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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC KCP Leasing and Services, LLC Scot Spencer, and George Warde	: : :	 Docket No. OST 2004-17486
Respondents	:	
Violations of 49 U.S.C. $41101 and 41712 Enforcement Proceeding	: :	

MOTION TO SET HEARING ON PENDING MOTION

I. INTRODUCTION

Respondent Scot Spencer hereby requests that the Department of Transportation set a hearing on his motion that has been pending since it was filed in October 2005 in the above-entitled matter (the "Motion"). Respondent Spencer, along with Respondents Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, filed their Motion requesting the following relief, in the alternative: (1) that the final order issued in

the pending matter be vacated for procedural defectiveness; (2) for permission to file exceptions to the initial decision of the Department; (3) for permission to file a petition for discretionary review of the initial decision; or (4) reconsideration, rehearing, and re-argument of the default judgment. This relief was requested on multiple grounds, as set forth in Respondents' moving papers. The Office of Aviation Enforcement and Proceedings ("Enforcement Office") timely submitted its answer to Respondents' Motion. After not receiving any ruling from this Department for two months, the Enforcement Office requested that this Department expedite the hearing on the pending Motion. No action has been taken by the Department. Accordingly, Respondent Spencer now requests that the pending Motion be set for hearing before the Department so that the matter may be finally resolved.

II. BRIEF PROCEDURAL HISTORY

This proceeding was initiated by the Enforcement Office on April 5, 2004. (Notice of Enforcement Proceeding, filed Apr. 5, 2004.) On August 23, 2005, the Department issued an order granting the Enforcement Office's motion for default judgment, and entered judgment against Respondents Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, and Scot Spencer. (Order Entering Default Judgment, issued Aug. 23, 2006.) In so doing, the Department ordered "Scot Spencer, personally, to permanently cease and desist from further marketing or other involvement in air transportation operations so that he is banned from the aviation industry...." (*Id.* at p. 3, ¶ 7.)

On October 12, 2005, Respondents filed, with supporting documents, their Motion. (Motion for Vacating of Initial Decision and Final Order and in the alternative Motion to File Exceptions to Initial Decision Out of Time and Exceptions to Initial Decision and Motion to File Petition for Discretionary Review of Initial Decision Out of Time and Petition for Discretionary

Review of Initial Decision and in the alternative, Petition for Reconsideration of Final Order, filed Oct. 12, 2005.) This Motion requested relief, in the alternative, for the following: (1) that the final order issued in the pending matter be vacated for procedural defectiveness; (2) for permission to file exceptions to the initial decision of the Department; (3) for permission to file a petition for discretionary review of the initial decision; or (4) reconsideration, rehearing, and re-argument of the default judgment. (*Id.*) The Motion is attached hereto as Exhibit A.

The Enforcement Office submitted a substantive answer on October 21, 2005. (Answer of the Office of Aviation Enforcement and Proceedings Opposing the Motions and Petitions of Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, and Scot Spencer, filed Oct. 21, 2005.)

After not receiving any ruling or notice of hearing, the Enforcement Office moved the Department to Expedite "its decision on the motions and petitions filed." (Motion to Expedite Proceeding, filed Jan. 30, 2006.)

More than 15 years later, the Department still has not ruled on the pending motions.

III. ARGUMENT

Respondent Spencer has been left in a procedural purgatory for the last 15 years, with his pending Motion left unresolved. The challenged order issued by the Department stood to severely interfere with Respondent Spencer's right to earn a living, was procedurally defective, and should have been reconsidered, as outlined in the Motion. And, until the pending Motion is resolved, Respondent Spencer cannot seek review by the district court. *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 9 F.3d 980, 980–81 (D.C. Cir. 1993). Respondent Spencer respectfully requests that after 15 years, he be given the opportunity to be heard on this pending Motion, and that the

Department render a decision in accordance with its obligations under the Federal Administrative Procedure Act. (14 C.F.R. § 302.11(g); see 5 U.S.C. §§ 551, *et seq.*)

IV. CONCLUSION

For the above stated reasons, Respondent Spencer respectfully requests that his Motion be set for hearing before the Department.

Dated: November 4, 2021

LARSON LLP

By: _____

Stephen G. Larson
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Attorneys for Scot Spencer

Attachment: Service List

Docket No. OST 2004-17486

FILING AND SERVICE LIST

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WASHINGTON, DC

Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC KCP Leasing and Services, LLC Scot Spencer, and George Warde	: : :	Docket OST 2004-17486-52
Respondents	:	
Violations of 49 U.S.C. §41101 and 41712 Enforcement Proceeding	:	

MOTION FOR VACATING OF INITIAL DECISION AND FINAL ORDER AND in the alternative MOTION TO FILE EXCEPTIONS TO INITIAL DECISION OUT OF TIME AND EXCEPTIONS TO INITIAL DECISION and MOTION TO FILE PETITION FOR DISCRETIONARY REVIEW OF INITIAL DECISION OUT OF TIME AND PETITION FOR DISCRETIONARY REVIEW OF INTIAL DECISION and in the alternative, PETITION FOR RECONSIDERATION OF FINAL ORDER.

Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, and Scot Spencer (collectively "Respondents"), request that the Initial Decision of the Administrative Law Judge, dated August 23, 2005, which became a Final Order on September 22, 2005 be vacated on the grounds that the Initial Decision was procedurally defective and therefore void.

In the alternative pursuant to Section 302. 9(2) of the Code of Federal Regulations, Respondents, for good cause shown, hereby seek permission to file, out of time, Exceptions to the Initial Decision of the Administrative Law Judge dated August 23, 2005 . Permission is warranted because the Initial Decision was procedurally defective for multiple reasons, including, but not limited to, its failure to notify respondents of critical and expressly mandated information, including "the time within witch exceptions to, or petitions for review of, such decision may be filed. . .". 302.31 (c). Assuming such permission is granted, Respondents set forth their Exceptions to the Initial Decision herein.

If permission to file Exceptions out of time is denied, Respondents move, in the alternative, for permission to file, out of time, a Petition for Discretionary Review of the Initial Decision of the Administrative Law Judge dated August 23, 2005. Permission is warranted because the Initial Decision was procedurally defective for multiple reasons, including, but not limited to, its failure to notify respondents of "the time within with exceptions to or petitions for review of, such decision may be filed. . .". 302.31 (c). Assuming such permission is granted, respondents' Petition for Discretionary Review is set forth below.

To the extent that Respondents' application to file Exceptions is granted or respondents' application to file a Petition for Discretionary Review is granted, respondents request that the Final Order in effect be stayed until a decision is rendered with respect to the Exceptions or the Petition for Discretionary Review is heard.

To the extent that both of the above motions are denied, Respondents, in the second alternative, hereby move, pursuant to 14 CFR 302.14, for reconsideration, rehearing and/or reargument of the Default Judgment dated August 23, 2005, which became a Final Order on September 22, 2005.

Procedural/Factual History

On August 8, 2005, the DOT Enforcement Office purportedly served, by federal express, a Motion for Default Judgment on Scot Spencer and the corporate respondents.[1] The Motion was based upon purported discovery violations and the relief requested was as a sanction pursuant to Fed. R. Civ. P. 37. Although the Motion was sent to an address in New Jersey that Scot Spencer had provided to the DOT as his home address, Scot Spencer was traveling throughout the month of August and was not at the address to receive his mail. Neither Scot Spencer nor the corporate respondents timely received the Motion for Default Judgment. Affidavit of Scot Spencer, ("Spencer Aff.") ¶¶ 1,5,6. On August 12, 2005, a conference was held in this matter pursuant to an Order that had been issued by the Honorable Richard C. Goodwin on April 20, 2005. That Order was purportedly served on Scot Spencer at 10 E. 29th Street, New York, New York, a residence that Mr. Spencer had vacated prior to April 20, 2005. Spencer Aff. ¶ 2. That Order was purportedly served on the corporate respondents at 443051 east 386 Road, Vineta, OK, an address that was not that of the corporate respondents. Spencer Aff. ¶ 8. Neither Scot Spencer nor the corporate respondents received notice of the August 12 Conference. Spencer Aff. ¶¶ 1-3 ,8 Accordingly, none of the respondents appeared for the conference or advised the ALJ or the DOT that they would not appear since they were unaware of the proceeding. Spencer Aff. ¶¶3, 8._.

On August 18, 2005, the day after respondents' papers in Opposition to the Motion for Default Judgment would have been due, the DOT moved to have an Order of default entered. On August 23, 2005, the Administrative Law Judge issued an Order Entering Default Judgment. The Order granted the Enforcement Office's August 8, 2005 Motion for a Default Judgment as a

[1] Mr. Spencer was not represented by counsel at this time.

sanction for alleged failures to comply with discovery deadlines. The Order stated that "there exists good cause. . . to find that Scot Spencer and the other Respondents have failed to submit themselves to the Departmental processes and to order that they be found to be in default of this proceeding."

Spencer and the corporate respondents became aware of the Default Order and the Motion for Default Judgment on August 25, 2005, when they were notified of their existence by a third party. Spencer Aff. ¶ 6. Spencer immediately took action to secure counsel, but, at the height of summer vacation, he had difficulty doing so until after Labor Day. Spencer Aff. ¶ 7.

On September 13, 2005, counsel served a Petition for Reconsideration pursuant to 14 CFR 302.14 on the belief that the August 23, 2005 Order was a Final Order. On September 23, 2005, DOT filed its opposition to the Petition, asserting, among other arguments that 14 CFR 302.14 was an improper provision under which to seek relief because the August 23 Order was an "Initial Decision."

By Decision dated September 28, 2005, the Administrative Law Judge denied Respondent's Motion on jurisdictional grounds holding that its "authority terminated upon issuance of the default judgment, served August 23, 2005," citing 14 CFR §302.17 (a)(4).

Upon receipt of the September 28, 2005 Decision, Respondents learned for the first time that the Administrative Law Judge considered the Default Judgment issued on August 23, 2005 to be an Initial Decision. Likewise, once learning that the August 23, 2005 was an Initial Decision, Respondents then learned that it became a Final Order effective September 22, 2005, pursuant to 14 CFR 302.31(d).

POINT I

The August 23, 2005 Order Was Defective and Should be Vacated and ReIssued

To the extent the August 23, 2005 Order was an Initial Decision, it was wholly defective and contained none of the indicia and warnings necessary to identify it as an Initial Decision.

First, the August 23, 2005 Order did not comply with 14 CFR 302.31 (c). That provision states that every Initial Decision must state on its face:

> The time within which exceptions to, or Petitions for Review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed.

The August 23, 2005 decision contained no such language.

Next, the August 23, 2005 Order did not comply with 302.31 (d). That provision requires that an Initial Decision must "recite that it is made under delegated authority, and contain notice of the provisions of paragraph (d) of this section." [Section (d) states that the initial decision shall become effective as a final order 30 days after service unless exceptions are filed].

The August 23, 2005 decision contained no such language.

As a result of these procedural defects, Respondents were rightfully confused about the type of decision that had been issued and thus were unaware of the rights they had and the time deadlines they had for enforcing those rights. This was particularly problematic because Respondents were without counsel at the time and new counsel was not retained until 2-3 weeks later. Moreover, even when new counsel was retained, its review of the Order led counsel to conclude that it was not an Initial Decision since it did not contain the hallmark language required. Based on the absence of the mandated language, Respondents assumed the Order was a Final Decision and served a Petition for Reconsideration of a Final Order pursuant to 14 CFR 302.14.

Respondents were severely prejudiced by these procedural defects. Had the Initial Decision contained the necessary language, Respondents would (1) have known to file timely Exceptions to the Initial Decision; (2) have known to file a timely Petition for Discretionary Review; and (3) would have known that the Initial Decision would not be effective as a Final Order until 30 days thereafter.

Based on the procedural defects and resulting prejudice to Respondents, Respondents request that the Final Order be vacated and that a new Initial Decision be issued in accordance with the procedural requirements set forth in 14 CFR 302.31(c).

In the alternative, Respondents make an application for an enlargement of time to file Exceptions and/or a Petition for Discretionary Review for good cause shown. Respondents' Exceptions and Petition for Discretionary Review are set forth below.

In the event the application for an enlargement of time to File Exceptions and/or a Petition for Discretionary Review is not granted, Respondents herewith file a Petition for Reconsideration pursuant to 14 CFR 302.14.

Respondents Have Good Cause to Support their Application for Enlargement of Time to File Exceptions and/or A Petition for Discretionary Review

Pursuant to 14 CFR 302.9(a)(2):

> whenever a party has the right or obligation to take action within a period prescribed by this part, by a notice given thereunder, or by an order or regulation, the DOT Decisionmaker or the Administrative Law Judge assigned to the proceeding, as appropriate, may . . . (2) upon motion permit the act to be done after the expiration of the specified period, where good cause for the failure to act on time is clearly shown.

As set forth above, Respondents failed to act upon the Initial Decision by either filing exceptions or by filing a Petition for Discretionary Review because they were unaware that the Default Order was an Initial Decision. Given the blatant failure of the

Default Order to contain any of the hallmark language necessary for Respondents to have known that it was an Initial Decision, Respondents' failure to act on time was understandable and for good cause. Moreover, because the very language missing from the Initial Decision was the explicit language necessary to have advised Respondents of their substantive and procedural rights, Respondents' failure to act on time is understandable and for good cause.

As set forth above, the Default Order failed to contain the mandated language advising respondents that (a) they had 7 days to file Exceptions; (b) they had 21 days to file a Petition for Discretionary Review; and (c) absent either of the above, the Order would become a Final Order in 30 days. Had the Order contained this required language, Respondents would have known the nature of the Order and their rights to file Exceptions and request Discretionary Review.

For these reasons, Respondents have demonstrated good cause as to why they failed to file timely Exceptions or failed to file a timely Petition for Discretionary Review.

Exceptions to Default Order dated August 23, 2005

Pursuant to 14 CFR 302. 217(a), Scot Spencer, Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, assert the following exceptions to the August 23, 2005 Order.

1. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that "there exists good cause, including those reasons stated in the Enforcement Office's Motion for Default Judgment, to find that Scot Spencer and the other Respondents have failed to submit themselves to the Departmental

processes and to order that they be found to be in default in this proceeding."

2. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that respondents are "deemed to have admitted to all of the allegations in the Enforcement Office's Complaint, dated April 5, 2004."

3 . Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that respondents "violated 49 U.S. C. § 41101 by operating as an indirect air carrier without the requisite authority from the Department."

4. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that respondents "engaged in unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

5. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that it had the authority to order that respondents "cease and desist from violating 49 U.S.C. § 41101 and 41712."

6. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that respondents are jointly and severally liable for $1,000,000 for the violations described in the complaint . The maximum civil penalty for a violation of Chapter 411 of 49 USC (failure to have certificate authority) or Section 41712 (unfair or deceptive practices)of 49 USC is $1100 per violation for an individual or small business. There is nothing in the record to support a penalty of $1,000,000. Further, pursuant to 49 USC 46301(c) any such penalty can only

be issued after notice and an opportunity for a hearing, neither of which occurred here.

7. Respondents take exception to the ALJ's ultimate conclusion (including all underlying findings and statements) that it had the authority under any statute to order respondents to "permanently cease and desist from further marketing or other involvement in air transportation operations so that he is banned from the aviation industry for the violations described above." No such authority authorizes the ALJ to issue such an order. Furthermore, Respondents take exception to the language of the Order in Paragraph 7 of the Initial Decision in that the Order is vague and overbroad.

8. Respondents take exception to the ALJ's consideration of the Enforcement Office's Motion for Default Judgment pursuant to Fed. R. Civ. P. 37. The Enforcement cited no authority to support the application of Fed. R. Civ. P. 37 to these proceedings. In any event, under case law interpretations of Fed. R. Civ. P. 37, the ultimate sanction of a default judgment may only be issued under Fed. R. Civ. P. 37 once a party has been given specific advance notice by the Judge that such a judgment will be entered as failure to comply with a discovery order.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to 14 CFR 302.32 Scot Spencer, Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, Respondents seek discretionary review of the Default Order dated August 23, 2005 on the grounds that the Order was defective for the following reasons.

Errors of Material Fact

Pursuant to 14 CFR 302.32(2)(i)(a), respondents seek discretionary review of the

following erroneous findings of material fact set forth in the Default Order dated August 23, 2005.

1. The ALJ erroneously found as a matter of material fact that "respondents failed to comply in any meaningful regard [to discovery proceedings] and rebuffed the Enforcement Office's efforts to informally work out a solution."

2. The ALJ erroneously found as a matter of material fact that "Scot Spencer failed to produce a single document that is responsive to the subpoena."

3. The ALJ erroneously found as a matter of material fact that Scot Spencer, at his deposition "refused in general to answer relevant questions."

4. The ALJ erroneously found as a matter of material fact that "Scot Spencer and the other Respondents did not attend or have representation at the conference [on August 12, 2005] as directed, nor did they notify [the DOT] that they could not be there and seek alternate arrangements."

5. The ALJ erroneously found as a matter of material fact that "Scot Spencer and the other Respondents have failed to file an answer to the Enforcement Office's motion [for default judgment.]."

6. The ALJ erroneously found as a matter of material fact that respondents "failed to submit themselves to the Departmental processes and to order that they be found to be in default in this proceeding."

In support of all these objections to erroneous findings of material facts, we submit the Affidavit of Scot Spencer, sworn to October 12, 2005.

Erroneous Conclusions of Law

Pursuant to 14 CFR § 302.32(2)(ii) and (iii), respondents seek discretionary

49 USC (failure to have certificate authority) or Section 41712 (unfair or deceptive practices)of 49 USC is $1100 per violation for an individual or small business. Further, pursuant to 49 USC 46301(c) any such penalty can only be issued after notice and an opportunity for a hearing, neither of which occurred here.

7. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act, Chapter 463 of 49 USC or otherwise to order respondents to "permanently cease and desist from further marketing or other involvement in air transportation operations so that he is banned from the aviation industry for the violations described above" or from ordering the prohibition of conduct in areas outside their authority.

Procedural Errors

Pursuant to 14 CFR § 302.32(2)(iv), Respondents seek discretionary review of the following prejudicial procedural errors.

1. Although respondents were purportedly served with the Motion for Default Judgment, respondents did not timely receive the Motion for Default Judgment.

2. To the extent the decision to grant the Enforcement Office's Motion for Default Judgment was based, in part, upon the non appearance of respondents at the August 12 Conference, the address to which the notice of the August 12 Conference was sent to Spencer was an address that Scot Spencer had vacated months before and Spencer did not receive notice. When the DOT learned of Spencer's new address during discovery proceedings, it took no steps to re-send the Notice of Conference to the new address or otherwise advise Spencer of the Conference. In addition, the address to which

the notice of the August 12 Conference was sent to the corporate respondents was not an address associated with the corporate defendants.

3. As set forth above, the August 23, 2005 Order was in utter non-compliance with 14 CFR 302.31. It did not state on its face "the time within which exceptions to, or Petitions for Review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed." It did not "recite that it is made under delegated authority, and contain notice of the provisions of paragraph (d) of this section. [Section (d) states that the initial decision shall become effective as a final order 30 days after service unless exceptions are filed].

PETITION FOR RECONSIDERATION

Pursuant to Section 302.14 of the Code of Federal Regulations, Ascend Aviation Group, LLC, Ascend Aviation Marketing and Sales, LLC, KCP Leasing and Services, LLC, and Scot Spencer (collectively "Respondents") hereby move for reconsideration, rehearing and/or reargument of the Order entering Default Judgment against Respondents dated August 23, 2005 ("Initial Decision"), which purportedly became a Final Order on September 22, 2005.

The matters of record erroneously decided by the Initial Decision which became a Final Order are:

1. The ALJ erroneously concluded that the Respondents failed to submit themselves to the Departmental processes and had defaulted. Respondents did not fail to submit themselves to the Departmental processes and participated in all of the proceedings relating to this matter with the exception of (1) responding to the Motion for Default Judgment which Motion Respondents did not receive; and (2) appearing at the August 12, 2005 conference, notice of which Respondents did not timely receive. Affidavit of Scot Spencer. ¶¶ 2,5, 8. Respondents seek a vacating of the Default

Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

2. The ALJ erroneously concluded that the Respondents are "deemed to have admitted to all of the allegations in the Enforcement Office's Complaint, dated April 5, 2004." Respondents do not admit the allegations in the Enforcement Office's Complaint, nor did the ALJ have the authority, under the circumstances, to reach such a conclusion. Respondents did not submit papers in opposition to the Motion for Default Judgment because Respondents did not timely receive the Motion Papers. Affidavit of Scot Spencer ¶ 5,6. Respondents seek a vacating of the Default Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

3. The ALJ erroneously concluded that the Respondents "violated 49 U.S. C. § 41101 by operating as an indirect air carrier without the requisite authority from the Department." Respondents had no opportunity to present evidence on this topic. The ALJ did not have the authority, under the circumstances, to reach such a conclusion. Respondents seek a vacating of the Default Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

4.. The ALJ erroneously concluded that the Respondents "engaged in unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712. Respondents had no opportunity to present evidence on this topic. The ALJ did not have the authority, under the circumstances, to reach such a conclusion. Respondents

review of the following erroneous legal conclusions set forth in the Default Order dated August 23, 2005 on the ground that they are a "departure from or contrary to law, the Department's rules or precedent" and on the ground that the errors involve substantial and important questions of law, policy and discretion.

1. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37 , the Administrative Procedure Act or otherwise to enter judgment in favor of claimant based on alleged discovery violations.

2. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act or otherwise to find that respondents were "deemed to have admitted to all of the allegations in the Enforcement Office's Complaint, dated April 5, 2004."

3. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act or otherwise to find that respondents "violated 49 U.S. C. § 41101 by operating as an indirect air carrier without the requisite authority from the Department."

4. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act or otherwise to find that respondents were "engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712."

5. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act or otherwise to order that respondents "cease and desist from violating 49 U.S.C. § 41101 and 41712."

6. The conclusion that the ALJ had the authority under Fed. R. Civ. P. 37, the Administrative Act, Chapter 411 of 49 USC, Section 41712 of 49 USC, or otherwise to find that respondents are jointly and severally liable for $1,000,000 for the violations described in the complaint. The maximum civil penalty for a violation of Chapter 411 of

seek a vacating of the Default Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

5. The ALJ erroneously concluded that it had the authority to order that Respondents "cease and desist from violating 49 U.S.C. § 41101 and 41712 as a sanction or otherwise, without a hearing and the opportunity to present evidence. The ALJ did not have the authority, under the circumstances, to reach such a conclusion. Respondents seek a vacating of the Default Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

6. The ALJ erroneously concluded that it had the authority to order that Respondents are jointly and severally liable for $1,000,000 for the violations described in the complaint as a sanction or otherwise, without a hearing and the opportunity to present evidence. The ALJ did not have the authority, under any circumstances, to reach such a conclusion, which is contrary to law. The maximum civil penalty for a violation of Chapter 411 of 49 USC (failure to have certificate authority) or Section 41712 (unfair or deceptive practices)of 49 USC is $1100 per violation for an individual or small business. There is nothing in the record to support a penalty of $1,000,000. Further, pursuant to 49 USC 46301(c) any such penalty can only be issued after notice and an opportunity for a hearing, neither of which occurred here. Respondents seek a vacating of the Default Judgment and the opportunity for Respondents to submit papers in opposition to the Motion for Default Judgment demonstrating that the sanction of default is not warranted nor authorized.

7. The ALJ erroneously concluded that it had the authority to order that Respondents "permanently cease and desist from further marketing or other involvement in air transportation operations so that he is banned from the aviation industry for the violations described above." There is no authority in the Administrative Procedure Act, Fed. R. Civ. P. 37, Chapter 463 of 49 USC, or any other statute authorizing the ALJ to issue permanent injunctions from participation in the aviation industry. Moreover, any such order is vague and overbroad.

This Petition is further based upon new matter that petitioner, with due diligence, could not have known or discovered prior the date the case was submitted for decision. That new matter is the fact that the Initial Decision was defective in multiple respects. First, the Initial Decision did not comply with 14 CFR 302.31 (c). That provision states that every Initial Decision must state on its face:

> The time within which exceptions to, or Petitions for Review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed.

The Initial Decision contained no such language.

Next, the Initial Decision did not comply with 14 CFR 302.31 (d). That provision requires that an Initial Decision must "recite that it is made under delegated authority, and contain notice of the provisions of paragraph (d) of this section." [Section (d) states that the initial decision shall become effective as a final order 30 days after service unless exceptions are filed].

The Initial Decision contained no such language.

As a result of these procedural defects, Respondents were rightfully confused about the type of decision that had been issued and thus were unaware of the rights they had and the time

deadlines they had for enforcing those rights. This was particularly problematic because Respondents were without counsel at the time and new counsel was not retained until 2-3 weeks later. Moreover, even when new counsel was retained, its review of the Order led counsel to conclude that it was not an Initial Decision since it did not contain the hallmark language required. Based on the absence of the mandated language, Respondents assumed the Order was a Final Decision and then served a Petition for Reconsideration of a Final Order pursuant to 14 CFR 302.14.

Since the Initial Decision was defective, it could not have become a Final Order.

This Petition is further based upon new matter that petitioner, with due diligence, could not have known or discovered prior the date the case was submitted for decision. That new matter is the Motion for Default Judgment itself, which Respondents were unaware of as of the time the case was submitted for decision. Respondents did not receive the Motion for Default Judgment until after the Initial Decision was issued. Affidavit of Scot Spencer ¶ 5,6..

CONCLUSION

The Initial Decision dated August 23, 2005 should be vacated for failure to comply with the procedural requirements clearly set forth in 14 CFR 302.31(c). If the Initial Decision is vacated, any Final Order, would necessarily be vacated as well. If the Initial Decision is vacated and reissued pursuant to 14 CFR 302.31(c), Respondents will have the opportunity to file timely exceptions and/or a Petition for Discretionary Review.

If the Initial Decision is not vacated, Respondents should be afforded the opportunity to file, out of time, for good cause shown, exceptions and/or a Petition for Discretionary Review as set forth above.

Finally, if the above relief is not granted, Respondent's Petition for Reconsideration is

filed herewith and should be granted in its entirety for the reasons set forth above.

Dated: October 12, 2005

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