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.,

Plaintiffs,

-against-

THE TOWN OF EAST HAMPTON,

Defendant.

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

DEFENDANT'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

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AAIA	The Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47107
Airport	The East Hampton Airport
ANCA	The Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521-47533
Baldwin Dec.	Declaration of Ted Baldwin, dated May 8, 2015
Brief	Plaintiffs' Memorandum of Law In Support of Their *Motion For a Temporary Restraining Order*, filed in this action, *FOEHA, v. The Town of East Hampton*, 15 Civ. 2246 (SJF) (ARL)
Cantwell Dec.	Declaration of Larry Cantwell, Supervisor for the Town of East Hampton, dated May 7, 2015
Complaint	The amended Complaint in this action, *FOEHA, v. The Town of East Hampton*, 15 Civ. 2246 (SJF) (ARL)
Curfew Law	Local Law No. 3 of 2015 of the Town of East Hampton (nighttime curfew on all aircraft) (**Exhibit B** to Plaintiffs' Complaint)
dB	Decibel
DNL	Day-night noise exposure level (a noise metric used by FAA based on computer modeling that averages all noise from aircraft over a one year period to produce a noise "contour" or "footprint" identifying areas exposed to similar noise levels)
Dec.	Declaration
EPNdB or EPNL	Effective perceived noise level in decibels (noise metric used by FAA to measure noise in terms of human annoyance)
Ex.	Exhibit
Extended Curfew Law	Local Law No. 4 of 2015 of the Town of East Hampton (extended curfew for noisy aircraft) (**Exhibit C** to Plaintiffs' Complaint)

FAA	Federal Aviation Administration
Grant Assurances	The series of contractual commitments regarding the operation and management of an airport, which the AAIA (49 U.S.C. § 47107) requires that airports execute in order to receive federal grants
HMMH	Harris Miller Miller & Hanson Inc. d/b/a HMMH, a consultant providing expert noise analysis for the Town
Local Laws	Local Law No. 3 of 2015, Local Law No. 4 of 2015, and Local Law No. 5 of 2015 of the Town of East Hampton (**Exhibits B - D** to Plaintiffs' Complaint)
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INTRODUCTION

Plaintiffs seek to enjoin three noise rules ("Local Laws") that will restrict some aircraft operations at East Hampton Airport ("Airport') in order to address a long-standing noise problem in the East End of Long Island. Plaintiffs claim they will suffer severe economic harm from possible loss of business revenue, potential lay-offs, and the cost and inconvenience of using alternative airports or aircraft. Those claims of economic injury do not amount to irreparable injuries that support a temporary restraining order ("TRO"). More fundamentally, Plaintiffs' motion fails because their case rests on an attempt to rewrite decades of law affirming the authority of local governments such as the Town of East Hampton ("Town") to enact reasonable airport noise rules and rejecting almost every argument Plaintiffs offer in support of their motion.

Plaintiffs say that "local governments have no authority to impose airport noise or access restrictions using their police powers." Brief at 1. That misses the point. The Town exercised its ***proprietary*** power – a power expressly reserved to airport proprietors. *British Airways Bd. v. Port Auth.*, 558 F.2d 75, 85 (2d Cir. 1977) ("Congress has reserved to proprietors the authority to enact reasonable noise regulations, as an exercise of ownership rights in the airport, because they are in a better position to assure the public weal" than FAA). The Second Circuit recognized that

> states and localities retain power ***in their capacity as airport proprietors*** to establish requirements as to the level of permissible noise created by aircraft using their airports, [which] … includes the right to deny use of airports to aircraft on the basis of nondiscriminatory noise criteria.

Global Int'l Airways Corp. v. Port Auth., 727 F.2d 246, 248 (2d Cir. 1984) (emphasis added); *Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 90 (2d Cir. 1998) (affirming restrictions eliminating 47% of helicopter operations, imposing a curfew, and banning helicopters on weekends). Plaintiffs find few cases where a court has struck down a local noise restriction, and those few examples are readily distinguishable.

Although noise rules must be reasonable, nonarbitrary, and nondiscriminatory, the focus of the reasonableness analysis is on whether the noise rule is tailored to the local problem. The Local Laws easily meet that test. There is no genuine dispute that there is a critical noise problem in the Town caused by incessant aircraft overflights, particularly at night and by noisy aircraft. Plaintiffs make no attempt to challenge that fact and offer no evidence to the contrary. There also is no genuine dispute that the Local Laws are reasonably tailored to the noise problem while allowing unfettered and continued access to the Airport for the vast majority (77 percent) of operations. These laws target a substantial local problem and are plainly reasonable.

Plaintiffs attempt to avoid the almost unbroken line of authority by arguing that the Local Laws are inconsistent with two statutes: (1) the Airport and Airway Improvement Act, 49 U.S.C. § 47107 ("AAIA"), which sets forth the commitments (known as "grant assurances") with which airport proprietors must comply if they want to receive federal airport grants; and (2) the Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521-47533 ("ANCA"), which requires local governments that wish to remain eligible for federal grants to follow certain procedures before adopting noise rules. FAA does not agree with Plaintiffs' position. FAA has reasonably concluded that the relevant grant assurances have now expired. This position is consistent with the plain language of the AAIA. FAA also has interpreted ANCA, consistent with legislative history, to mean that the Town may adopt a noise rule without following ANCA's procedures, although to do so would bar future federal funding. The Town informed FAA of its intent to adopt the Local Laws and FAA took no action. It was reasonable for the Town to rely on FAA's interpretations of two statutes FAA administers when the Town adopted the Local Laws.[1]

[1] FAA filed a letter (Document 34 in this case) supporting the TRO. Yet FAA expressly took no position on the merits, and thus offers no support on likelihood of success on the merits. Nor does FAA identify any emergency or other urgent reason to grant the TRO. FAA has had

Plaintiffs greatly overstate the magnitude of impact the Local Laws might have on their business in the very limited time during which the TRO would be in effect. Conversely, if the Local Laws are enjoined, the tens of thousands of residents in the Town and nearby areas will be subjected to unreasonable levels of noise, the impacts from which can never be mitigated. But fundamentally, Plaintiffs fail to meet their heavy burden to show any likelihood of success on the merits and are therefore not entitled to block the enforcement of these important Local Laws that are necessary to protect the essential qualities of peace and quiet that are the core of what makes East Hampton and the East End of Long Island a desirable haven.

FACTUAL BACKGROUND

The Town owns and operates the East Hampton Airport. The Airport offers no commercial service, but serves a range of private recreational, personal and corporate aircraft operations and charter operations by fixed-wing aircraft and helicopters. In recent years, the frequency of operations has increased dramatically. In particular, operations by helicopters have increased by almost 50% in just the last year. Cantwell Dec. ¶¶ 5, 8-11; Cantwell Ex. 1 at 2-5.

Aircraft noise has long been a source of concern and controversy in the Town. The Town is renowned for its peace and quiet and natural beauty. Increased operations by loud jet aircraft and helicopters in particular have disrupted that natural quiet and calm and led to decades of litigation and a growing demand for action by the Town to reduce aircraft noise levels. In the past few years, these calls for action have mushroomed. The Town has received petitions signed by hundreds of residents. It has received resolutions from the leadership in surrounding towns and villages. Town Board members have received thousands of informal complaints. Hundreds

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since late January to evaluate the issues in Case No. 15CV2241 and has had several weeks to consider the Local Laws and evaluate its position. There is nothing urgent about preserving the status quo to allow FAA to mull things over.

of residents have attended public hearings to demand action and testify to the numerous ways that aircraft noise disrupts their lives. Newspaper articles, editorials, and letters to the editor demanding action to reduce aircraft noise appear constantly. Aircraft noise was one of the pivotal issues in the last Town election. Cantwell Dec. ¶¶ 7-12; Cantwell Ex. 1 at 2.

For over a decade, the Town has been studying solutions to the problem of aircraft noise. Cantwell Ex. 1 at 3-9. Prior to 2012, the Town felt constrained by its understanding that conditions attached to its most recent federal grant limited the Town's ability to act. Zornberg Dec. Ex. A. In 2012, what had been an uncertain legal environment became far clearer. FAA, in response to a formal inquiry from then-Congressman Bishop, announced its position on two key legal principles. First, the agency committed to comply with the terms of a 2005 Settlement Agreement between FAA and a community group called the Committee to Stop Airport Expansion, (in which FAA had agreed that certain grant assurances at the Airport would expire on December 31, 2014). Second, the agency announced its interpretation of ANCA: the statute will not apply to the Town if it adopts noise rules after its grant assurances expire on December 31, 2014 – but if the Town takes this path, it will forego future federal airport grants. Pilsk Dec. Ex. 1 (FAA's responses to Congressman Bishop). FAA's legal interpretations removed the two most serious impediments to the Town's ability to adopt local airport restrictions.

Over the course of 2014 and early 2015, the Town engaged in a more focused, deliberate, comprehensive, and very public analysis of the noise problem in light of FAA's legal clarifications. The Town updated old studies, commissioned new studies using a variety of noise metrics and methodologies, and retained nationally respected airport noise consultants to assist the Town. It carefully considered the expert testimony, advice from the business community, concerns of airport users and businesses, and opinions of its constituents. It reviewed data

regarding airport operations and formal complaints logged on the Town's noise complaint management system. It examined whether prior efforts to address noise concerns had been successful, including voluntary and mandatory flight paths, curfews, and other noise rules. It met with representatives of aviation interest groups and FAA to discuss the Town's options. Cantwell Dec. Ex. 1 at 9-21; Baldwin Dec. ¶¶ 9, 27-18. In short, the Town engaged in an exhaustive, comprehensive, and highly-transparent examination of the problem and potential solutions. *Id*. ¶ 38 (Town turned to use restrictions only after decades of exhaustive study).

Ultimately, the Town determined that a serious noise problem existed that had not been addressed by existing noise abatement efforts and that further action was needed. The Town considered more than a dozen options, ranging from the onerous to the purely symbolic. Cantwell Dec. Ex. 1 at 8, n. 47. After much deliberation and public debate, the Town decided that the three Local Laws strike the appropriate balance between providing meaningful noise relief and retaining adequate access to the Airport. Using 2013-2014 data (the full year of data analyzed by Town consultants), the Local Laws would have affected under 23% of total operations, while addressing the cause of over 60% of the complaints logged on the Town's noise complaint system. Cantwell Ex. 1 at 21; Baldwin Dec. ¶ 11. The Local Laws are a carefully-crafted, reasonable compromise that minimizes impacts on Airport uses and maximizes noise benefits to residents. They were enacted under the Town's proprietary authority, consistent with FAA's interpretation of the statutes, which FAA is charged with enforcing.

ARGUMENT

I. Standard For Obtaining A Temporary Restraining Order

Granting a temporary restraining order or preliminary injunction is a "drastic" and "extraordinary" remedy. *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 33 (2d Cir. 1991) (preliminary injunction); *Ram v. Lal*, 906 F. Supp. 2d 59, 68 (E.D.N.Y. 2012) (preliminary

injunction). The standards for issuing a TRO and a preliminary injunction are the same. *Jackson v. Johnson*, 962 F. Supp. 391, 392-393 (S.D.N.Y. 1997). In order to obtain either, a movant must demonstrate: "(1) irreparable harm absent injunctive relief; and (2) either a likelihood of success on the merits, or a serious question going to the merits … with a balance of hardships tipping decidedly in the plaintiff's favor." *Donohue v. Mangano,* 886 F. Supp. 2d 126, 149 (E.D.N.Y. 2012). However, where a TRO or preliminary injunction would affect a government action, the Second Circuit requires the more rigorous "likelihood of success on the merits" standard. *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014). "This higher standard reflects judicial deference toward 'legislation or regulations developed through presumptively reasoned democratic processes.'" *Forest City Daly Housing v. Town of N. Hempstead*, 175 F. 3d 144, 149 (2d Cir. 1999). Accordingly, Plaintiffs "must establish a clear or substantial likelihood of success on the merits." *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007).

II. Plaintiffs Cannot Show A Clear Likelihood Of Success On The Merits

A. The Local Laws Are Not Preempted By Federal Law

Congress gave the federal government exclusive control over airspace management and preempted state regulation of the "price, route, or service of an air carrier," 49 U.S.C. §§ 44701-16, § 41713(b)(1), but expressly reserved to airport proprietors the authority to restrict operations at their airport to address local noise concerns. 49 U.S.C. § 41713(b)(3) (airport operators not preempted from exercising proprietary powers). Courts have reaffirmed this "proprietor's exception" for decades. *Global Int'l*, 727 F.2d at 248 (local governments retain power in their capacity as airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports). The proprietor's exception is narrow in that it applies only to actions by airport proprietors, but airport proprietors have broad authority to regulate noise levels so long as the regulation is "reasonable, nonarbitrary and non-discriminatory." *Nat'l*

Helicopter, 137 F.3d at 87 (affirming weekend curfew from 6 PM to 10 AM and phased ban on all weekend operations).

Applying that standard, courts have affirmed noise rules just like the Local Laws. Nighttime curfews because "[t]he protection of the local residential community from undesirable heliport noise during sleeping hours is primarily a matter of local concern and for that reason falls within the proprietor exception." *Nat'l Helicopter*, 137 F.3d at 92 (affirming helicopter curfew); *see also Santa Monica Airport Ass'n v. Santa Monica*, 481 F. Supp. 927, 938 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir.1981) (upholding curfew and other airport access rules). The Town's Curfew Law (Complaint Ex. B) is no different. Courts have also upheld curfews on noisier aircraft. *Nat'l Aviation v. City of Hayward*, 418 F. Supp. 417, 429-430 (N.D. Cal. 1976) (upholding curfew on noisy aircraft); *Alaska Airlines v. Long Beach*, 951 F.2d 977 (9th Cir. 1992) (ordinance setting noise limits for individual aircraft not preempted) (injunction upheld due to procedural flaws); *Nat'l Helicopter*, 137 F.3d 81. No one can seriously argue that either the Curfew Law or the Extended Curfew Law (Complaint Ex. C) is *per se* preempted.

Courts have also upheld airport noise rules that focus on the noisiest aircraft. *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183 (2d Cir. 2001) (upholding ban on commercial air tour flights by sea planes); *Alaska Airlines*, 951 F.2d 977 (overall cap on number of commercial operations is not preempted); *Global Int'l.*, 727 F.2d 246 (refusing to enjoin an interim noise budget restricting the number of operations by noisy aircraft). Because courts have affirmed outright ***bans*** on noisy aircraft, it follows that a ***less restrictive*** measure like the One-Trip Limit Law (Complaint Ex. D) is also not preempted. *Nat'l Bus. Aviation Ass'n v. City of Naples Airport Auth.*, 162 F. Supp.2d 1343 (M.D. Fla. 2001) (upholding ban on noisy aircraft); *Arrow Air, Inc. v. Port Auth.*, 602 F. Supp. 314 (S.D.N.Y. 1985) (same).

B. Plaintiffs' Attempt To Rewrite Decades Of Law Is Unavailing

Plaintiffs ignore the almost unbroken line of cases affirming the authority of local airports to adopt airport noise rules and they misconstrue the selected cases they do cite. Plaintiffs cite *Global Int'l* and *Arrow Air*, arguing that a local noise rule can only avoid preemption if it is "consistent with" with federal law. Brief at 13-14. This is wrong. *Global Int'l* asks whether there is a ***direct*** conflict between an FAA rule and the local noise rule. 727 F.2d at 251. The Court found that a strict interpretation of conflict preemption "would leave too little leeway for local regulation of cumulative noise exposure, which is … an important component of the federal scheme itself" and upheld the Port Authority's exercise of its proprietary power. *Id.* at 251-252 ("this is not a case in which compliance with the federal and local regulations is physically impossible …"). Plaintiffs cannot show that compliance with federal law and the Local Laws is impossible. And Plaintiffs cite to the Commerce Clause analysis in *Arrow Air*. Brief at 13-14, *citing* 602 F. Supp. at 322. Under its Supremacy Clause, analysis, however, that Court expressly reaffirmed the right of airport proprietors to establish levels of permissible aircraft noise. *Id*. at 319 (ban on certain noisy aircraft not preempted).

Plaintiffs then try to define the proprietor exception test for reasonableness as a "rigorous" test. Brief at 22 (citing *Clay Lacy Aviation v. Los Angeles*, Case No. 00 CV 9255, 2001 LEXIS 24944 at *6 (C.D. Cal July 26, 2001)). However, in *Clay Lacy*, the Court stated:

> Once a proprietor has reached an informed conclusion that an airport has an excessive noise problem, it may mandate a percentage reduction where the percentage chosen is tied to a study indicating how that specific percentage would address the noise problem. Weekday and weekend curfews are permissible. … The prevailing theme is that the regulations must be specifically tied to noise level.

Id. at *7-*8 (upholding ban on aircraft exceeding certain noise levels). The Local Laws plainly meet that standard: they respond to a well-documented noise problem, and they target the type

of noise to which individuals are the most sensitive. Cantwell Ex. 1 at 17-21; Baldwin Dec. ¶ 34 (Town's study was meticulous); *id*. at ¶ 39-40 (Local Laws are tailored to the Town's problem).

The few cases Plaintiffs offer where courts actually struck down local noise rules are readily distinguishable. *City and Cnty. of San Francisco v. FAA*, 942 F.2d 1391, 1398 (9th Cir. 1991) (ban on aircraft based on date of certification was discriminatory because it did not regulate all aircraft with equivalent noise levels); *Santa Monica,* 481 F. Supp. at 944 (ban on certain jets was discriminatory because louder propeller-driven aircraft were not banned); *Nat'l Helicopter,* 137 F.3d at 91 (ban on heavy helicopters was discriminatory because weight is not noise, which was the problem ordinance was intended to address). Here, in contrast, the Curfew applies to all aircraft and the Extended Curfew and One-Trip Limit are based on FAA-determined aircraft noise levels and focus on reducing noise levels. Complaint Ex. B-D.

C. This Court Should Not Consider Plaintiffs' Arguments About Compliance With AAIA And ANCA And Should Defer To FAA's Interpretation Of The Federal Aviation Statutes

Plaintiffs' preemption argument rests primarily on the notion that the Local Laws violate ANCA and specific conditions of grants the Town received from FAA pursuant to the AAIA. This Court should not address the merits of Plaintiffs' AAIA and ANCA preemption arguments because the question of compliance with statutes is not part of a preemption analysis. Moreover, Plaintiffs cannot show a likelihood of success on their arguments challenging FAA's interpretation of the aviation statutes it administers.

1. Plaintiffs' Argument Conflating ANCA And AAIA Compliance With Preemption Analysis Is Incorrect And Immaterial

There is no valid preemption argument. FAA has determined that: (1) AAIA grant assurances that apply to local noise rules are no longer in effect at the Airport; and (2) ANCA

does not prohibit the Town from adopting the Local Laws. Pilsk Dec. Ex. 1 (FAA responses to Bishop). Since neither statute applies, neither statute can preempt action by the Town.

Plaintiffs' constitutional argument (that the Local Laws are unreasonable because they conflict with the AAIA and ANCA) also miss the mark because FAA has already determined that those laws do not bar the Town's actions. The Town acted reasonably in relying on FAA's statutory interpretation. Although Plaintiffs attempt to dismiss FAA's formal responses to Congressman Bishop as an unsigned document, the agency's interpretations are set forth in a public submission to a Member of Congress who sat on the FAA oversight committee, and these responses were simultaneously transmitted to the Town by the agency's senior counsel. Pilsk Dec. Ex. 1. FAA's positions have received considerable public and press scrutiny, but the agency has never wavered from its position. Moreover, in February 2015 (prior to adopting the Local Laws), the Town briefed senior officials at FAA regarding the Town's intention to adopt the Local Laws and made clear that the Town would be relying on FAA's interpretations as previously expressed to Congressman Bishop. Cantwell Dec. ¶¶ 21-22. At no time did FAA tell the Town that its interpretations of the relevant statutes had changed or that the Town would violate FAA statutes if it took its planned action. *Id.* Thus, the Town reasonably relied on FAA's stated position that ANCA and AAIA did not prevent adoption of the Local Laws.[2]

Further, the issue of whether the Town should ***comply*** with ANCA or the AAIA is legally distinct from the question of whether the Town's actions are preempted.

> Although the authority of airport proprietors to enact noise regulations is not preempted by federal law, this authority is not without limits. . . .

[2] *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1983), cited by Plaintiffs, is not relevant. *Lavin* was an attempt by a disgruntled army recruit to estop the government from applying a mandatory retirement age rule based on promises made by an army recruiter. Here, the Town does not seek to estop FAA; it has merely relied on FAA's public interpretation of FAA-administered laws. Plaintiffs cite no law suggesting that that is improper.

> Airport proprietors who exceed their regulatory authority risk having federal funds withheld by the [FAA]. . . . Whether the FAA is required to approve of a local noise regulation is a different question from whether the regulation is constitutional, and the analysis in *City and County of San Francisco* has no application to this case.

Alaska Airlines, 951 F.2d at 982, n.2. *See also Santa Monica*, 481 F. Supp. at 945-946 (considering, and dismissing, challenges to curfew and other noise rules based on alleged violations of the AAIA separate from preemption challenge), *aff'd*, 659 F.2d 100 (9th Cir. 1981). In both cases, the court adjudicated (and affirmed) local noise rules under preemption standard without reference to the AAIA standard. Because ANCA also provides for FAA enforcement under AAIA, the reasoning in the AAIA cases applies to ANCA as well. *See* 49 U.S.C. § 47526 ("Limitations for noncomplying airport noise and access restrictions").

Plaintiffs cite *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1220 (10th Cir. 2001), for the proposition that the AAIA preempts local noise rules. Brief at 18. *Arapahoe* does not hold, or even suggest, such a rule. The Court in *Arapahoe* simply held that a prior state court decision finding that the airport proprietor was not preempted from adopting a noise rule did not collaterally estop FAA from finding that the airport had violated its AAIA obligations.

The separation of compliance from preemption makes sense for two reasons. First, there is no private right of action to enforce either the AAIA or ANCA. *Sound Aircraft Servs. v. Town of E. Hampton*, 192 F.3d 329 (2d Cir. 1999) (no private right of action to enforce grant assurances under AAIA); *E. Hampton Airport Prop. Owners Ass'n v. Town Bd. of E. Hampton*, 72 F. Supp. 2d 139, 146 (E.D.N.Y. 1999) (same).[3] It would frustrate Congress' intent to allow

[3] Although no reported case has addressed whether ANCA supports a private right of action, two unreported cases held that it does not. *Horta, LLC v. San Jose*, Case No. C 02-04086 JF, 2008 U.S. Dist. LEXIS 111151 *11 (N.D. Cal. 2008) ("Congress did not intend to create a private right of action for ANCA violations."); *Tutor v. Hailey*, Case No. CIV-02-475-S-BLW, 2004 U.S. Dist. LEXIS 28352 *26-27, (D. Idaho 2004) (no implied private right of action).

Plaintiffs to circumvent a prohibited private right of action through a Supremacy Clause claim. *Armstrong v. Exceptional Child Ctr., Inc.*, 191 L. Ed. 2d 471 (2015) (denying claim for injunction based on preemption when Congress did not provide private remedy).

Second, Plaintiffs can obtain all of the relief they need in their separate litigation against FAA. If a court finds that they are correct that FAA's interpretations of the AAIA and ANCA are wrong, FAA could, if it so chose, initiate appropriate administrative enforcement actions against the Town. FAA also could seek preliminary injunctive relief if it had a basis to believe there was a violation of laws which the agency administers. Plaintiffs' argument is built on a house of cards. First, they assert that they will prevail in another case in showing that FAA exceeded its delegated authority in interpreting the AAIA and ANCA; second, once they win that argument, they assume that FAA will elect to take enforcement action; ***and*** third, if FAA takes such action, Plaintiffs assume FAA will find a violation. Plaintiffs need to prevail at all three steps to demonstrate a strong likelihood of success. That is simply too much supposition and speculation to find a strong likelihood of success on the merits.

2. The Town Reasonably Relied on FAA's Interpretations

Plaintiffs argue that FAA's interpretations set forth in a communication to a Member of Congress were unreasonable. This is incorrect. FAA's positions are correct and provided a rational basis for the Town to proceed.

a. <u>FAA Had The Authority To Limit The Duration Of The Town's Grant Assurances</u>

Plaintiffs mischaracterize the 2005 Settlement Agreement as an abdication of mandatory enforcement authority. Brief at 18-21.[4] In the 2005 Settlement Agreement, FAA defined the

[4] Plaintiffs rely on an affidavit by Kirk Shaffer, a former political appointee, who opines that FAA's positions at issue here are unprecedented and inconsistent with FAA policy as he understands it. The opinions of a paid expert opining on what FAA could, should, or might have

duration of several of the Town's obligations under the AAIA.[5] Pilsk Dec. Ex. 3 at ¶ 4. There is nothing in the AAIA that restricts FAA's authority to define the duration of any particular airport proprietor's grant assurances. The only applicable mandatory duty the AAIA imposes on FAA is to obtain an assurance "in a form satisfactory to the Secretary," providing that "the airport will be available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1). The Town provided those assurances when it obtained the 2001 grant (and all prior grants). Accordingly, FAA fully discharged its duty.

Otherwise, the AAIA delegates to FAA considerable discretion to "prescribe requirements for sponsors that the Secretary considers necessary," 49 U.S.C. § 47107(g)(1)(A). *Id.* at § 47107(a) (FAA may accept assurances in a form "satisfactory to the Secretary"). That discretion includes the authority to define the duration of grant assurances, and Plaintiffs cite no authority to the contrary.[6] The Justice Department was well within its plenary authority to settle the litigation by agreeing to limit certain of the Town's obligations under AAIA. *See* 28 U.S.C. §§ 516, 518, 519. The cases cited by Plaintiffs to limit that authority are inapposite. *Cf. Exec. Bus. Media v. U.S. Dep't of Defense*, 3 F.3d 759 (4th Cir. 1993) (settlement agreement could not

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done both before and after his short tenure at FAA are simply immaterial to assess the reasonableness of what experienced FAA officials decided. Mr. Shaffer may not agree with the substance of the 2005 Settlement Agreement (executed prior to his tenure) or the positions articulated by agency officials in 2012 (after his tenure), but the fact is that FAA did take those positions, and Mr. Shaffer's successor, who met with Town officials earlier this year, did nothing to disavow those positions.

[5] FAA confirmed in its communication to Congressman Bishop that the effect of the 2005 Settlement Agreement is that some of the Town's grant obligations "expire" at the end of 2014.

[6] FAA administrative decisions cited by Plaintiffs are not relevant. *Platinum Aviation & Platinum Jet Ctr. BMI v. Bloomington-Normal Airport Auth., Ill.*, did not involve a contract with FAA. It involved a contract between the airport proprietor and a tenant that violated grant assurances, and FAA declined to affirm the contract. The agreement in *In re Compliance with Fed. Obligations by the City of Santa Monica, Cal.*, expressly incorporated all grant assurances and did not limit the duration of any grant assurance as the 2005 Settlement Agreement did.

require action prohibited by department regulations); *U.S. v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008) (same). FAA and the Justice Department acted within their discretion.

b. The Town Reasonably Relied On FAA's Conclusion That ANCA Does Not Prohibit The Town From Adopting Local Noise Rules So long As The Town Accepts The Loss Of Federal Funding

Plaintiffs correctly quote ANCA as setting forth procedures for "airport noise and access restrictions" imposed by "airports." Brief at 16-17. But Plaintiffs ignore other sections that direct FAA to withhold grant funds and deny eligibility for future grants if an airport proprietor does not comply with ANCA. 49 U.S.C. § 47524(e) and § 47526. *See also* 14 C.F.R. § 161.505 (same). *Schwartz v. Romnes*, 495 F.2d 844, 849 (2d Cir. 1974) (statutes must be read as a whole, with effect given to all provisions, looking at the overall structure and purpose of the statute and its legislative history). ANCA provides specific ***and limited*** enforcement mechanisms in the event a proprietor does not follow the procedures outlined in Section 47524. "[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Exceptional Child Ctr.*, 191 L. Ed. 2d at 479. Thus, Congress created a clear choice for airport proprietors: comply with ANCA or lose eligibility for federal funding.

The legislative history of ANCA is clear. Congressman Oberstar, sponsor of the legislation and Chairman of the Aviation Subcommittee, explained that "Airports which impose unapproved access restrictions after October 1990 would become ineligible for funds from the Airport Improvement Program and may not impose Passenger Facility Charges." Pilsk Dec. Ex. 5 (Cong. R. E3694 (1990)). *FEA v. Algonquin SNG, Inc.* 426 U.S. 548, 564 (1976) (statement by a sponsor of legislation is accorded "substantial weight"). Moreover, FAA has long agreed with that understanding. Pilsk Dec. Ex. 4 (Pickard Memorandum) ("imposition of restrictions subject to ANCA without complying with Part 161 would affect the airport's eligibility to receive Federal funds and passenger facility charges indefinitely, unless restrictions imposed in violation

of ANCA are rescinded."). That position is precisely what FAA restated in its correspondence to Congressman Bishop: " … 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] in proposing new airport noise and access restrictions." Pilsk Dec. Ex. 1 at 1 (*citing* 49 U.S.C. § 47524(e)).

Moreover, the Second Circuit has rejected preemption challenges to local noise rules adopted after ANCA was enacted, but where the airport proprietor did not comply with ANCA. *SeaAir*, 250 F.3d 183 (restrictions on seaplane tour operations); *Nat'l Helicopter*, 137 F.3d 81. FAA's interpretation of ANCA set forth in the answers to Congressman Bishop is neither new nor contrary to ANCA. At worst, ANCA is ambiguous because it does not address enforcement other than by withholding grant eligibility. *City of Naples Airport Auth. v. FAA*, 409 F.3d 431, 434-35 (D.C. Cir. 2005) (ANCA is ambiguous on relationship between complying with ANCA and withholding grant funds under the AAIA; upholding ban over FAA objections under AAIA).

D. The Local Laws Are Reasonable, Nonarbitrary, And Not Unjustly Discriminatory

Plaintiffs advance additional arguments that the Local Laws are constitutionally unsound. Brief at 21-25. Each such argument has been rejected by other courts and is without merit.

1. The Town's Reliance On Complaint Data Is Reasonable

Plaintiffs claim it was constitutionally unreasonable for the Town not to define the noise problem using a specific metric and a specific threshold to measure noise impacts. Brief at 22. Plaintiffs argue that FAA has established a single metric (the yearly day-night noise exposure level expressed in decibels ("DNL"))[7] and that FAA ***requires*** the use of this metric to justify any

[7] DNL, short for "day-night noise exposure level," is a noise metric based entirely on computer modeling that averages all noise from aircraft over a one-year period to produce a noise "contour" or "footprint" identifying areas exposed to similar noise levels.

noise restrictions. *Id*. Plaintiffs further imply that FAA ***prohibits*** any local noise rule absent a showing of noise exposure above DNL 65 decibels ("dB"). *Id*. at 23. Plaintiffs are wrong.

It is true that FAA established the DNL metric and the noise standard of 65 dB for purposes of planning studies submitted under ANCA and the Airport Noise and Safety Act of 1979, 49 U.S.C. § 47502(1)-(3), and its implementing regulations, 14 C.F.R. Part 150 (the "Part 150 Regulations"). But the FAA regulations make clear: neither the metric nor the threshold is binding on local governments making decisions on appropriate noise levels in their communities:

> The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State or local law. … FAA determinations under part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.

14 C.F.R. Pt. 150, App. A, Tbl. 1 n.*. *See also* 14 C.F.R. Pt. 150, App. A § A150.101(b). Moreover, the Part 150 program (a federally-funded planning program for noise compatibility, which is required if an airport proprietor wants to apply for federal grants for noise mitigation) is ***voluntary***. 49 U.S.C. §§ 47503, 47504. Like hundreds of airports nationwide, the Town did not volunteer to participate in this program and did not seek FAA grants for noise mitigation.

Courts have rejected the argument that FAA's recommended noise metric and its preferred noise threshold are binding in all cases. *Helicopter Ass'n Int'l v. FAA*, 722 F.3d 430, 436 (D.C. Cir. 2013) (affirming FAA-imposed helicopter routes to address noise problems below DNL 45 dB because there is no "statutory or regulatory provision that sets 65 dB as the minimum noise level that must be reached before FAA can regulate the impact of aircraft noise on residential populations."); *NBAA*, 162 F. Supp. 2d 1343 (rejecting challenge to ban on noisy

jets based on noise impacts below DNL 60 dB).[8] Plaintiffs' argument that there are no residential areas with an exposure level of DNL 65 dB or higher is of no legal consequence.

Plaintiffs argue that FAA does not permit a proprietor to use complaint data to justify adopting a noise restriction. Brief at 23. This argument misstates both reality and current law. As a general matter, complaint data is considered a reliable and appropriate way to assess the degree to which individuals in a specific community are affected by airport noise. Baldwin Dec. ¶¶ 13, 19-20. Moreover, courts have rejected recent attempts by some of these same Plaintiffs to challenge the use of complaint data. *Helicopter Ass'n Int'l*, 722 F.3d at 436 ("the FAA could reasonably accept these comments [hundreds of complaints] from individual members of the public … as empirical data of a noise problem.") (internal citation omitted); *NBAA*, 162 F. Supp. 2d at 1353 ("However 'unscientific' [Plaintiff] might consider such complaints, there is nothing in the record that suggests they are an inappropriate consideration for an entity that is charged with assessing and addressing the noise problem at a particular airport.").

Plaintiffs fault the Town's complaint data, arguing that the Town "solicited" complaints, that complaints came from areas far from the Airport, and that a few households accounted for a disproportionate number of complaints. Brief at 22-23. The record is clear: the Town did not "solicit" complaints; it simply established a complaint hot line and made the public aware of its existence. Cantwell Dec. ¶¶ 15-16; Baldwin Dec. ¶ 13. The Town Board was aware of, and fully disclosed the geographic and household distribution of the complaints. Cantwell Dec. ¶ 17. And the converse is also true: there are residents who did not register formal complaints who have been adversely affected by aircraft noise and support the Town's efforts to reduce noise

[8] Mr. Harris posits that the other "accepted" method for evaluation of community noise impacts is to conduct a study pursuant to ANCA and its regulations at 14 C.F.R. Part 161. Harris Dec. ¶ 25. As discussed above, however, the Town was not required to comply with ANCA and therefore, that statute does not restrict the Town's ability to adopt the Local Laws.

levels. *E.g.*, Saltoun Dec. at ¶¶ 12-13. Those facts do not detract from the broader point that many thousands of East End residents made complaints and/or experience disruptive noise levels from aircraft overflights. Saltoun Dec. ¶ 9; MacNiven Dec.¶¶ 6-7; Cantwell Dec. ¶ 12.

Further, the Town did not rely on complaint data alone. The Town conducted several noise studies over the past decade. Cantwell Dec. ¶ 18 & Ex. 1 at 3-9 (history of noise studies at the Airport, many of which examined and quantified noise using the DNL metric); Baldwin Dec. ¶ 23. The Town considered multiple sources of information – noise modeling, complaint data, community meetings, formal letters and comments to the Town Board, and testimony from residents – in order to define the problem and craft a precise solution. Cantwell Dec. ¶¶ 8-12 & Ex. 1 at 2. The Town did not rely upon a single data source. This is exactly the methodology FAA used when it developed the mandatory North Shore helicopter routes, which the D.C. Circuit recently affirmed. *Helicopter Ass'n Int'l*, 722 F.3d at 436. There is nothing improper, much less unconstitutional, about the Town considering complaint data as part of its effort to develop meaningful solutions to a legitimate noise problem.

2. The 91 EPNdB Threshold Defining "Noisy" Aircraft Is Reasonable

Plaintiffs argue that the Town Laws are unreasonable and arbitrary because the definition of noisy aircraft – aircraft with a published noise rating of 91 EPNdB ("effective perceived noise level in decibels") or more – is unreasonable and arbitrary. Brief at 24. Plaintiffs are wrong. EPNdB (also referred to as "EPNL") is a metric that was specifically developed to assess precisely what concerns the Town – how individual aircraft annoy people. As FAA explains:

> EPNL is a single number measure of the noise of an individual airplane flyover that approximates laboratory annoyance responses. . . . The EPNL computation process effectively yields a time integrated annoyance level.

FAA, Advisory Circular 36-4C, Noise Standards: Aircraft Type and Airworthiness Certification, at ¶ 192(a) (available at http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC36-4C.pdf). FAA publishes EPNdB levels for all certificated transport category aircraft, *i.e.*, all aircraft types except for light, single-engine propeller aircraft types and certain light helicopters, which FAA does not rate because they are considered too quiet to regulate for noise purposes. Baldwin Dec. ¶¶ 25-26. EPNdB is an appropriate way to classify aircraft as "noisy" for purposes of a law intended to reduce the impacts of aircraft noise on a community. *Id.* ¶¶ 43, 47.

The Town selected the threshold of 91 EPNdB as the line between noisy and not noisy because it restricts operations by aircraft that tend to generate the most complaints while allowing continued operations of aircraft that generate fewer complaints. As a practical matter, this threshold allows unrestricted operations by the most modern and quietest aircraft types. Cantwell Dec. Ex. 1 at 18-19 (91 EPNdB threshold based on several factors including review of comparable restrictions at other airports, examination of the actual fleet at East Hampton Airport, and review of actual noise disturbance caused by aircraft operating at the Airport).

The selection of this metric for the Extended Curfew Law and the One-Trip Limit Law is not "extreme" or "excessive." *Cf.* Brief at 23. When applied to actual operations data at the Airport in 2013-2014, the Extended Curfew Law would have affected only 4.3% (1,243 of 25,714) of the total operations during that period. Likewise, the One-Trip Limit Law would have affected only 13.4% (3,443 of 25,714) of the total operations. Baldwin Dec. ¶ 11. Over 77% of operations during the 2013-2014 year would have been unaffected by the three Local Laws. *Id.* By contrast, in *Nat'l Helicopter*, the court ***affirmed*** a measure mandating a 47% reduction in total operations stating:

> While we agree that the mandated 47 percent reduction in operations was not backed by any study reflecting the appropriate scenario or

> demonstrating that such specific percentage of noise reduction was the ideal, we also believe that the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed. . . . It is unrealistic to insist that a proprietor justify by some scientific method a specific percentage reduction in operations in order to achieve the general result of a reduction of excessive noise.

137 F.3d at 90-91. Courts also have upheld total bans on loud aircraft, *e.g.*, *NBAA*, *supra* (banning all Stage 2 aircraft) and a total weekend ban on helicopters, *Nat'l Helicopter*, *supra*. There is, therefore, nothing extreme, unique, or certainly unconstitutional, about the Town's decision to limit operations by aircraft with published EPNdB ratings of 91 and above.

Plaintiffs emphasize that Plaintiff Eleventh Street's Falcon 7x, which is classified by FAA as a "Stage 4" aircraft, is deemed a "noisy" aircraft under the Town's standard. But FAA stage classifications[9] are adjusted to account for weight and are not a good measure of absolute noise levels. Baldwin Dec. ¶ 44-45. To highlight the absurdity of Plaintiffs' argument, the Boeing 747 freighter is also classified as "Stage 4." *Id*. ¶ 46. The Falcon 7x may be quiet relative to its weight, but it is not quiet on an absolute basis relative to other aircraft operating at the Airport. *Id*. ¶ 45. In any event, a noise rule is not unreasonable or discriminatory under the Supremacy Clause just because it may restrict some aircraft while allowing less noisy aircraft to operate. *NBAA*, 162 F. Supp. 2d at 1353.

E. The Local Laws Do Not Raise Any Substantial Safety Issues

Plaintiffs argue that the Local Laws raise safety concerns because pilots may fly in an unsafe manner to beat the curfew or may use alternative airfields that are not safe for the potential volume of operations. Brief at 24-25. The Ninth Circuit rejected this argument:

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[9] FAA has established "stage classifications" in its regulations at 14 C.F.R. Part 36. These classifications establish noise limits for certification purposes. The standards, measurement locations and procedures, noise limits and even the noise metrics used vary according to combinations of aircraft design and characteristics. *See* Baldwin Ex. 1 at 15-16.

> [The District Court] noted that the [noisy aircraft] ordinance did not regulate airspace or flight. It reasoned that the tendency to violate a certain law does not render the law improper or illegal. These arguments are sound. Appellants have cited no authority which convinces us that the district court was incorrect. The principles of comity and federalism militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted. We have no warrant to strike down an ordinance merely because the public reacts to it in a manner inconsistent with federal law.

Santa Monica, 659 F.2d at 105.[10]

The Local Laws will not force any pilot to operate in an unsafe manner. As in *Santa Monica*, nothing in the Local Laws alters the fact that pilots retain full control of their operations, including the duty of flying safely. *Id.* All three Local Laws include an exception for operational or medical emergencies. *See* Complaint Ex. B, C & D at § 75-38(E). Plaintiffs' speculative fears about possible responses to the Local Laws by future pilots do not make local laws unconstitutional. Courts have rejected similar arguments precisely because they would have the effect of nullifying a proprietor's ability to adopt any meaningful noise rules. *Alaska Airlines*, 951 F.2d at 985 ("Virtually any effort to impose specific limitations on flights and noise levels could be subject to similar attacks and create endless litigation. We find that each of the challenged provisions is sufficiently supported by a reasonable and legitimate justification.").[11]

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[10] Plaintiffs' reliance on an FAA decision denying a Part 161 request for a curfew based on similar concerns is unavailing. Part 161, which implements ANCA, does not apply to the Local Laws. FAA's fact-specific decision regarding an operational restriction at one of the world's largest airports is inapplicable to whether the Local Laws are constitutional.

[11] Mr. Shaffer argues that the Local Laws could have negative impacts on the National Airspace System because of the "important" role of the Airport in the National Airspace System. Mr. Shaffer offers no concrete evidence of what those impacts might be. It is difficult to see how restrictions on less than a quarter of the flights at one of several airports on Long Island could harm the National Airspace System. In just the New York metropolitan area, LaGuardia, JFK International, Teterboro, and Westchester County all have noise restrictions and operate safely.

Indeed, if Plaintiffs' argument were accepted, no curfew and no restriction could ever be adopted because someone could always speculate about safety concerns.

F. The Local Laws Do Not Violate The Commerce Clause

Plaintiffs pled a Commerce Clause claim, Complaint ¶ 125, but did not raise it in their Brief. At any rate, Plaintiffs cannot demonstrate likelihood of success on that claim. The Second Circuit has held that local noise rules are not subject to Commerce Clause challenges because Congress has expressly permitted airport proprietors to adopt local noise rules. *Nat'l Helicopter*, 137 F.3d at 92 (rejecting Commerce Clause challenge to several helicopter operating restrictions); 49 U.S.C § 41713(b)(3) (proprietary powers are not preempted).

III. Plaintiffs Cannot Demonstrate Irreparable Injury

In order to show irreparable injury, the mere possibility of harm is insufficient. *Borey*, 934 F.2d at 34. A TRO should not "issue upon a plaintiff's imaginative, worst case scenario of the consequences flowing from the defendant's alleged wrong." *Ram*, 906 F. Supp. 2d at 68. Only in the most serious cases where monetary loss will likely force a party into bankruptcy, and financial compensation will not fully compensate the injury, will economic harm justify issuing a TRO or preliminary injunction. *See Borey*, 934 F.2d at 34.

Plaintiffs claim they have no damages remedy against the Town. Brief at 8. While the Town is reluctant to acknowledge any damages remedy, and does not waive any defenses it may have, Plaintiffs' claim under the Commerce Clause could support a damages claim under 42 U.S.C. § 1983. *Meekins v. City of New York*, 524 F. Supp. 2d 402, 410-11 (S.D.N.Y. 2007) (considering Section 1983 claim based on Commerce Clause, but dismissing on the merits); *C & A Carbone v. Clarkstown*, 770 F. Supp. 848, 852 (S.D.N.Y. 1991). Further, there appears to be support for the argument that the Eleventh Amendment would not bar such a claim against the Town. *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp. 2d 421, 427 (N.D.N.Y. 2005) ("Of

course, counties, cities, towns and villages do not enjoy Eleventh Amendment immunity.")[12] Because the losses claimed by Plaintiffs relate to an expected drop in business and can be calculated, it is far from clear that Plaintiffs do not have an adequate remedy at law. *CollaGenex Pharms., Inc. v. IVAX Corp.*, 375 F. Supp. 2d 120, 132 (E.D.N.Y. 2005).

Plaintiffs' case for an injunction rests on their fears that the Local Laws will cause them to lose revenues and goodwill and lay off employees. Yet, Plaintiffs' Declarations are replete with qualifiers like "fear," "likely," "possible," "may," "likely would," and "could be." *E.g.*, Renz Dec. ¶¶ 18, 21; Jungck Dec. ¶¶ 17, 24; Vellios Dec. ¶¶ 16, 20; Herbst Dec. ¶¶ 15b, 15e, 20; Zuccaro Dec. ¶ 20; Carlson Dec. ¶ 23; Ashton Dec. ¶¶ 25, 26. Plaintiffs' losses are based on speculative fears, not proof of actual lost business.

Moreover, Plaintiffs must show more than a potential loss of business to justify emergency relief. The cases cited by Plaintiffs involve the termination of contracts that were the entire basis for a business. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (termination of license to distribute plaintiff's sole product); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (same). When a plaintiff is threatened with the loss of only one of several products, courts have denied emergency relief, even when plaintiffs faced a substantial loss in revenue. *CollaGenex Pharms.*, 375 F. Supp. 2d at 132 (no TRO for loss of access to a product that accounted for 80% of revenues where damages resulted from "'an expected sharp drop in revenue' which can be

[12] Plaintiffs rely on *Nat'l Helicopter*, 952 F. Supp. at 1020 n.4 to support their view that the Eleventh Amendment would bar a damages claim. Brief at 11. But *Nat'l Helicopter* relied on *U.S. v. New York*, 708 F.2d 92 (2d Cir. 1983), which involved claims against the State of New York itself and did not address claims against a town. In *Pankos Diner Corp. v. Nassau Cnty. Leg.*, 321 F. Supp. 2d 520, 524 (E.D.N.Y. 2003) the County did not contest the Eleventh Amendment issue. *Cablevision Sys. Corp. v. E. Hampton*, 862 F. Supp. 875, 888-89 (E.D.N.Y. 1994), is inapposite because there was a specific statute that precluded money damages.

quantified. . . .") (citation omitted).[13] Similarly, the loss of goodwill is only considered an irreparable injury if damages cannot otherwise be proven or if loss of one product seriously damages plaintiff's ability to sell other products. *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995) (loss of license to distribute Mighty Morphin Power Ranger books).

Plaintiffs cannot make any of those showings. None of the Plaintiffs has a legal right to serve the Airport at any specific level of service. The Local Laws will not terminate any of Plaintiffs' businesses. They will affect only a limited number of operations at one airport. They do not prevent any Plaintiff from using any other airport, using different aircraft, or continuing to serve any of the other markets or customers they serve. As in *CollaGenex*, Plaintiffs may suffer a loss of business from one airport or one sector of the industry, but that does not impair their ability to operate in the other markets and airports they serve, including airports very close to East Hampton. Indeed, the helicopter operator Plaintiffs all admit that they serve other markets besides East Hampton. Ashton Dec. ¶ 4; Dec.¶ 4; Vellios Dec. ¶ 4; Carlson Dec. ¶ 4. Plaintiffs may lose some revenue, but they are not deprived of their ability to conduct business.[14]

Moreover, Plaintiffs fears of dire losses are overstated. Over the course of a month, the three regulations will affect approximately 346 operations (i.e., 173 round trips). Baldwin Dec.

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[13] *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1992) and *Hillside Medical Lab. v. Perales*, No. 88 Civ. 5644, 1988 U.S. Dist. LEXIS 10536 (S.D.N.Y. 1988), also cited by Plaintiffs, are inapposite. *Nemer Jeep-Eagle* did not apply a TRO standard, but the more "flexible" standard for a specific performance pending arbitration. *See Suchodolski Assocs. v. Cardell Fin. Corp.*, No. 03 Civ. 4148, 2004 LEXIS 1427 (S.D.N.Y. 2004) (distinguishing *Nemer Jeep-Eagle* as the "wrong standard" for preliminary injunction). *Hillside Medical* involved the refusal of a state agency to reimburse plaintiff for medical services already rendered, thus cutting off plaintiff's cash flow; it did not involve loss of potential future business.

[14] The Declarations of Eleventh Street and Sabin Metal Corporation describe at most, the inconvenience of not being able to use the most convenient airport in a preferable aircraft. Sabin Dec. ¶ 8; Jungck Dec. ¶ 17. Personal inconvenience is not an irreparable injury. *Hassan v. Slater*, 41 F. Supp. 2d 343, 348-49 (E.D.N.Y. 1999) (denying TRO to block closure of LIRR station despite hardships on people with disabilities).

at ¶ 11. This is less than 1% of the annual operations at the Airport. Many of the Plaintiffs can continue to provide unlimited service to the Airport in compliant aircraft and non-curfew hours, and face no legal restrictions serving any or all of the three nearby airports. Stumpp Dec. at ¶¶ 10-13. Although Plaintiffs claim there are operational and other concerns about using those airports, those three airports offer a viable alternative means for Plaintiffs to serve the East End of Long Island and are already used by at least some of the Plaintiffs.[15] *Id.* at ¶¶ 10-14. Those alternative airports will remain attractive to customers who want to avoid traffic or having to take the train by flying most, if not all, of the way to their destination. *Id.* Plaintiffs may fear that those alternatives will not work, but they have not proven they cannot.[16] Operators at the Airport have experienced volatile market conditions in recent years without going out of business. *Id.* at ¶ 18. The Town Laws may compel changes in the way Plaintiffs do business, but those changes do not amount to irreparable injury.

IV. The Balance Of Harms Tips Decisively In Favor Of Denying An Injunction

The injuries Plaintiffs claim are purely financial and can be mitigated by changing their way of doing business or through damages. On the other hand, the Local Laws serve to protect the truly irreplaceable qualities of peace and quiet in the East End – qualities which are the mainstay of the local economy. The peace and quiet of the Hamptons is the Town's brand, and one of the things that makes East Hampton such a desirable vacation area. The association of East Hampton with the perpetual irritant of aircraft noise would destroy that brand and irreparably harm the Town, its residents, and its visitors. For individuals and families, those days or weeks of peace and calm may represent their entire summer vacation. If the quiet they

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[15] *E.g.*, http://analarcorp.com/helicopter-rates/ (accessed on May 8, 2015); http://www.libertyhelicopterscharter.com/helicopter-charter-rates/ (accessed on May 8 2015).

[16] For Sound Aircraft, the Local Laws will not have the severe impact it fears because many operations will adjust to the Local Laws and continue to use the Airport. Stumpp Dec. at ¶ 17.

expect is destroyed by aircraft noise, it is gone and can never be replaced. In the end, the convenience of a few and some of the profits of Plaintiffs should not be allowed to destroy the peace and quiet amid the natural beauty of the East End of Long Island, which is the very lifeblood of this Town.

CONCLUSION

For the foregoing reasons, the Town respectfully submits that Plaintiffs' Motion for a Temporary Restraining Order should be denied.

Dated: May 8, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused true and correct copies of the following documents to be served on May 8, 2015, via the Court's electronic filing system upon all counsel of record:

- Defendant's Opposition to Motion for Temporary Restraining Order, dated May 8, 2015
- Expert Declaration of Peter Stumpp, dated May 8, 2015
- Expert Declaration of Ted Baldwin, dated May 8, 2015
- Declaration of Larry Cantwell, dated May 7, 2015
- Declaration of Tom MacNiven, dated May 7, 2015
- Declaration of Munir Saltoun, dated May 5, 2015
- Declaration of W. Eric Pilsk, dated May 7, 2015

Dated: May 8, 2015

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/S/

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