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 MOTION TO RECIND SETTLEMENT AGREEMENT OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION

The plaintiff, Boston Executive Helicopters, LLC ("BEH"), hereby moves this Honorable Court to rescind and set aside the Settlement Agreement or, in the alternative, reconsider its Memorandum and Order of November 20, 2020 ("the Order") denying BEH's Motion to Enforce Settlement Agreement. As grounds therefore, BEH states that on July 7, 2021 and July 16, 2021, FlightLevel Norwood, LLC ("FLN"), in a separate action as discussed below, produced discovery "the July 2021 Discovery" which included numerous communications between FLN and the NAC attorneys that should have been produced under the July 30, 2019 Settlement Agreement. See Affidavit of Christopher Donovan, submitted herewith, ¶4, and Exhibit 1, Bates Nos. 1-94. This discovery included communications exposing the fraud by the Town of Norwood, NAC and Town attorneys. Letters from August 2, 2019 [Bates No. 57] and August 20, 2020 [Bates No. 92] were included in the July 2021 Discovery as were other letters outlined in the Donovan Affidavit. Among this correspondence were letters and communication outside the settlement period that were subject direct inquires by BEH or its counsel, as well as to numerous public records requests by BEH and its counsel; however, the NAC and their attorneys chose to conceal these records

despite request and in violation of state law. The August 2, 2019 letter [Bates No. 57] from FLN Attorney Hartzell to NAC Attorney Karis North included multiple other letters and engineering plans. The significance of these letters cannot be overstated; attorneys violated their responsibilities under Rule 3:07 to the detriment of BEH both pre and post settlement. The failure to disclose resulted in hundreds of thousands of dollars in legal cost and lost income to BEH and several lawsuits which continue to this day. Included in the August 2, 2019 letter from NAC attorney Hartzell to North are communications from December 5, 2017, December 23, 2018, and February 7, 2019 exposing the fraud by Town attorneys and others both pre and post settlement. Had these letters and material facts in these letters been known to BEH, BEH would never have signed the Settlement Agreement of July 30, 2019. The NAC and their attorneys knew this as we had spent months of motion practice when, after the December 7, 2018 agreement they had inserted an easement for FLN. Knowing the August 2, 2019 letter and accompanying letters would expose fraud, the attorneys knowingly concealed these letters and facts from BEH and the Court. The Town has not and never intended to meet its obligations under the Settlement Agreement, and as averred by Mr. Donovan in his affidavit, fraudulently induced BEH to entered into the Settlement Agreement. Thus, the Settlement Agreement should be rescinded and set aside.

In the alternative, the Court should reconsider the Order, and grant BEH appropriate relief. This Court's Order denied BEH's motion to enforce the settlement agreement with respect BEH's claim that Norwood failed to provide the promised amount of ramp space free of encumbrances, principally on the ground that the Settlement Agreement only entitled BEH to a "standard form, non-exclusive" lease agreements, and relying upon a dictionary definition of "non-exclusive." BEH respectfully moves for reconsideration of this ruling, as Norwood have since used the Court's Order to maintain that the Leases themselves, executed after the Order was issued, are "non-

exclusive," granting and supporting FlightLevel – BEH's chief competitor – ordering BEH to move its vehicles and FBO operations at FlightLevel's beck and call. Moreover, BEH suggests that the Order misapprehended and did not consider the legal, regulatory, and contextual meaning of the phrase "non-exclusive." In addition, recent events demonstrate that Norwood and its counsel lied and misled the Court in representing that all correspondence required to be shared under the communications clause of the settlement agreement had been produced to BEH, and they should be sanctioned and compelled to comply with that provision of the settlement agreement. For these and the other reasons set forth herein, BEH respectfully requests that the Court reconsider the Order.

BACKGROUND

The specific facts upon which BEH relies are set forth in the Affidavit of Christopher Donovan, submitted herewith.

On or about November 20, 2020, the Court in this action issued the Order denying BEH's motion to enforce the settlement agreement between BEH and the defendants, Town of Norwood ("Town"), Norwood Airport Commission ("NAC") and the individually named Town and NAC officials (collectively, "Norwood"). Following the Court's Order, on or about December 21, 2020, the NAC and BEH entered into separate Standard Form Ground Leases for portions of the Airport known as the West Apron the DC-3 Apron ("the Leases"). See Affidavit of Christopher Donovan ("Donovan Aff."), ¶18 [Bates Nos. 100, 114], submitted herewith. Pursuant to the terms of the 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. Id. at ¶2.

The Leases do not contain the term "non-exclusive" and show no permitted uses by anyone other than BEH. The Leases executed between Norwood and BEH contain no language or any indication that they are "non-exclusive," in the sense that they grant FlightLevel or any other third party property rights to BEH's leaseholds; rather, the Leases, for the reasons discussed below and under FAA guidance, contain standard "exclusive rights" language that ensures that any commercial activities carried on pursuant to the leases shall be subject to competition from others and the lessee (BEH) shall not have exclusive access or monopolistic rights on or to the airport.

Also, since the Court's Order, documents produced by a third-party clearly evidence that Norwood and its counsel lied and misled the Court in representing that all correspondence required to be shared under the communications clause of the settlement agreement had been produced to BEH.

ARGUMENT

A. The Legal Standard.

Under Fed. R. Civ. P. Rule 60, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . and (6) any other reason that justifies relief."

The evaluation of a motion for reconsideration is committed to the district court's sound discretion, and Rule 60(b)(6) provides for relief from a judgment or order for "any other reason that justifies relief" not specifically set forth in Rule 60(b)(1)-(5). Fed. R. Civ. P. 60(b)(6); Cavallaro v. UMass Mem. Health Care, Inc., No. 09-40181, 2010 U.S. Dist. LEXIS 144471, at *7-

8 (D. Mass. Dec. 20, 2010). While motions under this rule are ordinarily granted only when exceptional circumstances are present, a district court has "substantial discretion and broad authority to grant or deny" a motion for reconsideration filed pursuant to Fed. R. Civ. P. 59(e) or 60(b). Provanzano v. Parker View Farm, Inc., 827 F. Supp. 2d 53, 62 (D. Mass. 2011) (citing Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 81 (1st Cir. 2008)). Specifically, the contours of Rule 60(b)(6) are "particularly malleable," and the Court's "decision to grant or deny such relief is inherently equitable in nature." Ungar v. PLO, 599 F.3d 79, 83 (1st Cir. 2010). A court may grant a motion for reconsideration "where the movant shows a manifest error of law," if the court has "patently misunderstood a party . . . or if the court made an error not of reasoning but apprehension." Ruiz Rivera, 521 F.3d at 81-82. Moreover, a motion for reconsideration will also be granted where the Court has overlooked matters or controlling decisions that might have materially influenced the earlier decision. In re Optimal U.S. Litig., 813 F. Supp. 2d 383, 387 (S.D.N.Y. 2011); Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995) (affirming grant of motion for reconsideration based on overlooked and relevant case law and legislative history).

B. The Settlement Agreement Should Be Rescinded And Set Aside.

The Settlement Agreement may be rescinded where BEH can demonstrate by a preponderance of the evidence that the Agreement was induced by fraud. "A court cannot enforce a settlement contract which is tainted . . . by fraud practiced upon a party to the contract." Delphi Corp. v. Litex, Inc., 394 F. Supp. 2d 331, 339 (D. Mass. 2005). The First Circuit applies Massachusetts contract principles to the evaluation of fraudulent inducement claims. See Delphi Corp., 394 F. Supp. 2d at 339 (referring to Nash v. Trustees of Boston Univ., 946 F.2d 960, 967 (1st Cir. 1991). "Under Massachusetts law, to establish a claim for fraud in the inducement a plaintiff must prove: (1) the defendant made knowingly false statements; (2) those statements were made with the intent to deceive; (3) those statements were material to the plaintiff's decision to

execute the agreement; (4) the plaintiff reasonably relied on those statements; and (5) the plaintiff was injured as a result of her reliance." Delphi Corp., 394 F. Supp. 2d at 339 (referring to Zyla v. Wadsworth, 360 F.3d 243, 254 (1st Cir. 2004), citing Kendra Corp. v. Pot O'Gold Money Leauges, Inc., 329 F.3d 216, 225 (1st Cir. 2003) (applying Massachusetts law)). Courts will also consider claims of fraud in the inducement where vital information was fraudulently withheld. See e.g., Mendelson v. Leather Mfg. Corp., 326 Mass 226, 235-36 (1050); US Trust v. Henley & Warren Management, Inc., 40 Mass. App. Ct. 337 (1996). Here, as set forth through the Affidavit of Christopher Donovan, and the attached exhibits, BEH has proven that the Town Defendants and their counsel made false or misleading statements concerning the encumbrances on the promised space and also withheld vital correspondences requested directly and through public records requests.

On July 30, 2019 in this Court, Attorneys Simms and Davis told the Court and BEH, "the Board of Selectmen met in Executive Session yesterday and have basically approved all of those three items in favor of Boston Executive Helicopters. So, I have revised the settlement agreement and release so that there no longer is an easement on the West Ramp. This is one item Mr. Fee identified." [ECF No. 224, p. 3]. The July 2021 Discovery exposes the lies and fraud of this statement. At no point, including at this hearing, did the NAC or its counsel inform BEH about FlightLevel's claims about encumbrances, or concerns complaints about the settlement. Davis and Simms (North was present in this Court) knew although the BOS had voted to remove any easement on the West ramp, the NAC had voted an easement on the West Ramp for FLN on February 17, 2017. FLN had been in constant contact with North, Davis and Simms regarding encumbrances and claimed rights on the ramps under the settlement agreement. Davis, Simms and

North chose to knowingly lie to BEH and this Court, to induce BEH to sign the Agreement, which has resulted in BEH becoming embroiled in litigation with FLN.

Based on the discovery on July 16, 2021 by FLN, Town attorneys Simms, Davis and North knew they were concealing material facts from the December 5, 2017 email, December 14, 2018 contact with FLN, December 23, 2018 email from FLN and the February 7, 2019 letter from FLN. These emails and letters contained facts which would prevent any FBO use of the West and DC-3 ramps to BEH for FBO operations and expose the deceit by Town, its attorneys and others.

C. As To Reconsideration, The Integration Clause Did Not Bar BEH's Motion Given The Overwhelming Evidence Of Fraud In The Inducement

As a preliminary matter, BEH respectfully suggests that it was error for the Court to determine that BEH could not "simultaneously allege fraud in the inducement to overcome the integration clause . . . while representing hat the Agreement is valid." See Order, fn. 3. This is contrary to Massachusetts law, which holds that the victim of a fraudulent contract (i.e., the Settlement Agreement) may rescind the transaction or affirm it and sue for damages. Geoffrion v. Lucier, 336 Mass. 532, 537 (1957); Forman v. Hamilburg, 300 Mass. 138, 142 (1938); Goodwin v. Dick, 220 Mass 556, 557 (1915); Ginn v. Almy, 212 Mass. 486, 493 (1912). Thus, there was no legal requirement for BEH to disavow the validity of the Settlement Agreement in order to allege such fraud in the procurement of the agreement.

As outlined extensively in the Donovan Affidavit, BEH's position in seeking enforcement was buttressed by the recent disclosure of material communications and information that was withheld from BEH, despite the Town and its counsel's representations to the Court that all documents had been produced to BEH under the Settlement Agreement. It is BEH's firm belief that the Town and their attorneys purposefully made these omissions and misstatements to induce

BEH to sign the Settlement Agreement, and that at no point did they have any intention of living up to the terms of the agreement.

D. The Court Should Have Considered The Legal, Regulatory, And Contextual Meaning Of "Non-Exclusive" To Interpret The Settlement Agreement.

As to the substance of the Court's Order, BEH respectfully suggests that the Court erred in declining to afford the word "non-exclusive" in the Settlement Agreement its technical or contextual meaning, but instead utilized a dictionary definition in holding that the "term 'non-exclusive' means 'not limited to only one person or organization, or to one group of people or organizations,'" and finding that this "language does not support BEH's demand for a lease 'free of encumbrances.'"

A settlement agreement is interpreted in the same manner as any other contract. See, e.g., Perry v. F.D.I.C., 2010 WL 5349883 at *6 (D. Mass. Dec. 21, 2010). When interpreting a written contract, courts "look at text, context, and purpose to discover whether a proffered reading of the contract is reasonable." Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 436 (1st Cir. 2013). "For contract language mandated by a federal regulation, this context includes the regulation and the federal policy underlying the regulatory scheme." Id.; Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 237 (1st Cir. 2013) (courts "may look to extrinsic evidence in order to resolve any ambiguities" in the contract and relevant statutes and regulations "may be helpful in this endeavor"). Here, the term's meaning cannot be derived from a sole dictionary definition; rather, "non-exclusive" must instead be understood in light of its regulatory, legal, as well as the other contexts in which "exclusive" or "non-exclusive" is a legal term of art in the context of airports operating under federal and state grant assurances. Persuasive canons of contract interpretation counsel the Court to take that approach.

Reliance on an isolated dictionary definition to the exclusion of context warrants reconsideration of the Order. Courts do not adhere to "ordinary meaning" when the phrase in question has a specific meaning in a particular statute and/or is a term of art. For example, the Supreme Court has stated that "where Congress has used technical words or terms of art, 'it is proper to explain them by reference to the art or science to which they (are) appropriate."' Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974) (citation omitted). There, the Court applied the phrase "working conditions" as a term of art, stating: "While a layman might assume that time of day worked reflects one aspect of a job's 'working conditions', the term has a different and much more specific meaning in the language of industrial relations." Id. at 202.

The rule of contract interpretation requiring the application of the technical meaning or terms of art is not limited to legal terms of art, but also extends to non-legal terms of art as they may be used in particular industries. See, e.g., Lodge Corp. v. Assurance Co. of America, 56 Mass. App. Ct. 195, 197, 775 N.E.2d 1250, 1252 (2002) (construing the non-legal term "building materials" and stating: "In construing the terms of a policy, we consider the common and technical understanding of the words as well as the conduct of the parties in light of all the circumstances"); Restatement (Second) of Contracts, §202(3) (1981) (cited with approval by Lodge Corp., 56 Mass. App. Ct. at 197, 775 N.E.2d at 1252) ("Unless a different intention is manifested, (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning; (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field").

In the present context, and as utilized in the Settlement Agreement, the phrase "non-exclusive" is borne out of the requirements of "federal law and FAA's grant assurances, which bind the airport," as acknowledged by the Town Defendants. The Federal Aviation Act of 1958,

as amended, 49 U.S.C. § 40101, *et seq*., assigns the FAA broad responsibilities for regulating air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In these programs, the airport sponsor assumes certain obligations through grant assurances, and 49 U.S.C. § 47122 mandates the FAA to ensure airport owners comply with their grant assurances. Indeed, this Court has previously noted this context in a prior case involving a municipal airport: "the Airport on occasion submits applications to the FAA for grants to fund airport development, planning, and aviation-related projects. As a condition of funding, the FAA requires the Airport to comply with certain assurances. Among the pertinent grant guarantees are those relating to the exercise of exclusive rights, use of airport revenues, and economic nondiscrimination." Rectrix Aerodome Centers, Inc. v. Barnstable Mun. Airport Comm'n, 632 F. Supp. 2d 120, 124 (D. Mass. 2009) (Stearns, J.) (emphasis added).

As explanation for inclusion of the phase in the Settlement Agreement, the Defendants state that "Norwood raised multiple times in negotiations that the West Apron lease would need to be executed subject to an easement [that was never agreed to by BEH] over the corner of that lot for FlightLevel to access fueling facilities. . . . Consequently, the word "non-exclusive" was included in the Settlement Agreement to reflect FlightLevel's interests to access other parts of the Airport." This is not true.

As demonstrated in the Donovan Affidavit, Norwood has never defined the term "non-exclusive" using a dictionary definition, and its current interpretation is wholly contrary to its extensive communications and past dealings with the FAA on this issue, and FAA guidance on this issue. The Town has a lengthy history of FAA "exclusive rights" violations toward

prospective new FBO operations. These exclusive rights violations show the NAC, through Corrective Action Plans filed with the FAA, are well versed in leases containing "non-exclusive" language, to correct "exclusive rights" violations cited by the FAA. The non-exclusive term in airport operations is well known and defined by the FAA, and the NAC. This term has nothing to do with encumbrances on AIP leased ramps, or the definition first used by the NAC in its November 6, 2020 Opposition to BEH's motion to enforce.

It is important to note that the use of "non-exclusive" – a phrase which does not even appear in the Leases – was the result of a prior grant assurance violation against the Airport in 2008, see Boston Air Charter v. Norwood Airport Commission, Final Decision and Order, No. 16-07-03, 2008 WL 4186034 (Aug. 14, 2008) ("FAA policy regarding the airport owner or sponsor's responsibility for ensuring the availability of services on reasonable terms and without unjust discrimination provides that third-party leases contain language incorporating the [grant assurance] principles"), and again in 2018 against BEH, see also Bos. Exec. Helicopters, Complainant, No. 16-15-05, 2018 WL 9708595, at *1 (November 2, 2018). In that 2008 Determination, the FAA found that the NAC had violated several grant assurances, including violating "grant assurance 23, Exclusive Rights, by entering into lease agreements that gave control of the only power source to one tenant." Id, at *1.

Even with respect to the Town's Part 16 violations against BEH, on November 18, 2019 North sent the FAA a letter regarding the Corrective Action Plan. [Bates No. 255]. The FAA required the NAC to "Discontinue leasing practice that provides Exclusive Rights to a single FBO." Id. North responded to the FAA that to correct the leasing practices that provide exclusive rights to a single FBO, the leases will be "non-exclusive." [Bates No. 256].

The NAC proposed in its Corrective Action Plan [Bates Nos. 167-170] to address this 2008 violation by voting to "formalize into future practice a shorter term leasing policy that will seek to prevent granting of one party control over the majority of the ramps." The NAC went on to say that the "short-term leasing policy also includes the NAC's intention to implement subordination agreement and non-exclusivity clauses in all future leases." (emphasis added). Finally, the NAC admitted that the "non-exclusivity clause provides explicitly that any commercial activities carried on pursuant to the lease shall be subject to competition from others and the lessee shall not have exclusive access or monopolistic rights on or to the airport." In other words, indicating in the Settlement Agreement that the leases would be "standard form, non-exclusive" lease agreements meant that the leases would include a lease provision with the non-exclusive rights for each AIP funded ramp that would thereafter be leased, and not any suggestion that the NAC could lease ramp space without disclosing existing encumbrances or claimed rights that would prohibit or severely limit expected FBO operations.

This was further confirmed in a March 2015 response from the NAC to the FAA wherein, on January 15, 2015, the FAA specifically requested that the NAC identify the "lease provision with the non-exclusive rights for each AIP funded ramp that is leased." Donovan Aff., ¶68. In response, the NAC provided as an attachment the NAC's "standard provision with regard to non-exclusive rights," and stated that "this language is included in all NAC leases following the [2008] Part 16 compliance action plan submitted to the FAA." Id. The relevant portions of that provision are substantially similar to the provisions in the Leases concerning the Federal grant obligations. Id.

As far back as June 2009, Town Counsel notified the Airport Manager, in accordance with the lease of ramp space "any potential tenant would be told, "This is the lease form which we use,

the areas of negotiation so far as NAC is concerned are term and price." [See Bates No. 260]. This "Standard Lease Form" includes the subordination language mandated by FAA, regarding Exclusive Rights, and non-exclusive use under the Grant Assurances. In no way does this refer to encumbrances as the NAC now tries to claim.

Indicating in the Settlement Agreement that the leases would be "standard form, non-exclusive" lease agreements meant that the leases would include a lease provision prohibiting exclusive (i.e. monopolistic) rights on the Airport *as a whole* for each AIP funded ramp that would thereafter be leased, and not any suggestion that the NAC could lease ramp space without disclosing existing encumbrances or claimed property rights that would prohibit or severely limit expected FBO operations, or allow unfettered third-party access to the leaseholds without BEH.

This was further confirmed in a March 2015 response [Bates No. 178] from the NAC to the FAA's January 15, 2015, specific request [Bates No. 171] that the NAC identify the "lease provision with the non-exclusive rights for each AIP funded ramp that is leased." In response, the NAC provided as an attachment the NAC's "standard provision with regards to non-exclusive rights," and stated that "this language is included in all NAC leases following the [2008] Part 16 compliance action plan submitted to the FAA." [Bates No. 178]. The relevant portions of that provision are substantially similar to the provisions in the Leases.

As states by Mr. Donovan, ¶69, most if not all of the leases at the Airport contain similar "exclusive rights" language, including the lease to BEH's Lot F, on which BEH has constructed its hangar For example, the Assignment, Assumption and Amendment of Lease pertaining to BEH's Lot F [Bates No. 186], provides that the:

> Lease (including the Assignment) shall be subordinate to the provisions of any existing or future agreement entered into between the Prime Lessor and the United States of America for the purpose of obtaining federal aid for the improvement and/or development of

> the Norwood Memorial Airport ("Airport"); that nothing in the Lease (including the Assignment) shall be construed to grant or authorize the granting of an exclusive right; that the facilities of the Airport have been financed in larger part by grants from the Federal Aviation Administration ("FAA") and/or the [MassDOT], meaning that receipt of these grants is conditional upon compliance by the Prime Lessor with certain assurances, and therefore, any term or condition of the Lease (including the Assignment) which is found to be in conflict or inconsistent with any such federal and/or state grant assurance shall be subordinated to such federal and/or state grant assurance; and that the Prime Lessor, in compliance with the FAA and/or the MassDOT grant assurances, may not and does not give any lessee or sub-lessee assurances of exclusive access or monopolistic rights on or to the Airport, and thus, any commercial activity authorized on the Demised Premises may be subject to competition from others, on or off the Airport. The Prime Lessor has the right to require an amendment of the Lease (including the Assignment) to comply with all existing and future FAA and/or MassDOT-Aeronautics Division grant assurances."

(emphasis added). Notwithstanding the aforementioned language, neither Norwood nor anyone else has ever suggested that BEH's Lot F and hangar can be freely used or accessed by any third party to store aircraft or come and go as they please – or that the lease was subject to undisclosed claimed property rights of others – nor could they as such would deprive BEH of its possessory leasehold interest.

Moreover, in a May 10, 2019 email exchange [Bates No. 95] between Airport Manager Russ Maguire and Jorge Panteli, Compliance and Land Use Specialist with the Federal Aviation Administration, Maguire confirmed that the West Apron (and the ABC Ramps) were to be "non-exclusive, thus open to all qualified/permitted fuel providers." As stated by Maguire, "I did pass along to the Norwood Airport Commission Chairman (Mark Ryan), and he's in full agreement regarding both lots A,B,C and the West Apron-namely, that both aprons are to be non-exclusive, thus open to all qualified/permitted fuel providers. This position, as mentioned, is supported by subordination language already crafted into our leases." [Bates No. 95].

E. Recent Discovery Demonstrates That Norwood And Its Counsel Misled The Court In Representing That All Correspondence Required To Be Shared Under The Agreement Had Been Produced.

In opposing BEH's Motion to Enforce, Norwood and its counsel represented to the Court that they had produced "all correspondence . . . that is required to be shared pursuant to the Agreement." See Affidavit of Mina Makarious [Doc. No. 243-1], ¶22. Similarly, Norwood and its counsel represented to the Court that "since the execution of the Agreement the Airport Manager has provided BEH and FlightLevel a weekly package containing all such correspondence" required to be produced under the Settlement Agreement. See Norwood's Opposition [Doc. No. 243], p. 12.

The Settlement Agreement required 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."

As previously indicated, BEH refused to sign the agreement on July 30, 2019, until the handwritten clause was included. The handwritten clause, which also included communications between attorneys for Norwood and FlightLevel, was based on the collusion outlined in Doc. No. 200 between FlightLevel and the NAC, including their attorneys. The parties handwrote the clause into the Settlement Agreement, including the attorney communication, in the hallway of the Court on July 30, 2019, which was agreed by the Town.

Despite Norwood's representations to the contrary, and confirming BEH's long held suspicion that Norwood was ignoring this requirement, recently, on July 7, 2021 and July 16, 2021, in response to a subpoena, FlightLevel produced communications between its counsel and

Norwood's counsel, that had not been previously produced as required by the Settlement Agreement. Donovan Aff., ¶4. These communications, intentionally withheld, contained critical communications which would have shown the continued intentional violations of the agreement, and the collusion between Norwood and FlightLevel, to the detriment of BEH, including an August 2, 2019 letter from FlightLevel's counsel to Norwood's counsel, sent just three days after the signed settlement agreement, discussing meetings and communications regarding the West Apron and DC-3 ramp leases due BEH under the agreement.

FlightLevel acknowledged in that correspondence that "in light of the representations made to Judge Sterns at Tuesdays hearing" the Town had agreed to provide BEH "everything it wanted," and that "FlightLevel would not be granted the access easement that had been approved by the NAC . . . ." The August 2, 2019 letter, intentionally concealed by Norwood, also includes a detailed letter from Hartzell to North on December 23, 2018, concerning the West and DC-3 ramps, and FLN encumbrances. The recently produced documents also include an August 20, 2020 letter from FlightLevel's counsel to Norwood's counsel discussing the BEH leases and alleged promises made by the Town regarding FlightLevel's rights.

Further demonstrating that Norwood has not lived up to the communications clause, and misled the Court, on June 30, 2021, in response to a public records request, Attorney North for Norwood provided numerous documents which should have been provided under the settlement agreement and contradict Norwood's representations to the Court that all of the required written communication had been produced.

All of these communications should have been produced under the settlement agreement, but were not. It is clear that Norwood has 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. The conduct here does not appear to be inadvertent, given the repeated failure of Norwood to comply with the provision.

The Court should reconsider the Order, and order Norwood to produce all communications "by and between the NAC and BEH or [FlightLevel]," including "any of their attorneys or representatives," between the period of July 30, 2019 and January 30, 2021, as required by the Settlement Agreement. The Court should further sanction the Town and its counsel, and award BEH's its costs and fee incurred in seeking compliance with the Settlement Agreement.

F. BEH Requests That The Court Clarify The Order To Reflect That The Court Did Not Interpret The Parties' Legal Rights Under The Leases.

BEH requests that this Court clarify the Order to reflect that the Court did not interpret the legal effect of the Leases executed by BEH following the issuance of the Order. This request is made to avoid confusion and possible misinterpretation by another court or the public. As grounds for this request, BEH states that FlightLevel and Norwood have used the Court's Order to maintain that the Leases themselves are "non-exclusive," granting FlightLevel unrestricted access to the leaseholds to the detriment and planned use of ramps by BEH.

For example, on or about March 16, 2021, in a litigation commenced by FlightLevel and pending in the Massachusetts Superior Court (Norfolk County), captioned FlightLevel Norwood, LLC et al. v. Town of Norwood, et al., Civil Action No. 1982CV01099, BEH filed a counterclaim against FlightLevel asserting state law claims and seeking a declaration from the Superior Court that FlightLevel has no rights under the Leases to use BEH's leaseholds in connection with, without limitation, the provisioning of FlightLevel's fueling system, the lightering of fuel to and from said fueling system, the operation of fuel transport vehicles or other vehicles, and the fueling of aircraft of any kind. Donovan Aff., ¶54. The counterclaim in that action was borne out of FlightLevel's demanding that BEH move vehicles, supported by the NAC and its counsel, Mina

Makarious, and their continued insistence that it is free to traverse BEH's new leaseholds. Id. The NAC went so far as to claim BEH was in default of its lease by parking vehicles on its leasehold. Further, even though the NAC said BEH could put infrastructure on the West Apron, the NAC then denied BEH's request to place containers on the space for FBO operations, to benefit FlightLevel. In that case, FlightLevel has taken the position and asserted that this Court, in the Order, made an affirmative determination that the Leases themselves are "non-exclusive." Id. at 55. FlightLevel goes even further to suggest that this Court, in the Order, has already determined that BEH has no right to exclude FlightLevel from the leaseholds under the terms of the Leases. Id.

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 has also asserted in seeking a preliminary injunction against BEH concerning the West Ramp that this Court "determined that the West Apron Lease and the DC-3 Lease provide non-exclusive rights to BEH . . . ." See Donovan Aff., ¶56. Notwithstanding that the Superior Court in that action recently ruled that "[n]either lease explicitly grants FlightLevel any access rights to these areas," see Donovan Aff., ¶111 and Bates No. 135, p. 4, FlightLevel continues to press that this Court's Order necessarily determined that the Leases themselves are non-exclusive and granted third parties, such as FlightLevel, access to BEH's leaseholds. Id.

The Leases executed between the Town and BEH (substantially in the same form as the proposed leases before this Court on BEH's Motion to Enforce), contain no language or any indication that they are non-exclusive, or grant property rights to any third party. Id. at ¶57. The phrase "non-exclusive" does not appear in the Leases. At issue before the Court was the definition

of "non-exclusive" as used in the Settlement Agreement, not the leases. BEH respectfully takes issue with the Court's findings in the Order, as discussed below, but at a minimum BEH respectfully requests that this Court issue a clarifying order that it made no findings with respect to the then yet-to-be executed leases, or the legal interpretation thereof under Massachusetts state law, with respect to what rights may or may not be granted to a third party under the terms of the Leases. Specifically, BEH requests that this Court clarify that it made no determination, as suggested by FlightLevel, that the Leases themselves are "non-exclusive." BEH's request is made for the purpose of clarifying and avoiding any confusion or misinterpretation of the Court's Order regarding the Leases themselves by another court or any third party.

G. The Town/NAC Still Have Not Provided The Promised Amount Of Space Under The Agreement.

As set forth in the Donovan Affidavit, the Town/NAC and their attorneys repeatedly failed to disclose existing and claimed encumbrances on the West and DC-3 ramps, to induce BEH to sign the Agreement, while also knowing that any such encumbrances would in fact reduce the amount of space being offered to BEH. That BEH executed the proffered Leases did not change the fact that the amount of ramp space promised under the Settlement Agreement still, to this date, has not been provided. See Donovan Aff., ¶31-42. The Leases themselves do not supersede the Town Defendants' obligation to provide the promised amount of operable ramp space.

H. The Court Should Reconsider Its Ruling That The Town Defendants Did Not Breach The Oversight And CAP Provisions Of The Settlement Agreement.

In denying BEH's motion, the Court stated that "BEH does not maintain, nor would it have standing to assert, a conflict of interest between the Board and NAC, the parties represented by the Board's chosen liaison" and that "BEH does not allege that the interests of Norwood's counsel are inconsistent with the liaison's responsibilities under the Agreement." BEH specifically asked for this provision in the Settlement Agreement given case law, of which counsel for the Town

Defendants was involved,[1] that suggests that oversight of an airport authority is held exclusively by the Airport commission; thus, it was important that those roles not be shared by the same individual so that the BOS would be directly involved in and receive unfiltered information concerning the Airport.

Regarding the Corrective Action Plan, in denying BEH's motion the Court stated that "BEH's argument that this language of the Agreement entitles it to a 'seat at the Table' with the FAA and the right 'to attend any FAA meetings regarding the [J]CAP' is something of a stretch." BEH notes, however, at the evidentiary hearing on June 28, 2019 Simms told this Court "We are willing to let him participate in negotiations with the FAA, if the FAA says he can sit in those meetings. What more- what other seat at the table does Mr. Donovan want" "That's how far the Town is willing to go to accommodate his, quote, "seat at the table" and as well allow BEH to provide input into the corrective action plan." Donovan Aff., ¶124. 129. Moreover, on August 26, 2019, Maguire emailed the FAA compliance officer about a conference call and that Maguire was "hoping to include Chris Donovan of Boston Executive helicopters." Id. at ¶129.[2] The NAC understood its obligation to include BEH, yet failed to do so.

I. The Court Should Reconsider Its Ruling That The Town Defendants Did Not Violate The TOFA/OFA Provision Of The Settlement Agreement.

The Court also erred in failing to find that NAC 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

[1] *Martha's Vineyard Airport Commission v. Dukes County Commission*, Massachusetts Superior Court Civil Action No. 1474CV00023 (June 8, 2015).

[2] On August 28 Simms and Davis again told this Court in their motion: "FAA/Verizon relief. The NAC has tentatively set up a teleconference with two officials from the FAA (Jorge Pentelli and Michelle Ricci) for next week. Once the date is confirmed, BEH will be notified and invited to participate. In addition, on August 27, 2019, the NAC sent Mr. Donovan a letter soliciting his views on this topic." Donovan Aff., ¶125.

voted recently to increase the TOFA/OFA restrictions into BEH's current leasehold including BEH's existing fuel storage system.

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 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.

The TOFA requirement under the Settlement Agreement did not merely require the NAC to send a letter, but to support the removal of the TOFA markings. In fact, on November 20, 2019, Ryan wrote to the FAA indicating that "The NAC supports BEH's letter/petition for TOFA/OFA relief. Please review BEH's petition and make your determination. If BEH's petition is granted, the NAC is obligated to remove the TOFA/OFA markings on Gate 3 Taxi Lane within 60 days of such determination." [Bates No. 266]. 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 in 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.

The Defendants suggest that all that was required under the Settlement Agreement was a letter to the FAA, and nothing more. Yet, the Agreement requires the Defendants to "support" the removal of the TOFA, and submitting documents to the FAA contravening that support violates the letter and spirit of the Agreement, and was certainly sought to deprive BEH of the "fruits" of that Agreement.

In Massachusetts, "a covenant of good faith and fair dealing is implied in every contract." Biltcliffe v. CitiMortgage, Inc., 952 F. Supp. 2d 371, 381 (D. Mass. 2013) (citing Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004)). The covenant provides that neither contracting party may take action that destroys or injures the other's right to enjoy the "fruits of the contract." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991). Contracting parties agree implicitly to "'deal honestly and in good faith in both the performance and enforcement" of the contract's terms. Biltcliffe, 952 F. Supp. 2d at 381 (citing Hawthorne's Inc. v. Warrenton Realty Inc., 414 Mass. 200, 211 (1993). The covenant's purpose is to "guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." Uno Restaurants, 441 Mass. at 385. The covenant imposes an obligation on contracting parties to "preserve the spirit of the bargain rather than the form"; it constitutes a set of specific rules to uphold contract law's basic purpose: "the protection of reasonable expectations of parties induced by promise." Christensen v. Kingston School Committee, 360 F. Supp. 2d 212, 226 (D. Mass. 2005).

The District Court's conclusion that all that was required under the Agreement was a letter of support for removal of the TOFA is clearly wrong. Even if the District Court is correct that the removal of the marking are not within Norwood's sole power to remove, the Town Defendants' plan to increase the TOFA area is clearly contrary to the expectation of the parties under the Settlement Agreement. Massachusetts law provides that a contracting party may breach the covenant of good faith and fair dealing without breaching any of the underlying contract's express terms. Massachusetts v. Schering-Plough Corp., 779 F. Supp. 2d 224, 240 (D. Mass. 2011). The court's concern is the "spirit of the bargain" and "not whether the defendant abided by the letter of the contract in the course of performance." Speakman v. Allmerica Fin. Life Ins., 367 F. Supp.

2d 122, 132 (D. Mass. 2005). Planning to increase the TOFA, and also telling the FAA that the NAC intends to increase the TOFA area outside BEH's hangar – rather than remove it completely – is a clear violation of the "spirit of the bargain" under the Settlement Agreement.

WHEREFORE, Boston Executive Helicopters, Inc. respectfully requests that this Honorable Court rescind and set aside the Settlement Agreement or, in the alternative, reconsider the Order as requested herein, 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: November 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above documents, filed through the Electronic Case Filing System, was served upon the attorney of record for each party by email and by electronic means on November 19, 2021.

/s/ Eric H. Loeffler
Eric H. Loeffler