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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT, IMPOSE SANCTIONS, AND AWARD ATTORNEYS' FEES

The plaintiff, Boston Executive Helicopters, LLC ("BEH") hereby requests that this Honorable Court order Defendants to perform obligations agreed to under a General Release & Settlement Agreement dated July 30, 2019 (the "Settlement Agreement"), and sanction the Defendants for fraud in the inducement, failure to act in accordance with the Settlement Agreement and for material omissions and misrepresentations made to BEH and the Court. The facts supporting this Motion are set forth in the accompanying Affidavit of Christopher R. Donovan ("Donovan Affidavit"), President of BEH. As grounds for this Motion, BEH states the following.

INTRODUCTION

This Motion is made necessary by the Defendants' multiple breaches of the Settlement Agreement, a copy of which is attached to the Donovan Affidavit as Exhibit 1. As discussed in greater detail below, the Defendants have breached the Settlement Agreement in the following manners:

a. By failing to provide BEH a lease for the promised amount of ramp space, free of encumbrances which would prevent BEH from operating as an FBO;

b. By purposefully and materially undermining BEH's petition to the FAA seeking approval for the removal of all TOFA/OFA markings on Taxiway 3;

c. By failing to distribute copies of all email and correspondence contemporaneously by and between the Town/NAC, FlightLevel or BEH, including between their respective attorneys or representatives;

d. By failing to provide copies of all correspondence and allow BEH to participate in any meetings with the FAA, allowing BEH a "seat at the Table" in a "Joint Corrective Plan" regarding the negotiations for the corrective action plan, from the Directors Determination for Case no. 16-15-05 wherein the Airport was found to have violated BEH's rights;

e. By the Board of Selectmen abandoning its obligation and otherwise failing to provide oversight of the NAC regarding issues involving BEH;

f. By failing to provide the appropriate turn around at the Gate #3 access area; and

g. By continuing the retaliation toward BEH because BEH exercised its constitutional right of petition.

To date, BEH still does not have a lease for ramp space at the Airport which can be used for FBO operations as promised in the Settlement Agreement. As outlined in the Donovan Affidavit, the Defendants and their counsel intentionally concealed encumbrances on the West and DC-3 Ramps, which were only made known to BEH after the Settlement Agreement was executed. Thus, the existence of and failure of the Defendants to identify all encumbrances renders the ramps promised to BEH (West and DC-3 Ramps) in the settlement agreement useless for any FBO operations by BEH or construction of a hangar, which the Defendants knew prior to the Settlement Agreement.

The Defendants have further sought to actively undermine BEH's petition to the FAA for the removal of TOFA/OFA markings on Taxiway 3 and, in fact, have *proposed and affirmatively advocated* to the FAA that the markings be expanded into BEH's hangar/leasehold on Lot F. The

Defendants have purposefully withheld communications required to be disclosed under the Settlement Agreement and the Board of Selectmen have failed to provide oversight of the NAC as promised, requiring intervention by the Court.

FACTS[1]

BEH is an FAA licensed Air Carrier at the Norwood Memorial Airport ("Airport") in Norwood, Massachusetts. Since 2010, BEH has been requesting to lease ramp space from the Airport which is necessary to operate as a Fixed Based Operator ("FBO") and sell fuel at the Airport.

As the Court is aware, the trial of this matter was scheduled to commence on December 10, 2018. Prior to the trial date, the Town/NAC were found in violation of federal law by the FAA regarding BEH, including retaliation toward BEH. BEH submitted a damages report of approximately $6.9 million dollars, excluding a viable claim for attorneys' fees. Evidence uncovered during discovery showed an extensive history of retaliation by the defendants and BEH had adduced more than sufficient evidence from which a reasonable jury could conclude that BEH engaged in constitutionally protected activities which were a substantial or motivating factor in the NAC's retaliatory conduct.

Those actions included among other things the defendants delaying and tabling discussion of BEH's interest in obtaining a lease and FBO permit in light of BEH's filings to the FAA, public records requests, and the like. The defendants' appalling conduct in this regard was often overt, including open criticism of BEH's petitioning activities by their counsel and officials, such as when Commissioner Sheehan wrote a letter to the local newspaper stating that BEH "might find itself in a better position" had BEH not "threaten[ed] the NAC with litigation and fil[ed] false

[1]This section is intended to serve as a summary of the fact upon which BEH relies, and BEH directs the Court's attention to the Donovan Affidavit for a full discussion of the facts supporting this Motion.

complaints to government agencies." In denying BEH an FBO Commercial permit, the Defendants wrongly informed the FAA that BEH was "litigious," that the NAC had a "right to protect itself from financial and/or litigation risk," that BEH "unfairly and unnecessarily involve(d) the FAA through the part 13 and 16 complaint process, and turning to the local media to present false claims."[2] Incredibly, at one point the NAC even demanded that in order to obtain an FBO permit, BEH would have to withdraw this federal action and any FAA complaint – a clearly Unconstitutional Condition.

In the week leading up to trial, the parties, by and through counsel, began serious settlement discussions. On Thursday, December 6, 2018, Mr. Donovan, along with BEH's counsel, Michael Fee, met with counsel for the Defendants, John Davis, for in person discussions regarding settlement. During the negotiations on December 6, 2018, the parties came to a written agreement concerning settlement of the litigation. The December 6, 2018 agreement [Doc. 188-2], which both boards (the NAC and the BOS) approved, provided for, among other things: (a) approval of BEH as an FBO at the Airport; (b) execution of leases to BEH for the entire West Ramp and DC-3 Ramps for terms of five years; (c) support by Defendants for BEH's pursuit of construction of a hangar on the West Ramp and approval by the FAA for a long-term thirty (30) year lease on the West Ramp; (d) construction by the NAC of a pedestrian access gate at Taxiway 3 within ninety (90) days; (e) implementation of communications protocol to resolve disagreements regarding operations issues for a period of two years following execution of the settlement agreement; (f) commitment by Defendants and BEH to work collaboratively on a Joint Corrective Action Plan to

[2]On August 5, and 6, 2019, FlightLevel owner Alan Radlo wrote two letters to the BOS, NAC, and Ryan containing antisemitic bias, saying the Town was "handing the keys" to a company run by "Israelis." The antisemitism exhibited by Radlo toward BEH and its owner was shared by the Airport Manager Russ Maguire, as outlined in our original complaint, when he openly stated to Chris Donovan, "That rich Jew thinks he can do whatever he wants at the airport." [Doc. 1, ¶146].

address the FAA Director's Determination in BEH's Part 16 Complaint; (g) submission of a joint petition from the NAC and BEH to the FAA to remove restrictive markings in the area of BEH's current leasehold; (h) promptly post all correspondence from Norwood Airport Operators and their counsel on its monthly meeting agendas and (i) settlement agreement terms acknowledging that BEH had satisfied the minimum standards for issuance of an FBO permit in 2014. What this agreement did not do is release the Town/NAC from any other conduct, including the collusion with FLN against BEH.

It is significant to note that, at the December 6, 2018 settlement meeting, BEH was offered the ABC Ramp for a lease for FBO operations. BEH declined the ABC Ramp based on the fact BEH would have the entire West Ramp and DC-3 Ramp without encumbrances available for FBO operations, and because BEH was told no hangar could be built on the ABC Ramp. Following the execution of the Settlement Agreement, the NAC proceeded to lease the entire ABC Ramp to FlightLevel.

Following the December 6th agreement, on December 11, 2018, Attorney Davis changed the agreement of December 6, 2018 [Doc. 188-2], with a new written agreement [Doc. 190-7], which included new terms not previously agreed upon authorizing the NAC to record an easement over the West Ramp for the benefit of the current exclusive FBO operator at the Airport, FlightLevel. The proposed agreement also included other terms not agreed-to and removed several key provisions., including releasing the Town/NAC from all collusion with FLN which was a concern of Donovan, Doc. 200, acknowledged by Mazzucco, Doc 191, and Cooper, Doc. 192.

In his affidavit of January 22, 2019 [Doc. 190], while discussing the December 6, 2018 meeting, Attorney John Davis stated "the West apron lease would have to be subject to an easement because the NAC could not settle this matter with BEH in a way that would invite a future lawsuit

from FlightLevel." Notwithstanding that comment, that is precisely what he and other representatives of the Town/NAC have done through fraud and deceit. Davis also claimed to be in communication prior to December 6, 2018 with FlightLevel Attorney Hartzell. [Doc. 204, ¶10].

Immediately following the execution of the July 30, 2019 Settlement Agreement, on August 14, 2018, FlightLevel's Attorneys Hartzell and Burlingham met with Attorneys Davis, North, defendant Ryan, Airport Manager Maguire and Town Manager Mazzucco. This meeting was prompted by the anti-Semitic comments from FLN owner Alan Radlo toward BEH. The Town gave FlightLevel a copy of the July 30, 2019 settlement agreement which had net even been fully executed by the Town. [Doc. 223]. On the same day, August 14, 2019, BEH filed a motion to enforce the settlement and for sanctions. Several defendants had refused to sign the agreement and more importantly, the NAC had already breached the agreement, refusing to approve BEH as an FBO.

Following the Settlement Agreement, on August 26, 2019, FlightLevel commenced an action 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 to "enforce a unanimous vote by the NAC to create a non-exclusive easement over Lot H (on the West ramp)," to enforce a license agreement ("the Lot B&H License") concerning the area known as the "Lot B&H Licensed Area" on the West Ramp, as well as a July 17, 1987 Tank Farm Sublease, a claimed right to install a fuel delivery system from Lot H (portions of the West ramp) to the DC-3 Ramp, and rights to install, maintain, a fuel terminal and dispensing system on the DC-3 Ramp.

FlightLevel's Complaint claimed rights to the West Ramp through a previously undisclosed and unrecorded transfer of the Lot B&H License to FlightLevel through a Landlord

Estoppel Agreement dated December 17, 2007, signed by defendants, Commissioners Ryan and Shaughnessy. The assignment of the Lot B&H License, and other claimed rights by FlightLevel, were never disclosed to BEH throughout the settlement discussions beginning in December 2018 through the execution of the Settlement Agreement on July 30, 2019. These claimed rights, which are acknowledged by the Town, essentially render the West and DC-3 Ramps useless for FBO operations, or any hangar construction, and have embroiled BEH in costly litigation with FlightLevel.

Not only was the assignment of the Lot B&H License not disclosed to BEH, Attorney Davis, Attorney North, and others knew as early as December 14, 2018, that FlightLevel was making these explicit claims to the West and DC-3 Ramps. FlightLevel has claimed that, upon learning in December 2018 about the reported settlement between BEH and the Town, FlightLevel 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 [i.e. the West Ramp] 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." Again, the assertion and existence of these claimed rights was not disclosed to BEH until after the July 30, 2019 Settlement Agreement was executed, when FlightLevel filed suit.

The most egregious example of the Defendants hiding the ball is their failure to disclose to BEH that the Lot B&H License had been assigned to FlightLevel in December 2007. Over the past several years, as detailed in the Donovan Affidavit, BEH made countless requests to the Town/NAC to understand the potential limitations on the use of the West and DC-3 Ramps. Mr.

Donovan's requests and concerns were outlined and confirmed by Attorney Davis [Doc. 190, 204], Town Manager Mazzucco [Doc. 191], and Assistant Town Manager Cooper [Doc 192].

Those requests have included specific questions concerning existing or planned encumbrances on the West Apron or DC-3 Ramp. At no time prior to the FlightLevel Complaint did the Town/NAC ever disclose the unrecorded assignment of the Lot B&H License in 2007. Additional, numerous documents prepared by the Town/NAC do not show the existence or assignment of the Lot B&H License Agreement. Even following the attempted insertion of a new easement on the West Apron after the December 6th settlement, BEH and its counsel made numerous inquiries and attempts to understand precisely what encumbrances and claimed rights existed on the West and DC-3 Ramps, including specifically the status of the Lot B&H License, which by its original terms provided that it "shall not be transferable." On December 17, 2018 [Doc. 190-15], Attorney Fee specifically asked for copies of the sewer easement over the West Ramp and "whatever other encumbrances exist on the West ramp." The Town/NAC and its attorneys knew about the December 14, 2018 communication and claimed rights by FlightLevel, including the assignment of the B&H License to FlightLevel in 2007, yet did not disclose this information to BEH.

In another example, on December 17, 2018 [Doc. 199-7], Attorney Simms wrote to Attorney Fee and provided a drawing for the proposed West Apron easement that was prepared by Commissioner Ryan – who serves as the Town Engineer and who has been on the NAC for over 20 years. The drawing did not show an existing B&H License Agreement on the West Ramp, yet Ryan knew he had transferred the Lot B&H License in 2007. This information was concealed from BEH. Davis never informed Attorney Fee or BEH of the numerous claims and encumbrances on the West and DC-3 Ramps he was aware of which would prevent FBO operations by BEH, or

any hangar construction. Notwithstanding specific requests by Attorney Fee, among countless others by BEH, the Defendants concealed the fact that the NAC (specifically, through Ryan and Shaughnessy) had consented to the Lot B&H License being transferred and assigned to FlightLevel in 2007.

The failure to disclose the assignment of the Lot B&H License is substantial. Not only has the failure to disclose embroiled BEH in new litigation with FlightLevel, the Lot B&H License substantially reduces the amount of usable space promised on the West Ramp and would render the West Ramp useless for FBO operations by BEH. Incredibly, the Town/NAC has refused to answer questions regarding the amount of usable space being offered BEH and has refused to answer questions regarding "existing, planned, proposed, and claimed encumbrances" on the West and DC-3 Ramps. See Exhibit 5. The DC-3 Ramp appears completely encumbered by FlightLevel's claims and the recent Technical Master Plan Update adopted by the NAC.

Beginning on January 22, 2019, the Town/NAC filed numerous motions and affidavits with the Court concerning the leased space offered BEH and BEH's concerns regarding encumbrances. At no point did they disclose the numerous existing and/or claimed encumbrances by FlightLevel. In hearings before this Court over the enforcement of the December 6th agreement, Attorney Davis and others heard Mr. Donovan testify in open Court that BEH would never accept a lease that had encumbrances that would impact FBO operations. Yet, he and others concealed the assignment of the Lot B&H License and other claimed encumbrances from the Court and BEH. There can be little doubt that Attorney Davis and others for the Town knew on July 30, 2019 when the Settlement Agreement was signed that FlightLevel had claimed numerous rights and encumbrances on the West and DC-3 Ramps, and those claims would impact BEH's rights under the Settlement Agreement.

Breach of the TOFA/OFA Provision

In addition to failing to provide BEH with a lease of the promised space, the NAC has breached the Settlement Agreement by purposefully and materially undermined BEH's petition to the FAA seeking approval for the removal of all TOFA/OFA markings on Taxiway 3. Compounding matters, the NAC actually voted recently to increase the TOFA/OFA restrictions into BEH's current leasehold effectively ending the use of BEH's fuel system.

Since the construction of BEH's hangar, the NAC and others have used the taxilane object free area ("TOFA/OFA") markings at Gate 3, which is adjacent to BEH's lot and hangar, to retaliate and discriminate against BEH, all with the assistance of FlightLevel. Under the Settlement Agreement, the parties agreed that BEH was to prepare a petition to the FAA seeking approval for the removal of all TOFA and/or OFA markings on Taxiway 3. The NAC was, in turn, obligated to "submit a letter to the FAA in support of BEH's petition for TOFA and/or OFA relief within thirty (30) days after the receipt of BEH's submission to the FAA." The Settlement Agreement further provides that, if approved by the FAA, "the TOFA/OFA markings on Taxiway 3 shall be removed by the NAC within sixty (60) days."

On August 27, 2019, BEH submitted a petition to the FAA, with a copy to Commissioner Ryan, Attorney North, the Town Manager, Tony Mazzucco, and BOS Chairman Bishop, requesting removal of the TOFA/OFA markings. Despite numerous requests as outlined in the Donovan Affidavit, the NAC did not send a letter of support until November 2019.

Notwithstanding NAC's express obligation to support the removal of the TOFA/OFA markings, on June 17, 2020, the NAC approved a new Technical Master Plan Update (TMPU). The TMPU had four options regarding the TOFA/OFA in front of the BEH hangar, covered under the Settlement Agreement. One option would have mirrored the promises under the Settlement

Agreement. Incredibly, contrary to the agreement, the NAC chose the most destructive option which does not show removal of the TOFA/OFA markings, but rather shows the TOFA/OFA area being increased and moved South in front of BEH's hanger. 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 increase of the Gate 3 TOFA/OFA violates the letter and spirit of the Settlement Agreement. It should also come as no surprise that moving the TOFA/OFA south will benefit FlightLevel, as it will take its buildings on the North side of the Gate 3 lane outside of the TOFA/OFA, whereas BEH's entire fuel system and front hanger will now be inside the new TOFA/OFA.

It is also significant to note that moving the TOFA/OFA South on Gate Lane 3, the NAC will also significantly reduce the size of the West Ramp that had been promised to BEH under the Settlement Agreement. Further, as if that conduct was not egregious enough, the NAC's Technical Master Plan Update (TMPU) also plans to utilize the DC-3 Ramp, the same ramp BEH is supposed to lease for FBO operations under the Settlement Agreement, as a new aircraft wash facility for the Airport. Prior TMPU drafts also showed a "Fuel service vehicle access way" running through the West ramp.

So, in addition to the claimed rights and encumbrances by FlightLevel on the DC-3 Ramp, the NAC has approved the TMPU to use the DC-3 Ramp as the airport aircraft wash area, and possibly another encumbrance running through the West apron, significantly reducing the promised amount of ramp space to BEH.

Breach of the Communications Clause

The Settlement Agreement contains a handwritten clause requiring that "[f]or a period of eighteen (18) months following the execution of this Agreement, and subject to any applicable exemptions under the Massachusetts Public Records Law, the Town and the NAC agree to copy, or distribute copies, to both BEH and Flight Level Norwood, LLC, including any of their attorneys or representatives, any and all email and correspondence, by and between the NAC and BEH or [FlightLevel], contemporaneously, with any such communications."

This clause requiring disclosure of communications is an important clause for BEH, as BEH learned through discovery that the NAC and their attorney(s) worked for years with FlightLevel to undermine BEH's efforts to become an FBO and retaliate against BEH. Mr. Donovan previously outlined this collusion in his previously filed affidavit of March 1, 2019 [Doc. 200]. These concerns were further acknowledged by Davis [Doc. 204], Mazzucco [Doc. 191], and Cooper [Doc. 192]. The Town has also previously withheld certain public records claiming that records held by their attorney are exempt from the public records law, though that position was rebuked by the Massachusetts Secretary of State. Thus, it was important to BEH to ensure that the Settlement Agreement memorialized the NAC/Town's responsibility to maintain transparency by requiring that copies of correspondence by and between it and BEH and FlightLevel, including correspondence initiated or received by their respective attorneys.

Notwithstanding the clear requirement, the Town/NAC has continually failed to comply with the communication provision. The NAC/Town have continued to conceal communications, including relevant and critical communications which directly impacted and harmed BEH. For example, correspondence between FlightLevel and the NAC/Town from August 2019 was not

produced to BEH until July 10, 2020. Numerous other letters and communications have apparently not been provided to BEH despite many requests.

Breach of the Corrective Action Plan Provision

In November 2018, the FAA issued a determination on BEH's Part 16 complaint that the Town/NAC had violated federal grant assurances by "unreasonably denying" BEH's ability to establish an FBO at the airport and "improperly granting" exclusive rights to the existing FBO, FlightLevel. In that determination, the FAA cited several examples of retaliation by the NAC toward BEH.

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 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, although Simms presented to this Court over a year ago that a meeting was planned with the FAA and BEH would be notified. [Doc. 226]. The Town/NAC has also failed to copy BEH on all correspondence with the FAA concerning the Corrective Action Plan in violation of the Settlement Agreement.

ARGUMENT

I. THE COURT HAS JURISDICTION AND THE INHERENT POWER TO ENFORCE THE SETTLEMENT AGREEMENT

Courts have long recognized the prudential policy favoring settlement as a preferred alternative to costly, time-consuming litigation. See Mathewson v. Allied Marine Industries, Inc., 827 F.2d 850, 852 (1st Cir. 1987). As such, a negotiated settlement is a most solemn undertaking in the eyes of the courts. Id. On this basis, courts retain an inherent power to supervise and enforce settlement agreements entered into by parties. Id. Whereas garden-variety contract negotiations implicate the interest of the contracting parties, settlement negotiations which take place in the context of ongoing litigation implicate the courts as well. Id. There is an institutional interest in the solemnity of such agreements, in bringing certainty to the process, and in minimizing the opportunities for lawyers and litigants alike to act as Monday morning quarterbacks. Id.

The policy of favoring settlement agreements as a means of avoiding costly and time consuming litigation would hardly be furthered by leaving a party without recourse when the other party fails to perform according to the terms of the agreement. See Dankese v. Defense Logistics Agency, 693 F.2d 13, 16 (1st Cir. 1982), citing Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975). It is well established, therefore, that a trial court retains an inherent power to supervise and enforce settlement agreements entered into by parties to an action pending before the court. Dankese, 693 F.2d at 16.

Pertinent here, the Court also specifically retained "jurisdiction over the case to resolve any disputes that may arise from the implementation of the settlement agreement's terms." [Doc. No. 228]; see also Baella-Silva v. Hulsey, 454 F.3d 5, 10–11 (1st Cir. 2006) ("ancillary jurisdiction exists where the district court has ensured its continuing jurisdiction to enforce a settlement

agreement either by 'including a provision explicitly retaining [enforcement] jurisdiction . . .'"), quoting Lipman v. Dye, 294 F.3d 17, 20 (1st Cir. 2002).

II. THE DEFENDANTS ARE IN BREACH OF THE SETTLEMENT AGREEMENT.

The Defendants have failed to perform under the terms of the Settlement Agreement in several material respects, as fully set forth in the above statement of facts and the Donovan Affidavit. Principally, the NAC/Town have failed to provide a lease to BEH for the amount of space promised under the Settlement Agreement, free of encumbrances that will allow BEH to conduct FBO operations and build a hangar. The Defendants have intentionally and materially undermined BEH's petition to the FAA requesting removal of TOFA/OFA marking outside of BEH's hangar on Lot F, and plan to increase the TOFA/OFA area to the detriment of BEH and in violation of the Settlement Agreement.

The Defendants have also unquestionably failed to distribute copies of all email and correspondence by and between the Town/NAC, FlightLevel or BEH, including between their respective attorneys or representatives, and have not permitted BEH to participate in meetings with the FAA concerning the Corrective Action Plan, all in violation of the Settlement Agreement. The Board of Selectmen have also abandoned their oversight responsibilities under the Settlement Agreement by assigning that role to counsel, who represents both the NAC and the Town.

III. THE SETTLEMENT AGREEMENT SHOULD BE ENFORCED ACCORDING TO ITS TERMS.

Settlement agreements are commonly enforced by specific performance. See Correia v. Desimone, 34 Mass. App. Ct. 601 (1993) (affirming award of specific performance where party attempted to renege on settlement agreement reached the day before). Specific performance is typically an appropriate remedy when a party to a settlement agreement attempts to renege. Malave v. Carney Hospital, 170 F.3d 217 (1st Cir. 1999). Summary enforcement of an arm's

length settlement is considered a useful device to hold parties to their word. Malave, 170 F.3d at 222. Moreover, specific performance is a proper and usual remedy in disputes involving the conveyance of land. McCarthy, 429 Mass. at 89, 706 N.E.2d 629; Raynor v. Russell, 353 Mass. 366, 367, 231 N.E.2d 563 (1967), and cases cited. Specific performance is favored because "[i]t is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." Greenfield Country Estates Tenants Ass'n, Inc., 423 Mass. at 88, 666 N.E.2d 988.

The existence of the Settlement Agreement cannot be denied in good faith. The essential terms of that agreement were memorialized in writing and are unambiguous. BEH has stood (and stands) ready to perform its portion of the bargain and has repeatedly taken steps encourage the Defendants to perform their obligations to no avail. There is simply no excuse for the Defendants to refuse to abide by the terms of its bargain with BEH.

The Court should compel the Defendants to provide BEH the amount of space promised under the Settlement Agreement, free of encumbrances. The Defendants should also be compelled to withdraw the TMPU and confirm to the FAA that it supports removal of the TOFA/OFA marking outside of BEH's hangar, and enjoin the NAC from its plan to increase the TOFA/OFA area to the detriment of BEH and in violation of the Settlement Agreement.

The Defendants should also be compelled to distribute copies of all past and future email and correspondence by and between the Town/NAC, FlightLevel or BEH, including between their respective attorneys or representatives in accordance with the Agreement. Finally, the Board of Selectmen should be compelled to provide the oversight responsibilities they promised under the Settlement Agreement. The Defendants should also notify the FAA that they have not complied with their promises under the Settlement Agreement, and withdraw their Corrective Action Plan,

and any FAA approval of such, until BEH is provided all communication regarding the CAP and allowed to participate in new meetings with the NAC and BEH present to address the systemic violations by the NAC.

IV. THE COURT SHOULD IMPOSE SANCTIONS FOR THE DEFENDANTS' CONDUCT.

The Court's general equitable power as well as the provisions of Rule 11(b)(1), grant it the discretion and authority to sanction the Defendants, and/or their counsel for this misbehavior. Topalian v. Ehrman, 3 F.3d 931, 934 (5th Cir. 1993); Young v. Gordon, 330 F.3d 76, 80 (1st Cir. 1958); Jones v. Winnipesaukee Realty, 990 F.2d 1, 4 (1st Cir. 1993). This Court has the authority to award attorneys' fees and costs to the party seeking to enforce a settlement when the opposing party has acted in bad faith, vexatiously, or wantonly. See F.D. Rich. Co. v. Industrial Lumber Co., Inc., 417 U.S. 116, 129 (1974).

The Defendants and their counsel, without any colorable basis and clearly acting in bad faith, have unreasonably and vexatiously compounded and delayed BEH becoming and operating as an FBO at the Airport in order to avoid an imminent trial date, only later to repudiate their obligations under the agreement, thereby putting BEH and this Court to the burden, time and expense of yet another motion to enforce the Settlement Agreement.

The fact that the Defendants and their counsel failed to disclose the existing and claimed encumbrances on the West and DC-3 Ramps, beginning in at least in December 2018, while knowing that any encumbrance that would reduce space or impact FBO operations would be completely unacceptable to BEH, is inexcusable and clear evidence of bad faith. Notwithstanding the countless requests from BEH to identify any such encumbrances on the ramps, the Defendants and their counsel purposefully omitted the existence of the limitations to induce BEH into a settlement and to avoid a trial. The Court should not countenance such "bait and switch" tactics.

As with the attempt to insert a new easement in favor of FlightLevel after the December 2018 settlement, the Defendants and their counsel have intentionally sought to draw out these proceedings in perpetuity to prevent BEH from operating as an FBO at the Airport. See 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"); Schwartz v. Hospital of Univ. of Pa., 1989 WL 64286 (E.D. Pa. 1989) (holding that a party and his counsel "acted in bad faith, and are jointly and severally liable, in failing to honor the settlement agreements entered into with the defendants and in opposing the motions of defendants to enforce the settlement agreements").

Moreover, the Defendants should be ordered to pay BEH's counsel fees in connection with this matter, as well as BEH's counsel fees in having to defend the lawsuit filed by FlightLevel. In additional to the aforementioned powers to sanction, Massachusetts also recognizes that attorney's fees may constitute compensable damages under the "third-party attorney fee exception." See, e.g., M.F. Roach Company v. Town of Provincetown, 355 Mass. 731, 732 (1969). The "third-party attorney fee exception" recognizes that attorneys' fees may constitute an element of compensatory damages when, as a result of a breach or tort, a litigant is forced to defend against a third party in order to protect his or her rights. Id. The rationale behind this rule is sound: where the tort or breach of another caused the litigant to take specific action, the litigant should be compensated for his or her reasonably necessary loss of time, attorney's fees, and other expenditures suffered or incurred to protect his or her rights. The First Circuit had adopted this rule, stating that "when the natural consequence of a defendant's tortious conduct or a defendant's breach of contract is to cause the plaintiff to become involved in litigation with a third party, the

attorney's fees associated with that litigation are recoverable from the defendant. Mut. Fire, Marine & Inland Ins. Co. v. Costa, 789 F.2d 83, 88 (1st Cir. 1986) (applying Massachusetts law) (citations omitted). The Town/NAC's conduct has caused BEH to be sued by FlightLevel, and BEH is entitled to recover those fees, as well as the fees incurred since the Settlement Agreement, against the Town/NAC.

Due to the Defendants' and their counsel's actions, BEH has been denied the resolution for which it bargained, and now finds itself again having to expend a significant amount of money litigating the enforceability of the settlement just to obtain that for which it originally bargained. The Defendants have continually and consistently acted in bad faith prior to settlement and certainly post settlement. They have offered no solution to the damage they have caused. This bad faith conduct has also embroiled BEH in litigation with FlightLevel, at great expense and time, with the resulting lost revenue.

The Defendants, with the ongoing assistance of counsel, at the time of this motion, have still, despite numerous demands, not complied with the aforementioned provisions of the Settlement Agreement, have not acted in good faith in delivering to BEH a lease for the amount of ramp space promised in the Settlement Agreement, and have caused BEH to continue to incur attorney fees in trying to motivate the Town/NAC to comply with the basic provisions of the Settlement Agreement.

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: October 9, 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 October 9, 2020.

/s/ Eric H. Loeffler
Eric H. Loeffler