

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1982CV01099

FLIGHTLEVEL NORWOOD, LLC, et al.,

Plaintiffs,

v.

TOWN OF NORWOOD, et al.,

Defendants.

BOSTON EXECUTIVE HELICOPTERS, LLC,

Plaintiff-in-Counterclaim,

v.

FLIGHTLEVEL NORWOOD, LLC, et al.,

Defendants-in-Counterclaim.

**OPPOSITION OF BOSTON EXECUTIVE HELICOPTERS, LLC
TO FLIGHTLEVEL'S MOTION FOR INJUNCTIVE RELIEF**

The defendant, Boston Executive Helicopters, LLC (“BEH”) hereby submits this opposition to the Plaintiffs’ (collectively, “FlightLevel”) Motion for Injunctive Relief.¹ As a preliminary and dispositive matter, the injunctive relief sought by FlightLevel here has already been DENIED by the Superior Court (Kirpalani, J.) in a separate action. In that other case, FlightLevel asserted the very same arguments it asserts here, and Judge Kirpalani ruled that FlightLevel had failed to demonstrate a likelihood of success on the merits of its claims. See

¹BEH also relies upon and incorporates herein by reference the Affidavits of Christopher Donovan, Halim Choubah, and Eric H. Loeffler, submitted herewith.

June 3, 2021 Superior Court Order, attached hereto as Exhibit 1. Judge Kirpalani also ruled, in denying the preliminary injunction, that “[n]either of [BEH’s] lease[s] explicitly grants **FlightLevel any access rights to these areas**” leased by BEH. See id., at p. 4. By law, a plaintiff like FlightLevel is not permitted a second bite of the apple by seeking relief on claims and issues that have already been decided by the courts. At best, FlightLevel’s motion is a motion for reconsideration, but FlightLevel fails to comply with the requirements of Superior Court Rule 9D. Filing this motion in the present action, instead of seeking reconsideration with Judge Kirpalani, is plainly forum shopping and exactly what Rule 9D is meant to prevent. BEH also notes that FlightLevel failed to appeal from the denial of its prior motion on these issues after having its motion denied by Judge Kirpalani.

The area of the Airport at issue here is leased by BEH. FlightLevel has no rights to access to BEH’s leased areas for its business. While FlightLevel characterizes its request as seeking to prevent BEH from “interfering” with its so-called “rights,” what FlightLevel is really attempting to obtain is an order requiring BEH to allow FlightLevel to use BEH’s leased property for FlightLevel’s business. There is no basis for this requested relief, and FlightLevel itself has refused in the past to permit others, including BEH, from utilizing its own leaseholds.²

FlightLevel’s motion and request for relief is based entirely upon non-existent property rights to the areas now leased by BEH, and its attempt to obtain this relief was already rejected by Judge Kirpalani. As it did before Judge Kirpalani, FlightLevel here argues that there are “four sources of FlightLevel’s rights to use certain portions of Lot B, Lot H and the DC-3 Apron

²FlightLevel’s disingenuousness in this regard is glaring: In a letter dated September 24, 2013, Peter Eichleay of FlightLevel addressed the NAC about BEH’s intentions to become an FBO and Mr. Eichleay stated expressly that one business at the Airport should not be compelled to allow another business at the Airport to use its property: “Needless to say, our stance is a common sense one that holds true for all American enterprise according to common law: namely that no business would ever be compelled to allow its assets to be used to their own detriment let alone to enable a competitor without just compensation (e.g. Ernie Boch wouldn’t allow Herb Chambers to sell cars on his lots; Ford would never grant Honda access to its plants; etc.).” See Donovan, Aff., ¶64.

to access its fuel farm: (1) the Lot G Sublease and its ‘25’ Tank Farm Access Easement rights over Lot B; (2) the Tank Farm Sublease and its ‘25’ Tank Farm Access Easement rights over Lot B - and its rights to Lot H and the DC-3 apron; (3) the License Agreement and its ‘Lot B&H Licensed Area’ access rights; and (4) the February 15, 2017 unanimous NAC vote approving FlightLevel’s Fueling Plan.” None of the first three “sources” actually cover the area complained of by FlightLevel to make its supposed “wide-turn” onto BEH’s leased property. As to the fourth “source,” there was no easement granted or recorded by the Town, and none exists. In other words, none of these “sources” permits FlightLevel to turn its fuel delivery trucks on BEH’s property, and deny BEH the use of its own leaseholds for its FBO business. FlightLevel cannot point any existing and legitimate property right to support its request for injunctive relief. Simply stated, as in its prior motion, FlightLevel cannot demonstrate a likelihood of success on the merits of its claims that it has rights to access BEH’s property.

Additionally, FlightLevel cannot show that it has suffered any harm as a result of any conduct by BEH. Even if FlightLevel could demonstrate a likelihood of success – which it obviously cannot – FlightLevel has demonstrated no harm by failing to make the required showing that it cannot under any circumstances provision its fuel system without accessing and making a wide turn onto BEH’s property. As discussed below, and as supported by the Affidavits of Christopher Donovan and Halim Choubah, P.E., FlightLevel can access its fuel farm for deliveries from multiple directions, can do so without traversing BEH’s property.³ As further detailed below, FlightLevel’s own fueling plans demonstrate that it can access and provision the fuel farm without the need for the requested injunction. To allow the requested relief would be to deny BEH the rightful use of property that it leases for its own FBO

³To gain a better understanding of the dispute and the areas in question, BEH would invite the court in its discretion to schedule a view of the site of the dispute at the Airport.

operations. Of course, that is the real intent of the present motion: to keep BEH from competing with FlightLevel on the merits. Simply put, FlightLevel has no basis for seeking injunctive relief (again) from this Court and its Motion for Injunctive Relief must be denied.

BACKGROUND

The Norwood Memorial Airport (the “Airport”) is a public airport located in Norwood, Massachusetts, owned and operated by the Town of Norwood. The Norwood Airport Commission (“NAC”) was established pursuant to G.L. c. 90, §§51E, and is charged with custody, care, and management of the Airport. Donovan Aff., ¶4. Owners and operators of aircraft using airports such as the Airport typically utilize the services of a privately owned fixed based operator, or “FBO.” Donovan Aff., ¶5. Under the NAC’s Regulations and Minimum Standards, an FBO is defined as an airport-based organization which provides aircraft fueling services while engaging in a minimum of one of the primary service areas that include: (1) location-based services (line services/ground handling; crew and passenger services; facilities (aircraft tie-downs, hangars, offices); (2) technical services (aircraft maintenance and parts; paint and interiors); (3) flight services (charter and aircraft management); or (4) aircraft sales. Donovan Aff., ¶6.

Until recently, the Airport was served by only a single fuel provider/FBO, FlightLevel. Donovan Aff., ¶7. FlightLevel leases approximately 85% of the ramp space at the Airport. Until recently, the only public ramps remaining within NAC’s control were the West Apron and the DC-3 Ramps. FlightLevel has sought to obtain all available ramp space for the operation of its FBO to the exclusion of all other prospective competing FBOs, including BEH. Donovan Aff., ¶8.

Since 2010, BEH has held an existing Part 135 commercial permit to operate at the Airport. Since October 2010, BEH has requested ramp space and rights to operate a second FBO at the Airport, in order to provide aeronautical services to the Airport's users, such as aviation fueling services. BEH has submitted numerous requests, both verbally and in written form, seeking a permit and reasonable ramp space at the Airport in order to allow BEH to operate an FBO, sell fuel, and use the costly investments it has already made at the Airport. Donovan Aff., ¶9.

On November 2, 2018, the FAA issued a decision on BEH's separate Part 16 Complaint finding the Town of Norwood to be in violation of Federal law and its Federal grant obligations, and recognized conclusively that FlightLevel was the beneficiary of impermissibly granted exclusive rights (i.e., a monopoly) at the Airport. The FAA found that the Town "imposed unreasonable restrictions on BEH . . . which, when combined with the leasing practice with FlightLevel, have the overall effect of solidifying FlightLevel's position at the Airport to the detriment not just for BEH, but any other entity which would be seeking an opportunity to provide FBO services." Donovan Aff., ¶16. FlightLevel has done everything it can to prevent BEH from becoming an FBO at the Airport, including repeatedly making false claims of obstruction and interference by BEH.

BEH Lawsuits Against The Town/NAC

In October of 2015, BEH filed a lawsuit against the Town and others, which was removed to federal court, captioned Boston Executive Helicopters LLC v. Francis T. Maguire, et al., United States District Court, District of Massachusetts, Civil Action No. 1:15-cv-13647-RGS ("the Federal Case"). Donovan Aff., ¶15.

On July 30, 2019, BEH and the Town/NAC entered into a General Release & Settlement Agreement (the “Settlement Agreement”). Donovan Aff., ¶17. In addition to other issues, the Town agreed to work “cooperatively to ensure that BEH is promptly approved and permitted as a full Service Fixed Base Operator (‘FBO’) at Norwood Memorial Airport within thirty (30) days of the execution of this Agreement.” Donovan Aff., ¶18.

The Town further agreed in the Settlement Agreement that the NAC would enter into lease agreements with BEH for AIP Ramp #3-25-0037-27 (2006), consisting of approximately 72,000 s.f. (the ‘West Apron’), and AIP Ramp #3-25-0037-26\2005), consisting of approximately 15,295 s.f. (the ‘DC-3 Ramp’) (the ‘Leases’).” Donovan Aff., ¶19. On August 26, 2019, the NAC granted BEH a permit to operate as an FBO. Donovan Aff., ¶20.

In keeping with its efforts to prevent competition, shortly after the Settlement Agreement was signed, on August 26, 2019, FlightLevel commenced this lawsuit in the Norfolk Superior Court against BEH, the Town, the NAC, and others, for injunctive relief to protect alleged access rights over portions of the West and DC-3 Ramps, including among other claimed rights, breach of an easement voted on by the NAC on February 15, 2017, and breach of a January 24, 1996 License Agreement (“the Lot B&H License”). Donovan Aff., ¶21.

On or about May 20, 2020, in this action, FlightLevel filed a Motion for Injunctive relief against BEH (and the Town/NAC) seeking to enjoin BEH “from interfering with FlightLevel’s leasehold and access rights.” In that Motion, FlightLevel, just as it does here, claimed that BEH was blocking “access to and egress from its fuel farm.” Donovan Aff., ¶22. On or about July 1, 2020, the Court denied FlightLevel’s Motion for Injunctive Relief. Donovan Aff., ¶23.

On or about December 21, 2020, the NAC and BEH entered into a Standard Form Ground Lease for a portion of the Airport known as the West Apron. Donovan Aff., ¶24, Exhibit

A. On or about December 21, 2020, the NAC and BEH entered into a Standard Form Ground Lease for a portion of the Airport known as the DC-3 Apron. Donovan Aff., ¶25, Exhibit B.

Pursuant to the terms of the West Apron and DC-3 leases, BEH has the right to use the leased ramp space for its own FBO operations including, aircraft handling, fueling of aircraft, aircraft tie-downs, and including but not limited to operations customarily associated with an FBO. Donovan Aff., ¶26.

The leases executed between the Town and BEH contain no language or any indication that they are non-exclusive, or grant FlightLevel access rights. The phrase “non-exclusive” does not appear in the leases. Moreover, the issue before Judge Stearns concerned enforcement of the settlement agreement, not an interpretation of property rights granted or not granted under the yet to be signed leases. Donovan Aff., ¶27.⁴

FlightLevel Has Already Lost On This Issue In Another Action

In another action commenced by FlightLevel pending in the Massachusetts Superior Court (Norfolk County), captioned FlightLevel Norwood, LLC v. Boston Executive Helicopters, LLC et al., Civil Action No. 1582CV01637, FlightLevel sought the same injunctive relief against BEH. Donovan Aff., ¶28. On February 26, 2021, the court (Kirpalani, J.) – though later acknowledging that he had not considered the papers submitted by BEH when the injunction issued – issued an order enjoining BEH from interfering with access to FlightLevel’s fuel farm, including but not limited to “the parking of vehicles or aircraft or the placement of obstructions in the Gate 3 Taxilane Object Free Area, on FlightLevel’s Lot G Sublease premises, on

⁴Moreover, the term “non-exclusive” as used in the Settlement Agreement has nothing to do with encumbrances, or unknown and concealed claimed rights – or that third parties would be permitted unfettered access to traverse BEH’s leaseholds. The inclusion of that phrase was meant to ensure that the leases would contain standard language prohibiting the granting of an “exclusive right” under FAA grant assurances as it relates to competition at the airport, not property rights. The interpretation of the use of “non-exclusive” in the settlement agreement is on appeal to the First Circuit. In any event, and controlling here, Judge Kirpalani already has ruled that “[n]either of [BEH’s] lease[s] explicitly grants FlightLevel any access rights to these areas.”

FlightLevel's Tank Farm Lease Lot premises, on FlightLevel's '25' Tank Farm Access Easement area, on the 'Lot B&H Licensed area,'" and on the area on Lot H. The court also enjoined BEH from interfering with FlightLevel's rights under its Tank Farm Sublease. Id. at ¶29.

Shortly thereafter, BEH filed its Emergency Motion to Vacate the Preliminary Injunction Order. On June 3, 2021, the Court issued a Memorandum of Decision and Order allowing BEH's Emergency Motion to Vacate the Preliminary Injunction Order, correctly finding that **"FlightLevel has failed to establish a likelihood of success on the merits of its claim is sufficient to deny injunctive relief."** Judge Kirpalani ruled, in denying the preliminary injunction, that "[n]either lease explicitly grants FlightLevel any access rights to these areas." See Exhibit 1, p. 4,

Having lost on this issue, FlightLevel now seeks a second bite at the apple, albeit with a different judge, and makes the very same arguments as to its supposed rights that were rejected by Judge Kirpalani. See Affidavit of Eric H. Loeffler, Exhibits 1 through 6.

FlightLevel Has No Identifiable Property Right To Access BEH's Property

Notwithstanding BEH's possessory interests, FlightLevel continues to maintain that they have "pre-existing leasehold and access rights" to the West Apron and DC-3 Apron. FlightLevel has wrongly claimed that it has unfettered access rights over the West and DC-3 Aprons, including pursuant to an alleged vote by the NAC to create a non-exclusive easement over Lot H (on the West Apron), a license agreement concerning the area known as the "Lot B&H Licensed Area" on the West Apron, an alleged right to install a fuel delivery system from Lot H (portions of the West Apron) to the DC-3 Apron, and alleged rights to install, maintain, a fuel terminal and dispensing system on the DC-3 Apron. Donovan Aff., ¶33.

Over BEH's objection, and notwithstanding the BEH's leases, FlightLevel has stated that they fully intend to "utilize such portions of the West Apron and/or DC-3 Apron as shall be necessary to provision its fuel farm and exercise its access rights." Donovan Aff., ¶36. On January 11, 2021, FlightLevel was put on written notice that if they enter upon or traverse BEH's leaseholds that it would be deemed a trespass. Donovan Aff., ¶37. On January 12, 2021, FlightLevel caused and/or directed an 18 wheel semi-truck gasoline tanker under their direction and control to trespass on and across BEH's leasehold on the West Apron, almost striking one of BEH's fuel vehicles. Donovan Aff., ¶38. Since the execution of the West Apron and DC-3 Leases, FlightLevel employees have continued to frequently drive vehicles and otherwise trespass onto BEH's leaseholds. Donovan Aff., ¶39.

FlightLevel does not have rights to access any of BEH's leaseholds for fueling or any other purpose without BEH's consent and, in no event, does FlightLevel have the right to demand that BEH move aircraft or vehicles parked on and within BEH's leaseholds. Donovan Aff., ¶40. FlightLevel has not provided any lease agreement or other evidence that it has any rights to the West Apron, or the DC-3 apron, leased to BEH. Donovan Aff., ¶41.

FlightLevel similarly does not have an easement as suggested to access the fuel farm over BEH's leased portion of Lot H. FlightLevel continues to baselessly maintain that a February 2017 vote of the NAC to have the NAC's counsel work with FlightLevel to create such an easement over the West Apron portion of Lot H granted it rights. But that easement was never completed and since that time the NAC has leased that area to BEH. Donovan Aff., ¶42.

The plans attached to the West and DC-3 Leases (see Exhibits A and B) contain no easement or other access rights in favor of FlightLevel. Prior to the execution of the leases, on April 29, 2020, Town Counsel sent a title exam to BEH regarding the West and DC-3 Aprons.

No easement or other access rights in favor of FlightLevel as suggested here were noted. Donovan Aff., ¶43.

FlightLevel Can Access Its Fuel Farm

FlightLevel is able to access their fuel farm, including receiving deliveries of “Jet A” and Avgas fuel from transports, without accessing or traversing BEH’s leaseholds, and without impeding or interfering with BEH’s rights under its leases. Donovan Aff., ¶46.

Most tellingly, FlightLevel recently produced the plans prepared by its expert Norwood Engineering that specifically show that FlightLevel can receive bulk fuel deliveries without traversing onto BEH’s leaseholds. See Donovan Aff., Exhibit D. These plans prepared for FlightLevel conclusively show that FlightLevel’s delivery vehicles do not need to make a turn onto BEH’s leasehold on the West Apron.

FlightLevel has previously loaded and unloaded fuel delivery vehicles on both the West, East, and South sides of the Fuel farm. Donovan Aff., ¶52, Exhibit F. FlightLevel has also repeatedly loaded and unloaded fuel from outside the fenced area of the fuel farm, on dirt, through the fence – and not on the so-called “Containment Pad.” Donovan Aff., ¶53, Exhibit G. BEH has observed on many occasions FlightLevel or its transports entering the fuel farm from the East and West, and also backing in from the East and West, loading and unloading from the East, South, and West. Donovan Aff., ¶57, Exhibit E. There is no need or regulatory requirement for FlightLevel’s transports of Avgas or “Jet A” to refuel FlightLevel’s tanks from the so-called “containment pad.” FlightLevel often loads and unloads fuel from vehicles not situated on the “containment pad.” Donovan Aff., ¶58, Exhibit E.

There is no need for FlightLevel to enter or exit from the East side of the fuel farm, and a wide turn in that area is not required. BEH has observed for many years FlightLevel unloading

bulk fuel deliveries from the East and South side of the fuel farm – without any turn on to the West apron (now leased by BEH). Donovan Aff., ¶59, Exhibit E.

To the extent FlightLevel claims any difficulty maneuvering on its property, that is an issue of its own making. FlightLevel has installed gates and a fence around its fuel farm. There is no need or legal requirement for the gates and/or a fence. BEH’s own underground fuel storage facility has no fence or gate surrounding the area. Donovan Aff., ¶60. FlightLevel’s claim that the area of Lot H (now leased by BEH), which is shown on the “AutoTurn Plan,” must be free of obstructions and vehicles is a falsehood. As shown on the photos attached as Exhibit E, that precise area on the West Apron has aircraft tie downs located in the same area complained of by FlightLevel. Donovan Aff., ¶61. FlightLevel has been utilizing the fuel farm, without any problems or complaint, with aircraft permanently tied down/parked, in that exact same location. Donovan Aff., ¶62, Exhibit E.

Here, FlightLevel has failed to demonstrate that it will suffer irreparable harm. FlightLevel has not proffered any competent evidence to support its position that it is unable to deliver Jet-A fuel without access to BEH’s leasehold; neither has FlightLevel proffered any competent evidence that it has no other alternative for off-loading Jet-A fuel exists. FlightLevel’s silence on this latter point is telling. As noted below, FlightLevel is able to access its fuel farm, including receiving deliveries of fuel from transports, without accessing or traversing BEH’s leaseholds, and without impeding or interfering with BEH’s rights under its leases.

Following Judge Kirpalani’s Order of February 26, 2021, BEH retained a licensed professional engineer, Halim A. Choubah, P.E, to perform a review and evaluation of FlightLevel and its related entities’ claims that fuel transports must be able to use the “the wide

turn area on Lot H” located on BEH’s leasehold in order to reach and exit FlightLevel’s fuel farm located on a different portion of Lot H at the Airport. More specifically, Mr. Choubah was also asked to perform a review and evaluation of FlightLevel’s claim that the portion of BEH’s leasehold on Lot H abutting the easterly boundary of the Tank Farm Lease Lot must be kept free of obstructions for FlightLevel’s vehicles to access the fuel farm.

Mr. Choubah has thirty-five (35) years of experience in the civil engineering field with extensive experience in land development, planning zoning, permitting, and construction. Pertinent to the matters addressed herein, he has worked extensively in the design of gasoline filling stations, including site layout for optimal fuel delivery circulation and fueling operations, including evaluating ingress and egress, and the turning radius, of fuel trucks carrying up to 10,000 gallon loads. Mr. Choubah has been responsible for the design, permitting and construction supervision of over 100 filling stations in New England over the past fifteen (15) years.

As set forth in his affidavit, submitted herewith, Mr. Choubah performed his review with the understanding that: (1) FlightLevel has claimed that BEH positioned its fuel truck or other vehicles in the area on Lot H on BEH’s own leasehold; (2) FlightLevel claims that its inbound Jet-A delivery Transports must execute a wide turn (over BEH’s leasehold) before turning 180 degrees west to line up with and position over the Jet-A containment pad on the south side of FlightLevel's fuel farm, as depicted on FlightLevel’s AutoTURN plan; and (3) FlightLevel claims that its fuel deliveries arrive in 8,000 to 10,000 gallon loads, on transports of up to 65 feet long. As further detailed in his affidavit, Mr. Choubah also understands that FlightLevel further maintains that its inbound Jet-A delivery Transports must off-load the Jet-A fuel from the “Jet-A

loading and containment pad” located on FlightLevel’s fuel farm, and that without access to BEH’s leasehold on Lot H, FlightLevel cannot supply Jet-A fuel to its fuel farm.

As it pertains to FlightLevel’s claims, Mr. Choubah opines, to a reasonable degree of professional certainty, that FlightLevel is able to access its fuel farm, including receiving deliveries of “Jet A” and Avgas fuel from transports, without accessing or traversing BEH’s leaseholds, and without impeding or interfering with BEH’s rights under its leases. See Choubah Affidavit, ¶16. FlightLevel can load and unload bulk and service vehicles, from multiple locations throughout its fuel farm on its own property on Lot H, and from different directions, without accessing BEH’s leasehold. See Choubah Affidavit, ¶17. Attached as Exhibits B, C, and D to the Choubah Affidavit are stamped engineering drawings prepared by CEG showing how FlightLevel can accomplish this – again, without traversing onto BEH’s property – and as discussed in more detail below.

According to Mr. Choubah, the “AutoTURN Plan” relied upon by FlightLevel shows only FlightLevel’s preferred way to enter the fuel farm (from the East); however, this is not the only way FlightLevel can access and refuel its fuel farm for both Jet-A and Avgas deliveries. See Choubah Affidavit, ¶18. FlightLevel’s large tanker vehicles can enter the fuel farm from the East, West, or South directions. Id.

For example, as shown on the plan prepared by CEG, Exhibit B, FlightLevel can instruct its fuel delivery tankers to access the fuel farm for delivery by driving along the 25’ Tank Farm Access Easement located on the West side of the condo hangars and making a left turn onto the area to the South of the fuel farm. See Choubah Affidavit, ¶19. From that location, fuel tankers, including the large delivery transports carrying Jet-A fuel and Avgas, can easily unload fuel into FlightLevel’s storage tanks using hoses typically carried by fuel tankers. Id.

As stated by Mr. Choubah, large fuel trucks, such as the trucks delivering Jet-A fuel and Avgas to FlightLevel, typically carry hoses to off load fuel. Delivery tankers of the size relied upon by FlightLevel (i.e., transports of up to 65 feet long delivering 8,000 to 10,000 gallons) carry hose lengths of approximately 60 feet. Thus, fuel delivery vehicles such as the vehicles servicing FlightLevel's fuel farm can easily unload fuel up to a distance of at least 60 feet from the tank. Using those hoses, FlightLevel can provision its fuel farm from the South side of the fuel farm without traversing onto BEH's leaseholds. See Choubah Affidavit, ¶20.

As another example, and as shown on the plan prepared by CEG, Exhibit C, FlightLevel can also instruct its fuel delivery tankers to access the fuel farm for delivery by driving along the 25' Tank Farm Access Easement located on the East side of the condo hangars and parking along the East side of the fuel farm, in the same location that FlightLevel currently unloads Avgas fuel. From that location, fuel tankers, including the large delivery transports carrying Jet-A fuel and Avgas, can easily unload fuel into FlightLevel's storage tanks using hoses typically carried by fuel tankers. See Choubah Affidavit, ¶21.

As yet a further example, as shown on the plan prepared by CEG, Exhibit D, FlightLevel can also instruct its fuel delivery tankers to access the fuel farm for delivery by driving along the 25' Tank Farm Access Easement located on the West side of the condo hangars and parking along the West side of the fuel farm. From that location, fuel tankers, including the large delivery transports carrying Jet-A fuel and Avgas, can easily unload fuel into FlightLevel's storage tanks using hoses typically carried by fuel tankers. See Choubah Affidavit, ¶22.

Based upon the forgoing, Mr. Choubah has opined to a reasonable degree of professional certainty that FlightLevel's transport vehicles can easily off-load Jet-A fuel and Avgas from the

East, West, and South locations using hoses carried on the vehicles, and without accessing BEH's leasehold.

Further supporting the fact that this is an issue of FlightLevel's own making, Mr. Choubah's notes that FlightLevel has gates and fencing surrounding its fuel farm, yet there is no legal or regulatory provision requiring a fence around the fuel farm. See Choubah Affidavit, ¶24. BEH's own underground fuel storage tanks do not have fencing surrounding BEH's fuel farm on Lot F. Id. FlightLevel could easily remove the gates and fence and provide itself with more room to maneuver its vehicles without traversing onto BEH's leasehold. Id.

If FlightLevel wishes to maintain a fence around the fuel farm, which is not required, FlightLevel could easily relocate the gates and fence approximately 15 feet closer to the "Jet A" fill points and still provide itself with more room to maneuver its vehicles without traversing onto BEH's leasehold. Id. By way of illustration, removing or relocating the fence would easily allow FlightLevel's fuel delivery tankers to access the fuel farm for delivery by driving along the 25' Tank Farm Access Easement located on the East side of the condo hangars and making a wide turn (but without traversing BEH's leasehold) onto the South side of the fuel farm. Id. From that location, fuel tankers, including the large delivery transports carrying Jet-A fuel and Avgas, can easily unload fuel into FlightLevel's storage tanks. Id. Again, FlightLevel has proffered no evidence that it is unable to remove or relocate its fence to allow its trucks more room to maneuver on FlightLevel's own property.

Additionally, FlightLevel has suggested that its vehicles must be parked on the so-called "Jet-A containment pad" located on the south side of the fuel farm. Mr. Choubah notes that he is not aware of any professional standard, legal, or regulatory requirement for FlightLevel's transports of Avgas or "Jet A" to provision FlightLevel's fuel tanks from the so-called "Jet-A

containment pad” on the south side of FlightLevel’s fuel farm. See Choubah Affidavit, ¶25. In other words, FlightLevel’s fuel delivery vehicles do not need to be parked on or near the so-called containment pad to off-load fuel of any type. Id. Thus, as Mr. Choubah opines to a reasonable degree of professional certainty, FlightLevel is not required by any standard, law, or regulation to off-load Jet-A fuel from the “Jet-A loading and containment pad” located on FlightLevel’s fuel farm. Id.

If, however, FlightLevel wishes to load and unload fuel from the “Jet-A” containment pad on the South side of the fuel farm, and without making any changes to the existing fencing and gates, it can easily do so by entering the fuel farm by driving along the 25’ Tank Farm Access Easement located on the West side of the condo hangars as depicted in Exhibit B. Id.

FlightLevel could also relocate the existing fence currently located south of the “Jet A” fueling area approximately 15’ closer to the fill points (similar to the Avgas containment pad layout) and FlightLevel’s fuel delivery vehicles could then easily position themselves over the containment pad. Id. Or, as noted above, FlightLevel can use the “containment pad” on East side of the fuel farm where they currently load/unload Avgas. Id.

In summary, Mr. Choubah opines to a reasonable degree of professional certainty that FlightLevel’s inbound Jet-A delivery Transports do not need to execute a wide turn over BEH’s leasehold on Lot H to be able to off-load Jet-A fuel on FlightLevel’s fuel farm. See Choubah Affidavit, ¶26. He further opines that FlightLevel can off-load inbound Jet-A fuel from its delivery transports without traversing over BEH’s leasehold on Lot H. See Choubah Affidavit, ¶27. Finally, and based upon the foregoing, Mr. Choubah opines that BEH’s leasehold on Lot H abutting the easterly boundary of the Tank Farm Lease Lot does not need to be kept free of

obstructions for FlightLevel's vehicles to access the fuel farm for Jet-A or Avgas deliveries. See Choubah Affidavit, ¶28.

In its prior motion before Judge Kirpalani, at the February 26, 2021 hearing on FlightLevel's motion, counsel for FlightLevel did not dispute that FlightLevel's tankers could access the fuel farm using hoses from different locations, but suggested that this method would be inefficient; however, mere inconvenience or inefficiency is hardly enough to overcome the proposition that a property owner such as BEH is entitled to have its property free of interference and unlawful trespasses, and in no event should the extraordinary relief of a preliminary injunction – depriving BEH of the lawful use of its property – be grounded upon a parties' mere inconvenience.

And, as if that were not conclusive enough, BEH has captured video of FlightLevel's tankers accessing the fuel farm for a Jet-A delivery from the East (using FlightLevel's preferred method of entry) without trespassing onto BEH's property. The link noted below shows a video of one of FlightLevel's tankers maneuvering into the fuel farm without going over what is now BEH's property.⁵

Based upon the forgoing, FlightLevel is perfectly capable of delivering fuel to its fuel farm – without the need to trespass onto BEH's property. FlightLevel has made no attempt to make the required showing that it cannot under any circumstances provision its fuel system without making a wide turn onto BEH's leasehold. Accordingly, FlightLevel cannot show that it has or will suffer any irreparable harm and the request for injunctive relief should be denied.

⁵https://drive.google.com/file/d/1tvIqhHsZzBe4OpRBIvZg-URMn_zQiNYt/view?ts=6050212c

STANDARD FOR INJUNCTIVE RELIEF

An injunction is an extraordinary remedy. See, e.g., Gut v. MacDonough, No. 07- 1083-C, 2007 WL 2410131, at *16 (Mass. Super. Ct. Aug. 14,2007); Mass. Corr. Officers Federated Union v. County of Bristol, 64 Mass. App. Ct. 461, 468 (2005); Silverman v. Liberty Mutual Ins. Co., No. 01-2767-F, 2001 WL 810157, at *17 (Mass. Super. Ct. July 11,2001) (Gants, J.). The purpose of an injunction is merely to maintain the status quo while litigation is pending. See, e.g., Thayer Co. v. Binnall, 326 Mass. 467, 479 (1950). To obtain preliminary injunctive relief the moving party must show that: (1) they have a reasonable likelihood of success on the merits; (2) if the preliminary injunction is not granted they will suffer irreparable harm – losses that cannot be repaired or adequately compensated upon final judgment; and (3) the harm the moving party will suffer if the injunction is denied outweighs the harm and injury the non-moving party will suffer if the injunction is granted. Boston Police Patrolmen’s Ass’n, Inc. v. Police Dept. of Boston, 446 Mass. 46, 49 (2006). It is entirely inappropriate to order a preliminary injunction on a record of sharply disputed facts. Mass. Fed’n of Nursing Homes. Inc. v. Commonwealth, 772 F. Supp. 31, 37 (D. Mass. 1991) (A court should not grant an injunction when there is a close factual dispute that could go either way at trial”).

ARGUMENT

A. FlightLevel Has Failed To Demonstrate A Likelihood Of Success On The Merits.

As Judge Kirpalani has already found, FlightLevel has failed to demonstrate a likelihood of success on the merits warranting the requested relief. FlightLevel has no cognizable property rights to access BEH’s leaseholds on the Airport, or to demand that BEH move aircraft or vehicles parked on and within BEH’s leaseholds. FlightLevel is able to access its fuel farm,

including receiving deliveries of fuel from transports, without accessing or traversing BEH's leaseholds, and without impeding or interfering with BEH's rights under its leases.

1. FlightLevel Has No Property Rights To Access BEH's Leasehold, Or Demand That BEH Move Aircraft Or Vehicles.

Pursuant to the terms of BEH's West Apron and DC-3 leases, BEH has a possessory interest and the exclusive right to use the leased ramp space for its own FBO operations including, aircraft handling, fueling of aircraft, aircraft tie-downs, and including but not limited to operations customarily associated with an FBO. Again, in the other pending action, Judge Kirpalani has already found that "[n]either of [BEH's] lease[s] explicitly grants FlightLevel any access rights to these areas."

There is no existing instrument, whether recorded or not, that gives FlightLevel access rights over BEH's leaseholds on the West and DC-3 Aprons in the area complained of by FlightLevel. The portion of Lot H (which is on BEH's leasehold) that FlightLevel claims BEH parked vehicles preventing a fuel delivery is not covered by the Tank Farm Sublease, the Tank Farm Access Easement, or the "Lot B&H Licensed Area." FlightLevel can point to no document or right that grants it access rights to this particular area of the West Apron, because there are none. On this basis alone, the Court must deny FlightLevel's motion.

2. FlightLevel Is Perfectly Able to Access And Provision Its Fuel Farm Without Trespassing On BEH's Leaseholds And Will Suffer No Harm By The Denial Of Its Motion.

FlightLevel is able to access its fuel farm, including receiving deliveries of fuel from transports, without accessing or traversing BEH's leaseholds, and without impeding or interfering with BEH's rights under its leases. BEH has never obstructed or blocked FlightLevel. FlightLevel has not received a fuel delivery because of BEH.

There is no need for FlightLevel to enter or exit only from the East side of the fuel farm, and a wide turn (onto BEH's leasehold) in that area is not required. BEH has observed for many years FlightLevel unloading bulk fuel deliveries from the East side of the fuel farm – without any turn on to the West apron (now leased by BEH). On many occasions, FlightLevel or its transports have entered the fuel farm from the West, and have also backed into and out of the fueling area from the East and West.

As set forth in the Choubah affidavit: (1) FlightLevel's inbound Jet-A delivery transports do not need to execute a wide turn over BEH's leasehold on Lot H to be able to off-load Jet-A fuel to FlightLevel's fuel farm; (2) FlightLevel can off-load inbound Jet-A fuel from its delivery transports from multiple locations without traversing over BEH's leasehold on Lot H; and (3) that BEH's leasehold on Lot H abutting the easterly boundary of the Tank Farm Lease Lot does not need to be kept free of obstructions for FlightLevel's vehicles to access the fuel farm for Jet-A or Avgas deliveries. Accordingly, FlightLevel cannot show that it has or will suffer any harm and the preliminary injunction should be vacated immediately.

To the extent FlightLevel claims any difficulty maneuvering on its property, that is an issue of its own making. FlightLevel has installed gates and a fence around its fuel farm; yet, there is no need or legal requirement for the gates and/or a fence. BEH's own underground fuel storage facility has no fence or gate surrounding the area.

In any event, FlightLevel has not shown – which it must do – that it cannot provision the fueling system in another manner, or that it has property rights to support its request for relief. As such, FlightLevel's motion must be denied.

3. **The Requested Relief Would Impermissibly Prevent BEH From Exercising Its Property Rights On Other Areas Of The Airport.**

The relief requested by FlightLevel would impermissibly prevent BEH from using its own property on areas well outside of the area FlightLevel wrongly claims it needs to turn (on BEH's property) to access the fuel farm. BEH has lease rights to portions of Lots F, G, B, and H, including the entire Gate Lane and claimed Object Free Area. This includes aircraft and vehicle parking rights. For example, the proposed order would prohibit BEH from "parking of vehicles or aircraft . . . on FlightLevel's Lot G Sublease premises." FlightLevel does not "own" Lot G. BEH, however, operates out of two condo hangars on Lot G, Units 7 and 8, with access rights, as depicted in the diagrams attached to the Affidavit of Christopher Donovan. See Loeffler Aff., Exhibit 5. BEH also hangars two aircraft in those condo units on Lot G. As written, the proposed order does far more than allow FlightLevel to turn its fuel vehicles on BEH's property; the proposed order effectively deprives BEH the use of the use of its leased hangars and property, essentially putting BEH out of business. See Loeffler Aff., Exhibit 5.

BEH also has access rights on the "Lot B & H License" area through its lease agreement for the West Apron, and also through the attached Lot B&H License Agreement itself, which provides that the license "shall be for the benefit of occupants . . . of the Hangar located on Lot G and a portion of Lot H" Id. The Lot B & H License was not issued in connection with FlightLevel's fuel farm, or access thereto, and is entirely on the West Apron, leased to BEH. Again, it should be noted that "Lot H" contains over 100,000 square feet, and includes areas leased by BEH and FlightLevel, and also includes property owned and controlled by the Town. The AutoTURN plan submitted by FlightLevel includes areas of Lot H, now leased to BEH.

Additionally, the 25' Tank Farm Access Easement is by its terms "non-exclusive" and runs the East and West sides of the condo hangars on Lot G. BEH has lease rights to enter and exit the Condo hangars its leases from EAC Realty Trust. The proposed order, broadly

prohibiting the parking of vehicles or aircraft, interferes with and deprives BEH of its property rights and use of this area. Id., ¶14.

Similarly, the proposed order, prohibiting the parking of vehicles and aircraft in the Gate 3 Taxi Lane Object Free Area (“TOFA”), an area not controlled by FlightLevel, affects BEH’s property rights outside of the area complained of by FlightLevel in order to allegedly access its fuel farm. As it stands, the proposed order prevents BEH access to the Gate Lane 3, including access to and from its Lot F, the condo hangars on Lot G, and BEH’s leased space on the West and DC-3 Ramps. For example, BEH has rights to park in the parking spaces located on the North end of Lot G, which are located in the TOFA, but were grandfathered in according to the NAC. According to the proposed order, BEH would be prohibited from parking in these leased spaces.

In sum, the proposed order and relief sought by FlightLevel does far more than allow FlightLevel to make a “wide turn” onto BEH’s leasehold; the relief sought would effectively prohibits BEH from operating on many other areas it leases at the Airport. For this reason, the Motion should be denied.

CONCLUSION

For the forgoing reasons, the Court should deny FlightLevel’s Motion for Injunctive Relief, and grant BEH such other and further relief that the Court deems just and proper.

Respectfully submitted,

BOSTON EXECUTIVE HELICOPTERS, LLC,

By its attorneys,

/s/ Eric H. Loeffler

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Dated: August 2, 2021

CERTIFICATE OF SERVICE

I, Eric H. Loeffler, hereby certify that on this 2nd day of August 2021, I served a true and accurate copy of the foregoing document to counsel of record by email as follows:

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