UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ANALAR CORPORATION, ASSOCIATED AIRCRAFT GROUP, INC., ELEVENTH STREET AVIATION LLC, HELICOPTER ASSOCIATION INTERNATIONAL, INC., HELIFLITE SHARES LLC, LIBERTY HELICOPTERS, INC., SOUND AIRCRAFT SERVICES, INC., and NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,

No. 15 Civ. 2246 (SJF) (ARL)

Plaintiffs,

-against-

THE TOWN OF EAST HAMPTON,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

LANKLER SIFFERT & WOHL LLP
Lisa Zornberg
Matthew G. Coogan
Jonathan Lamberti
500 Fifth Avenue, 34th Floor
New York, NY 10110
(212) 921-8399

Attorneys for Plaintiffs

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TABLE OF ABBREVIATIONS

Parties

AAG	Associated Aircraft Group, Inc.
Analar	Analar Corporation
Eleventh Street	Eleventh Street Aviation LLC
FOEHA	Friends of the East Hampton Airport, Inc.
HAI	Helicopter Association International, Inc.
HeliFlite	HeliFlite Shares LLC
Liberty	Liberty Helicopters, Inc.
NBAA	National Business Aviation Administration
Sound	Sound Aircraft Services, Inc.
The Town	The Town of East Hampton

Terms

2005 Settlement Agreement	Settlement in *Committee to Stop Airport Expansion v. Department of Transportation*, 03 Civ. 2634 (E.D.N.Y.)
AAIA	Airport and Airway Improvement Act of 1982
AIP	Airport Improvement Program
ANCA	Airport and Noise Capacity Act of 1990
Bishop Responses	Unsigned 2012 FAA response to questions posed by Congressman Timothy Bishop
FAA	Federal Aviation Administration
FAA Compl.	Complaint in related action *FOEHA v. FAA*, 15 Civ. 441 (SJF) (ARL)
HTO	East Hampton Airport
Town Compl.	Amended Complaint in this action, *FOEHA v. The Town of East Hampton*, 15 Civ. 2246 (SJF) (ARL)

Declarants

Ashton Dec.	Declaration of Scott E. Ashton dated April 28, 2015
Brown Dec.	Declaration of Steve Brown dated April 28, 2015
Carlson Dec.	Declaration of Kurt Carlson dated April 28, 2015
Harris Dec.	Expert Declaration of Andrew S. Harris dated April 29, 2015
Herbst Dec.	Declaration of Cynthia L. Herbst dated April 28, 2015

Jungck Dec.	Declaration of Eric Jungck dated April 28, 2015
Renz Dec.	Declaration of Michael Renz dated April 29, 2015
Sabin Dec.	Declaration of Andrew Sabin dated April 22, 2015
Shaffer Dec.	Expert Declaration of D. Kirk Shaffer dated April 29, 2015
Vellios Dec.	Declaration of Chris Vellios dated April 28, 2015
Zornberg Dec.	Declaration of Lisa Zornberg dated April 29, 2015
Zuccaro Dec.	Declaration of Matthew S. Zuccaro dated April 29, 2015

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PRELIMINARY STATEMENT

On April 16, 2015, the Town of East Hampton ("the Town") enacted laws severely restricting access to East Hampton Airport through the imposition of mandatory curfews and trip limits (hereafter, "the Restrictions"). Plaintiffs seek emergency relief to enjoin enforcement of the Restrictions until this action and the related case of *FOEHA v. FAA*, 15 Civ. 441 (SJF) (ARL) ("*FAA Action*") are decided on the merits.

This interim relief is warranted because: (i) if allowed to take effect, the Restrictions will immediately and irreparably harm Plaintiffs, devastating their businesses; (ii) the Restrictions violate the unambiguous mandates of Congress and federal law; and (iii) the public interest is served by granting an injunction to prevent unnecessary disruption of the national air transportation system and potential safety risks. Plaintiffs have been informed by counsel to the FAA that the FAA intends to file a letter with the Court in support of this application.

In the field of aviation regulation, compliance with federal law is paramount. Congress has established the federal government's exclusive sovereignty over the airspace of the United States and preempted the field of aviation regulation to promote and protect a safe and efficient national air transportation system. Local governments have no authority to regulate aircraft in flight; no authority to impose airport noise or access restrictions using their police powers; and no authority to enact or enforce airport noise or access restrictions that violate or conflict with federal law and policy. Simply put, "Congress has left room only for local action that advances and is consistent with federal policy; other, noncomplementary exercises of local prerogative are forbidden." *British Airways Bd. v. Port Auth.* ("*Concorde I*"), 558 F.2d 75, 84–85 (2d Cir. 1977).

In enacting the Restrictions, the Town transgressed its extremely limited authority. The Restrictions are preempted because they blatantly violate the Town's federal obligations under:

(i) the Airport Noise and Capacity Act of 1990 ("ANCA"), 49 U.S.C. § 47521, *et seq.*, which forbids airport operators from imposing any airport noise or access restrictions unless ANCA's stringent requirements have first been met, and (ii) the Airport and Airway Improvement Act of 1982 (the "AAIA"), as amended 49 U.S.C. § 47101, *et seq*., under which the Town agreed in 2001, in return for federal airport funding, to abide by federally mandated conditions known as "grant assurances" until at least September 2021. The Town appears to concede that it disregarded both ANCA and the AAIA in enacting the Restrictions, but claims that it was excused from complying with those laws by a 2005 settlement agreement to which the Town was not even a party. The Town is wrong. The 2005 settlement agreement provides no support – factually or legally – for the Town's attempt to evade its federal obligations.

The Restrictions are also preempted because they conflict with a host of federal regulations and policies governing aircraft classification, noise impact determination, and safety. Further still, the Restrictions are unreasonable and excessive, and they impose discriminatory and arbitrary local standards that interfere with federal ones.

If this Court finds that the Town must comply with either ANCA or the AAIA, or that the Restrictions are unreasonable or discriminatory or arbitrary or interfere with federal policy, then the Restrictions are preempted as a matter of law and must be enjoined. Because all of those conclusions are compelled here, and because Plaintiffs' showing of irreparable harm is overwhelming, Plaintiffs' request for emergency interim relief should be granted.

BACKGROUND

We respectfully refer the Court to the Amended Complaint ("Town Compl.") and the Complaint in the *FAA Action* ("FAA Compl.") for a full recitation of the relevant facts and a detailed summary of the relevant provisions of ANCA, the AAIA, and related federal regulations.

A. East Hampton Airport

East Hampton Airport (the "Airport") is a public-use, federally funded airport that the FAA has designated as important to our national air transportation system. Town Compl. ¶¶ 2, 59. Of the approximately 19,000 airports and landing facilities in the United States, the FAA has deemed fewer than 3,400 important to the nationwide system of air transportation – and East Hampton Airport is one of them. Shaffer Dec. ¶ 14-18. Built and developed with federal funds, the Airport connects the eastern end of Long Island to the rest of the nation and supports local and regional economies. Thousands of people depend upon Airport access for their businesses, to get to work and home, and for their travel needs. Throughout its 79-year history, the Airport has been open to commercial and recreational aircraft of all kinds. *See* Town Compl. ¶¶ 55–60.

B. The Town's Grant Assurance Obligations

The Town is the Airport's sponsor, proprietor, and operator – interchangeable terms used in the federal aviation laws. The Town most recently received federal airport funding in 2001, under the Airport Improvement Program (AIP) of the AAIA. *Id.* ¶ 62. In accepting those funds, the Town agreed to abide by the AAIA's mandatory grant assurances, requiring the Town to: (i) keep the Airport open and accessible to all types of aircraft and aeronautical activities, including commercial activities, on reasonable terms without unjust discrimination (Grant Assurance 22.a), (ii) maintain the Airport in a safe and well-serviced condition (Grant Assurance 19.a); and (iii) not impose anti-competitive restrictions on Airport use (Grant Assurance 23). *See id.* ¶¶ 48–52, Ex. A. Grant Assurances 19.a and 22.a remain binding on the Town at least until September 25, 2021. Grant Assurance 23 never expires. *See id.* ¶¶ 53, 61–63.

C. The 2005 Settlement Agreement

For years, some residents of East Hampton have actively opposed Airport development

and operations, and complained about aircraft-related noise. The same could undoubtedly be said of nearly any local community near an airport – which is why Congress preempted the field of aviation noise regulation and imposed uniform, national regulation, recognizing that no national system of air transportation would be possible if left to patchwork regulation by local governments subject to political winds and community pressures. *See* Shaffer Dec. ¶¶ 20-28.

Between 2001 and 2003, one local group calling themselves the "Committee to Stop Airport Expansion" (the "Committee"), initiated various legal actions in an attempt to stop Airport development. This included a lawsuit filed in the Eastern District of New York (the "Committee Action"), which named the FAA as a defendant. Town Compl. ¶¶ 88–89.

In 2005, the parties in the Committee Action executed a settlement agreement (the "2005 Settlement Agreement") resolving the Committee's litigation. In Paragraph 7 of that Agreement, the FAA agreed that Grant Assurance 22.a and three other grant assurances (22.h, 29.a, and 29.b) (collectively the "Subject Grant Assurances") "will not be enforced [by the FAA] beyond December 31, 2014." FAA Compl., Ex. B. The Agreement provided that, aside from those four grant assurances, "[a]ll other grant assurances with respect to any grant awarded to East Hampton Airport . . . shall be enforced in full." *Id.* The Agreement did not mention ANCA. *Id.* The Agreement was not so-ordered by the court. Town Compl. ¶¶ 90–94.

The Town and East Hampton Airport were neither parties to the Committee Action nor signatories to the 2005 Settlement Agreement. Indeed, in 2011, the Town's counsel repeatedly advised the Town that the 2005 Settlement Agreement did not affect the Airport's status as a federally "obligated" airport, and that the Town needed to comply with ANCA before imposing any Airport curfew or access restrictions. Zornberg Dec., Exs. A–C (Town counsel advising: "Town is currently 'grant obligated' to FAA," Ex. C at 2; it is a "[c]ommon misperception[]" that

"[t]he Town's grant assurances will expire at end of 2014," Ex. B at 5; and Town "must comply both with the grant assurances and with [ANCA's] Part 161," Ex. A at 2).

In or about December 2011, at the behest of a community group calling itself the "Quiet Skies Coalition," then-U.S. Representative Timothy Bishop submitted a list of questions to the FAA probing the legal effect of the 2005 Agreement on the FAA and the Town's ability to impose airport access and noise restrictions after December 31, 2014. FAA Compl. ¶¶ 62–64.

Someone at the FAA (Plaintiffs do not know who) responded to Bishop in an unsigned 2012 writing (the "Bishop Responses"). *See* FAA Compl., Ex. C. The Bishop Responses expressed the view that the 2005 Settlement Agreement, after December 31, 2014, prospectively stripped the FAA of its jurisdiction to enforce the Subject Grant Assurances or to investigate or adjudicate third-party administrative complaints that the Town had violated those assurances. *Id.* In addition, and despite the fact that the 2005 Settlement Agreement contained no mention of ANCA, the Bishop Responses included a sentence that interpreted the 2005 Agreement as relieving the Town from complying with ANCA's requirements after December 31, 2014, "unless the [T]own wishes to remain eligible to receive future grants of Federal funding." *Id.* at 1. The author of the Bishop Responses provided no legal authority for that statement.

Following publication of the Bishop Responses, and notwithstanding the Town counsel's earlier legal advice, the Town decided to wait until after December 31, 2014 to impose noise and access restrictions that do not comply with ANCA or the AAIA – on the theory that the 2005 Settlement Agreement, as interpreted by the Bishop Responses, relieved the Town of its obligations to comply with ANCA and the AAIA.

D. The FAA Action

On January 29, 2015, the *FAA Action* was filed to redress the FAA's abdication of its

statutory duties with regard to East Hampton Airport.[1] The *FAA Action* contends that the FAA violated its statutory duties and exceeded its statutory authority when it settled the Committee Action by agreeing not to enforce certain of the Town's grant assurances. The *FAA Action* seeks declaratory and injunctive relief that: (i) the FAA is statutorily obligated to ensure that the Town complies with its grant assurances (including Grant Assurance 22.a) until September 2021; (ii) neither the 2005 Settlement Agreement nor the FAA's interpretation of that Agreement in the Bishop Responses can restrain the FAA from carrying out its statutorily imposed duties under the AAIA; and (iii) the Bishop Responses' one-sentence statement about ANCA, *i.e.*, that the Town purportedly need not comply, is contrary to law. FAA Compl. ¶¶ 82–114 & Prayer for Relief.

E. The Town's Enactment of the Restrictions

After the *FAA Action* was filed, and without waiting for the FAA's response, the Town proceeded to impose severe airport access restrictions. The Restrictions, adopted April 16, 2015, are unprecedented for a public-access, federally obligated airport in the United States. Shaffer Dec. ¶¶ 33-36. They include: (i) a mandatory curfew, prohibiting use of East Hampton Airport between 11:00 p.m. and 7:00 a.m. (the "Mandatory Curfew"); (ii) an extended curfew for "Noisy Aircraft" banning flight from 8:00 p.m. to 9:00 a.m. ("the "Extended Curfew"); and (iii) a one-trip limit prohibiting "Noisy Aircraft" from flying more than one trip per week during the "season," an undefined term[2] (the "One-Trip Limit"). Town Compl. ¶¶ 64–69 & Exs. B–D. The Restrictions define a "Noisy Aircraft" as "any airplane or rotorcraft for which there is a

[1] Until December 31, 2014, it remained possible that an intervening event – namely, acceptance by the Town of additional AIP funding – would moot the FAA's unlawful 2005 Settlement Agreement. That did not occur. FAA Compl. ¶¶ 69–70.

[2] The term "season" is apparently intended to mean May through September. In its haste to impose the Restrictions, the Town refused to defer a vote until the term "season" could be defined. Instead, it passed the Restrictions in ambiguous form, and noticed proposed additional legislation to define "season."

published Effective Perceived Noise in Decibels (EPNdB) approach (AP) level of 91.0 or greater." *Id.* ¶ 67 & Exs. C–D. Violations are deemed criminal offenses, punishable by fines, injunctions, and bans from using the Airport. *Id.* ¶ 68 & Exs. B–D.

The Restrictions will prohibit nearly all helicopters and many jet aircraft from using the Airport for 13 hours of every day, year-round. The Restrictions further bar those aircraft from accessing the Airport for more than one trip per week during the five busiest months of the year – May, June, July, August and September – significantly limiting helicopter and jet flight, and effectively shutting down commercial charter service by helicopters. The Restrictions will also significantly reduce Airport revenues needed for Airport maintenance.[3]

F. This Action

Plaintiffs filed this action on April 21, 2015, challenging the Restrictions as federally preempted and unlawful. Plaintiffs include multiple charter providers, industry associations, and businesses that will be immediately and irreparably harmed by the Restrictions.

THE RESTRICTIONS SHOULD BE ENJOINED PENDING DECISION ON THE MERITS

A. Standard for TRO or Preliminary Injunction

Entry of a TRO or preliminary injunction is warranted upon a showing by Plaintiffs of (1) irreparable harm, (2) likelihood of success on the merits, and (3) that the public interest weighs in favor of granting the injunction. *See Pope v. Cnty. of Albany*, 687 F.3d 565, 570 (2d Cir. 2012); Fed. R. Civ. P. 65. The standard for a TRO and preliminary injunction is the same. *See Kane v. N.Y. State Nurses Ass'n*, No. 11 Civ. 6505 (RJS), 2011 WL 4862924, at *2

[3] In February 2015, the Town promised that before any vote, its finance subcommittee would analyze the proposed restrictions to ensure that, if adopted, the Airport could remain financially sustainable and meet its capital and maintenance needs. No such analysis was issued. Instead, the finance subcommittee stated in March 2015 that it was unable to reach a consensus on whether and how severely the Restrictions would affect the Airport. The Town nonetheless enacted the Restrictions. Town Compl. ¶ 72.

(S.D.N.Y. Oct. 13, 2011). Of these factors, "[a] showing of irreparable harm is the single most important prerequisite for the issuance of a [TRO or] preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation marks and citation omitted).

Point I
Plaintiffs Will Be Irreparably Harmed if the Restrictions Are Allowed to Go into Effect

There is overwhelming evidence that the Restrictions will immediately and severely harm Plaintiffs in ways that cannot be remedied later. *See Reuters Ltd. v. United Press Int'l, Inc*., 903 F.2d 904, 907 (2d Cir. 1990) (irreparable harm is "imminent, not remote or speculative," and it is an injury "incapable of being fully remedied by monetary damages"). First, the Town's Restrictions will cause catastrophic economic injuries to Plaintiffs' businesses. *Cf. Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124, 125–26 (2d Cir. 1984). Second, the Restrictions will savage the relationships, good will, and reputation of Plaintiffs' businesses – causing injury that can be neither measured nor reversed. *Cf. Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68–69 (2d Cir. 1999). Third, even if the damages to Plaintiffs could be valued, Plaintiffs have no recourse at law against the Town. *Cf. Cablevision Sys. Corp. v. Town of E. Hampton*, 862 F. Supp. 875, 888–89 (E.D.N.Y. 1994), *aff'd*, 57 F.3d 1062 (2d Cir. 1995). Any of these injuries would suffice to demonstrate irreparable harm; here, the facts demonstrate all of them.

A. The Restrictions Will Cause Severe Economic Harm to Plaintiffs

First, the Restrictions threaten the continued existence of some Plaintiffs. For example:

- AAG projects that the Restrictions will result in a more than 90% decrease in its flights to and from the Airport that will "threaten the viability of AAG's business model." Ashton Dec. ¶¶ 22, 23. Indeed, AAG predicts the Restrictions will force "deep cuts in clients, charter services and flight operations" that will " put AAG at

serious risk of needing to close or restructure." *Id.* ¶ 36.

- Analar predicts that it could "lose up to 60% of its charter business," causing it to question "whether [it] could continue under its current business structure." Renz Dec. ¶¶ 18, 25. The Restrictions likely would force Analar to abandon its charter business and restructure as a maintenance and consulting company. *See id.* ¶¶ 25, 30.

- Liberty predicts the Restrictions will "effectively shut down [its] ability to provide charter flights to and from HTO during the summer," cost it up to 50% of its revenue, and force it to restructure to "maintain its viability." Vellios Dec. ¶¶ 14, 15, 19.

- Sound makes most of its money by selling fuel, and it sells most of its fuel during the summer months. Herbst Dec. ¶¶ 7–9. If the Restrictions reduce Sound's business as predicted, "it would not be able to sustain itself in its current form." *Id.* ¶ 19.

The above, unquestionably, constitutes irreparable injury. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *Roso-Lino Beverage Distribs.*, 749 F.2d at 125–26. Not only does the "destruction of a business itself" defy monetary calculation, but it renders an award of monetary damages "a hollow promise." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (affirming grant of interim relief where, because of the irreparable harm, "a favorable final judgment might well be useless").

Second, because of the Restrictions' drastic impact on Plaintiffs' businesses, Plaintiffs will likely be forced to eliminate jobs and sell or lose essential operating equipment:

- Analar foresees the need to lay off seven of its 15 employees and reduce its seven-helicopter fleet by four. *See* Renz Dec. ¶¶ 8, 17, 25.

- Sound expects that, if it survives, it may be required to lay off multiple staff – many of whom have worked for Sound over a decade. Herbst Dec. ¶¶ 5, 21.

- HeliFlite predicts it will be forced to reduce its fleet by 25% and lay off 8 to 10 staff members. Carlson Dec. ¶ 23.

- Liberty's parent company, which employs Liberty's pilots, expects to have to lay off five full-time pilots and another five part-time pilots. Vellios Dec. ¶ 20.

- AAG "projects that it likely would need to lay off as many as eight pilots, two or

more mechanics, two or more dispatchers, plus additional overhead positions." Ashton Dec. ¶ 24.

- Eleventh Street will either have to sell its only jet – a state-of-the-art aircraft that the FAA has certified as meeting the quietest federal standards – or be forced to give up the Airport as its primary base of operations. Jungck Dec. ¶¶ 3, 5, 17, 19.

Losing essential operating equipment and laying-off staff constitute "major business disruptions" and amount to irreparable harm, even if Plaintiffs manage to survive. *See Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp*., 992 F.2d 430, 435 (2d Cir. 1993); *Hillside Med. Lab. v. Perales*, No. 88 Civ. 5644 (JFK), 1988 WL 100195, at *2 (S.D.N.Y. Sept. 22, 1988) (layoffs and salary reductions constituted irreparable harm). Moreover, the Restrictions will cause Plaintiffs to lose the intangible benefits of having long-serving, highly skilled employees; once these employees leave, Plaintiffs would likely be unable to restore the composition and quality of its staff. *See* Herbst Dec. ¶ 22; Carlson Dec. ¶ 23. This loss of key personnel cannot remedied after-the-fact, so it must be prevented now.

B. The Restrictions Will Cause Incalculable and Irreversible Damage to Plaintiffs' Goodwill, Relationships, Market Share, and Reputation

Plaintiffs also face the imminent and unquantifiable loss of reputation, good will, market share, and business opportunities. For example:

- The Restrictions virtually eliminate AAG's ability to fly the exclusive aircraft of its business to East Hampton, and will accordingly cause AAG to lose "as many as 50%" of its clients. Ashton Dec. ¶¶ 24, 26.

- The Restrictions will significantly impact the business relationships between Sound and its customers. Sound anticipates that the Restrictions will cause its largest client to move its jet operations elsewhere, erasing 16% of Sound's revenue. Herbst Dec. ¶ 19. The Restrictions will likely devastate Sound's client base, but the full harm cannot be estimated. *See id*. ¶¶ 15(a)–(f), 16-19.

- Analar and HeliFlite expect that the owners of helicopters it operates will sell those aircraft if the Restrictions take effect, eliminating Analar's and HeliFlite's ability to use those aircraft to serve its other clients. Carlson Dec. ¶¶ 26-27; Renz Dec. ¶ 24. And if the owners do not sell, the One-Trip Limit will force Analar into the center of

client disputes about which partial owner of the aircraft can use it that week. *Id.* ¶ 21.

- Liberty predicts that the One-Trip Limit will curtail its ability to serve "longtime customers" it has acquired over the years. Vellios Dec. ¶ 17.

- HeliFlite, Liberty, AAG, and Analar anticipate that their helicopter clients will switch to aircraft unaffected by the Restrictions, or to other modes of travel entirely, costing them market share as well as customers. This harm cannot be avoided by Plaintiffs' using other airports. Carlson Dec. ¶¶ 24, 28; Vellios Dec. ¶¶ 21, 23-25; Ashton Dec. ¶¶ 27, 30-34; Renz Dec. ¶¶ 26, 28. And many Plaintiffs anticipate that, once lost, their customers and market share will never return. Carlson Dec. ¶ 31; Vellios Dec. ¶ 21; Ashton Dec. ¶ 27; Renz Dec. ¶ 26.

These severe and unquantifiable losses – of client relationships, reputation, goodwill, business opportunities, and current and future market share – further establish irreparable harm. *See Ticor Title Ins. Co.*, 173 F.3d at 68; *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004).

C. Plaintiffs Have No Recourse at Law Against the Town for Damages

Even if the Restrictions' damage to Plaintiffs could be measured in dollars and cents, Plaintiffs still face irreparable harm because they have no adequate remedy to recover those damages if they later prevail on the merits. *See Cablevision Sys. Corp.*, 862 F. Supp. at 888–89. Plaintiffs, with the possible exception of Sound, are aware of no cause of action that would permit them to recover money damages against the Town.[4] Moreover, courts in this circuit have refused to recognize claims for money damages arising out of regulatory action taken by local governments. *See Pankos Diner Corp. v. Nassau Cnty. Legislature*, 321 F. Supp. 2d 520, 524 (E.D.N.Y. 2003); *Nat'l Helicopter Corp. of Am. v. City of New York*, 952 F. Supp. 1011, 1020 n.4 (S.D.N.Y. 1997) (granting preliminary injunction to air carriers because federal suit against City for monetary relief would be barred by the Eleventh Amendment), *aff'd in part, rev'd in part*, 137 F.3d 81 (2d Cir. 1998). Where, as here, money damages are unavailable as a matter of law,

[4] Sound has a lease with the Town and may have some limited remedies available to the extent that the Town's actions are in breach of that lease.

Plaintiffs have demonstrated irreparable harm. For all of these reasons, taken separately or together, Plaintiffs have more than satisfied the requisite showing of irreparable harm.

Point II
Plaintiffs Can Show a High Likelihood of Success on the Merits

To establish "a likelihood of success on the merits," a plaintiff need not prove to an "absolute certainty" that she or he will succeed. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1984), *overruled on other grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). "[A] finding that a plaintiff has more than a fifty-fifty chance of succeeding on the merits of their claims" is enough. *RxUSA Wholesale, Inc. v. Dep't of Health & Human Servs.*, 467 F. Supp. 2d 285, 288–89 (E.D.N.Y. 2006), *aff'd*, 285 F. App'x 809 (2d Cir. 2008). Plaintiffs readily meet that burden here. The Court need look no further than the unambiguous directives of Congress to determine that the Restrictions conflict with federal law and are preempted.

A. The Federal Government's Preemption of Aviation Noise Regulation

Under the Supremacy Clause of the Constitution, state and local laws that conflict with federal law are "without effect." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010). Congress may preempt local legislation expressly or impliedly, and preemption may occur when local governments intrude into a field occupied exclusively by the federal government, or when local law stands as an obstacle to the achievement of federal objectives. *Id.* All of these preemption principles apply here.[5]

In 1973, the Supreme Court held that Congress had impliedly preempted the field of aircraft noise regulation because of "the pervasive nature of the scheme of federal regulation" in this area, and because "the network of airports throughout the United States and the constant

[5] Plaintiffs can challenge local laws under the Supremacy Clause regardless of whether the federal statutes confer a private right of action. *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 221–22 (2d Cir. 2008).

availability of these airports are essential to the maintenance of a sound air transportation system." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 640 (1973) (holding that local governments are barred from using police powers to regulate aviation noise). *Burbank* left open, and the cases following it found, that Congress had reserved only an "extremely limited role" for local airport proprietors to regulate noise levels for the airport and its immediate environs. *British Airways Bd. v. Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977) ("*Concorde II*"). To fit within that limited role, such regulations must be "reasonable, nonarbitrary, and non-discriminatory," and must be "consistent with federal policy." *Concorde I*, 558 F.2d at 84–85; *see also City & Cnty. of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991).

This narrow carve-out from an otherwise totally preempted field – referred to as the "local proprietor's exception" – was based on the rationale that an airport proprietor, as property owner, is liable to other property owners for excessive aircraft noise that emanate from the airport, and therefore, should have some power to insulate itself from this liability. *See Griggs v. Allegheny Cnty.*, 369 U.S. 84, 88–90 (1962).[6]

The touchstone of the local proprietor's exception has always been that local regulation must be *consistent* with federal law and policy. *See Global Int'l Airways Corp. v. Port Auth.*, 727 F.2d 246 (2d Cir. 1984) (dismissing facial challenge to local noise restriction only after finding no conflict between local restriction and federal law; and even then, permitting air carriers to establish a conflict factually before the trial court); *see also Arrow Air, Inc. v. Port Auth.*, 602 F. Supp. 314, 322 (S.D.N.Y. 1985) (local proprietor can regulate noise levels "[s]o long as the local

[6] In 1978, Congress, as part of the Airline Deregulation Act, expressly provided that local governments cannot enact or enforce any "law, regulation, or other provision . . . related to a price, route or service of an air carrier," except insofar as a local government is "carrying out its proprietary powers and rights" as an airport proprietor. 49 U.S.C. § 41713(b)(1), (3). Charter operators are carriers within the scope of that statutory provision. *See Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 733 (E.D.N.C. 2008).

action advances and is consistent with federal policy" (alteration and citation omitted)).

Moreover, in 1990, Congress passed ANCA – significantly diminishing the already-extremely-limited authority of local proprietors to impose noise or access restrictions. Setting forth Congress's findings that community concerns about noise had "led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system," and that "a noise policy must be carried out at the national level," 49 U.S.C. § 47521 (emphasis added), ANCA expressly preempts local proprietors from imposing any noise or access restrictions on any aircraft classified by the FAA as a "Stage 2" or "Stage 3" aircraft unless the proprietor has first complied with ANCA's stringent requirements.[7] 49 U.S.C. § 47524(b)–(c); *see also* Town Comp. ¶¶ 39–45 (detailing ANCA's requirements). ANCA reflects Congress's goal of alleviating community noise concerns through new technology, rather than access restrictions. *See* 49 U.S.C. §§ 47521(5), 47524, 47528, 47529 (providing for orderly phase-out of louder, older aircraft and transition to a national fleet of newer, quieter aircraft).

Section 47524 of ANCA – the statute's cornerstone – forbids local proprietors from imposing any restriction on Stage 3 and Stage 4 aircraft (including most jets) without FAA approval or the unanimous consent of all affected aircraft operators. 49 U.S.C. § 47524. Section 47524 likewise forbids proprietors from imposing any restriction on Stage 2 aircraft (including most helicopters) unless, at least 180 days before the effective date of the proposed restriction, the proprietor publishes for public comment various required analyses, including cost-benefit

[7] The FAA classifies aircraft into "Stages" based on their ability to operate beneath various noise thresholds specified by the FAA. In general, Stage 1 aircraft emit the most noise; Stage 2 aircraft emit less noise than Stage 1; and Stage 3 aircraft emit less noise than Stage 2. In 2005, the FAA promulgated a Stage 4 classification for certain aircraft. Stage 4 is currently the quietest classification for jet aircraft. *See* Stage 4 Aircraft Noise Standards, 70 Fed. Reg. 38,742, 38,748 (July 5, 2005). By definition, Stage 4 aircraft operate beneath the noise thresholds specified for Stage 3 aircraft and thus are protected by the same ANCA requirements that apply to Stage 3 aircraft. Shaffer Dec. ¶ 21.

analyses and a "Part 161" noise study prepared under specific federal requirements and standards. *Id.* § 47524(b); 14 C.F.R § 161.205(a). Shaffer Dec. ¶¶ 21-26; Harris Dec. ¶ 26.

ANCA fundamentally altered the balance of power between the federal and local government by displacing local proprietors' authority to unilaterally impose restrictions. Indeed, as part of ANCA, the federal government assumed liability for any suits resulting from the FAA's denial of restrictions on Stage 3 aircraft – mooting the rationale for the proprietor's exception. *See* 49 U.S.C. § 47527. Congress further provided that ANCA did not affect pre-existing federal legislation "[e]xcept as provided by Section 47524 of this Title" – underscoring the change in the landscape, and the law's preemptive impact. 49 U.S.C. § 47533 (emphasis added).

B. The Town Must Comply with ANCA

There is no dispute that the Town did not even attempt to comply with ANCA in enacting the Restrictions. All of the Restrictions apply to Stage 2, Stage 3 and Stage 4 aircraft, yet the Town never obtained FAA approval, never prepared the requisite analyses or Part 161 noise study, and never provided the required notice and comment period. Shaffer Dec. ¶ 33.

Instead, the Town has claimed that ANCA does not apply to East Hampton Airport, a claim that appears to be based entirely on the single sentence in the Bishop Responses – that suggested without citation to any supporting authority or provision of the 2005 Settlement Agreement – that the 2005 Settlement Agreement excuses the Town's compliance with ANCA.[8] That statement is categorically wrong, both factually and legally, and does not give the Town license to violate federal law.

[8] The full sentence reads: "The FAA's agreement [in the 2005 Settlement] not to enforce also means that unless the town wishes to remain eligible to receive future grants of Federal Funding, it is not required to comply with the requirements under [ANCA], as implemented by title 14 CFR, part 161, in proposing new airport noise and access restrictions." FAA Compl., Ex. C at 1.

Factually, there is no basis to contend that the 2005 Settlement Agreement waived the Town's obligations to comply with ANCA. The 2005 Settlement Agreement did not mention ANCA, did not speak to airport noise or access restrictions, and did not even use the word "noise." Nor was the Town or Airport a party to the Agreement.

Moreover, insofar as the Bishop Responses suggested (erroneously) that ANCA applies only to federally obligated airports, the implication that East Hampton Airport is not federally obligated is also factually wrong. The Airport is federally obligated, and will remain so until September 2021, as even the terms of the 2005 Settlement Agreement reflect, and as the Town's counsel repeatedly advised the Town. Zornberg Dec., Exs. A–C.

In any event, ANCA unambiguously applies as a matter of law to all U.S. airports, not just federally obligated airports. ANCA established a "national aviation noise policy," 49 U.S.C. § 47523 (emphasis added), and directed the FAA to establish by regulation a "national program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft," *id.* § 47524 (emphasis added). Given Congress's express dictate of a national noise policy, it would be absurd to construe ANCA as applying only to federally obligated airports. Of the approximately 19,000 airports in the United States, only approximately 3,300 are even eligible for federal funding. Shaffer Dec. ¶ 16. Any purported interpretation of ANCA as applying to only a small subset of U.S. airports cannot be squared with Congress's broad establishment of a national noise policy.

Moreover, Section 47524 unambiguously addresses any airport noise or access restriction imposed on any Stage 2 or Stage 3 aircraft by any airport operator. *See* 49 U.S.C. § 47524(b) & (c). Section 47524's language is targeted at the "restriction"; it includes no exception of any kind based on type of airport or airport operator. *See City of Naples Airport Auth. v. FAA*, 409 F.3d

431, 433 (D.C. Cir. 2005) (stating, without limitation, that ANCA "governs the manner in which individual airports may adopt noise restrictions on aircraft").

ANCA's plain statutory terms apply to the Restrictions. *See, e.g.*, *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (when interpreting statutes, the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous"); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

The FAA's regulations further confirm that ANCA applies here. The regulations explicitly state that ANCA's mandatory notice, review, and approval requirements apply "to all airports imposing noise or access restrictions as defined in § 161.5 of this part." 14 C.F.R. § 161.3(c) (emphasis added). East Hampton Airport unquestionably meets the definition of an "airport." *See* 14 C.F.R. § 161.5 (broadly defining "airport" to include "any area of land or water, including any heliport, that is used or intended to be used for the landing and takeoff of aircraft"). Likewise, the Town's Restrictions unquestionably meet § 161.5's definition of "noise or access restrictions," which broadly includes any restrictions "affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft." *Id*. Any attempt to interpret ANCA's applicability as dependent on the airport's past or future receipt of federal funds under the AAIA would squarely contradict the FAA's position in *City of Naples Airport Authority*, where the FAA argued that ANCA and the AAIA impose separate, independent sets of obligations. The court deferred to that interpretation. 409 F.3d at 433–35.

In the face of such clear statutory and regulatory authority that the Town must comply with ANCA, and that ANCA preempts the Restrictions, it is wholly unavailing for the Town to

try to avoid its federal obligations by pointing to a single, misguided sentence in the unsigned Bishop Responses. Even if it reflected the current view of the FAA – and that is anything but clear – the Bishop Responses' statement about ANCA is legally indefensible, and entitled to no judicial deference as it contravenes ANCA's plain language and the FAA's own regulations. *See N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003) ("We will not defer to an agency's interpretation that contravenes Congress' unambiguously expressed intent."); *Yakubova v. Chertoff*, No. 06 Civ. 3203 (ERK) (RLM), 2006 WL 6589892, at *3 (E.D.N.Y. Nov. 2, 2006) (declining to accept agency interpretation in litigation that was "contrary to its own regulations"); *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981) ("Persons dealing with the government are charged with knowing government statutes and regulations, and they assume the risk that government agents may exceed their authority and provide misinformation."); *Schuster v. Comm'r of Internal Revenue*, 312 F.2d 311, 317 (9th Cir. 1962) ("Congress's legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official."). In sum, ANCA preempts the Restrictions, and there is no non-frivolous argument to the contrary.

C. The Town Must Comply with the AAIA

The Restrictions are also preempted because they violate the Town's grant assurances under the AAIA. When the Town entered its 2001 grant agreement with the FAA, that agreement was "not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will." *San Francisco*, 942 F.2d at 1396. Airport restrictions that contravene an airport proprietor's grant assurances implicate the Supremacy Clause and must be struck. *Id; see also Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1220 (10th Cir. 2001) (local regulation preempted by Grant Assurance 22.a,

stating that federal scheme is designed "to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis" (quotation marks and citation omitted)). As matters of public policy and law, the Town cannot cast off its substantial grant assurance obligations.

The Town does not appear to dispute (i) that it did not comply with Grant Assurance 22.a in enacting the Restrictions or (ii) that the Restrictions cannot proceed if Grant Assurance 22.a remains in force. *See* Shaffer Dec. ¶ 29 (explaining how, in practice, Grant Assurance 22.a requires proprietors to first seek FAA determination of whether proposed access restrictions are reasonable and nondiscriminatory). Instead, the Town's claim, again, is that Grant Assurance 22.a "expired" on December 31, 2014 as a result of the 2005 Settlement Agreement. That claim likewise fails both factually and legally.

Factually, the 2005 Settlement Agreement did not purport to release the Town from any of its legal obligations under the AAIA. The Town was not a party to the Settlement Agreement and was not released from anything. While Paragraph 7 of the 2005 Settlement Agreement stated that the FAA would not enforce the four specified grant assurances after December 31, 2014, it did not purport to waive the Town's obligations to comply with those assurances.

Legally, Congress's clear mandates in the AAIA compel the conclusion that the FAA lacked statutory authority to settle litigation by waiving either its own enforcement authority under the AAIA, or the Town's grant assurances – rendering Paragraph 7 of the 2005 Settlement Agreement void, illegal, and unenforceable. *See* FAA Compl. ¶¶ 82–93; *United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008) (neither the Attorney General nor the federal agencies it represents are empowered to agree to settlement terms that violate the Congressional directives or civil laws governing the agency); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*,

3 F.3d 759, 762 (4th Cir. 1993).

The AAIA unambiguously dictates, in nondiscretionary terms, that the FAA: (i) must receive grant assurances as a precondition to AIP funding, 49 U.S.C § 47107(a); (ii) must ensure airport compliance with the grant assurances, *id.* § 47107(g); and (iii) must investigate and adjudicate all reasonably grounded complaints that the grant assurances are being violated, *id.* § 46101(a)(1). As the FAA has itself explicitly stated, the FAA cannot waive those statutory obligations, or a proprietor's grant assurances, in order to settle a civil lawsuit, because to do so would violate Congress's directives. Thus, in the FAA's own words:

- "FAA can neither bargain away the rights of access [to airport facilities] nor waive the grant assurances of the Respondent [airport]. FAA is required to enforce the federal statutes to protect the federal interest in the Airport." *Platinum Aviation & Platinum Jet Ctr. BMI v. Bloomington-Normal Airport Auth., Ill.*, FAA 106-06-09 (2007), 2007 WL 4854321, at *15 (Nov. 28, 2007 Director's Determination).

- "The [Settlement] Agreement [as to Santa Monica Airport] does not contain any such waiver of statutory jurisdiction by the FAA, nor could it. The FAA may not by agreement waive its statutory enforcement jurisdiction over future cases. *In re Compliance with Fed. Obligations by the City of Santa Monica, Cal.* ("*Santa Monica*"), FAA 16-02-08 (2008), 2008 WL 6895776, at *26 (May 27, 2008 Director's Determination) (emphasis added).

- "The FAA is the Federal agency assigned responsibility by Congress for enforcing . . . AIP grant obligations referenced in the [Settlement] Agreement. The FAA did not and could not abdicate that responsibility by signing an agreement with Santa Monica that settled existing litigation." *Id.* (emphasis added).

- "Just as the FAA cannot agree to waive its statutory enforcement jurisdiction, the agency cannot, and did not, agree to a waiver by a Federally obligated airport of its statutory obligations under the grant assurances . . . ." *Id.* at 27 (emphasis added).

The 2005 Settlement Agreement purported to do exactly what the FAA acknowledged in *Santa Monica* and *Platinum Aviation* that the FAA lacks authority to do. It is also at odds with the FAA's established policies and procedures. Shaffer Dec. ¶¶ 44-47. Congress's clear mandates in the AAIA, and the FAA's own statements and policies, compel the conclusion that

Paragraph 7 of the 2005 Settlement Agreement was unlawful, and could not have released the Town from any of its federal grant assurance obligations.

Moreover, besides violating Grant Assurance 22.a, the Restrictions also run afoul of Grant Assurances 19.a and 23, which the 2005 Settlement Agreement never purported to affect. The Restrictions violate Grant Assurance 19.a because they will strip the Airport of revenue essential for the Airport's proper maintenance. *See* Town Compl. ¶ 85; Sabin Dec. ¶ 10–12; Ashton Dec. ¶ 35; Brown Dec. ¶ 19.[9] The Restrictions violate Grant Assurance 23 because they are anti-competitive and effectively grant exclusive rights to use the Airport to some aircraft operators at the expense of others. *See, e.g.*, Town Compl. ¶ 86; Ashton Dec. ¶¶ 26-27. Although drafted in neutral-sounding language, the Extended Curfew and One-Trip Limit target charter helicopter operators, rendering them non-competitive and granting exclusive rights to other types of charter aircraft (like seaplanes) that are not subject to the Restrictions' "Noisy Aircraft" standard for reasons unrelated to actual noise impact. *See City of Pompano Beach v. FAA*, 774 F.2d 1529, 1544 (11th Cir. 1985) ("unreasonable standards and requirements" can impermissibly create an exclusive right by fostering non-competitive situation).

D. The Restrictions Conflict with Federal Law and are Unreasonable, Arbitrary, and Discriminatory

The Restrictions are furthermore preempted because they impose unreasonable, arbitrary, and discriminatory noise and access restrictions. *Concorde II*, 564 F.2d at 1011; *see also Clay Lacy Aviation v. City of L.A.*, 00 Civ. 9255, 2001 WL 1941734, at *3 (C.D. Cal. July 27, 2001). "Examination by the Court of whether or not a regulation is reasonable, non-arbitrary, non-

[9] *See* FAA Order 5190.6B, ¶ 7.5(b) (Sept. 30, 2009) (airport proprietor's obligations under Grant Assurance 19.a include making available the "funds[] and other resources . . . to implement an effective maintenance program").

discriminatory is rigorous and not a loose rational basis inquiry . . . ." *Clay Lacy Aviation*, 2001 WL 1941734, at *3. The Restrictions here cannot survive this review because they so clearly "inhibit the accomplishment of legitimate national goals." *Id.* In that regard, we particularly refer the Court to the detailed declarations of D. Kirk Shaffer, former Associate Administrator for Airports at the FAA; Andrew S. Harris, an expert in acoustics and airport noise; Steve Brown, a leader of the NBAA; and Matthew S. Zuccaro, the President of HAI.

First, the Town's Restrictions directly conflict with ANCA and the AAIA and, therefore, are unreasonable *per se*. The Restrictions also burden commerce and conflict with national goals of promoting a safe, open, and efficient national air transportation network, which depends upon airport compliance with uniform, federal standards. *See* 49 U.S.C. §§ 47101, 47521; Shaffer Dec. ¶¶ 33-41; Brown Dec. ¶¶ 9, 17; Zuccaro Dec. ¶¶ 17, 19.

Second, the Town justified its Restrictions with deeply flawed data that are noncompliant with federal regulations. To assess airport noise impact on individuals in a uniform manner nationwide, the federal government has established a single metric – yearly DNL – and requires its use by all airports to justify any efforts to reduce airport noise by restricting aircraft access. *See* 14 C.F.R. §§ 161.9(a); 161.205(b); Harris Dec. ¶¶ 25-26; Shaffer Dec. ¶¶ 23, 25. Here, however, the Town instead used a methodology of its own design: a telephone hotline. The Town collected, not sound measurements, but 23,954 hotline complaints, itself a highly misleading number. The noise complaint calls did not come from thousands of households, but from only 633 households – approximately 1.2% of the households in the covered geographic area – with approximately 50% of all calls coming from just 10 households. Harris Dec. ¶¶ 35–37. In addition, the hotline was not open only to those within earshot of the Airport; rather, the Town invited and accepted calls from up to 23 miles away, from people well outside the

immediate environs of the Airport. Harris Dec. ¶¶ 38, 44. In addition, nothing about the complaints themselves indicates if they related to take-offs and landings at East Hampton Airport, or to fly-over noise from aircraft headed to or from other airports. Harris Dec. ¶ 38.

For good reason, the FAA has rejected the notion that complaint data alone can be sufficient to support access restrictions imposed by a local proprietor. *See Aircraft Owners & Pilots Ass'n Members v. City of Pompano Beach, Fla.*, No. 16-04-01 (2005), 2005 WL 3722717, at *28 (Dec. 15, 2005 Director's Determination); FAA Order 5190.6B, ¶ 13.9 (Sept. 30, 2009). Unreliable complaint data lead to unreasonable, arbitrary restrictions.

Significantly, the Town had to turn to a hotline to justify its Restrictions because when it previously studied its noise problem with FAA-approved methodology, it found it had none. *See* Harris Dec. ¶¶ 14, 28, 48. The Town's past studies have identified no area outside the Airport boundaries with an exposure level of DNL 65 dB or higher – the threshold at which the FAA considers noise to become incompatible with ordinary residential land use. Id. In short, federally prescribed methods for noise impact measurement have not yielded data to support the imposition of the Restrictions; they have yielded the opposite.

Third, The Town's "Noisy Aircraft" standard is unreasonable because it is so extreme and excessive. *See* Shaffer Dec. ¶ 36. It defines as "Noisy" even the quietest jet aircraft manufactured today, including the Stage 4 Dassault Falcon 7x operated by Plaintiff Eleventh Street. *See* Jungck Dec. ¶ 5 (Falcon 7x is a state-of-the-art jet that many in the industry refer to as a "whisper jet"); Brown Dec. ¶ 22 (discussing specific aircraft operated by NBAA members generally recognized as quiet but deemed "Noisy Aircraft" under the Town's Restrictions). The fact that even Stage 4 (the quietest in operation) jets are barred under the Town's "Noisy Aircraft" standard exemplifies why this newfangled, local standard conflicts with the federal

scheme for noise regulation, and with federal policy encouraging quiet technology as a way of addressing airport noise. *See, e.g.*, 49 U.S.C. § 47521(5).

The Noisy Aircraft standard is also arbitrary and discriminatory. It is arbitrary because it uses a metric – EPNdB approach levels – that is not a valid indicator of noise that actually occurs in the normal operation of an aircraft. *See* Harris Dec. ¶¶ 39–45. The Noisy Aircraft standard is discriminatory because not all aircraft have published EPBdB certification levels. Under the Restrictions, if an aircraft does not have a published EPNdB certification level, it is not considered a "Noisy Aircraft," regardless of the actual noise level an aircraft produces. *See id.* ¶ 45; Town Compl., Ex. D; *Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81, 91 (2d Cir. 1998) (invalidating access restriction based on size); *San Francisco*, 942 F.2d at 1396–98 (invaliding access restriction based on date when FAA certified aircraft).

Fourth, the Restrictions are unreasonable and conflict with federal law because they create potential safety problems. "[A] restriction that is unsafe is also unreasonable." FAA Decision on 14 CFR Part 161 Study – Proposed Runway Use Restriction at LAX (Nov. 7, 2014) ("LAX Decision"), at 44. In a carefully reasoned decision, the FAA determined that converting a voluntary curfew to a mandatory curfew (as the Town has done here) was unreasonable because the prospect of financial penalties and injunctions imposed factors that "reache[d] into the cockpits of individual aircraft and interact[ed] with safety parameters affecting critical . . . decisions" by pilots. *Id.* at 42–44. The FAA has rejected the imposition of mandatory curfews as unreasonable on other occasions – s*ee* FAA, Final Decision on the Application for a Curfew by Burbank-Glendale-Pasadena Airport Authority (Oct. 30, 2009) ("Burbank Decision"), at 14–20 – and has approved mandatory curfews only for a few airports in limited and special

circumstances, after extensive analysis of safety and national concerns.[10] Here, there is real concern that the Restrictions' mandatory curfews, punishable by fines and injunctions, are unsafe, because of pilot impact, and because the Restrictions may unsafely divert traffic to nearby airports that are unequipped to handle the increased demand. *See* Shaffer Dec. ¶ 35-41; Brown Dec. ¶ 23; Zuccaro Dec. ¶ 19.

Point III
Granting a TRO Is Equitable and Serves the Public Interest

The balance of hardships unquestionably favors an injunction. For Plaintiffs, an injunction now is the only way to ensure they will survive until the Court decides the merits. For the Town, while some residents will undoubtedly be unhappy with an injunction, it nevertheless does no more than preserve the *status quo*. Granting an injunction also serves the public's interest. The FAA supports enjoining the Restrictions. Given the FAA's pervasive and exclusive control over the field of aviation, and that the federal government is charged to act in the public interest, the FAA's view that an injunction is appropriate should be afforded great weight by the Court. *See Arapahoe*, 242 F.3d at 1220 (in arena of aviation regulation, "federal concerns are preeminent"). Further still, the public interest will be served "by enjoining the enforcement of the invalid provisions of [local] law," while the Town, on the other hand, "does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (citation omitted).

[10] The LAX Decision is available at http://www.faa.gov/airports/environmental/airport_noise/part_161/media/Final-Determination-LAX-Part%20161-Application-20141107.pdf. The Burbank Decision is available at http://www.faa.gov/airports/environmental/airport_noise/part_161/media/Burbank_10_30_09.pdf. We can provide copies to the Court if requested.

CONCLUSION

The Court should enjoin the restrictions until it adjudicates the merits of Plaintiffs' action and the FAA Action.

Dated: New York, New York
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LANKLER SIFFERT & WOHL LLP

By: _____

Lisa Zornberg (lzornberg@lswlaw.com)
Matthew Coogan (mcoogan@lswlaw.com)
Jonathan Lamberti (jlamberti@lswlaw.com)
Attorneys for Plaintiffs