



**Issue Date: 26 October 2020**

Case No.: 2019-AIR-00001

In the Matter of

**STERLING MAZENKO**

Complainant

v.

**PEGASUS AIRCRAFT MANAGEMENT, LLC,  
HENRY AIR II TRUST; AND  
HENRY AIR II LLC**

Respondents

**DECISION AND ORDER DENYING RELIEF**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15,453 (Apr. 1, 2002). 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**<sup>1</sup>

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”) on May 9, 2018. In its September 17, 2018 letter, OSHA made the following determinations: Complainant timely filed his complaint; Respondents are an air carrier within the meaning of the Act;<sup>2</sup> and Complainant is a covered employee. After Complainant requested that OSHA terminate its investigation and issue a determination, OSHA dismissed the

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<sup>1</sup> The procedural history does not include procedural motions pertaining to enforcing subpoenas issued to a third party. It also does not include motions related to the production of documents or Orders extending deadlines. *See* Order Granting in Part Complainant’s Motions to Compel (May 15, 2019).

<sup>2</sup> At the time of the initial complaint, Henry Air II, LLC was not a named Respondent.

complaint based upon the information it had gathered to that point. On October 3, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, on October 18, 2018, this matter was assigned to the undersigned. On October 23, 2018, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated November 8, 2018, and attached his statement, which was originally transmitted as part of his complaint to OSHA. This Tribunal issued a Notice of Hearing and Pre-Hearing Order on November 16, 2018, which set May 3, 2019 as the discovery cut-off date and June 3-7, 2019 as the hearing dates.

On November 13, 2018, Complainant filed his initial pleading complaint. On November 30, 2018, Respondent Pegasus Aircraft Management answered Complainant's initial pleading complaint. On November 30, 2018, the parties exchanged their initial disclosures.

On January 9, 2019, Henry Air II Trust answered Complainant's initial pleading complaint.

On February 11, 2019, the parties filed a Joint Motion for an Order to Compel Further Responses to Interrogatories, Production of Documents and Depositions. On February 27, 2019, the Tribunal issued a Discovery Order directing discovery responses and the deposition of certain witnesses or Complainant would be limited in certain damages.

On March 26, 2019, Respondents filed a Motion to Compel the Deposition of Complainant's counselor and to permit additional deposition time of the Complainant. On March 27, 2019, Complainant filed a response. On April 22, 2019, the Tribunal issued an Order Granting in Part Respondents' Motion to Compel.

On April 10, 2019, Complainant filed a Motion to Amend Pleadings Complaint. In this motion, Complainant wished to add Henry Air II LLC<sup>3</sup> as a named Respondent and withdraw the named respondent Pegasus Elite Aviation, Inc. On April 23, 2019, Respondents replied to Complainant's Motion to Amend the Complaint. On May 7, 2019, the Tribunal issued an Order Granting Complainant's Motion to Amend His Pleading Complaint.

On April 5, 2019, Respondents<sup>4</sup> filed a Motion for Summary Decision. On April 24, 2019, Respondent filed a document titled Respondents' Evidentiary Objections to Evidence Proffered in Opposition to Motion for Summary Decision. On May 10, 2019, the Tribunal issued an Order Denying Respondents' Motion for Summary Decision.

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<sup>3</sup> The evidence establishes that Henry Air II, LLC had been aware of Complainant's initial Pleading Complaint since at least December 19, 2018 as Complainant's counsel served it with a copy. *See* Respondent's Opp. To Mot. to Amend Compl., Ex. 4.

<sup>4</sup> In this order, unless the Tribunal names a specific respondent, Respondent and Respondents refer to the named respondents (Pegasus Aircraft Management, LLC, Henry Air II Trust; and Henry Air II LLC) as a collective party.

Respondents Pegasus Aircraft Management, LLC (“PAM”) and Henry Air II Trust submitted their prehearing statement and proposed exhibit list on May 26, 2019. Complainant submitted prehearing materials on May 26, 2019.

On May 28, 2019, the Tribunal received a Motion for Continuance of Hearing Dates as well as a Special Entry of Appearance on behalf of Henry Air II LLC. On May 29, 2019, the Tribunal held a teleconference with the parties and, after hearing argument, denied its motion during the teleconference. Thereafter, the Tribunal issued a written Order Denying Respondent Henry Air II LLC’s Motion for Continuance. However, the Tribunal also informed the parties that should Henry Air II LLC “show surprise from the evidence adduced at the hearing, or wish to present new and material evidence post-hearing, the Tribunal would consider whether to grant post-hearing development and/or re-open the proceedings as allowed by 29 C.F.R. § 18.90(b).”

This Tribunal held a hearing in this matter in Des Moines, Washington from June 3 to June 7 and July 11 to 12, 2019.<sup>5</sup> Complainant and Respondents’ representatives were present during all of these proceedings.<sup>6</sup> At the hearing, this Tribunal admitted Joint Exhibits (“JX”) 1 – 12,<sup>7</sup> Respondents’ Exhibits (“RX”) 1-40, 43-53, 55-60, 63-65, 67-84, 87, 89-106, 109-122, 125-127, 129-135,<sup>8</sup> and Complainant’s Exhibits (“CX”) 1-84, 86, 88, 89-91.<sup>9</sup> Prior to taking testimony, the parties stipulated that Respondent’s termination of Complainant was an adverse action. Tr. at 18-19. The Tribunal heard argument about Respondent Pegasus Aircraft Management’s answer to the complaint concerning the issue of whether it was an air carrier had been admitted. After hearing arguments, the Tribunal found that this issue of whether Respondent Pegasus Aircraft Management was subject to the Act remained in dispute.<sup>10</sup> Tr. at 8-16.

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<sup>5</sup> The Transcript of the June 3-7, and July 11-12, 2019 proceedings will hereafter be identified as “Tr.” Both parties provided brief opening statements. Tr. at 88-130.

<sup>6</sup> At the beginning of the hearing, Respondent Henry Air II LLC did not appear and had not retained a counsel for these proceedings. However, Respondents’ Counsel for Pegasus Aircraft Management, LLC, and Henry Air II Trust indicated that he may be retained by Respondent Henry Air II LLC. On June 6 and 7, 2019, Respondents’ counsel formally entered an appearance on behalf of Henry Air II LLC as well. Tr. at 878-79, 1254, 1841-42. Additionally, for the July 11, 2019 proceedings, Complainant was not present in the hearing room but consented to the hearing proceeding without him. Complainant opted to work as a contract pilot on short notice. Tr. at 1616. Additionally, on this same day he participated and testified via video-teleconference from Spain. Tr. at 1474, 1616, 1647.

<sup>7</sup> Tr. at 21. In post-hearing Orders, the Tribunal admitted JX 13 and JX 14.

<sup>8</sup> Tr. at 85, 240, 1477-1509, 1728, 2021.

<sup>9</sup> Tr. at 34, 87, 2022-23.

<sup>10</sup> In Complainant’s brief, he argues that Pegasus Aircraft Management (“PAM”) made binding admissions that it was an air carrier in its pleadings. Compl. Br. at 7. Complainant cites to Pleading Complaint ¶ 4 to which Respondents replied “Respondents admit paragraph 4 only to the extent that they admit complainant was hired by PAM (and only PAM) and that Respondents are carriers as alleged.” Resp. to Complaint, ¶ 2. Complainant’s position is PAM’s failure to deny the allegation that PAM is an air carrier under 49 U.S.C. 42121 is also a judicial admission. Compl. Br. at 8. However, Complainant ignores that it was given leave to amend its complaint and arguably the filing of such rendered answers to the initial complaint as having no legal effect. *See Muir v. L3Harris Techs., Inc.*, 2020 U.S. Dist. LEXIS 88626 (D. AZ., May 20, 2020)(plaintiff’s amended complaint supersedes the original complaint and renders it without legal effect citing *Lacey V. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012)); *Loux*

During the hearing, the Tribunal heard from the following witnesses: Complainant, Michael Palmer, David Wescott, Bruce Huffman, Charles O'Dell, Jon Wells, Pasquale Raguseo, Emilio Lopez, James Skorheim, Tony Yoder, Timothy Prero, and David Mendelson.<sup>11</sup>

During the hearing, Complainant offered evidence of Respondent Pegasus Aircraft Management's website. CX 81. However, CX 81 was not a complete depiction of the text on the website, as portions of the text could not be captured with screen shots. Because of this, Respondent's counsel objected to the use of the paper exhibit. The Tribunal admitted CX 81. Subsequently, Respondent's website was the focus of cross-examination of some witnesses. As a result of the discrepancy between what was on the paper copy of Respondent's website and what was actually being displayed during the hearing, the Tribunal ordered Respondent not to change the website. Tr. at 1806-07. The Tribunal also directed the parties to attempt to provide it with the actual pictures of the website as shown during the hearing. Tr. at 2020.

On August 12, 2019, the parties submitted JX 13 for admission into the record. The parties have agreed that this is how the website at issue existed on July 26, 2019.<sup>12</sup>

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*v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). The Tribunal follows the ARBs guidance that it should permit liberal amendment to pleadings. *Cobb v. FedEx Corporate Services, Inc.*, ARB No. 12-052, ALJ No. 2010-AIR-24, slip op. at 4 n.4 (Dec. 13, 2013); *see also Evans v. U.S. Evtl. Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 11 (July 31, 2012).

Because these are to be expedited proceedings, the Tribunal attempted to clarify issues in the case from the outset by requiring a pleading complaint and an answer to that complaint, much akin to the Federal Rules of Civil Procedure. It was the Tribunal's understanding early on in these proceedings that a key issue was whether Respondents were employers subject to the Act. This was reflected in their Motion for Summary Decision. *See* Motion at 1. It was also reflected in the Tribunal's May 29, 2019 Order which provided: "Finally, the Tribunal understands that the flight operations involved in this case were conducted under 14 C.F.R. Part 91. The Tribunal specifically wants the parties to address during the hearing how such flight involved an 'air carrier' as defined by the Act." Complainant specifically conceded in its pre-hearing statement that the air carrier issue was disputed by Henry Air II Trust and Henry Air II LLC. *See* Complainant's Pre-hearing Statement (May 26, 2019), at 3.

When the Tribunal raised this issue at the hearing, Respondent immediately denied admitting that PAM was an air carrier and if there was a concern counsel requested leave to amend. Tr. at 8. At the beginning of the hearing, the Tribunal expressed concerns about whether the pleadings were correct or should be amended. Tr. at 9-10. It was the Tribunal's understanding from the very beginning of this case that Respondents were contesting whether they were subject to the Act because of the contention that all flights at issue were Part 91 flights. However, at the end of the day, these are notice pleadings and there is little question that Complainant had been on notice all along that Respondents were contesting their status as air carriers or contractors of air carriers.

<sup>11</sup> The Tribunal also received deposition testimony from Tina Thomas (RX 80), Aaron Karse (RX 81), Jorge Alva (CX 60, RX 94), Jean Francese (CX 61, RX 78), Ocea Mazenko (RX 97), Cynthia Strauss (RX 98), James Young (CX 62, RX 99), John Lutz (RX 111), Meagan Goldin (RX 75) and Michael Evans (RX 63). Apparently, Complainant intended to call Mr. Young as a witness. However, just prior to the hearing, Mr. Young resigned so PAM could not require his attendance absent a subpoena. *See* Tr. at 1502-04. After hearing the parties' arguments, the Tribunal denied the motion to subpoena him and will consider his deposition testimony instead. Tr. at 2015.

<sup>12</sup> During the hearing the Tribunal was presented with a website that depicted the website at issue as of December 5, 2017. Tr. at 1818. *See* <https://web.archive.org/web/20171025180142/http://pegjet.com/>.

On September 30, 2019, Complainant's counsel filed a Motion for Sanctions alleging that when he visited Respondent's website to take pictures for submission as ordered by the Tribunal, he noticed the website had been changed.<sup>13</sup> Of note, the Motion for Sanctions was filed after the parties had already submitted JX 13<sup>14</sup> for inclusion into the record to show how the website at issue existed on July 26, 2019.<sup>15</sup> On October 17, 2019, Respondent filed its response.<sup>16</sup> On October 25, 2019, the Tribunal issued an order granting in part Complainant's motion and directing the parties to submit a paper picture copy of Respondent's website as it existed at the time of the hearing accompanied by a declaration of its accuracy from Respondent's IT staff. The Tribunal's order additionally stated that the submission would be considered JX 14.

On November 25, 2019, Respondent submitted JX 14, which included a declaration and 41 photographs of a website, reflecting this was its website as it existed as of July 11, 2019. This was accompanied by a declaration that the photographs accurately depict Respondent's website as of July 11, 2019. On December 4, 2019, Complainant submitted a letter to the Tribunal expressing concern regarding the authenticity of JX 14 and the prejudice to Complainant's interest in the litigation setting forth five concerns about the documents authenticity. It requested the alternative remedy that the Tribunal adopt a presumption of liability as a sanction for the destruction of material evidence. On December 17, 2019, Respondents filed their opposition to the renewed motion for sanction. On May 7, 2020, the Tribunal issued an Order denying Complainant's renewed motion for sanctions and admitted JX 14.

Complainant submitted its closing brief on November 7, 2019. Respondents submitted their closing brief on December 26, 2019. Complainant submitted his reply brief on January 24, 2019.

This decision is based on the evidence of record, the testimony of the witnesses at the hearing, and the arguments by the parties.

## II. FACTUAL BACKGROUND AND EVIDENCE

### A. Overview of the Events leading to the dispute before the Tribunal

This case involves the operation of a Gulfstream 650ER ("G650") aircraft with U.S. registration number N889LM for the benefit of Mr. Michael Evans.<sup>17</sup> Mr. Evans is president of

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<sup>13</sup> A more detailed summary of events surrounding this issue is contained in the Tribunal's *Order Granting In Part Complainant's Motion for Sanction for Spoliation of Evidence* (Oct. 25, 2019).

<sup>14</sup> JX 13 was admitted in to the record as part of the Tribunal's October 25, 2019 Order, at 4 n. 3.

<sup>15</sup> Apparently, in September, one of Complainant's counsel discovered what he believed to be an alteration of the website at issue that occurred prior to submission of JX 13. Although this alteration was unknown by counsel, it was known by co-counsel. Respondent's counsel adamantly maintains that September was the first time that he had heard such concern.

<sup>16</sup> Respondent submitted an Amended Opposition to Motion for Sanction on October 23, 2019. In-turn Complainant filed a Reply to Opposition to Motion for Sanction on October 25, 2019

<sup>17</sup> In this order, this particular G650 will be referred to by its registration number, N889LM.

Alibaba Group, a large international conglomerate.<sup>18</sup> G650s are large business jets designed for long trips with luxury accommodations.<sup>19</sup> Respondent PAM hired Complainant as a Captain on October 13, 2017 (JX 1), where his schedule was two weeks on, two weeks off. Tr. at 531. Mr. Evans operated N889LM globally, traveling to such places as Europe, Singapore, and China.

On or about November 30, 2017, this aircraft was purchased by Delaware Trust Company. Through a series of other trusts and limited liability companies, Delaware Trust Company channeled control of the use of the aircraft to Mr. Michael Evans. See JX 2 – JX 8. However, the aircraft is owned and registered under a trust name, Delaware Trust Co., Trustee.<sup>20</sup> JX 4; JX 9. Mr. Evans retained the services of Pegasus Aircraft Management (“PAM”) to manage the aircraft and the logistics associated with his frequent flights worldwide. However, the contract consummating this agreement actually occurred between PAM and Henry Air II LLC. The flights involving N889LM were conducted<sup>21</sup> following the rules contained in Federal Aviation Regulations (“FAR”) Part 91. In addition to these rules, the FAA issues supplemental approvals for certain types of equipment and operations. These are called Letters of Authorization (“LOAs”). In the November 2017 – February 2018 timeframe, Complainant expressed concerns to other PAM pilots and PAM management about the existence of the LOAs and, if they existed, they were not in the aircraft when it was being operated. Respondent terminated Complainant’s employment on February 9, 2019. Tr. at 360. Complainant contends that his discharge was in retaliation for requesting the presence of LOAs when operating the aircraft.

Respondent PAM references three incidents as its basis to terminate Complainant’s employment: an incident involving ITPS (a trip planning service) where Complainant allegedly told one of ITPS’s employees not to tell Mr. Lopez (PAM’s scheduler) what he was telling the pilots concerning the flight planning and associated support; an incident at the Signature FBO at Teterboro, New Jersey, concerning the aircraft not being pulled out of the hangar in a timely manner; and an incident involving Mr. Alva (a mechanic) where Complainant allegedly told Mr. Alva that he “needed to be more of an asshole” when dealing with vendors.

## B. Stipulated Facts<sup>22</sup>

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<sup>18</sup> As Complainant described the company, “They’re the Amazon of China but like twice as big.” Tr. at 211. See Tr. at 113; see also RX 63 at 3.

<sup>19</sup> See <https://www.gulfstream.com/en/aircraft/gulfstream-g650er/>. See also Type Certificate Data Sheet T00015AT available at [https://rgl.faa.gov/Regulatory\\_and\\_Guidance\\_Library/rgMakeModel.nsf/0/3629ebd68ccb00d78625842b006eacba/\\$FILE/T00015AT\\_Rev%2015.pdf](https://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/3629ebd68ccb00d78625842b006eacba/$FILE/T00015AT_Rev%2015.pdf). The aircraft is certified for up to 19 passengers and has a maximum payload capacity of 6,500 pounds.

<sup>20</sup> JX 9. The Tribunal also takes official notice of the FAA registration information. See [https://registry.faa.gov/aircraftinquiry/NNum\\_Results.aspx?nNumberTxt=889LM](https://registry.faa.gov/aircraftinquiry/NNum_Results.aspx?nNumberTxt=889LM).

<sup>21</sup> See discussion, *infra*, about whether more rigorous rules should have been followed.

<sup>22</sup> These stipulated facts come from the Pleadings and requests for admissions, and were restated at the beginning of the hearing. Tr. at 6-8. See also the discussion about whether Respondent PAM conceded that they were air carriers, *infra*.

1. During Complainant's employment with Respondent, Pegasus in this case,<sup>23</sup> Complainant always operated the aircraft in a safe manner.
2. Complainant admits that the aircraft structure and system were in a condition to be operated safely.
3. During his employment with Respondent, Complainant never told Respondents he was going to report any safety issue to any governmental agency.
4. During his employment with Respondent, Complainant never reported any safety issues or violations to any governmental agency.
5. Pegasus Aircraft Management hired Complainant.
6. Pegasus Aircraft Management contracted with the Henry Air Trust to manage its aviation needs, specifically in regards to operating its aircraft N889LM.
7. N889LM operates under the FAA regulations, Title 14 CFR 91.
8. The Trust, through its agents, flies Mr. Evans, his family, and associates, to their various desired destinations throughout the world.

### C. Findings of Fact

#### 1. General Information about Complainant and his transition to PAM

Complainant is a pilot with 43 years of experience, having flown for a legacy carrier prior to retiring in 2012. He now flies corporate jets for Part 135 and Part 91 operators.<sup>24</sup> He has about 19,800 hours of total flight time, with between 16,000 and 17,000 being in jets. He holds an Airline Transport Pilot certificate with ratings in the Boeing 777, 767, 757, 737, 727, as well

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<sup>23</sup> The Tribunal understands Complainant's reference to Pegasus as being Pegasus Aircraft Management.

<sup>24</sup> Part 135 and Part 91 refers to those portions of the Federal Aviation Regulations ("FAR"), under which a given flight is conducted. In very general terms, there are three types of aircraft operations: private flights, charter operations, and scheduled operations. As a general proposition, the larger the aircraft or the more souls on board, the more rigorous the rules are to conduct those types of operations. However, as seen in this case, even large aircraft that carry only a few passengers can be subject to the least restrictive regulatory oversight. Private flights are subject to the rules under Part 91 and are the least rigorous. *See* 14 C.F.R. Part 91. Charter flights have additional requirements, including those for maintenance, training and operation. These are governed by 14 C.F.R. Part 135. The most regulated types of operations are those that the general public is most familiar with and those are scheduled passenger carrying flights that one commonly uses to travel between large airports. Those flights are usually governed by 14 C.F.R. Part 121.

as other aircraft.<sup>25, 26</sup> He also holds a mechanic certificate with airframe and powerplant ratings. Tr. at 131-33; *see* CX 75.

In 2016, Complainant left the employ of Nike to work as a contract pilot for Jet Aviation, who in-turn had a contract with Henry Air Trust LLC to manage an aircraft for Mr. Michael Evans, a Canadian national.<sup>27</sup> Complainant left Nike for Jet Aviation in part because the pay was better and it was a better schedule. Tr. at 134. In 2016, Complainant was married, had two young children, and lived near Portland, Oregon. Tr. at 134. On October 13, 2017, Complainant accepted an offer of employment, which was on PAM letterhead, to be a captain for “Henry Air Trust.”<sup>28</sup> JX 1. This resulted in him leaving Jet Aviation and joining three other pilots who were going to operate a Gulfstream G650 for Mr. Evans, but under a different management company.<sup>29</sup>

## 2. Background concerning Mr. Evans and N889LM

In 2016-2017, Mr. Evans utilized a Gulfstream G550 aircraft for his travels. A company called Jet Aviation managed this aircraft for Mr. Evans’ benefit.<sup>30</sup> Jet Aviation had three pilots it used for Mr. Evans’ aircraft: Jay Young, Ben Izzie, and David Westcott.<sup>31</sup> Tr. at 133.

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<sup>25</sup> The Transcript is unclear as to the models to which he is also type rated. However, the Tribunal believes that he was referencing the Fokker 100, Short 360 and Westwind aircraft. *See* Tr. at 132.

<sup>26</sup> Although he didn’t testify as such, given that he was flying a Gulfstream 550 and 650 aircraft, the Tribunal presumes that he was type rated on these aircraft as well.

<sup>27</sup> Tr. at 109. At the time of these events Mr. Evans was the President at Alibaba Group, a Chinese multinational technology company. Tr. at 107, 113. *See generally*, <https://www.alibabagroup.com/en/ir/home>.

<sup>28</sup> This offer of employment is symptomatic of the confusing paperwork associated with this matter. An entity called Henry Air Trust is not otherwise involved in this matter. As the Tribunal understands the representations of counsel, Henry Air Trust was an entity involved in the management or operations of a Gulfstream G550 that Mr. Evans had used prior to November 2017. *See* Tr. at 89. However, an entity called Henry Air II Trust is a Respondent in this matter. These are two different trusts that are not to be confused.

<sup>29</sup> As the next section will address, Mr. Evans became dissatisfied with Jet Aviation and sought out new management.

<sup>30</sup> It is the Tribunal’s understanding that Henry Air Trust was somehow involved use of Mr. Evans’ prior aircraft (the G550), but had nothing to do with N889LM.

<sup>31</sup> Mr. Westcott testified by video-teleconference. Tr. at 358. He holds an ATP certificate and is type rated in ten different aircrafts, including the Gulfstream 550s, 650s, Citations, West Wind and Lear Jets. He has about 13,400 hours of total flight time with 10,000 to 11,000 being in jets. He is retired and last worked as a self-employed contract pilot. He flew for Mr. Evans from somewhere in February 2016 until he was fired from Pegasus on February 9, 2018. Tr. at 360. Mr. Evans hired him. Tr. at 412. He started with him with a management company in Teterboro for about six months before the airplane left that company and moved to Jet Aviation, and then the aircraft moved to Pegasus after that. Tr. at 360-61. Although he was offered employment by PAM (RX 85), he never even interviewed with them before he signed his contract. As far as he was concerned, he worked for Mr. Evans. Tr. at 412. At Jet Aviation, the pilots for Mr. Evans were Mr. Young and himself, and they added Mr. Ben Izzie a few months later. While working at Jet Aviation he worked with Complainant as Complainant was one of the contract pilots that assisted part time.

Complainant was used as a contract pilot for Mr. Evans' aircraft and flew about two weeks per month. Tr. at 135, 138. Towards the latter part of 2017, Mr. Evans decided to find a different management company for his aircraft.<sup>32</sup> This coincided with Mr. Evans' decision to purchase a new Gulfstream G650, ultimately registered as N889LM. It is this aircraft's operation that is at the heart of the allegations before the Tribunal.

At some point in 2017, Mr. Evans became dissatisfied with Jet Aviation and his staff began a search for a management company that was more flexible and dedicated to his specific needs. Mr. Evans tasked his assistant and Mr. Young to find a new management option.<sup>33</sup> Tr. at 1844. Mr. Young was essentially the lead captain for the flight crew.<sup>34</sup> Tr. at 1849; CX 63 at 13. Mr. Young recommended PAM to Mr. Evans because "they would offer us the more personalized attention and be a more boutique type of Management Company." RX 99 at 12.

At the time Complainant joined PAM, Mr. Evans, or an entity on behalf of Mr. Evans, had purchased a new Gulfstream G650ER aircraft but it had not been delivered or even FAA registered at that time. Tr. at 141, 1846. As Mr. Evans is a Canadian citizen, he cannot own a U.S. registered aircraft, so title to the aircraft actually is held by Delaware Trust Company,<sup>35</sup> a U.S. entity, but ultimately subleased to Mr. Evans. JX 8.<sup>36</sup> However, as far as the pilots were concerned, they were going to be flying Mr. Evans' aircraft. Tr. at 182. Mr. and Mrs. Evans picked out the color scheme for the aircraft, the interior of the aircraft and the custom aircraft registration number. Tr. at 183-84. The aircraft ultimately was registered as N889LM.<sup>37</sup> The

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<sup>32</sup> Tr. at 135-36, 364, 585. See Tr. at 89; RX 78 at 5-6.

<sup>33</sup> Mr. Westcott testified that he too was involved in the search for a new management company from Jet Aviation, but not the decision to select Pegasus; Mr. Young has the lead on finding the new management company. Tr. at 362. They looked at a number of other management companies and had even been involved with interviewing them, but when Pegasus came along, Mr. Westcott "was left out of the deal." Tr. at 373.

<sup>34</sup> Mr. Young identified himself as the Director of Aviation for the Henry Air II Trust Account. RX 99 at 3; CX 62 at 3. Mr. Mendelson similarly identified him as "the Director of Aviation for that flight department." CX 63 at 10. Of note, according to Complainant's letter of offer, he reported to the Aviation Director of Henry Air Trust. JX 1. Yet, Mr. Mendelson acknowledged that Complainant reported to Mr. Young who reported to him. CX 63 at 13.

<sup>35</sup> Only a U.S. citizen, a partnership where all members are U.S. citizens, or a corporation organized under the law of the U.S. can register an aircraft with the FAA. 49 U.S.C. § 40102(a)(15). An aircraft can be registered by a U.S. citizen trustee. 14 C.F.R. § 47.7(c). The FAA calls these "non-citizen trusts." See 78 FED. REG. 36412 (June 18, 2013). See also <https://nbaa.org/flight-department-administration/aircraft-registration-transactions/owner-trusts/>. An aircraft registration number is a number unique to that aircraft and an aircraft can only be registered in any one country at a time. All U.S. registered aircraft have an "N" at the beginning of the unique identifying number. See generally, [https://www.faa.gov/licenses\\_certificates/aircraft\\_certification/aircraft\\_registry/register\\_aircraft/](https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/register_aircraft/).

The Tribunal also notes that International Trip Planning Services, the company used for the flight plans for this aircraft, identify the operator as being Henry Air II. See, e.g., CX 24 at 5; CX 36 at 2.

<sup>36</sup> Although PAM personnel understood Mr. Evans had the sole right to use this aircraft, the agreement is a non-exclusive lease and specifically provides that "the Aircraft may be subject to concurrent leases to one (1) or more Co-Lessee(s)." JX 8 at 1.

<sup>37</sup> The tail Number N889LM was selected because 8 is a lucky number in China and the letters "L" and "M" represent the first names of the Evans: Liese and Mike. Tr. at 184.

sublease provides that the aircraft is not to be used in commercial service as a common carrier or otherwise for compensation. JX 8 at 6 (¶ 5.2).

3. Background Information about the framework of the legal instruments used for the purchase of N889LM from Gulfstream and its subsequent lease terms on its use.

The legal documents associated with the sale and operation of N889LM between various legal entities present a clear picture that those entities desired that the N889LM be operated only under the requirements of 14 C.F.R. Part 91.<sup>38</sup> However as will be discussed later, the type of aircraft, and the purpose for which the aircraft is operated, dictates what FARs apply. It is not what a party says they are doing on paper which controls what FARs they must actually follow. Rather, how they actually operate the aircraft on any given flight determines which rules apply.

The overall paperwork in this case about the ownership and operations of this aircraft is excessively convoluted and created confusion as to the roles of Respondents. Not only must one deal with similar names<sup>39</sup>, but the transactions were so complicated that the parties to those transactions made errors (such as using the wrong entity names) on the paperwork. According to Mr. Mendelson, it was the most complex ownership model he had ever worked with. Tr. at 1923-24. Therefore, in order to understand the construct of the various intertwined agreements involved in this case, a summary of these documents is necessary.

On December 16, 2016, Aviation 2015 Trust created a limited liability company called Henry Air II, LLC. Mr. Steve Loeb is the sole Trustee of Aviation 2015 Trust. Aviation 2015 Trust is the sole member of Henry Air II, LLC. The purpose of the Henry Air II, LLC is for the operation, maintenance and financing of aircrafts. JX 2.

On December 20, 2016, Henry Air II, LLC executed a sales agreement with Gulfstream Aerospace Corp for the purchase of a G650ER aircraft. As sole trustee of Aviation 2015 Trust (which is the sole member of Henry Air II, LLC), Mr. Loeb signed the agreement on behalf of Henry Air II, LLC. CX 84. The aircraft was then assigned to the Delaware Trust Company for purposes of taking title. CX 84.

A series of documents were generated on November 15, 2017 impacting this transaction:

- A trust agreement was created on November 15, 2017, entitled Henry Air II Trust, between Henry Air II, LLC and Delaware Trust Company (DTC). JX 4. Mr. Loeb signs as the Trustee of Aviation 2015 Trust, the Sole member of Henry Air II, LLC. JX 4 at 20. The purpose of the Trust Agreement was for Henry Air II, LLC to cause title to an aircraft, ultimately registered as N889LM, to be conveyed to DTC. JX 4 at 1 and 30. It also authorized DTC to effect the registration of the aircraft with the FAA. JX 4 at 7-8. The parties also signed a Trust Agreement Supplement No. on November 15, 2017.

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<sup>38</sup> This will be demonstrated further in this order.

<sup>39</sup> For example, the list of entities involved here include, Henry Air Trust, Henry Air II Trust, Henry Air, LLC, Henry Air II, LLC, Pegasus Aircraft Management, and Pegasus Elite Aviation.

- An aircraft operating lease was created on November 15, 2017, between Henry Air II, LLC and DTC. The agreement identifies DTC as the aircraft owner. JX 3. The document is signed by Mr. Steve Loeb as Trustee of Aviation 2015 Trust, the sole member of Henry Air II, LLC. This operating lease granted to Henry Air II, LLC an exclusive lease to possess, use, and operate N889LM. JX 3 at 1. The lease requires Henry Air II, LLC to pay all costs, expenses, fees, and charges incurred in connection with the delivery, possession, use and operation of N889LM. JX 3 at 1. This includes the costs associated with maintenance of the aircraft. JX 3 at 2. However, title to the aircraft was to remain with DTC. JX 3 at 3. This agreement gives Henry Air II, LLC the right to sublease the aircraft. This agreement also required Henry Air II, LLC to certify that N889LM would be “maintained and inspected under FAR Part 91 for operations to be conducted under this agreement; and [Henry Air II, LLC] understands that it is responsible for operational control of the aircraft when the aircraft is operated pursuant to this agreement.” JX 3 at 8.
- Henry Air II, LLC thereafter subleased the plane to Mr. Evans.<sup>40</sup> JX 8. In this sublease, Mr. Evans represents that he intends to operate N889LM under Part 91 “within the scope of and incidental to its own personal and business purposes.” JX 8 at 2. The lease charged Mr. Evans an hourly operating rent of \$0 per flight hour in consideration of him assuming all aircraft costs and expenses.<sup>41</sup> The sublease was purportedly on a flight by flight basis. JX 8 at 3. Although it was a non-exclusive lease,<sup>42</sup> Mr. Evans had first priority in the use and operation of the aircraft. JX 8 at 4. The sublease required Mr. Evans to operate the aircraft per the provisions of Part 91 and not in commercial service as a common carrier, or for compensation or hire except as permitted by 14 C.F.R. §§ 91.321<sup>43</sup> and 91.501.<sup>44</sup> JX 8 at 6. It further provides that Mr. Evans “shall be solely and exclusively responsible for the use, operation and control of the Aircraft at all times during which the Aircraft is in [his] possession.” JX 8 at 6. It further specifies that he:

[S]hall exercise Operational Control of the Aircraft during all flight operations [he conducts]. Further, at all times while the Aircraft is in the possession of [Mr. Evans, he] shall have exclusive possession, command, and control of the Aircraft, and the pilots of any flight by [him] shall be under [his] exclusive command.

JX 8 at 7.

On November 30, 2017 several events occurred:

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<sup>40</sup> Mr. Evans signed this lease in his individual capacity (JX 8 at 14), while Mr. Loeb signed as the Trustee of Aviation 2015 Trust, the Sole member of Henry Air II, LLC (JX 8 at 13).

<sup>41</sup> Those costs did not include any costs for the purchase or financing of the aircraft. *See* JX 8 at 6-7 and 15.

<sup>42</sup> No evidence was provided to the Tribunal that N889LM was ever used by any person or entity other than Mr. Evans or his wife.

<sup>43</sup> This regulation applies to the carriage of candidates in elections.

<sup>44</sup> The regulation lists ten types of operations authorized when common carriage is not involved.

- The aircraft (N889LM) was registered with the FAA and its owner is identified as DTC. JX 9.
  - Mr. Evans and Henry Air II, LLC entered into a non-exclusive aircraft lease agreement. Mr. Loeb, as Trustee of Aviation 2015 Trust and sole member of Henry Air II, LLC, signed this agreement. Mr. Evans also signed the agreement. JX 8 at 13 and 14.
  - Mr. Young accepted delivery of the aircraft on behalf of Mr. Evans. JX 8 at 17.
4. Background Information about Pegasus Aircraft Management (PAM) and Pegasus Elite Aviation (PEA) and how they relate to each other

PAM is a limited liability company founded in February 2017 with three members who each own one-third of the business: Tony Yoder,<sup>45</sup> David Mendelson,<sup>46</sup> and Tim Prero<sup>47, 48</sup>. See Tr. at 1535. Mr. Prero was a silent partner.<sup>49</sup> Tr. at 1367-71, 1701; see *id.* at 1736-40. Mr. Prero is the operator of Pegasus Elite Aviation (“PEA”). Neither Mr. Yoder nor Mr. Mendelson have an ownership interest in PEA. Tr. at 1376. PAM pays LLC’s owned by Mr. Yoder and Mr. Mendelson the cost for their services to PAM out of the management fees charged to its clients such as Mr. Evans. Tr. at 1760. In general terms, Mr. Yoder handled the financial side of the business and Mr. Mendelson handled the operational side of the business. See Tr. at 1754-55, 1799-1800. PAM does not hold an air carrier certificate. Tr. at 1382. Mr. Mendelson is PAM’s

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<sup>45</sup> Mr. Tony Yoder holds an ATP certificate with type ratings in the D850, the Falcon 50 through 900EX, the Gulfstream G550 and 455, the Airbus A320 and Boeing 787, and is qualified to fly the F-18. He has over 10,000 total flight hours, with 9,800 being in jets. He has been an employee of United Airlines since 2000. Mr. Yoder also has prior experience working for aircraft management companies. Tr. at 1735-36. He is the CEO and managing partner of PAM. Yet, Mr. Yoder has never spoken to Mr. Evans, but speaks to Ms. Francese (Mr. Evans’ assistant) all of the time. Tr. at 1410.

<sup>46</sup> Mr. Mendelson holds certificates as an ATP and CFI. He has type ratings in the Beech 1900, CL65-200, and G-V series, 450 and 550. He has about 10,400 total flight hours, with over 8,900 being in jets. Tr. at 1843. Through an entity that he owns, he is a one-third owner of PAM. Tr. at 1844. He worked in aviation professionally from 1998 until around 2014. Note: The year 2014 is an estimate by the Tribunal because Mr. Mendelson was never specific about when he left aviation to join this cyber-security firm. He joined an upstart cyber-security company (Tr. at 1897), which grew from 30 employees to several hundred in just over two years. He then talked with Mr. Yoder about doing something different so he took a lucrative package to leave the cyber-security company and partnered up with Mr. Yoder and Mr. Prero to create PAM. Tr. at 1858-62.

<sup>47</sup> Mr. Tim Prero holds an ATP certificate with type ratings in the G-I, G1159, G-IV, G-V, Leer Jet, Hawker and Citation. He is also a Certified Flight Instructor (CFI); Certified Flight Instructor – Instruments (CFI-I); and multi-engine instructor (MEI). He has 29,900 hours total flight time, 24,000 being in jets. Mr. Prero has been a pilot since 1976 and in aviation full-time since 1983. He has owned three air carrier certificates. Tr. at 1521-22.

<sup>48</sup> Tr. at 1378. Actually, the owners are Bradley Aviation Group, LLC, Jet Pros, LLC, and Mr. Prero. Mr. Mendelson is the sole owner of Bradley Aviation Group, LLC. Mr. Yoder owns Jet Pros, LLC, and Mr. Prero owns PEA. CX 63 at 3.

<sup>49</sup> Mr. Yoder explained that Mr. Prero does not do any of the work at PAM and that he and Mr. Mendelson make all of the decisions. Tr. at 1377. Mr. Prero did serve as PAM’s agent for service, but he did not charge PAM for doing that. Tr. at 1701. Mr. Prero testified that he has never been involved in PAM’s day to day operations. Tr. at 1537.

Chief Operating Officer. Tr. at 1377. From February 2017 through September 2017, PAM was not receiving any income. Tr. at 1744.

PAM is essentially an asset manager that gathers all the bills for high end clients' aircraft usage and sends the clients a consolidated bill from all of the vendors used, and in return charges a flat monthly management fee for this service.<sup>50</sup> Tr. at 1383, 1749-50, 1756-58; RX 132. It does not receive compensation for providing air transportation to passengers.<sup>51</sup> Tr. at 1384. PAM is an aircraft management business that goes out and finds Part 91 aircraft and offers to be the asset manager for those companies that own the aircraft. Tr. at 1535. N889LM was PAM's first client aircraft. Mr. Prero knows this because he was asked to be an agent of service for FAA documents for the aircraft. Tr. at 1537. According to the management agreement, PAM was performing the management services for the benefit of Henry Air II Trust. CX 63 at 57-58, JX 7 at 2; *see* JX 6.<sup>52</sup>

PAM has never held an air carrier certificate. Tr. at 1536, 1844. PEA and PAM are located in separate buildings but in the same airport in Van Nuys, California. Tr. at 1010, 1801. In addition, PEA rents hangar space while PAM only has an office at the Teterboro, New Jersey airport. Tr. at 1096. PAM uses PEA's certificate to advance its business when it is in its interest. PAM used PEA's human resource assets.<sup>53</sup> Complainant's W-2 identifies PEA as his employer. CX 45 at 2; Tr. at 340. PEA did PAM's payroll.<sup>54</sup> Tr. at 1660; *see* CX 80. PAM's pilots receive health benefits through PEA's health insurance program,<sup>55</sup> and PAM's services are linked to PEA's website. PEA, identified as an insured airline, purchased insurance for N889LM under its Global Aerospace insurance policy. CX 78; *see* Tr. at 1667-70. Mr. Prero testified that PAM is listed as an additional insured. Tr. at 1670. Mr. Prero also testified that PEA does not charge PAM for being on its insurance program. Tr. at 1675. Additionally, N889LM has never been on PEA's Part 135 certificate.<sup>56</sup>

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<sup>50</sup> Mr. Yoder testified that he sends a monthly consolidated bill to Ms. Jean Francese, Mr. Evans' personal assistant, "and she literally goes by every line" in her review of the bill. Tr. at 1759. This bill can be 50 to 70 pages long. Tr. at 1766.

<sup>51</sup> The Tribunal took official notice of the definitions in 49 U.S.C. § 40101 or 40102. Tr. at 1384.

<sup>52</sup> JX 6 is an amendment to the management agreement. It does two things; it changes the name of the party to the agreement from Henry Air, LLC to Henry Air II, LLC and it acknowledges that it is a sublease between Henry Air Trust II and Mr. Evans where Mr. Evans would be the operator of the aircraft. JX 6; CX 63 at 21-22.

<sup>53</sup> Mr. Prero testified that PEA bills PAM for the time his HR person spent working on PAM issues. Tr. at 1657-58. He said "a portion of her salary was dedicated to PAM and it was a flat fee per month." But he could not recall what portion of her salary was apportioned to PAM. Tr. at 1675.

<sup>54</sup> According to Ms. Thomas, PEA's HR payroll manager, she spent 70 percent of her time working PEA matters and 30 percent on PAM matters. RX 80 at 8.

<sup>55</sup> Complainant was paying Pegasus Elite Aviation for his COBRA payments for dental and vision. CX 44-1 to 44-4; Tr. at 339-40. Mr. Prero testified that PEA shared its health, dental and vision insurance policy with PAM employees for about six or seven months. Tr. at 1664.

<sup>56</sup> No air carrier can conduct operations with an aircraft that is not on its air carrier certificate. 14 C.F.R. §§ 119.5(g) and (l), and 205.4. *See also* FAA Order 8900.1 w/ chg 163, vol. 3, chap. 18, ¶ 3-921 (July 5, 2011). D085 is that portion of the operations specification for any Part 135 air carrier that lists the aircraft that the operator is authorized to use to conduct its operations.

Per Mr. Yoder, “Alibaba or Henry Air, whatever we’re calling it this days...” was PAM’s first airplane to sign a management contract with PAM, but it was the third aircraft to show up on the property to be managed. Tr. at 1381-82. At the time of the hearing, PAM had six aircraft under its management, including N889LM. Tr. at 1382. The aircraft has only been operated under the rules in Part 91 and it has never been placed into commercial service. Tr. at 1396. Only Mr. Evans had the power to initiate or cancel flights. Tr. at 1397.

PEA is a wholesale charter company who sells to brokers and operates under a Part 135 certificate, which is different than what PAM does. Tr. at 1376-77. It is a sub-chapter S corporation (established in 2009) and is owned by Mr. Prero and his wife. PEA holds a Part 135 air carrier certificate.<sup>57</sup> Mr. Prero is the company CEO and Director of Operations, and he is also a check airman for the company for two different types of aircraft. PEA is an aircraft charter company and they also conduct air ambulance flights, but primarily Part 135 on demand charter flights. They get ninety percent of their passengers from brokers. Tr. at 1527-28. N889LM has never been on PEA’s operation specifications (“opspecs”).<sup>58</sup> Tr. at 1544. According to Mr. Prero, PEA had conducted two charter flights for Alibaba prior to the arrival of N889LM. Tr. at 1544-47; RX 131. For these two flights, Mr. Prero stated that PEA billed PAM, who in-turn billed Alibaba. Tr. at 1553-55. However, in looking at a quote for a flight conducted for Alibaba on November 21, 2017, it provides:

#### Charter Quote

Pegasus Aircraft Management [hereinafter referred to as “PAM”] agrees to provide aircraft charter services to the above name client in accordance with the attached schedule and the price quote stated.

RX 131 at Bates Stamp DFC 001349. In this quote for charter services, there is no reference to PEA.

Mr. Prero has never met or talked to Complainant, nor has Complainant conducted any flights for PEA. Tr. at 1530. Additionally, there is a considerable amount of training required to conduct Part 135 flights. The FAA requires each Part 135 operator to develop a training program for pilots that will be operating under its certificate.<sup>59</sup> Complainant did not go through

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<sup>57</sup> Air carrier certificate number E0XA672J. Tr. at 1520-1529.

<sup>58</sup> A Part 135 air carrier can only conduct flights using aircraft on its operations specifications. 14 C.F.R. § 119.5(g) and (l). An air carrier’s OpSpec D085 identifies which aircraft the operator is permitted to use in the conduct of its operations. See Tr. at 1544-45.

<sup>59</sup> Mr. Prero described the training requirements as follows:

[I]f he was to complete training at somewhere like Flight Safety, for example, to fly a Gulfstream for a Part 91 operation, and then he came the next day to me and wanted a job, he would have to go through a whole training process all over again. The training that he had before means nothing. You have to complete, you know, like 80 hours of classroom training, plus another 40 hours of what’s called Basic In-Doc Training for the training, another eight hours of emergency training, probably 20 hours of simulator flight training, either the simulator or the aircraft, usually a simulator.

Tr. at 1530. See also 14 C.F.R. Part 135, subpt. H.

the PEA training. Tr. at 1531. None of Mr. Westcott, Mr. Izzie, and Mr. Young went through PEA's part 135 training. Tr. at 1531-33.

PAM uses PEA's website to promote its business. PEA's website was put together by "some kids. Some IT nerds." Tr. at 1679. PEA's website includes information about PAM.<sup>60</sup> The information about PAM was added to the PEA website in April 2018. Tr. at 1813-14, 1816-19. PAM, in particular Mr. Mendelson, was involved in the development of the website, but Mr. Prero did not know to what degree. Tr. at 1694-95. Mr. Mendelson testified that he was the person that approved the uploading of the contents of the website that pertain to PAM. Tr. at 1902. PEA has its website to advertise what they do. Tr. at 1680. PEA's website's Aircraft Management dropdown description<sup>61</sup> provides: "Pegasus Air Management brings an executive team with over 90 years of combined experience to the corporate aviation industry. Our VIP part 91 and 135 charter operations are based in the largest 65,000 square foot facility in Van Nuys, CA." CX 81 at 1; Tr. at 1684. When one goes from the main webpage to the "Maintenance" tab and "clicks" on that hyperlink, the page that is displayed is "Pegasus Aircraft Management Aircraft Maintenance"<sup>62</sup> On this webpage are the following statements:

With Pegasus Aircraft management, safety is a given. We have been awarded respected safety ratings like Wyvern Wingman and the ARGUS Platinum Award.

We hold an FAA 135 Certificate<sup>63</sup> providing World Wide Operations with an average fleet utilization of over 6,000 hours, and for over a decade have demonstrated sustained excellence in flight operations across all aspects of PAM's operations. These are just some of our many qualifications to manage, operate, and maintain business jets in the private or commercial market.

Our Management team has over 70 years of industry experience managing some of the most complex, worldwide operations in corporate and commercial aviation. Pegasus Aircraft Management's HQ and dispatch center is located at our state-of-the-art 65,000 square foot VIP hangar in Van Nuy's, CA<sup>64</sup>

CX 81 at 4. According to Mr. Prero, this was an error by the web designer. Tr. at 1690-91. It was supposed to refer to PEA. Tr. at 1692. Mr. Prero maintained that the website was intended to function so that if you clicked on the "Elite" tab, you would go to the Elite Charter business,

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<sup>60</sup> The main webpage is [www.pegjet.com](http://www.pegjet.com). This webpage shows a Gulfstream G650. On the starboard side of the aircraft, next to the depicted aircraft fuselage as the corporate jet is facing the reader, there's a hyperlink to "Pegasus-Aircraft Management". On the port side, there is a hyperlink to "Pegasus-Elite Aviation". Above the pictured aircraft are subdirectory links "Charter"; "Maintenance"; "Management"; "Sales & Acquisition"; "Our Fleet"; "About"; and "Contact". See Tr. at 1683, 1689.

<sup>61</sup> When one moves the mouse over the word "Maintenance" on the top of the main page and "clicks" on "Maintenance", this is where the statement is located. This page is identified as <https://pegjet.com/aircraft-management>. See CX 81 at 1 (bottom left of document).

<sup>62</sup> See CX 81 at 4 bottom left which references webpage <https://pegjet.com/aircraft-maintenance/>

<sup>63</sup> Mr. Mendelson admitted that this was false because PAM does not hold any aircraft certificate. Tr. at 1903.

<sup>64</sup> On cross-examination, Mr. Mendelson admitted that PAM does not have such a hangar but leases space at the hangar portrayed on the website. Tr. at 1904, 2011; see CX 81.

and if you clicked on the “Management” tab, you would go to the Management business.<sup>65</sup> Tr. at 1720. Mr. Prero testified that he learned about this about 90 days prior to the hearing and that he has talked to Mr. Mendelson<sup>66</sup> about it since then. Tr. at 1694. Additionally, on the website there is a short video of Mr. Yoder stating “And we’ve now added a division for aircraft management” and “we offer charter all around the world, so we’ve been doing that for almost a decade.” Tr. at 1695, 1811.

In the case of the account for N889LM,<sup>67</sup> Mr. Yoder would gather all of the bills and submit a consolidated report to Ms. Jean Francese, Mr. Evans’ personal assistant. For example, PAM would coordinate the maintenance itself and it might pay the bill for the maintenance. If it did so, PAM would then immediately rebill the client without any markup. Tr. at 1391. Included in this bill would be PAM’s monthly management fee. Ms. Francese would review the bill and forward it to Alibaba.<sup>68</sup> If the costs were business related, Alibaba would pay the entire bill. If there were personal flights involved, Mr. Yoder would have to provide a cost analysis for the given personal flights.<sup>69</sup> While Alibaba would still pay PAM the entire bill, Mr. Evans would have to reimburse Alibaba for the costs of personal trips. Tr. at 1768-76; *see also id.* at 1390; JX 7 at 7. Mr. Evans never paid PAM directly, all costs were reimbursed to PAM by Alibaba. Tr. at 1770. Regardless of whether the aircraft flies or not, PAM receives a \$14,500 per month management fee.<sup>70</sup> Tr. at 1385-86. However, N889LM flies about 800 hours a year. Tr. at 1387.

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<sup>65</sup> The Tribunal noted during the hearing that Mr. Mendelson and Mr. Yoder are listed under the “Charter Team” tab on the website. To get to this information one would “click” on “Charter” at the main page, scroll to the bottom of the page where there were additional hyperlinks entitled “Aircraft”; “Maintenance Management”; “Company”; “About”; “Team”; “Air Safety”; “Charter Team”; “Connect”; “Locations”; “Blog”; “818-742-6666”; and [Charter@Pegjet.com](mailto:Charter@Pegjet.com). When one “clicks” on the “Team” hyperlink, the names David Mendelson, Tony Yoder, and Emilio Lopez appear describing the aviation background. CX 81 at 9 to 13; <https://pegjet.com/about/our-team/>; Tr. at 1723-24.

<sup>66</sup> The testimony is unclear as to whether the speaker on the video was Mr. Mendelson or Mr. Yoder. The questioning starts with reference to Mr. Mendelson, but later questions refer to the male voice as being that of Mr. Yoder. *See* Tr. at 1695-98. Mr. Yoder acknowledge that his voice was on the video. Tr. at 1811. In Mr. Mendelson’s testimony he noted that both he and Mr. Yoder’s voices were in the video. Tr. at 1900. In either case, the orator was from PAM not PEA.

<sup>67</sup> JX 7 is the management agreement between PAM and “Henry Air, LLC”. However, the name Henry Air, LLC was later amended to refer to Henry Air II, LLC. Tr. at 1385; JX 6.

<sup>68</sup> *See* RX 78 at 4-5 and 8.

<sup>69</sup> *See also* RX 63 at 4.

<sup>70</sup> PAM also received \$3,500 per month as a maintenance fee and \$2,500 per month for N889LM to be on a fleet fuel program run through PEA. JX 7 at 1; RX 134; Tr. at 1565.

Because of the size of its fleet, PEA is able to obtain a volume discount on purchases of fuel. As PAM does not have a large fleet, it uses PEA’s services for its fuel, but pays it 10 cents per gallon as a handling fee. Even with this additional charge, it is normally cheaper than paying as an individual aircraft. The fuel program allowed the purchase of fuel at a discounted price at various FBOs throughout the world. Tr. at 1389-91, 1558-61.

CX 36 is an invoice from World Fuel Services to PEA for fuel for N889LM. Tr. at 1648-49. World Fuel Services is one of PEA’s vendor. It reflects that the operator for N889LM is Henry Air II, LLC. CX 36 at 2. There is a World Fuel fuel card for that account in the aircraft. Thus, PAM’s pilots can use

5. The Transition of Mr. Evans' account from Jet Aviation to PAM

On October 13, 2017, Mr. Young, Mr. Westcott,<sup>71</sup> Mr. Izzie, and Complainant all left Jet Aviation in order to continue to fly for Mr. Evans. All of them were hired by PAM.<sup>72</sup> The pilots were not interviewed by PAM's management (Mr. Yoder or Mr. Mendelson) before being hired.<sup>73</sup> They were all hired around mid to late October 2017. Tr. at 1400, 1844. Mr. Evans approved the compensation level for the pilots. Tr. at 1402-03. The entire crew came at the recommendation of Mr. Young. Tr. at 1845. Mr. Mendelson's offer of employment for Mr. Young identified him not only as a pilot but the "Primary point of contact between PAM and Henry Air Trust" with the title of "Aviation Director, Henry Air Trust."<sup>74</sup> CX 71. The pilots' salaries were \$245,000, and they also received a ten percent bonus on an annual basis, a 401k match,<sup>75</sup> and health insurance for the pilot's entire family.<sup>76</sup> JX 1; Tr. at 139-40. The offer letter, signed by Mr. Mendelson and dated October 13, 2017, states that Complainant was to serve as a pilot in command of a Henry Air Trust company aircraft and to work with a dedicated PAM Operation Manager. JX 1. Complainant actually joined PAM on October 16, 2017. Tr. at 141.

Only Mr. Evans, or staff acting on his behalf, initiated or cancelled flights for N889LM.<sup>77</sup> Tr. at 403, 528. The non-exclusive aircraft agreement between Mr. Evans and Henry Air II, LLC, provides that Mr. Evans shall have operational control of the aircraft during any flight he conducts with the aircraft and that the pilots operating the aircraft are under his exclusive control.

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PEA's account to make charges on PEA's account and then PEA later bills PAM for the fuel charges. Tr. at 1649-52.

N889LM was also included in PEA's fleet insurance policy because it could get a rate 30 to 40 percent less than if Alibaba got it on its own. Tr. at 1561-64; see RX 133, CX 78.

<sup>71</sup> Mr. Westcott's understanding was the pilots that came over from Jet Aviation would continue to run the flight department as they saw fit, as they had been doing for the last year and a half. Pegasus was going to just take care of the things the pilots did not want to take care of, like the website. The pilots were going to manage themselves but Pegasus was "going to take care of logistics payroll, insurances, managing the maintenance of the airplane and the things that the pilots would not be necessarily involved in." Tr. at 366-67. However, Pegasus ended up having more control than they originally talked about which created some conflict with their staff.

<sup>72</sup> Tr. at 1399 and 1844.

<sup>73</sup> Yet, curiously, Mr. Yoder also testified that Mr. Young had "some misgivings about whether PAM should make an offer to [Complainant]." "[H]e wasn't sure if [Complainant] was going to be the right fit." Tr. at 1448.

<sup>74</sup> Mr. Mendelson recalled first meeting Mr. Young in April 2017 when he and Mr. Yoder sat down with Mr. Young to talk about PAM. Tr. at 1846.

<sup>75</sup> Complainant noted that the offer letter indicates a three percent match, but the pilots were told before the offer was tendered that it would be closer to seven percent. Tr. at 140-41.

<sup>76</sup> Mr. Young's base salary was \$270,000. CX 71.

<sup>77</sup> Tr. at 582. According to Mr. Westcott, Mr. Evans had ultimate authority as to whether a flight was going. Tr. at 403. However, he also said that Pegasus had operational control because they were managing the airplane. Tr. at 417.

JX 8 at 7. Ms. Jean Francese is Mr. Evans' personal assistant,<sup>78</sup> and coordinates with PAM the schedule for the aircraft.

PAM's scheduler is Mr. Emilio Lopez.<sup>79</sup> Tr. at 636. Mr. Lopez is not a pilot. He is PAM's liaison between the pilots and Mr. Evans' staff. Tr. at 576, 578. Mr. Yoder brought on Mr. Lopez specifically to be the liaison for N889LM. Tr. at 1403. Mr. Lopez's job was to make logistics happen that were needed for trips made using N889LM. Tr. at 1404. Mr. Lopez's sole responsibility was N889LM. Tr. at 1200. Mr. Evans would initiate a flight by notifying his personal assistant, Ms. Francese, who in-turn passed the information to Mr. Lopez. Mr. Lopez would use scheduling software<sup>80</sup> to reflect when a departure needed to occur to arrive at a given time. Tr. at 1404-05. And Mr. Evans, via Ms. Francese, was constantly changing his flight schedules. Tr. at 1405.

Although he was employed by PAM, Complainant never thought of PAM personnel such as Mr. Mendelson or Mr. Yoder as his bosses. Rather, he viewed Mr. Evans as his employer, stating: "if Mr. Evans wanted to go someplace, we took him." Instructions for flights went from Mr. Evans to Ms. Francese to PAM to the pilots. Tr. at 525-28. Complainant only flew N889LM during this time.<sup>81</sup> In general, the flights only included Mr. Evans. Tr. at 365, 564. There were occasions where people other than Mr. Evans flew on N889LM. He would fly business associates, some friends and family, and his assistants.<sup>82</sup> Mr. Evans' wife, children, and house staff would fly with him approximately 15 to 20 percent of the time. There were rare occasions where business associates would fly with him. Tr. at 365. However, according to Mr. Westcott, these were all Part 91 flights. Tr. at 404.

## 6. Management Agreement involving N889LM

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<sup>78</sup> Tr. at 368, 372, 528, 582, 643; RX 78. See Tr. at 112.

<sup>79</sup> Mr. Emilio Lopez has worked for PAM since mid-October 2017. CX 74. He does not hold any FAA certificates, but has worked in the aviation industry 15 years. Tr. at 1121, 1145-47, 1184-88. At the time he was hired, his title was Managing Director of East Coast Operations, but he was subsequently promoted a few months prior to his hearing testimony. He was hired to be a coordinator for support of N889LM, where he was the liaison between Mr. Evans' executive assistant, Ms. Francese, and use of the aircraft itself. Tr. at 1121-22, 1863. He was not involved as a liaison for trips prior to the new G650 coming onboard. Tr. at 1127. He did not manage or supervise the pilots. Tr. at 1127. When the aircraft came onboard, there were four pilots (Mr. Young, Mr. Izzie, Mr. Westcott and Complainant) and a flight attendant, Mr. Nunes. Tr. at 1128.

<sup>80</sup> Mr. Yoder identified the software as FOS, which he believed stood for flight operations scheduling. Tr. at 1405; see also *id.* at 1209 and 1236.

<sup>81</sup> At some point, Mr. Mendelson offered Complainant the opportunity to do contract work in another G650 aircraft that PAM managed. However, in mid-January 2019, Mr. Evans prohibited additional pilot contract work. Tr. at 565-66; CX 70. In the email to the pilots, they were addressed as "Alibaba Crews". *Id.*

<sup>82</sup> See also Tr. at 1124.

On September 28, 2017, Mr. Evans, through Mr. Young, retained the services of PAM to manage “his” aircraft.<sup>83</sup> Tr. at 108. For its services, PAM is paid \$14,500 per month regardless of the hours Mr. Evans uses the aircraft. JX 7.<sup>84</sup> Mr. Mendelson stated that “in all my years it’s the most complicated flying schedule, it just flies constantly.” Tr. at 1863.

Although the agreement was for the management of N889LM for Mr. Evans’ use, the agreement itself was signed by Mr. Loeb, Trustee of “Henry Air LLC.” JX 7 at 16. This designation was an error and was corrected in an amendment to the PAM agreement — Mr. Loeb changed the party to Henry Air II, LLC and thereafter signed the amendment as Trustee of Aviation 2015 Trust, sole member of Henry Air II, LLC.<sup>85</sup> JX 6 at 2. This agreement provides that Henry Air II “will have and retain exclusive operational control, and exclusive possession, command and control, of the Aircraft. [PAM] will act as [Henry Air II, LLC’s] contractor and agent in establishing and maintaining such operational control.” JX 7 at 3. The agreement provides that, on Henry Air II, LLC’s behalf, PAM will obtain an FAA approved MEL for N889LM. JX 7 at 5. This agreement provides that Henry Air II, LLC’s current employer, Alibaba Group Holdings Limited, will reimburse it for all expenses in managing, operating, owning and maintaining the aircraft for business purposes. However, use of the aircraft for personal use will be paid by Henry Air II, LLC.<sup>86</sup> JX 7 at 9. On or about January 24, 2018,<sup>87</sup> Mr. Mendelson and Mr. Loeb executed an amendment to this agreement. JX 6. In this amendment, the parties added a clause that indicates that Henry Air II, LLC subleased N889LM to Mr. Evans under a certain non-exclusive aircraft lease agreement,<sup>88</sup> and that per that agreement, the aircraft is to be operated under Part 91 and Mr. Evans “will have and retain exclusive operational control, and exclusive possession, command and control of [N889LM]. JX 6 at 1. The amendment further provides the performance of the obligations of the original agreement owed by PAM to Henry Air II, LLC shall be provided to for the benefit of Mr. Evans as the operator of N889LM. JX 6 at 1.

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<sup>83</sup> According to Mr. Mendelson, Mr. Evans did not make the decision to move to PAM. Rather, Mr. Steve Loeb did. Mr. Loeb was the attorney for Mr. Evans. Mr. Mendelson testified that he discussed the move with him and he “had to actually really sell our services to him. And he, at the time, was very much committed to staying at Jet, and I had to convince him that this was the right move.” Tr. at 2013-14. As previously noted, Mr. Loeb is also the Trustee for Aviation 2015 Trust, who is the sole member of Henry Air II, LLC. JX 3. See JX 2 at 11. Henry Air II, LLC was created on December 16, 2016 for the purpose of purchasing an aircraft, establishing a trust to acquire the aircraft, and entering into agreements for the operation, maintenance and financing of the aircraft. JX 2 at 1.

<sup>84</sup> See also Tr. at 110.

<sup>85</sup> The parties in this case never explained to the Tribunal why Henry Air II LLC was involved in this matter when all evidence presented indicated that this agreement was for the benefit of Mr. Evans. The Tribunal assumes it is because Mr. Evans, a senior Alibaba executive, had a non-exclusive lease from Henry Air II LLC, albeit with first priority. And as Henry Air II LLC was also employed by Alibaba (JX 7), it was being used as a tool to assist Mr. Evans’ use of the aircraft.

<sup>86</sup> The Tribunal was not provided any documentation about any third party agreement between Alibaba and Henry Air II, LLC to effectuate this provision of the agreement.

<sup>87</sup> There is no actual date on the document that reflects when it was executed. However, at JX 6 at 1, there is an annotation that it was witnessed by Mr. Yoder on January 24, 2018.

<sup>88</sup> Presumably JX 8.

7. Preparation for N889LM operations and initial issues with Letters of Authorization

During the period October 2017 through December 2017, the pilots worked at various times in Savannah, Georgia on getting the aircraft (N899LM) ready for Mr. Evans, including obtaining documentation and in particular Letters of Authorization (“LOA”).<sup>89</sup> This is where Mr. Yoder and Mr. Lopez first met Complainant. Tr. at 1400; CX 64 at 32.

At some point, Mr. Young asked Complainant to go to Savannah to do a final inspection on the aircraft, which he did. Complainant spent a week there, working with Gulfstream to get this new aircraft prepared to operate. Tr. at 141. While working with Gulfstream, Complainant had a Gulfstream representative provide the information about how the aircraft was equipped and that information was necessary for ITPS<sup>90</sup> and ARINC<sup>91</sup> to file an ICAO flight plan.<sup>92</sup> Tr. at 156-57, 306, 616-17, 620 1065; RX 29 at 8. When Complainant gave this information to Mr. Mendelson, he informed him of the need to amend the aircraft’s flight code information as they received LOAs from the FAA. CX 26 at 3; Tr. at 305-06, 619; *see* RX 29 at 8. He gave this information to Mr. Mendelson because he did not have access to change it with ARINC or with ITPS; that had to be done by “Pegasus” and Mr. Mendelson was the primary point of contact for him.<sup>93</sup> Tr. at 306-07.

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<sup>89</sup> In general there are three types of authorizations the FAA issues to operators: Operations Specifications (OpSpecs); Management Specifications; and Letters of Authorization (LOA). These authorizations are used to tailor broad regulations to individual aircraft types, operators, locations, and to address other unique situations. Most of FAA Order 8900.1 is focused on OpSpecs and accordingly it is organized around that concept. Much of the information about LOAs is contained in FAA Order 8900.1, Chapter 18, section 2. Like OpSpecs, LOAs have templates that are divided into six general topics. The topics involved in LOAs at issue in this case are Parts A, B, C, D and E. Part A are mostly administrative in nature. Part B concerns En route authorizations and limitations. *Id.* at § 4. Part C addresses airplane instrument approach authorizations. Parts D and E are Maintenance related, such as authorization to use a MEL. *See* FAA Order 8900.1, vol. 3, ch. 18 §§ 3 to 6. *See also* Tr. at 755. Air carriers are issued OpSpecs while Part 91 operators are issued LOAs. Tr. at 885. As described by Mr. Prero, LOAs authorize “[h]ow the aircraft could be operated, what certain equipment on an aircraft that can be used to operate the flight, certain airspace in the world where you can operate or cannot operate. In some cases certain countries where you can go or not approved to go.” Tr. at 1539-40. The example he gave was operating in Reduced Vertical Separation Minimum (“RVSM”) airspace. *Id.* at 1540; *see* 14 C.F.R. Part 91, appx. G.

<sup>90</sup> International Trip Planning Services, LLC. *See* CX 24.

<sup>91</sup> Apparently, Respondent used ARINC for domestic flight plans and ITPS for international trips. Tr. at 621.

<sup>92</sup> According to the ITPS witness, Mr. Wells, it is not ITPS’s job to ensure that the operator is authorized to use the equipment on the aircraft. ITPS personnel merely put the equipment codes provided to them by the operator in to the flight plan. Tr. at 1068-69.

<sup>93</sup> Mr. Yoder was not involved in the process of procuring any of the LOAs. Tr. at 1418.

Complainant’s expert, Mr. Huffman, testified that, on the five flight plans he reviewed, the equipment codes were wrong and as a consequence there were violations of the Federal Aviation Regulations. He also testified to the missing LOAs for the flight plans. *See generally*, Tr. at 756-96. Mr. John Huffman testified via a videotaped deposition. Tr. at 748.

It was also around this time Complainant became involved in obtaining LOAs for the aircraft; a process he had never been involved with previously. Tr. at 144-45; *see also* RX 50. Complainant provided this information to Mr. Mendelson. Mr. Mendelson would then forward this information to Mr. Prero, who would liaison with the FAA about obtaining the LOAs.<sup>94</sup> Tr. at 1846. Mr. Mendelson testified that he was thrilled about the crew requesting the LOAs. Tr. at 1849. Mr. Mendelson recalled that he received communications from the crew about LOAs only from Mr. Young and Complainant. Tr. at 1854.

In early November 2017, Complainant began communicating with Mr. Mendelson, PAM's Chief Operating Officer ("COO") (CX 71) and Mr. Emilio Lopez, PAM's Managing Director, Eastern Region (CX 74). Complainant had identified a list of at least ten LOAs needed to maximize the capabilities of this aircraft. CX 8; Tr. at 145. Over the coming weeks, Mr. Mendelson gave Complainant repeated assurances that he would obtain the needed LOAs. CX 9, CX 10, CX 12, CX 13; Tr. at 148-50, 162-63. However, LOAs cannot be issued until one owns the aircraft and ownership had not been transferred at that point.<sup>95</sup> Tr. at 166-67, 809-10, 894, 1538; RX 73 at 3.

The week after Thanksgiving, the pilots (Mr. Lopez, Mr. Yoder, and Mr. Mendelson) went to Savannah, had a meeting, and addressed the final details before the aircraft was placed into service. Tr. at 142-43. Mr. Prero was the agent of service and Mr. Mendelson was gathering the information needed from the pilots. Tr. at 1418. This is the only time Mr. Yoder could remember speaking to Complainant. Tr. at 1412. When Mr. Mendelson walked into the meeting, Mr. Lopez informed Mr. Mendelson that "it seems like these guys are a little abrasive...."<sup>96</sup> Tr. at 1864. Mr. Mendelson did most of the talking at that meeting. Mr. Lopez did not recall any conversation about the LOAs at that meeting. Tr. at 1133-34. He recalled the crew members "being more hostile, more guards up, ... defense mode from the crew members ... towards him and the overall situation about – with Pegasus." Tr. at 1135.

Exchange of custody of the aircraft occurred on November 30, 2018. Tr. at 536. Mr. Young then flew the aircraft down to Grand Cayman to complete the sale and accept the aircraft. Following acceptance of the aircraft, Mr. Young and a contract pilot flew N889LM to Geneva, Switzerland, where Complainant, Mr. Izzie, and Mr. Westcott had been prepositioned to be part of the new crew. Tr. at 1397-98. These three pilots then continued on to China as the flight crew. Tr. at 143-44, 167. After flying to China, Complainant returned home by commercial means. Tr. at 167 and 1399.

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<sup>94</sup> However, Mr. Mendelson told the pilots that he was "working closely" with the POI when, in fact, he was working indirectly with the POI through Mr. Prero and never talked to the POI about the LOAs involved here. Tr. at 1909; *see* CX 9. He repeatedly misrepresented his interactions with the POI to the crew. Tr. at 1932-33; CX 13, CX 26, CX 34.

<sup>95</sup> Mr. Westcott testified that they had no LOAs on the day they went to accept the ownership of the aircraft. Tr. at 393. Of note, until ownership is established, one cannot determine the operator for issuance of any LOAs.

<sup>96</sup> However, Mr. Mendelson testified that, aside from comments Complainant made about a former colleague of his, Complainant was never discourteous, unprofessional or anything other than appropriate with him. Tr. at 1910; *see* CX 51.

On December 1, 2017, the day PAM's personnel picked up the new aircraft, certain LOAs still had not been issued.<sup>97</sup> CX 13.<sup>98</sup> When an LOA is required to operate an aircraft in certain airspace, to conduct certain instrument approaches, or to use certain equipment on the aircraft, a copy of the LOA must physically be aboard the aircraft. Tr. at 420-21, 1029. Despite the lack of certain LOAs, PAM began to operate this aircraft. All flights were conducted following 14 C.F.R. Part 91. As mentioned earlier, while Mr. Evans uses the aircraft mostly for business, it is occasionally used for personal use. On December 7, 2018, Complainant wrote to Mr. Mendelson and identified four LOAs that remained outstanding: CPDLC; ADS-B; LPV; and MEL.<sup>99</sup> RX 33 at 2. Mr. Mendelson provided an update the following day. RX 33 at 1; Tr. at 533-34. Thru December 2017, PAM operated N889LM when at least four LOAs remained outstanding.<sup>100</sup> CX 11, CX 16; Tr. at 168-75. On December 8, 2017, Mr. Mendelson wrote to

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<sup>97</sup> It appears that the initial batch of LOAs erroneously identified the operator as Henry Air, LLC. CX 69.

<sup>98</sup> In this email, Complainant attached an article about the European Union Aviation Safety Agency (EASA), Europe's civil aviation authority, not recognizing the use of a generic master minimum equipment list ("MMEL") and requiring a minimum equipment list ("MEL") specific to a particular aircraft. *See generally*, Christian Oliver, *MMEL Not Accepted by ICAO States, Europe, and Preparing for European Ramp Inspections – SAFA* (Nov. 7, 2017), available at <https://www.rvsmcompliance.com/preparing-european-ramp-inspections-safa/>. This concerned the apparent reluctance on the part of PAM's principal operations inspector (POI) issuing the aircraft operations specification D095 rather than D195, despite EASA allegedly requiring a specific MEL. Tr. at 163; *see also id.* at 1586-87. Complainant explained that he was concerned about this because they flew into France almost every trip and did not want to be in non-compliance should French authorities conduct a ramp inspection. Tr. at 161, 164. However, Mr. Prero testified that he was not aware of a country that required a MEL instead of a MMEL. Tr. at 1588. But on cross-examination, he admitted that he was told that at least France required it. Tr. at 1719.

<sup>99</sup> Mr. Yoder noted that there is not a single LOA the FAA requires the aircraft to have. Tr. at 1413. Mr. Yoder expressed frustration at the FAA process of LOA approval citing to the CPDLC. He noted that "there's not one G650 ever built that can't fly CPDLC. There not one G650 ever built that can't fly RVSM." And that's because that equipment comes standard with every one of the aircraft. Tr. at 1414-15. He was in favor of getting as many LOAs as possible. Tr. at 1420; *see also* CX 63 at 31. However, once the paperwork is submitted to the FAA POI, there is nothing PAM could do but wait for its approval. Tr. at 1419. In his opinion, the only reason the LOAs became an issue was because it was a new aircraft. Tr. at 1420. Mr. Prero agreed with this view. Tr. at 1543-44.

<sup>100</sup> Those being: The border overflight exemption, the Flight Operations Manual (FOM), Safety Management System (SMS) certificate, signatory carrier status, and access to the FRAT (flight risk assessment tool) on ARINC. Tr. at 168-69. Aeronautical Radio, Incorporated (ARINC) is a major provider of transport communications and systems engineering solutions for aviation. *See* <http://www.rockwellcollins.com>. SMS is a mandatory FAA program for certain types of operations set forth in 14 C.F.R. Part 5, but is separately required for all aircraft that operate in European airspace. *See* Tr. at 150-51; <https://www.easa.europa.eu/easa-and-you/safety-management/safety-management-system-sms>.

The presence or absence of these LOAs is of significance to the pilots and aircraft owners that operate their aircraft outside the United States. Per 14 C.F.R. § 91.703, each person operating a civil aircraft of U.S. registry outside of the United States shall comply with Annex 2 of the ICAO Convention when over the high sea, and comply with a foreign nation's regulations relating to flight and maneuver of the aircraft when in that foreign nation's airspace.

the crew about the status of the LOAs. He wrote that A153, the LOA pertaining to ADB-S, had been issued and to let him know if they needed a reprint. CX 11. However, A153 had, in fact, not been issued. Tr. at 1912. He told the crew that he would speak to the FAA Principal Operations Inspector (“POI”)<sup>101</sup> that day as he was going to meet him at 1:00 p.m. CX 11. However, Mr. Mendelson never spoke to PAM’s POI about Letters of Authorization (“LOAs”); that was done by Mr. Prero. Tr. at 1913, 1923; *see also* CX 13 at 3. Mr. Mendelson told the pilots that he had submitted LOA D195 for approval (CX 11) when, in fact, such a request was never submitted to the FSDO<sup>102</sup> for the POI to approve. Tr. at 1914. On December 22, 2017, Mr. Mendelson told the pilots by email that he would “tackle the FAA open items right after they return from holiday.” CX 16. Between December 22, 2017 and January 17, 2018, Mr. Mendelson did not update the crew about the status of the LOAs.<sup>103</sup> Tr. at 1946; *see* CX 26.

In mid-January 2018, Mr. Mendelson still had not provided the flight crew with all of the LOAs for N889LM. In addressing a fuel tankering issue, on January 17, 2018, Complainant asked about the progress of the remaining LOAs and the resolution about the pilots’ 401(k) benefits. CX 21. Mr. Mendelson had last informed the flight crew about the missing LOAs back on December 22, 2017. Tr. at 189; *see* CX 16. By this point, Complainant and the other three pilots were becoming frustrated and a little annoyed that Mr. Mendelson had neither provided the LOAs nor had he informed the pilots of their status. Tr. at 190.

On January 21, 2018, Complainant again reminded Mr. Mendelson in an email, using bold red lettering, about the missing LOAs. Yet Mr. Mendelson testified that he did not know “what the significance of the red font would be.”<sup>104</sup> Tr. at 1963. These LOAs concerned use of a Minimum Equipment List (D195); use of ADS-B (A153)<sup>105</sup>; use of LPV<sup>106</sup> outside of the US

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<sup>101</sup> A POI is a FAA Aviation Safety Inspector that is designated as the liaison between operators and the FAA about a given entity’s operations. They are the FAA representatives that are authorized to issue an owner or operator LOAs. *See* FAA Order 8900.1, vol. 3, Ch. 2, § 3-55.A. In general, POIs are assigned to a given operator or given geographic area. In addition to a POI, the FAA utilizes inspectors whose specialties are maintenance (PMI) and avionics (PAI). The Inspector is responsible for ensuring legal compliance of the individuals or carriers with FAA rules and regulations. The Inspector has the authority to instigate surveillance, inspections, and work programs to monitor and evaluate a compliance with the FARs.

<sup>102</sup> Flight Standards District Office. This is the FAA office that houses the Aviation Safety Inspectors. These offices are located throughout the United States. *See generally*, [https://www.faa.gov/about/office\\_org/field\\_offices/fsdo/](https://www.faa.gov/about/office_org/field_offices/fsdo/).

<sup>103</sup> On January 6, 2018, Mr. Mendelson learned that his older brother and only sibling had died and they were extremely close. Because of this Mr. Mendelson took about ten days off from work. Tr. at Tr. at 1855-57.

<sup>104</sup> The Tribunal found this testimony not credible.

<sup>105</sup> In late 2018, the FAA discontinued the ADS-B Out LOA and now operators need only carry Notice 8900.491 to show foreign inspectors. *See* FAA Notice 8900.491, *Decommissioning Opspec/MSpec/LOA A153, ADS-B Out Operations Outside of U.S.-Designated Airspace, and OpSpec/MSpec/LOA A353* (Nov. 9, 2018). *See also* Tr. at 851, 1579. However an LOA is still required for ADS-B In operations.

<sup>106</sup> LPV stands for Localizer Performance with Vertical guidance and is a type of precision instrument approach. In general terms, it is an approach that utilizes the global positioning system and provides both vertical and horizontal guidance to the aircraft during the landing phase similar to an instrument landing system (ILS) approach. *See* AC 90-107, *Guidance for Localizer Performance with Vertical Guidance*

(C052); and use of a CPDLC<sup>107</sup> on board the aircraft (A056). CX 26 at 2; Tr. at 195. The day prior, Complainant expressed the urgency of getting the ADS-B<sup>108</sup> and CPDLC LOAs to Mr.

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*and Localizer Performance without Vertical Guidance Approach Operations in the U.S. National Airspace System* (Feb. 11, 2011). The LOA request is authorization to conduct such approaches outside the United States. Tr. at 543. Without the authorization, the aircraft could not legally conduct that type of instrument approach and would have to select some other type of instrument approach. Tr. at 544-48, 896.

<sup>107</sup> CPDLC is controller-pilot data link communications. It is a means of communication between an air traffic controller and a pilot, using data link for air traffic control communications, particularly when in oceanic and remote continental airspace. CPDLC, when authorized, is an acceptable means of delivering and accepting an ATC clearance. See AC 90-117, *Data Link Communications* (Oct. 3, 2017) (RX 125). However, there is no FAA or ICAO rule that mandates its use. It is a tool of convenience used in lieu of old school voice communications. See Tr. at 540; see also *id.* at 678-79. If one does not have either the equipment or authorization to use CPDLC, the pilot would use other approved radio equipment. See Tr. at 819-25, 900, 1581; RX 79 at 47-49.

Of note, Mr. Westcott testified that, despite not having permission to use the CPDLC system, when asked if they used the system he replied “I would believe we probably were.” Tr. at 395. However, Mr. Westcott also testified that management never told him that they did not have an LOA for CPDLC and to not use it. Mr. Young was part of Pegasus Management and was the lead pilot and he would use it, so Mr. Westcott thought “that it was good to go.” Tr. at 397-98, 417. Complainant had a similar understanding after seeing Mr. Young use the CPDLC. Tr. at 736-37. Mr. Westcott testified that as of February 9, 2018 he had no idea whether there were any LOAs that were not issued by that time. Tr. at 419. Further he “wasn’t going to lose [his] job over it.” Tr. at 418. However, he was afraid that if there was a ramp check in Europe and they grounded the aircraft, there were going to be stuck, and then they would have to tell Mr. Evans that Pegasus was not managing the airplane correctly. Tr. at 419. His concern was that the aircraft “was safely being flown and the LOAs didn’t make it any less safe or more safe. It was just paper work that was required.” Tr. at 422. It is this mindset that is very troubling to the Tribunal.

There is little question that the pilots felt “a tremendous amount of pressure” to conduct the flights at the time desired by Mr. Evans. Complainant essentially testified that if he perceived that he could not conduct a flight lawfully, “we would do it if it wasn’t a – if it wasn’t a safety of flight issue, there’s – there’s a huge difference.” Tr. at 583; see also *id.* at 678. However, whether or not a given flight will occur is ultimately the decision of the pilot in command alone.

“Operational control, with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight.” 14 C.F.R. § 1.1 (definitions). The problem with Mr. Westcott’s and Complainant’s approach is a pilot *is* responsible to ensure that any LOAs required to conduct the flight have been issued and are aboard the aircraft, or the flight must be adjusted to remain in compliance with the aircrafts operating authorities and limitations. 14 C.F.R. § 91.3(a) unequivocally provides that “the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.” While PAM, or even Mr. Evans, may be accountable for the flight’s operations, it is the pilot who is ultimately responsible for the conduct of any given flight from the moment he accepts the aircraft for a flight until completion of the flight, in particular when being conducted under Part 91. See *Texasgulf, Inc. v. Colt Elecs.Co.*, 615 F. Supp. 648, 661 n. 23. (S.D.N.Y. 1984); see also Tr. at 815-18. For responsibility for operational control by air carriers, see, e.g., 14 C.F.R. §§ 121.533 and 135.77. As such, he has an independent obligation to ensure that the aircraft he operates is authorized to conduct flights in certain air space or utilize certain equipment or conduct certain instrument approaches in that airspace. The operation of the aircraft without approved LOAs necessary to conduct a given flight is a violation of the Federal Aviation Regulations. See *Huerta v. Boeta*, NTSB Order EA-5744, 2015 NTSB LEXIS 12, at \*25 (Apr. 16, 2016) (60-day suspension of pilot’s ATP certificate for operating an aircraft

Mendelson noting they were “fairly significant since we are required to have both in our daily operating environment.” CX 26 at 3. On January 26, 2018, Mr. Mendelson wrote to flight crews informing them that the LOAs had been approved and he was “working on getting the new Ops specs cut today.” CX 82. However, a short time later, Complainant learned that this was not true.<sup>109</sup> CX 34 at 3. This frustrated Complainant and the other flight crew members for these were items the flight crew needed to work effectively. Tr. at 201.

#### 8. Incidents involving Mr. Lopez

It was the pilots’ understanding that Mr. Lopez was going to be the liaison between Mr. Evans’ staff and the pilots. Tr. at 576. Essentially, he took any information about a given trip from Ms. Francese and put it in the system for the parties that needed the information to accomplish the trip. Once he received a call from Ms. Francese for a trip, he would gather all of what Mr. Evans’ mission was at that time, put it into PAM’s system, populate a generic trip sheet, and send it back to Ms. Francese for her reference. Then he would go to the needed third party vendors, such as ITPS, to obtain the necessary slots or permits and make sure everything was aligned, and then communicate back with Ms. Francese. Mr. Lopez would notify the pilots about an upcoming trip that was being planned. Tr. at 1123-26.

Mr. Lopez represented Pegasus. Tr. at 204. The flight crew initially had concerns about Mr. Lopez in Savannah, even before the aircraft was delivered, as it was unclear to them what his role was to be. Tr. at 204-05, CX 62 at 7-8. The flight crew was told that it was their department,<sup>110</sup> and they knew what they wanted and how they wanted everything set up. According to Complainant, Mr. Lopez “pushed back from day one on how the pilots wanted things done.” Tr. at 205.<sup>111</sup> Mr. Young testified at deposition that there was friction between Mr. Lopez and some of the pilots. CX 62 at 8. Mr. Lopez agreed that the pilots had issues with him from day one. CX 64 at 22-23. The flight crews wanted the trip sheets done a certain way because their way included addresses for the fixed base operators, for car services, frequencies and times. The flight crew asked him to put those items on the trips sheets and he would not do it. Tr. at 205, 640. Although this was not his role, Mr. Lopez viewed himself as being the manager of the pilots.<sup>112</sup> CX 64 at 6-7.

In late December 2017 or January 2018, there was an in-person meeting that occurred at the Teterboro airport in the Signature South conference room with Mr. Lopez, the crew members, Ms. Francese and Mr. Mendelson in attendance. Tr. at 1130-32, 1138. Mr. Lopez had suggested to Mr. Mendelson that a meeting occur to get everybody in the same room in order to

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in RVSM airspace with an aircraft not authorized to do so). *See also* Tr. at 515. *But see* Tr. at 962-63 (Respondent’s expert opined use of incorrect flight codes was a mistake, not a violation). Further a highly qualified pilot should know not to violate FAA regulations for convenience. RX 79 at 55.

<sup>108</sup> Automatic Data Surveillance Broadcast; *see also* Tr. at 192-93.

<sup>109</sup> Tr. at 201; *see also* CX 33 at 1 [time 1/27/18, 5:45:03 PM] to [time 1/27/18, 8:42:02].

<sup>110</sup> *See* CX 14 at 1 [time 12/12/17, 7:02:31 PM]; Tr. at 208-09; *see also* RX 7 at 1.

<sup>111</sup> *See also* CX 29 at 1 (“[Mr. Lopez] pushes back every time we say something or ask for something.”).

<sup>112</sup> However, in his deposition, he changed his testimony that he did not supervise the pilots. CX 64 at 15.

talk about expectations, the crews' feelings towards him, and to establish what Ms. Francese needed from him. His goal was to figure out what the problems were and to resolve them. Tr. at 1138-39. He acknowledged that "we had a lot of growing pains." Tr. at 1139. According to Mr. Lopez, instead of information just coming from him, Ms. Francese was getting calls from crew members about slots and permits or the crewmembers were going directly to the handlers themselves, bypassing PAM's third party vendors. Tr. at 1140. During the meeting, they talked about procedures and Ms. Francese made it "completely understood" that information would come from Ms. Francese and then filter through him, and then be passed on to the crew members. Tr. at 1142-43. When she concluded the meeting, she informed them that this had to work because if it did not they were all out of a job. Tr. at 1143-44.

Mr. Lopez made a series of scheduling errors in December 2017 and January 2018. One such incident occurred on December 12, 2017, when Mr. Lopez scheduled the aircraft to fly to Seattle. Mr. Westcott and Mr. Izzie were the pilots of that flight. Tr. at 369-70; CX 14. They were coming out of Canada so they had to clear customs. Instead of having the aircraft land and go through customs at Boeing Field, Mr. Lopez had the aircraft land at the Seattle-Tacoma airport ("SEA-TAC"), which is not designed to handle general aviation customs as easily. Tr. at 208; CX 14. Landing at SEA-TAC caused customs clearance to take almost an hour, which made Mr. Evans livid. Tr. at 1225. According to Mr. Westcott, had the pilots been involved in the trip planning process, they would have advised not to land at SEA-TAC but rather Boeing Field. Tr. at 370-71. Ms. Francese took the blame for this mishap. Ms. Francese and Mr. Young were concerned about Pegasus being blamed for this mishap as it occurred under the new contract. Further, his staff was already very upset about moving to another management company. Mr. Westcott had the impression, based on having heard a conversation between Mr. Francese and Mr. Young, that if things did not work out with Pegasus, both of them would lose their jobs. Tr. at 372-73. At the hearing, Mr. Lopez denied this was his mistake. Tr. at 1226-27.

In another incident, Mr. Lopez also sent the aircraft to the wrong Fixed Based Operator ("FBO") in Toronto. Tr. at 209. He allegedly mishandled car service for Mr. Evans' arrival in France in mid-January 2018. Tr. at 209-10. Mr. Lopez denied this was his fault. Tr. at 1232.

Ms. Francese, Mr. Young and Mr. Westcott had an iMessage group. Tr. at 373; CX 22. This document reflects an instant message (IM) exchange occurred on January 18, 2018. Tr. at 377; CX 22<sup>113</sup>. This exchange concerned Mr. Lopez obtaining an arrival slot in Hong Kong 12 or 14 hours different than when Mr. Evans wanted to get there, and they did not understand why he changed it when it had originally been correct. These slots into Hong Kong are very difficult to obtain.<sup>114</sup> Tr. at 210-11; CX 22. Mr. Lopez again denied this was his mistake. Tr. at 1228.

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<sup>113</sup> The handwritten notes on the document are Mr. Westcott's. Tr. at 374.

<sup>114</sup> The information for a refueling order for N889LM in Hong Kong, on February 3, 2018, reflects that the customer to be billed was to PEA, not PAM. CX 36 at 1; see Tr. at 310. PEA, not PAM, is again listed as the customer for fuel order on January 9, 2018, for N889LM while in Shanghai. CX 77 at 3; Tr. at 311-12. PEA took out a \$750 million combined single limit insurance policy on N889LM for the period of November 5, 2018 to November 5, 2021. CX 78. The fact that PEA opted to take out insurance on the aircraft given today's climate of tort liabilities is not unreasonable. *Accord, In the Matter of Air*

According to Mr. Westcott, this was an example of a situation that could have been avoided if the pilots had been kept in the communication loop. Ms. Francese ends the instant messaging with “Please call the handler. I think we need to only have him [Mr. Lopez] print the trip reports. Tr.at 375; CX 22. The slots with the airports are arranged by a handling agency, International Trip Planning Services (ITPS). Tr. at 376. Mr. Westcott took from Ms. Francese’s IM that she wanted the pilots to be more involved with communicating with ITPS about trip planning. Tr. at 376. However, he did not know if Mr. Young or Ms. Francese spoke to Mr. Lopez about this incident. Tr. at 378.

On January 23, 2018, Mr. Westcott and Mr. Young exchanged text messages about no car being available for Mr. Evans upon his arrival. A car reservation been made by Mr. Lopez. Pegasus wanted to become involved in the ordering of cars, but the car they requested did not show up. CX 28; Tr. at 378-79. This was also a previous responsibility of the pilots, but with Mr. Lopez involved, the pilots were no longer in the loop. Tr. at 379. The message exchange ends with Mr. Young indicating that he has a conference call with Ms. Francese and Mr. Mendelson to discuss Mr. Lopez. Tr. at 380; CX 28. It was Mr. Westcott’s understanding that Mr. Lopez’s responsibilities were going to be limited moving forward. He was not going to be doing the slots or ordering cars. However, Mr. Westcott did not know if a conference call actually occurred or whether they actually spoke about these topics with Mr. Lopez. Tr. at 380.

On January 23, 2018, Complainant reported to Mr. Young that “Emilio has a bad attitude and it’s wearing on [Mr. Westcott] and I.” RX 95 at 5. By January 26, 2018, there is correspondence reflecting the tension between the flight crews and Mr. Lopez. Tr. at 221-22; CX 29 at 1-2 [time: 1/26/18 9:11:51 AM to 1/26/18, 11:16:57 AM]; *see also* Tr. at 643. However, Mr. Yoder testified that he did not hear specific complaints from either Ms. Francese or the pilots about Mr. Lopez. He did not perceive any kind of problem and the hearing testimony bothered him. “And I never hear one word. Not one word. Not one. I mean, not one. Just pick up the phone.” Tr. at 1410-12.

#### 9. Reports of Conflicts Allegedly Involving Complainant

It is important to Mr. Yoder that PAM have a positive reputation in the industry. Tr. at 1422-23. At some point he started hearing about incidents involving Complainant. Tr. at 1423. He sensed from the beginning that the flight crew did not want to be team players. He has since learned that the crew was having issues with Mr. Lopez as well. From the beginning, Mr. Yoder heard reports from Mr. Lopez about Mr. Westcott and Complainant talking down to him. Tr. at 1425-26. Everything he heard about the pilots’ conduct was coming from Mr. Lopez. Tr. at 1793. It started as far back as December, with Mr. Lopez complaining about being “their whipping boy.” Tr. at 1426. He was hoping that it would work out. That went on for most of December and the beginning of January, and then Mr. Lopez called about an incident involving Complainant. Tr. at 1427. Mr. Yoder only received adverse reports about Complainant from Mr. Lopez. Tr. at 1427-28. He next recalled Mr. Lopez reporting that the crew was treating ITPS personnel poorly. When asked, Mr. Yoder acknowledged that he did not speak to anybody

on the crew about the need to assimilate and get along with Mr. Lopez. Tr. at 1428. Mr. Yoder was hearing over time that Complainant was being rude to the vendors. Tr. at 1429. Mr. Yoder contacted ITPS to get a feel for how things were going and they commented about how the pilots can be real pushy. He essentially apologized to them and he felt like the matter would blow over. Tr. at 1431-32.

#### *Complainant's contacts with ITPS*

Complainant acknowledged having a conversation, at the direction of Mr. Young, with ITPS about their communications with pilots. Tr. at 472; CX 27 at 2 [1/25/18, 7:26:20 am]. The communications from ITPS were to include the pilots, Mr. Lopez and PAM Operations, and Complainant reported that information back to Mr. Young within a matter of minutes of Mr. Young requesting such. Tr. at 475-78; CX 27 at 2.

Mr. Jon Wells testified by video deposition.<sup>115</sup> Tr. at 1036-72; *see also* CX 55. He was the primary contact at ITPS for the N889LM account during the period from December 1, 2017 to February 2018. Tr. at 1052-53; RX 55 at 17. He is employed by ITPS, which provides international flight service support. He receives trip requests from clients and then arranges ground handling at any location. In 2017, he was a senior operations staff member. However, his position changed to special account manager mid-January 2018. During the period December 1, 2017 to February 2018, he received several calls from Complainant about flight planning requirements.<sup>116</sup> He received similar calls from the other members of N889LM's flight crew. Tr. at 1044-45. It was fairly routine for pilots to interface with ITPS regarding flight plans. Tr. at 1046. He interacted with Mr. Lopez frequently by telephone or email. Tr. at 1057, 1149, 1151.

On at least one occasion, Complainant requested that Mr. Wells not tell Mr. Lopez that he had called to discuss trips or what was discussed.<sup>117</sup> However, Mr. Wells relayed that information to Mr. Lopez. Mr. Lopez similarly testified that he had one conversation with Mr. Wells about Complainant. Tr. at 1152. Mr. Wells could not recall the exact date of the conversation with Complainant, but it was sometime around the second week of January 2018. Tr. at 1054. Mr. Wells also could not recall the details of that conversation other than Complainant had asked him not to tell Mr. Lopez that Complainant had spoken to him. Tr. at 1070-71.

According to Mr. Lopez, Mr. Wells called him because he was not too happy with how he was being spoken to and what Complainant was asking him to do. According to Mr. Lopez, Complainant had asked Mr. Wells to undermine him and take him (Mr. Lopez) out of the picture, and Mr. Wells did not feel right doing what Complainant was asking him to do. Tr. at 1153. Mr.

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<sup>115</sup> The record contains a signed declaration by Mr. Wells, but he testified that he did not draft this declaration. Tr. at 1059.

<sup>116</sup> The flight plan includes information about the equipment on board the aircraft. RX 55 at 22. The pilots tell ITPS the aircraft's capabilities and the ITPS planner use that to generate a flight plan. RX 55 at 26.

<sup>117</sup> Tr. at 1052. *See also* RX 55 at 18.

Lopez reported this information to Mr. Mendelson and Mr. Yoder. Mr. Lopez testified that both thanked him for providing them with that information. Tr. at 1156. Mr. Mendelson said he thought this “was a huge issue” for him because Mr. Lopez was responsible for disseminating all the information back to the client, and that it needed to be fixed right away. Tr. at 1865. Mr. Lopez also reported to Mr. Mendelson that Mr. Westcott and Complainant had been fairly rude on the phone to ITPS personnel. Tr. at 1866. Mr. Mendelson called the ITPS’s COO and he reported to Mr. Mendelson that there was some aggressive behavior happening and that Complainant and Mr. Westcott had instructed ITPS personnel to keep Mr. Lopez out of their day to day business. Tr. at 1866. Mr. Mendelson then reportedly contacted Mr. Young who said that he was going to discuss the matter with the individuals involved. Tr. at 1866.

*Incidents during the third week of January 2018 at Signature during and immediately after N889LM’s maintenance*

During the third week of January 2018, while N889LM was in maintenance in Teterboro,<sup>118</sup> Complainant made videotaped recordings. One concerned the SAFA<sup>119</sup> binder he prepared, which contained documents necessary should the aircraft be subjected to a SAFA ramp inspection.<sup>120</sup> The second video covers an additional binder he prepared that contained miscellaneous items that would not necessarily be part of a SAFA check. Tr. at 279; CX 31; CX 32.<sup>121</sup> Complainant sent the videos via text message to the pilots. Tr. at 510. On the video, Complainant states that there are three blank tabs where LOAs are still missing<sup>122</sup> and confirms that the pilots still had not received Safety Management System (“SMS”) training.<sup>123</sup> Tr. at 281-82, 288, 290-91; CX 31; CX 32. As of the date of the video, the flight crews still did not have online access to the FRAT form, and it was his understanding that the flight crew had not received SMS training.<sup>124</sup> Tr. at 284. Complainant referenced LOA A153 (ADS-B) and said

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<sup>118</sup> N889LM maintenance records reflect work was being performed on it in Teterboro beginning January 23, 2018 and it departed for Shannon, Ireland on January 28, 2018. Tr. at 1604-05; RX 3 at 2; RX 130 at 2. However, Complainant noted that the maintenance records provided the Tribunal did not include any of the work he observed being accomplished or the maintenance forms the pilots completed. Tr. at 1628-32; *see* CX 90.

<sup>119</sup> A SAFA check is the equivalent of a ramp check in the U.S. and is authorized by EASA. Tr. at 279. *See generally*, EASA, *SAFA Ramp Inspections, Guidance material ver. 2.0* (2012), available at <https://www.easa.europa.eu/sites/default/files/dfu/SAFA%20Ramp%20Inspections%20Guidance%20Material%20-%20Version%202.0.pdf>.

<sup>120</sup> However, on cross-examination, Complainant acknowledged that the SAFA check list does not reference LOAs. Tr. at 512.

<sup>121</sup> The Tribunal did not accept the actual videotapes into evidence but accepted the transcript of the videotapes. However, it did observe the videotape at the hearing itself. *See* Tr. at 283, 286, 288.

<sup>122</sup> Complainant clarified on cross-examination that they were not available to the pilots in the aircraft in either hard copy or digital form. Tr. at 511.

<sup>123</sup> On cross-examination, Complainant acknowledged receiving a copy of Pegasus Elite Aviation’s SMS training materials and initial SMS test via email in November 2017. Tr. at 605-07; RX 13, RX 14.

<sup>124</sup> SMS is not required training for domestic Part 91 operations. However, ICAO recommends SMS be incorporated into national safety regulations for operators of non-commercial aircraft over 12,500 pounds maximum takeoff weight, which is the case for a G650. *See* Tr. at 1010-15; 14 C.F.R. Part 5. *See generally*, <https://nbaa.org/flight-department-administration/sms/overview/>.

that during this time he made flights into Europe, Canada and Hong Kong when that authorization was not aboard the aircraft. Tr. at 292. Between Christmas and the New Year's holiday, Complainant and Mr. Young flew N889LM from Toronto, Canada to Jamaica and the LOA was not aboard the aircraft. According to Complainant, it was required to be aboard the aircraft to depart Toronto because ADS-B was required in Canadian air space for new aircraft and for operations in Europe.<sup>125</sup> Tr. at 293, 559-60.

### *Hangar Incident*

During the week of January 21, 2018, Mr. Young was Complainant's co-pilot when they flew the plane to Teterboro to have maintenance performed.<sup>126</sup> Tr. at 349. While the maintenance was being performed, Complainant, but not Mr. Young, stayed at a local hotel. Complainant would go to the airport to check on the progress of the work. In addition, Mr. Westcott, who lived close by, came to the airport every other day<sup>127</sup> while it was in maintenance. Tr. at 351.

During this week, a contractor mechanic for PAM, Mr. Jorge Alva, and an assistant performed maintenance on N889LM while working with Gulfstream mechanics who were there performing warranty work.<sup>128</sup> See also Tr. at 382. Complainant knew Mr. Alva prior to joining PAM. Tr. at 449-50; see generally CX 48. Complainant was 90 percent sure that this was the first time that Mr. Alva had worked on a G650 and learned during that week that Mr. Alva had not been trained on the airplane.<sup>129</sup> Tr. at 452-53. To Mr. Westcott's knowledge, Mr. Alva was

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<sup>125</sup> ADB-S was not required to be installed onto U.S registered aircraft for operations in the U.S. until January 1, 2020. 14 C.F.R. § 91.225. However, per § 91.703, if Canada required it to operate it in its airspace, N889LM could not legally operate in Canadian airspace without it. The Tribunal could not find where Canada actually mandates ADS-B in its airspace, but instead promotes voluntary compliance until it completed additional studies of its use in Canada. See generally, Transport Canada Advisory Circular No. 700-009, *Automatic Dependent Surveillance – Broadcast* (Mar. 11, 2011), available at <https://www.tc.gc.ca/en/services/aviation/reference-centre/advisory-circulars/ac-700-009.html>. Respondents' expert witness, Mr. Charles O'Dell, similarly came to this conclusion. Tr. at 916.

Mr. Charles O'Dell testified as an expert witness. Mr. O'Dell holds ATP and certified flight instructor certificates with multiple type ratings, and has approximately 14,000 total flight hours, with 12,000 being in jets, and has a wide variety of experience in aviation. Tr. at 880-82, 955-60; RX 72; see also *id.* at 885-90. In his business he has been involved in the procurement of Letters of Authorization. Tr. at 884. Following a review of documents he generated at report. RX 73, RX 74; Tr. at 892.

<sup>126</sup> Complainant recalled that it was at the end of a long trip. They flew to Paris, Milan, Newark, and Teterboro. He also recalled Mr. Rich Nunes being the flight attendant. Tr. at 349.

<sup>127</sup> Complainant testified that Mr. Westcott came to the airport every other day, but Mr. Westcott testified that he came every day. Compare Tr. at 350 with 381.

<sup>128</sup> Mr. Alva specifically recalled this incident occurring on January 25, 2018. RX 94 at 8; Mr. Alva's deposition is also located at CX 60.

At the time of the hearing he was PAM's Director of Maintenance, but back in January 2018 he had his own aircraft maintenance company at Teterboro. Tr. at 1168; RX 94.

<sup>129</sup> Mr. Alva acknowledged that although he had experience with Gulfstream planes, at that point he had not been trained on the Gulfstream G650. He received his training on the G650 in July 2018, which was paid for by "Pegasus". RX 94 at 6.

not trained about the maintenance for the G650, and was not familiar with the aircraft.<sup>130</sup> Mr. Alva was relying on other people to do the work. Mr. Alva came with another contractor, and there were two mechanics from Gulfstream Aerospace working on warranty issues. Tr. at 385-86, 454-55. According to Mr. Mendelson, it was extremely important to have a good relationship with Gulfstream.<sup>131</sup>

Complainant observed that the required work was not getting done as quickly as he thought it should be. Tr. at 455-56. He also knew that Mr. Alva was a nice person but did not push people to get work done. Complainant admits that while speaking to Mr. Alva, he told him “sometimes you’ve got to be an asshole” to get the work done. According to Complainant, this occurred during a normal conversation and there was no arguing or raised voices. While Mr. Alva acknowledged Complainant’s comment, he essentially responded that is not his style.<sup>132</sup> Tr. at 455, 461-63, 495. Complainant had no discussions with Mr. Lopez about his conversation with Mr. Alva. Tr. at 464. Mr. Lopez recalls the incident differently.

Mr. Lopez recalled that Mr. Alva and Gulfstream mechanics were doing some work on the aircraft. He decided to go down and check in to make sure everything was going smoothly. When he got downstairs, he noticed Complainant and Mr. Westcott, along with Gulfstream field reps, inside the hangar. Tr. at 1169. Mr. Alva was supervising the work and it sounded like Complainant was talking to Mr. Alva about how quickly the work was getting done. During his conversation with Mr. Alva, Complainant told him: “Jorge, you need to be an asshole to get work done here.” Tr. at 1170-71.<sup>133</sup> He was next to Mr. Alva when this was said<sup>134</sup> and Mr. Alva turned to Mr. Lopez in disbelief of what he just heard and responded, “[Complainant], that’s – that’s not how I do my job. I don’t work that way, you know, I have basically good relationships here in the airport for a reason.”<sup>135</sup> Tr. at 1171, 1178; *see* RX 94 at 11. While the three were together, Mr. Lopez reported telling Complainant: “We can’t -- we -- we don’t -- we don’t talk like that to our vendors. We’re not going to be an asshole to our vendors. And we’re certainly not going to, you know, talk this way to our people.” Tr. at 1178; *see also id* at 1872. Mr. Lopez testified at the hearing that Complainant did not respond to this comment. Tr. at 1179. Mr. Lopez says he was concerned that this kind of behavior would have a negative impact on PAM’s reputation. Tr. at 1179-80.

While Mr. Lopez was in the hangar, a second incident occurred. According to Mr. Lopez, while the interchange between Complainant and Mr. Alva (described above) was

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<sup>130</sup> However, Complainant was aware that Mr. Alva hoped that PAM would send him to be trained on the G650 and that Mr. Young had advised him of such on January 11, 2018. Tr. at 488; RX 92 at 2. Mr. Westcott was asked on cross-examination about an incident were Mr. Alva could not even figure out how to put in an external plug to the aircraft. Tr. at 437-38; *see* RX 92 at 2-3.

<sup>131</sup> Tr. at 1871.

<sup>132</sup> Mr. Alva recalled telling Complainant that “I can’t do that because it’s not in my character and it’s not good for business.” RX 94 at 10.

<sup>133</sup> Mr. Mendelson’s rendition of the events as he heard about them from Mr. Lopez is at Tr. at 1871-75.

<sup>134</sup> Mr. Alva recalled Mr. Lopez being there during the conversation. RX 94 at 10.

<sup>135</sup> Mr. Lopez and Mr. Mendelson describe Mr. Alva as a quiet guy and someone who gets along with everybody. Tr. at 1177, 1875. Mr. Lopez calls him “the mayor” because he knows everybody and he is friends with everybody at the airport. Tr. at 1177.

occurring, Mr. Westcott was walking towards the wing. Mr. Westcott turned around and said: “Hey, Jorge, are these oil cans going to service themselves, too?” Tr. at 1171. Complainant was present and saw that there were four or five oil cans sitting on the ground and no work was being done. Tr. at 456, 493. Mr. Westcott’s concern was there were a long list of things that needed to be accomplished, and because very little was getting done, he told Mr. Alva that he would do it himself. Tr. at 457, 493. Mr. Alva insisted that he would take care of it, but he did not. In Complainant’s mind, that was the end of it, and nobody, including Mr. Alva and Mr. Lopez, said anything to him about it. Tr. at 386-88. Complainant thought that Mr. Alva was “a little miffed” that Mr. Westcott was doing his job. Tr. at 457. Mr. Westcott did not hear anything that day about what Complainant said to Mr. Alva. In Complainant’s mind, it was a non-event and Mr. Westcott just wanted to help and get things done. Tr. at 458, 494. However, according to Mr. Lopez, the combination of comments about his work clearly agitated Mr. Alva because Mr. Alva felt that his Gulfstream peers had heard what had happened. Tr. at 1172.

Following this incident, Mr. Lopez went back upstairs and called Mr. Mendelson and told him what happened. Mr. Lopez was pretty upset because they had all these vendors looking at PAM as a new company. Tr. at 1172-73. Furthermore, Mr. Alva later came up to Mr. Lopez’s office and told him that he cannot work like that and that it was uncalled for.<sup>136</sup> Tr. at 1173. Mr. Lopez told Mr. Alva “to just keep doing what you’re doing” and that he would pass along the incident to Mr. Mendelson and Mr. Yoder, which he did. Tr. at 1173, 1177.

Mr. Mendelson reported that he later contacted Mr. Alva<sup>137</sup>, who was very upset and did not need anyone telling him how to do his job. Tr. at 1875. Mr. Mendelson believed that he sent the email at RX 93<sup>138</sup> after speaking to Mr. Alva regarding the incident. Tr. at 1877; *see id.* at 1175. The purpose of the email was to acknowledge that there was an incident that day and to let the crew know that he was aware of it. Tr. at 1877. Following the incident, Mr. Alva and Complainant spoke. Mr. Alva never considered the interaction with Complainant to be an issue. RX 94 at 12.

Mr. Yoder recalled an incident with Mr. Alva as reported to him by Mr. Lopez. Mr. Lopez reported Complainant telling Mr. Alva “You’ve got to be an asshole”, and that “it was really more the tone and everything that he was talking about.” Tr. at 1435. Mr. Lopez reported to him that Complainant had talked rudely to Mr. Alva. Tr. at 1438. The incident involved the pilots getting upset because the work was not going as quickly as they wanted. Tr. at 1436. In this case, Mr. Alva was a vendor, and Mr. Yoder began to get the impression that the whole department was not working. Tr. at 1436. He recalled the aircraft was to fly within the next day or so. Tr. at 1437. Mr. Yoder called Mr. Alva about the situation and to see how things were going. Mr. Alva “seemed a little bit upset but he wasn’t ‘I can’t believe these people,’ or anything like that.” He told Mr. Alva that it is not the way we do things and that they were

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<sup>136</sup> Later in his testimony, Mr. Lopez said “His exact words were, ‘Dude, I can’t do this.’” Tr. at 1177.

<sup>137</sup> Mr. Alva testified at his deposition that he called Mr. Mendelson the next day about the incident. RX 94 at 12.

<sup>138</sup> The January 25, 2018 email provides: “Jorge. Are they nice to you and your team for your work on the aircraft. We appreciate it and thank you very much for the update. Please let us know if there’s anything you need from our end.” RX 93 at 1.

trying to get this all straightened out. Tr. at 1439. Eventually, PAM hired Mr. Alva as its lead mechanic, and Gulfstream paid for his training on the G650. Tr. at 1440-41.

Following this incident, Mr. Mendelson began to question whether Complainant and Mr. Westcott were a good fit for that account. Mr. Mendelson had previously spoken to Mr. Yoder about his concerns. Tr. at 1877-78.

### *Signature FBO Incident*

It was also during the third week of January 2018 that an incident occurred at the Signature FBO reception area. Mr. Pasquale Raguseo, the Signature FBO manager at Teterboro airport, recalled<sup>139</sup> that, within a couple of months of PAM starting operations, one of the Signature's service representatives reported an incident to him. Mr. Raguseo was told a crew member for PAM was being rude to and berating<sup>140</sup> the Signature service representative. Tr. at 1079-80. He recalled telling Mr. Lopez that something occurred at the counter involving one of his pilots. Mr. Lopez apologized and said that he would look into it for him. Tr. at 1082-83. According to Mr. Raguseo, the Pegasus Elite pilots were being too loud in the lobby so he mentioned it to Mr. Lopez. Mr. Raguseo's memory of the incident is vague, and he doesn't even recall the name of the person that reported the incident to him. Tr. at 1092, 1100. As he described it: "we have situations like this all the time, where a pilot and a customer service rep could be having an issue, or we were late rolling out an airplane. We're not perfect. We do have service issues from time to time. But sometimes, pilots don't necessarily handle the situation professionally as well." Tr. at 1093. There's some kind of incident with a pilot at one of Signature's facilities at Teterboro "probably once a day." Tr. at 1098. Mr. Raguseo does not know who the Signature Customer Service Representative was that was subjected to this conduct, nor did he attempt to learn of their identity once subpoenaed to come testify for the hearing. Tr. at 1105-08.

Mr. Lopez recalls being notified by Mr. Raguseo in the earlier part of January 2018 about an incident that occurred at the front desk involving PAM and one of Signature's customer support representatives. He immediately went to the front desk, and as soon as he walked downstairs, Complainant was there in the vicinity of the front desk. Tr. at 1158-60. He observed that both the front desk employee and Complainant were upset. He asked what happened, and Complainant told him that the airplane was not online. The front desk employee overheard the

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<sup>139</sup> Mr. Raguseo testified by video deposition. *See also* RX 58. He has worked for Signature Flight Support since 2013. In 2017 and 2018, he was the general manager for Teterboro. Tr. at 1073-74. Signature has three locations there: East, West and South. Tr. at 1075. Teterboro is the busiest private airport in the world. Signature provides services for private jets, passengers, and crew members. They are a full service business and part of its work includes the roll out of airplanes for flights. Tr. at 1076-77. He is familiar with PAM, as their offices are located at Signature South. He has known Mr. Lopez since 2005, when they worked together for another company at the Teterboro airport. Tr. at 1083.

<sup>140</sup> However, during cross-examination, Mr. Raguseo did not recall the individual reporting the matter to him as using the word "rude" or "berating" or whether it was just some sort of incident downstairs. Tr. at 1101, 1103. He was left with the impression that there was not a good situation, "definitely some kind of rude or berating behavior. But for – for me to tell you the exact words, sir, I'm sorry, I can't." Tr. at 1103.

comment and said the airplane was technically not late and was actually rolling out now. Tr. at 1162. Complainant turned to her, and in a raised voice, “said to her, in a rude voice, ‘Just get the airplane out.’” Tr. at 1161-62. Mr. Lopez tried to diffuse the situation, and told Complainant “You know, hey, we gotta – we can’t do that.” Tr. at 1162. Although the front desk employees went about their business, he stayed around to monitor the situation. He first testified that he did not see Mr. Westcott or Mr. Coburn in the vicinity. Tr. at 1164. However, during his deposition, he testified that Mr. Westcott and Mr. Alva were both there. Tr. at 1195; RX 64 at 42. He also never mentioned having a confrontation with Complainant or Mr. Westcott.<sup>141, 142</sup> Further, in his May 17, 2018 letter to Mr. Mendelson, Mr. Lopez wrote that he separately reported this incident to Mr. Mendelson and Mr. Yoder, having called Mr. Mendelson first. Tr. at 1165; CX 49. Needless to say, Mr. Lopez and Mr. Westcott have a different recollection of these events and there are several varying accounts of the events that transpired.

Mr. Westcott was the pilot in command of the flight leaving Teterboro following maintenance. Tr. at 382. The aircraft was pulled out to leave on January 27 or 28. Typically, if the flight crew wanted the aircraft to be online, they would call ahead and the FBO would have the plane ready 30 minutes earlier so the aircraft would be waiting for them. On January 27, 2018, Complainant was staying at the hotel. Mr. Westcott and Mr. Dave Coburn, the contract pilot, came in and spent the night prior to their departure the next day. Mr. Coburn was going to be an extra pilot on that trip. Mr. Nunes was the flight attendant. Tr. at 381. Complainant and Mr. Coburn met Mr. Westcott and they remained together until they departed. The flight was scheduled to depart after dinner time. They were going to Long Island, then to Switzerland, and then on to China. Mr. Westcott, Complainant, and Mr. Coburn were present when the aircraft was pulled out of the hangar. Mr. Westcott has no knowledge of Complainant berating a Signature employee at the crew desk but would have said something had he seen it. Tr. at 383. According to Complainant, if he was berating something about the plane not being ready, Mr. Coburn and Mr. Westcott would have been in a position to see it. Tr. at 351-54. Complainant denied ever berating anyone and said he would never do it because “this is a service business.” Tr. at 354. Complainant does not recall Mr. Lopez being at the Signature FBO the day they departed. Tr. at 354-55. Mr. Westcott denied that Mr. Lopez came up to him and Complainant saying he would take care of an issue with Signature’s Customer Service representative. Tr. at

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<sup>141</sup> However, in his unsolicited May 17, 2018 letter to Mr. Mendelson, after he learned that Complainant had initiated proceedings against PAM (Tr. at 1202-03), Mr. Lopez wrote: “While downstairs, I was approached by both [Complainant] and [Mr. Westcott]. I was being reprimanded in front of my -- our vendors on my work. I’m open for constructive criticism, however, I will not tolerate confrontational conversations, especially in front of our vendors who we have such a good relationship with.” Tr. at 1212-13; CX 49.

The Tribunal has great difficulty believing that Mr. Lopez would remember a customer service representative being reprimanded but not that the same persons reprimanding him in front of PAM’s vendor. Further, Mr. Mendelson admitted that Respondents had no documentation of Mr. Lopez making any form of complaint against Complainant or Mr. Westcott prior to their termination of employment. Tr. at 1981.

<sup>142</sup> However, Mr. Lopez seemed to have no difficulty reporting to Mr. Mendelson that Complainant and Mr. Westcott had made threats about Mr. Evans wanting to pull the account if they did not something done. CX 64 at 40-42.

386. Complainant never heard anything from anyone about this allegation until he learned of it during discovery in this case. Tr. at 355.

Mr. Yoder learned of this incident from Mr. Lopez, who told him that Complainant was yelling at the Signature Service Representatives to get the plane out, which was making PAM look bad. Tr. at 1432. Mr. Yoder talked to Mr. Mendelson about what they were going to do. However, he did not reach out to anyone from Signature and he never talked to Complainant about the incident. Tr. at 1435. He believed this was an issue for Mr. Mendelson to handle as the Director of Operations. Tr. at 1432-34. Yet, Mr. Yoder did not verify whether Mr. Mendelson ever talked to Complainant about the incident. Tr. at 1433.

Mr. Mendelson learned of this incident from Mr. Lopez towards the latter part of January. Tr. at 1868. Mr. Lopez reported that there was a lot of rude behavior at the Signature counter and the people at the counter felt upset by it. Because Signature is the largest FBO, it is important that PAM maintain a good relationship with Signature. Therefore, Mr. Mendelson reached out to Mr. Young again. Tr. at 1869. Mr. Young expressed some frustration with the situation about the pilots. Mr. Mendelson believed that Mr. Young stated that he had talked to the pilots about the incident but he could not recall what Mr. Young reported back to him. Tr. at 1870. However, Mr. Young stated that Mr. Mendelson never asked him to address the incident with Complainant or Mr. Westcott. RX 99 at 15.

Regarding Mr. Lopez's May 2018 letter to Mr. Mendelson (CX 49), Complainant strongly disagreed with its contents, stating: "this is fiction". Tr. at 465. As for the allegation about reprimanding Mr. Lopez in front of vendors, Complainant denied this and stated "show me a vendor who saw it." Tr. at 466. Complainant also adamantly denied Mr. Lopez's rendition of events about a Signature Customer agent and an alleged interaction in the hangar he described in his June 18, 2018 declaration (CX 50). Tr. at 467-70. Further, he denied that Mr. Lopez ever approached him about the incidents. Tr. at 470. Similarly, Mr. Westcott adamantly denied the contents of Mr. Lopez's May 17, 2018 letter to Mr. Mendelson. CX 49. He stated: "I just have difficulty finding anything on this page that is even realistic. When I read it, I was shocked. None of this is true." Tr. at 390; *see id.* at 446. He denied participating in or hearing someone reprimand Mr. Lopez in front of vendors. Tr. at 391.

#### 10. February 2018 and Complainant's Termination of Employment

Following this incident, Mr. Yoder and Mr. Mendelson talked with one another and expressed concerns about the culture at PAM given their desire to get off to a good start in the aviation community. Tr. at 1442, 1879-80. Mr. Yoder never spoke to Complainant about the allegations being made against him. Tr. at 1794. However, in his view, Complainant and Mr. Westcott "definitely were abrasive." Tr. at 1795. Mr. Yoder and Mr. Mendelson talked it over quite a few times and decided to let two people go, Mr. Westcott and Complainant. Tr. at 1442. Before doing that, Mr. Yoder specifically told Mr. Mendelson to call Mr. Young, Ms. Francese<sup>143</sup> and Mr. Evans to get their approval. Tr. at 1443, 1798. Mr. Mendelson spoke to Mr.

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<sup>143</sup> Ms. Francese recalled Mr. Mendelson telling her over the telephone that Complainant and Mr. Westcott were going to be terminated. RX 78 at 8.

Evans about the concerns he had with Mr. Westcott and Complainant. Mr. Mendelson testified that Mr. Evans agreed that the two pilots were no longer the right fit. Tr. at 1882. However, Mr. Evans learned from either someone at PAM or one of his assistants that PAM had made the decision to terminate the pilots. RX 63 at 7. One of the reasons he was given for their firing was the pilots' rudeness and inappropriateness towards a PAM vendor. RX 63 at 8. In his opinion, PAM was not even under an obligation to inform him of the action they were taking. RX 63 at 7. Mr. Mendelson next recalled contacting Mr. Young, mentioning that he spoke to Mr. Evans and that they believe that it was the right thing to do going forward. Tr. at 1883. Mr. Mendelson then contacted Ms. Thomas about getting Mr. Westcott and Complainant on the telephone with him. Tr. at 1883. Mr. Mendelson reported back to Mr. Yoder that he had talked to all three and they agreed to terminate Complainant's and Mr. Westcott's employment. Yet, prior to terminating their employment, no one in management ever called and asked Complainant or Mr. Westcott for their side of the story. Tr. at 1445, 1799, 1885. As Mr. Yoder stated, "that's a pretty crappy situation in my book." Tr. at 1445. However, he maintained that change needed to be made for the good of the business. Tr. at 1446. Given that Complainant and Mr. Westcott were on a trip, they waited until they were home to notify them. Tr. at 1444.

On February 8, 2018, Complainant again sent an email to Mr. Mendelson and Mr. Yoder inquiring about the progress of receiving the four LOAs (CPDLC, ADS-B, LPV and MEL) when they had been told by Mr. Mendelson that they had been approved two weeks prior. In this email, he also inquired into the ongoing issue about the flight crews' 401(k) benefits. Tr. at 227-28; CX 37.<sup>144</sup> Mr. Mendelson responded and requested a telephone call with Complainant the following day "to discuss a few things from the last trip." CX 38. The parties agreed to a group meeting. However, the next morning, Mr. Mendelson wrote the following to Complainant: "I need to speak to you off line." CX 38; Tr. at 228-29. When Mr. Mendelson called Complainant at around 10 a.m., he had Ms. Tina Thomas, a Human Resources employee from PEA, were on the line.<sup>145</sup> It was during this call that Mr. Mendelson terminated Complainant's employment. Tr. at 229. When Complainant asked for a reason for his termination, Mr. Mendelson would not answer the question other than saying "I can't really say anything" while Ms. Thomas simple explained that "It was a business decision." Tr. at 230; *see* RX 80 at 9. Complainant inquired about a severance and Ms. Thomas directed him to Mr. Mendelson, who did not respond to Complainant's inquiry. Tr. at 230-31. Respondent never provided Complainant with written notification of his termination. Tr. at 233.

At the time of Complainant's termination, there were two LOAs that had been requested but had yet to be approved (the CPDLC and ADS-B). Tr. at 1894.

On February 25, 2018, Complainant filed two claims for unemployment, one in Oregon and one in New Jersey. He identified the employer on both applications as Pegasus Elite Aircraft. CX 40 at 2 to 8. On March 6, 2018, Ms. Thomas, PEA's human resource employee, wrote to the State of New Jersey unemployment office. In this letter, she acknowledged that

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<sup>144</sup> CX 37 included typed comments Complainant made on this copy of emails. The Tribunal struck them from the exhibit and lined them out on the exhibit itself. *See* Tr. at 225-27.

<sup>145</sup> In December 2018, Ms. Thomas left PEA and became a PAM employee. Tr. at 1752. *See also* RX 80.

Complainant worked for Pegasus Elite Aviation in the State of Oregon and had filed a claim for benefits in Oregon. CX 40-1. On March 9, 2018, Ms. Thomas also responded to Complainant's unemployment application in the State of Oregon. She identified herself as the HR manager. Her explanation for Complainant's termination was "Not a good fit; did not align with core business objectives." *Id.* at 6 and 7; RX 8 at 11. She also noted that the basis for his termination did not include that he violated company policy. CX 40 at 7. *See also*, Tr. at 338-39.

Mr. Westcott received a call from Mr. Mendelson at 5:50 p.m. on February 9, 2018. Mr. Mendelson told him, "the decision had been made, and that his services were no longer required. Period." The reason given was it was a business decision. Tr. at 391.

Following Complainant's and Mr. Westcott's termination, Mr. Lopez has continued to work with Ms. Francese. Despite the early hiccups, he is now confident that PAM is finally where they need to be to run the account. Tr. at 1183.

PAM immediately hired two replacement pilots after the termination of Mr. Westcott and Complainant. Tr. at 1448. Mr. Yoder noticed a dramatic improvement in synergy after this move. Tr. at 1451, 1797.

### III. ISSUES<sup>146</sup>

- Is the Complainant and/or Respondent covered under the Act?
- Did the Complainant engage in protected activity?
- 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?

#### A. Summary of Complainant's Position

Complainant maintains that he raised repeated concerns regarding the missing LOAs. He believed that operating the aircraft without them violated FAA rules, regulations and orders. Compl. Br. at 3-4. In response, PAM terminated his employment. Compl. Br. at 5. Complainant maintains that PAM is an air carrier or contractor covered under the Act and that PAM made binding judicial admissions that it was an air carrier. Compl. Br. at 7. He also maintains that PAM held itself out as an air carrier and is also a contractor of an air carrier. Compl. Br. at 10 – 15. He asserts that Henry Air II, LLC, is liable as an air carrier or joint employer. Compl. Br. at 16-24. Complainant claims that he reasonably believed that the aircraft missing LOAs and SMS violated 14 C.F.R. § 91.703(a),<sup>147</sup> and his protected conduct related to violations of FAA orders, rules or regulations. Compl. Br. at 27-32. He notes that Respondent concedes that his termination of employment was an adverse employment action. Tr. at 32. Finally, he maintains that his protected activity was a contributing factor to his termination, citing to its temporal proximity, and claims that the alleged reason for his termination is both

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<sup>146</sup> Respondent's conceded at the hearing that its termination of Complainant's employment was an adverse action. Tr. at 18-19.

<sup>147</sup> Compl. Br. at 25-27.

false and pretextual. Compl. Br. at 33-44. Complainant posits that Respondents have failed to prove that he would have been terminated in the absence of his protected activity. Compl. Br. at 45. For damages, he seeks reinstatement (or in the alternative front pay), backpay amounting to \$182,805, interest on his backpay, reimbursement or payment for the cost of him recertifying for the G650 aircraft, and \$300,000 in compensatory damages. Compl. Br. at 45-50.

In his reply brief, Complainant reiterated that PAM is an air carrier, made binding judicial admissions that it is an air carrier, and also held itself out as an air carrier. Reply Br. at 1-6. He continued to assert that Henry Air II, LLC, is a liable air carrier and joint employer. Reply. Br. at 6-9. Complainant reiterates that he has established his prima facie case and Respondent is unable to rebut it by clear and convincing evidence. Reply Br. at 9-15. Complainant also attempts to rebut Respondent's claim that he failed to mitigate his damages. Reply Br. at 16-19.

#### B. Summary of Respondent's Position

Respondents asserts that Complainant asking about the status of discretionary LOAs had nothing to do with his termination. Complainant never reported to anyone that the aircraft could not be operated lawfully or that he himself had operated it unlawfully. Further, Respondent was affirmatively requesting LOAs because they benefit from having them. Respondents maintain that Complainant did not have a reasonable belief that any violation occurred. In fact, under the Federal Aviation Regulations, he had the ultimate authority on how to conduct any given flight. Any violations that occurred during flight would therefore be his responsibility, not theirs. Resp. Br. at 1-10. Respondents argue that they are not subject to the Act because none of them are air carriers, *i.e.*, they do not transport passengers or property for compensation. Resp. Br. at 15-16. Additionally, Respondents argue they are not a contractor of an air carrier. Resp. Br. at 24-28. Respondents refute that there was a judicial admission that they are an air carrier. Resp. Br. at 17-24. Notwithstanding the above, Respondents assert that Complainant otherwise failed to establish his *prima facie* case. Resp. Br. at 29-46. Respondents reject the notion that they are joint employers. Resp. Br. at 46. In the event the Tribunal finds for Complainant, Respondents argue that Complainant failed to mitigate his damages and did not produce sufficient evidence to warrant an award of damages for emotional distress, or harm to his reputation, or other remedies. Resp. Br. at 47-49.

#### IV. CONCLUSIONS OF 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 protected activity; (2) Respondent took an 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 Complainant meets this burden of proof, the burden 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. Credibility<sup>148</sup>

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other evidence of record. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See *Fraday v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec’y Oct. 23, 1995).

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence.<sup>149</sup> *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altomose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

The Tribunal found Complainant’s rendition of facts surrounding his efforts to obtain the LOAs for N889LM, and the events surrounding the incidents at Signature in January 2018, to be generally credible. The record before the Tribunal supports Complainant’s accounts.<sup>150</sup> The Tribunal observed his demeanor during the hearing and found that he conducted himself in a professional manner.

The Tribunal found Mr. Westcott somewhat credible. During the hearing, the Tribunal observed his demeanor and found him to be a bit defensive and abrasive. This gives credence to Respondents concerns about his personal interactions.

The Tribunal found Mr. O’Dell and Mr. Huffman equally credible. The Tribunal found no reason to give more weight to the opinion of one expert over the other.

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<sup>148</sup> As the Complainant has not prevailed in his claim, the Tribunal need not address the credibility of witnesses offered on the issue of damages.

<sup>149</sup> Based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence.

<sup>150</sup> This is not to say that the record proves Complainant’s claim but rather that the record is not in stark contrast to Complainant’s testimony on these facts.

The Tribunal found Mr. Lopez incredible and therefore gives his version of events very little weight. The Tribunal found Mr. Lopez to be more interested in self-promoting his own actions rather than providing an accurate account of the events in question. He provided the information to Mr. Mendelson and Mr. Yoder that ultimately led to Complainant's termination. Instead of directly addressing any issues with Complainant, he ran to Mr. Mendelson to report matters in a light most favorable to himself. The Tribunal was left with the impression that any action the pilots did that remotely reflected poorly upon him was spun and deflected back to the pilots.<sup>151</sup> The Tribunal was struck by how, when questioned, he denied any responsibility for any of the logistics that went awry during the early months of PAM's contract with Mr. Evans. The Tribunal has no doubt that logistic hiccups occurred given the operational tempo of this aircraft's use. The Tribunal found it curious that the point man for coordinating those logistics presented himself as impervious to fault. What also struck the Tribunal as odd was the total lack of contemporaneous documentation by Mr. Lopez about any of the alleged rude and inappropriate behavior by Complainant or Mr. Westcott. Complainant and Mr. Westcott either denied these events ever happening or explained that they did not occur in the manner described by Mr. Lopez.<sup>152</sup> Juxtapose this with the numerous emails and IM messages in the record where Complainant's actions are contemporaneously detailed. And most telling is the unsolicited memorandum he prepared after Complainant and Mr. Westcott were terminated and had initiated proceedings against PAM. When reviewing the record as a whole, and considering the testimony of the actual witnesses to alleged events, the Tribunal has the impression that Mr. Lopez knew that his logistical hiccups were becoming a problem and to protect himself he had to find scapegoats to deflect his shortcomings. Mr. Mendelson's management style, or rather lack of management, allowed this to occur.

The Tribunal finds Mr. Mendelson's testimony less credible and gives it little weight. The Tribunal also finds the whole manner in which Complainant and Mr. Westcott were terminated to be troubling. To not even inquire, or give an employee the opportunity to defend themselves against allegations by another employee is frankly poor form. Fortunately for Respondents, this Tribunal does not evaluate a case based on demonstrated management skills.

The Tribunal did not find the deposition testimony of Ms. Francese very credible.<sup>153</sup> She testified about Mr. Lopez in glowing terms and that there were "growing pains."<sup>154</sup> However, her contemporaneous instant messages do not paint as rosy a picture (CX 22). Similarly, the testimony reflects that she was not as enamored with Mr. Lopez during the period at issue as she claimed in her deposition. *See* Tr. at 212, 220, 371, 374-76, 643; CX 29.

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<sup>151</sup> This view is based not only upon Mr. Lopez's testimony but the undersigned's own observation of his demeanor while testifying. *See Svedsen v. Air Methods*, ARB No. 03-074, ALJ No. 2002-AIR-16 (Aug. 26, 2004).

<sup>152</sup> The Tribunal also notes that Mr. Young testified at deposition that he had never seen Complainant display any rude or unprofessional behavior, and that Complainant had a very good reputation in the pilot community. CX 62 at 21-22.

<sup>153</sup> *See Riddell v. CSX Transportation, Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 13 n. 3 (May 19, 2020)

<sup>154</sup> *See, e.g.*, CX 61 at 16-17.

The Tribunal found the deposition testimony of Mr. Evans credible. His understanding about how matters are handled at levels below him are not inconsistent with the position he holds in a company with global reach.

The Tribunal found Mr. Prero's testimony about his involvement with the LOA process and with the issues surrounding PEA's website to be credible. Mr. Prero, who had limited interest or liability in these proceedings, provided credible testimony about the inner workings of PAM and his interface with not only Mr. Mendelson and Mr. Yoder, but with the FAA and Mr. Loeb. The Tribunal found him particularly credible concerning his testimony about the LOAs.

The Tribunal found Mr. Yoder credible. The Tribunal observed the demeanor of Mr. Yoder throughout the proceedings. He came across as a person who realized that his company had treated Complainant unfairly, and it had. As he listened to the testimony, the Tribunal observed a noticeable change in his view on how the matter was handled. The Tribunal also found his actual testimony credible. He would address concerns in a straightforward way and would admit when things were not done in the most professional manner by his employees or its management. The Tribunal found his frustration about not getting the full story of the events in question to be refreshing and convincing.

#### B. Complainant's Preponderance of the Evidence Case

Whether the Respondents are subject to the Act is an issue of coverage under the Act. This issue is not jurisdictional in nature, as the Tribunal clearly has jurisdiction to hear the complaint because the parties are properly before it, the proceeding is of a kind or class which it is authorized to adjudicate, and the claim is not obviously frivolous. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053 (Aug. 31, 2000). The question of whether Respondent is an air carrier and thus covered under the Act does not affect jurisdiction. *See E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997). The proper question then is whether Respondents are subject to the Act. A finding that the Respondents are not an air carrier or contractor of an air carrier would be fatal to the complaint.

##### 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). AIR 21 proscribes retaliation by an air carrier against an employee when the employee provides information to his employer or to the government concerning 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. 49 U.S.C. § 42121(a). An employee seeking relief under AIR 21 must show that his employer is an "air carrier" within the meaning of the Act. The regulations implementing AIR 21 state that the definition of air carrier under the 49 U.S.C. § 40101(a)(2) is applicable to AIR 21. *See* 68 Fed. Reg. 14101 (March 21, 2003).

“**Air carrier**” is defined in 49 U.S.C. § 40102(a)(2) as “a citizen of the United States undertaking by any means, directly or indirectly, to provide **air transportation**.”<sup>155</sup> (Emphasis added.) “**Air transportation**,” is in turn defined as “foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.”<sup>156</sup> 49 U.S.C. § 40102(a)(5) (emphasis added). “**Foreign air transportation**” means “the transportation of passengers or property by aircraft *as a common carrier for compensation*, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.” 49 U.S.C. § 40102(a)(23). Similarly, “**Interstate air transportation**” means “the transportation of passengers or property by aircraft *as a common carrier for compensation*, or the transportation of mail by aircraft, between a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States...when any part of the transportation is by aircraft.” 49 U.S.C. § 40102(a)(25).<sup>157</sup> Therefore, to be an air carrier subject to the Act, a company must be engaged in common carriage using an aircraft.

Furthermore, coverage under the Act is not limited to “air carriers” — contractors or subcontractors of air carriers are also potentially liable. *See* 29 C.F.R. § 1979.101. According to the regulations, the term “**Contractor**” means “a company that performs safety-sensitive functions by contract *for an air carrier*.” 29 C.F.R. § 1979.101 (emphasis added). In the Final Rule implementing this definition, OSHA agreed with a submitter’s comment that the term “‘safety-sensitive functions’ includes security-related activities.” *See* Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 FED. REG. 14100, 14101–02 (Mar. 21, 2003). Thus, the Act may cover Respondents if the preponderant evidence shows that they performed safety or security functions for an air carrier.

The evidence establishes that none of the Respondents hold an air carrier operating certificate. Based upon the evidence presented at the hearing, whether any of these entities hold or should hold an air carrier operating certificate is only part of the issue. The question this Tribunal confronts is whether N889LM was being operated in common carriage. If so, those operating it are an air carrier as defined by the Act.<sup>158</sup>

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<sup>155</sup> Respondents do not argue that they are not a citizen of the United States, and the evidence of record establishes that Respondents all qualify as a “citizen of the United States” as the Act defines that phrase.

<sup>156</sup> Complainant did not allege or offer evidence that Respondents transported mail.

<sup>157</sup> The definition is actually more expansive but those terms are not applicable in this case. *See* 49 U.S.C. § 40102(a)(25)(A)(ii)-(iv).

<sup>158</sup> Anyone piloting as an air carrier must have an air carrier operating certificate and operate only in compliance with those terms. 49 U.S.C. § 44711(a)(4); *see* 14 C.F.R. §§ 119.5(a), (g) and (l). However, there are circumstances where a business conducting private carriage utilizing large aircraft can also be required to have an operating certificate. *See* 14 C.F.R. § 119.5(c).

Part 125 applies to aircraft with a seating capacity of 20 or more passengers or a maximum payload capacity of 6,000 pounds or more. The G650ER can meet this requirement because its maximum payload capacity can be 6,500 pounds. *See* Type Certificate Data Sheet T00015AT, *supra*. 14 C.F.R. 119.23(a) addresses operations of such aircraft engaged in passenger-carrying operations when common carriage is not involved and provides that, unless deviation authority is issued, an operator must comply with the certification and operations specifications of part 125. *See* also 14 C.F.R. § 119.5(c). If an operator had

PAM, Henry Air II, LLC, and Henry Air Trust are citizens of the United States. Mr. Evans is not a U.S. citizen, nor is he a named party in this litigation. There is evidence that N889LM transported passengers between states and internationally. What is also clear is, while PAM coordinated the logistics necessary to conduct the flights, it was Mr. Evans as the leaseholder that had ultimate operational control of the aircraft. Mr. Evans controlled the aircraft, subject only to pilot override for safety reasons because of their authority under 14 C.F.R. § 91.3.<sup>159</sup> The Tribunal further recognizes that PAM's management attempted to leverage its association with PEA to make it appear that it was far more sophisticated and accomplished than it actually was. In the Tribunal's view, it was PAM management's clumsy attempts to aggrandize its company using PEA's website and resources that created the question presented as to whether PAM operated as a common carrier at times relevant to the current litigation.

The focus here is the meaning of the term "common carrier" when describing "foreign air transportation" and "interstate air transportation." Neither the Act nor the FAA Act define the phrase "common carrier."<sup>160</sup> It is a fact specific determination.<sup>161</sup> Whether an entity is considered a common carrier through use of aircraft hinges upon whether it holds itself out to the public or to a definable segment of the public as being willing to transport for hire, indiscriminately. *Las Vegas Hacienda, Inc. v. Civil Aeronautics Bd.*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962); *Thibodeaux v. Exec. Jet Int'l, Inc.*, 328 F.3d 742, 750 (5th Cir. 2003)(quoting *Woolsey v. Nat'l Trans. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993); *Valdivieso*

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such deviation authority, it would be reflected in A005 or A125, albeit an LOA or an OpSpec. The Tribunal has been provided no information that Respondents received such a deviation. In fact, all indications are that, as of May 17, 2018, at least Henry Air II Trust did not have LOA A005 or A125. See CX 66 (Summary of Authorizations). The Tribunal understands that LOAs were not issued to Henry Air II, LLC, PAM, or Mr. Evans. Absent being granted a deviation as set forth in 14 C.F.R. § 125.1(b)(5), even when conducting private carriage, an aircraft such as the G650ER may have to comply with the requirements of Part 125, not just Part 91.

The reason why the answer is not clear is because it depends on information from the aircraft itself. The G650ER can be subject to Part 125 because it has a theoretical maximum payload capacity of 6,500 pounds. See Type Certificate Data Sheet T00015AT, *supra*. However, the Type Certificate Data sheet indicates that depending on how the aircraft was configured using Gulfstream Aircraft Service Changes, the maximum weight can be reduced to 5,950 pounds. In such a case, Part 125 would not apply. The record does not inform the Tribunal of the actual configuration of this aircraft.

Therefore, separate and apart from other issues in this case, the Tribunal questions whether *any* of the flights involved in this case could have been conducted legally without an operating certificate. See AC 125-1A, *Operations of Large Airplanes Subject to 14 CFR Part 125* (Sept. 15, 2016). Fortunately, whether this aircraft has been operated in private carriage without a proper operating certificate is a matter for the FAA to resolve and not this Tribunal.

<sup>159</sup> The record makes it abundantly clear that Respondents' are United States citizens. Mr. Evans' citizenship as a Canadian does not nullify this fact.

<sup>160</sup> See 49 U.S.C. § 40102(a)(23), (25) and (27). However, the FAA regulations define Noncommon carriage as "aircraft operation for compensation or hire that does not involve a holding out to others." 14 C.F.R. § 110.1

<sup>161</sup> This position is supported by the FAA regulations concerning navigation of foreign civil aircraft within the United States wherein it provides: "the Department will determine whether particular flights for which a permit is sought will be in common carriage, and therefore in air transportation, based on all the facts and circumstances surrounding the applicant's entire operations." 14 C.F.R. § 375.40.

*v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir. 2002). Under the Federal Aviation Regulations, operations that constitute common carriage are required to hold air carrier certificates and conduct their operations under Parts 121 or 135. See 14 C.F.R. § 119.1. To address this issue, the Federal Aviation Administration published Advisory Circular (AC) 120-12A, *Private Carriage versus Common Carriage of Persons or Property* (Apr. 24, 1986).<sup>162</sup> The purpose of this circular is to provide “general guidelines for determining whether current or proposed transportation operations by air constitute private or common carriage.” *Id.* at 1.

It is obvious to this Tribunal that the complex agreements involved in this case were designed to insulate the various entities from liability and were drafted with an eye towards operating under the less stringent requirements of 14 C.F.R. Part 91. The FAA safety standards for common carriers require compliance with a higher level of pilot training and certification, aircraft maintenance procedures, and operational safety rules than those required of flights conducted under part 91 general operating rules. Part 91 specifically excludes common carriers from its coverage. In short, Part 91 contains the FAA’s baseline regulations for the operation of any aircraft in the United States. 14 C.F.R. §§ 91.1 and 91.101. The rationale for this difference is that the general public has a right to expect a higher level of safety from airlines that solicit their business than from a person or entity that just operates an aircraft for its own needs. Part 119 of the FAA’s regulations subjects flights operating as air carriers to safety requirements beyond what Part 91 requires. See 14 C.F.R. § 119.1. From the documents presented, the Parties’ contract agreements say that the operations are to be conducted under Part 91. However, the mere fact that the Respondents sign a contract to operate a particular aircraft exclusively for Mr. Evans or for Henry Air II, LLC does not classify such operations as private.<sup>163</sup> “If the FAA examined operations in this manner, looking only at operations for each individual customer, every operator could claim that operations for each customer are private carriage.”<sup>164</sup> Analysis of the totality of the evidence determines which rules apply.

Complainant hinges much of his argument that Respondent PAM held itself out as common carrier by citing to PEA’s website.<sup>165</sup> It is a violation of the Federal Aviation Regulations for a party to advertise that it performs an operation that requires an air carrier

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<sup>162</sup> Complainant also cites to similar provisions of FAA Order 8900.1, vol. 2, chap. 2 on the issue of common carriage. Compl. Br. at 11-12.

<sup>163</sup> As previously stated, it is not how a document categorizes an airplane that determines what parts of the FARs apply. Rather, it is how the aircraft is actually operated on any given flight that dictates what rules apply.

<sup>164</sup> FAA Interpretation to Howard Turner (Apr. 13, 2013) at 3, available at [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/regulations/interpretations/Data/interps/2005/Howard%20Turner%20-%20\(2005\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2005/Howard%20Turner%20-%20(2005)%20Legal%20Interpretation.pdf).

<sup>165</sup> Complainant attempts to make much ado about administrative intermingling that occurred between PEA and PAM, such as, *inter alia*, the use of the same HR personnel, fuel contracts, and payroll services. Compl. Br. at 14-15. The Tribunal is unpersuaded that the intertwining of functions between an established company and a nascent company presents is anything more than Mr. Prero trying to promote and profit from his 1/3 interest in PAM.

certificate without actually holding one.<sup>166</sup> 14 C.F.R. 119.5(k). “Holding out” is accomplished through “the actions of agents, agencies, or salesman, who procure passenger traffic from the general public and collect them into groups to be carried by the operator.” AC 120-12A, para. 4b. In other words, “holding out” means “offering air transportation to the general public in the commercial market.” *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430, 434 (9th Cir. 1962), *cert. denied*, 369 U.S. 885 (1962). Even a reputation to serve the general public is sufficient to constitute an offer to carry all customers. “The fact that the holding out generates little success is of no consequence.” AC 120-12A, at para 4c; *Flytenow, Inc. v. FAA*, 808 F.3d 882, 887 (D.C. Cir. 2015), *cert. denied*, 137 S.Ct. 618 (2017)

*PAM IS AN AIR CARRIER UNDER THE ACT, BUT HENRY II, LLC AND HENRY AIR II TRUST ARE NOT AIR CARRIERS UNDER THE ACT.*

*PAM is an air carrier*

PAM uses PEA’s website to hold itself out for air transportation. CX 81. PAM admits the purpose of the web site is advertising, but also claims that the website contains inaccurate representations of its true business. CX 81 clearly communicates to the reader of the website that they engage in charter operations:

We hold an FAA 135 Certificate providing World Wide Operations with an average fleet utilization of over 6,000 hours, and for over a decade have demonstrated sustained excellence in flight operations across all aspects of PAM’s operations. These are just some of our many qualifications to manage, operate, and maintain business jets in the private or commercial market.<sup>167</sup>

It is undisputed that the statement that PAM holds an FAA 135 certificate is false. Mr. Mendelson admitted as much. Tr. at 1903. This is problematic for PAM because this public representation on the internet infers its willingness to conduct such operations. Moreover, this is not the only representation concerning PAM’s holding of a Part 135 certificate. The website also represents that PAM’s “VIP part 91 and 135 charter operations are based in the largest 65,000 square foot facility in Van Nuys, CA.”<sup>168</sup> CX 81 at 1. It does not matter, as claimed by Respondents, that these were erroneous entries by the web designers. PAM’s management is responsible for the contents of its advertising, including content that is misleading. Importantly, the representation must be viewed from the point of view of the reader of the advertisement.<sup>169</sup>

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<sup>166</sup> See AC 91-37B, *Truth in Leasing* (Feb. 10, 2016), at para. 3.3 (“No one may legally offer charter air service for compensation or hire unless he or she has a valid air carrier or operating certificate issued by the FAA.”), quoted by Compl. Br. at 12.

<sup>167</sup> CX 81 at 4.

<sup>168</sup> See also Tr. at 1082 which references another website representation about PAM holding a Part 135 certificate which was not captured on CX 81, but was shown to the Tribunal during the hearing itself. Compl. Br. at 13.

<sup>169</sup> Respondent notes that the website referenced was not publically available until April 2018. Resp. Br. at 21 n. 29. If this were the only evidence of PAM holding itself out as an air carrier, this would constitute persuasive evidence because the holding out would not have occurred until after Mr. Evans had entered into the contract with PAM for its services. However, the evidence of PAM holding itself out as a

A reasonable member of the public would not know of the alleged web designer's error. Furthermore, there is evidence that PAM held itself out at least to Alibaba, the employer of Henry Air II, LLC,<sup>170</sup> as a charter operator separate and apart from the website. This document tends to weigh against PAM's assertion that the website representation was in error. CX 131 at Bates Stamp DFC 001349. Next, the FAA has broadly construed the type of entities that must hold an air carrier certificate. The FAA's General Counsel's office has issued scores of interpretations that address whether entities have held themselves out for common carriage, which would therefore require an air carrier operating certificate, or use of an approved exception.<sup>171</sup> By virtue of the representations contained on PEA's website, and the evidence that PAM represented itself to a customer as a charter operator (JX 7), the Tribunal finds that PAM held itself out for common carriage. Because of this holding out for common carriage, it was required to obtain an air carrier operating certificate.

Finally, there must be a determination about what rules each individual flight operated under. Here, Complainant has presented no evidence that N889LM was ever used to conduct flights other than for Mr. Evans.<sup>172</sup> He has presented no evidence that any of the flights he actually conducted were anything other than Part 91 flights. There is evidence to suggest that the flights included members of his staff, and occasionally his wife and business associates. But that does not establish that the given flights were conducted or required to be conducted under Part 135. Air carriers routinely conduct flights under Part 91, with the most common examples being training, post-maintenance or repositioning flights.<sup>173</sup> While Part 91 flights by Part 135 operators are likely covered under the Act because the very purpose of those types of flights are to facilitate ongoing air carrier operations, that is not the case here. Here, it is undisputed that every N889LM flight was conducted as a Part 91 flight. There is little, if any, evidence linking PAM's bumbling efforts to use PEA's website with the actual operation of N889LM.<sup>174</sup> Even fellow pilots acknowledged that they were all Part 91 flights. Thus, although there was a holding out by PAM for air transportation on PEA's website, and therefore it should have held an air

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charter operator to others (such as Alibaba) prior to this date indicates that the representations on the website were merely a codification of what was being orally represented to others prior to that time. This is consistent with this nascent company's puffing of its business facilities and aircraft management experience in this highly competitive market.

<sup>170</sup> JX 7.

<sup>171</sup>

*See*

[https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/regulations/Interpretations/?year=all&q=holding+out&bSubmit=Search](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/Interpretations/?year=all&q=holding+out&bSubmit=Search).

<sup>172</sup> Although the lease Mr. Evans had for the aircraft was a non-exclusive one, no evidence has been presented that it was used by anyone other than Mr. Evans. Furthermore, given the undisputed testimony of the global nature of Mr. Evans' travels and frequency of his aircraft usage, one would be hard pressed to find time where anyone other than Mr. Evans used the aircraft.

<sup>173</sup> *See CSI Aviation Servs. vs. U.S. D.O.T.*, 637 F.3d 408, 415 (D.C.C.A. 2011) ("The more obvious reading of the statute, however, is that a company can segregate its operations, acting sometimes 'as a common carrier' and sometimes not. Indeed, DOT itself has taken this approach in the past.").

<sup>174</sup> Respondent's counsel correctly notes the website separately referenced PEA and PAM. Furthermore, when one sought a quote for a charter flight, the reader was directed to the PEA portion of the website only. Resp. Br. at 22 citing Tr. at 1720-22, 1815-16; JX 14. This adds credence to PAM's contention that problems with the accuracy of the website were unintentional.

carrier certificate for those operations to which it so held itself out, PAM's holding out on PEA's website that it would conduct common carriage had no impact on the Part 91 (private carriage) operations that were conducted with N889LM. In sum, but for PAM's advertising on the PEA's website, the Tribunal would find that it was not an air carrier. Though PAM was an air carrier based on the representations made on the website, the Tribunal finds that PAM was not acting as an air carrier when it was conducting management functions for N889LM. However, the Act does not require that an air carrier conduct itself as an air carrier to be subject to the Act.<sup>175</sup> The ARB has broadly construed what constitutes an "air carrier" for purposes of the Act. See *Cobb v. FedEx Corp. Svcs, Inc.*, ARB Case No. 12-052, ALJ Case No. 2010-AIR-024 (Dec. 13, 2013). Here, PAM actively holds out a transportation service to the public via PEA's website. It hires the pilots and coordinates scheduling, maintenance and a variety of services. At a minimum, it is indirectly providing air carrier services (but for it holding itself out on the website, this would be a closer question). However, the Tribunal finds this situation similar to *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ Case No. 2006-AIR-002 (June 30, 2009) and *Cobb, supra*.<sup>176</sup> While this is an expansive reading of the Act,<sup>177</sup> it is also consistent with Congress's intent that the definition of "air carrier" be expansively construed. See *Cobb v. FedEx Corp. Svcs, Inc.*, ARB Case No. 12-052, slip op. at 10 and 13 (Dec. 13, 2013). Accordingly, the Tribunal finds that Respondent PAM is subject to the Act because it held itself out as holding a Part 135 air carrier certificate.<sup>178</sup>

*Neither Henry Air II LLC nor Henry Air II Trust are air carriers as defined by the Act.*

Complainant argues that Henry Air II, LLC is not only an air carrier but also a contractor of an air carrier because it provides a safety sensitive function for an air carrier, specifically Henry Air Trust. Compl. Br. at 15. However, there is no evidence that Henry Air Trust (vs. Henry Air II Trust) had any involvement in the operation of N889LM. At most, there was an error in identifying Henry Air Trust in the initial paperwork establishing the complicated structure on how N889LM was to be utilized. Further, Complainant asserts that Henry Air II Trust and Henry Air II LLC are air carriers. Complainant argues that because they did not provide private carriage as set forth in Part 91, they therefore conducted common carriage, which in turn makes them air carriers under the Act. Compl. Br. at 16. This portion of Complainant's

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<sup>175</sup> For example, the Tribunal notes that indirect air carriers and those without any direct role in air carriers operations are subject to the Act. See, e.g., *Fullington v. AVSEC Svcs, LLC*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 7 (Oct. 26, 2005)(a janitorial company with contracts for cleaning services with an air carrier is a covered employer under the Act).

<sup>176</sup> Similar to *Cobb* and *Evans*, PAM held itself out to provide air transportation. As discussed, PAM made public representations on its website that would lead a reasonable person to believe that it provided air transportation. PAM stated that it has worldwide positions and about 6,000 hours in fleet utilization. This representation at least infers that PAM is using multiple aircraft to conduct global operations.

<sup>177</sup> The Tribunal recognizes that a person operating as common carriage in a certain field may be a provider of transportation for hire in other fields as long as they can "show that private carriage is clearly distinguishable from its common carriage business and outside the scope of its holding out." AC 120-12A, at ¶ 4h. *CSI Aviation Svcs. vs. U.S. D.O.T.*, 637 F.3d at 415-16. However, the Tribunal finds Congressional intent was for the coverage of the Act to be expansive.

<sup>178</sup> The consequences of this holding out are a matter for the FAA to decide, not this Tribunal.

argument is premised upon Respondents being the aircraft's operator. As will be addressed below, the facts belie Complainant's allegations.

- a. Respondents Henry Air II, LLC and Henry Air II Trust do not perform a safety sensitive function for an air carrier.

Henry Air II, LLC has a contract with PAM in which PAM provides aviation management support for Mr. Evans' use of N889LM. By the very terms of its management agreement, "[PAM] will act as [Henry Air II, LLC's] contractor and agent in establishing and maintaining such operational control." JX 7 at 3. However, the purpose of its management agreement pertains to providing flight crews, as well as operation and maintenance support of N889LM for the benefit of Mr. Evans, not PAM. Second, that agreement deviates from the terms and conditions between Henry Air II, LLC and Mr. Evans in one significant way. The sublease between Henry Air II, LLC and Mr. Evans makes it clear that operational control would be vested with Mr. Evans alone. JX 8.

The Act requires that for a contractor to be subject to the Act, the contractor must perform a safety sensitive function by contract *for an air carrier*. The facts demonstrate the existence of a contractual relationship, wherein PAM provides safety sensitive functions to Henry Air II, LLC for the benefit of Mr. Evans. Henry Air II, LLC does not provide those safety sensitive functions to PAM. Rather, Henry Air II, LLC contracts with PAM to *obtain* performance of safety sensitive functions *from* PAM. Thus, the Tribunal finds that although a contract exists between PAM and Henry Air II, LLC, it is not the type of contract covered under the Act. Therefore, Henry Air II, LLC is not a contractor of an air carrier as defined by the Act.

As for Henry Air II Trust, the Tribunal finds no evidence that it had any contractual relationship with PAM. Henry Air II Trust gave Henry Air II, LLC an exclusive lease where all matters, except those pertaining to title, were bestowed upon Henry Air II, LLC.

- b. Henry Air II, LLC was an operator of N889LM but Henry Air Trust II was not.

Respondent correctly notes that it is not uncommon to place an aircraft on the air carrier certificate of a Part 135 operator, and yet retain the right to use it to conduct Part 91 operations so long as the owner or operator maintains operational control. *See generally*, FAA Legal Interpretation 1989-5, 1989 WL 1631912 (Mar. 28, 1989); Resp. Br. at fn 32. Part 135 air carriers are only required to have exclusive use of one airplane that is placed on its operations specifications. 14 C.F.R. § 135.25(b). All other aircraft may be utilized by the Part 135 operator on an as needed basis so long as they are maintained according to its operations specifications. Here, the problem is, by its actions, PAM should have had an air carrier certificate which in turn would require identification of the specific aircrafts it would be authorized to use in D085 of its OpSpecs.<sup>179</sup> However, it had none of those items.

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<sup>179</sup> Again, D085 is the operations specification for any Part 135 air carrier that lists the aircraft that it is authorized to use to conduct its operations.

Unlike with PAM, there is no evidence that either Henry Air II Trust or Henry Air II, LLC held themselves out as offering air transportation. The contracts between the parties make it clear that the intent of all three Respondents was that any flight be conducted under Part 91 rules alone. Complainant contends that Henry Air II, LLC did not provide private carriage under Part 91 and thus engaged in common carriage. Compl. Br. at 16.

Complainant focuses in on the provisions of 14 C.F.R. § 91.501 to support its contention that N889LM was operated in common carriage. As Complainant correctly notes, 14 C.F.R. § 91.501 sets forth ten types of operations<sup>180</sup> that a U.S. registered, turbojet-powered, multiengine

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<sup>180</sup> Those operations are set forth in 14 C.F.R. § 91.501(b) and include the following:

- (1) Ferry or training flights;
- (2) Aerial work operations such as aerial photography or survey, or pipeline patrol, but not including firefighting operations;
- (3) Flights for the demonstration of an airplane to prospective customers when no charge is made except for those specified in paragraph (d) of this section;
- (4) Flights conducted by the operator of an airplane for his personal transportation, or the transportation of his guests when no charge, assessment, or fee is made for the transportation;
- (5) Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company;
- (6) The carriage of company officials, employees, and guests of the company on an airplane operated under a time sharing, interchange, or joint ownership agreement as defined in paragraph (c) of this section;
- (7) The carriage of property (other than mail) on an airplane operated by a person in the furtherance of a business or employment (other than transportation by air) when the carriage is within the scope of, and incidental to, that business or employment and no charge, assessment, or fee is made for the carriage other than those specified in paragraph (d) of this section;
- (8) The carriage on an airplane of an athletic team, sports group, choral group, or similar group having a common purpose or objective when there is no charge, assessment, or fee of any kind made by any person for that carriage; and
- (9) The carriage of persons on an airplane operated by a person in the furtherance of a business other than transportation by air for the purpose of selling them land, goods, or property, including franchises or distributorships, when the carriage is within the scope of, and incidental to, that business and no charge, assessment, or fee is made for that carriage.
- (10) Any operation identified in paragraphs (b)(1) through (b)(9) of this section when conducted -
  - (i) By a fractional ownership program manager, or
  - (ii) By a fractional owner in a fractional ownership program aircraft operated under subpart K of this part, except that a flight under a joint ownership arrangement under paragraph (b)(6) of this section may not be conducted. For a flight under an interchange agreement under paragraph (b)(6) of this section, the exchange of equal time for the operation must be properly accounted for as part of the total hours associated with the fractional owner's share of ownership.

civil aircraft can perform while not in common carriage.<sup>181</sup> Operation of N889LM, a Gulfstream G650ER, is subject to this regulation. Of these ten types of operations, only § 91.501(b)(4) and (5) apply in this case.<sup>182</sup> Complainant contends that Henry Air II Trust was the operator and that the flights were not conducted for personal or business purposes of Henry Air II Trust, but instead for Mr. Evans' and/or Alibaba's use. Compl. Br. at 17. Further, Complainant maintains that Henry Air II Trust was the operator, as reflected by the Letters of Authorization ("LOAs"). Compl. Br. at 17-121. The argument assumes the designation for the LOAs was correct. The Tribunal finds these arguments without merit and addresses each below.

As a beginning point, it is abundantly clear that Henry Air II Trust gave Henry Air II, LLC an exclusive lease for the use of aircraft N889LM. JX 3. Henry Air II, LLC in turn gave Mr. Evans a non-exclusive aircraft lease agreement. JX 8. The terms of this sublease specifically prohibit Mr. Evans from operating the aircraft as a common carrier. JX 8 at 6. The record establishes that Henry Air II Trust had no involvement in the manner of operation of N889LM.<sup>183</sup>

i. Authority to operate N889LM using section 91.501(b)(4)

Section 91.501(b)(4) allows an operator to conduct flights for the operator's personal transportation or the transportation of the operator's guests when no charge, assessment or fee is made for transportation. Here, the transportation is for Mr. Evans (a senior executive for *Alibaba*), his staff, and occasionally his wife and guests. The term "operator" in § 91.501(b)(4) applies to individuals operating an aircraft for personal use. It does not apply to corporations operating an aircraft because corporations have no "personal use." As the Tribunal finds that Mr. Evans was the operator of the aircraft, despite Complainant's arguments to the contrary, the operations involved in this matter could be conducted under 14 C.F.R. § 91.501(b)(4).

ii. Authority to operate using section 91.501(b)(5)

It is clear to the undersigned that the very purpose of Henry Air II, LLC was to facilitate the use of N889LM for Mr. Evans' business (and personal) use which by implication benefits Alibaba. The non-exclusive lease and its amendment under the PAM agreement delegated

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<sup>181</sup> The FAA has repeatedly stressed "that subpart F of Part 91 was promulgated as a general exception to the certificate rules for commercial operations, and as such, has been strictly interpreted to avoid any abuse of these provisions." FAA Ltr of Interp to BSTC Corp fm Rebecca MacPherson, Assist. Ch. Counsel for Regulations, AGC-200 (June 22, 2009)(citations omitted) available at [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/regulations/interpretations/Data/interps/2009/BSTC%20Corp%20-%20\(2009\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2009/BSTC%20Corp%20-%20(2009)%20Legal%20Interpretation.pdf).

<sup>182</sup> Compl. Br. at 16. Respondent did not contest this assertion in its reply brief, but did also note that § 91.501(b)(9) applied as well. Resp. Br. at 21.

<sup>183</sup> Because Henry Air II, LLC had the right to use N889LM when it was not being used by Mr. Evans, it may separately be considered an operator when using N889LM. Recall that under the contract terms, Henry Air II, LLC had obtained exclusive use of the aircraft by Henry Air II Trust, but subsequently gave Mr. Evans priority use of the aircraft. *See* JX 8 at 4. Therefore, theoretically at least, Henry Air II, LLC could have used the aircraft if Mr. Evans was not utilizing it. However, no evidence has been presented that this ever occurred.

authority and responsibility of the aircraft to Mr. Evans.<sup>184</sup> Henry Air II, LLC was supposed to handle the bills for the aircraft's flight. JX 3. However, the testimony presented reflects that the expenses for all N889LM flights were funneled to Mr. Evans' staff for payment; not to Henry Air II, LLC. The Tribunal finds that the actions of Henry Air II, LLC and Mr. Evans in the operation of N889LM are so intertwined that they are essentially one and the same. The only separation of the two occurred when Mr. Evans used N889LM for personal reasons. In that case, he reimbursed Alibaba for the cost of his personal trips.<sup>185</sup> While the Tribunal has not been presented documents to specifically connect the dots, it appears that Henry Air II LLC's function is for the benefit of Alibaba who employs both; it utilizes Henry Air II LLC for the benefit of Mr. Evans.<sup>186</sup>

The Tribunal agrees with Complainant that, at least on paper, Mr. Evans is not an official or employee of either Henry Air II Trust or Henry Air II, LLC. Compl. Br. at 20. The evidence before this Tribunal is that Mr. Evans was an employee of Alibaba and Henry Air II, LLC was also in the employ of Alibaba. The Tribunal also agrees with Complainant that the evidence presented reflects Mr. Evans' use of N889LM in his professional capacity with Alibaba and not Henry Air II Trust or Henry Air II, LLC.<sup>187</sup>

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<sup>184</sup> JX 8; JX 6.

<sup>185</sup> The Tribunal wonders why there is even a sublease if the intent was for Henry Air II, LLC to have operational control. One possible reason is the Henry Air II, LLC would have operational control during all business related flights, while the sublease would be used to establish operational control over Mr. Evans' use of the aircraft for personal flights. As the business related flights were ultimately paid for by Alibaba, and Henry Air II, LLC was an employee of Alibaba, and Mr. Evans was a senior executive conducting business for Alibaba using the aircraft, this would make sense. However, the language of the sublease undercuts this if that was the intent. First, a stated purpose of the sublease provides: "Lessee intends to operate the Aircraft under Part 91 of the FAR within the scope of and incidental to its own personal and business purposes." JX 8 at 2. All the evidence presented to the Tribunal reflects Mr. Evans' only "business purposes" concerned his duties with Alibaba. Second, paragraph 5.2 references Mr. Evans' use with citation to the entirety of 14 C.F.R. § 91.501. JX 8 at 6 (para. 5.2). This includes both operations for business and personal flights. *Id.* at 91.501(b)(4) and (b)(5). Thus, by the very terms of the sublease, every time he used the aircraft he had operational control. Had there been some sort of document delineating when the flight was being conducted by Henry Air II, LLC versus when Mr. Evans was using the aircraft, there might be an argument that at least for business related flights, Henry Air II, LLC had operation control. However, given the totality of the evidence before the Tribunal, it was Mr. Evans who had operational control of all of the flights at issue here and there is no indication that the sublease was not in effect for each flight.

<sup>186</sup> In his closing brief, Respondents counsel mentions that part of Mr. Evans' employment contract with Alibaba provides that he is entitled to use an aircraft. Resp. Br. at 11. However, while such a provision would not be unusual for person of Mr. Evans position, the record does not appear to contain testimony or documentary evidence to that effect.

<sup>187</sup> Assuming *arguendo* that Henry Air II, LLC was determined to be an operator and Mr. Evans was not considered the operator, the Tribunal is persuaded that its operations would be covered under 14 C.F.R. § 91.501(b)(5). Here, the use of the aircraft was clearly primarily a "business use." Section 91.501(b)(5) addresses this situation. From the evidence provided, the only business being conducted during these flights was for the benefit of Alibaba. In fact, Mr. Evans testified that he purchased the airplane to assist him in doing his job for Alibaba. RX 63 at 5. Complainant ignores the broad language in § 91.501(b)(5), instead focusing only on the fact that Mr. Evans is not an official of Henry Air II, LLC. The persons

Here, Henry Air II, LLC was created for the purpose of facilitating the use of the aircraft by Mr. Evans. However, again, the actions of Henry Air II, LLC are almost non-existent other than to pass all of its authority down to Mr. Evans. Even assuming Henry Air II, LLC is the operator, this does not mean that it is also an air carrier. Again, there is nothing in the corporate structure or the actions of Henry Air II, LLC that indicates that it held itself out as a common carrier.

iii. LOAs are to be issued only to an aircraft's operator

Complainant wants the Tribunal to give weight to the fact that Letters of Authorization were issued to Henry Air II Trust at one point<sup>188</sup> and Henry Air II, LLC at another point. Compl. Br. at 18-19. Given Mr. Mendelson's loose oversight of this aircraft and its paperwork, the Tribunal credits that portion of Mr. Prero's testimony that this was simply a mistake. Tr. at 1571-72, 1712, 1926. Ultimately, Mr. Mendelson told Mr. Prero that Mr. Loeb, an attorney and Henry Air II, LLC's representative -- and Mr. Evans' attorney<sup>189</sup> -- instructed them to put Henry Air II Trust as the owner.<sup>190</sup> PAM's POI agreed that the Trust's name should be used.<sup>191</sup> Tr. at 1569-709, 1709-15, 1924-25. Whether or not this was the correct determination is a separate matter. Furthermore, given the complexities of the paperwork associated with the ownership and use of this aircraft, the Tribunal does not find it at all unreasonable that confusion ensued as to what name should be properly placed on the LOAs. A salient theme throughout these proceedings was PAM's management, in particular Mr. Mendelson, had never dealt with an ownership model as complex as the one for N889LM. Tr. at 1924. Finally, the Tribunal notes that the identity of the entity on an LOA itself has no legal effect on the use or ownership of the aircraft. The LOA is merely supplemental authorization to operate an aircraft under the use of a particular operator or to use certain equipment. If the LOAs are incorrect, the result is they

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covered under that provision are much broader and extend to officials of the parent, subsidiaries of the company operating the aircraft, or a subsidiary of the parent. There is evidence that Henry Air II, LLC was in the "employ" of Alibaba. Whether it is "a subsidiary of the company or a subsidiary of the parent" cannot be definitively determined from the information provided. However, what is clear to the Tribunal is Henry Air II, LLC was separate from Mr. Evans in name only. Thus, the Tribunal cannot foreclose the possibility that the operations using N889LM could be conducted under the authority of 14 C.F.R. § 91.501(b)(5).

<sup>188</sup> The initial LOAs reflect that Henry Air II Trust was this aircraft's operator. Tr. at 977. However, this aircraft is owned by DTC and there is no indication that Henry Air II Trust was an operator.

<sup>189</sup> Tr. at 2014.

<sup>190</sup> According to Mr. Mendelson, the decision to put Henry Air Trust II on the LOAs was directed by Mr. Loeb, the trustee for the Trust. Tr. at 1924-26 and 1928-29 and 2013. The Tribunal questions the accuracy of Henry Air II Trust, rather than Henry Air II, LLC, being the correct entity to identify for the LOAs under these facts for while Henry Air II Trust may have been the owner of the aircraft, they were not the operator of the aircraft. However, the Tribunal but need not decide that issue. *See also* Tr. at 1924-26.

<sup>191</sup> One can tell this occurred by looking at the reference to the amendment to the LOA. The LOAs in CX 69 are the original LOAs as reflected by the entry at the bottom middle of the document which reflects "Amdt 0", whilst the correct to Henry Air II Trust LOAs are noted as "Amdt. No.: 1" on the bottom of the document. *Compare, e.g.,* CX 69 with CX 67; *see also* Tr. at 1575.

cannot be relied on. At best, this might provide some indicia of who the FAA POI considered the operator, but given the vagaries of the ownership paperwork in this case, the Tribunal gives it very little weight on this issue.<sup>192</sup>

Despite the above, a brief explanation of the LOA process is warranted. The FAA issues (or is supposed to issue) LOAs to the aircraft's *operator*.<sup>193</sup> According to the FAA, an operator is the entity having *operational control* of the aircraft for a particular flight. Of note, the operator is not necessarily the manager<sup>194</sup> or owner of the aircraft. For the LOA to be effective, *the operator named on the LOA must be the same operator who has operational control of a given flight*. If multiple operators operate the same aircraft, separate LOAs for each operator are required.<sup>195</sup> *See generally*, Tr. at 935-36, 977-78. "An LOA is issued to the person exercising operational control and not to a specific aircraft. Thus multiple LOAs may be issued to multiple operators for use in a single aircraft."<sup>196</sup> "It is the operator's responsibility to submit a request for an LOA in the name of the person or entity that will have operational control of the aircraft."<sup>197</sup> So this raises the question: who had operational control of the aircraft for the flights conducted by Complainant for Mr. Evans?

Operational control is defined as having the "exercise of authority over initiating, conducting or terminating a flight." 14 C.F.R. § 1.1. The FAA determines where operational control lies based on the terms of each lease *as well as how the arrangement actually operates*.<sup>198</sup> The determination of who has operational control of an aircraft is a fact specific

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<sup>192</sup> The FAA guidance provides that it is the operator's responsibility to inform the POI about which entity would have operational control. However, that does not mean that what is provided is correct. Given the complex nature of the documents here and how communication was flowing within and between the Respondents in this case, it is not surprising that confusion could arise as to who was the operator. The Tribunal understands how the POI might defer to the request to have Henry Air II Trust on the LOAs, because it is Respondent's responsibility to properly identify the operator. Accordingly, the Tribunal gives very little weight to the fact that the LOAs were issued to Henry Air II Trust as evidence it had operational control.

<sup>193</sup> The Tribunal notes that there is no evidence that, during the time of Complainant's employment with PAM, he raised the issue about whether the LOAs were provided to the proper operator. His focus was on whether the LOAs had been issued at all.

<sup>194</sup> "The part 91 operator named on the LOA may hire a management company to provide flightcrew (as independent contractors), management, fueling, and maintenance services. However, only the part 91 operator has operational control, not the management company." FAA Order 8900.1, vol. 3, ch. 2, ¶ 3-2-2-5(H)(2), thru chg 681) (Nov. 13, 2019), available at [https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03\\_002\\_002.htm](https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03_002_002.htm).

<sup>195</sup> FAA Order 8900.1, vol. 3, ch. 2, ¶ 3-2-2-5(I) (thru chg 681) (Nov. 13, 2019), available at [https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03\\_002\\_002.htm](https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03_002_002.htm).

<sup>196</sup> FAA Order 8900.1, vol. 3, ch. 2, ¶ 3-2-2-5 (thru chg 681) (Nov. 13, 2019), available at [https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03\\_002\\_002.htm](https://fsims.faa.gov/wdocs/8900.1/v03%20tech%20admin/chapter%2002/03_002_002.htm).

<sup>197</sup> *Id.* at ¶ 3-2-2-5(H)(1).

<sup>198</sup> *See* FAA Legal Interpretation to Eichenberger & Buckley from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Aug. 26, 2011).

inquiry.<sup>199</sup> FAA AC 91-37B explains that there are a number of factors to consider in determining “operational control” and who maintains operational control. The factors include:

1. Which entity makes the decision to assign crewmembers and aircraft; accept flight requests; and initiate, conduct, and terminate flights?
2. For which entity do the pilots work as direct employees or agents?
3. Which entity is maintaining the aircraft and where is it maintained?
4. Prior to departure, which entity ensures the flight, aircraft, and crew comply with regulations?
5. Which entity decides when and where maintenance is accomplished, and which entity directly pays for maintenance?
6. Which entity determines weather and fuel requirements and which entity directly pays for the fuel?
7. Which entity directly pays for the airport fees, parking and hangar costs, food service, and/or rental cars?

It is clear that the intent of the terms of the initial operating lease involved in this case is that operational control was to be vested in Henry Air II, LLC. JX 3 at 8. However, what was intended by terms of a contract is not determinative. Henry Air II, LLC thereafter executed a non-exclusive lease agreement with Mr. Evans. JX 8. The terms of the sublease provide that Mr. Evans “shall exercise Operational Control of the Aircraft during all flight operations conducted by Lessee [Mr. Evans].” The record establishes that it was Mr. Evans alone (or his staff) that made the requests for a given flight. He was responsible for “obtain[ing] the services of pilots and crew for all of [his] operations of the Aircraft.” JX 8 at 7. He was responsible for all of the aircraft expenses<sup>200</sup> and did not have to pay Henry Air II, LLC any per-hour operating costs.<sup>201</sup> However, no evidence was presented that Mr. Evans had any aviation expertise. Essentially his “flight department” as well as his billing department rested with PAM. In fact, the very reason a busy person such as Mr. Evans hires a management company is because he does not want to get involved in the technical issues of airplane ownership, operation, or maintenance.

Nonetheless, although the ministerial matters concerning the crews’ pay and benefits was managed by PAM, the crew believed that they worked for Mr. Evans.<sup>202</sup> The crew was purportedly offered employment by “Henry Air Trust”, but there is no evidence that such an

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<sup>199</sup> See FAA Legal Interpretation to Gregory S. Walden from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Jan. 20, 2011)(citing Legal Interpretation to McRainey; *Administrator v. M&N Aviation Inc. & Sky Way Enter., Inc.*, NTSB Cases EA-5260 (2006); *Administrator v. Darby Aviation*, NTSB Case EA-5159 (2005).

<sup>200</sup> Although Mr. Evans was responsible for all of the expenses, the evidence shows that Alibaba paid all business travel expenses.

<sup>201</sup> For example, the Tribunal does not see in the agreements any requirement for there to be an engine reserve per flight hour of use.

<sup>202</sup> Tr. at 156 (Complainant), Tr. at 404 (Westcott), RX 2, RX 99 at 19 (Young), RX 122 at 101(Izzie). Even Mr. Yoder believed as much. Tr. at 1387-88.

entity actually had any involvement whatsoever with Complainant, PAM, or N889LM.<sup>203</sup> Rather, the offer for employment to the crew came on PAM-stationary. *See, e.g.*, JX 1. Further, the Agreement between PAM and Henry Air II, LLC made it clear that all flight personnel would be employed and paid by PAM and PAM was responsible for any benefits to the crew. JX 7 at 3. PAM was the entity that was coordinating the aircraft's operation and maintenance, and per its agreement with Henry Air II, LLC, was to ensure the flight, aircraft, and crew complied with the FARs, including all training requirements. *See* JX 7 at 2-5. On behalf of Henry Air II, LLC, PAM assisted in scheduling the aircraft, producing itineraries, organizing ground transportation, arranging for aircraft catering services, and arranging for landing permits, clearances and ground handling. PAM decided where aircraft maintenance occurred, and paid for fuel, airport, parking and hangar fees. PAM paid such expenses directly to the vendors but then sought reimbursement from Henry Air II, LLC. However, and most notably, Henry Air II, LLC and PAM agreed that Mr. Evans:

will have and retain exclusive operational control, and the exclusive possession, command and control, of the Aircraft. Pegasus Aircraft Management acknowledges and consents to the Sublease,<sup>204</sup> and further agrees that (a) performance obligation owed by Pegasus Aircraft Management to [Henry Air II, LLC] shall be provided for the benefit of [Mr. Evans] as operator of the Aircraft, and (b) obligations of [Henry Air II, LLC] relating to operation may be satisfied by [Henry Air II, LLC] by reference to [Mr. Evans'] obligations under the Sublease.

JX 6 at 1 (para. 2(b)). From this language, it is clear that any operational control that Henry Air II, LLC may have had was delegated to Mr. Evans.<sup>205</sup> Therefore, the Tribunal finds that Mr. Evans had operational control of the aircraft and PAM effectuated Mr. Evans' control. Thus, the LOAs themselves are incorrect and any operations that involved the use of LOAs given to Henry Air II Trust in the flights involved in this case would result in violation of FAA regulations.<sup>206</sup>

PAM is a pawn in this shell game of hide the responsible "operator". Although the lease agreements provides that both Henry Air II, LLC and Mr. Evans acknowledge themselves as having operational control over the aircraft, in practice Henry Air II, LLC was merely a facilitator to do the bidding of Mr. Evans. The net effect of the leasing documents, management agreement and practicalities of how things actually worked, was the needs and desires of Mr. Evans in the use of N889LM. Therefore, the Tribunal finds that Mr. Evans exercised operational control of the aircraft. In so finding, the Tribunal concludes that the LOAs should not have been issued to Henry Air Trust II. The Tribunal has been shown no evidence that it was the operator

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<sup>203</sup> The Tribunal finds this reference was a ministerial error in the complicated paperwork for Mr. Evans to transition between aircraft.

<sup>204</sup> The sublease being referenced is the one between Henry Air II, LLC and Mr. Evans – JX 8.

<sup>205</sup> The fact that Mr. Evans claimed in his deposition that he did not know that he was the operator of the aircraft (RX 63 at 5) has no bearing on whether he actually was.

<sup>206</sup> Having found such, Complainant never questioned who should have been issued the LOAs, he only inquired into the existence of the LOAs. Thus, who the proper recipient of the LOAs should have been is collateral to the findings this Tribunal must make.

of the aircraft. The only evidence concerning how the FAA concluded it should issue the LOAs to Henry Air II, LLC were statements that the decision was essentially made for it by counsel, who is the sole member of the several entities used in this case, Mr. Loeb.<sup>207</sup> It is noted that this same counsel controls Henry Air II, LLC and Henry Air II Trust, both of whom appear to have been created for the benefit and purpose of facilitating Mr. Evans' use of N889LM. Regarding the issue of who should be issued the LOAs, Mr. Prero offered the following description of Mr. Loeb's involvement:

Q You just had a general understanding that planes owned by Henry Air II Trust, there's some kind of sublease to Michael Evans?

A All I knew was the attorney -- I think Steven Loeb -- he's in charge of the trust, he's in charge of owning the airplane, and he developed all the documents. This is how he wanted it done. I figured it had its approval, so that's why I went there.

Q Did you talk to Loeb?

A No. That was through David Mendelson.

Q Mendelson told you that?

A Yes.

Q And so you made this decision to list Henry Air II Trust as the operator before you put in Henry Air II, LLC as the operator, I mean was the mistake that you intended for it to be Henry Air II Trust or did you make a mistake first and then started looking at it?

A Well, obviously it's the other way around, or they wouldn't still be that way.

Q So, tell me what do you mean by: "Obviously the other way around"?

A I originally developed the LOAs in LLC and I was told that that was wrong and I changed them within two days. Then I had the LOAs issued in the correct name, Henry Air II Trust.

Tr. at 1712-13; *see id.* at 1714-15.<sup>208</sup> While there may be other documents that exist to dispel this result, the Tribunal must decide the case based on the evidence duly presented before it.

After parsing out the complex agreements surrounding Henry Air II Trust and Henry Air II, LLC, the Tribunal finds that the evidence supports a finding that neither of them constitute air carriers. As the Tribunal finds Respondent PAM *is* an air carrier subject to the Act, it will continue to the address the additional elements Complainant must preponderantly establish.

## 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)”

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<sup>207</sup> *See also* Tr. at 1925.

<sup>208</sup> Additionally, Mr. Mendelson confirmed that “the decision to put Henry Air Trust II on the LOAs was Mr. Loeb’s.” Tr. at 1926.

engaged in the air carrier safety-related activities the statute covers. The governing regulations define the term “employee” as:

an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

29 C.F.R. § 1979.101 (emphasis added).

AIR 21 protects an employee if he:

- (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 [subtitle VII of title 49 of the United States Code] or any other law of the United States; [or]
- (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; . . . .<sup>209</sup>

Here, Complainant worked for PAM<sup>210</sup> as a captain of a transport category aircraft that conducted domestic and international flights. Normally, Complainant would qualify as a covered employee. However, as discussed above, Respondents Henry Air II, LLC and Henry Air II Trust are not air carriers or contractors of air carriers covered under the Act and therefore Complainant is not a covered employee as to them. By its actions of holding itself out, however, PAM is an air carrier.

Accordingly, the Tribunal finds that Complainant has established by the preponderance of evidence that, as to his relationship with PAM, he was an employee protected by the Act.

### 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:

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<sup>209</sup> 49 U.S.C. § 42121(a)(1) and (2). Subsections (3) and (4) are not applicable in this case. An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

<sup>210</sup> Complainant raised the issue of Respondents’ being a joint employer. There could be an argument that Mr. Evans and PAM were joint employers. However, because Mr. Evans is not a party to this case, the Tribunal need not decide this issue.

(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. § 42121(a)) (emphasizing that “an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement”) (emphasis in original)). Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). To prove subjective belief, a complainant must show that he “held the belief in good faith.” *Id.* “[T]o determine whether a complainant’s subjective belief is objectively reasonable, an ALJ must assess his 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.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot’s belief in light of his training and experience).

Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, 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 (July 2, 2009). “The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety.” *Hindsman v. Delta Airlines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (June 30, 2010).

#### Discussion of Protected Activity

- a. Whether Complainant Held a Good Faith Subjective Belief in the Existence of an FAA Violation

Respondent argues that Complainant did not have a good faith subjective belief that his reports contained allegations that they violated or were about to violate a FAA rule. Resp. Br. at 30. Respondent misunderstands the standard here. The complainant need not convey reasonable belief to their employer. “The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or authorities.” *Bondurant v. Southwest Airlines, Inc.*, ARB No. 14-049, ALJ No. 2013-AIR-7, slip op. at 5 (Feb. 29, 2016)(quoting *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, -42, slip. op at 15 (May 25, 2011).

Further, Respondent seems to misunderstand the nature of protected activity. Respondent seems to suggest that if Complainant operated in violation of the LOAs that makes him a “lawbreaker,” and not a whistleblower who should be protected. *See* Resp. Br. at 30, 32 and 33. This is simply not the case. The aviation community has long recognized the value associated with self-reporting violations of the Federal Aviation Regulations and protecting those that so report from adverse certificate action.<sup>211</sup> To not protect those in the best position to report safety violations because they participated in the regulatory violation would mute the very voices needed to learn of those safety violations. To preclude recovery to a whistleblower because he had some slight participation in the wrongdoing later charged would “mute more than a few whistles.” *Paolella v. Browning-Ferris, Inc.*, 973 F.Supp. 508, 513 (E.D. Pa. 1997), *aff’d*, 158 F.3d 183 (3d Cr. 1998).

The Tribunal finds that while Complainant may have believed that the absence of some LOAs could result in a FAA violation, that was not the case for all of them.<sup>212</sup> Of import, one does not need an LOA to operate an aircraft; however, one does need an LOA or several LOAs to fly in certain airspace or to use certain equipment on the aircraft. FAA Order 8900.1,<sup>213</sup> volume 3, Chapter 18, section 1, addresses the types of authorizations the FAA issues.<sup>214</sup>

The Tribunal does not find that he had a good faith subjective belief concerning the use of certain communication or navigation instruments or procedures. He was aware, for example, that no FAA rule required use of the CPDLC and in fact many, if not most, aircraft do not even have CPDLC. He acknowledged that he should have used voice communications but in some occasions had opted not to. Tr. at 515-17. Second, as the person who initially transmitted the

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<sup>211</sup> The FAA has implemented such programs as the Aviation Safety Reporting Program (ASRP). AC 00-46E (Dec. 16, 2011). This program has been in existence since 1975. *Id.* at ¶ 2. Essentially, this program provides immunity from sanction if the pilot timely self-reports to NASA an inadvertent regulatory violation within ten days of its occurrence. *See* 14 C.F.R. § 91.25. In general, this program is designed for the individual airman. Later, the FAA extended this practice to air carriers by implementing the Voluntary Disclosure Report Programing (VDRP) and the Aviation Safety Action Program (ASAP). *See* AC 00-58B (Apr. 29, 2009) and AC 120-66B (Nov. 15, 2002), respectively.

<sup>212</sup> Complainant’s contentions about PAM’s SMS material being unavailable to him is unconvincing. In reality, he was provided copies of the training material. RX 13, RX 33. Had he had any questions/concerns about this he never further manifested them with PAM. *See* Tr. at 604. The experts offered at this hearing similarly agree. RX 70, RX 74 at 3; Tr. at 943.

<sup>213</sup> *See* FAA Order 8900.1, *available at* <https://fsims.faa.gov>.

<sup>214</sup> For the discussion about the three types of FAA authorizations, *see* footnote 89, *supra*.

equipment codes from Gulfstream to ITPS, he knew that it included information about the use of equipment and communications which still had to be approved through LOAs. For example, on November 22, 2017, Complainant in a crew chain test stated: “ITPS has our data. BUT it assumes all LOA’s are in place (RVSM, RNP, CDPLC, ETC . . .) *If/when we fly, we need to notify ITPS so they can modify the flight plan so our equipment codes are accurate.*” RX 29 at 8 (emphasis added). The use of those items is solely within the control of the pilot and he had the option of whether to utilize them or not.

However, Complainant’s expressed concerns about the use of D095 versus D195 when conducting operations outside of the United States is a closer issue because that involves maintenance, or the deferment of maintenance, which is something which he potentially does not control. And Complainant testified about emailing his concern about its use in Europe. Tr. at 700. However, Complainant also testified that he would not conduct a flight if he thought it was unlawful or unsafe. Tr. at 584. While this is not the standard for whether the aircraft was airworthy, it does reflect his state of mind towards safety. The Tribunal is also mindful that when the issue was raised, management acted upon it (RX 33) and that Complainant was aware that the FAA position was one can use the MMEL as an MEL as long as the pilot has the procedures aboard the aircraft. Tr. at 1018. In short, the Tribunal finds that Complainant’s inquiries were consistent with seeking to maximize the abilities of the aircraft by continuing to monitor which LOAs were in effect and he did not believe that the failure to have them were a violation of any FAA rules, regulations, or standards.

b. Whether 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 not objectively reasonable.

The Complainant is a highly experienced and qualified professional pilot, who is arguably at the apex of the corporate aviation ladder. He is a former airline pilot and holds an airline transport pilot certificate with several ratings. The Tribunal does not find it objectively reasonable that a pilot with such qualifications would believe the absence of LOAs violated Federal Aviation Regulations. A pilot with his level of experience would be expected to make sure that the aircraft was airworthy and had aboard required FAA documents to conduct the proposed flight, or alter the flight to remain within the limits of authority granted to the pilot by those documents.<sup>215</sup> While Complainant has presented numerous emails and responses concerning the absence of LOAs, these merely reflect his desire to maximize the capabilities of N889LM, for which LOAs were needed. He also demonstrated his efforts to notify Mr. Mendelson about the need for LOAs. Yet, there is no evidence that the aircraft could not be operated in safe manner in the absence of the LOAs. LOAs are essentially tools of convenience. The Tribunal wholeheartedly agrees that per 14 C.F.R. 91.703(a), when N889LM was operated

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<sup>215</sup> *See* CX 62 at 25.

outside the United States, it had to comply with Annex 2 to the Chicago Convention.<sup>216</sup> Complainant's briefly references his concerns about not having LOA's and SMS in compliance with ICAO requirements. Compl. Br. at 25. Of note, Complainant did express concern about the validity of using LOA D095 (MMEL) versus having an MEL particular to N889LM. Compl. Br. at 26. On January 20, 2018, Complainant expressed concern about what documents the flightcrews were required to have "in our daily operating environment." But one must look at exactly what A153 and A056 pertain to. The Tribunal will briefly address them below.

The evidence before this Tribunal is Complainant had concerns in mid to late January 2018 about four LOAs: A056 (CPDLC); A153 (ADS-B); C052 (LPV when outside the US) and D195 (MEL).<sup>217</sup> CX 26, RX 39. However, at the time of his discharge, only two LOAs remained outstanding: A056 and A153.<sup>218</sup> Both of these LOAs had been submitted for approval but had approval requirements beyond that of PAM's POI.<sup>219</sup> It is also undisputed that it was in everybody's interest to have the LOAs. Tr. at 1420, 1850. PAM's management on several occasions thanked Complainant for his work on getting what LOAs they could. RX 18, RX 22, RX 30, RX 31, RX 36, RX 37, RX 39 and RX 40.

Complainant wants the Tribunal to fault "Henry Air Trust" for providing false information about the aircraft's equipment codes. Compl. Br. at 28-29. The Tribunal infers from this that the issue is the aircraft owner provided false information to ITPS who then created the flight plans that were later used by the pilots to conduct their flights. Assuming this occurred, it is a red herring because Complainant *knew* that those approvals needed in the LOAs were not present because of his persistent emails. A pilot does not just sit back and accept what information is handed to them for a flight they are to conduct. If there were errors in any flight plans, it was his obligation as the pilot in command to correct any errors or inform ATC, for example, that he was unable to accept certain approaches. Tr. at 948-49, 968, 975; RX 74 This goes to the very heart of the meaning of pilot in *command* and that responsibility is clearly set forth in § 91.3.<sup>220</sup>

All of Complainant's concerns about the LOAs are easily dispensed with except for one. LOAs A056, A153, and C052 concern the use of certain equipment on the aircraft to communicate or navigate. All of the pilots knew that the LOAs were missing. Tr. at 194. The failure to have these LOAs onboard has nothing to do with whether or not the aircraft can operate. They all have to do with whether the flight crew can use certain means of

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<sup>216</sup> Annex 2 to the Convention on International Civil Aviation, Rules of the Air, available at [https://www.icao.int/Meetings/anconf12/Document%20Archive/an02\\_cons%5B1%5D.pdf](https://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons%5B1%5D.pdf) Dec. 7, 1044,

<sup>217</sup> At the hearing and in its brief, Complainant also raises the issue of SMS training. *See* Tr. at 150, 174, 284, 601-05; RX 13. However, the Tribunal finds little evidence to support that was any concern for Complainant during the time he was employed by PAM. If anything, the Tribunal was left with the impression that he discarded the training material as unnecessary.

<sup>218</sup> *See* RX 24 – RX 27, RX 35, CX 67.

<sup>219</sup> CX 11 reflects that by December 8, 2017, the CPDLC LOA had been submitted to AFS 200 and there was an estimated timeline of when it would be approved. AFS-200 is FAA's Air Transportation Division located in Washington, D.C. *See* [https://www.faa.gov/about/office\\_org/headquarters\\_offices/avs/offices/afx/afs/afs200/afs220/](https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afx/afs/afs200/afs220/).

<sup>220</sup> There is little question that Complainant was well aware of his authority under § 91.3.

communication (CPDLC), or navigate using certain equipment (ADS-B, LPV). The remedy is merely to limit operations to those that do not require this equipment.<sup>221</sup> *See* Tr. at 968. The Tribunal heard no evidence that the aircraft could not get to its intended location without these items nor was there any evidence that any of the Respondents pressured or directed Complainant to operate the aircraft in violation of any FARs. Furthermore, there was no evidence presented that Complainant was told to conduct a given flight in manner that required use of a given LOA. All the evidence presented showed that the absence of the LOA approvals would limit the means by which the aircraft could get to its proposed destination. Such limitations are common place in aviation. For example, there is the Lateral Navigation (“LNAV”) approach which is essentially a LPV approach but without vertical guidance. In essence, an LNAV approach is a non-precision GPS approach whilst an LPV is considered a precision approach.<sup>222</sup> And there are radio frequency approaches such as Instrument Landing System (“ILS”)<sup>223</sup> or Vertical Omni Directional (“VOR”).<sup>224</sup> Thus, the absence of the LPV LOA merely means that the flight crew could not legally use the aircraft to fly that particular type of instrument approach.<sup>225</sup> The crew would be free (and the aircraft was capable) to fly one of several other variations for an instrument approach available for that airport.

Complainant seemed to emphasize the need for LOA A153 and A056; commenting that they are “fairly significant since we are required to have both in our daily operating environment.” CX 26. The Tribunal is unsure what Complainant meant by the daily operating environment, but the remedy for the pilot is simple - one does not operate in the environment that requires that approval. These LOAs are simply not required to operate the aircraft.<sup>226</sup> Granted, the lack of these LOAs may limit the aircrafts maximum utilization but that is a different concern. And as the Tribunal understands the evidence, the flight crew was intimately involved in the flight operations. If there was a discrepancy, they had an obligation to modify any flight to conform to the documents that were on board the aircraft as pilots are ultimately responsible for any given flight. For example, initially N889LM did not have an LOA for RVSM flights. The consequence of this is the flight crew could not legally operate N889LM at altitudes at or above 29,000 feet. *See* 14 C.F.R. § 91.180 and Part 91, appx. G. If they were to receive a flight plan that proposed them operating at or above 29,000 feet, they would have to amend it, or at a minimum, inform ATC that they did not have authorization to operate in that airspace. Finally, as to these two LOAs, Complainant himself agreed that the CPDLC was “not necessarily required.” Tr. at 195-96. Moreover, Complainant was aware that other pilots were using the

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<sup>221</sup> Concerning use of LPV approaches, Complainant admitted that if one did not have approval to use the LPV instrument approach you “don’t shoot an LPV approach.” Tr. at 196, 543.

<sup>222</sup> *See generally*, FAA-H-8083068, INSTRUMENT PROCEDURES HANDBOOK (2017)

<sup>223</sup> An ILS is a precision instrument approach that consists of a localizer and glide slope indicator, and marker beacon audio announcement in the cockpit and an outer marker and approach lights at or near the airport. *See id.* at Glossary.

<sup>224</sup> *See* FAA, *Instrument Fly Handbook* (2017), chap 4 available at [https://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/instrument\\_procedures\\_handbook/](https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/instrument_procedures_handbook/). A VOR approach is a widely used non-precision approach that does not involve a GPS signal.

<sup>225</sup> However, if there was an in-flight emergency, despite the absence of a LPV LOA, the pilot could use their emergency authority under 14 C.F.R. § 91.3(b) to execute an LPV approach.

<sup>226</sup> *See* CX 63 at 24 and 27.

CPDLC in violation of the LOA but affirmatively chose not to report it to management.<sup>227</sup> He acknowledged that ADS-B was only required “in certain airways” referencing Hong Kong, Singapore and Europe (Tr. at 195), but did not express the need for ADS-B in other countries he was flying into such as Canada. Tr. at 559. For example, ADS-B was not required in the U.S. prior to January 1, 2020. *See* 14 C.F.R. § 91.225.

That a pilot has to have the proper paperwork to actually utilize certain equipment on an aircraft is knowledge gained at the very beginning of a pilot’s education, and is engrained into every pilot almost from day one. For example, even though Complainant holds an ATP and has thousands of hours of flight time, he is not authorized to operate *any* aircraft, even a simple 2-seat Cessna 152, unless he has his airman’s certificate in his physical possession or readily accessible. 14 C.F.R. § 61.3(a)(1). If he was to forget his license at home, he would need to retrieve it before operating the aircraft. Similarly, to operate any aircraft, it must have certain documents in it, the most common of which be a copy of the aircraft’s registration. 14 C.F.R. § 91.203(a). In general, the FAA regulations are proscriptive in nature; if you do not have permission to do or use something, you cannot do or use it.<sup>228</sup> In this case, the evidence establishes that N889LM and its flight crew were able to fly, but were unable to use the aircraft to its maximum potential because the operator had not yet received approval to utilize certain equipment already installed on the aircraft. In such a situation, the obligation is upon the pilot to not operate the aircraft using unapproved equipment or procedures. If Complainant or the flight crew opted to operate the aircraft in a manner that required LOA approval, but did not have LOA approval on board, they violated the regulations. And if there was an attempt by PAM or Mr. Evans to have them do so, the pilots have every right to say they are unable to do so. Had that situation occurred, that would be a protected activity. However, under the facts presented here, no such event occurred. No one from PAM ever told Complainant to violate the regulations or threatened him with discipline if he did not. *See* Tr. at 193, 522-23. The pilots may have had concerns about telling Mr. Evans why they could not do certain things with the aircraft such as a certain approach, but there is no evidence that ever manifested itself through the statements or actions of Mr. Evans, Mr. Mendelson or Mr. Yoder.

The remaining issue concerns the MEL. In the absence of an MEL, a pilot may not operate an aircraft with inoperative equipment or instruments. 14 C.F.R. § 91.213. N889LM had an approved MMEL using D095. RX 25. Mr. Mendelson communicated to Complainant that the D095 was sufficient and informed him of the POI’s position twice in December 2017.<sup>229</sup>

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<sup>227</sup> Complainant explained that he did not report it to Mr. Mendelson because he was the 401(k) guy and not someone involved in the operations of the aircraft. Tr. at 521-25. This explanation would be consistent with his view that he considered neither Mr. Mendelson nor Mr. Yoder his bosses. Tr. at 526.

<sup>228</sup> It seemed as though Complainant took the approach that because he wanted to use it, they were going to because it did not impact his view on safety. Tr. at 192-93. This view was shared by Mr. Westcott. Tr. at 396-400. According to Mr. Westcott’s view, management took care of “government paperwork.” Tr. at 422; *see also* 401, 420. This mindset is not consistent with safety and/or the basic tenets of the Federal Aviation Regulations or the Tribunal’s understanding within the aviation culture in general.

<sup>229</sup> Mr. O’Dell testified that the majority of FSDOs take the view that an approved MMEL is sufficient for an aircraft’s MEL. Tr. at 933. Mr. Young was also of the view that ICAO did not require an MEL specific to the aircraft. CX 63 at 51. However, when pressed, he revised his deposition testimony saying that he needed guidance on it. *Id.* at 56.

RX 31, RX 33. Mr. Mendelson also told Complainant that, despite the POI's position, they had asked for the MEL LOA (D195). RX 31. Complainant expressed concern that France, and possibly other countries, required use of D195.<sup>230</sup> The FAA issues both documents. As Respondent correctly notes, "PAM cannot force the FAA to do something to change its views." Resp. Br. at 38. The evidence before the Tribunal is PAM's POI initially refused to issue D195. More concerning according to Complainant is that even though the D095 was approved, there is evidence that the operator never developed the individualized operations and maintenance limitations. The lack of individualized operations and maintenance limitations invalidates the LOA. Compl. Br. at 30

The problem here is there was no evidence presented that the operator ever operated the aircraft in the manner that required *use* of D095.<sup>231</sup> There would or could only be a violation if there was a maintenance discrepancy that would otherwise ground the aircraft, but for it qualifying to be placed on the MEL and the operator opted not to have the discrepancy repaired prior to further flight. However, this was a new aircraft. The Tribunal has not been able to locate a flight log in the record or maintenance record (CX 89) that reflects a maintenance discrepancy that was not repaired prior to further flight and Complainant has cited to none. Therefore, there is no issue with D095 or D195 because it had never been utilized. Further, had Complainant had any concern about the airworthiness of the aircraft because of a perceived defective MEL, he had every right to have the item fixed prior to the next flight. There is no evidence that this ever occurred.

Complainant's argument about use of the approved D095 being defective because no operation and maintenance items were identified completely fails because the LOA references use of the MMEL, a document that already contains a list of operations and maintenance limitations<sup>232</sup> established by the manufacturer so the operator need not develop a completely new one. Next, the argument concerning the omission of the operations and maintenance limitations to D095 was first raised in Complainant's Brief, and not referenced in his pleadings.<sup>233</sup> Compl. Br. at 30; Resp. Br. at 39 n. 54. No evidence supports the contention that this was a concern of Complainant's as he was raising the issue. At best, his concern was whether certain countries permitted use of an MMEL as set forth in D095 or required an aircraft specific MEL as referenced in D195.

Finally, Complainant has knowledge of whether the D195 LOA is needed from the FAA. He is a U.S. certificated pilot operating a U.S. registered aircraft. Any violation concerning the aircraft's operation or use would be regulated by the FAA. Surely, a pilot with Complainant's experience in international and foreign flights knows that it is the State of Registry that specifies the requirements for a given aircraft. *See* RX 69. And it is the State of Registry's regulatory

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<sup>230</sup> Mr. O'Dell stated in his report that the only country which he was aware that wanted an MEL was France. RX 73 at 6. However, he later testified that Europe in general adopted this requirement. Tr. at 931.

<sup>231</sup> In fact, Complainant testified that they never needed to use it. Tr. at 164-65.

<sup>232</sup> *See generally*, MMEL FOR GULFSTREAM AEROSPACE GVI (G650), GVI (G650ER) REV. 1A (Nov. 6, 2014) available at [https://fsims.faa.gov/wdocs/mmel/g-vi\\_rev1a.pdf](https://fsims.faa.gov/wdocs/mmel/g-vi_rev1a.pdf).

<sup>233</sup> Furthermore, it "is axiomatic that the complaint may not be amended by the briefs." *Candor v. United States*, 1 F.Supp. 3d 1076, 1082 (S.D. Cal. 2014).

agency, in this case the FAA, that would specify and approve an aircraft's MEL.<sup>234</sup> Further, any alleged violations of regulatory standards would be addressed by the foreign aviation regulatory body referring the matter to the FAA. Complainant has presented no evidence that a foreign nation could take action against either the aircraft or him for operating the aircraft using the approved LOA.<sup>235</sup> In fact, the only evidence about foreign inquires was an incident where Complainant was the pilot and law enforcement conducted a ramp check in Geneva where they checked everything including weight and balance, but the inspectors did not look at the aircraft's LOAs (which include the MEL). Tr. at 682-83; CX 17 at 1-2.

In sum, the Tribunal finds no instances of protected activity in this case.

#### 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 (Sept. 28, 2011); see also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sept. 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.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.<sup>236</sup> Accordingly, the

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<sup>234</sup> See FAA Order 2150.3B, *Compliance and Enforcement Program*, Chaps 4 and 6 (thru chg 13, Aug 27, 2018); see generally, Yodice, *A Foreign Matter: International OPS and FAA Enforcement*, AOPA News (Mar. 7, 2016), available at <https://pilot-protection-services.aopa.org/news/2016/march/07/foreign-matter>.

<sup>235</sup> Mr. O'Dell testified that he knew of no one that had received a violation for using the MMEL as an MEL. Tr. at 1017-18.

<sup>236</sup> See also *Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that

Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

### Discussion of Adverse Action

Here, Respondent terminated Complainant’s employment. Employer conceded this was an adverse action and the Tribunal so finds. Tr. at 18-19.

### Adverse Action: Conclusion

Complainant has successfully established that Respondent committed adverse action when it terminated Complainant. Respondent also concedes that it terminated Complainant.

### 5. Contributing Factor Analysis

Complainant successfully established that Respondent committed an adverse action by terminating his employment. Accordingly, the Tribunal must determine whether Complainant’s protected activity was a contributing factor in that unfavorable personnel action. *See* 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*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). 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

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it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress”).

whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original). However, “the mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two. *Acosta v. Union Pacific Railroad Co.*, ARB No. 2018-0020, ALJ Case No. 2016-FRS-00082 slip op. at 11 (Jan. 22, 2020)(citations omitted).<sup>237</sup>

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). “[W]here 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 decisionmaker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, slip op. at 56.

To succeed in a whistleblower action, a complainant must also show that the employer had knowledge of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This requirement stems from the statutory language prohibiting employers from taking adverse action against an employee “because” the employee has engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(a)). Accordingly, a complainant bears the burden of showing that the person making the adverse employment decision knew about the employee’s past or imminent protected activity. *Id.*

#### Discussion of Contributing Factor Analysis

Here, the Tribunal finds that the PAM handled the termination of Complainant poorly and similarly finds PAM’s “management” lacking in dealing with the flight crew. It further finds that Mr. Mendelson’s and Mr. Yoder’s reliance on Mr. Lopez’s reporting of incidents without conducting their own investigation wanting. Under these facts, the Tribunal is troubled by management terminating an employee without even giving him an opportunity to present his version of the facts. However, being a poor manager is not what this Tribunal must decide. The ARB has stated on many occasions that an ALJ should not sit as a super-personnel advocate when viewing the employer’s decisions for an adverse action. *See Acosta v. Union Pacific Railway Co.*, slip op. at 11. The Act “is not a wrongful termination statute. An employer’s actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for [AIR-21] whistleblowing activity.” *Id.* Here, the Tribunal finds that the facts establish that, albeit for self-serving reasons, Mr. Lopez reported actions by Complainant that concerned both Mr. Mendelson and Mr. Yoder. The Tribunal does not doubt that Mr. Lopez embellished events to place himself in a better light with Mr. Mendelson and Mr. Yoder. Unfortunately for Complainant, the key to resolving this issue is not what happened during the three events relied upon to terminate Complainant, but rather how Mr. Lopez described the events to Mr. Mendelson and Mr. Yoder. More importantly, what Mr. Lopez conveyed to Mr. Mendelson and Mr. Yoder concerned conduct that had nothing to do with Complainant’s alleged

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<sup>237</sup> However, *see Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7<sup>th</sup> Cir. 1998)(“Timing may be an important clue to causation, but does not eliminate the need to show causation.) cited in *Acosta*.

protected activity. It was that alleged misconduct that drove the decision to terminate Complainant's employment. In sum, the Tribunal is not convinced by a preponderance of evidence that Complainant's reporting of LOAs had anything to do with his termination. If there is a contributing factor here, it was management's failure to investigate the nature of the alleged events that led to Complainant's termination. However, this is not the type of evidence that assists Complainant in meeting his burden.

6. Conclusion: Complainant's Preponderance of Evidence Case

The Tribunal finds that Respondents Henry Air II Trust and Henry Air II, LLC are not subject to the Act because they are not air carriers or contractors of air carriers. The Tribunal finds that PAM held itself out to the public as someone that should, but did not, hold an air carrier certificate. The Tribunal finds under these fact that PAM is an air carrier. PAM terminating Complainant's employment was an adverse action. However, Complainant has failed to establish that he engaged in protected activity. As there is no protected activity, he cannot establish that protected activity was a contributing factor in his termination. Finally, even if his concerns raised could be construed as protected activity, they were not in any way a contributing factor in the decision to terminate his employment.

V. CONCLUSION

Only Respondent PAM is subject to the Act and Complainant suffered adverse actions. However, he has failed to establish that he engaged in protected activity. Thus, Complainant is not entitled to relief under the Act.

VI. ORDER

For the reasons stated above, Complainant's complaint is hereby **DISMISSED** with prejudice.

SO ORDERED

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

**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).