



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
On the 11th day of July, 2006

**Principal Air Services, LLC, and
David C. Bernstein**

**Violations of 49 U.S.C. §§ 41101
and 41712**

Docket OST 2006-23528

Served July 11, 2006

CONSENT ORDER

This consent order concerns unauthorized service by Principal Air Services, LLC, (PAS) and David C. Bernstein. Between January 1, 2004, and February 1, 2006, Mr. Bernstein, through PAS, a business entity over which he exercised absolute ownership, direction, and control, engaged in air transportation without holding the requisite economic authority from the Department. This order directs Mr. Bernstein and the companies he owns or controls to cease and desist from such future unlawful conduct and assesses Mr. Bernstein a compromise civil penalty of \$400,000. It also enjoins Mr. Bernstein personally for a period of 15 months from most involvement, either directly or indirectly, with any entity that holds an operating certificate issued by the Federal Aviation Administration (FAA) authorizing operations under 14 CFR Part 125.

Mr. Bernstein is a United States citizen. He is the sole shareholder and sole director of PAS. He also serves as the president and chief executive officer of PAS. There are no other officers. Mr. Bernstein is heavily involved in the day to day marketing, management, and operations of the company. Internal to PAS, Mr. Bernstein makes all significant decisions affecting it. In light of the foregoing, Mr. Bernstein is the animating force behind PAS.¹

¹ Personal responsibility for corporate liability may attach when an individual's conduct amounts to an "animating force" that causes the violation of a statute and accompanying regulations. *Citronelle-Mobile Gathering, Inc., v. Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App. 1987), cert. denied, 484 U.S. 943 (1987). In certain cases, the Department has found individuals who made "day-by-day decisions" on behalf of corporate entities personally liable for the unlawful conduct of those entities. See, e.g., *Tropical Airways, Inc., and Larry Singh, Charter Violations*, Order 87-12-43 (Dec. 17, 1987).

In February 2004, DB Air, Ltd., a company under the absolute ownership, direction, and control of Mr. Bernstein entered into a consent order with the Office of Aviation Enforcement and Proceedings (Enforcement Office) for violations of 49 U.S.C. §§ 41101 and 41712.² In that consent order, the Department found³ that DB Air had unlawfully engaged in air transportation as an indirect air carrier without holding the requisite economic authority. Specifically, DB Air was found to have falsely held itself out as a direct air carrier and to have sold as a principal air transportation aboard two Boeing 727 aircraft that DB Air had leased from a third party and had placed on the FAA Part 121 operations specifications of a direct air carrier that held the requisite DOT economic authority. The licensed direct air carrier then operated the flights sold by DB Air pursuant to a management arrangement between the two companies.

PAS is a citizen of the United States⁴ incorporated on May 9, 2003, in Delaware and an operator of aircraft pursuant to 14 CFR Part 125. Authority under this FAA regulation is limited to private carriage operations.⁵ Notwithstanding this proscription, the Enforcement Office believes that PAS has held out and performed significant common carriage service since at least January 2004. PAS's unauthorized service as a common carrier violates the economic licensing requirement of 49 U.S.C. § 41101 and constitutes an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.⁶

In order to engage directly or indirectly in air transportation, a citizen of the United States is required to hold economic authority⁷ from the Department of Transportation

² *DB Air, Ltd., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-2-21 (Feb. 23, 2004).

³ A consent order issued by the DOT Deputy General Counsel in an aviation enforcement case becomes an "action of the Department" 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative. 14 CFR 385.32. No such petition was received with respect to the consent order against DB Air and the Department elected not to review the findings in the order. Thus, the DB Air consent order is an order of the Department. See also *American Airlines, Inc., Violations of 49 U.S.C. §§ 40127, 41310, 41702, and 41712* DOT Docket 2003-15046, Order Denying Motion of American Airlines, Inc., to Dismiss (August 21, 2003) (recognizing Enforcement Office consent orders as Department precedent).

⁴ A "citizen of the United States" includes a corporation organized in the United States that 1) meets certain specified numerical standards regarding the citizenship of its president, officers and directors, and holders of its voting interest and 2) is under the actual control of citizens of the United States. 49 U.S.C. § 40102(a)(15).

⁵ 14 CFR 125.11(b) provides that "[n]o certificate holder may conduct any operation which results directly or indirectly from any person's holding out to the public to furnish transportation."

⁶ Under Department enforcement case precedent, violations of 49 U.S.C. § 41101 and the Department's licensing requirements constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. See, e.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2005-3-39 (March 30, 2005).

⁷ In general, economic authority is granted to large aircraft operators (e.g., operators of Boeing 707s) in the form of a certificate of public convenience and necessity issued under 49 U.S.C. §§ 41102 and 41103. Before granting economic authority, DOT must find a carrier to be "fit," which entails a determination that the carrier is owned and controlled by U.S. citizens and has adequate financial

pursuant to 49 U.S.C. § 41101, or an exemption from that provision, such as those applicable to direct air carriers operating as air taxis under 14 CFR Part 298 and indirect air carriers functioning as air freight forwarders under 14 CFR Part 296. “Air transportation” includes the transportation of passengers or property by aircraft as a common carrier for compensation between two places in the United States or between a place in the United States and a place outside of the United States.⁸ Common carriage, in the context of air service, consists of the provision or holding out of transportation by air to the public for compensation or hire.⁹ From the standpoint of the requirements of section 41101, the holding out of air service, as well as the actual operation of that service, constitutes “engaging” in air transportation.¹⁰

PAS currently operates a “luxury-configured” Boeing 707 aircraft (N88ZL).¹¹ Between January 2004 and February 2005, PAS provided single-entity¹² charter passenger air service to a number of customers. The Enforcement Office maintains that this transportation was obtained by direct and indirect holding out to the public. For example, on at least three occasions, PAS obtained customers via direct solicitations. On at least one other occasion, PAS transported a customer obtained via the e-mail advertising of a

resources, a competent management team, and a positive compliance disposition. This fitness requirement is a continuing one and the Department monitors “certificated” carriers to ensure their compliance. Certificated carriers must also meet certain Departmental economic rules, such as liability insurance requirements (14 CFR Part 205) and escrow requirements to protect charterers’ funds and expectations (14 CFR 212.8 and 380.34). In addition, carriers engaging in common carriage with large aircraft must comply with the safety-related certification and operating rules of Part 121 of the Federal Aviation Regulations (14 CFR Part 121).

Large aircraft operators that engage in common carriage without the appropriate DOT and FAA authorizations harm consumers by denying them the level of protection afforded by duly licensed carriers that have been found fit by the Department and are complying with the FAA safety regulations applicable to common carriage operations aboard large aircraft. Operators without the appropriate authority, whose costs are lower by dint of their failure to obtain economic authority and to comply with the appropriate FAA safety rules, place duly licensed common carriers at a competitive disadvantage.

⁸ 49 U.S.C. §§ 40102(a)(5), (a)(23), and (a)(25).

⁹ See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (Dec. 29, 2003).

¹⁰ Prior to 1994, when Title 49 of the United States Code was recodified and simplified, 49 U.S.C. § 41101 stated that no carrier could “engage” in air transportation without appropriate authority. Although the wording of section 41101 now states that what is prohibited is “providing” air transportation without authority, Congress made clear when it recodified Title 49 that in doing so it did not intend any substantive change to the statute. Act of July 5, 1994, Pub. L. 103-272, § 6(a), 108 Stat. 745, 1378.

¹¹ From July 2003 until sometime in 2004, PAS also operated a specially configured Boeing 727-200 aircraft.

¹² A single-entity charter is a charter for the entire capacity of the aircraft, the cost of which is borne by the charterer and not directly or indirectly by the individual passengers.

third party.¹³ In addition, Lowa, Ltd., an affiliated company¹⁴, held out PAS's Boeing 707 aircraft on its Internet website.¹⁵

Even assuming that PAS did not actively solicit business, its operations involved the provision of air transportation to a large number of diverse entities and, by doing so, it engaged in a course of conduct that evinced a willingness to provide passenger air transportation to the public, thereby constituting an unlawful holding out of common carriage via reputation.¹⁶ Although PAS avers that it has not held out in this manner, the Enforcement Office views the number of customers that PAS served as far exceeding any reasonable interpretation of the boundaries of private carriage for hire under relevant precedent.¹⁷

In mitigation, Respondents state that PAS did not hold out air transportation to the general public and assert that PAS's aircraft, configured with two bedrooms and two bathrooms is not capable of certification under 14 CFR Part 121, which is generally the FAA regulatory analog to DOT certification under 49 U.S.C. § 41101. Respondents

¹³ A non-common carrier may not perform common carriage operations that result from the marketing efforts of a third party, such as another air carrier or an air charter broker, agent, or affiliated company. See, e.g., *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-2-7 (Feb. 9, 2004).

¹⁴ Mr. Bernstein is the president and chief operating officer of and largest single shareholder in Lowa, Ltd.

¹⁵ PAS maintains that Lowa's Internet advertising was an effort to sell, not charter, the aircraft. While the website did not contain explicit language offering the aircraft for charter, it did not contain language explicitly offering the aircraft for sale either. More importantly, though, when taken in the context of PAS's overall activities, which amounted to engaging in common carriage, the website cannot be objectively viewed as merely an offer to sell the aircraft (even assuming the veracity of PAS's claim regarding its intention to that effect). Notwithstanding the specific language used (or not used), in light of PAS's holding out of common carriage service, the effect of the website cannot be viewed as being only a solicitation to prospective aircraft buyers and not also as being a solicitation to prospective aircraft charterers.

¹⁶ A holding out of common carriage occurs when a carrier engages in a course of conduct such that it gains a reputation for having a willingness to serve the public. See, e.g., *Woolsey*, 993 F.2d at 524 n.24; *Premier Aircraft Management Violations of 49 U.S.C. §§ 41301, 41703, and 41712 and 14 CFR Part 375*, Order 2004-5-11 (May 13, 2004); *Intercontinental, U.S., Inc., Enforcement Proceeding*, 41 C.A.B. 583, 601 (1965).

¹⁷ In what it termed "a close one," the CAB, which held jurisdiction over aviation licensing matters prior to the Department, deemed as private certain air service operations by Part 125 operators Zantop International Airlines (Zantop) and Air Traffic Service Corporation (ATSC) that involved transporting cargo pursuant to contracts with the three major American automobile manufacturers, plus a *de minimus* level of non-automotive related traffic. *Automotive Cargo Investigation*, 70 C.A.B. 1540, 1554 (1976). Aside from the limited number of customers served by Zantop and ATSC, the CAB's decision in this case appeared predicated substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide service equivalent to that needed by the "Big Three." *Id.* at 1553. Today, by contrast, in the market PAS says it serves (charter air transportation for rock stars and high net worth individuals, and governments), there are numerous duly licensed common carriers with the capability to provide air transportation service similar if not equivalent to that which PAS claims to provide.

assert that the FAA encouraged certification of the aircraft under 14 CFR Part 125 and that some of its services were rendered to entities that are outside the scope of common carriage. With respect to the specific instances in which the Enforcement Office asserts that PAS directly solicited customers, an employee, who has since been dismissed, entered, according to PAS, into several of the subject contracts without authorization. Respondents submit that there is no evidence to support the Enforcement Office's surmise that the Iowa website was intended for a purpose other than sale of the aircraft and add that they have added language to the site that will prevent any confusion over the purpose of the site.

The Enforcement Office views seriously the violations of the Department's licensing requirements by David C. Bernstein and Principal Air Services, LLC. We have carefully considered the facts of this case and continue to believe enforcement action is necessary. Our opinion is based in part on the fact that the unlicensed common carriage operations of Principal Air Services, LLC, persisted after the Enforcement Office's recent compliance initiative involving Part 125 operators unlawfully engaging in common carriage.¹⁸ Respondents, in order to avoid litigation and without admitting or denying the alleged violations, agree to the issuance of this order. Further, David C. Bernstein¹⁹ agrees to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 by engaging in common carriage directly or indirectly, and to an assessment of \$400,000 in compromise of potential civil penalties. Of this total amount, \$200,000 shall be paid under the terms described below. The remaining \$200,000 shall be suspended for two years following the date of issuance of this order and then forgiven, unless David C. Bernstein violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and David C. Bernstein may be subject to further enforcement action. In addition, except to the extent necessary to facilitate the sale of his ownership interest in Principal Air Services, LLC, and to provide certain post-sale, technical consulting services to the new owners regarding those assets, David C. Bernstein agrees to cease and desist for a period of 15 months following the date of issuance of this order from any involvement, either directly or indirectly, with any entity that holds an operating certificate issued by the FAA authorizing operations under 14 CFR Part 125.²⁰ These penalties are appropriate in view of the nature and

¹⁸ This initiative resulted in 16 consent orders against Part 125 operators and related companies. The first, which was against Sky King, Inc., (Order 2002-10-18) was issued on October 10, 2002, and the last, which was against C&M Airways (Order 2005-6-2), was issued on June 2, 2005. Principal Air Services' equivalent conduct occurred during and extended beyond this period.

¹⁹ As the animating force behind Principal Air Services, the Enforcement Office views Mr. Bernstein, rather than Principal Air Services, as the culpable party in this matter. Accordingly, this order's assessed civil penalty and its cease and desist provisions bind only Mr. Bernstein.

²⁰ The Department has, in the past, prohibited individuals from engaging in certain types of air transportation. See, e.g., *In the Matter of Ascend Aviation Group, LLC, et al, Enforcement Proceeding*, DOT Docket 2004-17486-47, Order Granting Default Judgement (Aug. 23, 2005) (ordering individual to "permanently cease and desist from marketing or other involvement in air transportation operations"); *Robert O. Nay, et al, Enforcement Proceeding, Robert O. Nay, Emerald Tours, Ltd. (Virginia), World Classics, Ltd., and Emerald Tours, Ltd. (Illinois) Enforcement Proceeding*, DOT Docket 45663, Initial Decision of Administrative Law Judge Ronnie A. Yoder (Nov. 18, 1991), rev'd in part on other grounds, Order 92-9-48 (Sep. 28, 1992) (ordering company president in his personal capacity to cease and desist

extent of the violations in question and serve the public interest. Moreover, they create a deterrent to future air transportation operations without appropriate economic authority by David C. Bernstein and Principal Air Services, LLC, as well as by other similarly situated persons and entities.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of the order as being in the public interest.
2. We find that David C. Bernstein and Principal Air Services, LLC, violated 49 U.S.C. § 41101, as described above, by engaging in air transportation without appropriate economic authority.
3. We find that by engaging in the conduct described in paragraph 2, above, David C. Bernstein and Principal Air Services, LLC, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.
4. We order David C. Bernstein and all other entities owned, controlled, or managed by him or for which he acts as an officer to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712.
5. We assess David C. Bernstein a compromise civil penalty of \$400,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of this total amount, \$50,000 shall be due and payable 30 days from the date of issuance of this order, \$50,000 shall be due and payable 180 days from the date of issuance of this order, \$50,000 shall be due and payable one year from the date of issuance of order, and \$50,000 shall be due and payable 18 months from the date of issuance of order. The remaining \$200,000 shall be suspended for 24 months after the service date of this order, and then forgiven unless David C. Bernstein violates this order's cease and desist or payment provisions contained in ordering paragraphs 4 through 7, in which case the entire unpaid amount shall become due and payable immediately and David C. Bernstein may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject David C. Bernstein to the assessment of interest, penalty, and collection charges under the Debt Collection Act.
6. We order David C. Bernstein to pay the compromise civil penalty assessed in ordering paragraph 5, above, by wire transfers through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S.

from operating public charters for a period of five years); *Orien L. Dickerson, and Independent Air, Inc., Violations of Section 411 of the Federal Aviation Act and 14 CFR Part 207*, Order 92-8-1 (Aug. 3, 1992) (ordering company vice president in his personal capacity to refrain from "gainful involvement" with air carriers, travel agents, or public charter operators for 18 months).

Treasury. The wire transfers shall be executed in accordance with the instructions contained in the Attachment to this order.

7. Except to the extent necessary to facilitate the sale of his ownership interest in Principal Air Services, LLC, for a period not to exceed three months from the date of issuance of this order and to provide certain post-sale, technical consulting services to the new owners regarding those assets, we order David C. Bernstein, in his personal capacity, to cease and desist for a period of 15 months following the issuance of this order from any involvement, either directly or indirectly, with any entity that holds an operating certificate issued by the FAA authorizing operations under 14 CFR Part 125.

This order will become a final order of the Department ten days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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