

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL HUERTA, Administrator, Federal)
Aviation Administration,)
)
Petitioner,)
)
v.)
) No. 13 C 8529
SKYPAN INTERNATIONAL INC.,)
)
Respondent.)

**PETITION FOR
SUMMARY ENFORCEMENT OF SUBPOENA**

Petitioner the Federal Aviation Administration (FAA), by Zachary T. Fardon, United States Attorney for the Northern District of Illinois, moves pursuant to 49 U.S.C. §§ 40113, 46104 and 47122; and Title 14, Part 13 of the Federal Aviation Regulations for summary enforcement of its subpoena served upon respondent and, in support, submits a memorandum of law and exhibits 1 through 5: the subpoena, declaration of FAA attorney Jose L. Nieves, declaration of FAA inspector John Wilkens, correspondence from FAA to respondent's attorney, and correspondence from respondent's attorney to FAA.

Respectfully submitted,

ZACHARY T. FARDON
United States Attorney

By: s/ Katherine E. Beaumont
KATHERINE E. BEAUMONT
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-7223
katherine.beaumont@usdoj.gov

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**FAA’s MEMORANDUM OF LAW IN SUPPORT
OF ITS PETITION FOR SUMMARY ENFORCEMENT OF SUBPOENA**

Introduction

This is a summary proceeding upon a petition by the Federal Aviation Administration pursuant to 49 U.S.C. §§ 40113, 46104 and 47122; and Title 14, Part 13 of the Federal Aviation Regulations.¹ FAA seeks the enforcement of an administrative subpoena *duces tecum* requiring Skypan International Inc. (hereafter Skypan) to produce any and all business records, agreements, contracts, email communication, proposals, photographic products and/or materials and records of payment, in the possession or control of Skypan, relating to a contract for aerial photography between Macklowe Properties and Skypan concerning the photography of the area surrounding 440/432 Park Avenue, New York, New York. The FAA’s administrative subpoena *duces tecum* also required Skypan to produce any and all surveys, reports, photographs and/or materials, in the possession or control of Skypan, relating to the use of the Skypan RPV System, or any other

¹ Proceedings to enforce administrative subpoenas are summary in nature as permitted by Fed. R. Civ. P. 81(a)(5).

unmanned aerial system, in the New York and Chicago Class-B airspace to conduct commercial aerial photography.

Skypan has refused to comply with the subpoena. The FAA seeks enforcement of the subpoena upon the grounds that the FAA is authorized by statute to issue the subpoena in question, it has complied with the procedural requirements incident to the issuance of the subpoena, the records sought by the subpoena are relevant to an authorized activity of the FAA, and the subpoena is not unreasonably broad or burdensome.

Facts

Skypan is a private, for-profit photography company with headquarters at 711 North Milwaukee Avenue in Chicago, Illinois, that specializes in aerial photography. The company has advertised on the internet their use of unmanned aircraft to produce aerial photography and videography products that cannot be obtained through conventional use of manned aircraft.

Based on information discovered during the course of an FAA investigation, the FAA has reason to believe that Skypan operated an unmanned aircraft for commercial purposes within five miles of the New York LaGuardia Airport. This area is within the lateral limits of the New York Class B airspace from the surface to 7000 feet. Operating in this area requires the pilot of an aircraft to receive Air Traffic Control clearance prior to operation. In addition, any aircraft operating within Class B airspace must be equipped with an operable coded radar beacon transponder having Mode C capability and an operable two-way radio capable of communication with Air Traffic Control on the appropriate frequencies. The evidence of the investigation revealed that Skypan had not complied with these and other Federal Aviation Regulations. Therefore, the FAA believes that Skypan's operation of its unmanned aircraft to conduct

commercial aerial photography in the New York and Chicago metropolitan areas may have violated Federal Aviation Regulations.

The FAA's investigation seeks information regarding Skypan's commercial contract with Macklowe Properties on behalf of 56th and Park (NY), LLC, (hereinafter Macklowe Properties) to conduct aerial photography using an unmanned aircraft in the vicinity of 440 Park Avenue and 432 Park Avenue within the New York Class B airspace area.

In early February 2012 an anonymous complaint was filed with the FAA regarding the commercial use of an unmanned aircraft to take aerial photography within the New York Class B airspace contrary to Federal Aviation Regulations. On or about February 3, 2012, Mark Segal, Skypan co-owner, was contacted by Aviation Safety Inspector (ASI) James Ciccone, Farmingdale Flight Standards District Office (Farmingdale FSDO), and advised that commercial operation of unmanned aircraft in the New York Class B airspace is not authorized by Federal Aviation Regulations. In addition, on or about March 21, 2012, ASI Clifford Sweatte emailed Mr. Segal advising him that commercial use of an unmanned aircraft in the New York Class B airspace is not authorized and contrary to the public safety.

In early September 2012, a second anonymous complaint was made to the Farmingdale FSDO stating that Skypan was again engaged in commercial unmanned aerial photography in the New York Class B airspace area. ASI John Wilkens, Farmingdale FSDO, investigated the allegation that Skypan had operated an unmanned aerial aircraft in violation of Federal Aviation Regulations. On or about September 19, 2012, ASI John Wilkens contacted Mr. Richard Dubrow, employee of Macklowe Properties, regarding the circumstances surrounding their contract with Skypan for aerial photography services. Mr. Dubrow confirmed that Macklowe

Properties did contract with Skypan for commercial aerial photography of a development project at 432 Park Avenue, New York, NY.

On November 11, 2012, ASI Wilkens issued a letter of investigation to Skypan advising the company that the FAA was investigating the operation of an unmanned aircraft system for the purpose of commercial photography by Skypan International on or about May 8, 2013, in the vicinity of 432 Park Avenue, New York, New York.

On December 12, 2012, the FAA issued an administrative subpoena duces tecum to Macklowe Properties requiring the company to produce any and all business records, agreements, contracts, photographic products and/or materials and records of any payment relating to a contract for aerial photography between Macklowe Properties and Skypan. Macklowe Properties complied with the FAA's administrative subpoena duces tecum and produced various business records, receipts, copies of photographs, and written statements clarifying the dates that the unmanned aerial photography took place.

The information provided by Macklowe Properties indicated that Skypan agreed to provide Macklowe Properties unmanned aircraft aerial photography services to be conducted in May, July, August, and September of 2012. The unmanned aircraft aerial photography services were conducted in the vicinity of 440/432 Park Avenue, New York, New York. 2012. The business records detailed performance of commercial aerial photographs during both daytime and evening hours at altitudes between 350 feet and 1400 feet using an unmanned aircraft. Macklowe properties paid Skypan approximately \$130,622 for all the unmanned aircraft aerial photography services provided during May, July, August, September and October 2012.

On August 2, 2013, the FAA served upon Skypan the document subpoena at issue. The records sought from Skypan will assist the agency in its determination of whether, and to what extent, Skypan violated Federal Aviation Regulations. Accordingly, the FAA has a legitimate interest in these records. Skypan has refused to comply with the subpoena². Ex. 5.

Jurisdiction and Venue

Because this case arises under 49 U.S.C. Section 46104, which authorizes the FAA to enforce a subpoena for compliance, and by petitioning “a Court of the United States to enforce the subpoena,” *See* 49 U.S.C. §4610(b), this court has jurisdiction over this enforcement action under 28 U.S.C. §1331.

Venue is proper under 28 U.S.C. §1391(b) because Skypan is located within this judicial district and because this proceeding arises from Skypan’s refusal to produce information to the FAA.

Argument

The court should enforce the FAA subpoena served upon respondent Skypan and compel production of the records requested. “In a subpoena enforcement proceeding, the role of the court is ‘sharply limited.’” *Inspector General, United States Dep’t of Housing and Urban Dev. v. St. Nicholas Apts.*, 947 F. Supp. 386, 388 (C.D. Ill. 1996)(quoting *E.E.O.C. v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987)). Generally, administrative subpoenas are enforced if the subpoena: (1) is within the statutory authority of the agency; (2) seeks information reasonably relevant to the inquiry; (3) is not unreasonably broad or burdensome; and (4) seeks information not

² Skypan objects, in part, because the FAA informed the company that it had been the subject of an investigation that did not establish a violation and was closed. That prior closed investigation is separate from the current investigation. Ex. 3, ¶¶ 5-7.

presently in the possession of the government. *United States v. Powell*, 379 U.S. 48, 57 (1964); *United States v. Morton Salt*, 338 U.S. 632 (1950); *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986). The Seventh Circuit has followed this standard. *Chao v. Local 733*, 467 F.2d 1014 (7th Cir. [YEAR??]) *E.E.O.C. v. Quad/Graphics, Inc.*, 63 F.3d 642, 645 (7th Cir. 1995)(“As a general proposition, courts enforce an administrative subpoena if it seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency’s authority.”). In *Quad/Graphics*, the court explained that when a court reviews an administrative subpoena, it must be “satisfied that the demand for information is not ‘too indefinite’ and that it has not ‘been made for an illegitimate purpose.’” 63 F.3d at 645 (citations omitted). As shown below, the FAA subpoena served on Skypan in this case seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the FAA’s authority and responsibility.

A. The Issuance of the FAA Investigative Subpoena Was Within Petitioner’s Statutory Authority.

Congress has made it the “duty and responsibility” of the Federal Aviation Administration to conduct investigations related the aviation safety and as such may subpoena witnesses and records related to a matter involved in the investigation from any place in the United States to the designated place of the hearing or investigation pursuant to 49 U.S.C. § 46104. This allows the FAA to conduct, supervise, and coordinate investigations relating to the programs and operations of the FAA. The FAA is authorized to subpoena all information, documents, reports, answers, records, accounts, papers and other data and documentary evidence necessary in the performance of its duties. *Id.* §46104(a)(1-4).

The administrative subpoena issued by the FAA Eastern Regional Counsel was issued because it was determined during the FAA investigation that it was necessary to obtain the respondent's business records and to review those records to determine if, and to what extent, Skypan's operation of an unmanned aircraft violated Federal Aviation Regulations during May, July, August, and September of 2012. The requested information is essential to completion of the FAA investigation, and Skypan's failure to comply with the subpoena impairs this ability.

B. Petitioner Complied With Applicable Procedural Requirements.

The issuance of the FAA's investigative subpoena to Skypan was in compliance with the FAA Eastern Regional Counsel's internal procedures. Pursuant to the authority legally delegated to him, the Eastern Regional Counsel issued the subject subpoena, which was properly served upon Skypan on August 2, 2013.

C. The Information Sought in the FAA's Subpoena Is Reasonably Relevant to Petitioner's Investigation.

The FAA's subpoena seeks documents that are relevant to its investigation of Skypan's violation of Federal Aviation Regulations. In the context of enforcing subpoenas, "relevance" is defined liberally. So long as the material requested "touches a matter under investigation," the subpoena will survive a challenge that the material is not relevant. *E.E.O.C. v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982)(quoting *Motorola v. McLain*, 484 F.2d 1339, 1345 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)). Moreover, an agency's appraisal of relevancy "must be accepted so long as it is not obviously wrong." *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995)(quoting *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 946 (D.C. Cir. 1994)).

The records sought here undoubtedly touch the matters at issue in the investigation: whether Skypan operated an unmanned aircraft to conduct commercial aerial photography in violation of the Federal Aviation Regulations. The subpoena seeks review of Skypan's email communications, business records, receipts, and photography products related Skypan's unmanned aircraft aerial photography. These records are expected to show when, where, and for what purpose Skypan operated an unmanned aircraft in the New York Class B airspace in May, July, September, and October of 2012. Such records are directly relevant to the FAA investigation.

D. The Subpoena Is Not Unreasonably Broad or Burdensome.

The subpoena is reasonably focused on materials at the center of FAA investigation, namely, records related to Skypan operation of unmanned aircraft for commercial aerial photograph in controlled airspace in violation of Federal Aviation Regulations. The respondent has the burden of showing that the subpoena is unreasonable. *Dow Chemical v. Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982); *St. Nicholas Apts.*, 947 F. Supp. at 392. Where the agency inquiry "is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *S.E.C. v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Indeed, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). However, "broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant." *Adams v. F.T.C.*, 296 F.2d 861, 867 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

In this case, the FAA’s investigative subpoena is reasonably restrictive inasmuch as it seeks only records that are related to Skypan’s operation of an unmanned aircraft to conduct aerial photography for Macklowe Properties and in any operation of an unmanned aircraft within the Class B airspace of New York and Chicago from January 1, 2012, through August 2, 2013. The information contained in the records is crucial to determining whether Skypan violated Federal Aviation Regulations during its operation of unmanned aircraft in the Class B airspace of New York and Chicago. *See Westinghouse*, 788 F.2d at 171. Given the FAA’s investigative and subpoena authority and the limited scope of the subpoena at issue, Skypan cannot resist compliance on the basis of undue burden. The subpoena narrowly defines the documents needed, as well as the time period for the documents. The time period specified in the subpoena—January 1, 2012, to August 2, 2013—is within the period of time that Skypan and Macklowe Properties contracted for unmanned aerial photography in the Class B airspace of the New York metropolitan area. Furthermore, the documents demanded cover a relatively short time period of one year and seven months. As such, any potential inconvenience or disruption to Skypan’s business operations should be minor, if any. *See Quad/Graphics*, 63 F.3d at 645 (“subpoena will not be enforced if the demand is ‘excessively burdensome,’ that is, if ‘compliance would threaten the normal operation of respondent’s business.’”) (citations omitted). Accordingly, Skypan should be ordered to comply with the subpoena.

Conclusion

For the foregoing reasons, petitioner requests the court to compel Skypan to comply with the FAA subpoena (Pet. Ex. 1) within 30 days.

Respectfully submitted,

ZACHARY T. FARDON
United States Attorney

By: s/ Katherine E. Beaumont
KATHERINE E. BEAUMONT
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-7223
katherine.beaumont@usdoj.gov

Of counsel:

Alfred R. Johnson Esq.
Eastern Regional Counsel
Federal Aviation Administration
1 Aviation Plaza
Jamaica, New York 11434