UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

MICHAEL P. HUERTA, Administrator Federal Aviation Administration Complainant, v. RAPHAEL PIRKER Respondent.	))))))))))))	 Docket No. CP-217 Unassigned

ADMINISTRATOR'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

The Administrator of the Federal Aviation Administration pursuant to 49 C.F.R. § 821.17 of the Board's Rules of Practice in Air Safety Proceedings files this response on opposition to Respondent's Motion to Dismiss. The Respondent makes the following assertions in his motion to dismiss:

1) there is no existing Federal Aviation Regulation governing the operation of model aircraft;[1]
2) the "public record" confirms that model aircraft operation is unregulated;
3) the FAA has expressly declined to regulate "model aircraft;"
4) the FAA lacks jurisdiction to regulate anything outside of the "navigable airspace;"
5) the FAA faces "pressure" due to the public's concern about "drones;" and

[1] Respondent goes to great length to characterize the aircraft he operated as just a "model." Whether it is a "model" as Respondent uses the term or not, it is by both statutory and regulatory definition is an aircraft. 49 U.S.C. § 40102(a)(6), 14 C.F.R. § 1.1. Specifically 49 U.S.C. §40102(a)(6) defines aircraft as: "any contrivance invented, used, or designed to navigate, or fly in, the air." 14 C.F.R. § 1.1 defines aircraft as: "a device that is used or intended to be used for flight in the air."

6) the FAA's policy statements concerning UAS operations are not binding or enforceable.

Each of Respondent's assertions is either unfounded, irrelevant for purposes of a motion to dismiss the Complaint, or rely upon unsupported and contested questions of fact that require resolution at a hearing on the merits of the case.

The FAA unquestionably has authority to regulate aircraft in U.S. airspace. Consistent with that authority it long ago promulgated a regulation through notice and comment that prohibits the careless or reckless operation of aircraft in that airspace that could potentially endanger the life or property of another. The Respondent is alleged to have violated that single regulation, 14 C.F.R. § 91.13.

Respondent's attempt at pages 12-13 of its motion to characterize Congress' direction to the FAA to develop regulations specifically pertaining to UASs does not imply as Respondent suggests that no regulations applicable to UASs currently exist. Indeed, section 91.13 clearly and without any ambiguity pertains to the operation of any aircraft by any person and prohibits careless or reckless operation that could potentially endanger the life or property of another. To the extent that Respondent is arguing that the Advisory Circular (AC) 91-57 and the 2007 Notice of Policy on unmanned aircraft operations in the National airspace system are inconsistent with the Administrator's position that section 91.13 pertains to the operation of all aircraft including UASs, that argument is flawed as a matter of law. It is clear from a plain reading of AC 91-57 and the 2007 Notice that those policy statements addressed UASs as "aircraft" within both the statutory and regulatory definitions of "aircraft."

To the extent that the Respondent is arguing that the information contained in the AC 91-57 and the 2007 Notice supersede the operational requirements contained in 14 CFR part 91 regulations, it is clear that compliance with the regulations is mandatory, while the policies addressed in AC 91-57 and the 2007 Notice are not mandatory. However, insofar as those policies reflect regulatory requirements, those requirements are manadatory. AC 91-57 states "this advisory circular outlines, and encourages voluntary compliance with safety standards for model aircraft operators [set out in the AC]." The 2007 Notice sets forth policy to distinguish between different types of UAS operations. Neither policy contains a blanket exemption for any category of UAS that would permit such an aircraft to be operated in a careless or reckless manner contrary to the prohibition of section 91.13. Additionally, Respondent's claim that the FAA's 2007 UAS Policy Notice improperly substituted for valid APA rulemaking is groundless and has nothing whatsoever to do with the issue that is pending before the Board in this case. Respondent appears to think that if he vigorously criticizes the FAA's efforts to address UAS operations over time it will excuse that his operation as alleged in the Complaint was inherently careless or reckless.

Additionally, the Respondent makes a number of unsupported and contested factual allegations that, for purposes of a motion to dismiss, should disregard as they are issues that, if they are even relevant, can only be resolved by reviewing evidence that will be placed in the record. For example, Respondent asserts that UASs are used safely in the production of motion pictures and television shows and in competitions with reduced proximity to bystanders. See Resp't's Mot. at 6, 24-26. The Respondent also alleges that Mr. Pirker used spotters, coordinated with the hospital heliport, and took unspecified "other measures" to ensure the absence of other aircraft during the alleged flight. Id. at 3. He makes these claims without affidavits or other admissible evidence of any kind to support what he is trying to argue. To the extent the Respondent is requesting the Board to consider these, and other, factual assertions, the Respondent's motion is more properly characterized as one for summary judgment. See C.F.R. §821.17(d). As such, the law judge must view the evidence in the motion "in the light most favorable to the non-moving party." See, e.g., Administrator v. Gibbs, NTSB Order No. EA-5638 (2012) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). As the Respondent has submitted no admissible evidence of any kind in support of his motion, when construing the facts in the light most favorable to the Administrator, the Complaint is legally sufficient and the Respondent's motion to dismiss should be denied.

I. The Complaint is not deficient on its face.

In a motion to dismiss, the allegations of the Complaint must be accepted as true. *See* Cruz v. Beto, 405 U.S. 319 (1972). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232 (1974), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984). A Complainant should be given the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the Complaint. *See* Retail Clerks Intern. Ass'n, Local 1625, AFL–CIO v. Schermerhorn, 373 U.S. 746, 754 (1963); *see also* Arar v. Ashcroft, 585 F.3d 559, 567 (2d Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

The Complaint clearly references the single regulation allegedly violated, 14 C.F.R. § 91.13, and places the Respondent on adequate notice of the conduct at issue. The Complaint unambiguously states the time, location, and activities that contributed to the alleged violation. No evidence or documentation of any kind outside of the Complaint itself must be considered to fully grasp the nature or scope of the allegations.

Furthermore, the Respondent's assertion that the FAA lacks jurisdiction over the operation of aircraft below the "navigable airspace" is incorrect. *See* Resp't's Mot. at 10. 49 U.S.C.

§ 40103(b)(1) states that "[t]he Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and *assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.*" *Id.* (emphasis added). As the legislative history of the Federal Aviation Act of 1958 demonstrates, Congress proposed to "give the Administrator authority to regulate the use of *all airspace* over the United States by both civil and military aircraft . . . ." United States v. Christenson, 419 F.2d 1401, 1404 (9th Cir. 1969) (citing 1958 U.S. Code Cong. & Admin. News, p. 3745) (emphasis added). Additionally, 49 U.S.C. § 40103(b)(2) states that the Administrator shall prescribe regulations on the flight of aircraft for "navigating, protecting, and identifying aircraft" and "protecting individuals on the ground." *Id. See also* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973).

The Respondent accurately cites the definition of "navigable airspace;" however, that definition does not in any way, explicitly or implicitly, define the outer limits of the FAA's authority to regulate airspace. In sum, the FAA's mandate to regulate the use of all airspace necessary to "ensure the safety" of aircraft, for "protecting, and identifying" those aircraft, and for "protecting individuals on the ground" is not confined solely to the "navigable airspace."

II. Unmanned Aircraft Systems (UAS) are "aircraft" as defined in 14 C.F.R. § 1.1 and are subject to the FAA's regulatory authority.

The FAA has broad authority to prescribe regulations and standards to establish "practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security." 49 U.S.C. § 44701(a)(5). In doing so, the Administrator seeks "to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. § 44701(c).

The 2007 Notice of Policy clarified the FAA's policy concerning the operation of unmanned aircraft systems. *See* "Unmanned Aircraft Operations in the National Airspace System," Docket

No. FAA-2006-25714, 72 Fed. Reg. 29 at 6689 (Feb. 13, 2007). Prior to the 2007 Notice, the only policy applicable to model aircraft was AC 91-57. However, the Respondent's assertion that prior to the 2007 Notice the FAA abjured the authority to regulate UASs or model aircraft is inaccurate. As the 2007 Notice recognizes, there has been dramatic growth in the numbers and uses of UASs since the publication of AC 91-57 in 1981. But, as already noted above neither of these documents set forth any exemption for UASs that would authorize careless or reckless operations contrary to section 91.13. Indeed the purpose of both policies on their face was to provide some additional guidance to UAS operators to assist them in operating UASs with safety in mind.

Respondent's argument that the FAA faces "pressure" due to the public's concern about "drones" is also unavailing. *See* Resp't's Mot. at 11-13. The Respondent seeks to characterize the aircraft at issue in the Complaint as one example of "devices that for decades have been referred to as a (sic) model airplanes or model helicopters [and which] are increasingly referred to as 'drones.'" *Id.* at 11. Aside from being another factual assertion for which Respondent submits no evidence, the Administrator has made no allegation in the Complaint that the aircraft used by the Respondent bears any relation to drones employed by the U.S. military in overseas military operations. However, the assertion that the aircraft piloted by the Respondent in this case is akin to any type of line-of-sight model airplane that was publicly available in 1981, the year the Advisory Circular was published, strains credulity. The sophisticated design and capabilities of Respondent's aircraft were precisely what allowed him to pilot the aircraft in such a dangerous manner, well beyond his immediate line-of-sight. Only when an evidentiary record on this point is created at a hearing in this matter, will the Board will be able to decide if Respondent's operation as alleged in the Complaint violated section 91.13.

The FAA has long had the authority to regulate "aircraft" as that term is defined in 14 CFR. § 1.1 and 49 USC §40102(a)(6). Notwithstanding Respondent's assertion to the contrary, AC 91-57 does not state that UASs in general, and model aircraft in particular, are "subject to *non-regulation*." *See* Resp't's Mot. at 28. Respondent's assertion that the Federal Aviation Regulations do not apply to UASs is groundless. He makes a convoluted argument that the prohibitions on interfering with crewmembers, somehow excludes UASs from the definition of "aircraft," but that argument does not support his proposition. He seems to think that every regulation in part 91 must apply to UAS operations and if that is not so, then none do. But he overlooks that he must read the plain wording of each regulation to understand the scope of its applicability. For example, some regulations prohibit conduct by any person (like section 91.13), while others prohibit conduct by a pilot in command.[2] He cites no authority in support of his novel argument and he propounds no sound legal theory why section 91.13 does not apply to his operation as alleged in the Complaint.. In sum, every section of part 91 need not apply to UASs in order to make the prohibition on careless and reckless operations applicable to Respondent's operation of a UAS. UASs are devices used "for flight in the air" and the prohibitions of section 91.13 clearly apply to such operations.

III. 14 C.F.R. § 91.13(a) applies to Unmanned Aircraft Systems (UAS).

14 C.F.R. § 91.13(a) states that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." As UASs are "aircraft" pursuant to 14 C.F.R. § 1.1, their careless or reckless operation is prohibited. 14 C.F.R. § 91.1 states that "this part prescribes rules governing the operation of aircraft (other than moored balloons, kites, unmanned

[2] Respondent at page 10 of his motion cites FAA Order 2150.3B and suggests that the FAA is acting contrary to its policy in initiated this action against him because he is a Swiss citizen. FAA order 2150.3B provides general guidance only on how it intends to carry out its statutory and regulatory enforcement responsibilities. It does not act to limit the Administrator's authority to take any enforcement action when he finds it is in the interest of safety.

rockets, and unmanned free balloons, which are governed by part 101 of this chapter, and ultralight vehicles operated in accordance with part 103 of this chapter) within the United States . . . ." Id.

The fact that "unmanned rockets" and "kites," among others, are addressed in specific sections of the FARs does not imply that UASs are thereby removed from the definition of "aircraft." Respondent's assertion that UASs should be given specific treatment in the FARs does not result in the conclusion he suggests that they are not "aircraft" as the term is used in the FAA's regulations. In fact, the express exclusion of "moored balloons, kites, unmanned rockets, and unmanned free balloons" from Subpart A demonstrates that these devices are also "aircraft" as defined in 14 C.F.R. § 1.1.

Both a plain reading of the definition of "aircraft" and the specific treatment of certain types of aircraft in the regulations indicate that a broad application of the regulations to devices used for flight in the air was intended. Nothing in AC 91-57 or in the 2007 Notice demonstrates that FAA policy excluded UASs from the definition of "aircraft" such that their careless or reckless operation is permissible.

WHEREFORE, for the reasons stated above, the Administrator respectfully requests that Respondent's Motion to Dismiss be denied.

Respectfully submitted,

Alfred R. Johnson, Jr.
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Dated: 11/1/13

CERTIFICATE OF SERVICE

I hereby certify that on this day copies of the foregoing Administrator's Response to Respondent's Motion to Dismiss was sent by fax and placed in the United States mail, postage prepaid, addressed as follows:

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