 178	Westbrook's April 7, 2016 Deposition Transcript.
CX 181	Wilcox's December 4, 2015 Declaration.
CX 182	Coulter's December 4, 2015 Declaration.
CX 186	Phenom 100 Quick Reference Handbook, dated December 12, 2008.
CX 194	Wilcox's May 9, 2016 Deposition Transcript.
CX 196	NTSB's August 29, 2013 report concerning the Sedona incident.
CX 197	NTSB's August 29, 2013 "Brief of Accident."
CX 198 <sup>61</sup>	NTSB's July 4, 2013 "History of Flight" report.
CX 199	NTSB's February 27, 2013 Cockpit Voice Recorder summary.
CX 200	NTSB's May 26, 2011 "Record of Conversation" with Zajic. Zajic stated that the "airplane was at about 120 knots during the final approach."
CX 201	NTSB's May 26, 2011 "Record of Conversation" with Complainant. Complainant also said that the approach speed was 120 knots. Also included was Complainant's May 27, 2011 email to Cawthra. He said "On base to final I made radio calls and Hal slowed to V <sub>app</sub> and descended for the airport." Complainant further stated that he did not "feel like [the brakes] were one hundred percent effective and that the airplane was not stopping."
CX 202	William Kind's May 25, 2011 passenger report to the NTSB.
CX 203	Respondent's procedures for the EMB-500 dated May 21, 2010.
CX 204	Respondent's standard operating landing procedures, dated December 15, 2011.
CX 205	Opera 4.1 data provided to Complainant on May 25, 2011.
CX 206	Respondent's July 2, 2013 letter terminating Complainant's employment, signed by Wilcox.
CX 207	Email dated July 11, 2011 from Coulter to Respondent's pilots enclosing an "Information Notice" about "brake enhancements."

<sup>61</sup> CX 198 was not specifically admitted at the hearing; this Tribunal finds that neither party objected to its admission, so it is hereby ADMITTED.

<b>Exhibit</b>	<b>Description</b>
CX 209	Complainant's September 13, 2013 offer of employment with Swift.
CX 210	Email dated May 25, 2011 from Wilcox alerting individuals about a Facebook post on Respondent's Facebook concerning the Sedona incident.
CX 211	Keith Rabin, President of Respondent, wrote to Wilcox on February 23, 2011, discussing an emergency landing and saying "we need to discuss our approach with Embraer on brakes."
CX 213	Phenom 100's Quick Reference Handbook, dated December 12, 2008.
CX 214	Email from Wilcox to Cawthra enclosing data to help Cawthra prepare his report to Respondent's Board of Directors.
CX 218	Complainant's pay stub from Superior Transportation Association for pay period April 16, 2016 to April 30, 2016.
CX 219	Complainant's paycheck for the period of January 1, 2017 through January 15, 2017.

In support of its position, Respondent presents the following evidence, as described below.<sup>62</sup>

<b>Exhibit</b>	<b>Description</b>
RX 1	A Path to Understand the Performance of Embraer Phenom 100 N224MD at Sedona (RES-000054-RES-000062) prepared by Coulter in response to Complainant's June 26, 2013 email to Cawthra. Cawthra calculated that the airplane could never have stopped on the runway after adjusting for speed, slope, and temperature.
RX 2	Document prepared by Brian Coulter regarding Complainant's assertions in his June 26, 2013 email to Joshua Cawthra (RES-001107 through RES-001109). "All JetSuite performance predictions were based upon Opera 4.1 data," but Opera itself was not available to the pilots. Coulter said that the braking required "greater than normal focus from the pilot."
RX 3	Text from "Mark" at 12:50 p.m. re: brakes, landing in rain.
RX 4	Statement by Complainant re: incident on May 25, 2011. Complainant said that the "plane just would not slow down no matter what the captain did."
RX 5	69 responses [re: Respondent Safety Culture Survey].
RX 6	OSHA file. OSHA dismissed Complainant's complaint.
RX 7	Public docket contents of the NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport.
RX 8	Emails produced by OSHA pursuant to FOIA Request.
RX 9	Emails and related documents received from OSHA pursuant to FOIA Request.
RX 10	Emails received from OSHA pursuant to FOIA Request.
RX 11	Plaintiff's Deposition Exhibit 33 – FAA Advisory Circular. The Landing Distance Calculations were just "rules of thumb" and "are not intended to replace data provided by either the manufacturer or the company to perform

<sup>62</sup> This Tribunal notes with some concern that Respondent wrote the term "CONFIDENTIAL" next to many of its Exhibits when it submitted its exhibit list. This Tribunal made clear at hearing numerous times, "protective orders do not extend to documents that are admitted into evidence." Tr. at 1060, 344.

Exhibit	Description
	calculations with the accuracy required for certification or FAA approval.”
RX 14	Respondent’s Standard Operating Procedures. These procedures were in effect during the Sedona incident.
RX 15	Airplane Flight Manual for Phenom 100, Revision 9. This document was dated December 12, 2008.
RX 16	List of Sedona flights prior to May 25, 2011. Respondent flew to Sedona approximately 21 times.
RX 17	Email from Westbrook to Complainant, <a href="mailto:Katie@f7tiger.com">Katie@f7tiger.com</a> , cc: Coulter, Claussen re: Class Date re: conditional offer of employment.
RX 18	Complainant’s training records with Respondent showing the training he received.
RX 19	Email from Naomi Lacy to Westbrook, cc: Complainant, Moore, Coulter, Claussen re: Phenom 100 Initial Training March 17, 2011.
RX 20	Email from Westbrook to Naomi Lacy, cc: Complainant, Moore, Coulter, Claussen re: Phenom 100 Initial Training March 17, 2011.
RX 21	Email from Westbrook to Tom Beach, FAA, cc: Coulter, Claussen re: Training Dates.
RX 22	Complainant’s Certificate re: Phenom 100 Systems Evaluation.
RX 23	Complainant’s Certificate re: Phenom 100 Systems Training completed by Complainant.
RX 24	Email from Coulter to Pilots re: Change in Wet Runway Restrictions.
RX 25	Email from Complainant to Coulter re: [Logging] Flight Hours.
RX 26	Email from Coulter to Complainant re: Flight Hours.
RX 27	Email from Westbrook to Complainant, cc: Coulter re: Flight time.
RX 28	Email from Complainant to Westbrook re: Flight time.
RX 29	Airplane Flight Manual for Phenom 100, Revision 10.
RX 30	Memo to Incident File, dated May 25, 2011, from Edward McCall, General Manager/CEO Sedona-Oak Creek Airport Authority re: Aircraft Incident of Embraer Phenom 100 (N224MD). The aircraft left “a fishtail pattern down the runway.”
RX 31	Aircraft Accident N224MD statement by William Kind ATP (Passenger) for the NTSB.
RX 32	NTSB Certification of Party Representative and related documents.
RX 33	Email from Coulter to Westbrook re: N224MD Performance+Manifest SJC-SEZ.
RX 34	Email from Wilcox to JSOps, JS Sales, jsall re: ERC Deactivated. Wilcox promised to investigate the cause of the accident and “ensure it doesn’t ever happen again.”
RX 35	Email from Wilcox to jsall re: Respondent Sedona Incident Statement.
RX 36	Email from Wilcox to jsall re: Incident Alert.
RX 37	Email from <a href="mailto:performance@jetsuite.com">performance@jetsuite.com</a> to Complainant re: Perf at SJC for N224MC. Contains performance data.
RX 38	Handwritten Statement by Hal Zajic regarding runway overrun on 5/25/11. Stated “aircraft not slowing quickly, and with max brake, started getting anti-

Exhibit	Description
	skid.”
RX 39	Document re: Record of Conversation from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport.
RX 40	Document re: Record of Conversation from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport. The plane approached at 120 knots. The pilot complained of brake issues.
RX 41	Document re: Record of Conversation from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport.
RX 42	Email from Frank Westbrook to Alex Wilcox, Keith Rabin, Brian Coulter, Gary Waldman re: Complainant transferred to emergency room, Flagstaff Medical Center.
RX 43	Email from Complainant to Cawthra re: Complainant report of 5/25/11 incident “The plane would not slow down no matter what Hal did and then we flew off the end of the runway.”
RX 44	NTSB Certification of Party Representative.
RX 45	Email from Complainant to Cawthra re: 72 hour report.
RX 46	Email from Complainant to Cawthra re: report of 5/25/11 Sedona incident.
RX 47	Email from Westbrook to Complainant re: 710-766196 Yates, Colin.
RX 48	Email from Complainant to Westbrook re: 710-766-196 Yates, Colin.
RX 49	Email from Complainant to Westbrook re: Letter to the NTSB.
RX 50	Email from Complainant to Westbrook re: Letter to the NTSB.
RX 51	Email from Westbrook to Complainant re: Insurance.
RX 52	Email from Complainant to Westbrook re: Insurance.
RX 53	Approved Minutes of Board Meeting of Directors of Neeleman JS Holdings, LLC. The minutes state that there was “not enough data available to determine the cause of the incident” at that time.
RX 54	Email from Wilcox to jsall re: Internal Update – N224MD. The airplane that crashed in the Sedona incident, N224MD, will not be used again.
RX 55	Document re: Accident Site and Airplane Examination from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport. There was no evidence of “preimpact mechanical malfunction.”
RX 56	Email from Cawthra to Marimoto, cc: Wilcox, Coulter, Nouh, Ochoa, re: WPR11FA236: JetSuite N224MD Update. This email shows the progress of Respondent’s investigation into the Sedona incident.
RX 57	Email from Wilcox to Cawthra, re: WPR11FA236: JetSuite N224MD Update.
RX 58	Email from Westbrook to Beach, cc: Claussen, Coulter re: Flight & duty times.
RX 59	Email from Westbrook to Beach, cc: Claussen, Stephanson, Coulter re: Load Manifests.
RX 60	Email from Westbrook to Beach, cc: Claussen, Coulter re: Pilot Data for Zajic and Complainant.
RX 61	Letter from FAA to Hal Zajic. Stated “[o]perations of this type are contrary to the Federal Aviation Regulations.”
RX 62	Email from Coulter to <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> re: INF-FLT-11-002 Brake Enhancements ( <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> ). Respondent planned to upgrade brakes

Exhibit	Description
	on its Embraer manufactured planes.
RX 63	Email from Coulter to <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> re: INF-FLT-11-002 Brake Enhancements-Rev 1 ( <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> ).
RX 64	Email from Coulter to <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> re: INF-FLT-11-002 Brake Enhancements-Rev 2 ( <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> ).
RX 65	Email from Wilcox to Coulter, Keith, Waldman re: Message from the Chairman Fwd: Re: “Braking” News. Respondent implemented its brake upgrades in Embraer manufactured planes.
RX 66	Email from Wilcox to jsall, BCC: <a href="mailto:Board@jetsuite.com">Board@jetsuite.com</a> re: “Braking” News.
RX 67	Email from Coulter to <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> re: INF-FLT-11-002 Brake Enhancements-Rev 3 ( <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> ).
RX 68	Email from Complainant to Westbrook re: Doctor visit.
RX 69	Email from <a href="mailto:wes.warner@jetsuite.com">wes.warner@jetsuite.com</a> to <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> , cc: Coulter re: INF-FLT-11-002 Brake Enhancements-Rev 3 ( <a href="mailto:pilots@jetsuite.com">pilots@jetsuite.com</a> ).
RX 70	Confidential, Intellectual Property, and Non-Solicitation Agreement.
RX 71	Email exchange between Westbrook and Complainant re: Letter of Investigation.
RX 72	Email from Complainant to Westbrook re: Letter of Investigation. Complainant did not wish to share the letter of investigation with anyone.
RX 73	Email from Westbrook to Zajic, Complainant, cc: Coulter re: Letter of Investigation.
RX 74	Email from Westbrook to Coulter re: Letter of Investigation.
RX 75	Email exchange between Brian Coulter and Alex Wilcox re: Sedona runway overrun. They planned to terminate Zajic if he acted “in a careless, reckless, or unsafe manner.”
RX 76	Email from Complainant to Westbrook, cc: Claussen, Coulter re: Doctor visit.
RX 77	Email from Complainant to Westbrook, cc: Claussen, Coulter re: Doctor visit.
RX 78	Email from Turner to Coulter, Westbrook re: Colin Yates Medical Release.
RX 79	Email from Wilcox to jsall re: Survey Says!
RX 80	Email from Complainant to Westbrook, cc: Coulter, re: medical issues.
RX 81	Email from Westbrook to Complainant, cc: Coulter, re: response to email from Complainant about medical related issues.
RX 82	Email from Complainant to Coulter re: Admin work.
RX 83	Document re: BCU Examination from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport. “Review of the recovered data revealed no stored faults related to the accident flight. The BCU was installed on a test bench and functionally tested. The BCU operated normally with no anomalies noted.”
RX 84	Emails between Complainant and Zajic re: investigation by FAA. Complainant was “afraid” he would need an attorney.
RX 85	Email from Zajic to Complainant re: FAA investigation results.
RX 86	Email from Complainant to Westbrook re: Letter.
RX 87	Email from Complainant to Westbrook re: Pilot pay.
RX 88	Email exchange between Complainant and Zajic re: Zajic’s termination from

Exhibit	Description
	Respondent. Complainant was “expecting” termination from Respondent.
RX 89	Email from Complainant to Westbrook, cc: Coulter re: Flight Hours.
RX 90	Email from Coulter to Admin [colin.yates@jetsuite.com] cc: Westbrook re: Flight Hours.
RX 91	Email from <a href="mailto:Cory@angelflightwest.org">Cory@angelflightwest.org</a> to Complainant, cc: SoCal Wing Leader re: Colin W. Yates – Welcome back to Angel Flight West.
RX 92	Email from Robert Hamel to jsall re: Respondent’s Safety Culture Survey.
RX 93	29 responses [re: Respondent’s Safety Culture Survey].
RX 94	Email from Complainant to Westbrook re: First Officer position and Austin Reay Resume.
RX 95	Email from Westbrook to Lorie Hernandez, Complainant re: ***Colin Yates – Flight hours.
RX 96	Email from Complainant to Westbrook re: ***Colin Yates – Flight hours.
RX 97	Email from Complainant to Westbrook, cc: Coulter re: Commercial flying.
RX 98	Email from Complainant to Westbrook, cc: Coulter re: Flight hours.
RX 99	Email from Westbrook to Complainant, cc: Coulter, Cape re: Colin Yates letter. On July 3, 2012, Complainant received a warning for refusing to accept a duty assignment.
RX 100	Email from Complainant to Westbrook, cc: Coulter, Kevin Cape, Wilcox re: Complainant letter and duty assignment.
RX 101	Email chain between Wilcox and Complainant re: letter.
RX 102	Email chain between Wilcox and Complainant re: letter.
RX 103	Email from Westbrook to Complainant, cc: Coulter, Cape, Wilcox re: response to Complainant’s letter.
RX 104	Email from <a href="mailto:Safety@jetsuite.com">Safety@jetsuite.com</a> to jsall re: Online Hazard Reporting System Login Instructions.
RX 105	Email from Complainant to Westbrook, cc: Coulter re: Updated hours for Jslogbook.
RX 106	Email from Complainant to Westbrook, cc: Coulter re: Updated hours for Jslogbook.
RX 107	Email chain between Wilcox, Cawthra, Coulter, bcc: Westbrook re: Respondent’s Operational Enhancements. Complainant cooperated with the NTSB investigation.
RX 108	Email from Complainant to Westbrook re: RSP638 Diversion.
RX 109	Email from Marimoto to Cawthra re: Phenom 100 N224MD in Sedona. States that the plane could not have safely landed, given the unstabilized approach and excessive airspeed on approach and landing.
RX 110	Document re: Performance Study from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport. On approach, the Vref speed was 97 knots and the aircraft’s airspeed was 117 knots.
RX 111	Email from Cawthra to Wilcox, Coulter, Kurko, Marimoto, <a href="mailto:dac@cenipa.aer.mil.br">dac@cenipa.aer.mil.br</a> , <a href="mailto:felipefam@cenipa.aer.mil.br">felipefam@cenipa.aer.mil.br</a> , and <a href="mailto:Christ@pui.com">Christ@pui.com</a> re: WPR11FA236 – Docket Items 1 of 2.
RX 112	Email from Kevin Cape to JSall re: ACTION REQUIRED – Respondent’s

Exhibit	Description
	Employee Handbook.
RX 113	Email from Complainant to Kevin Cape re: ACTION REQUIRED – Respondent’s Employee Handbook.
RX 114	Email from e500-pilots on behalf of Robert Hamel to Pilots, cc: Wilcox, Coulter, Westbrook, Rabin re: Pilot Safety Items resume.
RX 115	Complainant’s At-Will Employment Agreement and Acknowledgment of Receipt of Employee Handbook.
RX 116	Document re: Flight Data Recorder and Other Devices from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport.
RX 117	Document re: Cockpit Voice Recorder from NTSB investigation into the May 25, 2011 runway overrun at Sedona, Arizona airport. Complainant said the airspeed was “V <sub>app</sub> -ish.”
RX 118	Email from Complainant to Wes Warner re: P100 Check Airman opening attaching Resume. Complainant’s resume was attached.
RX 119	Email from Complainant to Coulter, Westbrook, Harish re: Trip number 57914. Complaint complained to Respondent about operational issues unrelated to air safety.
RX 120	Job Search Emails. These emails were sent in May of 2013.
RX 121	Job Search Emails. Complainant applied to Virgin in June 2013.
RX 122	Email from Complainant to Joshua Cawthra re: status of NTSB investigation.
RX 123	Emails between Complainant and Cawthra re: status of NTSB investigation.
RX 124	Email from jsall on behalf of Alex Wilcox to JSall re: Weekly Update.
RX 125	Job Search Emails. Complainant received a response from Virgin.
RX 126	Complainant’s Transcript from Embry-Riddle Aeronautical University.
RX 127	Letter from Alex Wilcox to Complainant dated July 2, 2013, stating that his last day of employment with Employer “is today” and stating that Employer provided him with a “final paycheck in the amount of \$4,737.82.”
RX 128	Frank Westbrook’s Deposition Exhibit 138 - Document Entitled WPR11FA236 History of Flight.
RX 129	Email from Complainant to Coulter re: Colin Yates final check.
RX 130	Email dated July 6, 2013 from Wilcox to JSall re: “Friday” Update, including a CEO Statement on safety.
RX 131	Email from Coulter to Delassantos, cc: Rabin re: Colin Yates Final Check, correcting the amount received on his final check.
RX 132	Email from Wes Warner to Coulter re: P100 Check Airman Opening, attaching Complainant’s resume.
RX 133	Email from Complainant to Clinton Colin Graham Walker re: Demand Letter.
RX 134	NTSB Factual Report and probable cause findings re: Sedona runway overrun. The brake control unit operated “normally.” The unfactored landing distance based on Opera version 4.1 was 5,624 feet.
RX 135	Email dated September 27, 2013 from Complainant to Robert Engel, his financial advisor re: moving to Arizona “because I’m taking a new job there.”
RX 136	Records Request – Pilots to Swift Aircraft Management.
RX 137	Complainant W2 from Respondent for 2013.

<b>Exhibit</b>	<b>Description</b>
RX 138	Performance Records and Certification of Phenom 100 Recurrent – Operator Specific Training Program.
RX 139	Pilot Position Description.
RX 140	Letters from Complainant to Kevin Burdette, Flight Operations Manager - Swift Aircraft Management re: his resignation as of October 31, 2014.
RX 141	Letter to Complainant c/o Ari Wilkenfeld, Esq. re: results of FAA investigation, finding that a violation of air carrier safety did not occur.
RX 142	December 11, 2014 Letter from the FAA stating that its investigations of air carrier safety allegations in relation to this matter “did not substantiate that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred.”
RX 143	Letter from Vincent Murray, Manager, Audit & Analysis Branch, FAA to Complainant re: no finding of safety violations.
RX 144	Email from HR – Recruitment CAE to Complainant re: Application Received for the job Phenom 100/300 Full Time Instructor.
RX 145	“Rebuttal Affidavit” of Complainant submitted to OSHA. Complainant said that the AFM or QRH does not provide formulae or data to calculate landing distances using slope. The fact that the information provided to him did not include slope “was exactly my concern.”
RX 146	Job offer letter to Complainant from STA, dated April 18, 2015.
RX 147	Email from Complainant to Michael Thomson re: jobs.
RX 148	May 18, 2015 Letter from OSHA regarding its findings and dismissal of Complainant’s complaint, because his alleged protected activity was not reasonable, and because he could not prove a causal connection between his adverse employment action and any whistleblowing behavior.
RX 149	Letter to Mustafa El-Farra from DOL re: Freedom of Information Act (FOIA) Request 783727.
RX 150	Plaintiff’s Deposition Exhibit 32 – Complainant’s Bizjetjobs.com profile.
RX 151	FAA records re: 5/25/11 Sedona incident.
RX 152	Documents received pursuant to subpoena from Swift Aircraft Management.
RX 153	Superior Transportation Assoc. Earnings Statements – December 1, 2015 through January 15, 2016.
RX 154	Documents produced pursuant to subpoena from Superior Transportation Associates, Inc.
RX 155	Documents received pursuant to subpoena from Bizjetjobs.com.
RX 156	NA <sup>63</sup>
RX 157	Complainant’s Fifth Set of Supplemental Discovery Responses containing Complainant’s proficiency check data April 2015, April 2014, April 2013.
RX 158	Complainant’s Fourth Set of Supplemental Disclosures concerning damages claimed.
RX 159	Complainant’s Sixth Set of Supplemental Discovery Responses.
RX 160	Pay Stub and copy of Check, \$1,239.50 from Employer to Michael Thomson.
RX 161	Email from Michael Thomson to Frank Westbrook; cc: Brian Coulter re:

<sup>63</sup> Respondent withdrew this exhibit. Tr. at 1121.

<b>Exhibit</b>	<b>Description</b>
	Resignation Notice effective 8/31/2013.
RX 162	Verizon text message – SHIV regarding affidavit used with OSHA.
RX 163	Check to Shiv Bhalla, \$2,204.18 cashed.
RX 164	2014 1099-MISC to Colin Yates from Clay Lacy Aviation.
RX 165	2015 1099-MISC to Colin Yates from Clay Lacy Aviation.
RX 166	Notice to Consumer and Deposition Subpoena for the Production of Business Records to the Custodian of Records of Virgin America, Inc.
RX 167	Virgin America, Inc.'s response to Respondent's June 15, 2016 Deposition Subpoena for the Production of Business Records.
RX 168	Notice to Consumer and Deposition Subpoena for the Production of Business Records to the Custodian of Records of Skydive Elsinore, LLC.
RX 169	Skydive Elsinore, LLC's response to Respondent's June 22, 2016 Deposition Subpoena for the Production of Business Records.
RX 170	Notice to Consumer and Deposition Subpoena for the Production of Business Records to the Custodian of Records of Superior Transportation Associates, Inc.
RX 171	Superior Transportation Associates, Inc.'s response to Respondent's June 22, 2016 Deposition Subpoena for the Production of Business Records.
RX 172	Notice to Consumer and Deposition Subpoena for the Production of Business Records to the Custodian of Records of Clay Lacy Aviation, Inc.
RX 173	Letter to El-Farra from David Shapiro re: Clay Lacy Aviation, Inc.'s response to Respondent's June 22, 2016 Deposition Subpoena for the Production of Business Records.
RX 174	Notice to Consumer and Deposition Subpoena for the Production of Business Records to the Custodian of Records of Threshold Air Charter, Inc.
RX 175	Threshold Air Charter, Inc.'s response to Respondent's June 22, 2016 Deposition Subpoena for the Production of Business Records.

The parties also present the following joint exhibits:

<b>Exhibit</b>	<b>Description</b>
JX A	Emails re: Complainant's job applications, including jobs involving Phenom 100.
JX B	Flight Training Records for Complainant.
JX C	Part 135 Training Program, Single-line Record Entry Form.
JX D	Record of Simulator Checks (STI 8410).
JX E	Temporary Airman Certificate, Medical, Restricted Radiotelephone Operator Permit, USA Passport, CA Driver License, Resume, Pilot Duty Assignment.
JX F	Email from Wilcox to JSall re: Hydraulic Pressure Issue VNY Today.
JX G	Email from Coulter to Pilots re: Low Hydraulic pressure.
JX H	Email from Wilcox to JSall re: Hydraulic Pressure Issue VNY Today.
JX I	Email from Wilcox to JSall re: Braking News.
JX J	Email from Wilcox to Marc Nouh, JSall, cc: JSOps, Robert Hamel, Kristina Lector and Keith Rabin re: Fleet Maintenance Completed.

<b>Exhibit</b>	<b>Description</b>
JX K	Email from Sinnett to Westbrook, Julian Cantu, Sasha Turner, Colin Yates re: Complainant's completion of Captain upgrade.
JX L	Excerpts from Employee Handbook.
JX M	Email from Complainant to Cawthra with attachments.
JX N	Email from Wilcox to Coulter re: N224MD, Colin Yates.
JX O	Email from Cawthra to Marimoto, Wilcox re: email from Complainant N224MD.
JX P	Email from Wilcox to Cawthra; cc: Marimoto re: N224MD, Colin Yates email.
JX Q	Email from Cawthra to Wilcox; cc: Marimoto re: N224MD, Colin Yates.
JX R	Email from Wilcox to Cawthra; cc: Marimoto re: N224MD, Colin Yates.
JX S	Email from Wilcox to Cawthra re: N224MD, Colin Yates.
JX T	Email chain between Cawthra and Wilcox re: N224MD, Colin Yates.
JX U	Email chain between Cawthra and Wilcox re: N224MD, Colin Yates.
JX V	Email chain between Marimoto, Wilcox, Cawthra re: N224MD, Colin Yates.
JX W	Email chain between Marimoto, Wilcox, Cawthra re: N224MD, Colin Yates.
JX X	Email from Coulter to Wilcox re: NTSB Response, including attachment re: Colin Yates' comments.
JX Y	Email chain between Wilcox, Cawthra, Marimoto and Coulter re: N224MD, Colin Yates, JS response to Colin Yates' comments attached.
JX Z	Email from Cawthra to Wilcox re: N224MD, Colin Yates, thanking him for forwarding comments.
JX ZA	Email chain between Marimoto, Cawthra, Wilcox re: N224MD, Colin Yates, Embraer's response to Colin Yates comments attached.
JX ZB	Email from M. Beth Forry, Swift Aircraft Management to Complainant re: compensation and benefits.
JX ZC	Complainant's Restated Complaint of Discrimination filed with the OALJ.
JX ZD	Complainant's Initial Disclosures.
JX ZE	Respondent's Request For Production of Documents to Complainant Colin Yates (Set One).
JX ZF	Complainant's Responses to The Respondent's Request For Discovery.
JX ZG	Complainant's Supplemental Response to Respondent's Request for Production of Documents.
JX ZH	Complainant's Second Set of Supplemental Discovery Responses.
JX ZI	Complainant's Third Set of Supplemental Discovery Responses.
JX ZJ	Complainant's Fourth Set of Supplemental Discovery Responses.
JX ZK	Respondent's First Set of Interrogatories and Second Request For Production of Documents.
JX ZL	Complainant's Responses to Respondent's First Set of Interrogatories and Second Request For Production of Documents.

### III. ISSUES

- Is the Complainant and/or Respondent covered under the Act?
- Did the Complainant engage in protected activity?
- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?
- What Remedies, if any, is Complainant due?

#### A. Complainant's Position

Complainant wrote that it was “undisputed” that Respondent is an air carrier and that Complainant is a protected employee under AIR 21. *See* Compl. Brief at 25 n.43. Complainant also argued that Respondent “clearly” took an unfavorable personnel action against Complainant “when it suspended him less than 24 hours after learning that he had emailed the NTSB investigator about safety concerns.” *Id.* at 25 n.44 (citing to JX N). He argued “Respondent engaged in the exact type of behavior AIR 21 seeks to prevent.” *Id.* at 26.

Complainant submitted that he engaged in protected activity. Complainant said that in the email he sent to the NTSB, and in the resulting meeting with Respondent, he raised multiple safety concerns, including:

1. The AFM/QRH are less complete than Opera software used by the NTSB during its investigation, which is not available to Respondent's pilots;
2. The manuals lack critical slope information;
3. The Phenom 100's braking system is unreliable; and
4. The manner in which Respondent operated the Phenom 100 was unsafe.

*Id.* at 26-27 (citing JX M; Tr. at 209, 431, 619, 621, 729; CX 170 at 77). Complainant alleged that his concerns about the lack of slope information implicated potential violations of 14 C.F.R. § 23.1581, which requires an AFM to identify specific performance information necessary to safely operate the aircraft.<sup>64</sup> *Id.* at 27. According to Complainant, § 23.1587 requires an AFM to include detailed and accurate information about “landing distance” and slope of runways. *Id.* Complainant discussed “Advisory Circular No. 91-79, Runway Overrun Prevention” which

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<sup>64</sup> A review of the performance data in this aircraft's AFM and QRH, *see* CX 33 and JXM respectively, provided at the hearing causes this Tribunal great concern. This Tribunal has serious questions as to how the material provided to the flight crew conforms with 14 C.F.R. § 23.1587(a)(5), which requires an AFM to include *detailed* and accurate information about “the effect on landing distances of runway slope.” From the materials provided in this case, this Tribunal sees no evidence that the AFM as it existed at the time of the Sedona incident complied with the regulatory requirement to address the slope of runways in performance data provided by the manufacturer. *See* JX M (containing information to calculate landing distances assuming “zero slope”); CX 33 (“Unfactored Landing Distance tables are presented . . . for the conditions below: . . . zero slope”). Accordingly, this Tribunal encourages the FAA to reconsider whether supplementation of this aircraft's AFM by adding slope of runway data is required to comply with this regulation, if such a deficiency is not already remedied.

discussed the importance of providing slope of runways information at the July 2, 2013 meeting. *Id.*

Complainant pointed out that § 23.735 governs requirements for braking systems, so his description of the Phenom 100's brakes as "awful" in his email and at the July 2, 2013 meeting also constituted protected activity. *Id.* at 28 (citing to JX M; CX 170 at 83). Because § 135.385 mandates that airplanes must be able to land "within 60 percent of the effective length," Complainant asserted that his complaint about whether the Phenom 100 should service airports like Sedona's also constituted protected activity. *Id.* Complainant made similar arguments concerning the approach procedures Respondent set forth in the SOP as well as in JS Logbook. *Id.* at 28-29 (citing to CX 203; CX 205; Tr. at 629-31). Complainant also referred to this Tribunal's finding in the Order dismissing Respondent's Motion for Summary Decision that Complainant's efforts to explore the cause of the accident "related to a violation or alleged violation of an FAA requirement," since Respondent faulted Complainant for flying in a "careless and reckless" manner in violation of § 91.13(a). *Id.* at 29 (citing to MSJ Order at 11).

Complainant generally argued that he reported in good faith the safety concerns addressed in the email and at the July 2, 2013 meeting. *See id.* at 29-31. Complainant subjectively believed that speed was not the only causative factor in the accident and that "public safety necessitated a more complete review." *Id.* at 29 (citing to Tr. at 170-73, 393-941, 206, 399). Complainant specifically noted how there was no data at his disposal concerning runway slope and that Respondent's procedures violated FAA regulations and guidelines. *See id.* at 30 (citing to Tr. at 431). Complainant averred that he was competent to make such safety assessments. *See id.* (citing to JX B; Tr. at 664; CX 18 at 25; CX 1; CX 10).<sup>65</sup>

Complainant also averred that his concern about the Phenom 100's braking efficiency was made in objective good faith, because documentary evidence and testimony reflect the same concern. *Id.* at 30 (citing to Tr. at 553, 709, 219-21, 679-86, 831-33, 525-34, 487, 179, 569-70, 741-42, 881-82, 706-07; CX 110; CX 105-06; CX 112-13; CX 125; CX 129; CX 134; CX 142; CX 211; CX 110; CX 42; CX 178; CX 118; CX 93; CX 112; CX 98). Complainant noted that Respondent created a 1,000-foot buffer zone to the plane's landing distance. *See id.* (citing to CX 110 at 1). Three pilots, Thompson, Rico, and Bhalla confirmed the accuracy of Complainant's calculations. *See id.* (citing to Tr. at 234, 553, 571, 700-01; CX 2 at 2). Complainant said that Respondent even confirmed that his assertions were reasonable:

including that his calculations yielded results similar to those obtained through Opera when the runway is slopeless, that the AFM/QRH lacks information about the effect of slope and landing distance, Opera software containing that information was not available to Respondent's pilots, and material discrepancies exist between calculations produced by the use of the manuals and those produced by Opera when runway slope is a factor.

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<sup>65</sup> Complainant also raised this Tribunal's finding on page 11 of its Order Denying Respondent's Motion for Summary Decision.

*Id.* at 30-31 (citing to Tr. at 177, 230-35, 536, 552-53, 562 538, 674-78, 618, 674-80, 252, 420, 645, 720, 1030; JX M; JX X; RX 1; CX 170 at 189, 219; CX 110; CX 118; CX 1).

Complainant argued in the alternative that his email to the NTSB investigator constituted protected activity, because Complainant “assisted or participated” in a government proceeding. *See id.* at 31 (citing to 49 U.S.C. § 42121(a)(4)). He claimed that when he contacted the NTSB about his safety concerns, the investigation was still ongoing, because the NTSB did not release the factual report about the Sedona incident until June 24, 2013 and it did not formally adopt its findings until August 29, 2013. *See id.* (citing to JX M; CX 198; CX 197). Complainant argued that no reasonableness standard is included in the Act for this type of protected activity. *See id.* at 31 n.56.

Complainant submitted that direct evidence and circumstantial evidence demonstrates that his protected activity contributed to Respondent’s adverse employment action. *See id.* at 31-33. Complainant averred that the temporal proximity between his protected activity and adverse actions “is sufficient by itself to satisfy the lenient contributing factor standard.” *Id.* at 32. He noted that Respondent suspended Complainant less than 24 hours after learning that Complainant communicated his safety concerns to the NTSB and terminated him a few days later. *See id.* (citing to JX N; CX 158 at 3). Complainant stated that evidence shows that Respondent suspended Complainant because of his email to the NTSB. *See id.* (citing to Tr. at 1004-12, 203-13, 434-41, 450, 976, 997, 1076, 938-39, 957, 729, 791, 598-605, 599-605, 619, 662-671, 718-19, 729-30; CX 81; CX 83-86; JX N; CX 158 at 3; CX 171 at 106, 173; CX 91; CX 170 at 76; CX 181; CX 182). Specifically, Complainant pointed out that Wilcox stated that he suspended Complainant because he “wasn’t qualified to understand [Complainant’s] allegations [in his email].” *See id.* (citing to CX 171 at 106; Tr. at 957, 996, 1076). Complainant also noted that the whole purpose of the meeting was to discuss the email that Complainant sent to the NTSB. *See id.* at 33 (citing to Tr. at 209, 441, 450, 619; CX 170 at 83; CX 171 at 173-74; CX 181; CX 182).

Complainant’s final argument was that Respondent is unable to prove that it would have taken the same unfavorable employment action absent Complainant’s protected behavior. *See id.* at 33-37. Complainant averred that he was a “capable and respected pilot who Respondent promoted after the Accident.” *Id.* at 34 (citing to Tr. at 257-58, 580-81, 538, 789-90, 664-668, 141; CX 80; CX 42 at 1; CX 170 at 238-39; CX 90; CX 170 at 229; CX 178 at 25-26). Complainant again claimed that Respondent terminated him “because of his email to the NTSB, and because he defended his assertion in the termination meeting.” *See id.* (Complainant’s emphasis) (citing to Tr. at 170-73, 205-15, 598-99, 604-05, 662; 619-21, 729, 791, 938-39, 957, 976, 996, 1004-12, 1070-76, 202-05; CX 83-86; JX M; JX N; CX 158 at 3; CX 171 at 106; CX 166 at 143; CX 91; CX 170 at 76-77; CX 81; CX 162 at 2-4). The first time Respondent had ever allegedly questioned Complainant’s competency was at the July 2, 2013 meeting, after Complainant had sent the email to the NTSB investigator.

Complainant raised the case *Benjamin v. CitationShares Management, LLC*, ARB No. 14-039 (ARB Jul. 28, 2014) to argue that Respondent’s purported justifications for the adverse action are “inextricably intertwined.” *See id.* at 34. Here, the purpose of the termination meeting

was to discuss the email to the NTSB and the issues contained therein. *See id.* (citing Tr. at 619-21). Respondent's alleged argument is that, at the meeting, Respondent "lost confidence in Complainant's ability to fly." *Id.* at 35 (citing to CX 181 at 3; CX 182 at 4). Complainant also averred that Respondent engaged in "shifting explanations" for its adverse employment action. *See id.* (citing to *Douglas v. SkyWest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sep. 30, 2009)). Complainant pointed to the following alleged "shifting explanations":

1. Respondent stated that Complainant was terminated "for cause" in its termination letter. *See id.* at 35 (citing CX 162, CX 206).
2. In JX N, Respondent's agents said that they suspended Complainant due to the email he wrote to the NTSB. *See id.*
3. On or around June 25, 2013, Respondent stated that Complainant "failed to perform his job duties." *See id.* at 36 (citing to CX 162; CX 181 at 1-2; Tr. at 138, 617). Respondent stated that the June 25, 2013 final draft of the CVR represented the first time that it understood Complainant's ineptitude. However, Complainant noted that Respondent had received multiple drafts of the CVR, as well as witness statements, prior to the June 25, 2013 CVR. *See id.* (citing Tr. at 690-703; CX 83-CX 86). The only new information learned from the CVR was that the Captain referred to the approach speed as "V<sub>app</sub> -ish" rather than "V<sub>app</sub>." *Id.* (citing Tr. at 703; CX 170 at 195).
4. Complainant alleged that Respondent falsely claimed that it decided to terminate him based on the July 2, 2013 meeting, noting how Delassantos cut Complainant's final paycheck prior to the meeting. *Id.* (citing Tr. at 598-99, 604-05; CX 81).

Complainant then argued that his termination differed from Respondent's typical termination protocol. *See id.* at 36-37. First, although Respondent's chief pilot is typically involved with the termination of pilots, he had no input on the decision to terminate Complainant. *See id.* at 36 (citing to CX 162 at interrogatory no. 4; Tr. at 1062; CX 178 at 27). Complainant also said that other pilots were provided an opportunity to retrain or to resign and that it was unique for him to be fired "for cause" rather than for any clear reason. *See id.* at 36-37 (citing to Tr. at 661-62; CX 178 at 24).

#### B. Respondent's Position

Respondent argued that Complainant has no direct evidence that his alleged protected activity contributed to his termination. *See Resp. Brief* at 25. Respondent averred in the alternative that, even if Complainant established a prima facie case, the evidence shows clearly and convincingly that it would have taken the same adverse employment action absent the alleged protected activity. *Id.*

Respondent continued that Complainant's June 26, 2013 email to the NTSB does not constitute protected activity, "because it does not fit within any of the categories described in 49 U.S.C. § 42121(a)." *Id.* at 26. Respondent averred that subsection (a)(4) does not apply because the email to the NTSB did not identify a violation or alleged violation of any air safety law. *See id.* at 27. Specifically, Respondent alleged that Complainant did not hold a subjectively

reasonable or objectively reasonable belief that his email concerned a violation of air safety. *Id.* According to Respondent, Complainant's belief was not objectively reasonable, because he "made the calculations in his June 26, 2013 email to Cawthra using the 'zero flap' configuration and the anti-icing 'on' configuration, even though there were no icing conditions and they were not landing at zero flaps on the day of the accident." *Id.* at 29 (citing to Tr. at 406-407; CX 166 at 80-82). Respondent noted that the runway at Sedona airport on the day of the incident was not wet and visibility was clear. *Id.* (citing to CX 166 at 50-51). Because Complainant's calculations were not reasonable based on the circumstances, Respondent proffered that Complainant's protected activity was also unreasonable. *See id.* Respondent said that no reasonable pilot with Complainant's experience would believe that "any airplane" should have safely landed safely at Sedona airport. *See id.* Complainant determined that the slope of the runway was not at issue, even though the QRH for the Phenom 100 stated that pilots should make considerations concerning the slope of the runway. *See id.* (citing to JX M; Tr. at 422, 449). Respondent further averred that Complainant's witness, John Rico, testified that that the calculations in Complainant's email would produce different outcomes if the pilot did not make a stabilized approach. *See id.* at 29-30 (citing to Tr. at 557-558, 571).

Respondent then argued that, assuming Complainant's email constituted protected activity, Complainant has failed to show a causal link between his email and the adverse employment action. *See id.* at 30. Respondent wrote that there was "no evidence of a causal link between his June 26, 2013 email and his termination." *Id.* (emphasis in original). Respondent countered that "the new NTSB report and CVR summary fueled [Respondent's] doubts over [Complainant's] fitness in his safety-sensitive position; [Complainant's] hubris – and failure to acknowledge his role in the crash – sealed his fate." *Id.* Respondent called Complainant's link between his "cynical email" and termination "conclusory." *Id.* Respondent pointed to the testimony of Wilcox and Coulter, which purportedly established a legitimate, non-retaliatory reason for Complainant's termination. *See id.*

Respondent averred that temporal proximity of the protected activity to the adverse employment action is a relevant, "although not necessarily determinative, factor" in finding causation." *Id.* at 31 (citing to *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2002)). According to Respondent, this rule is applicable when an independent intervening event occurs between the protected activity and the adverse employment actions. *See id.* (citing to *Barber v. Planet Airways, Inc.*, ARB Case No. 04-056, 2006 WL 1151953, at \*5 (Apr. 28, 2006). Specifically, Respondent said that three intervening events occurred in Complainant's case: (1) Wilcox's and Coulter's review of the NTSB factual report and CVR summary; (2) the July 2, 2013 meeting where Complainant did not acknowledge responsibility for the crash; and (3) Respondent's "resulting legitimate non-retaliatory reasons for terminating [Complainant]." *Id.* (citing to *Mizusawa v. U.S. Dept' of Labor*, 524 Fed. Appx. 443 (10th Cir. 2013) for the principle that temporal proximity was insufficient to show that a causal connection existed, "due to intervening events that could have independently caused Mizusawa to lose his job"); and *Svendson v. Air Methods, Inc.*, 2002-AIR-00016, slip op. at 7-8 (Aug. 26, 2004) (where a pilots "petulant" behavior led to the termination decision)).

Respondent stated that it has shown by clear and convincing evidence that it would have terminated Complainant even in the absence of his email. *See id.* at 32. Respondent said that

Complainant blamed the aircraft for the crash and was “adamant” that the crash was not his fault. *Id.* at 33 (citing to Tr. at 662, 1078). Throughout the July 2, 2013 meeting, Complainant never took any responsibility for the accident and said there was no pilot error. *See id.* (citing to Tr. at 734, 1002). Respondent alleged that Coulter and Wilcox “lost confidence in [Complainant’s] ability to operate safely,” based on the “arrogant” statements Complainant made at the meeting. *See id.* (citing to Tr. at 79-97, 983-84, 996; CX 171 at 173-74). Respondent argued that if it wanted to terminate Complainant due to his email they would have done so without undertaking the July 2, 2013 meeting. *See id.* Respondent alleged that the first time Complainant admitted fault was during his testimony when he said that he could have “called a go around . . . and I could have said something but I did not.” *Id.* (citing to Tr. at 210). Prior to this admission, Respondent said that Complainant “continu[ed] to deflect any and all blame for the crash. In doing so, [Complainant] failed to cast any doubt on the legitimate, non-retaliatory reasons for his termination.” *Id.* at 34 (citing to *Taylor v. Express One Int’l, Inc.*, 2001-AIR-0002 DOL ARB Lexis 71 (Feb. 15, 2002)).

Respondent continued that Complainant’s June 26, 2013 email and his firing are not “inextricably intertwined.” Respondent allegedly would have taken the same adverse employment action, even if Complainant would have just made the assertions he made at the July 2, 2013 meeting; “his email was not a prerequisite for him to make those assertions.” *See id.* at 35. Respondent posited that even without the email, they would have still met with Complainant to discuss the newly released NTSB factual findings and CVR summary. *See id.* Due to Complainant’s “inability to recognize his fallibilities,” Respondent would have fired him anyway. *See id.*

Respondent responded to Complainant’s argument that, because Respondent issued Complainant’s final paycheck prior to the July 2, 2013 meeting, it shows that Respondent had already decided to fire him. *See id.* Respondent stated that California law requires “immediate” payment of all unpaid earned wages. *See id.* (citing to California Labor Code Section 201). Respondent’s practice is to issue “checks in advance for individuals who may or may not be terminated to ensure that [Respondent] complies with California law.” *See id.* (citing to Tr. at 601-02).

Respondent further attempted to impeach Complainant’s credibility. *See id.* at 36-38. It said that Complainant either lied to the NTSB investigator or lied at the hearing concerning whether the plane landed at too high a velocity. *See id.* at 36-37 (citing to Tr. at 320-31, 338, 392-93, 499-500, 159-60; RX 134-5; RX 40). Specifically, Complainant did not mention the “sink rate, pull up” signal, or at what speed they attempted to land. Respondent explained that “[a]s the First Officer responsible for monitoring speed, [Complainant] should have known all of those things and should have disclosed everything to Cawthra,” and alleged that Complainant lied to militate against an adverse finding from the NTSB. *Id.* at 37. Respondent argued that Complainant “has no credibility and his testimony should be disregarded to the extent that it is inconsistent with the testimony of any of [Respondent’s] witnesses.” *Id.*

#### IV. CONCLUSIONS OF FACT AND LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If the record preponderantly establishes the three foregoing elements of Complainant's establishes *prima facie* case, the burden then shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

##### A. Complainant's Prima Facie Case

###### 1. Covered Employer

To be subject to the Act the employer must be either an air carrier or a contractor or subcontractor of an air carrier. 49 U.S.C. § 42121(a). Here, the parties stipulated in their respective pre-hearing statements that Respondent is an air carrier. *Stipulated Fact #1*; Tr. at 85.

###### 2. Protected Employee

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers. 49 U.S. § 42121(a). Here, the parties stipulated that Complainant is a protected employee. *Stipulated Fact #2*; Tr. at 85.

###### 3. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

(1) 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; (2) 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; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, “As a matter law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.” *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 42121(a)) (emphasizing, “an employee need not prove an *actual* FAA violation to satisfy the protected activity” provided that the employee’s report concerns a federal law related to air carrier safety and the employee’s belief that the violation occurred is subjectively and objectively reasonable”) (emphasis in original)). Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former element, “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained, “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (evaluating the reasonableness of the belief of the *Burdette* complainant, a pilot, against the belief of a pilot with similar training and experience) (internal quotation marks omitted).

However, the Board observed, “mere words do not create an FAA violation when the parties’ actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (Jun. 30, 2010). Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations<sup>66</sup>, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (Jul. 2, 2009). Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.” *Id.* at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and “did not reasonably believe that safety violations existed at the time he made his complaint”).<sup>67</sup>

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<sup>66</sup> Complainant made reference to his safety concerns about the aircraft’s brakes, the performance data provided about the aircraft, and the safe operation of the aircraft. His allegations relate to at least the following regulatory requirements for the design and manufacture of the aircraft described in 14 C.F.R. §§ 23.735, 23.1581, and 23.1587. They also relate to the operation requirements for a Part 135 air carrier, specifically, 14 C.F.R. §§ 135.85 and 135.87 (as required by 135.387(b)). *See generally*, 14 C.F.R. § 91.103.

<sup>67</sup> *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, slip op. at 9 (Jun. 30, 2008); *Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, slip op. at 1 (Nov. 12, 1996).

## Discussion of Protected Activity

Here, Complainant alleges that he engaged in protected activity on a number of occasions. First, on May 26, 2011—the day after the Sedona incident—Complainant told the NTSB that he “did not feel [that the brakes] were one hundred percent effective and the airplane was not stopping.” CX 201. Complainant further purported to engage in protected activity in his June 26, 2013 email to Cawthra. JX M. In that email, Complainant related his concerns about the “serious miscalculations” contained in the AFM/QRH manuals at his disposal, and that the aircraft has an “awful braking system,” without lift dumping devices, so should not land at airports like Sedona. *Id.* Complainant further stated that the manuals at his disposal did not offer information about sloping runways, and that Respondent does not use Opera, which is the program that the NTSB used to analyze the Sedona incident. *Id.* The same day, Cawthra forwarded Complainant’s June 26, 2013 email to Wilcox, who in turn forwarded it to Coulter. JX N.

Employer argues that Complainant’s June 26, 2013 email does not constitute protected activity. Resp. Brief at 26. It avers that Complainant’s email does not qualify as assistance or participation in an NTSB investigation, because Complainant had already participated in the investigation two years prior to the NTSB’s publication of its June 24, 2013 final factual report. Resp. Brief at 27. Subsection (1) of 49 U.S.C. § 42121(a) does not apply, according to Employer, because the information Complainant provided “does not identify ‘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.’” *Id.*

This Tribunal finds that Complainant’s actions constitute protected activity under the Act. AIR 21 does not limit the types of activities deemed protected to the extent that Respondent suggests. To show protected activity, the Act merely requires an individual to provide “information relating to any violation or alleged violation of . . . any [] provision of Federal law relating to air carrier safety under this subtitle.” 49 U.S.C. § 42121(a). “Cit[ation] to a specific violation” is not required. *Malmanger*, ARB No. 08-071, slip op. at 9. Here, Complainant told the Federal Government, acting through NTSB agent Cawthra, of his concerns that the information at his disposal and the aircraft itself did not conform to FAA requirements. When Cawthra summarily forwarded Complainant’s June 26, 2013 email to Wilcox, he placed Respondent on notice of Complainant’s protected activity. Thus, the record shows that both the federal government and Respondent were on notice of Complainant’s concerns, under 49 U.S.C. § 42121(a)(1); either one must be placed on notice for a protected activity to arise.

Moreover, as this Tribunal explained in its denial of Respondent’s Motion for Summary Decision:

Additionally, Complainant’s email to the NTSB investigator could be construed as Complainant assisting or participating in a government proceeding. 49 U.S.C. § 42121(a)(4). A NTSB investigation “includes the field investigation (on-scene at the accident, testing, teardown, etc.), report preparation, and, where ordered, a

public hearing.” 49 C.F.R. § 831.4. The investigation commenced immediately after the accident, but the report was not released until the NTSB released its factual report on June 24, 2013. [RX 134]. However, it appears that the NTSB did not formally adopt those findings until August 29, 2013 when it issued its probable cause determination. [CX 196; *Stipulation #8*].<sup>68</sup> Thus, the investigation did not formally close until the NTSB issued its probable cause determination, which occurred after Complainant’s email. Therefore, in the light most favorable to the Complainant, he was participating or assisting in an ongoing investigation when he emailed the NTSB investigator concerning the calculations in the June 24, 2013 factual report.

For the same reason discussed, *supra*, review of the fully developed record currently before this Tribunal does not change the foregoing analysis.<sup>69</sup>

### Complainant’s Concerns Were Subjectively Reasonable

Complainant’s actions and thought process demonstrate that Complainant subjectively believed that he blew the whistle on a violation related to air safety. For instance, a day after the Sedona incident, Complainant told the NTSB investigator, Cawthra, of his concerns regarding the Phenom 100’s braking system. CX 201. Complainant testified that as he read the report, “I saw some items in there that just blew my mind, like how much landing distance they said the aircraft was going to take up.” Tr. at 392-99. Complainant’s May 26, 2011 statement included his observation that “the plane just would not slow down no matter what the captain did.” RX 4; RX 43. Complainant reiterated his concerns about the Phenom 100’s “awful braking system” in his June 26, 2013 email to Cawthra. *See* JX Y. Complainant also expressed his “concerns” over “some serious miscalculations in [Respondent’s] manuals and that they cannot be trusted whatsoever.” *Id.* Complainant reiterated his critique of the manuals at hearing. *See* Tr. at 170-75. He stated that he did not have the proper information at his disposal to figure out the impact of slope on the aircraft’s landing performance. Tr. at 176-77. Complainant recalled, “[E]very single time you land that airplane, you ... were always guessing which way it was going to swerve when you got on the brakes. It almost reminded me of flying a tail dragger.”<sup>70</sup> Tr. at 177. Zajic wrote that with “max brake, [he] started getting anti-skid.” RX 38. Complainant recalled, generally, that pilots call the Phenom 100’s peculiar landing characteristics the “Phenom sway.” Tr. at 485-87; *see* Tr. at 527-28 (where John Rico termed it “the Phenom Dance”). Complainant’s concerns also stemmed from his awareness of multiple brake failures occurring on the Phenom 100. Tr. at 178-79, 503. Further, Complainant was aware that

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<sup>68</sup> *See also* NTSB accident database at [http://www.nts.gov/\\_layouts/nts.aviation/Results.aspx?queryId=7e22a1b5-6ef9-4a5f-ad4d-1c007606ba62](http://www.nts.gov/_layouts/nts.aviation/Results.aspx?queryId=7e22a1b5-6ef9-4a5f-ad4d-1c007606ba62).

<sup>69</sup> Finally, Complainant also told Cawthra of his concerns about the Phenom 100’s braking system during the May 26, 2011 “Record of Conversation.” CX 201. Thus, at the very least, Complainant “assisted or participated . . . [in a] proceeding” about air carrier safety. 49 U.S.C. § 42121(a)(4).

<sup>70</sup> Complainant’s statement was corroborated by Edward McCall, the General Manager of Sedona-Oak Creek Airport, who said that the plane left a “fishtail pattern down the runway.” RX 30.

Respondent revised its SOP for the Phenom 100 to address the multiple brake failures.<sup>71</sup> Tr. at 503-04. The evidence, taken as a whole, supports a finding that Complainant held a good faith subjective belief in his alleged protected activity.

Complainant further thought that Cawthra would welcome his thought process about the calculations used in the NTSB factual finding, which he thought were subpar. Tr. at 173-74. Complainant testified that as he read the report, “I saw some items in there that just blew my mind, like how much landing distance they said the aircraft was going to take up.” Tr. at 392-99. Specifically, Complainant stated that the NTSB report focused on the velocity of the landing, rather than the fact that the aircraft exhibited braking issues when it dramatically veered left and right on landing. Tr. at 170-75. Complainant testified that he wanted other pilots to learn from the incident, but the report only raised more questions in his mind. *Id.*

Complainant also recalled a conversation with Wilcox, where Wilcox asked Complainant why he sent the June 2013 email and Complainant responded that he had questions about the report and concerns about the Phenom 100’s braking system. Tr. at 204. Complainant reiterated his concerns at the July 2, 2013 meeting. Tr. at 207-10. On May 27, 2011, Complainant emailed Cawthra and detailed the events leading to the crash; Complainant noted the pilot’s difficulty at applying the brakes. RX 43 (“[Zajic] tried again to apply the brakes and the plane went to the right again.”). Complainant denied that his motivation for sending the email to the NTSB investigator was his desperation to try to divert a negative finding because of his pending application with Virgin America. Tr. at 401.

The foregoing evidence establishes that Complainant held a good faith, subjective belief that the safety concerns he expressed to Cawthra—and by extension Respondent—constituted the existence of a violation. *See Greene v. United Parcel Service*, 2016-AIR-00001, slip op. at 25-28 (Apr. 21, 2016). Complainant maintained such subjective beliefs and discussed them with Wilcox and Coulter at the July 2, 2013 meeting. Accordingly, this Tribunal finds that the preponderant evidence shows that Complainant held a subjective belief that his actions involved air safety violations, under 49 U.S.C. § 42121(a).

#### Complainant’s Concerns Were Objectively Reasonable

Objectivity is found by “assess[ing] a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as the aggrieved employee.” *See Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip. op. at 5 (Jan. 21, 2016). The record contains testimonial and documentary evidence concerning whether Complainant’s concerns were objectively reasonable.

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<sup>71</sup> Respondent notes in its brief that Complainant continued to fly the Phenom 100 after the Sedona incident, so he did not truly believe it was unsafe. *See* Resp. Brief at 7. This argument is ultimately unavailing. It is not at all uncommon for individuals to take regular risks in life, especially where their livelihood is considered. This Tribunal therefore finds that Complainant could have maintained a subjective belief that the Phenom 100’s braking system was “awful” and was a safety issue, while still convincing himself that flying the aircraft is in his best professional and financial interests.

Coulter—Respondent’s Vice President of Operations—testified<sup>72</sup> that the AFM did not allow a pilot to calculate the effect of runway slope on landing distance. Tr. at 669-74; 782-83. Michael Thomson is a pilot and agreed with Complainant’s concerns with the NTSB’s use of Opera, when that program was not available to Respondent’s pilots. Tr. at 233. Thomson’s greatest concern with the Phenom 100 was its braking system; he discussed such issues upon leaving his employment with Respondent. Tr. at 218-54. John Rico, another pilot, agreed with Thomson, noting that the software available to him did not calculate the effect of runway slope on landing distance. Tr. at 535-37. Rico testified to numerous braking issues he experienced while operating the Phenom 100 for Respondent. Tr. at 524-38. He opined that the Phenom 100’s braking system was different and “less reliable” than other aircraft he has flown. Tr. at 527-28. He agreed with Complainant’s characterization of the Phenom 100’s braking system as “awful.” Tr. at 552-53. Rico recalled experiencing seven brake-related incidents while operating the Phenom 100 for Respondent. Tr. at 531-34. Coulter further agreed that Respondent had suffered some brake failures with the Phenom 100. Tr. at 679-84. He acknowledged that the Phenom 100’s brakes were more sensitive than other airplanes, and said that Respondent had worked with Embraer to improve the aircraft’s braking system. Tr. at 679-90; CX 98. In March 2010, Respondent’s Director of Maintenance emailed Wilcox and Coulter and said many in the company, including himself, were “uncomfortable and doubtful with the reliability of the Phenom 100 brake system.” CX 105. Bhalla expressed his lack of desire to pilot the Phenom 100, citing “brake failure issues,” which he knew about before working for Respondent and also experienced while working for Respondent. Tr. at 831-39.

The record, further, contains documentary evidence supporting Complainant’s argument that his concerns were objectively reasonable. CX 95 is an email dated October 31, 2013 concerning hydraulic issues with the Phenom 100. CX 97 contains Respondent’s “Operational Enhancements” and “Runway Safety Initiatives” concerning the Phenom 100’s braking system. *See also* CX 110; CX 207. Respondent noted that “the Phenom 100 braking system has taken a lot of criticism over the past 2 1/2 years.” *Id.* CX 98 involved an incident in Albuquerque, New Mexico where the Phenom 100’s brakes failed; CX 101 involved a braking issue that occurred in Brazil; in March 2010 a Phenom 100 was involved in a brake system failure in Mammoth Lakes, California, CX 105-106; a brake failure occurred in Los Angeles in October 2011, CX 134. In November 2009, posts appeared on aviation forums concerning braking incidents involving the Phenom 100. *See also* CX 125. A March 10, 2010 email from Respondent’s Director of Maintenance contained his statement that he was “uncomfortable” and “doubtful” about the “reliability of the Phenom 100 brake system.” On July 11, 2011, Coulter emailed Respondent’s pilots about brake failures on the Phenom 100. CX 113. Respondent concluded that a December 2010 landing issue was due, in part, to an “insufficient braking coefficient,” CX 116, reporting that the pilot “did not feel braking action.” CX 118. Embraer drafted a service letter concerning a brake failure that occurred in December 2009. CX 129. In October 2012, one of Respondent’s pilots emailed Coulter concerning a brake failure he experienced on the Phenom 100. CX 142. Coulter wrote in his June 26, 2013 email to Complainant that the braking system required

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<sup>72</sup> Although this Tribunal took issue with the credibility of some of Coulter’s testimony, this statement is convincing as an admission against interest. *See Hileman v. Northwest Engineering, Co.*, 346 F.2d 668 (6th Cir. 1965) (explaining that the guaranty of reliability for declarations against interest (specifically concerning FRCP Rule 804, but the premise holds general applicability) lies in the assumption that an individual would not make a damaging admission unless it were true).

“greater than normal focus from the pilot.” RX 2. Finally, in July 2011, Coulter emailed all pilots employed with the Respondent to tell them about “brake enhancements” Respondent had negotiated with Embraer. See RX 62-RX 64; RX 67; RX 69; RX 65 (email with subject “‘Braking’ News”).

Nevertheless, the record does contain evidence that Complainant’s alleged protected activity was not objectively reasonable. Coulter testified that Complainant’s references to his concerns about the safety manuals and that the Phenom 100 had an awful braking system represented only Complainant’s opinion rather than true safety concerns, because a safety concern must be “about something that is material.” Tr. at 669-74. Coulter maintained that there was good reason that Opera was not included for pilot-use inflight, because it is an engineering tool with more parameters than is necessary for a pilot to reference in flight. Tr. at 725-28. Coulter also stated that no airworthiness directives, service bulletins, or service letters existed as to the Phenom 100’s braking system. *Id.* Coulter noted that in 2013 there were only 30 braking incidents out of 30,000 landings of the Phenom 100. Robert Briggs Ellingwood Hamel—Respondent’s safety director—said he received no concerns from pilots regarding the Phenom 100’s braking system, though he was not sure whether he heard pilots talking about it in other capacities. Tr. at 869-83. Wilcox—whose testimony this Tribunal found obfuscatory and generally not credible—at first said that Complainant’s email contained no viable performance data, and later acknowledged that he was “not qualified to understand [Complainant’s] allegations.” Tr. at 932-38. Wilcox maintained his belief that the statements made in Complainant’s emails to the NTSB were training matters, and did not raise valid safety concerns. Tr. at 1038-45, 1064.

This Tribunal finds that the preponderant evidence of record establishes that Complainant’s concerns were objectively reasonable. Chiefly, the record shows that many of Complainant’s peers expressed concerns similar to Complainant’s regarding the Phenom 100’s braking system. See *Burdette* ARB No. 14-059, slip op. at 5 (“To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”). Such concerns are demonstrated in the testimony of pilots with generally the same training and experience as Complainant, like Rico, Thomson, and Bhalla. This Tribunal also found Complainant’s testimony credible. Notably, the only pilot to opine in a credible way that Complainant’s concerns were not objectively reasonable was Coulter, Respondent’s Vice President of Operations,<sup>73</sup> and even Coulter admitted that he could not calculate the Phenom 100’s landing distance using the information found in the AFM, specifically because it lacked information to compensate for a downward sloping runway. Tr. at 669-74. The testimony of the pilots supporting Complainant’s position outweighs the contrary testimony of Coulter. Further, Hamel’s statement that he never received concerns concerning the Phenom 100’s braking system does not mean that such concerns did not exist. Thomson speculated that Respondent knew of the Phenom 100’s braking problems, and recalled. “[I]n my last flight, the captain refused to write it up because he said, ‘They’re not going to find anything wrong with it and this is a waste of time.’” Tr. at 224. This shows that pilots working for Respondent may not have written up every concern they had about

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<sup>73</sup> This Tribunal takes Wilcox at his word that he was not versed enough in the technical aspects of the conversation to render an opinion concerning the performance of the Phenom 100. Tr. at 938.

the braking system, because they thought raising such concerns was futile. This undermines Hamel's testimony, as well as Respondent's argument that the Phenom 100 did have any service bulletins concerning its brakes. Indeed, the record contains copious amounts of documentary evidence, showing that Complainant's concerns, especially related to the Phenom 100's braking system, were objectively reasonable. *See, e.g.*, CX 95; CX 97-100; CX 105-06; CX 110; CX 112-13; CX 116; CX 118; CX 123; CX 125; CX 129; CX 134; CX 142. This Tribunal credits such evidence as demonstrative of Complainant's burden to establish that his concerns were objectively reasonable.

This Tribunal also notes that after the accident at issue in this matter occurred, the Respondent acknowledged that landing distances provided by Embraer "are all but unobtainable, except by the most talented pilots." CX 110; Tr. at 714. Therefore, Respondent "created a real-world buffer of 1,000 additional feet for the execution of every landing whether with or without passengers." CX 110. As this Tribunal found in its Order denying Respondent's Motion for summary Decision, "this strongly suggests that Respondent finds Complainant's concerns about the aircraft's braking efficiency to be objectively reasonable."<sup>74</sup> *See Benjamin, supra*. Finally, it is reasonable to understand Complainant's use of zero flap configurations and anti-icing "on" configurations as his attempt to analyze hypothetical, worst case, situations; rather than a mere attempt to explain away the Sedona incident to save his professional reputation, as Respondent suggests. Complainant's high marks in training, as well as the esteem in which other pilots hold him—including Respondent's promotion of Complainant to captain—warrant this understanding of Complainant's calculations.

In conclusion, the preponderant evidence demonstrates that Complainant held a good faith, subjective belief that his concerns amounted to violations of federal law related to air safety; his concerns were also objectively reasonable. Thus, this Tribunal finds that Complainant's actions constitute protected activity under the Act.

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<sup>74</sup> *See* Order Denying Respondent's Motion for Summary Decision at 12:

Moreover, it is "Complainant's contention that the plane should have been able to land safely when calculated based on the performance data in the AFM." Complainant's Reply at 29 (emphasis in original). This point is significant because the AFM is what a pilot should use when operating the aircraft. It matters not what a software program calculates if that same information is not available to the pilot operating an aircraft. Operating an aircraft occurs in a fluid environment; wind direction, wind speed, temperature, density altitude, and runway contaminants, for example, can vary significantly from what is forecasted at the time of departure to when the aircraft arrives for landing. A pilot must use the resources available in the cockpit at the time a decision is made, and the pilot's performance should be judged according to that information, not [according to] information that is theoretically available to him or her. Part of this evaluation must include an analysis of whether Complainant's actions were consistent with the training that he was provided on the Phenom 100. As the evidence shows, neither the AFM nor the QRH provide slope correction when calculating landing distances on dry or wet runways. How Complainant was trained to conduct performance calculations is relevant to evaluate whether the safety concerns he communicated are objectively reasonable. Complainant Reply at 30; CX 31.

#### 4. Adverse Action

The Act provides, “No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, “An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis.” ARB No. 09-118, slip op. at 13-14 (Sep. 28, 2011); see *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sep. 13, 2011) (explaining that use of the “tangible consequences standard,” rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board has clarified, “*Burlington’s* adverse action standard, while persuasive, is not controlling in AIR 21 cases,” but that it is “a particularly helpful interpretive tool.” *Menendez*, ARB Nos. 09-002, 09-003 at 15.

#### Discussion of Adverse Action

Here, the parties stipulated that Complainant was fired from his job. See Stipulation #17 (“Respondent’s July 2, 2013 termination letter to Complainant states that his employment with Respondent was terminated ‘for cause.’”). Notably, neither party argued on brief that Complainant did *not* suffer an adverse employment action. Accordingly, this Tribunal finds that Complainant has proven that he suffered an adverse action, an essential element of a prima facie AIR 21 case.

#### 5. Contributing Factor Analysis

Finally, Complainant must demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed, “that the level of causation that a complainant needs to show is extremely low” and that an ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, USDOL Reporter, page 15 (Sep. 30, 2016). The ARB has characterized the contributing factor requirement as a “low standard,” which is “broad and forgiving.” *Palmer*, ARB No. 16-035 at 53. Therefore, the complainant “need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: “did the protected activity play a role, *any* role whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Though “[t]emporal proximity between protected activity and adverse personnel action ‘normally’ will satisfy the burden of making a *prima facie* showing of knowledge and causation,” and “may support an inference of retaliation, the inference is not necessarily dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). “Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). “The ALJ is thus *permitted* to infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, USDOL Reporter, page 56.

Complainant’s chief argument concerned the temporal proximity between his protected activity and Respondent’s adverse employment action. *See* Compl. Brief at 32 (“Here, Respondent suspended Complainant less than 24 hours after learning that he communicated safety concerns to the NTSB [investigator about the accuracy of the Board’s factual report concerning its landing distance calculations] and terminated him a few days later after he defended those assertions” at the July 2, 2013 meeting). Complainant also stated that Respondent admitted that it suspended him because of his email. *See id.* (citing to JX N (where Wilcox questioned Complainant’s “judgment in raising safety concerns two years later and to an outside party”); Tr. at 957, 976, 1076). Respondent also allegedly called the meeting to discuss the contents of Complainant’s email. *Id.* (citing Tr. at 209, 441, 450, 610; CX 170 at 83; CX 171 at 173; CX 181; CX 182).

Respondent generally argued there was no evidence of a causal link between Complainant’s email and his termination. *See* Resp. Brief at 30-32. Rather, the NTSB’s report prompted Respondent to doubt Complainant’s “fitness [to serve] in his safety-sensitive position” and his hubris sealed his fate. *Id.* Respondent argued that temporal proximity was relevant, but not determinative. *See* Resp. Brief at 31 (citing *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2002)). The July 2, 2013 meeting further served as an intervening event between the email and Complainant’s termination, according to Respondent. *Id.*

#### Discussion of the Contributing Factor Element

The Board asks me to answer the question: “did the protected activity play a role, *any* role whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, USDOL Reporter, page 52. The record compels this Tribunal to answer this question in the affirmative based on temporal proximity, alone. Although the Board allows this Tribunal to infer the connection by temporal proximity, it independently finds that the record further demonstrates the causal connection between Complainant’s protected activity and the Respondent’s adverse employment action. In short, Respondent discriminated against Complainant, a protected whistleblower under the Act.

The record shows that Respondent received notice of Complainant's email at 8:40 p.m. on June 26, 2013, when Wilcox responded to Cawthra's forwarding of Complainant's email, and responded "I was not aware of [Complainant's] concerns until now." JX P. Hours later, on June 27, 2013, Wilcox called Complainant and suspended him, saying that he did not know why Complainant would email the NTSB. Tr. at 203, 207.<sup>75</sup> It strains the bounds of credulity to accept Respondent's argument—that a phone call dealing with the subject of the protected activity that served to suspend an employee, occurring less than 24 hours after an employer receives notice of the employee's protected activity—does not constitute a situation that played "any role" in the adverse action.<sup>76</sup>

Respondent fares no better, even assuming that the adverse action did not occur until Complainant was terminated at the July 2, 2013 meeting. Less than one week separates the July 2, 2013 meeting from the date that Respondent learned of Complainant's email to the NTSB. Temporal proximity of this sort is convincing evidence that Complainant's protected activity played at least some part in Respondent's termination decision; Respondent cited to no cases in disagreement. Rather, Respondent argued that intervening events—in the form of Complainant's actions during the July 2, 2013 meeting—severed the temporal connection between Complainant's protected activity and his termination. See Resp. Brief at 31 (citing *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 650, 644 (7th Cir. 2002) (causal relationship is severed when an "independent[]" intervening event "could have caused the adverse action")). Respondent is unable to argue that the July 2, 2013 meeting was an independent intervening event because the substance of the conversation was not materially different than the content of Complainant's June 26, 2013 email. In both instances, Complainant expressed his concerns about the data contained in the manuals at his disposal, and about the braking system of the Phenom 100. See JX M; Tr. at 618-21. This Tribunal remains unconvinced that Complainant's allegedly flippant attitude toward a physically and emotionally stressful event that occurred three years prior—even if true—was an intervening event of such magnitude as to cause Respondent to summarily fire him "for cause."

Respondent is further unable to argue that Complainant's tone and behavior at the meeting served as an intervening event, because Wilcox acknowledged in his email to Coulter of the same day that Complainant was perhaps "reacting emotionally" to the contents of the NTSB report. JX N ("[T]his is a guy who has been publicly indicted for the accident and his distress is, I suppose, understandable."). It is difficult to square Respondent's argument on brief, that the NTSB-report prompted Respondent's "doubts over [Complainant's] fitness in his safety-

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<sup>75</sup> In its brief, Respondent argues that suspension with pay does not constitute an adverse employment action. Resp. Brief at 32, n. 26. In support of this proposition, Respondent cited to *Jones v. Southeastern Pennsylvania Transportation Authority*, 796 F.3d 323, 332 (3d Cir. 2015), a Title VII case concerning a public transit employee. This case is inapposite in the instant matter. As Respondent well knows, pilots earn seniority and training through hours flown. Thus, suspending a pilot, even with pay, still constitutes an adverse employment action. See, e.g., *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-7 (ARB Mar. 24, 2011), OALJ Reporter at 21;

<sup>76</sup> Further, this Tribunal notes that Wilcox admitted at hearing that he was not qualified to understand all of the points contained in Complainant's email to the NTSB, so he suspended Complainant until Coulter's return from vacation. Tr. at 957-59. This also shows an immediate causal connection between Complainant's protected activity and Respondent's adverse employment action.

sensitive position,” with Wilcox’s acknowledgment that Complainant’s emotions were “understandable” given the publication of the very same report. JX N. Given that Complainant’s emotional reaction was “understandable,” this Tribunal finds unconvincing Respondent’s assertion that Complainant’s actions at the July 2, 2013 meeting were sufficient to merit doubts over Complainant’s fitness to serve and warranted Complainant’s immediate termination. Following Respondent’s statement that his reaction was “understandable,” it is reasonable to conclude that Complainant merely acted on an emotional rather than rational impulse. Because Respondent is unable to establish that Complainant’s actions at the July 2, 2013 meeting constituted an independent intervening event, this Tribunal finds that Complainant has established the causal link between his protected activity and his termination.

## 6. Conclusion: Complainant’s *Prima Facie* Case

The preponderant evidence shows that Complainant has succeeded in his burden to demonstrate a prima facie case of retaliation under the Act. Respondent is a covered employer and Complainant is a protected employee. Complainant proved that his concerns were objectively and subjectively reasonable and that Respondent committed an adverse employment action due at least, in part, to the subject matters Complainant raised to the NTSB. Thus, Complainant has proven, by a preponderance of the evidence, a prima facie AIR 21 case.

### B. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant’s Protected Activity

Although Complainant has established his *prima facie* case, the Act provides, “[r]elief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C.A. § 42121(b)(2)(B)(iv). The burden, therefore, now shifts to Respondent to demonstrate by clear and convincing evidence that “in the absence of the protected activity, *it would have taken* the same adverse action.” *Palmer*, ARB No. 16-035 at 31. “Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11 (May 26, 2010). The Board further explained, “Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee’s protected activity played a role in the employer’s adverse action and relieves the employer of liability.” *Id.*

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer’s “explanations do not clearly and convincingly indicate that it would have” taken the same unfavorable action absent the protected activity. *See Negron v. Vieques Air Links, Inc.*, ARB No. 04-021 slip op. at 8 (Dec. 30, 2004); *see also Douglas v. SkyWest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sep. 30, 2009). “An employer’s shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason.” *Douglas*, ARB Nos. 08-070 and 08-074, slip op. at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees—employees involved in or accused of the same or similar

conduct—are disciplined in different ways. *Id.* at 17; *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the administrative law judge’s credibility determinations and “factual findings regarding temporal proximity, pretext, and shifting defenses . . . preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity”).

#### Discussion of Respondent’s Affirmative Defense

Respondent argued that Complainant’s termination occurred after Coulter and Wilcox lost confidence in his “ability to operate safely” and based on his “arrogant responses” at the July 2, 2013 meeting. Resp. Brief at 33. Respondent stated: “Indeed, if [Respondent] wanted to terminate [Complainant] because of his email, [Respondent] would have just terminated [Complainant] immediately upon receiving [the email] from Cawthra.” *Id.* Complainant’s attitude of “denying fallibility” was the alleged reason for his termination. *Id.* Respondent argued that Complainant’s email and his behavior at the July 2, 2013 were not “inextricable intertwined.” “[Complainant] would have made those same assertions of infallibility at the meeting even in the absence of his email; his email was not a prerequisite for him to make those assertions.” Respondent predicted that even without Complainant’s June 26, 2013 email, he would have still met with Respondent’s officials and maintained his attitude. Finally, Respondent stated that California law requires immediate payment of all wages upon termination, which explains why Wilcox asked Delassantos to prepare Complainant’s final check prior to the July 2, 2013 meeting.

This Tribunal finds that Respondent’s arguments do not show by clear and convincing evidence that it would have fired the Complainant absent his protected activity. Regardless of the Complainant’s behavior at the meeting, the meeting was called to address, specifically, the allegations Complainant made in his email to the NTSB. Tr. at 621. As discussed above, these allegations rise to the level of protected activity under the Act. Thus, the meeting was called to discuss, at least in part, Complainant’s protected activity. To agree with Respondent’s argument that it lost faith in Complainant’s ability to operate safely due to his actions at the meeting is to disregard the measurements, objective and subjective, of Complainant’s proficiency as a pilot, including yearly training and additional training Respondent provided to Complainant after the Sedona incident. *See* Tr. at 169, 276-86, 664 (Complainant never failed training and was promoted to Captain in 2012, after the Sedona incident); JX B; JX C; RX 18 (showing CAE trained Complainant in, *inter alia*, performance data, ground operations, landings, and missed approaches); *see also* Tr. at 537-38 (where Rico testified that Complainant was a professional and competent pilot); Tr. at 576-82 (where Vander Velde testified that Complainant was a competent pilot with skills comparable to pilots now employed by Virgin America); Tr. at 255-72 (where Malik said he had no question about Complainant’s judgment, decision-making skills, or piloting ability); Tr. at 752-53 (where Coulter acknowledged that, after the Sedona incident, Complainant flew a check airman to ensure that Complainant was comfortable and ready to fly). Even Coulter admitted that prior to June 2013, he felt that Complainant was a competent pilot. Tr. at 795. The foregoing evidence does not clearly and convincingly demonstrate that

Respondent fired Complainant for displaying “a lack of understanding of basic knowledge required of a pilot and lack of accountability for his action.”<sup>77</sup> CX 162.

Respondent’s hypothetical argument that, “if [Respondent] wanted to terminate [Complainant] because of his email, [Respondent] would have just terminated [Complainant] immediately upon receiving [the email] from Cawthra” is also unavailing. Complainant did indeed, almost immediately, suffer an adverse employment action when Wilcox grounded him due to the contents of his email to the NTSB. Moreover, he was fired less than a week after Respondent received notice of Complainant’s June 26, 2013 email. Although Respondent may be correct that California law requires immediate payment of wages to a terminated employee, the fact that Wilcox and Coulter entered the meeting check-in-hand does little to help Respondent in its high burden to show by clear and convincing evidence that it would have taken the same adverse employment actions against Complainant absent his protected activity. After all, the ostensible purpose of the meeting was to discuss Complainant’s protected activity, and it was only during the meeting that Respondent’s agents allegedly lost confidence in Complainant’s ability to safely operate an aircraft. *See also* Tr. at 662 (where Respondent’s witness, Delassantos, agreed that he never cut a final paycheck for a pilot who was not fired). Coulter asked Delassantos to cut Complainant’s final check at 10:41 a.m., less than two hours before the 12:30 p.m. meeting. CX 91; Tr. at 752 (where Coulter acknowledged that he prepared the check “if the decision were to be a termination”). This implies that Respondent contemplated Complainant’s firing prior to the July 2, 2013 meeting. Indeed, Wilcox admitted that he believed prior to the July 2, 2013 meeting that it could end in Respondent’s termination of employment. Tr. at 996-1000. The record, therefore, shows that Respondent is unable to clearly and convincingly prove that it fired Complainant based solely on its lost confidence in Complainant, which allegedly arose during July 2, 2013 meeting. Rather, the record establishes that Respondent had contemplated Complainant’s termination and taken steps to effectuate Complainant’s termination prior to the July 2, 2013 meeting. Further, Respondent’s argument that Complainant “would have made those same assertions of infallibility at the meeting even in the absence of his email” is pure conjecture and elides the fact that the main topic of the meeting was the content of Complainant’s email, his protected activity, and that Coulter and Wilcox arrived at the meeting with Complainant’s final paycheck in hand. Thus, unlike the fact pattern in *Benjamin*, ARB No. 14-039, Complainant’s protected activity was, indeed, inextricably intertwined with the adverse employment action.<sup>78</sup> For all of these reasons, the record shows

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<sup>77</sup> Importantly, Respondent’s argument disregards Wilcox’s statement to Coulter that Complainant’s emotional reaction was “understandable” based on the release of the final NTSB report, finding pilot error. JX N. Wilcox’s statement undercuts his argument that he lost faith in Complainant’s ability to fly because Complainant allegedly was “desperate to make the accident not his responsibility.” Tr. at 985-95. Respondent’s argument leaves unsaid why it would fire Complainant due to his reactions when its agents admitted that such reactions were “understandable.” Again, this Tribunal notes Wilcox’s obfuscatory behavior on the stand. *See, infra*.

<sup>78</sup> This Tribunal also notes that by June 2011 Respondent had access to a wealth of information concerning the Sedona incident. CX 85 contains an email chain from June 2011 where the NTSB provided Respondent with the following documents:

- A draft copy of the initial investigation field notes;
- The airport manager statement;

that Respondent is unable to prove by clear and convincing evidence that it would have taken the same adverse employment actions against Complainant even in the absence of his protected activity.<sup>79</sup>

## V. CONCLUSION

In sum, Respondent has failed to establish by clear and convincing evidence the existence of legitimate, nondiscriminatory grounds for Complainant's termination. This Tribunal has analyzed all the evidence and testimony of record; when considered as a whole, this Tribunal concludes that Respondent engaged in an adverse employment action with discriminatory intent. Further, the proffered reasons for Respondent's actions do not clearly and convincingly establish that Respondent would have taken the adverse employment actions suffered by Complainant even in the absence of his protected activity. Accordingly, Complainant has prevailed in his claim and is entitled to relief.

## VI. RELIEF

The Office of Administrative Law Judges "Rules of Practice and Procedure", 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §1979.107(a). Under those rules, the complainant is obligated, within 21 days of entry of an initial notice or order acknowledging the case has been docketed (29 C.F.R. §18.50(c)(i)(iv)), and "without awaiting a discovery request" (29 C.F.R. §18.50(c)(1)(i)), to disclose to Respondent, *inter alia*,

A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under §18.61 the

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- The captain's statement and rest information;
  - The first officer's statement and rest information;
  - A passenger statement;
  - Data derived from the maintenance download;
  - The flight data recorder data plots and tabular data;
  - Airport weather data; and
  - The NTSB preliminary report.

Thus, the only material piece of new information derived from the NTSB's 2013 report was likely the "V<sub>app</sub>ish" callout; again, Respondent has not proven by clear and convincing evidence that this use of slang—made while Complainant served as the pilot monitor—was of enough import to warrant Complainant's termination from his current job as captain. *See* RX 145 (Complainant's February 13, 2015 affidavit to the NTSB, asserting that the plane should have landed at Sedona airport). Moreover, Complainant knew that the cockpit voice recorder would eventually surface, so there is no reason for him to have lied—as Respondent asserts—about the facts of the conversation. *See* Resp. brief at 37.

<sup>79</sup> This Tribunal also notes some evidence of disparate treatment. For example, Wilcox and Coulter testified that Wilcox was not normally involved in the decision to terminate or discipline pilots. Tr. at 1062-63, 661 (where Coulter testified that the supervising pilot is typically "part of the decision" to conduct an adverse employment action). Tribunal, therefore, finds that Respondent's actions involved disparate treatment, which, as a matter of law, establishes that Respondent cannot explain clearly and convincingly that it would have taken the same adverse employment action absent the protected activity. *See Negron*, ARB No. 04-021 at 8.

documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

29 C.F.R. §18.50(c)(1)(i)(C). Furthermore, under 29 C.F.R. §18.53, the complainant has a continuing duty throughout the litigation to “supplement or correct” that disclosure if, at any time, the complainant learned it has become incomplete or incorrect in some material respect.

AIR 21 provides that if a violation is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C. § 42121(b)(3)(B); *see also Evans v. Miami Valley Hospital*, ARB No. 07-118 (Jun. 30, 2009), slip op. at 19; 29 C.F.R. § 1979.109(b).

#### A. Summary of the Arguments on Brief Concerning Damages

##### Complainant’s October 6, 2016 Revised Close of Record Brief

Complainant argued that captains earned an extra \$100 per day flown after flying more than 17 days per month. Compl. Brief at 38 (citing Tr. at 95). Each year, Complainant “would have been eligible” for a pay raise of \$15 additional dollars per day flown. *Id.* (citing CX 178 at 8, Westbrook’s deposition where he testified that captains’ salaries increase \$100–\$200 per day). Complainant cited to *Welch v. Cardinal Bankshares Corp.*, ALJ No. 2003-SOX-00015, at \*16-17 (Feb. 15, 2005) for the proposition that a prevailing whistleblower is entitled to “all promotions and salary increases that he would [have] otherwise obtained but for the illegal discharge.” Compl. Brief at 38 n.68. Complainant allegedly worked 22 days per month. Compl. Brief at 38.

Complainant allegedly mitigated his losses by applying for comparable positions; Swift hired him on October 1, 2013. Compl. Brief at 38 (citing Tr. at 106-07). His pay at Swift was “considerably lower” than his former salary. Thus, Complainant argued, Responded is liable for his back pay from the time of his termination through his employment at Swift. Compl. Brief at 39. Taking the job at Swift required Complainant to move to Phoenix, away from his “family and friends, his support network in California.” *Id.* (citing Tr. at 125). Complainant averred moving away from his professional support network in California impeded his future job growth because “professional connections are necessary to find positions within other Part 135 companies and vacant positions are not publically advertised.” *Id.* (citing Tr. at 125; 593-95). Because Complainant lacked professional connections in Phoenix, he returned to California, allegedly, “in order to better advance his career.” *Id.*

Upon returning to California, Complainant was unable to secure employment, despite applying to approximately 20 different employers; thus Complainant argued that he mitigated his damages. Compl. Brief at 39 n.74, 42 (citing Tr. at 123-29, 856, 109, 119, 121; JX ZC at 19; CX 52; CX 63; CX 64; CX 65; CX 66; CX 67; CX 68; CX 60; JX A). Complainant argued that this Tribunal should require Respondent to compensate Complainant for the period October 1, 2014

through April 7, 2015, his period of unemployment following his resignation from Swift, because “Complainant had no obligation to relocate outside of his general commuting area and accept the position with Swift in order to mitigate his damages.” Compl. Brief at 40 (citing *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983) (“[A] wrongfully discharged employee need not accept, in mitigation of damages, employment that is located an unreasonable distance from his home.”)). Complainant also asked for compensation for some of his employment with STA Jets, because he earned less, initially, than he did at Respondent. *Id.* at 40-41.

Complainant further argued that this Tribunal should not deduct his 2013-2015 income derived from moonlighting from any back pay award. Compl. Brief at 41. Complainant attempted to distinguish “income derived from moonlighting” from “interim earnings.” Compl. Brief at 41 n.82. He cited to *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1139 (10th Cir. 1983) for the proposition that moonlighting earnings are “interim earnings” when the plaintiff could not have concurrently held both the supplemental job and the job lost due to discrimination. *Id.* Complainant averred that while working for Respondent he was allowed to and actually performed contract work as a pilot for various charter companies. Compl. Brief at 41 (citing to Tr. at 124, 849-50; CX 55; JX ZL at 3-4). Complainant further asked for \$10,733 in lost moonlighting income for year 2016, because STA Jets prohibited such work. *Id.* (citing Tr. at 849; JX ZL at 3-4 (the average income Complainant earned as a contract pilot in 2013-2015)).

Complainant also requested compensatory damages in the amount of \$175,000.<sup>80</sup> Compl. Brief at 44. Complainant averred that Respondent’s actions “severely damaged [his] professional reputation, impeding his career trajectory and shattering his dream of becoming a pilot for a major airline.” Compl. Brief at 42 (citing Tr. at 105, 258, 547, 824). Complainant attempted to follow the ordinary career path to securing employment at the major airlines, including working for charter airlines and regional airlines. Compl. Brief at 42 (citing CX 178 at 14-15). At the time of his termination from employment, Complainant had applied to Virgin with the help of Vander Velde. Compl. Brief at 43 (citing Tr. at 99, 102, 580; JX A at 35). Complainant “halted” his application due to Respondent terminating his employment, allegedly because no major airline would hire a pilot with a termination for cause on his or her permanent record. *Id.* (citing Tr. at 104-05, 245-46, 545, 664, 685, 836-37; CX 178 at 28). Complainant alleged that his “reputation and marketability” would still be damaged even if Respondent formally rescinded his termination. Compl. Brief at 43. Upon his return to California, after working for Swift, Complainant had to sleep on an air mattress, which left a “serious emotional toll.” *Id.* (citing Tr. at 125, 546-47, 586, 821-22). Complainant referenced two cases to support his request of \$175,000 in non-pecuniary compensatory damages: *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (Feb. 9, 2001) and *Evans v. Miami Valley Hospital*, ARB No. 07-118 (Jun. 30, 2009). Compl. Brief at 44. Complainant also requested reimbursement for his move to Phoenix to work for Swift in the amount of \$3,986.87, and reimbursement of the cost to obtain his GS-IV PIC type rating. *Id.* at 45-46. Finally, Complainant asked for expungement of any negative personnel records, that Respondent post a

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<sup>80</sup> Although Complainant’s Revised Supplemental Brief indicated that he withdrew his request for front pay damages, it is worthwhile to note that Complainant initially requested two years of front pay damages, because at that point, allegedly, “Complainant will be able to once again begin applying for positions at major airlines.” Compl. Brief at 48 n.94.

notice of the decision, and to require its current employees to undergo AIR 21 training. *Id.* at 48-49.<sup>81</sup>

### Complainant's March 21, 2017 Revised Supplemental Brief on the Issue of Back Pay and Front Pay Damages

Complainant discussed the significance of CX 219, Complainant's recent paycheck showing that his salary had increased from \$110,000 per year to \$130,000 per year. Compl. Supp. Brief at 1. Notably, Complainant revised his request for back pay damages and withdrew his request for front pay damages. Complainant alleged \$186,792.84 in back pay damages. *Id.* at 2.

CX 61 is Complainant's W-2 for the first six months of 2013, showing that he made \$9,390.42 per month. Complainant took issue with Respondent's assertion that he worked 18.83 days per month, arguing that the record does not support this figure. Compl. Supp. Brief at 2 (citing Tr. at 474-77). Complainant indicated that the 18.83 figure could not be correct, because his monthly pay would reflect as \$7,715 per month, rather than \$9,390.42 per month. *Id.* at 3. Complainant cited to *United States v. Gross*, 626 F.3d 289, 298-99 (6th Cir. 2010) for the principle that it is best "and most accurate" to determine gross income through W-2 forms.

Complainant alleged that he flew 22 days per month. Compl. Supp. Brief at 3 (citing CX 61; Tr. at 94-95<sup>82</sup>). He earned \$400 per day until days 18-20 where he earned \$500 per day, and after day 21, \$600 per day. *Id.* This equated to a monthly total of \$9,500, which is similar to the \$9,390.42 per month indicated on Complainant's W-2. *Id.* (Complainant also noted that he was suspended for four days in June 2013 and the first six months of 2013 are three days shorter than the final six months). Complainant continued that his base rate would raise \$15 per day each year. *Id.* at 4 (citing CX 178 at 8-9). Thus, each year his monthly salary would increase by \$330.

Complainant stated that he tried to mitigate his damages, arguing that he took the job with Swift in October 2013, even though he "had no obligation to accept the position to mitigate his damages." Compl. Supp. Brief at 4. Complainant requested three months of back pay for the period between his firing from Respondent and his hiring at Swift; \$9,390.42 per month or \$28,171.26 total. *Id.* at 5.

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<sup>81</sup> Complainant further alleged that his "application process to Virgin was a mere formality. The only thing that kept Complainant's application process from perfectly mirroring the application process of the other four pilots Vander Velde assisted in getting hired by Virgin was Complainant's unlawful termination." Compl. Brief at 46. Complainant requested \$317,982.83: the difference between the amounts Complainant would have made in the three years prior to the mandatory retirement age of 65 years. *Id.* at 47 ("This means he has exchanged the final three years of earnings he would have been making at Virgin as an experienced Captain at the end of his career for his actual earnings over the last three years.").

<sup>82</sup> Complainant testified that he "usually worked an average of, you know, from 18 to sometimes 22 days in the month." Tr. at 95.

Complainant earned \$7,083.33 per month at Swift, but would have earned \$9,390.42 at Respondent. Thus, for the final three months of 2013, Complainant requested \$6,921.27; for 2013, in total, he requested \$35,092.53.

Complainant averred that, due to the cost of living adjustment he expected to earn every year from Respondent, his salary would increase by \$330 starting in January 2014. Compl. Supp. Brief at 6. Thus, for the year 2014, Complainant used \$9,720.42 as the basis for his back pay request. Complainant allegedly left Swift on September 30, 2014, so from January 1, 2014 until that time, he expected to earn \$87,483.78 from Respondent; however, he actually earned \$63,749.97. Complainant requested the \$23,733.81 difference. *Id.* at 6.

In October 2014, Complainant allegedly “left Swift . . . in order to return to California and better utilize his professional contacts to assist him in his career and finding a position that was more comparable to the one he held at [Respondent].” Compl. Supp. Brief at 6 (citing Tr. at 125, 593-95). Complainant argued that, because he had no obligation to accept the position at Swift, his resignation “did not end Respondent’s back pay liability.” *Id.* Complainant stated further that since he “voluntarily left his position at Swift, in part, due to the distance from his home in California and in an earnest search for better employment, the back pay period should not be tolled.” Compl. Supp. Brief at 6-7 (citing *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) and *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-78 (4th Cir. 1985) (allegedly: “[A] voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment.”).<sup>83</sup>

Following his resignation from Swift, Complainant was unable to secure further employment until April 2015, when STA Jets hired him. Compl. Supp. Brief at 7 (citing Tr. at 123). Complainant requested back pay for this period of unemployment. From October 2014 through December 2014, he requested \$29,161.26. In 2015, he estimated a monthly salary of \$10,050.42, based on receiving an annual cost of living increase. Therefore, from January 1, 2015 until his STA Jets hiring on April 7, 2015, he requested \$32,496.36. *Id.*

Complainant earned \$42,579.78 from STA Jets for the remainder of 2015; a monthly income of \$4,875.55. Compl. Supp. Brief at 7-8 (citing Tr. at 119, 121; CX 54). Complainant would have earned \$10,050.42 per month working for Respondent. Therefore, Complainant requested \$45,193.89 for the period April 8, 2015 through December 2015. Compl. Supp. Brief at 8.

STA promoted Complainant to G-IV PIC on January 1, 2016, so he earned \$8,333.34 per month. Also, if he had remained in the employ of Respondent, Complainant’s pay would have raised to \$10,380.42 due to the annual cost of living increase. Compl. Supp. Brief at 8 (citing CX 178 at 8-9; CX 51; RX 171 at 28). Complainant requested \$6,141.24 for period January 2016 through March 2016. *Id.*

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<sup>83</sup> Respondent incorrectly quoted the *Brady* case. The proper quote is: “a voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better paying employment.” Emphasis added.

On April 1, 2016, STA Jets named Complainant Director of Safety, which increased his monthly salary to \$9,166.67. Compl. Supp. Brief at 8 (citing CX 218). Complainant would have earned \$10,380.42 per month at Respondent. For the period April 2016 through December 2016, Complainant earned \$82,500.03; however, Respondent would have paid him \$97,473.78. *Id.* at 8-9. Complainant requested the \$14,973.75 difference. *Id.* at 9. Complainant received a raise on January 1, 2017, which increased his monthly income to a salary greater than what he would have made at Respondent; Complainant asked for no back pay damages past January 1, 2017. *Id.* (citing CX 219).

Complainant maintained his request for “future pecuniary damages.” Compl. Supp. Brief at 11 (citing, *e.g.*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001)). Complainant averred that he “lost experience and salary he would have earned has Respondent’s discrimination not prevented him from obtaining a position with a commercial airline.” Compl. Supp. Brief at 12. That Complainant now earns more at STA Jets than he did for Respondent does not, allegedly, negate the future pecuniary loss he received. *Id.*

#### Respondent’s November 2, 2016 Post-Hearing Brief (Concerning Front Pay and Back Pay)

Respondent argued that, even if this Tribunal finds a violation occurred, Complainant is not entitled to back pay following his resignation from Swift. Resp. Brief at 39-41. Respondent cited to *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277 (4th Cir. 1985) for the proposition that whistleblower plaintiffs must demonstrate “reasonable diligence to maintain any suitable employment which is secured. To permit otherwise would force the Title VII defendant to pay for the misconduct of a claimant in his subsequent employment . . . [A] claimant who voluntarily quits comparable, interim employment fails to exercise reasonable diligence in the mitigation of damages.” Resp. Brief at 40 (citing *Brady*, 743 F.2d at 1277<sup>84</sup>). “Voluntarily quitting alternative employment without good reason,” is another example of willful conduct where courts allegedly do not permit back pay. Resp. Brief at 40 (citing *Sangster v. United Airlines Inc.*, 633 F.2d 864 (9th Cir. 1980)). Thus, Respondent argued that this Tribunal should terminate any back pay award as of October 22, 2014, the date when Complainant resigned from Swift. Resp. Brief at 40.

Respondent stated that Complainant’s reliance on *Spagnuolo* was distinguishable from the instant matter because, there, the judge ordered reinstatement and the employer requested a

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<sup>84</sup> The *Brady* court’s rule statement included the following citation sentence:

*E.g. NLRB v. Aycock*, 377 F.2d 81, 87 (5th Cir. 1967); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174, n. 3 (2d Cir. 1965); *see e.g. Shell Oil Co.*, 218 NLRB 87, 90 (1975); *Gary Aircraft Corp.*, 211 NLRB 554, 557 (1974); *Mastro Plastics Corp.*, 136 NLRB 1342, 1350 (1962).

It continued: “[t]he courts have also approved this general rule for application in employment discrimination cases. *DiSalvo v. Chamber of Commerce, etc.*, 568 F.2d 593, 597-598 (8th Cir. 1978); *see e.g. Stone v. D.A. & S. Oil Well Servicing Inc.*, 624 F.2d 142, 144 (10th Cir. 1980); *Muller v. United States Steel Corp.*, 509 F.2d 923, 930 (10th Cir. 1975).”

reinstatement order that placed an age-discrimination plaintiff into a comparable position in another part of the country—Denver, Colorado rather than Charlotte, North Carolina. The court declined, noting distance of the new job and the plaintiff’s advanced age. Resp. Brief at 40-41. Respondent further argued that Complainant, “a pilot in a profession rife with commuters,” voluntarily took a job in Phoenix and then quit that job on his own volition, so Respondent should not be responsible for back pay. *Id.* at 41.

Respondent continued that Complainant’s contract work should reduce any back pay award. Resp. Brief at 41-42. Notably, Respondent cited to the *Whatley* case for this proposition, even though Complainant cited to *Whatley* in support of his opposite conclusion. Because Complainant allegedly is unable to establish that, had he maintained employment with Respondent, he would be able to earn all of the income derived from moonlighting in the years since his termination from Respondent,<sup>85</sup> this Tribunal should reduce any back pay award.

Respondent further maintained that it should not be responsible for lost earnings potential because Virgin did not hire Complainant. Resp. Brief at 43-44. Respondent argued that, regardless of the Sedona incident, Virgin would not have hired Complainant. Respondent noted that Vander Velde was a pilot, but did not make the hiring decisions at Virgin. *Id.* at 43 (citing Tr. at 451-53). Moreover, Complainant knew that Virgin preferred applicants with college degrees and type ratings in the Airbus 320, which he did not have. *Id.* at 43 (citing Tr. at 388-89, 452-53). Respondent continued that Complainant did not establish that his inability to obtain employment at Virgin Airlines or any other carrier was due to his termination. *Id.* Even without his firing, his work history would include the crash, which the NTSB concluded was due to pilot error. Vander Velde testified that he is unaware of any other Virgin pilot who has a crash with an NTSB finding of pilot error. *Id.* at 43 (Tr. at 590). Further, Virgin’s response to Respondent’s subpoena shows that Yates applied for a position with over 1,200 applications and that Complainant’s application scored a 40 out of 100 possible points. *Id.* at 44 (citing RX 167). Complainant also allegedly did not show that Virgin knew about his termination. *Id.* Respondent requested that this Tribunal not take judicial notice of Complainant’s salary figures of a Virgin captain, because the evidence was available to him before hearing and because it comes from an unverified website. Resp. Brief at 44-45.

Respondent argued that Complainant does not deserve any compensatory damages for emotional distress, because Complainant is unable to show emotional harm due to his termination. Resp. Brief at 46 (citing Tr. at 824). Complainant does not see a healthcare provider for emotional distress due to the termination and Respondent posited that any distress was equally likely due to NTSB’s finding of pilot error. *Id.* (citing CX 166 at 164). Respondent also attempted to distinguish the cases Complainant relied on. In *Evans*, the ARB affirmed a \$100,000 emotional distress award<sup>86</sup> when a pilot was hired and fired on the same day by a subsequent employer after the subsequent employer learned of the plaintiff’s discriminatory termination. Respondent averred that the record does not show that Complainant was ever fired due to his termination from Respondent. *Id.* at 46-47 (citing Tr. at 402, 454-55 (where

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<sup>85</sup> As a self-employed pilot, Complainant earned \$18,000 in 2013; \$9,000 in 2014; and \$5,200 in 2015. Compl. Brief at 42 (citing JX ZL at 3-4).

<sup>86</sup> Respondent made clear that the *Evans* case did not involve \$175,000, as Complainant suggested. Resp. Brief at 46.

Complainant agreed that his firing was not a factor in securing employment with his two subsequent employers)). According to Respondent, the *Hobby* case was also unique due to the length of the plaintiff's lay off: 8 years. Because Complainant did not have such a lengthy lay off, he does not merit an award for emotional distress.<sup>87</sup> *Id.* at 47.

#### Respondent's March 16, 2017 Supplemental Brief (Concerning Front Pay and Back Pay)

Respondent replied to Complainant's supplemental brief. It highlighted how CX 219 demonstrates that Complainant cannot ask for back pay after January 1, 2017. Resp. Supp. Brief at 2. It further argued that CX 219 "eliminat[ed] any potential front pay award he could recover," because Complainant has "indisputably" been made whole. *Id.*

Respondent called Complainant's back pay calculations "erroneous." First, Respondent disagreed that Complainant's back pay would continue "following his voluntary resignation from his employment with Swift." Resp. Supp. Brief at 3. Respondent stated that any back pay should cease on October 22, 2014. *Id.* Second, Respondent noted that Complainant received earnings from contract work following his termination from Respondent. *Id.* at 4. Finally, Respondent argued that Complainant's calculations as to his earnings at Respondent (should he have stayed an employee) were also erroneous. *Id.* Respondent stated that Complainant's average days working per month was 18.83.<sup>88</sup> *Id.* (citing Tr. at 473-74). Based on this average, Respondent computed an annualized salary of \$93,780, or \$7,815 per month. *Id.* This figure was based off a monthly pay scale, as follows: \$400 per day as a base rate; \$500 per day for days 17 through 19; and \$600 per day for days 20-25. *Id.* (citing Tr. at 94-95, 698-99).

#### B. Reinstatement

Although the Act envisions reinstatement as an automatic remedy, neither party raised this as a remedy at the hearing or in their briefs. Further, in his role as Director of Safety at STA Jets, Complainant earns more than in his previous job as a captain for Respondent. *See* Tr. at 93; CX 219. Therefore, this Tribunal finds that reinstatement is not conducive to either party. However, the Tribunal will order back pay, as follows. *See Clemmons v. Ameristar Airways, Inc.* ARB No. 08-067, ALJ No. 2004-AIR-11 (May 26, 2010).

#### C. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe

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<sup>87</sup> Respondent further argued that this Tribunal should deny Complainant's requests for: (1) compensation for his training expenses; (2) notice of the decision; and (3) additional training for Respondent's employees concerning AIR 21. Resp. Brief at 47-50.

<sup>88</sup> Respondent agreed with Complainant's assertion, that Captains received a bonus of \$100 per day during days 17, 18, and 19, and an extra \$200 per day after day 20. *See* Compl. Supp. Brief at 3,

benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of establishing that the back-pay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (Mar. 29, 2000).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with “unrealistic exactitude.” *Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (Jun. 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Back pay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id.* at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby*, ARB Nos. 98-166, -169, *supra*, slip op at 32.

i. Complainant’s Back Pay Request

Complainant’s Revised Supplemental Brief on the Issue of Back Pay and Front Pay Damages includes a table that identifies his request for compensatory damages. *See* Compl. Supp. Brief at 9-10. This Tribunal has modified the form (but not the substance) of this table and includes it, as follows:

<b>7/2/13 - 9/30/13</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,390.42	\$28,171.26
Credit - unemployed	\$0.00	\$0.00
<b>Difference Allegedly Owed</b>		\$28,171.26

<b>10/1/13-12/31/13</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,390.42	\$28,171.26
Credit - Swift	\$7,083.33	\$21,249.99
<b>Difference Allegedly Owed</b>		\$6,921.27

<b>1/1/14-9/30/14</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,720.42	\$87,483.78
Credit - Swift	\$7,083.33	\$63,749.97
<b>Difference Allegedly Owed</b>		\$23,733.81

<b>10/1/14-12/31/14</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,720.42	\$29,161.26
Credit - Unemployed	\$0.00	\$0.00
<b>Difference Allegedly Owed</b>		\$29,161.26

<b>1/1/15-4/7/15</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,050.42	\$32,496.36
Credit - Unemployed	\$0.00	\$0.00
<b>Difference Allegedly Owed</b>		\$32,496.36

<b>4/8/15-12/31/15</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,050.42	\$87,773.67
Credit - STA Jets as G-IV SIC	\$4,875.55	\$42,579.78
<b>Difference Allegedly Owed</b>		\$45,193.89

<b>1/1/16-3/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,380.42	\$31,141.26
Credit - STA Jets as G-IV SIC	\$8,333.34	\$25,000.02
<b>Difference Allegedly Owed</b>		\$6,141.24

<b>4/1/16-12/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,380.42	\$97,473.78
Credit - STA Jets as G-IV PIC and Director of Safety	\$9,166.67	\$82,500.03
<b>Difference Allegedly Owed</b>		\$14,973.75

<b>1/1/17-1/20/17</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,710.42	\$6,909.95
Credit - STA Jets as G-IV PIC and Director of Safety	\$10,833.33	\$6,989.25
<b>Difference Allegedly Owed</b>		\$0.00

Complainant's total request for compensatory damages is as follows:

<b>Total 7/2/13-12/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss		\$421,872.63
Credit - Actual Earnings		\$235,079.79
<b>Difference Allegedly Owed</b>		<b>\$186,792.84</b>

ii. Respondent's Pay Scale

Complainant drafted the foregoing table in discrete periods, because Respondent allegedly paid its captains on a sliding scale. Respondent's pay scale included at least two factors that remain outstanding questions of fact: (1) whether and to what extent captains earned extra income depending on the number of days worked per month; and (2) whether Respondent provided its captains a yearly cost of living increase. As discussed below, the record establishes that Complainant employed accurate calculations concerning these outstanding issues within the foregoing table.

Respondent paid its captains a base rate of \$400 per day flown. *See* Tr. at 94, 698-99; CX 178 at 8. From the 18th day flown per month to the 19th day flown, captains earned \$500 per day. Tr. at 94, 699. From day 20 to 25 (captains were only allowed to work a maximum of 25 days per month), captains earned \$600 per day. CX 178 at 10; Tr. at 95. Thus, the foregoing table includes the correct formula from which an adjudicator may discern an average monthly compensation amount. The record also shows that captains earned annual cost of living increases. *See* CX 178 at 9 (where Respondent's former chief pilot estimated an increase of \$10-

\$20 per day per year). This Tribunal, therefore, also finds reasonable Complainant's use of a \$15 per day cost of living increase each calendar year.

iii. Complainant Worked Approximately 22 Days Per Month

The parties disagree over the number of days Complainant worked per month. As discussed above, this figure is important, because Complainant was paid on a sliding scale and one variable factor was the number of days worked per month. Notably, Respondent argued that Complainant worked 18.83 days per month, while Complainant alleged working 22 days per month. The preponderant evidence supports Complainant's proposition.

Respondent's calculation is not well reasoned and deserves little probative weight. At hearing, Complainant estimated working "18-20 days" per month. Tr. at 473-74. *But see* Tr. at 94-95 (where Complainant testified that he worked between 18 and 22 days per month). Respondent's attorney asked Complainant "if he would go with 18.33" to which Complainant responded "I don't have any reason to believe not." When Complainant's counsel asked Respondent's counsel how he arrived at 18.83, Respondent's counsel replied "I'm looking at my notes, which are proprietary work product." *Id.* Although Complainant ostensibly agreed with Respondent's calculations, this Tribunal gives little weight to his testimony because the record does not reflect how Respondent arrived at the 18.83 figure.

By contrast, Complainant's counsel provided ample reasoning to support the conclusion that Complainant worked an average of 22 days per month; because the evidence of record further supports Complainant's calculation, this Tribunal finds it well-reasoned and worthy of controlling weight. Importantly, Complainant's counsel based its calculations on Complainant's 2013 W-2, which shows income for the first six months of 2013. *See* CX 61. The record shows that Complainant's W-2 is the most accurate reflection of Complainant's income for the time period in which he served as a captain for Respondent. *See United States v. Gross*, 626 F.3d 289, 298-99 (6th Cir. 2010). Notably, the record does not contain Complainant's W-2 for 2012, and even if it did, Complainant was promoted to captain in November 2012 so it would not provide an accurate reflection of the number of days he worked based on the pay scale discussed above. Further, the record provides no indication—and the parties' briefs are silent—as to whether Complainant received severance payments or other income from the Respondent in 2013 aside from wages for hours worked. The W-2 at CX 61 is therefore the best estimate of the income Complainant received from Respondent for calendar year 2013, and therefore for his tenure serving as a captain for Respondent. CX 61, therefore, serves as a reasonable basis to extrapolate Complainant's income for the purpose of calculating back pay.

In his supplemental brief, Complainant included a proof explaining why Complainant worked on average 22 days per month and why Respondent's 18.83 day estimate is incorrect. *See* Compl. Supp. Brief at 3-4. Complainant's argument follows:

Complainant earned \$6,800 for the first 17 flying days of each month, \$1,500 for flying days 18 through 20, and \$600 for flying day 21, totaling \$8,900. [*See* CX 61; Tr. at 94-95.] If Complainant completed a 22nd flying day, he would earn an additional \$600, making his average total \$9,500. *See id.* Because Complainant

actually earned \$9,390.42 [per month], as demonstrated by his W-2, this means Complainant, on average, earned \$490.42 of the \$600 that would be awarded for a 22nd flying day, or 81.7366 percent. *See id.* Considering that Complainant was actually suspended four (4) days before the end of June [2013], and considering that the first six months of the year are three days shorter than the last six months, it is fair to conclude that Complainant worked approximately 22 flying days per month.

$$\begin{aligned} 17 \times \$400 &= \$6,800 \\ 3 \times \$500 &= \$1,500 \\ 1.817366 [21.817 \text{ days total}] \times \$600 &= \$490.42 \\ \$6,800 + \$1,500 + \$49.42 &= \$9,390.42 \end{aligned}$$

*See id.* Dividing Complainant's gross pay of \$56,342.50 by the 6 months he worked for Respondent in 2013 also equals \$9,390.42. *See* Tr. at 94-95 (where Complainant testified that he worked between 18 and 22 days per month). This Tribunal, therefore, finds that the record establishes that Complainant worked approximately 22 days per month (21.817366 days to be exact).<sup>89</sup> Throughout this Decision and order, the \$9,390.42 monthly wage will be used as a base rate to establish Complainant's earned back pay.

#### iv. Complainant's Moonlighting Income

Complainant was allowed to moonlight while working for Respondent, but STA Jets banned the practice. Thus, Complainant asked this Tribunal to consider the "additional income" he earned after his termination from Respondent as "income derived from moonlighting" and not "interim earnings" serving to mitigate his back pay damages. Although Complainant did not make this explicit in his brief, the total amount Complainant requested this Tribunal to consider as wages derived from moonlighting was \$32,200. *See, e.g., JX ZL* (Complainant's response to "Interrogatory No. 3": "To the best of my knowledge, my total earnings in 2013 I earned [sic] about \$18,000.00 flying as a self-employed contract pilot. In 2014, I earned about \$9,000.00 flying as a self-employed contract pilot and in 2015 I earned about \$5,200.00 flying as a self-employed contract pilot."); Tr. at 845-46. Complainant also requested \$10,733 "in lost income that he would likely otherwise have earned through moonlighting in 2016 had he continued to work at Respondent."<sup>90</sup> *See* Compl. Brief at 41; Tr. at 849-50 (where Complainant testified that

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<sup>89</sup> Respondent's calculation of 18.83 days per month also deserves little weight because Complainant's income using that figure for calendar year 2013 equates to \$7,715 per month—well short of the figure Complainant's W-2 establishes for Complainant's monthly income. *Gross*, 626 F.3d at 298-99.

<sup>90</sup> Here, Complainant shifted the focus of his request from one asking this Tribunal to treat his income as moonlighting earnings, rather than interim earnings, to what is tantamount to a request for front pay. Essentially, Complainant argued that he deserves the moonlighting income he would have made, but for the fact that his current employer, STA Jets, does not allow him to moonlight. This argument is collateral to the topic of treating his income as moonlighting earnings, rather than interim earnings. Complainant cites to no authority for this principle; moreover, in his supplemental brief, Complainant withdrew his request for front pay. *See* Compl. Supp. Brief at 2 n.2. Finally, the record does not show that Complainant would have moonlighted to the extent requested, if at all, assuming STA even allowed him to moonlight. *See* Tr. at 871 (where Complainant stated that he has not asked STA for permission to moonlight because "I've been really busy at STA Jets between being a director of safety and also being a

Coulter did not care about contract work, so long as Complainant did not fly for another Part 135 airline, but Complainant was not allowed to moonlight while working for STA Jets); Tr. at 124; CX 55. Complainant has not asked to moonlight while employed at STA Jets, because his jobs as director of safety and captain keep him “busy.” See Tr. at 850. Respondent argued that Complainant is unable to prove that, absent his firing from Respondent, he would have been able to perform the contract work he asserted was moonlighting and not “interim earnings.” Resp. Brief at 42 (citing *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1139 (10th Cir. 1983)).

*Whatley* is a case arising under Title VII of the Civil Rights Act of 1964; however, it still has general applicability here as an employment discrimination case. See e.g., *Nelson v. Walker Freight Lines, Inc.*, OALJ No. 1987-STA-00024 (Jan. 15, 1988) (citing favorably to the *Whatley* case). There, the Tenth Circuit discussed the distinction between wages earned through moonlighting and “interim earnings,” and held that any income derived from interim earnings would offset against the claimant’s back pay award. *Whatley*, 707 F.2d at 1139 (citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 454 (5th Cir. 1973)). Moonlighting income, on the other hand, would not offset. Moonlighting income becomes interim earnings—and offsets a back pay award—when a judge finds that a claimant is unable to continue performing such work when the claimant is reinstated to his previous job. *Id.* The *Bing* court explained:

If a supplemental or moonlight job is one that the discriminatee cannot perform when he wins his new position, the supplemental job is necessarily temporary, provisional or “interim.” By contrast, if one can hold his supplemental job and his desired full time job simultaneously and there is reason to believe he will do so, the supplemental job assumes a permanent rather than interim nature. Those earnings would be independent of the position sought and should not be taken into account in back pay calculations.

485 F.2d at 454. More recently, at least one court has included a requirement to show that a claimant had a history of moonlighting, before applying the standard found in *Bing*. See *Russell v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh*, No. 02:06-cv-01668, 2009 U.S. Dist. LEXIS 18345, at \*4 (W.D. Pa. Mar. 11, 2009). Applying this rule, a district court did not apply income derived from moonlighting in a back pay calculation when a claimant worked evenings while employed with the respondent and continued to do so after her discriminatory firing. See *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900, 903 (S.D. Tex. 1979).

Here, Complainant has successfully shown that Respondent allowed him to moonlight, and, indeed, that he did moonlight. See Tr. at 849-50; RX 164; RX 165; RX 169. Therefore, this Tribunal finds that Complainant’s earnings represent moonlighting income, and should not offset any income Complainant would have earned but for his discriminatory firing. Put another way, this Tribunal finds that Complainant’s earnings derived from moonlighting do not result in a reduction of Complainant’s back pay damages.<sup>91</sup>

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captain”). For all of these reasons, Complainant’s request for \$10,733 for alleged lost moonlighting income is hereby DENIED.

<sup>91</sup> This Tribunal expresses its deep displeasure at the following allegation made in Respondent’s brief:

v. Complainant Deserves No Back Pay for the Period Comprising His Voluntary Layoff: October 22, 2014 to April 7, 2015

Complainant requests compensatory damages, *inter alia*, for lost income occurring between October 1, 2014 and April 7, 2015. *See* Compl. Brief at 40-41. This purportedly represents the six-month period in which Complainant was unemployed subsequent to his voluntary resignation from Swift. Complainant also asks for compensation for the period of April 8, 2015 through December 31, 2016, when he made less in income working for STA than he would have made but for his discriminatory firing. *Id.* at 41. Complainant made two arguments in support of his request for back pay extending subsequent to his voluntary resignation from Swift. First, Complainant wrote that he “left Swift . . . in order to return to California and better utilize his professional contacts to assist him in his career and finding a position that was more comparable to the one he held at [Respondent].” Compl. Supp. Brief at 6 (citing Tr. at 125, 593-95). Second, Complainant argued that, because he had no obligation to accept the position at Swift, his resignation “did not end Respondent’s back pay liability.” *Id.* Complainant supported his latter argument within *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983), which stated that “[A] wrongfully discharged employee need not accept, in mitigation of damages, employment that is located an unreasonable distance from his home.” Concerning the former argument, he cited to *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992), which held “[A] voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment.”

Respondent countered, citing to *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-78 (4th Cir. 1985)—the authority that the *Delight* case relied on—for the proposition that whistleblower plaintiffs must demonstrate “reasonable diligence to maintain any suitable employment which is secured. To permit otherwise would force the Title VII defendant to pay for the misconduct of a claimant in his subsequent employment . . . . [A] claimant who voluntarily quits comparable, interim employment fails to exercise reasonable diligence in the mitigation of damages.” Resp. Brief at 40. Respondent also cited to *Sangster v. United Airlines Inc.*, 633 F.2d 864 (9th Cir. 1980)), which found that “[v]oluntarily quitting alternative employment without good reason,” is another example of willful conduct where courts generally do not permit back pay. *Id.* Respondent also attempted to distinguish *Spagnuolo* from the instant matter, because there the judge ordered reinstatement and the employer proposed to

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Clay Lacy Aviation issued IRS Form 1099s to Yates for the years 2014 and 2015 showing the income he earned working for them during those years. (RX 164 and RX 165.) Yates did not produce those to JetSuite in discovery, but rather waited until the hearing had already begun before providing copies to JetSuite’s counsel. In addition, Yates never produced his IRS Form 1099 for the year 2015 from Skydive Elsinore, which JetSuite received in response to its subpoena after the hearing. (RX 169, Exhibit 4-028.)

Resp. Brief at 42 n.29. *Supra*, this Tribunal found that such documents relate to moonlighting activities, which do not effect Complainant’s back pay award. Nevertheless, the issue of whether Complainant’s failure to provide such documents within the discovery period was an example of gamesmanship and should therefore impact the amount of attorney’s fees provided to Complainant’s counsel will be addressed in a separate order if and once attorney’s fees petitions are filed.

reinstate the plaintiff, who was of advanced age, in Denver, Colorado, rather than his home of Charlotte, North Carolina. Resp. Brief at 40-41. Respondent argued that Complainant, “a pilot in a profession rife with commuters,” voluntarily took a job in Phoenix and then quit that job on his own volition, so Respondent should not be responsible for back pay. Resp. Brief at 41.

This Tribunal finds that, when Complainant voluntarily quit his position at Swift, he tolled Respondent’s liability for back pay. *See Delight Wholesale*, 973 F.2d at 670 (finding that a back pay period was temporarily tolled when a plaintiff voluntarily quit, and began to run once the plaintiff secured new employment). Accordingly, Respondent’s liability for back pay tolls from October 22, 2014—the actual date of Complainant’s resignation—to April 7, 2015 the day before he began work at STA Jets. *See* Tr. at 460; RX 140; RX 152 (showing that Complainant’s last day flown for Swift was October 22, 2014); *Stipulated Fact* # 18 (stating that Complainant resigned from Swift on October 22, 2014). Complainant’s resignation letter included no reasoning for his resignation, RX 140; Complainant later testified that his resignation was his idea and was ‘totally voluntarily,’ Tr. at 460. On brief, Complainant averred that he quit “to once again be near his support network,” Compl. Brief at 39, and to “better utilize his professional contacts to assist him in his career growth and finding a position that was more comparable to the one he held at [Respondent],” Compl. Supp. Brief at 6.<sup>92</sup> Complainant’s counsel cited to pages 125 and 593-95 of his own testimony; however, this Tribunal notes that the testimony on page 125 generally concerns Complainant’s “lifestyle” after his voluntary resignation from Swift;<sup>93</sup> pages 593-95 contains irrelevant testimony from Vander Velde. Thus, Complainant’s counsels’ assertions for Complainant’s resignation from Swift appear unfounded within the record.<sup>94</sup>

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<sup>92</sup> Complainant also argues that he had “no obligation to accept the position at Swift” due to the distance between his home in California and his job with Swift in Phoenix. Compl. Supp. Brief at 6; Compl. Brief at 40 (citing *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983) for the principle that “[A] wrongfully discharged employee need not accept, in mitigation of damages, employment that is located an unreasonable distance from his home.”). This argument is unavailing. Complainant provided no support for the premise that Phoenix is located an “unreasonable” distance from his home in California. Complainant’s reliance on *Spagnuolo* is also misguided because that case involved an age discrimination suit where the employer attempted to effectuate the remedy of reinstatement by requiring the plaintiff to move from his family home in Charlotte, North Carolina to Denver, Colorado. The court ruled that, due to the plaintiff’s advanced age, the requirement to move to a new city is “likely to be particularly burdensome” and would place the plaintiff in a worse position but for the discriminatory firing. *Spagnuolo*, 717 F.2d at 118. Here, Complainant is neither old, nor does he ask for reinstatement, nor has he proven that Phoenix lies an unreasonably distance from his home in California. Thus, he is unable to rely on *Spagnuolo* for the premise that he was under no obligation to accept the job at Swift. The record establishes otherwise.

<sup>93</sup> Complainant averred he “moved back to California because that’s where my friends and family were.” Tr. at 125.

<sup>94</sup> This Tribunal also finds dubious Complainant’s counsels’ assertion that Complainant wanted to be closer to his personal and professional support networks. Complainant is expected to live a comparatively transient lifestyle due to the nature of his chosen profession; the advent of modern telecommunications also undermines Complainant’s argument that he required close personal access to his professional network. Moreover, the record shows that Complainant often engaged with his support network through email or other electronic means. *See, e.g.*, CX 63-69; RX 118, RX 120, RX 121, RX 125, RX 147, RX 162. Thus, Complainant is unable to show that he reasonably resigned from Swift to be closer to his personal and professional support network.

The record establishes that Complainant's resignation from Swift represents a voluntary quit. Although it is true that the *Delight Wholesale* court held that "a voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment," 973 F.2d 664, 670, the *Delight Wholesale* court actually paraphrased the holding of *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-78 (4<sup>th</sup> Cir. 1985). The *Brady* court wrote, "[t]hus, a voluntary quit does not toll the period when it is prompted by unreasonable working conditions or the earnest search for **better paying** employment. 753 F.2d at 1278 (emphasis added). The *Brady* court framed its ruling within five other cases, which it cited to as examples of this proposition. Because the *Brady* court was the source of the *Delight Wholesale* quote, and because of the numerosity of examples the *Brady* court relied on to draft the rule statement at issue, this Tribunal will examine the instant issue from the perspective of whether Complainant voluntarily quit his job in an earnest search for "better paying employment." The record is devoid of evidence or testimony that Complainant left his pilot position at Swift in search for better payment. Complainant testified that he moved back to California, "because that's where my friends and family were." Tr. at 125. This statement describes why Complainant moved back to California, but does not establish why Complainant left his position at Swift. For example, the record is silent as to whether Complainant could have lived closer to California and still have maintained employment with Swift. Importantly, Complainant's statement does not reflect his concern over "better paying employment" and so Complainant is unable to establish such a motivation for his resignation from Swift; a motivation required to forestall any tolling of damages after his voluntary resignation.<sup>95</sup> Accordingly, the record establishes that Complainant's award of back pay tolls for the period comprising his voluntary layoff: October 22, 2014 to April 7, 2015.

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<sup>95</sup> Nor does the Tribunal find that Complainant mitigated his damages during this period. In his brief, Complainant cited to the following exhibits to support his testimony that he applied for "probably like 20," (Tr. at 129) jobs after his voluntary resignation from Swift: CX 63-69; JX A. The period of Complainant's unemployment following his voluntary resignation was October 22, 2014 to April 7, 2015; however, the record only shows that he applied for jobs in February 2015, (CX 66-68; JX A,) and March 2015, (CX 63, 64, 69). Contrary to his testimony, then, the record establishes that Complainant did not apply for 20 jobs throughout his unemployment; he applied for a handful at the tail end of his voluntary unemployment period. Assuming arguendo this Tribunal has overlooked any attempts at mitigation, such attempts would not overcome the overarching fact that Complainant voluntarily quit his job at Swift and therefore failed to mitigate his damages. Accordingly, the record shows that Complainant did not mitigate his damages subsequent to his voluntary resignation from Swift until he secured employment at STA.

vi. Complainant's Back Pay Allotment

Based on the foregoing discussion, this Tribunal hereby ORDERS the Respondent to abide by the following schedule in order to make him whole following his discriminatory firing.

<b>7/2/13 - 9/30/13</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,390.42 <sup>96</sup>	\$28,171.26 <sup>97</sup>
Credit - unemployed	\$0.00	\$0.00
<b>Difference Ordered</b>		<b>\$28,171.26</b>

<b>10/1/13-12/31/13</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,390.42 <sup>98</sup>	\$28,171.26 <sup>99</sup>
Credit - Swift	\$7,083.33 <sup>100</sup>	\$21,249.99 <sup>101</sup>
<b>Difference Ordered</b>		<b>\$6,921.27</b>

<b>1/1/14-10/22/14</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,720.42 <sup>102</sup>	\$94,382.10 <sup>103</sup>
Credit - Swift	\$7,083.33 <sup>104</sup>	\$68,776.25 <sup>105</sup>
<b>Difference Ordered</b>		<b>\$25,605.85</b>

<sup>96</sup> See discussion, *supra* (establishing an average monthly compensation of \$9,390.42 for calendar year 2013).

<sup>97</sup> This figure is the product of \$9,390.42 times 3 (months).

<sup>98</sup> See *supra*.

<sup>99</sup> This figure is also the product of \$9,390.42 times 3 (months).

<sup>100</sup> See Tr. at 107-08; JX ZB; JX ZL at 3 (showing that Complainant earned \$85,000 per year at Swift, or \$7,083.33 per month).

<sup>101</sup> This figure reflects Complainant's income from Swift over three months.

<sup>102</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2014. See *supra* (finding that, because he worked an average of 22 days per month and earned \$15 extra per day worked, Complainant would have earned \$330 extra per month each calendar year).

<sup>103</sup> This figure is the product of \$9,720.42 times 9 (months) added to 22 days of income for October 2014 (\$313.56 per day (the quotient of \$9,720.42/31)).

<sup>104</sup> See Tr. at 107-08; JX ZB; JX ZL at 3 (showing that Complainant earned \$85,000 per year at Swift, or \$7,083.33 per month).

<sup>105</sup> This figure reflects Complainant's salary at Swift (\$7,083.33 per month) multiplied by 9 months; added to 22 days of income for October 2014 (\$228.49 per day (the quotient of \$7,083.33/31)).

<b>10/23/14-12/31/14</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$9,720.42 <sup>106</sup>	\$22,262.88 <sup>107</sup>
Credit - Unemployed	\$0.00	\$0.00
<b>Difference Ordered</b>		<b>\$0</b>

<b>1/1/15-4/7/15</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,050.42 <sup>108</sup>	\$32,496.36 <sup>109</sup>
Credit - Unemployed	\$0.00	\$0.00
<b>Difference Ordered</b>		<b>\$0</b>

<b>4/8/15-12/31/15</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,050.42 <sup>110</sup>	\$87,773.67 <sup>111</sup>
Credit - STA Jets as G-IV SIC	\$4,875.55 <sup>112</sup>	\$42,579.78 <sup>113</sup>
<b>Difference Ordered</b>		<b>\$45,193.89</b>

<sup>106</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2014. *See supra.*

<sup>107</sup> This figure is also the product of \$9,720.42 times 2 (months) added to 9 days of income for October 2014 (\$313.56 per day (the quotient of \$9,720.42/31)).

<sup>108</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2015. *See supra.*

<sup>109</sup> This figure accurately reflects Complainant's projected JetSuite income for this period.

<sup>110</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2015. *See supra.*

<sup>111</sup> Complainant worked 23 days in April 2015, which is a month with 30 days. Dividing 23 into 30 shows that Complainant worked for .77 of April 2015. Multiplying \$10,050.42 by .77 reveals a product of \$7,738.82. Adding this figure to \$80,403.36 (Complainant's monthly salary multiplied by 8 months), shows that Complainant's projected loss for the remainder of 2015 working for Respondent is \$88,142.18, which is \$368.51 greater than what Complainant claimed on brief. Considering Complainant carries the burden to establish damages, this Tribunal will use the figure as listed in his brief, because that is the requested amount.

<sup>112</sup> *See* Tr. at 119-121 (claiming that Complainant earned \$65,000 per year at STA Jets); CX 54 (Complainant's 2015 W-2 from STA Jets showing an actual income of \$42,579.78). Complainant worked 8 months and 23 days for STA Jets in 2015. Complainant worked 23 days in April 2015, which is a month with 30 days. Dividing 23 into 30 shows that Complainant worked for .77 of April 2015. Dividing Complainant's 8.77 months of work in 2015 by the yearly salary shown on his W-2 equates (\$42,579.78) to a monthly salary of \$4,855.16 per month; some \$20.39 less than what Complainant claimed. Considering Complainant carries the burden to establish damages—and because the record contains Complainant's W-2 from that year—this Tribunal will use the figure as listed in his brief, because that is the requested amount.

<sup>113</sup> According to his W-2, Complainant earned \$42,579.78 working for STA Jets in 2015. *See* CX 54.

<b>1/1/16-3/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,380.42 <sup>114</sup>	\$31,141.26 <sup>115</sup>
Credit - STA Jets as G-IV SIC	\$8,333.34 <sup>116</sup>	\$25,000.02 <sup>117</sup>
<b>Difference Ordered</b>		<b>\$6,141.24</b>

<b>4/1/16-12/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,380.42 <sup>118</sup>	\$93,423.78 <sup>119</sup>
Credit - STA Jets as G-IV PIC and Director of Safety	\$9,166.67 <sup>120</sup>	\$82,500.03 <sup>121</sup>
<b>Difference Ordered</b>		<b>\$10,923.75</b>

<b>1/1/17-1/20/17</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss	\$10,710.42 <sup>122</sup>	\$6,909.95 <sup>123</sup>
Credit - STA Jets as G-IV PIC and Director of Safety	\$10,833.33 <sup>124</sup>	\$6,989.25 <sup>125</sup>
<b>Difference Ordered</b>		<b>\$0.00</b>

<sup>114</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2016. *See supra.*

<sup>115</sup> This figure accurately reflects the product of Complainant's monthly projected salary (\$10,380.42) throughout the first 3 months of 2016.

<sup>116</sup> *See* CX 51 at 3 (showing that for the first two weeks in 2016, Complainant earned a gross income of \$4,166.67, or \$8,333.34 per month); RX 171 at 28 (reflecting a salary increase effective January 1, 2016).

<sup>117</sup> This figure accurately reflects the product of Complainant's monthly salary (\$8,333.34) throughout the first 3 months of 2016.

<sup>118</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2016. *See supra.*

<sup>119</sup> Complainant's counsel's calculation demonstrates mathematical error. Instead of multiplying \$10,380.42—Complainant's monthly salary—by 9, it transposed two numbers and multiplied \$10,830.42 by 9. Considering Complainant carries the burden to establish damages, if required, this Tribunal will use the lower, correct, figure (**\$93,423.78**) because it would be unfair to enforce higher damages than what is actually owed.

<sup>120</sup> *See* CX 218 (showing a gross income of \$4,583.33 for period 4/16/16 through 4/30/16).

<sup>121</sup> This figure accurately reflects the product of Complainant's monthly salary at STA Jets (\$9,166.67) for this period.

<sup>122</sup> This figure reflects the \$15 per day yearly cost of living increase for calendar year 2017. *See supra.*

<sup>123</sup> This figure accurately reflects Complainant's projected earnings from Respondent throughout the first 20 days (or .645) of January.

<sup>124</sup> *See* CX 219 (stating a gross income of \$5,416.67 for period 1/1/17 through 1/15/17).

<sup>125</sup> This figure accurately reflects Complainant's projected earnings from STA Jets throughout the first 20 days (or .645) of January.

Complainant’s total allowance for compensatory damages is as follows:

<b>Total 7/2/13-12/31/16</b>	<b>Average Monthly Compensation</b>	<b>Total Compensation</b>
Projected JetSuite Loss		\$417,822.57
Credit - Actual Earnings		\$240,106.07
<b>Difference Ordered</b>		<b>\$122,957.26</b>

D. Complainant Deserves No Compensatory Damages Due to His Inability to Work at Virgin

Complainant requested \$175,000 in compensation because Respondent’s actions allegedly “severely damaged [Complainant’s] reputation, impeding his career trajectory and shattering his dream of becoming a pilot for a major airline.” Compl. Brief at 42 (citing Tr. at 105, 258, 547, 824). Specifically, Complainant had already submitted an application with Virgin at the time of his wrongful termination; however, he “halted” his application, citing concerns that no airline would hire him because he had a termination on his employment record. *Id.* at 43 (citing Tr. at 104-05, 245-46, 545, 664, 685, 836-37; CX 178 at 28). Complainant applied to Virgin with the assistance of Vander Velde. *Id.*

Respondent countered, arguing that the record does not establish that Complainant would have received the Virgin job but for his discriminatory firing. Resp. Brief at 43-44. Vander Velde, Respondent noted, was a pilot and did not make hiring decision. Resp. Brief at 43 (citing Tr. at 451-53). Complainant also did not have a college degree and a type rating in the Airbus 320. *Id.* (citing Tr. at 388-89, 452-53). The record further shows that Complainant competed with over 1,200 other applicants for the Virgin pilot requisition; however, Complainant obtained an “assessment score” of 40 out of 100. *Id.* at 44 (citing RX 167).

Complainant cited to no authority for the proposition that he should receive \$175,000 in compensatory damages because he was forced to halt his application with Virgin. This Tribunal finds, therefore, that Complainant must establish by a preponderance of the evidence that Virgin would have hired a similarly situated pilot absent Respondent’s discriminatory firing. As discussed below, the record does not establish Complainant’s burden.

Complainant’s argument relies heavily on the testimony of Vander Velde who currently works for Virgin as a first officer. *See, e.g.*, Tr. at 576-595. Although Vander Velde was mentoring Complainant through the Virgin application process and has helped four other pilots secure employment with Virgin, the record does not establish that he is a member of the hiring process or otherwise has hiring authority at Virgin. Rather, Vander Velde stated he was “pretty familiar” with the hiring process. *See* Tr. at 590. Therefore, the record does not establish outright that Virgin would have hired Complainant due to his affiliation with Vander Velde.

Moreover, this Tribunal finds credible Respondent’s argument that, regardless of the firing, Complainant would not have received an offer from Virgin. First, Complainant was involved in a crash, the Sedona incident, that the NTSB concluded involved pilot error. Second,

Complainant is not a college graduate. Finally, Complainant did not hold type ratings in the types of aircraft comprising Virgin's fleet. Respondent's discovery that Complainant's application received a score of 40 out of 100 points further supports Respondent's assertions. Considering the foregoing discussion—as well as the fact that Virgin only hired 18 pilots out of the 1,228 applications received as part of the requisition—the record does not preponderantly establish that Virgin would have hired Complainant but did not due to his discriminatory termination.<sup>126</sup> RX 167. This Tribunal, therefore, denies Complainant's request for \$175,000 in additional compensatory damages.<sup>127</sup>

E. Complainant Deserves Compensatory Damages For Reimbursement of his Training to Work for STA Jets

Complainant stated that his employment with STA Jets was contingent on his obtaining GS-IV PIC rating; Complainant requested Respondent compensate him for the training costs incurred. *See* Compl. Brief at 45-46 (citing to CX 72, an invoice in the amount of \$7,500 for "Gulfstream IV Type Rating"). Respondent noted that Complainant cited to no authority for his request, and stated that it was Complainant's decision to accept employment at STA Jets, knowing that he would require training to achieve his GS-IV PIC rating. This Tribunal found, *supra*, that Respondent is not liable for compensatory damages occurring during his layoff after his voluntary quit from Swift because Complainant's affirmative act of quitting Swift constituted a failure to mitigate damages. The record shows that Complainant obtained his GS-IV PIC rating in an attempt to mitigate damages by securing employment with STA Jets. To deny Complainant reimbursement for his training would punish Complainant for mitigating damages, which contradicts the purpose of the Act's remedy section. Because Complainant earned his GS-IV PIC type rating in an attempt to mitigate damages, this Tribunal finds that Respondent's payment for his training would help make Complainant whole. Accordingly, Respondent is ORDERED to pay Complainant \$7,500 for his "Gulfstream IV Type Rating." CX 72.

F. Complainant Deserves Compensatory Damages for Moving Expenses Incurred to move to Phoenix to work for Swift

Complainant incurred \$3,986.87 in costs and expenses associated with his move to Phoenix to work for Swift. *See* Compl. Brief at 45 (citing to CX 23, an invoice for moving costs with a delivery date of October 1, 2013, Complainant's hiring date at Swift).<sup>128</sup> But for

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<sup>126</sup> Complainant's volitional act to suspend his application precludes anyone from ever knowing whether Complainant would have received employment from Virgin but for Respondent's discriminatory firing.

<sup>127</sup> Likewise, this Tribunal denies Complainant's request for \$325,000 in future pecuniary damages. *See* Compl. Supp. Brief at 11. The record does not establish, as Complainant argued on brief, that Complainant is precluded from being hired at commercial airlines due to his discriminatory firing. The record suggests that other factors, such as Complainant's lack of a college degree and lack of certification in the types of aircraft flown by commercial airliners also disserves his "dream" of becoming a commercial airline pilot. Further, the organic statute does not allow an award of punitive damages, so Complainant's requests for \$325,000 and \$175,000 for damages related to his Virgin application are each denied from that standpoint, as well. *See* 49 U.S.C. § 42121.

<sup>128</sup> The Tribunal notes that Respondent did not directly respond to this request on brief. To the extent that this Tribunal is mistaken and Respondent did touch on this issue, its arguments would not overcome

Respondent's discriminatory firing of Complainant, he would not have had to move to Phoenix, thereby saving him the costs of the \$3,986.87 in moving expenses. Accordingly, this Tribunal ORDERS the Respondent to pay Complainant \$3,986.87 in moving expenses.

#### G. Non-economic Compensatory Damages

"Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (Feb. 9, 2001). Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Evans v. Miami Valley Hospital*, ALJ No. 2006-AIR-22 at 52 (Jun. 30, 2009) (citing *Crow v. Noble Roman's Inc.*, ALJ No. 95-CAA-8 (Feb. 26, 1996); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (Sep. 24, 2010)) (affirming ALJ's award of \$50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a key step in determining the amount of non-economic compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

Complainant seeks three types of non-compensatory damages: (1) damages for "emotional distress, humiliation, and loss of reputation"; (2) expungement of any negative personnel records Respondent may possess; and (3) that Respondent place a copy of this Tribunal's Decision and Order in an area where its pilots will have access to read it in furtherance of additional training concerning the whistleblower protection provision of AIR 21.

The Act authorizes the Department of Labor, in part, "to take affirmative action to abate the violation." See 49 U.S.C. § 42121(b)(3)(B)(i). Concerning Complainant's request for expungement and requirement to advertise this Tribunal's decision, both types of non-compensatory damages are appropriate. The former will help make Complainant whole; the latter will help forestall future violations of the Act. Nevertheless, Respondent's point is well taken that "[n]ot 'all negative personnel actions' are at issue in this matter." As discussed above, Respondent discriminatorily fired Complainant due to the events surrounding the Sedona incident, as well as the actions (of all parties) surrounding the NTSB's report about that incident.

This Tribunal, therefore, ORDERS Respondent to expunge only negative personnel records that relate to either the Sedona incident, or the parties' actions surrounding the NTSB report, which led to Complainant's discriminatory firing. Furthermore, this Tribunal ORDERS Respondent to:

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the preponderant evidence showing that Complainant deserves compensation for his moving expenses to Phoenix to work for Swift.

- transmit via email copies of this Decision and Order<sup>129</sup> to all of its employees, officers, and directors in furtherance of the Respondent's duty to provide additional training in AIR 21's whistleblowing protections to all of its employees;
- the required email transmission shall occur within 21 days of the date of this Order; and
- within 14 calendar days of the transmission, provide to this Tribunal an attestation by a corporate officer that it has accomplished the above duties and requirements.

Failure to complete the foregoing requirements within 21 days of the issuance of this Decision and Order will subject Respondent to provide Complainant with an additional \$302.92 for each day it is in violation of this Tribunal's Order. The \$302.92 figure is the daily amount Complainant earned at the time of his discriminatory firing, based on a 31 day month and Complainant's monthly income of \$9,390.42. This Tribunal recognizes the damage done to Complainant's professional reputation and this additional sum will compensate Complainant for any additional damage incurred as a result of Employer's ongoing failure to ameliorate the damages identified herein.

Additionally, Complainant seeks \$175,000 in emotional damages. *See* Compl. Brief at 44-45 (citing to *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169 (Feb. 9, 2001) and *Evans v. Miami Valley Hospital*, ARB Case Nos. 07-118, 07-121 (Jun. 30, 2009)). Complainant requested \$175,000 in damages due to the purported similarities between Complainant's case and the cases cited. Respondent argued that Complainant has not established that his firing "caused him emotional harm, other than what would normally be expected for someone who loses his job," and further attempted to distinguish the factual circumstances surrounding Complainant's case with those he cited on brief. *See* Resp. Brief at 46-48.

The record shows that emotional damages are not warranted here to the extent that Complainant requests. Complainant deserves only nominal emotional damages. His reliance on *Evans* and *Hobby* are misplaced. Namely, the record shows that Complainant did not have the difficulties that the plaintiffs in those cases faced when finding new employment. *See Evans*, OALJ No. 2006-AIR-22 at 52 (awarding Complainant loss of reputation damages for the "problems he faced when trying to get another job"); *Hobby*, ARB Nos. 98-166, 98-169 at 30 (where Complainant was unable to gain comparable employment for eight years). Here, Complainant had no difficulty securing alternate employment in a timely manner. He even voluntarily quit his job at Swift. Moreover, he had to withdraw his claim for front pay damages because he now makes *more* than he would have if he remained employed with Respondent. Thus, Complainant has not shown through comparable cases that he deserves an award of emotional damages. *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

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<sup>129</sup> **Respondent shall also provide to its employees a summary of the Decision and Order**; the Respondent will place the summary in the body of the email attaching the Decision and Order. Respondent is further **ORDERED** to provide to this Tribunal a draft version of such a summary as well as its plans to effectuate further training concerning AIR 21's whistleblower provision. Respondent must receive this Tribunal's approval of such a summary before transmittal to its employees, officers, and directors.

Complainant nevertheless merits some emotional damages, because the record establishes that, but for his discriminatory firing, he would not have experienced emotional harm. According to Rico, he felt “upset,” “betrayed,” “distracted,” and “devastated.” Tr. at 546-47; *see* Tr. at 586 (Vander Velde agreeing).

The record also contains evidence that Complainant did not suffer severe emotional distress due to his discriminatory firing.<sup>130</sup> Bhalla stated that his firing did not have a “drastic” effect on his emotional state, (Tr. at 824), and Complainant testified that he never saw a healthcare professional for emotional distress. *See* CX 166 at 164 (Complainant’s November 9, 2015 deposition transcript). Notably, Complainant never testified as to his emotional reaction to the firing, *see* CX 166 at 162-63; Complainant relies on the statements of others to support his burden, *see supra*.<sup>131</sup>

Given this Tribunal’s review of the record, nominal compensation for emotional damages is warranted. Because Complainant was discriminatorily fired, and because providing such compensation may further the Act’s goal of deterring future violations, it is hereby ORDERED that Respondent pay Complainant \$9,390.42. This figure represents one month of Complainant’s final yearly salary prior to his discriminatory firing.<sup>132</sup> Further, this Tribunal has tailored its order to mitigate further emotional distress and damage to Complainant’s reputation in the aviation community by requiring Respondent to publish this Decision and Order.

#### H. Interest

A prevailing complainant is entitled to interest on an award of back pay. *See EEOC v. Ky. St. Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle v. Hydro Nuclear Servs.* ARB

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<sup>130</sup> Further, it is unavoidable that part of Complainant’s emotional distress emanates from the fact that he was involved in an incident involving a crash landing, leading to the injury of him and others. The NTSB ultimately found Complainant and Zajic responsible for the Sedona incident. The extent of his compensable emotional distress cannot be viewed in a vacuum and thus is not solely of Respondent’s doing. However, this Tribunal stresses that Respondent’s adverse employment action did cause Complainant emotional distress, so some damages are merited.

<sup>131</sup> Complainant further cited to his living conditions during his voluntary layoff from his job at Swift; however, as discussed above, Complainant quit on his own volition and this cannot reasonably be imputed to Respondent. *See* Tr. at 125; 821-822. Complainant has further not shown that he was ever unable to secure employment at major airlines but for Respondent’s discriminatory firing, so any discussion of his aspirations to work for Virgin does not establish emotional damages. *See* Tr. at 99-105, 580. Finally, John Rico noted how news of Complainant’s termination “will travel with him wherever he tries to gain employment.” The pilot community is extremely small, extremely well-connected, and this Tribunal understands that it can be problematic to be placed in such a situation because Complainant’s name and reputation is circulated amongst a small community. Tr. at 544. This Tribunal intends the publication of this decision, in part, to help clear Complainant’s name to the extent he suffered harm to his reputation as a result of Respondent’s discriminatory firing.

<sup>132</sup> *Supra*, this Tribunal found that Complainant earned \$9,390.42 at the time of his discriminatory firing. This equates to a yearly salary of \$112,685.04.

Nos. 99-041, 99-042, 00-012 (May 17, 2000), slip op. at 17-19.<sup>133</sup> Compounding interest is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (citing 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his back pay award, which is calculated by the identical formula set forth in *Doyle*.

#### I. Attorney Fees and Costs

Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty-one (21) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have fourteen (14) days within which to file any reply to Respondents' response.

#### VII. ORDER

Respondent shall provide Complainant the following:

- a. \$122,957.26 in back wages plus interest;
- b. \$7,500.00 in reimbursement for Complainant's Gulfstream IV Type Rating
- c. \$3,986.87 in moving expenses
- d. \$9,390.42 in emotional damages

The total pre-interest amount Ordered amounts to at least **\$143,834.55**. Additionally, Respondent is ORDERED to expunge Complainant's employment record as it relates to the Sedona incident and his discriminatory firing, and to publish this Decision and Order according to the parameters discussed, *supra*, including training its employees in AIR 21's whistleblower protection provisions.

SO ORDERED.

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, NJ

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<sup>133</sup> See also *Cefalu v. Roadway Express, Inc.*, ARB No. 09-070 (Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051 (Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045 (Dec. 29, 2000), slip op. at 9.

**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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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).