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 OPPOSITION TO MOTION TO INTERVENE

The plaintiff, Boston Executive Helicopters, LLC ("BEH"), hereby submits this Opposition to FlightLevel Norwood, LLC, EAC Realty Trust II, EAC Realty Trust IV, and Peter Eichleay, in his capacity as Trustee of EAC Realty Trust II and EAC Realty Trust IV's (collectively, "FlightLevel") Motion to Intervene. As a preliminary and dispositive matter, FlightLevel has failed to serve a pleading setting forth the claim or defense for which intervention is sought as required by Fed. R. Civ. P. 24(c), which requires denial of the motion. Further, FlightLevel has failed to present the Court with a jurisdictional basis for intervention, and its claims are otherwise not ripe and present no case or controversy for the Court to decide. Moreover, there is no legal or factual reason why FlightLevel should be permitted to intervene in this action. Significantly, (1) FlightLevel is not a party to the Settlement Agreement that is at issue in the pending motion before this Court; (2) the involvement or participation of FlightLevel was not required for the Defendants to enter into the Settlement Agreement, nor is it required for the Defendants to comply with their obligations under the Settlement Agreement; and, (3) FlightLevel

is currently involved in litigation in the Superior Court with regard to the purported property rights it proffers as support for its motion here.[1]

STATEMENT OF FACTS

BEH directs the Court to the Statement of Facts filed with its motion to enforce the Settlement Agreement. FlightLevel is not a party to and has no rights or responsibilities under the Settlement Agreement; further, FlightLevel has no right to oppose or enforce the Settlement Agreement. There is no basis for FlightLevel to intervene as a result of BEHs' motion to enforce, which seeks only enforcement of the Settlement Agreement or damages as a result of the breach thereof, an issue for which this Court has specifically retained jurisdiction.

ARGUMENT

A. FlightLevel Fails To Meet The Rule 24(c) Pleading Requirements.

FlightLevel cannot intervene unless it meets the procedural requirements of Rule 24(c), including the requirement that movants shall file "a pleading setting forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). "The language of the rule is *mandatory*, not permissive, and the rule sets forth reasonable procedural requirements to insure that claims for intervention are handled in an orderly fashion." Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 783-84 (1st Cir. 1988) (emphasis added); Public Serv. Co. of N.H. v. Patch 136 F.3d 197, 205 & n.6 (1st Cir. 1998) (failure to accompany motion to intervene with pleading setting forth claim or defense generally warrants denial). Here, FlightLevel has failed to file a pleading altogether, and certainly has not identified any particular legal claim or defense for which it seeks intervention. This is insufficient to satisfy Rule 24(c) and requires that FlightLevel's motion be denied.

[1]BEH's claims against the Defendants presented in its Motion to Enforce, however, are not part of the claims pending in the Massachusetts Superior Court action filed by FlightLevel.

FlightLevel's decision to ignore the plain and strict requirement of Rule 24(c) is intentional. Were they to comply, the complaint in intervention would highlight the very fact that they strenuously seek to obscure: that the Court lacks jurisdiction to hear FlightLevel's claims, that its claims are speculative and not ripe, and the relief it seeks is not available under Rule 24.

B. This Court Lacks Jurisdiction To Hear FlightLevel's Claims.

FlightLevel has further failed to present this Court with a jurisdictional basis for intervention; nor has FlightLevel addressed the jurisdictional issue in its memoranda in support of its motion to intervene. The First Circuit imposes the additional threshold requirement of proving independent jurisdictional grounds for the intervenor's claims or defenses. "It is well settled that permissive intervention ordinarily must be supported by independent jurisdictional grounds." International Paper Co. v. Inhabitants of Town of Jay, 124 F.R.D. 506, 510 (D. Me. 1989); see also Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 52 n. 5 (1st Cir. 1979) (stating that permissive intervention must be supported by independent jurisdictional grounds). FlightLevel has not proffered any valid basis upon which subject matter jurisdiction may be predicated for its motion for intervention to assert as yet unidentified claims in this action. Moreover, there is no federal question involved in FlightLevel's claims, and FlightLevel is not diverse to BEH or the Defendants.

In some instances, intervention can meet jurisdictional requirements based on supplemental jurisdiction, see 28 U.S.C. § 1367 and Arbaugh v. Y&H Corp., 126 S. Ct 1235, 1240 (2006), but FlightLevel does not meet those requirements either. To meet the requirements of supplemental jurisdiction, FlightLevel's claims must be "so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. As noted in BEH's motion to enforce before this Court,

this Court has original jurisdiction as to BEH's claims against the Defendants because it expressly retained jurisdiction over the Settlement Agreement and has the inherent authority to enforce each and every term of the parties' agreement or award BEH damages. See Baella-Silva v. Hulsey, 454 F.3d 5, 10–11 (1st Cir. 2006). FlightLevel's claims that enforcement of the Settlement Agreement somehow poses a threat to its purported interests do not form part of the same case and controversy in the instant action because FlightLevel is not a party to the Settlement Agreement at issue here, its claims are unknown, and FlightLevel is pursuing its purported interests in a separate state court action. As a result of the foregoing, there is no supplemental jurisdiction over FlightLevel's claims.

C. Because The Claims that FlightLevel Seeks To Assert Are Not Ripe, There Is No Case Or Controversy Presented For The Court To Decide.

Additionally, before the Court even proceeds to consider whether FlightLevel can establish all of the criteria for either intervention as of right or permissive intervention, there is an additional preliminary issue that ultimately renders that exercise moot. Specifically, the claims that FlightLevel seeks to assert by way of intervention are not ripe. Pursuant to Article III of the Constitution of the United States, therefore, there is no case or controversy for this Court to decide and the request for intervention must be denied.

As explained by the United States Supreme Court, the rationale behind the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). "While the doctrine has a prudential flavor, a test for ripeness is also mandated by the constitutional requirement [set forth in Article III] that federal jurisdiction extends only to actual cases or controversies." Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 535 (1s t Cir. 1995) (citations omitted); see also Mass. Assoc. of Afro-American Police, Inc. v.

Boston Police Dept., 973 F.2d 18, 20 (1st Cir. 1992) ("ripeness doctrine is grounded in both Article Ill concepts and discretionary reasons of policy"). In order to establish the ripeness of its claims, a party must satisfy a two-prong test, which focuses on the fitness of the issues for judicial decision and the hardship to the parties if consideration is withheld. See Abbott Laboratories, 387 U.S. at 149 (establishing two-prong test); Ernst & Young, 45 F.3d at 535 (holding that both prongs of the test must be satisfied). Here, FlightLevel cannot satisfy either prong of the test.

"The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all." Mass. Assoc. of Afro-American Police, 973 F.2d at 20 (citation omitted). In the present case, FlightLevel's claims, by its own admission, are unknown, uncertain, and contingent. To repeat, FlightLevel has not included the pleading setting forth its proposed claims as required under Rule 24, and merely seeks to intervene "to present its own interests and perspective regarding the issues at stake in BEH's Motion." FlightLevel Memo., p. 17. BEH and the Defendants have not executed a lease due to the Defendants' breach of the Settlement Agreement, and BEH has not asked this Court to make any determination concerning FlightLevel's claimed rights at the Airport; rather, BEH seeks enforcement of the Agreement insofar as the Defendants are obligated to provide BEH with a promised amount of space to conduct FBO operations, or hold the Defendants financially accountable if they are unable to do so. FlightLevel's unknown claims are hypothetical and unfit for review.[2]

[2]The Town Defendants' pending motion to dismiss FlightLevel's claims in the state court action seeks dismissal on similar grounds, arguing that because FlightLevel's "claims are based not on an actual transaction executed by the Town Defendants and Boston Helicopters but instead on the promise of a future lease of presently unspecified terms, [FlightLevel's] allegations do not articulate an actual claim."

D. While Styled A Motion To Intervene, The Relief FlightLevel Seeks Is Unavailable Under Rule 24.

The fundamental, underlying purpose of Rule 24 is to allow a non-party to intervene in the existing claims of an action, alongside either the existing plaintiff(s) or defendant(s). See Kamerman v. Steinberg, 681 F. Supp. 206,211 (D.C.N.Y. 1988) ("Ordinarily, a person desiring to intervene seeks to join a pending action either as a plaintiff or as defendant"). To that end, the rule provides that the prospective intervenor must include with its motion "a pleading set forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). As noted above, FlightLevel has not satisfied either of these requirements. In fact, its Motion suggests that it does not seek intervention at all. In essence, what FlightLevel truly seeks is to insert itself for the purpose of merely opposing BEH's motion to enforce (without asserting any claims through a required pleading which, as noted above, would not even be ripe). This is not what is anticipated or permitted by Rule 24.

E. FlightLevel Has Not Met The Requirements Of Either Intervention As Of Right, Or Permissive Intervention.

FlightLevel contends that it should be granted intervention as of right, pursuant to Fed. R. Civ. P. Rule 24(a)(2) or permissive intervention under Rule 24(b). As discussed above, intervention cannot be permitted because FlightLevel has not proffered the required pleading, has no standing, and FlightLevel has not articulated a jurisdictional basis for this Court to hear its unarticulated claims. Should this Court, however, rule otherwise, this Court should still deny FlightLevel the right to intervene because it cannot meet the federal intervention requirements.

FlightLevel's motion to intervene as of right fails as a matter of law because FlightLevel cannot satisfy the requirements for intervention set forth in Federal Rule of Civil Procedure 24(a). Rule 24(a)(2) requires FlightLevel to establish: (i) the timeliness of its motion; (ii) an interest relating to the subject of the pending action; (iii) a realistic threat that the disposition of the action

will impede its ability to protect that interest; and (iv) the lack of adequate representation of its position by the existing parties. R&G Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 584 F.3d 1, 7 (1st Cir. 2009). The test for intervention is conjunctive, and the failure to satisfy any one of the conditions dooms intervention. Public Serv. Co. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). As set forth below, FlightLevel has not and cannot show that its motion is timely, or that, absent intervention, FlightLevel will be deprived of any property right.

"[T]he most important factor is the length of time that the putative intervenor knew or reasonably should have known that his interest was imperiled before he deigned to seek intervention." In re Efron, 746 F.3d 30, 35 (1st Cir. 2014). An intervenor must file "promptly" as soon as he knows or should know "a pending case threatens to jeopardize his rights." R & G Mortg. Corp., 584 F.3d at 8. Timeliness depends on (1) the length of time the movant knew or reasonably should have known of their interest before moving to intervene; (2) prejudice to existing parties caused by the intervenor's delay; (3) prejudice to the intervenor if their motion is denied; and (4) the existence of "unusual circumstances" militating for or against intervention. Culbreath v. Dukakis, 630 F.2d 15, 24 (1st Cir. 1980).

By any measure, FlightLevel's motion is inexcusably late. FlightLevel acknowledges that it learned on December 7, 2018 that BEH and the Town had reported the lawsuit settled. FlightLevel also acknowledges that starting in December 2018, "upon learning of the reported settlement between BEH and the Town, FlightLevel's outside counsel sent multiple communications to the Town's counsel to notify and educate the Town about the existence of the FlightLevel's access rights on Lot B, Lot H and the DC-3 Ramp; the need for an easement over Lot H to allow fueling vehicle to access FlightLevel's fuel farm; and the importance of respecting FlightLevel's access rights in any settlement agreement made between the Town and BEH."

FlightLevel's Memo., p. 6. FlightLevel also took action to protect its alleged rights in August 2019 by commencing an action against the Town Defendants and BEH in the Massachusetts Superior Court. In the nearly two years since BEH first reached agreement with the Defendants, and since the Settlement Agreement was finalized on July 30, 2019, FlightLevel took no action to intervene in this action to protect its alleged interests.

Still further, FlightLevel's claimed harm or prejudice wholly misses the mark. As the First Circuit has noted, "[t]his [factor] requires that we determine whether the movant, had intervention been allowed, would have 'enjoy[ed] a significant probability of success on the merits.'" Banco Popular, 964 F.2d at 1232 (citations omitted). As noted previously, FlightLevel has not expressed any intent or desire to intervene for the purpose of seeking to prove or disprove that the Defendants breached the Settlement Agreement. Therefore, FlightLevel's focus on the harm it might suffer from the resolution of that issue is speculative and misplaced.

Moreover, FlightLevel is not so situated that the disposition of this dispute between BEH and the Defendants will impair or impede its ability to protect its interests. FlightLevel's purported interest are just that, purported and not definitive interests, as evidenced by the dispute regarding those interests currently under litigation in superior court. That is the proper forum for determining FlightLevel's claims, not here where the only issue before this Court is the enforcement of a Settlement Agreement to which FlightLevel is not a party. There is neither a "need" nor a legal reason why FlightLevel should be permitted to litigate before this Court the same claims it is currently litigating in state court. As for BEH's claims, the issue concerning the Defendants' breach of the Settlement Agreement is not before and will not be addressed by the state court. The Settlement Agreement is the subject of this action, and whether or not FlightLevel has interests is

irrelevant to BEH's motion seeking to require the Defendants to comply with their obligations under the Agreement or pay BEH damages as a result of the breach thereof.

FlightLevel cannot meet the requirements of permissive intervention either. Permissive intervention is permitted where the application for intervention is timely made and "an applicant's claim or defense and the main action have a question of law or fact in common." Fishgold v. Sullivan Drydock & Repair Corp., 328 US. 275, 281 (1946) (citing Rule 24(b)). The main action here is one involving a claim of breach of a Settlement Agreement. FlightLevel's claims have nothing to do, in law or fact, with BEH and the Defendants' obligations to each other under the Settlement Agreement. Moreover, other courts have denied motions for intervention by non-parties who attempted to intervene in actions dealing with settlements or agreements between other parties. See Gaskin v. Pennsylvania, 389 F. Supp. 2d 628, 644 (E.D. Pa. 2005) (noting that the court denied non-parties' motion to intervene to strike a proposed settlement agreement because they had no standing); see also Jefferson v. Camden, 2006 WL 1843178, at *1 (D. N.J. June 30, 2006) (noting that Court denied motion to intervene by several non-parties who wanted to oppose a settlement provision).

FlightLevel does not meet the requirements of intervention as of right or permissive intervention, requiring this Court to deny FlightLevel's motion to intervene.

CONCLUSION

For the foregoing reasons, Boston Executive Helicopters, LLC respectfully requests that the Court deny FlightLevel's Motion to Intervene, and grant BEH such other and further relief that the Court deems just and appropriate.

Respectfully submitted,

BOSTON EXECUTIVE HELICOPTERS, LLC,

By its attorney,

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Dated: November 20, 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 electronic means on November 20, 2020.

/s/ Eric H. Loeffler
Eric H. Loeffler