UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON EXECUTIVE HELICOPTERS, LLC,

Plaintiff,

v.

FRANCIS T. MAGUIRE, ET AL.,

Defendants.

C.A. NO. 15:CV-13647-RGS

PLAINTIFF'S REPLY TO NORWOOD'S OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT, IMPOSE SANCTIONS, AND AWARD ATTORNEYS' FEES

The plaintiff, Boston Executive Helicopters, LLC ("BEH") hereby submits this Reply to the Defendants' Opposition to BEH's Motion to Enforce Settlement Agreement, Impose Sanctions and Award Attorneys' Fees.

A. The Proposed Lease Does Not Comply With The Settlement Agreement.

The Defendants' opposition largely focuses on the term "non-exclusive" in the Settlement Agreement, suggesting without any support that this phrase means that BEH should have expected that the lease was subject to (undisclosed) property rights of others on the Airport, which substantially reduces the amount of usable space promised in the Settlement Agreement. In support, the Defendants state that "Norwood raised multiple times in negotiations that the West Apron lease would need to be executed subject to an easement [that was never agreed to by BEH] over the corner of that lot for FlightLevel to access fueling facilities. . . . Consequently, the word

"non-exclusive" was included in the Settlement Agreement to reflect FlightLevel's interests to access other parts of the Airport."

This revisionist interpretation of the meaning of "non-exclusive" is directly contradicted by the Defendants' own attorney, John Davis, who at a Selectmen's meeting on December 7, 2018, discussing the then settlement with BEH, defined the term "non-exclusive lease" to mean: "**The lease will be non-exclusive, meaning other flights can use that space that he will be leasing, but they would have to pay him rent.**" See Exhibit A, to the Affidavit of Christopher Donovan, submitted herewith. Attorney Davis made no mention of that phrase being included to accommodate an easement for FlightLevel, or any other type of encumbrance, at this meeting or at the NAC meeting on the same day. Id. In the NAC meeting on December 7, 2018, Attorneys Fee and North told the NAC that "[BEH] will have the entire west apron. It is a non-exclusive lease." Id. In fact, there was no mention of the FlightLevel easement at all during those meetings – consistent with BEH's position that inclusion of an easement for FlightLevel *after* the December 2018 settlement was an additional term not agreed to by BEH. As outlined in Christopher Donovan's Affidavit [Doc. 234], after both the BOS and NAC had approved the written agreement on December 7, 2018 [Doc. 188-2], the Defendants changed the agreement after Attorney North for the defendants had reviewed the agreement on December 10, 2018 [Doc. 188-5 and 221, pp. 4, 7, 44, 45, and 49] to include an easement for FlightLevel on the West Ramp. Thus, there was no mention or consideration of an easement or other encumbrances when Attorney Davis told the BOS and NAC what was meant by giving BEH a "non-exclusive lease."

In fact, Attorney Davis' interpretation of "non-exclusive" at that meeting to mean who can park aircraft on the ramp is entirely consistent with FAA guidance on the issue for ramps eligible

to receive federal grant funds. The FAA's AIP Handbook, Order 5100.38D, which deals with eligibility of airport ramp space for grant funds, refers to "Non-Exclusive Use Available for Public Aircraft Parking": "Apron pavement is only eligible [for grant funds] if it will be used for aircraft parking or as a compass calibration pad and is not exclusive use. A good rule of thumb is that the public should be able to park on the pavement in order for it to be considered eligible apron area."[1]

The Defendants' current counsel has acknowledged that the use of the phrase "non-exclusive" is borne out of the requirements of "federal law and FAA's grant assurances, which bind the airport." See Exhibit B ("The agreement does not call for an exclusive lease. It could not under federal law and FAA's grant assurances, which bind the airport"). Those Federal Grant Assurances provide that the NAC "will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." See Exhibit C. The Grant Assurances provide that the NAC "will permit ***no exclusive right*** for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." Id. Similarly, the Massachusetts State Grant Assurances provide that the "[NAC] and Board of Selectmen of the Town shall not exercise or grant any exclusive right or privilege which operates to prevent any person, firm or corporation from providing the same or similar service at the Airport." See Exhibit D. The Airport's Regulations themselves provide that

[1]https://www.faa.gov/airports/aip/aip_handbook/media/AIP-Handbook-Order-5100-38D-Chg1.pdf

nothing in a lease or a sub-lease agreement approved by the NAC at the Airport "shall be construed to grant or authorize the granting of ***an exclusive right***." See Exhibit E (emphasis added).[2]

The lease form proposed by the Defendants itself reveals that deeming the lease to be "non-exclusive" pertains to ensuring that the Defendants do not run afoul of the Federal and State Grant Assurances. See Exhibit F. Specifically included in the form lease, are the following provisions:

> It is understood and agreed that: a.) no right or privilege has been granted which would serve to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own regular employees (including, but not limited to, maintenance and repair) that it may choose to perform; b.) ***nothing herein contained shall be construed as granting or authorizing the granting of an exclusive right within the meaning of Section 308 of the Federal Aviation Act of 1958***; and c.) no lessee will be given more favorable terms for providing the same public service than any other lessee.
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> This Lease shall be subordinate to the provisions of any existing or future agreement entered into between the Lessor and the United States of America for the purpose of obtaining federal aid for the improvement and/or development of the Airport; ***that nothing in the lease shall be construed to grant or authorize the granting of an exclusive right***; that the facilities of Norwood Memorial Airport have been financed in part by grants from the FAA and Mass DOT, meaning that receipt of these grants is conditional upon compliance by the NAC with certain assurances, and therefore, any term or

[2]The Defendants cite two FAA Final Decisions for the proposition that "[r]amp and apron spaces at airports are routinely the subject of 'non-exclusive' leases to ensure that aeronautical users have access to the facilities they need to conduct their operations. See Opposition, p. 6, fn. 2 (citing Adventure Aviation v. City of Las Cruces, 2003 WL 22696923, at *4 (FAA Final Decision, Sept. 9, 2003); Roadhouse Aviation, LLC v. City of Tulsa, 2007 WL 1966160, at *16 (FAA Final Decision, June 26, 2007)). A cursory review of those cases reveals that they support BEH's (and Attorney Davis') position that use of "non-exclusive" in an airport lease pertains to use by "aeronautical users" and not to undisclosed existing or potential encumbrances on the real property. See, e.g., Adventure Aviation, *4 ("The commercial lease appears to be a non-exclusive use lease, allowing non-exclusive use of airport aprons and parking areas"). "Aeronautical users" are defined by the FAA to include "[i]ndividuals or businesses providing services involving operation of aircraft or flight support directly related to aircraft operation are considered to be aeronautical users." https://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b_chap18.pdf, page 18-2.

> condition of this Lease which is found to be in conflict or inconsistent with any such federal and/or state grant assurance shall be subordinated to such federal and/or state grant assurance; and that the NAC, in compliance with FAA and Mass DOT grant assurances, may not and does not give any lessee assurances of exclusive access or monopolistic rights on or to the Airport, and thus, any commercial activity authorized on the Leased Premises of this Lease may be subject to competition from others, on or off the Airport. The Lessor has the right to amend this lease to comply with all existing and future FAA and Mass DOT grant assurances.

Id. at Paragraph XXX. The Court should reject the Defendants' attempt to re-write history here. The inclusion of the "non-exclusive" language in no way pertains to existing or proposed encumbrances on the property; rather, as Attorney Davis represented, this language refers to who can use ramp space for parking aircraft.

Further, with regard to the leases themselves, while the parties reached agreement of the language of the leases, the legal description of the property to be leased remains unresolved given the claimed rights by FlightLevel. See Exhibit G. Indeed, soon after the Settlement Agreement was signed, after specific request from BEH, Attorney North provided "plans" of the West and DC-3 Aprons on August 16, 2019 to serve as exhibits to the leases. Those plans, drawn by Commissioner Ryan, did not show any encumbrances other than the underground sewer easement. [Doc. 234-28]. The Defendants knew these plans were not correct yet hoped that BEH would accept them and sign the lease agreements without full disclosure of the limitations on the use of the property. It was not until November 14, 2019 that the Defendants finally produced a survey of "areas the NAC would propose to lease to BEH." See Exhibits H and I. According to the Defendants, that survey showed, for the first time, "the encumbrances that these leased areas would be subject to, including the Lot B&H Licensed Area." Id. Yet, the survey only showed one

encumbrance, no square foot calculations for the proposed space, and none of the other claimed encumbrances and rights by FlightLevel that the Defendants failed to disclose to BEH. Tellingly, the Defendants do not even attempt to explain why FlightLevel's claimed rights were concealed from BEH, despite months of specific requests from BEH. Based upon those claimed rights, acknowledged by the Defendants, both ramps are useless for FBO operations (i.e. parking, tie-downs, and servicing aircraft).

The Defendants *now* claim that it was understood that the amount of space promised under the Agreement would be lessened by the TOFAs: "The description of the West Apron and DC-3 Ramp in the Agreement, ¶3, above, says nothing at all about measuring without the required square footage TOFAs." See Defendants' Opposition, p. 5. Again, however, the Defendants' new position is contradicted by Commissioner Ryan's August 16, 2019 "plans" which specifically show "72,000 sq. ft. OUTSIDE OF TOFA" on the West Apron, and "15,295± sq. ft. OUTSIDE OF TOFA." [Doc. 234-28]. Though the plans prepared by Ryan purposefully omitted the existing encumbrances, the plans confirm the Defendants' understanding that the promised amount of space would exclude TOFA areas.

It is important to note that the Defendants have steadfastly refused to acknowledge and confirm the amount of usable space they have proposed to BEH. For example, on June 24, 2020 BEH asked the Town, including the NAC and the Town attorneys, "Does the plan presented by [Attorney] Makarious show all the existing, planned, proposed and claimed encumbrances on the West and DC-3 ramps? If not, please identify any planned, proposed, existing, acknowledged or other encumbrances on this space." [Doc. 234-16; Exhibit 16]. Attorney Makarious' response was simply that the "Town cannot provide BEH Legal advice" Id.

The West Apron contains approximately 105,500 SF, according to the AIP plan. AIP ramp #3-25-0037-26 (2005), i.e. the DC-3 Ramp, contains approximately 78,000 SF, according to the AIP application. Based upon now known claimed, planned, and approved TMPU changes (including moving the TOFAs to take more ramp space), there is no usable space defined and/or depicted for BEH to conduct FBO operations. The entire apron may potentially be encumbered based on the FlightLevel's claims. It is not reasonable to assume FlightLevel will not exercise their claimed "rights to install, maintain, a fuel terminal and dispensing system on the DC-3 ramp." This would render the entire DC-3 ramp unusable for FBO operations.

The Settlement Agreement is a valid and enforceable contract, not an unenforceable "agreement to agree." The Agreement embodies all of the essential terms and conditions of the agreement between BEH and the Defendants (including reference to the NAC's "standard form" lease), the language shows an intent to be bound, and subsequent to the Agreement each side took affirmative steps to carry out the provisions of the Agreement.

B. The "Integration Clause" Does Not Bar The Relief Sought By BEH.

The Defendants are simply wrong in asserting that the Integration Clause in the Settlement Agreement precludes the relief sought by BEH. Massachusetts law allows the recipient of a fraudulent misrepresentation to rely on its truth, without further investigation, even where the written agreement contains an integration clause. In Bates v. Southgate, 308 Mass. 170, 182 (1941), a case involving deliberate misrepresentation, the Supreme Judicial Court held that "contracts or clauses attempting to protect a party against the consequences of his own fraud are against public policy and void where fraud inducing the contract is shown . . . ." In "cases of fraudulent inducement, relief is not barred by an integration clause, even where the parties are

sophisticated, and their bargaining powers are equal." Shawmut-Canton LLC v. Great Spring Waters of Am., Inc., 62 Mass. App. Ct. 330, 335 (2004), citing Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. at 429, 433 and 11 Williston, Contracts § 33.21, at 671 (4th ed.1999) ("a merger or integration clause is ineffectual to exclude evidence of prior or contemporaneous extrinsic representations for the purpose of showing fraud or other invalidating cause by way of defense").

C. The Defendants Have Refused To Address BEH's Concerns

The Defendants' claim that BEH's behavior, and its counsel's "limited" involvement, have made further negotiation of the lease impossible" is simply not true. Pursuant to the Settlement Agreement, Mr. Donovan attended communications, oversight and corrective action plan meetings on August 28, 2019, September 26, 2019, October 9, 2019, October 31, 2019, November 20, 2019, January 3, 2020, February 27, 2020, April 30, 2020, May 7, 2020, May 28, 2020, July 30, 2020, August 5, 2020, August 27, 2020, September 24, 2020.[3] Never throughout the course of these meetings did representatives of the Town endeavor to propose a solution to the concerns raised by BEH, that are now before the Court.

Under Paragraph 5 of the Settlement Agreement, the Town, by and through its Board of Selectmen, was required to "appoint a member of the Board of Selectmen or a designated liaison to attend NAC meetings at which an item concerning or related to BEH and/or BEH operations is listed or appears on the NAC agenda for eighteen (18) months following execution of this Agreement. Said liaison shall periodically report to the Board of Selectmen and/or the General Manager of the Town." Under Paragraph 6 of the Settlement Agreement, the Parties agree to

[3]Though BEH was never allowed to attend any meeting with the FAA regarding the Corrective Action Plan.

implement a communications protocol "to address issues concerning or related to BEH and/or BEH operational issues" at the Airport "and to resolve specific disagreements or conflicts that may arise between the Parties regarding such operational issues for eighteen (18) months following the execution of" the Settlement Agreement. Pursuant to this protocol, the Airport Manager, a representative of the NAC, a Selectmen liaison, and a representative of BEH, "shall meet monthly in a good faith effort to discuss operational issues and to resolve specific disagreements or disputes that may arise between them."

Since that time, the Defendants failed to attend those meetings in good faith to discuss various ongoing and unresolved issues between them and BEH, including items that necessarily relate to the Settlement Agreement. Specifically, Attorney Makarious, Maguire and Ryan have maintained that the monthly meetings are for "operational" issues only and not items and disagreements that relate to the Settlement Agreement; though this is contrary to acknowledgements by Commissioner Ryan that these meetings are also to discuss settlement agreement issues. See Exhibit 36. Commissioner Ryan also refused to allow BEH to address the NAC at public meetings, claiming the oversight meeting was the appropriate venue for any settlement agreement related issues.

Instead, on or about August 25, 2020, the BOS abdicated its responsibility to attend the oversight meetings and voted to designate Attorney Makarious as its representative. On or about that same date, the NAC also voted to have Attorney Makarious fulfill its role at the oversight meetings. Since that time, Mazzucco and Ryan have never attended another oversight meeting. By its terms, the provision is in place so that the BOS can provide oversight regarding the issues between the NAC and BEH. The Defendants have breached this provision by appointing one

person (i.e. a lawyer with apparent duties of loyalty to both the NAC and also to the Town) to fulfill both roles, effectively providing no oversight whatsoever.

D. The Defendants Have Breached The TOFA/OFA Provision of The Settlement Agreement.

The Defendants' Opposition fails to address the fact that the NAC has purposefully and materially undermined BEH's petition to the FAA seeking approval for the removal of all TOFA/OFA markings on Taxiway 3 by submission of the Technical Master Plan Update to the FAA, in which TOFA areas, including the specific area of Taxiway 3 which is the subject of the Agreement, are increased and moved South. Again, the result of the planned action by the NAC is that BEH's fuel system and hanger, which was and is outside the TOFA/OFA, has now been placed inside the new TOFA/OFA. The Defendants suggest that all that was required under the Settlement Agreement was a letter to the FAA, and nothing more. Yet, the Agreement requires the Defendants to "support" the removal of the TOFA, and submitting documents to the FAA contravening that support violates the letter and spirit of the Agreement, and was certainly sought to deprive BEH of the "fruits" of that Agreement.

In Massachusetts, "a covenant of good faith and fair dealing is implied in every contract." Biltcliffe v. CitiMortgage, Inc., 952 F. Supp. 2d 371, 381 (D. Mass. 2013) (citing Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004)). The covenant provides that neither contracting party may take action that destroys or injures the other's right to enjoy the "fruits of the contract." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991). Contracting parties agree implicitly to "'deal honestly and in good faith in both the performance and enforcement" of the contract's terms. Biltcliffe, 952 F. Supp. 2d at 381 (citing Hawthorne's

Inc. v. Warrenton Realty Inc., 414 Mass. 200, 211 (1993). The covenant's purpose is to "guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." Uno Restaurants, 441 Mass. at 385. The covenant imposes an obligation on contracting parties to "preserve the spirit of the bargain rather than the form"; it constitutes a set of specific rules to uphold contract law's basic purpose: "the protection of reasonable expectations of parties induced by promise." Christensen v. Kingston School Committee, 360 F. Supp. 2d 212, 226 (D. Mass. 2005).

The Defendants' argument that all that was required under the Agreement was a letter of support for removal of the TOFA is wrong. Massachusetts law clearly provides that a contracting party may breach the covenant of good faith and fair dealing without breaching any of the underlying contract's express terms. Massachusetts v. Schering-Plough Corp., 779 F. Supp. 2d 224, 240 (D. Mass. 2011). The court's concern is the "spirit of the bargain" and "not whether the defendant abided by the letter of the contract in the course of performance." Speakman v. Allmerica Fin. Life Ins., 367 F. Supp. 2d 122, 132 (D. Mass. 2005). Telling the FAA that the NAC intends to increase the TOFA area outside BEH's hangar – rather than remove it completely – is a clear violation of the "spirit of the bargain," which was that the NAC was to support removal of the TOFA.

E. The Settlement Agreement Required More Than Being "Invited" To Help Develop the Corrective Action Plan.

Pursuant to the Settlement Agreement, the "Town and NAC agree that BEH shall be allowed to participate in any meetings, and be copied on all correspondence, regarding the negotiation with the FAA regarding negotiation of required remedial measures in connection with

the Director's Determination on the Part 16 Complaint, with the intention and goal of crafting a 'Joint Corrective Action Plan.'"

On October 9 and 15, 2019, Chris Donovan of BEH met with Attorneys Mackey and Makarious (via phone), as well as Attorney North, Commissioner Ryan, Tony Mazzucco, and Russ Maguire regarding the corrective action plan due to the FAA from the NAC. Since that time, BEH has not been notified or allowed to attend any FAA meetings regarding the Corrective Action Plan.

Tellingly, the Defendants' do not represent that BEH has been provided all correspondence with the FAA, or that no meetings occurred (whether in person or remotely) with the FAA. On August 28, 2019, the Defendants represented to this Court that the NAC had set up a teleconference with two officials from the FAA for the following week, and that BEH would be notified and invited to participate. [Doc. 226, p.6]. BEH, however, was never notified or invited to participate in any such meeting.

F. The Court Should Not Stay BEH's Motion Pending The State Court Action.

The Defendants' suggestion that this matter be stayed pending resolution of FlightLevel's action in state court – or that FlightLevel should be joined here – should be flatly rejected. As a preliminary matter, it bears repeating that the Town's lawyers previously represented to this Court and BEH that the "NAC could not settle this matter with BEH in a way that would invite a future lawsuit from Flight Level." [Doc. 190]. Yet, that is precisely what they have done by failing to disclose FlightLevel's claims in advance of the Agreement. Not only have the Defendants caused BEH to become embroiled in a lawsuit it sought to avoid, incredibly, the Defendants have sought

to extricate themselves from that lawsuit, leaving BEH to defend against FlightLevel's claims if the Defendants' Motion to Dismiss is allowed by the state court.

CONCLUSION

Based upon the foregoing, Boston Executive Helicopters, LLC, having shown a clear breach of the Settlement Agreement and bad faith by the Defendants and their counsel, hereby respectfully requests that this Honorable Court issue an Order reopening the case, Order the Defendants and their counsel to comply with the Settlement Agreement terms, and issue an Order sanctioning the Defendants and their counsel in an amount to compensate BEH for its attorneys' fees and lost revenue caused by the Defendants' failure to provide space for BEH to operate as an FBO at the Airport, and costs, including attorneys' fees, incurred in defense of the FlightLevel case, which are another direct result of the Defendants and their attorneys.

Respectfully submitted,

BOSTON EXECUTIVE HELICOPTERS, LLC,

By its attorneys,

/s/ Eric H. Loeffler

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Dated: November 18, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above documents, filed through the Electronic Case Filing System, was served upon the attorney of record for each party by email and by electronic means on November 18, 2020.

/s/ Eric H. Loeffler
Eric H. Loeffler