

# Nelson Mullins

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February 20, 2009

**Via Facsimile Transmssion & Federal Express**

Hearing Docket  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591

**ATTN: Hearing Docket Clerk, AGC-430  
Wilbur Wright Building - Room 2014**

RE: Federal Aviation Administration v. SATSair, LLC  
FAA Docket No. CP09SO0001  
DMS No. FAA-2009-0024  
Our File No. 28296/09000

Dear Sir or Madam:

Enclosed for filing please find an original and one copy of the *Motion for Leave to File Answer* in connection with the above referenced matter. Please return a file-stamped copy to me in the postage paid envelope provided for your convenience.

Very truly yours,

*Mark C. Fava / sda*  
Mark C. Fava

MCF:pd  
Enclosures

cc: Gerald A. Ellis, Esquire (w/enclosure)

**U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
FEDERAL AVIATION ADMINISTRATION**

FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Complainant,	)	
	)	
v.	)	FAA Docket No. CP09SO0001
	)	
SATSair, LLC,	)	DMS No. FAA-2009-0024
	)	
Respondent.	)	The Honorable Issac D. Benkin
	)	
	)	
	)	

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**MOTION FOR LEAVE TO FILE ANSWER**

Respondent hereby Petitions the court for leave to file an Answer in the above referenced case beyond the 30 day period after service of the Complaint for the reasons set forth herein. Lead counsel for Respondent, Mark C. Fava, has spoken with counsel for the Administrator, Mr. Gerald Ellis, who does not oppose the filing of such Answer. The Complaint was filed by the Administrator on Friday, January 9, 2008 and received by the law office of counsel for Respondent on or about Monday, January 12, 2009. For the reasons set forth herein, Respondent respectfully requests that the court grant leave to file the Answer attached hereto as Exhibit A.

**BACKGROUND**

This is a contested civil penalty matter initiated by the Administrator by way of Notice of Proposed Civil Penalty issued to the Respondent on or about January 29, 2008. Subsequent to an informal conference with the parties attempting in good faith to resolve the matter, the Administrator issued a Final Notice of Proposed Civil Penalty to lead attorney for the

Respondent, Mark C. Fava on or about December 19, 2008. Respondent requested a hearing on or about December 29, 2008. The Administrator mailed the Complaint on or about Friday, January 9, 2009 by certified mail to another attorney in Mr. Fava's firm who was assisting in the settlement negotiations and representation of Respondent and who had requested the hearing. It appears the certified mail containing the Complaint was signed for by a mail clerk at Mr. Fava's firm on Monday, January 12, 2009. This occurred while the parties were continuing to engage in settlement discussions. Further, during the week of January 12, 2009, Mr. Fava was on a period of military reserve duty.

Due to an apparent administrative oversight, lead counsel for the Respondent Mr. Fava never saw the Complaint and was unaware of it having been served until February 10, 2009, the day after the Pre-trial Order was received. Upon receipt of the Pretrial Order, Mr. Fava inquired about whether a Complaint had in fact been filed and upon such inquiry, his office did locate in the file a copy of the Complaint, which had been sent by certified mail to another attorney in the firm, but such receipt apparently had been signed for by a mail clerk. This was the first time that both Mr. Fava and the other attorney in his office were aware that a Complaint had been filed and served.

### CONCLUSION

The Court's allowing the filing of the Answer will in no way prejudice the Administrator nor extend the deadlines set by the Court's pre-trial order for the timely adjudication of this matter. Further, the Administrator does not oppose such filing. As such, counsel for Respondent respectfully requests that this Court allow the Respondent's Answer to

be filed out of time for the reasons stated herein. Counsel for Respondent is also available for a conference call with the Court if additional information or testimony is desired.

Dated: February 20, 2009.

Respectfully submitted,

*Mark C. Fava /sda*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this date sent via facsimile one copy and via Federal Express an original and one copy of the foregoing Motion for Leave to File Answer, addressed to:

The Honorable Isaac D. Benkin  
Administrative Law Judge  
Office of Hearings, M-20  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
East Building Ground Floor, Room E12-320  
Washington, DC 20590  
Tel: (202) 366-0437  
Fax: (202) 366-7536

And, further, that I have this date sent via facsimile and via first class mail a copy of the foregoing Motion for Leave to File Answer, addressed to:

Gerald A. Ellis  
FAA Office of Regional Counsel, Southern Region  
1701 Columbia Avenue  
College Park, Georgia 30337-2714  
Fax: (404) 305-5223

This, the 20<sup>th</sup> day of February, 2009.

  
\_\_\_\_\_  
Steven D. Allen

U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
FEDERAL AVIATION ADMINISTRATION

**RECEIVED**

FEB 23 2009

**HEARING DOCKET**

FEDERAL AVIATION ADMINISTRATION, )

Complainant, )

v. )

SATSair, LLC, )

Respondent. )

FAA Docket Number

CP09SO0001

**RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES**

Pursuant to Rule 209 of the Rules of Practice (14 C.F.R. 13.209), Respondent, by and through undersigned counsel, hereby answers the Administrator's Complaint. In support thereof, Respondent answers each of the numbered paragraphs in the Complaint as follows:

I.

Respondent admits to the allegation contained in paragraph I.

II.

1. Respondent admits to the allegation contained in paragraph (1).

2. Respondent admits to the allegation contained in paragraph (2).

3. Respondent admits to the allegation contained in paragraph (3).

4. With respect to the allegations contained in paragraph (4), Respondent admits that the majority of its aircraft were manufactured in 2005 and 2006.

5. Respondent denies the allegation contained in paragraph (5).

6. Respondent denies the allegation contained in paragraph (6).

### III.

7. Paragraph (7) of Administrator's Complaint including subparts (a) and (b) calls for a legal conclusion such that a response is not required. To the extent that a response is required, said paragraph is denied.

8. Paragraph (8) of Administrator's Complaint calls for a legal conclusion such that a response is not required. To the extent that a response is required, said paragraph is denied.

9. Paragraph (9) of Administrator's Complaint calls for a legal conclusion such that a response is not required. To the extent that a response is required, said paragraph is denied.

### AFFIRMATIVE DEFENSES

1. Respondent relies upon the affirmative defense of reasonable reliance. See *Administrator v. Blum*, NTSB Order No. EA-5371 (February 29, 2008).

2. The Federal Aviation Administration's (FAA's) interpretation of its Federal Aviation Regulations in this case is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See 5 U.S.C. § 706(2)(A); *Watkins v. NTSB*, 178 F.3d 959, 961 (8<sup>th</sup> Cir. 1999).

3. The FAA's interpretation of its Federal Aviation Regulations is unconstitutionally vague. See *Thomas v. Hinson*, 74 F.3d 888, 889 (8<sup>th</sup> Cir. 1996); see also *Trans States Airlines, Inc. v. FAA*, 439 F.3d 863, 864-865 (8<sup>th</sup> Cir. 2006).

4. The FAA's application of its Federal Aviation Regulations in this case is contrary to the regulation's plain language. See *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728 (8<sup>th</sup> Cir.

2003), quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S. Ct. 1306, 99 L. Ed. 2d 515 (1988). See also *Trans States Airlines, Inc. v. FAA*, 439 F.3d 863, 864-865 (8<sup>th</sup> Cir. 2006).

5. Respondent asserts that the Acting Administrator lacks substantial basis in law and fact to continue prosecution of this matter.

6. Respondent asserts that the Acting Administrator has waived its authority and is estopped from proceeding in this action in that it has continued to approve other Part 135 operators throughout the country with operations specifications containing similar model aircraft without Mode S transponders and without waivers subsequent to the deadline in the federal regulations and subsequent to the initiation of this enforcement action.

**WHEREFORE**, SATSair respectfully requests that this Court:

- (a) Dismiss the Complaint with prejudice;
- (b) Tax all costs of this action against Complainant under the Equal Access to Justice Act; and
- (c) Grant SATSair such other and further relief as the Court deems just and proper.

Dated: February 20, 2009.

Respectfully submitted,

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