UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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IN RE COMMITTEE TO STOP AIRPORT EXPANSION,
PAT TRUNZO, JR., and PAT TRUNZO III

Petitioners.

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PETITION AND MEMORANDUM IN SUPPORT OF WRIT OF MANDAMUS ON BEHALF OF COMMITTEE TO STOP AIRPORT EXPANSION, PAT TRUNZO, JR., and PAT TRUNZO III

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CORPORATE DISCLOSURE STATEMENT

The Committee to Stop Airport Expansion is an unincorporated association of people living near and in the vicinity of the East Hampton Airport in Suffolk County, New York. It does not issue stock and has no parent corporation.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ANALAR CORPORATION, HELICOPTER ASSOCIATION INTERNATIONAL, INC., HELIFITE SHARES LLC, LIBERTY HELICOPTERS, INC., and SHORELINE AVIATION, INC.,

MEMORANDUM & ORDER
15-CV-0441(JS)(ARL)

Plaintiffs,

-against-

THE FEDERAL AVIATION ADMINISTRATION and MICHAEL P. HUERTA, FAA Administrator, in his official capacity,

Defendants.
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APPEARANCES

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SEYBERT, District Judge:

Presently pending before the Court are motions to intervene filed by non-parties the Committee to Stop Airport Expansion, Pat Trunzo, Jr., and Pat Trunzo III (collectively, the "Committee") and the Town of East Hampton (the "Town"). (Docket Entries 24, 39.) For the following reasons, the motions to intervene are GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiffs Friends of the East Hampton Airport, Inc. ("FOEHA"), Analar Corporation ("Analar"), Helicopter Association International, Inc. ("Helicopter Association"), Heliflite Shares LLC ("Heliflite"), Liberty Helicopters, Inc. ("Liberty"), and Shoreline Aviation, Inc. (collectively, "Plaintiffs") commenced this action against the Federal Aviation Administration ("FAA") and its administrator, Michael P. Huerta ("Huerta" and collectively, "Defendants") seeking declaratory and injunctive relief with respect to the East Hampton Airport (the "Airport"), a "public-use, federally funded airport" that is owned, operated, and sponsored by the Town. (See generally Compl., Docket Entry 1, ¶ 42.) FOEHA is a non-profit corporation that "represents the interests of local regional fixed wing aircraft and helicopter

owners, operators, lessors, pilots and their passengers and customers and local businesses that seek to keep [the] Airport open to all types, kinds and classes of aircraft activities and flying services . . . ." (Compl. ¶ 11.) The remaining Plaintiffs are charter operators that frequently use the Airport and a trade association with members that provide helicopter services at the Airport. (Compl. ¶¶ 12-16.)

I. Factual Background[1]

On September 25, 2001, the Town accepted a federal grant of $1,410,000 pursuant to the Airport Improvement Program ("AIP") for the development of the Airport. (Compl. ¶¶ 25, 46.) Upon its acceptance of the grant, the Town was required to comply with certain grant assurances for twenty years from the date of the Town's acceptance of federal funds.[2] (Compl. ¶¶ 29, 47-48.) One such grant assurance provides that "'the airport will be available for public use on reasonable conditions and without unjust discrimination,'" (the "Public Use Grant Assurance") (Compl. ¶¶ 29, 47 (quoting 49 U.S.C. § 47107(a)(1)).)

In or about 2003, the Committee commenced an action against the FAA and Department of Transportation challenging the

[1] The following facts are taken from the Complaint and are presumed to be true for the purposes of this Memorandum and Order.

[2] Thus, the Town was required to comply with certain grant assurances until September 25, 2021.

FAA's approval of the Town's 2001 airport layout plan (the "Layout Plan Action").[3] (Compl. ¶ 50.) In 2005, the parties to the Layout Plan Action executed a settlement agreement in which the FAA agreed not to enforce certain grant assurances, including the Public Use Grant Assurance, with respect to the Airport after December 31, 2014 (the "Settlement Agreement"). (Compl. ¶ 53.) However, the Settlement Agreement provides that all grant assurances will be enforced if the Town is awarded additional AIP funding. (Compl. ¶ 54.)

In or about December 2011, United States Representative Timothy Bishop submitted a list of questions to Huerta with respect to "the FAA's position on the legal effect of the 2005 Settlement Agreement on the FAA, and on [the Town's] ability to impose airport access and noise restrictions after December 31, 2014." (Compl. ¶¶ 63-64.) In or about 2012, the FAA provided written responses to Bishop's inquiries (the "Bishop Responses"). (Compl. ¶ 65.) The Bishop Responses state that: (1) the FAA considers itself legally bound by the Settlement Agreement; (2) the Settlement Agreement waives the FAA's enforcement of certain grant assurances and also waives the Town's obligation to comply with those grant assurances after December 31, 2014; (3) after December 31, 2014,

[3] The Layout Plan Action also named Norman Minetta, Secretary of Transportation, and Marion Blakey, Administrator of the FAA, as defendants. (See Compl., No. 03-CV-2634, Comm.'s Ex. A., Docket Entry 25-7.)

the FAA will not enforce the grant assurances or adjudicate any administrative complaints regarding the Town's violation of the grant assurances unless the Town receives a new AIP grant; and (4) the FAA interprets the Settlement Agreement to relieve the Town from its obligation to comply with the Airport Noise and Capacity Act of 1990 ("ANCA") regarding proposing new airport noise and access restrictions unless the Town desires to remain eligible for the receipt of future federal funding grants. (Compl. ¶ 67.)

Plaintiffs allege that by entering into the Settlement Agreement, the FAA exceeded its statutory authority and violated its statutory obligations. (Compl. ¶¶ 3-4.) As a result, Plaintiffs seek the following relief in this action: (1) a declaration that (a) Defendants are statutorily obligated to ensure that the Town is in compliance with certain grant assurances until September 25, 2021, (b) the Settlement Agreement and/or the Bishop Responses are not a lawful basis for Defendants' determination as to "whether and how" it will enforce certain grant assurances or adjudicate administrative complaints with respect to the Airport, (c) "Defendants' stated position that [the Town] is not required to comply with ANCA unless it wishes to remain eligible for federal funding is contrary to law"; and (2) an injunction directing Defendants to comply with the previously noted declarations. (Compl. at 25.)

II. The Town Action

On April 21, 2015, FOEHA, Analar, Helicopter Associates, Heliflite, Liberty, and other air carriers commenced an action against the Town seeking declaratory and injunctive relief enjoining enforcement of certain provisions of the Town of East Hampton Code that impose access restrictions on the Airport (the "Town Laws"). Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton, No. 15-CV-2246, 2015 WL 3936346 (E.D.N.Y. June 26, 2015) (the "Town Action"). The Town Laws were adopted on April 16, 2015, after the Town received the Bishop Responses. Id. at *2-5. In the Town Action, Plaintiffs allege that the Town Laws are invalid because: (1) they are preempted by ANCA and the AAIA and thus violate the Supremacy Clause of the Constitution; and (2) they violate the Commerce Clause of the Constitution as an unlawful restraint on interstate commerce. Id. at *6.

In May, 2015, Plaintiffs filed a motion seeking to enjoin enforcement of the Town Laws pending the resolution of the Town Action and this action, arguing that the Town Laws violate and are preempted by ANCA and the Airport and Airway Improvement Act of 1982 ("AAIA"), and that Plaintiffs will be irreparably harmed due to the "incalculable damages and severe economic losses" that will result from compliance with the Town Laws. Id. at *1-2. Plaintiffs' motion was granted in part and denied in part. Id. at *18.

Plaintiffs also filed a motion to consolidate the Town Action and this action (the "Consolidation Motion"), arguing that both actions share common questions of law and fact that include "(i) the Town's obligation to comply with, and the FAA's obligation to enforce, certain federal aviation laws with regard to East Hampton Airport; and (ii) the effect (if any) of a 2005 settlement on those statutory obligations." (Pls.' Consolidation Mot., Town Action, Docket Entry 14, at 2.) The Town opposed the Consolidation Motion, alleging that consolidation would not promote judicial efficiency and that "there are no common issues of fact or law that can be more efficiently addressed in a consolidated proceeding." (Town's Consolidation Opp., Town Action, Docket Entry 35, at 1-2.) The Town argued that consolidation was premature as the FAA had not yet appeared and might seek to dismiss the action. The Town also alleged that even if Plaintiffs were successful in this action, such a determination would not render the Town Laws unconstitutional, as "the question of compliance with laws is independent of whether the laws are preempted." (Town's Consolidation Opp. at 2.) The Court reserved judgment on the Consolidation Motion pending the FAA's response to the Complaint in this action. Friends of E. Hampton, 2015 WL 3936346, at *18. Plaintiffs subsequently withdrew the Consolidation Motion. (See Town Action, Electronic Order dated August 24, 2015.)

III. The Committee's Motion

On May 27, 2015, the Committee filed a motion to intervene in this action pursuant to Federal Rule of Civil Procedure 24(a). (See Comm.'s Mot., Docket Entry 24.) In a footnote, the Committee moves alternatively for permissive intervention under Federal Rule of Civil Procedure Rule 24(b). (Comm.'s Br., Docket Entry 25, at 10, n.10.) The Committee argues that as a party to the Settlement Agreement, it has an interest in this action because Plaintiffs are asserting that the FAA is statutorily required to enforce the grant assurances notwithstanding its representation in the Settlement Agreement that it would not enforce four grant assurances after 2014. (Comm.'s Br. at 6.) The Committee argues that its ability to file suit against the FAA for breach of contract or otherwise invoke the protections of the Settlement Agreement will be compromised should Plaintiffs prevail in this matter. (Comm.'s Br. at 7.) Additionally, the Committee argues that its "interest in preserving the Settlement Agreement is not being adequately represented in this action." (Comm.'s Br. at 7-8.)

A. Plaintiffs' Opposition

Plaintiffs oppose the Committee's motion and argue that the Committee is not a necessary party and its interest is not "direct nor substantial enough to warrant intervention as of right." (Pls.' Comm. Br., Docket Entry 29, at 6.) Plaintiffs

aver that this action pertains to statutory questions and does not seek to set aside the FAA Settlement Agreement; instead, Plaintiffs "seek[ ] a declaration that, regardless of the [Settlement Agreement's] provisions, the FAA cannot be handcuffed from performing the statutorily mandated duties dictated by Congress." (Pls.' Comm. Br. at 7.) Moreover, Plaintiffs allege that if this action results in the FAA failing to abide by the Settlement Agreement, any harm to the Committee would be the result of the FAA's agreement to a settlement term that it was not legally permitted to agree to. (Pls.' Comm. Br. at 8.)

Plaintiffs also argue that even if they prevail in this action, the Committee's interest in the Settlement Agreement will not be immediately impacted and any subsequent impact on the Committee is "too speculative and remote" and contingent on multiple events. (Pls.' Comm. Br. at 9.) Additionally, Plaintiffs allege that this action will not inhibit the Committee's ability to sue the FAA for breach of the Settlement Agreement. (Pls.' Comm. Br. at 10.) Finally, Plaintiffs aver that the Committee's argument that the FAA's defense will be "tepid" is premature as the FAA has not yet responded to the Complaint or asserted its views of the Settlement Agreement.[4] (Pls.' Comm. Br. at 12.)

[4] The Court notes that after the Committee's motion was fully briefed, the FAA filed an Answer as well as an Amended Answer. (Docket Entries 34 and 35.)

Plaintiffs also argue that the Committee should not be granted permissive intervention as its involvement in this action will result in multiplied briefing and "collateral fact issues" as well as "distraction and delay." (Pl.'s Comm. Br. at 12.)

IV. The Town's Motion

On September 1, 2015, the Town filed a motion to intervene in this action, arguing that it is entitled to intervene as of right or, alternatively, to permissively intervene. (Town's Mot., Docket Entry 39.) The Town argues that its interest in this action is significant because Plaintiffs seek to invalidate the FAA's position that (1) it is not required to enforce certain grant assurance requirements against the Town, and (2) the Town was not required to comply with ANCA's procedural requirements prior to passing the Town Laws. (Town's Br., Docket Entry 39-1, at 5.) Similarly, the Town avers that if Plaintiffs are successful in this action, its ability to defend the Town Laws in the Town Action will be impaired based on the principle of stare decisis. (Town's Br. at 6-7.) The Town also argues that its interests will not be adequately represented in this action in light of the FAA's support for Plaintiffs' temporary injunction in the Town Action. (Town's Br. at 7.) Alternatively, the Town argues that the Court should grant permissive intervention based on its "direct stake" in the Court's determination of the questions of law raised by Plaintiffs

regarding the FAA's statutory interpretation and the Town's legal obligations. (Town's Br. at 8.)

A. Plaintiffs' Opposition

Plaintiffs argue that the Town should be held to its previous position with respect to the Consolidation Motion that its participation in this action is "unnecessary and unwarranted." (Pl.'s Town Br., Docket Entry 42, at 1.) Plaintiffs aver that the Town's change in its position is "gamesmanship" that should not be countenanced. (Pls.' Town Br. at 3.) Additionally, Plaintiffs argue that the Town's opposition to the Consolidation Motion concedes that "any harm to its interest would be contingent on other events occurring after a finding in Plaintiffs' favor." (Pls.' Town Br. at 3 (emphasis in original).) Finally, Plaintiffs argue that permitting the Town to intervene will result in "delay, complication, and unnecessary briefing," as the Town has already extensively briefed its position regarding the Bishop Responses in the Town Action. (Pls.' Town Br., at 5.)

DISCUSSION

I. Intervention as of Right

Federal Rule of Civil Procedure 24(a)(2) provides, in relevant part, that:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as

> a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2). Thus, a motion to intervene as of right will be granted where the movant demonstrates: (1) timeliness of the motion; (2) the movant's interest relates to the property or transaction that constitutes the subject of the action; (3) absent intervention, the movant's ability to protect its interest will be impaired or impeded; and (4) the parties to the action do not adequately represent the movant's interest. MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006). "Failure to satisfy any one of these requirements is a sufficient ground to deny the application." In re Pandora Media, Inc., No. 12-CV-8035, 2013 WL 6569872, at *5 (S.D.N.Y. Dec. 13, 2013) (internal quotation marks and citation omitted; emphasis in original). In reviewing a motion to intervene, the Court accepts the motion's non-conclusory allegations as true. Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 262 F.R.D. 348, 352 (S.D.N.Y. 2009).

A. MasterCard Decision

Both Plaintiffs and the Committee rely on the Second Circuit's decision in MasterCard to support their arguments. (See Pls.' Comm. Br. at 5-9, Comm.'s Br. at 7.) The MasterCard action was filed by MasterCard against FIFA, the international governing

body of soccer that organizes the World Cup tournament. MasterCard, 471 F.3d at 380. MasterCard entered into a contract with FIFA in which it received the "first right to acquire exclusive sponsorship rights in its product category for the FIFA World Cup event in 2010 and 2014." Id. (internal quotation marks omitted). After Visa publicly announced a contract with FIFA for World Cup exclusive sponsorship rights through 2014, MasterCard filed an action against FIFA for breach of contract and injunctive relief enjoining FIFA from performing under the Visa Contract and directing FIFA to perform its obligations under the MasterCard contract. Id. at 380-81. Visa subsequently filed both a letter motion to dismiss pursuant to Federal Rule of Civil Procedure 19[5] as well as a motion to intervene pursuant to Rule 24. Both motions were denied by the district court, which held that Visa was not a necessary party. Id. at 381-82.

In affirming that Visa was not a necessary party, the MasterCard Court held that: (1) notwithstanding the inevitability

[5]Rule 19(a)(1) provides that an individual who is subject to service of process and whose joinder will not result in the absence of subject matter jurisdiction must be joined as a party where: (A) complete relief cannot be accorded among the existing parties in the person's absence, or (B) the person possesses an "interest relating to the subject of the action" and the disposition of the action in the individual's absence may (i) "impair or impede the person's ability to protect the interest" or (ii) leave the existing parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a)(1).

of future litigation should MasterCard prevail, "Visa's absence will not prevent the district court from granting complete relief between MasterCard and FIFA"; (2) if MasterCard prevails, Visa's contract will not be rendered invalid and "the harm Visa may suffer is not caused by Visa's absence from this litigation"; and (3) any risk of inconsistent obligations in the event that Visa sues FIFA and both Visa and MasterCard prevail in separate actions would not be the result of Visa's absence from this action but "the result of FIFA allegedly breaching its contract with MasterCard and awarding Visa sponsorship rights it was contractually prohibited from granting." Id. at 385-88 (emphasis in original). The MasterCard Court also affirmed the denial of Visa's motion to intervene based on untimeliness and the principle that a party that is not necessary pursuant to Rule 19(a) cannot satisfy the requirements for intervention as of right. Id. at 389-91.

B. The Committee's Motion

As the timeliness of the Committee's motion is not disputed, the Court will address the remaining Rule 24(a)(2) factors in turn. (See Pls.' Comm. Br. at 2.)

1. Interest Relating to the Subject of the Action

The determination of the subject of this action presents a closer issue. As previously noted, the Committee alleges that the Settlement Agreement constitutes the subject of this action while Plaintiffs aver that this is an action for a declaration

regarding the FAA's statutory obligations. While the Committee seeks to style this action as one to set aside or "gut" a contract, the Court disagrees. The crux of this action is the FAA's alleged failure to enforce the grant assurances against the Town and its position that the Town need not comply with ANCA; thus, the Committee's assertion that "'in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable,'" is misplaced. (Comm.'s Br. at 6 (quoting Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 700-01 (2d Cir. 1980).)

However, the "transaction" that led to the FAA's non-enforcement is the Settlement Agreement in which the FAA agreed that it would not, under certain circumstances, enforce certain grant assurances after December 31, 2014. Plaintiffs attempt to distance this action from the Settlement Agreement by emphasizing that they are seeking declaratory relief; however, the requested declaratory judgment specifically references the Settlement Agreement. (Compl. at 25.) Should Plaintiffs prevail in this action, the Court will enter a declaratory judgment stating that "[n]either the 2005 Settlement Agreement nor Defendants' interpretation of that Agreement in the Bishop Responses can be a lawful basis, in whole or in part, for Defendants' prospective determination of whether and how to enforce the Nondiscrimination Grant Assurances or adjudicate administrative complaints regarding

[the] Airport."[6] (Compl. at 25.) As Plaintiffs are specifically requesting that the Court enter a declaration that determines the applicability of the Settlement Agreement, it is clear that the Settlement Agreement constitutes, at the very least, a component of the subject of this action.

Nevertheless, to state a cognizable interest under Rule 24(a)(2), the Committee must demonstrate that such interest is "'direct, substantial, and legally protectable.'" Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123, 129 (2d Cir. 2001) (quoting Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990)). "'An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.'" Brennan, 260 F.3d at 129 (quoting Washington, 922 F.2d at 97). As noted by Plaintiffs, any harm to the Committee, i.e. the Settlement Agreement being breached and/or invalidated, is contingent upon a series of events--namely, "Plaintiffs prevailing in this action and the FAA or an airport operator prompting an administrative investigation of grant assurance violations by the Town and the FAA finding a violation

[6] The Complaint defines "Non-Discrimination Grant Assurance" to encompass the Public Use Grant Assurance and an additional grant assurance that provides that the Town "may establish such reasonable, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." (Compl. ¶ 53.)

and the FAA taking enforcement action in a manner deemed by the Committee [ ] to breach . . . the 2005 settlement agreement." (Pls.' Comm. Br. at 9 (emphasis in original).) The Court concurs that this level of contingency weighs against a finding that the Committee's interest in this action is "direct." Indeed, while the Court acknowledges that a declaration that the FAA is statutorily obligated to ensure the Town's compliance with the grant assurances could potentially support the invalidation of all or a portion of the Settlement Agreement, such a declaration will not have an immediate or direct effect on the Settlement Agreement. As noted by Plaintiffs, the FAA would have to breach the Settlement Agreement, i.e. enforce the grant assurances, before the Committee's interest in upholding the agreement is implicated.

Moreover, although the Court is mindful that intervention motions "tend[ ] to resist comparison to prior cases," the Committee, like Visa in the MasterCard action, is not a necessary party to this action as the Court will be able to grant complete relief in the Committee's absence; any resulting harm to the Committee will not be caused by its absence from this litigation; and any potentially inconsistent obligations on the part of the FAA would be the result of the FAA's agreement to provisions in the Settlement Agreement that it could not legally agree to. Aristocrat Leisure, 262 F.R.D. at 351-52; MasterCard,

471 F.3d at 389. Thus, the Committee has failed to demonstrate a direct interest in the subject of the action.[7]

2. Impediment to the Ability to Protect Interests

Whether the Committee's interests will be impeded by a disposition in favor of Plaintiffs also presents a close question. As previously noted, this action will not determine the validity of the Settlement Agreement and a determination in favor of Plaintiffs will not render the Settlement Agreement void or preclude the Committee from suing the FAA for breach of contract. However, this action will determine whether the FAA is statutorily obligated to enforce the grant assurances. Should the Court rule in favor of Plaintiffs, the stare decisis effect of the Court's declaration will impede the Committee's ability to argue, in a separate breach of contract action, that the FAA must forbear in enforcing certain grant assurances after December 31, 2014, pursuant to the Settlement Agreement. See Sackman v. Liggett

[7] Plaintiffs also argue that the Committee's interest in ensuring that the FAA complies with the Settlement Agreement is "not a legally protectable interest" because the United States has not waived sovereign immunity for lawsuits seeking the specific performance of a contract. (Pls.' Comm. Br. at 11.) In light of the Court's determination that the Committee has failed to establish a direct interest in the subject of the action, the Court need not determine whether the Committee's interest is "legally protectable." (See Pls.' Comm. Br. at 10-11.) Parenthetically, the Court notes that Plaintiffs do not dispute that the Committee would be entitled to commence an action against the United States in the Court of Federal Claims for breach of contract seeking monetary damages. (Pls.' Comm. Br. at 10.)

Group, Inc., 167 F.R.D. 6, 21 (E.D.N.Y. 1996) (Noting that the Second Circuit has held that "the stare decisis effect of a court's decision is sufficient to demonstrate the requisite impairment of an interest to support a motion to intervene.") (citing Oneida Indian Nation of Wis. v. State of N.Y., 732 F.2d 261, 265 (2d Cir. 1984); N.Y. Public Int. Research Group, Inc. v. Regents of Univ. of State of N.Y., 516 F.2d 350, 352 (2d. Cir. 1975)).

The Court concurs with the Committee that its position is dissimilar from that of Visa in the MasterCard action as the MasterCard Court was not charged with determining FIFA's statutory obligations. (Comm.'s Br. at 7.) The court's interpretation of the MasterCard contract would not have stare decisis implications with respect to the interpretation of the contract between Visa and FIFA in a separate action. Thus, the Court finds that the Committee has established that its interest in upholding the Settlement Agreement would be impaired should Plaintiffs succeed in this action.

3. Adequacy of Representation

The Court also finds that the Committee has demonstrated that its interests are not adequately protected in this action. The burden of demonstrating inadequacy of representation is generally "minimal," with a "more rigorous showing" being required where the proposed intervenor and an existing party share an identical ultimate objective. Butler, Fitzgerald & Potter v. Sequa

Corp., 250 F.3d 171, 179 (2d Cir. 2001) (internal quotation marks and citation omitted). While not specifically raised by the Committee, the FAA's silence with respect to the Committee's intervention motion speaks volumes. Moreover, rather than moving to dismiss the Complaint, the FAA has elected to Answer. (See Docket Entries 34 and 35.) While the Court acknowledges that the FAA has not yet asserted a position on the Settlement Agreement and could, in theory, support the validity of the agreement, the FAA's silence to date weighs in favor of a finding that the Committee's interests are inadequately represented.

Nevertheless, the Court DENIES the Committee's request for intervention as of right based on its failure to establish a direct interest in the subject matter of this action. See Pandora Media, 2013 WL 6569872, at *5 (the failure to establish any one of the Rule 24(a)(2) factors is a sufficient basis for denial of the motion for intervention).

C. The Town's Motion

The Court will similarly address each Rule 24(a)(2) factor with respect to the Town's motion in turn.

1. Timeliness

At the outset, the Court acknowledges that both Plaintiffs and the Town have ostensibly "flip-flopped" on their prior positions taken with respect to the Consolidation Motion. Plaintiffs moved to consolidate this action and the Town Action,

alleging the existence of common issues of law and fact, but now oppose the Town's participation in this action. Similarly, the Town opposed the Consolidation Motion--arguing both that the motion was premature and that a determination in favor of Plaintiffs would not render the Town Laws unconstitutional--but now seeks to intervene in this action as of right.

While Plaintiffs cite to Citizens Against Casino Gambling in Erie Cty. v. Hogen, 704 F. Supp. 2d 269 (W.D.N.Y. 2010), aff'd, 419 F. App'x 49 (2d Cir. 2011), in support of the argument that the Town's motion should be denied based on "gamesmanship," the facts in Hogen are dissimilar to those in this action. (Pls.' Town Br. at 2.) The Hogen Court held that the Seneca Nation of Indians' motion to intervene in an action challenging the legality of a casino operated by the Seneca Nation presented "unusual circumstances" weighing against a finding that its motion was timely. Hogen, 704 F. Supp. 2d at 271, 281-82. Particularly, the Seneca Nation had participated as amicus curiae in earlier actions in which the plaintiffs challenged agency determinations with respect to the Seneca Nation casino; each lawsuit was predicated on the same underlying assertions raised by the Hogen plaintiffs. Id. at 282. The court held that the Seneca Nation should have been previously aware of its interest concerning these issues but chose not to pursue intervention until approximately three years later. Id. The court denied the Seneca

Nation's motion to intervene based, in part, on the untimeliness of the application. Id. at 287.

Although the Court is troubled by the apparent "gamesmanship" on the part of both Plaintiffs and the Town, the Town's inconsistent positions in opposing consolidation and filing a motion to intervene does not rise to the level of "unusual circumstances" that would warrant a finding of untimeliness. Moreover, aside from alleging "gamesmanship," Plaintiffs do not otherwise argue that the Town's motion to intervene is untimely. (See generally Pls.' Town Br.)

2. Interest Relating to the Subject of the Action

Plaintiffs also argue that the Town's alleged interest in this action is plagued by contingency. (Pls.' Town Br. at 3.) The Town argues that it has a "significant interest" in this action because if Plaintiffs succeed in this action, the Town Laws and the Town's operation of the Airport will be significantly affected. (Town's Br. at 5-6.) However, as previously noted, the Town conceded in its opposition to the Consolidation Motion that Plaintiffs' success in this action would not render the Local Laws unconstitutional. (Town's Consolidation Opp. at 2.) While the Town now seeks to distance itself from a "double contingency" dilemma by arguing that "because Plaintiffs have framed their constitutional claims in the Town Action to include the very same claims they seek against FAA in this action, any ruling against

FAA could have a direct impact on the Town's ability to defend the [Town] Laws in the Town Action," that argument conflates the second and third Rule 24(a) factors. (Town's Reply Br., Docket Entry 43, at 7.) The Town's interest in upholding the Town Laws is not direct because the invalidation of the Town Laws is contingent on Plaintiffs prevailing in this action and the Town Laws being deemed preempted and/or unconstitutional. Thus, the Town's interest is "contingent upon the occurrence of a sequence of events before it becomes colorable" and does not satisfy the second factor considered with respect to Rule 24(a). See Brennan, 260 F.3d at 129 (quoting Washington, 922 F.2d at 97).[8]

3. Impediment to the Ability to Protect Interests

However, the Town has established that absent intervention, its ability to protect its interest will be impaired or impeded. The Town's ability to argue in the Town Action that the Town Laws are neither preempted by ANCA nor unconstitutional would be significantly impeded by the stare decisis effect of a disposition in favor of Plaintiffs in this action. See Sackman, 167 F.R.D. at 21. See also Hartford Fire Ins. Co. v. Mitlof, 193

[8] In light of the contingency of the Town's interest in this action, the Court need not address Plaintiffs' argument that the Town does not have a legally protectable "reliance interest" in the Bishop Responses. (Pls.' Town Br. at 3-4.) In any event, the Court disagrees that the Town's asserted interest is in "defend[ing] the correctness of the Bishop Responses"; rather, the Town's interest is in upholding the Town Laws. (Pls.' Town Br. at 3-4; see also Town's Br. at 5-6.)

F.R.D. 154, 162 (S.D.N.Y. 2000) (Holding that stare decisis supported intervention as of right where the proposed intervenor's interests would be impaired by a judgment in plaintiff's favor.) The Town's opposition to Plaintiffs' preemption arguments in the Town Action would be severely undercut by a declaratory judgment that the FAA is statutorily obligated to ensure the Town's compliance with grant assurances; the Settlement Agreement and the Bishop Responses are not a lawful basis for the FAA to determine the enforcement of grant assurances and complaints; and the FAA's position that the Town need not comply with ANCA is contrary to law. Notably, Plaintiffs do not proffer any argument that a favorable judgment would not impede the Town's interest. (See generally Pls.' Town Br.)

4. Adequacy of Representation

The Court also finds that the Town has satisfied its "minimal" burden of establishing that its interests are not adequately represented in this action. See Butler, 250 F.3d at 179. As noted by the Town, the FAA filed a letter in the Town Action in which it supported Plaintiffs' application for a preliminary injunction, stating that it desired to "properly consider Plaintiffs' claims and the Town restrictions, develop its position on the issues, and, should the FAA determine that the Town restrictions are contrary to federal law(s) and/or FAA regulations(s)--and/or the Court rule in favor of Plaintiffs in

the FAA Action [No. 15-CV-0441]--commence appropriate enforcement action." (May 4, 2015 Ltr., Town's Mot., Ex. A, Docket Entry 39-1.)

Moreover, during a hearing before the Court on Plaintiffs' motion for a preliminary injunction in the Town Action, counsel for the FAA declined to express a position on the merits, indicated that the FAA needed additional time to determine whether the Town Laws comply with FAA regulations, and stated that "[w]e don't think those Bishop responses in anyway waive the FAA's ability to seek an injunction or to enforce anything under the appropriate regulation." (Tr. of May 18, 2015 Hearing, Town's Mot. at Ex. B., Docket Entry 39-1, at 15:10-20, 16:10-17.) Needless to say, it remains unclear whether the FAA will adequately represent the Town's interest in upholding the Town Laws; specifically, the FAA has not provided any indication as to whether it will take the position that the Town need not comply with ANCA or that the Bishop Responses provide a lawful basis for determining whether grant assurances or complaints will be enforced.

Nevertheless, the Court DENIES the Town's motion to intervene as of right based on its failure to establish a direct interest related to the subject of the action.

II. Permissive Intervention

Federal Rule of Civil Procedure 24(b) provides, in relevant part, that: "[o]n timely motion, the court may permit

anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). The Court's permissive intervention analysis is informed by the same four factors considered in connection with motions for intervention as of right. Certified Multi-Media Solutions, Ltd. v. Preferred Contractors Ins. Co. Risk Retention Group LLC, No. 14-CV-5227, 2015 WL 5676786, at *6 (E.D.N.Y. Sept. 24, 2015). The phrase "claim or defense" is not to be read technically and only requires "some interest on the part of the applicant." Louis Berger Grp., Inc. v. State Bank of India, 802 F. Supp. 2d 482, 488 (S.D.N.Y. 2011) (internal quotation marks and citation omitted). Additionally, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

A. The Committee's Motion

As addressed above, while the Committee has not established a direct interest in this action, it has established both that a disposition in favor of Plaintiffs will impede the protection of its interests and that its interests are not being adequately represented. Additionally, the Committee's claim that the Settlement Agreement is a valid, binding agreement shares common questions of law and fact with this action--namely, whether the FAA is statutorily obligated to enforce the grant assurances

and whether the Settlement Agreement is a lawful basis for determining enforcement.

The Court also finds that intervention by the Committee will not "unduly complicate" or delay these proceedings. See Washington Elec., 922 F.2d at 98. See also FED. R. CIV. P. 24(b)(3). The Settlement Agreement is specifically referenced in the Complaint and is a component of the subject of this action; thus, the Committee's involvement will not create complications as the Court is already charged with determining whether the Settlement Agreement provides a viable basis for the FAA's non-enforcement. As this action is in its infancy--it was commenced in 2015 and minimal activity has taken place outside the filing of the pleadings and these motions for intervention--the Committee's involvement will not result in delay or prejudice to Plaintiffs.

As set forth infra, the Town has limited its permissive intervention request to the filing of one brief if the FAA fails to adequately represent its interests. The Court finds that a similar limited permissive intervention for the Committee is warranted. The filing of one brief will provide the Committee with the opportunity to present its position to the extent that the FAA fails to take a substantive position or takes a position adverse to the Committee. The Court finds, at this time, that no further involvement on the part of the Committee is warranted or necessary. The Committee may make an application for an expansion

of this grant of permissive intervention if, at a later date, it believes that its further involvement is necessary based on the progression of this litigation.

Accordingly, the Court GRANTS permissive intervention to the Committee to the extent that it will be permitted to file one brief in connection with any dispositive motions.

B. The Town's Motion

As set forth above, the Town has demonstrated that its ability to protect its interest in upholding the Town Laws will be impaired absent intervention and that its interests are not being adequately represented in this proceeding. While the Town has not established a direct interest relating to the subject of the action for purposes of intervention as of right, the Town certainly has a claim or defense sharing common questions of law with this action--namely, whether the FAA is statutorily required to ensure that the Town complies with grant assurances, whether the Settlement Agreement or Bishop Responses provide a lawful basis for the FAA to determine whether grant assurances or complaints will be enforced, and whether the Town is legally required to comply with ANCA.

Moreover, the Court finds that the Town's intervention in this action will not create undue delay or prejudice to the existing parties. The Town is not seeking to inject collateral issues into this action and limits its intervention request "only

to the extent that FAA fails to represent its interests and [ ] only for the opportunity to submit one brief if necessary." (Town's Reply Br. at 8.) Accordingly, the Court GRANTS permissive intervention to the Town to the extent that it will be permitted to file one brief in connection with any dispositive motions.[9]

C. Waiver of Pleadings Requirement

Federal Rule of Civil Procedure 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c). The Court finds that the waiver of the Committee's and the Town's respective pleading requirements is appropriate based on the limitations on the Court's award of permissive intervention and the intervenors' clear expression of their legal positions. See Blesch v. Holder, No. 12-CV-1578, 2012 WL 1965401, at *2 (E.D.N.Y. May 31, 2012) (Holding that waiver of the pleading requirement was justified where the intervenor's position was clearly set forth in its motion papers.)

CONCLUSION

For the forgoing reasons, the Committee's motion to intervene (Docket Entry 24) is GRANTED IN PART and DENIED IN PART and the Town's motion to intervene (Docket Entry 39) is GRANTED IN

[9] In the interest of minimizing further motion practice on this issue, the Court declines to condition the Town's permission to file one brief on the future adequacy of the FAA's representation.

PART and DENIED IN PART. The Court GRANTS permissive intervention to the Committee and the Town the extent that they will each be permitted to submit one brief in connection with any dispositive motions.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: February 29, 2016
Central Islip, New York

End of District Court Order

I. THE RELIEF SOUGHT

The Petitioners request a writ of mandamus: (1) vacating the District Court's Order and directing the District Court to allow the Petitioners to participate in the case below as a defendant pursuant to Rule 24(a)(2); and (2) directing the District Court to permit Petitioners to engage in normal motion practice, including the filing of dispositive motions, and that only a condition or restriction that may be imposed on an original party may be imposed on the Petitioners in the action below.

II. ISSUES PRESENTED FOR REVIEW

First, did the District Court exceed its authority when it decided that *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F. 2d 690 (2d Cir. 1980) is not the controlling precedent with respect to the Petitioners' motion to intervene as of right? Second, did the District Court exceed its authority when it failed to grant the Petitioners' motion to intervene as of right? Third, is the District Court's finding that the Petitioners do not have a "direct" interest in "the subject of the action" below the result of a clearly erroneous assessment of the facts ? Fourth, did the District Court render a decision based on a clearly erroneous view of the law, and thus, abuse its discretion, when it ruled that the Petitioners are not entitled to intervene as of right because their interests in the subject of the action are not "direct"? Fifth, did the District Court exceed its authority when it limited the Petitioners'

participation to filing only a responsive brief and only if a dispositive brief is filed? Sixth, is there another adequate means by which the Petitioners may attain the relief they seek? Finally, is the issuance of the requested writ appropriate in the circumstances?

III. FACTUAL STATEMENT

The Plaintiffs in *Friends of the East Hampton Airport, Inc., et al. v. The Federal Aviation Administration, et al.*, Case 2:15-cv-00441-JS-ARL (hereinafter referred to as "the case below") filed their complaint (hereinafter referred to as "Complaint") on January 29, 2015. ECF 1.[1] The action below challenges the enforceability of Paragraph 7 of the settlement agreement among the Petitioners and the defendants, the U.S. Department of Transportation ("DOT"), the Federal Aviation Administration ("FAA"), and, in their official capacity, the individuals in charge of those agencies (hereinafter referred to as "Settlement Agreement"). The Settlement Agreement resolved two federal court proceedings and an administrative proceeding before the FAA.

In 2002, the Petitioners and an individual, who is now deceased, sued the agencies listed above in the U.S. District Court for the District of Columbia in *Committee to Stop Airport Expansion, et al. v. Department of Transportation, et*

[1] Documents electronically filed in the case below will be referred to as "ECF" followed by a number. Documents filed electronically that are related to the Petitioners' appeal will be referred to as "App ECF." Documents related to this petition will be referred to as "Writ ECF."

al., Case 1-02-00619 (JR). In that suit, the Petitioners challenged the FAA's decision in 2001 to award about $1.5 million under the Airport Improvement Program[2] ("AIP") to the Town of East Hampton for reconstructing and rehabilitating an aircraft parking apron at the East Hampton Airport ("Airport"). The Petitioners sought an injunction prohibiting the defendants from disbursing any AIP funds for the apron project until the FAA complied with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4335, and the AIP regulations, including, most importantly, obtaining from the Town an airport layout plan (sometimes referred to as "ALP") adopted and approved by the Town Board.

In 2003, the Petitioners sued the DOT and the FAA challenging the FAA's August 20, 2001 decision to approve an airport layout plan for the Airport in violation of NEPA, the AAIA, and 14 C.F.R. Parts 151 and 152 in part on the grounds that the plan had never been approved by the Town Board. Approval of the layout plan by the Town and the FAA was part of the approval process for the pending AIP grant application referred to above. That case, *Committee to Stop Airport Expansion, et al. v. Department of Transportation, et al.*, CV 03-2634 (JS)(MLO), was filed in the Eastern District of New York. The Petitioners sought

[2] The Airport and Airway Improvement Act of 1982 ("AAIA"), authorizes the DOT to establish a federal grant program intended to encourage the development of airports. 49 U.S.C. §§ 47101-47131; 14 C.F.R. Part 152. The FAA administers the program.

declaratory and injunctive relief, including a request that the District Court vacate the FAA's approval of the airport layout plan and prohibit the defendants from approving any projects and/or awarding any AIP funds based on the layout plan approved by the FAA in 2001. [3]

That the Town Board did not, as required by law, in fact adopt the 2001 airport layout plan upon which the AIP grant was issued is no longer in dispute. The agreed upon predicate facts set forth in the Settlement Agreement include:

> WHEREAS, in August 2001, the Town of East Hampton submitted the 2001 ALP to the FAA (a copy of which is attached hereto as Exhibit D) and represented that the 2001 ALP was a true copy of the 1989 ALP; and
>
> WHEREAS, according to published reports, in December of 2002 or January of 2003 in response to a federal subpoena, the Town of East Hampton produced a copy of the 1989 ALP that included the signature of Pat J. Trunzo, III; and
>
> WHEREAS, Plaintiffs allege that a comparison of the airport layout plan produced by the Town in response to the subpoena and the 2001 ALP demonstrates that the 2001 ALP is not in fact a true copy of the 1989 ALP; and
>
> WHEREAS, to the best of the knowledge, information, and belief of the FAA, the approval of an ALP by the East Hampton Town Board may only be affected by resolution of the Town Board; and
>
> WHEREAS, to the best of the knowledge, information and belief of the FAA, since December 15, 1989 there has been no resolution of

[3] To be eligible for an AIP grant, the proposed development project must be included in an airport layout plan approved by the FAA. 49 U.S.C. § 47107(a)(16); 14 C.F.R. §§ 151.5(a), 152.107(c)(3).

> the East Hampton Town Board approving an ALP for the East Hampton Airport other than the 1989 ALP;… ECF 1, Ex. B at 2.

In addition, the Settlement Agreement resolved an administrative proceeding filed by the Petitioners against the Town of East Hampton, *Committee to Stop Airport Expansion, et al. v. Town of East Hampton*, FAA Docket No. 16-02-04. In that case, the Petitioners asserted that the Town was violating certain grant assurances. They asserted, *inter alia*, that the Town was violating Grant Assurance 29 because it used an airport layout plan to support its 2001 grant application that did not meet the regulatory requirements. The Petitioners asked the FAA, *inter alia*: 1) to suspend payment of AIP funds under the 2001 grant award and/or prohibit the Town from using AIP funds awarded in 2001 for the apron project; and 2) to terminate the Town's eligibility for federal grants until the Town complied with the Grant Assurances.

The Petitioners and the federal defendants agreed to resolve all three actions in one settlement agreement. This is the agreement that the Plaintiffs attack in the action below. In Paragraph 7, the FAA agreed not to enforce subsections a and h of Grant Assurance 22 and subsections a and b of Grant Assurance 29 in the 2001 grant agreement after December 31, 2014.[4] The FAA relies, in part, on Grant

[4] Grant Assurance 22(a) requires the Town to make the Airport available for use on "reasonable terms and without unjust discrimination" to those using the Airport. ECF 1, Ex. A at 10. Grant Assurance 22(h) allows the Town to establish "reasonable and not unjustly discriminatory" conditions to be met by all users of

Assurance 22 to review noise and access restrictions proposed or established by the airport owner-operator and, if it deems appropriate, to take enforcement action regarding any noise or access restriction it considers non-compliant.

At an East Hampton Town Board meeting on January 20, 2015, the Town Board stated its intention to enact airport access restrictions to reduce community noise impacts from airport operations relying in part on Paragraph 7 of the Settlement Agreement. On April 16, 2015, the Town adopted restrictions for the stated purpose of reducing community noise impacts.

The Plaintiffs filed the action below on January 29, 2015. In their first claim, the Plaintiffs allege that the FAA has a mandatory duty, which is not subject to the exercise of any discretion, to enforce the grant assurance provisions of the 2001 grant agreement until September 25, 2021, and, thus, the FAA must enforce the assurances despite its commitment in Paragraph 7 of the Settlement Agreement to do otherwise. ECF 1, ¶¶ 85, 86, 89. In their Prayer for Relief, the Plaintiffs seek a declaration that the FAA is "statutorily obligated to ensure that East Hampton complies with the Nondiscrimination Grant Assurances until September 25, 2021…." ECF 1 at 25**.** They also seek an injunction requiring the FAA to act consistent with the Court's declaration. ECF 1 at 25. In their second claim, the Plaintiffs allege that Paragraph 7 of the Settlement Agreement is unenforceable on

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the airport that are necessary for the safe and efficient operation of the Airport. ECF 1, Ex. A at 11.

public policy grounds. ECF 1, ¶ 100. In their Prayer for Relief, the Plaintiffs seek a declaration that the Settlement Agreement cannot be a lawful basis for the FAA's "prospective determination of whether and how to enforce the Nondiscrimination Grant Assurances…" and an injunction directing the Defendants to act consistent with the Court's declaration. ECF 1 at 25.

The United States filed its Answer on July 22, 2015 and its Amended Answer on August 11, 2015. ECF 34, 35. On May 27, 2015, the Petitioners filed their Motion to Intervene. ECF 24. On February 29, 2016, Judge Seybert denied the Petitioners' motion to intervene as of right pursuant to Federal Rules of Civil Procedure, Rule 24(a)(2), and nominally granted the request, set forth in the alternative, to intervene pursuant to Rule 24(b). ECF 44 (*Memorandum & Order, 15-cv-0441* (*JS*)(*ARL*) (dated February 29, 2016). Hereinafter referred to as "Order" or "intervention order." Although the District Court purported to grant the request to intervene on a permissive basis, the District Court only allows the Petitioners to file a responsive brief and only if one of the original parties files a dispositive motion. ECF 44 at 28.

The Petitioners filed a Notice of Appeal on March 25, 2016. ECF 48/App ECF 1. On May 11, 2016, the Plaintiffs filed a Motion to Dismiss. App ECF 29. The motion to dismiss was granted for lack of appellate jurisdiction on the ground

that the District Court's order regarding intervention is not final or immediately appealable under the collateral order doctrine. App ECF 55.

IV. ARGUMENT

A. Introduction

In dismissing the appeal of the Order, this Court cited *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 390 (1987). In that case too, appellants had been permitted to intervene under Rule 24(b), but subject to restrictions on their participation in the lawsuit (although those restrictions were considerably less onerous than those imposed on Petitioners). The Supreme Court nonetheless held that the order below was an interlocutory order and not appealable for lack of appellate jurisdiction. In so doing, the Supreme Court stated that the appellant had "alternative means" of challenging the order. *Stringfellow* at 378.

The majority opinion only discussed the availability of post-judgment appeal. However, in his concurring opinion, Justice Brennan, joined by Justice Marshall, wrote,

> [T]he alternative means of relief available to CNA, and available to an original party or intervenor of right facing similar restrictions, include the ability to petition the Court of Appeals for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. Mandamus is an appropriate avenue for relief from orders unsuited to appellate review under the collateral-order doctrine; such orders are not representative of a class of orders for which interlocutory review is generally needed, but

> sometimes involve extraordinary circumstances giving rise to a compelling demand for pretrial relief. 480 U.S. 370, 383.

Immediately relevant to this case, Justice Brennan went on to say,

> [A]lthough CNA's argument that the order here is effectively unreviewable on appeal does not constitute persuasive grounds for affording CNA an interlocutory appeal, the argument could properly be made in support of a petition for mandamus. Through that petition, CNA could seek review of both the denial of intervention of right and of the imposition of conditions, because, as explained above, the resolution of the former determines the scope of the District Court's discretion in issuing the latter. 480 U.S. 370, 384-385.

This case involves the extraordinary circumstances Justice Brennan envisioned giving rise to a compelling demand for pretrial relief. By this petition, Petitioners seek review of both the denial of intervention of right and of the imposition of conditions, as Justice Brennan contemplated.

The traditional use of the writ of mandamus in aid of appellate jurisdiction has been to confine the court subject to the writ to a lawful exercise of its jurisdiction or to compel it to exercise its authority when it has a duty to do so. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). The Supreme Court has identified three conditions that must be satisfied before a writ of mandamus is issued by an appellate court: 1) the petitioner must show that his right to the issuance of the writ is "clear and indisputable;" 2) the petitioner must have no other adequate means to attain the relief he seeks; and 3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the

circumstances. *Cheney v. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). The appropriate circumstances for the exercise of the Circuit Court's discretion identified by the Supreme Court include circumstances amounting to a judicial usurpation of power (*Will v. United States*, 389 U.S. 90, 95 (1967)), a clear abuse of discretion by the inferior court (*Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)), or where an issue of first impression is presented as to the scope of the jurisdiction or authority of the inferior court (*Schlagenhauf v. Holder*, 379 U.S. 104, 111-12 (1964)).[5]

B. The Petitioners Have a Clear and Indisputable Right to the Relief Sought With Respect to the Rule 24(a)(2) Submission

Petitioners are clearly and indisputably entitled to intervene as of right under this Circuit's ruling in *Crouse-Hinds Co. v. InterNorth, Inc*., 634 F.2d 690 (2d Cir. 1980). Petitioners also are entitled to intervene as of right under the criteria set forth in *Washington Elec. Coop. v. Mass. Mun. Wholesale Elec*., 922 F.2d 92, 97 (2d Cir. 1990). As discussed below, the Petitioners' interest in the subject of the action is "direct, substantial, and legally protectable."

[5] Consistent with *Schlagenhauf*, this Circuit has held that mandamus is an appropriate remedy when the legal issue presented is of first impression. *E.g.*, *In re S.E.C. ex rel Glotzer*, 374 F.3d 184, 187 (2d Cir. 2004); *In re Long Island Lighting Co.*, 129 F.3d 268, 270 (2d Cir. 1997); *In re United States*, 10 F.3d 931,933 (2d Cir. 1993).

District courts in the Second Circuit are bound by the law established by the Second Circuit Court of Appeals. *Liberty Synergistics Inc. v. Microflo Ltd*., 718 F. 3d 138, 154, n. 17 (2d Cir. 2013). The District Court exceeded its authority when it did not follow applicable Circuit precedent, and clearly abused its discretion[6] when it concluded that the Petitioners' interest is not "direct." Accordingly, the Petitioners have a clear and indisputable right to the requested writ of mandamus as regards intervention pursuant to Rule 24(a)(2).

1. The District Court Exceeded Its Jurisdiction When It Failed to Follow Circuit Precedent Regarding Rule 24(a)(2)

It is black letter law in this Circuit, as in general, that in a suit by a stranger to a contract to prevent one party to that contract from performing the contract in accordance with its terms, the other party to the contract must be joined. *Crouse-Hinds* at 701; *Lomayaktewa v. Hathway*, 520 F. 2d 1324, 1325 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). This Circuit and others rely upon the Supreme Court's opinion in *Shields v. Barrow*, 58 U.S. 130, 141-42 (1854) as the foundation for the principle that a party to a contract must be made a party in the lawsuit when the relief sought by a litigant, if granted, will adversely affect that person's interests in that contract. The Supreme Court's decision in *Shields v. Barrow*

[6] A district court abuses its discretion if it based its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence, or if it has rendered a decision that cannot be located within the range of permissible decisions. *Linde v. Arab Bank*, 706 F.3d 92, 107 (2d Cir. 2013).

makes it clear that it is irrelevant whether the plaintiff is seeking to set aside the entire contract or only one of the provisions, to prohibit performance of the contract or only performance pursuant to a particular provision. 58 U.S. at 139- 40.

In *Shields v. Barrow*, the plaintiffs sought, *inter alia*, to rescind a contract. *Id.* at 138-39. In that case the Supreme Court identified three classes of parties: 1) the original parties; 2) necessary parties, who are defined as non-litigants with an interest in the "controversy" who would have to be made parties in order for the court to resolve the rights of all persons with interests in the "controversy" but whose interests are separate from the interests of the original parties and, therefore, the court can adjudicate the case before it without affecting the interests of the non-litigants; and 3) indispensable parties, who are defined as non-litigants with an interest in the "controversy" and that interest is such that the court cannot adjudicate the case before it without affecting the interest of the non-litigant. *Id.* at 139. The Supreme Court described an action to rescind a contract, the type of action before it, as an action in which the absent parties to the contract at issue are indispensable parties to the suit. *Id.* at 139-40. However, the Supreme Court's decision does not turn on the fact that the plaintiff sought to rescind the contract. Rather it is based on a broader principle: no court can adjudicate a case if by doing so it will affect a person's right, without the person being either actually or constructively before the court. *Id.* at 141- 42. ("A circuit court can make no

decree affecting the rights of an absent person, and can make no decree between the parties before it, which so involves … the rights of the absent person, that complete and final justice cannot be done between the parties … without affecting those rights.")

The law in this Circuit is therefore that a person who is party to a contract, but not a litigant in a case to prevent performance of that contract, is a Rule 19 necessary party[7] if that person may be adversely affected by rulings concerning that contract, and, due to his absence from the case he cannot protect his interest. *Crouse-Hinds Co.*, 634 F.2d at 701, quoting from *Lomayaktewa*, 520 F.2d at 1325 ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.")

In addition, in *Mastercard Intern. Inc. v. Visa Intern. Service Ass'n*, 471 F.3d 377, 389 (2d Cir. 2006), this Circuit ruled that a person who is not a Rule

[7] Modern usage as to the terms "necessary" and "indispensible" is different than that in the *Shields* opinion. What the Supreme Court there described as an indispensible party is the core of the modern definition of "required" party under Rule 19(a). Despite the use of "required" in the Rule, courts often use "necessary party" to describe a Rule 19(a) party. An "indispensible" party is one whose joinder is not feasible and whose absence would require the case to be dismissed under Rule 19(b). There is no issue here about personal jurisdiction over Petitioners, but, if there were, they would be indispensible parties per *Crouse-Hinds* and Rule 19. For consistency with *Shields*, Petitioners will, as necessary, be referred to herein as indispensible parties although there is no issue presented about their absence or about dismissal of the case.

19(a) necessary party cannot satisfy the test for intervention as of right under Rule 24(a)(2). The converse statement is also true: a person who is a Rule 19(a)(2)(i) necessary party (or a Rule 19 indispensable party) is entitled to intervene under Rule 24(a)(2). *See*, 471 F.3d at 390. Rule 19(a)(2) and Rule 24(a)(2) mirror each other. *Id*. A person who has an interest in the subject of the action, and whose ability to protect that interest may, as a practical matter, be impaired or impeded by the judgment issued in the action is a Rule 19(a)(2) necessary party. *Crouse-Hinds,* 634 F.2d at 700-01. Under Rule 24(a)(2), such a person must be allowed to intervene unless an existing litigant adequately represents his interest. In the action below, the District Court ruled that the defendants do not adequately represent Petitioners' interest. Order at 19-20.

In *Mastercard*, intervention was denied to a third person who was not a party to the contract that was the subject of the action, but rather to a separate contract with one of the parties, FIFA. In upholding the denial of Visa's motion to intervene, this Circuit said:

> "Visa's reliance on [*Crouse-Hinds*] is misplaced. In *Crouse-Hinds*, *the actual contract involving the absent third party was the basis of the claim.* [Emphasis added.] The counterclaim specifically challenged the validity of the merger agreement and sought to set aside that agreement. If the defendant prevailed on this counterclaim, the merger agreement would be deemed invalid, which would presumably affect Belden's ability to then sue for breach of that agreement or invoke any of the protections in that agreement. Thus, non-party Belden was faced with the possibility of having its contract terminated in its absence. In contrast, in this case,

> while the Visa Contract may be affected by this litigation, it is not the contract at issue in MasterCard's lawsuit." *Mastercard*, 471 F.3d at 386.

In this case, as in *Crouse-Hinds*, it is the agreement between the FAA and Petitioners that is at issue in the action below. As in *Crouse-Hinds*, if the Plaintiffs prevail, the Settlement Agreement will be deemed invalid. Furthermore, the relief that Plaintiffs seek is not somehow incidental to Petitioners' interest in the Settlement Agreement. The relief Plaintiffs seek is precisely to render Petitioners' agreement with the FAA invalid. As regards the Settlement Agreement, that is indeed the entire object of their suit. As the District Court stated, a ruling in favor of the Plaintiffs "will impede the [Petitioners'] ability to argue, in a separate breach of contract action, that the FAA must forebear in enforcing certain grant assurances after December 31, 2014 pursuant to the Settlement Agreement." Order at 18.

2. The District Court's Attempt to Distinguish *Crouse-Hinds* Is Unavailing

The District Court concluded that *Crouse-Hinds* is not the relevant precedent because the Plaintiffs are not seeking to set aside the Settlement Agreement in its entirety, but only to bar the FAA from performing Paragraph 7. Order at 15. But Paragraph 7 is the key and only substantive provision of the Settlement Agreement. All of the other elements are matters of process. Furthermore, there is no basis in law for the distinction made by the court below between an action to set aside an entire contract and an action to prevent performance according to one of its terms,

and no authority is cited for the proposition. The Supreme Court's decision in *Shields* makes it clear that the relevant inquiry is not how much or how little of the contract plaintiffs seek to invalidate, but whether the non-litigant's rights will be adversely affected by a ruling in favor of the party attacking the contract. 58 U.S. 130, 141-42.

In cases where the party attacking the contract at issue is only attacking one provision, courts have not found that fact to be germane to the analysis. For example, in *Kescoli v. Babbitt*, 101 F. 3d 1304, 1309-10 (9th Cir. 1996), the Ninth Circuit found that the Navajo Nation and the Hopi Tribe were Rule 19 parties to an action against the federal Office of Surface Mining Reclamation and Enforcement and Peabody Western Coal Company seeking to prevent the performance of a settlement agreement among the federal agency, the two Indian Nations, and Peabody Western Coal Company, although the plaintiff sought to invalidate only one provision of the agreement.

A review of the Prayer for Relief in the Complaint shows that if the District Court grants the relief regarding either the Plaintiffs' First Claim or Second Claim, the Petitioners' interest in the bargain embodied in the Settlement Agreement will be not merely adversely affected, but extinguished, as the FAA, will be prohibited from acting consistent with Paragraph 7. The District Court's conclusion that *Crouse-Hinds* only applies if the litigant is seeking to set aside the entire contract

is based on a clearly erroneous view of the law. Therefore, *Crouse-Hinds* remains the controlling precedent. The failure of the District Court to adhere to applicable Circuit precedent is a usurpation of judicial power.

3. The District Court Clearly Abused Its Discretion When It Ruled that the Petitioners Do Not Meet the Rule 24(a)(2) Criteria

This Circuit has interpreted the language in Rule 24(a)(2) to require the putative intervenor to show that his interest is "direct, substantial, and legally protectable." *Washington Elec. Coop., v. Mass. Mun. Wholesale Elec.*, 922 F.2d 92, 97 (2d Cir. 1990). Having found that *Crouse-Hinds* is not the relevant precedent, the District Court went on to consider whether the Petitioners met the requirements set forth in Rule 24(a)(2). [8]

a. The Petitioners' Interests Are Direct and Substantial

The District Court concluded that the Petitioners had not shown that they have "a direct interest in the subject of the action."[9] Order at 16-17. This is unfathomable. The interest of Petitioners in the Settlement Agreement and in the

[8] The District Court did find that "the Settlement Agreement constitutes, at the very least, a component of the subject of this action." Order at 16. It did not find that the Settlement Agreement constitutes the entire subject of the action below because a third claim concerns a statute not mentioned in the Settlement Agreement. The mere existence in the suit of some other claim, not against the Settlement Agreement, cannot extinguish Petitioners' right to defend their agreement.

[9] The District Court also found that the motion was filed timely, that Petitioners' ability to protect their interests would be impaired if the District Court rules in favor of the Plaintiffs on either claim related to Paragraph 7, and that the United States is not adequately representing the Petitioners' interests. Order at 18-20.

authority of the United States to perform its agreement with Petitioners is the very subject of the action.[10] The relief Plaintiffs seek is to enjoin the FAA from performing its agreement with Petitioners. The relief sought by Plaintiffs, if granted, would extinguish for all purposes the interest of Petitioners' in their agreement with the FAA, because the FAA, a party to the lawsuit, would be barred by judicial order from performing the agreement.

In addition, the District Court concluded that the Petitioners' interest is not "direct" on the theory that no harm to Petitioners' interest will occur until the FAA takes action to enforce the relevant grant assurances, thereby breaching the Settlement Agreement. Order at 17. If the opinion of the District Court were correct, then far from always being an indispensible party to an action by a stranger seeking to prevent performance of a contract, the absent party to the contract would *never* be an indispensible party, because there can be no lawsuit to prevent performance of a contract unless the contract in relevant part has not yet been breached. The District Court's ruling in this regard cannot be reconciled with *Shields v. Barrow*, *Crouse-Hinds* or any of the other of cases where the very purpose of the action, as here, is to compel by judicial ruling a breach of the agreement that has not yet occurred.

[10] See the discussion of the Plaintiffs' claims in the Factual Statement.

The District Court also failed to consider the nature of the settlement. The Petitioners agreed in the Settlement Agreement to dismiss with prejudice two lawsuits concerning FAA funding for the apron project and an administrative proceeding relating to the project in exchange for the FAA agreeing not to enforce Grant Assurances 22(a) and (h) and Grant Assurances 29(a) and (b) after December 31, 2014. ECF 1, Ex. B §§ 1-3. If the FAA is prohibited from performing consistent with Paragraph 7, the foundation for the settlement is destroyed. Petitioners' interest is not only "direct;" it cannot possibly be any more direct.

Case law supports the conclusion that the Petitioners' interest in the action below is "direct." For example, in *Kescoli v. Babbitt*, the settlement agreement with a federal agency dealt with the permit issued by the federal agency to the company to conduct mining on land where two Indian Nations owned subsurface mineral rights and there were burial sites. 101 F.3d. at 1307-08. The Ninth Circuit found that: 1) in the settlement agreement the Indian Nations had struck a balance between burial site protection and economic gain from mining royalties; 2) the plaintiff was challenging the balance struck by the Indian Nations in the settlement agreement; and 3) the plaintiff's proposed change would directly affect the settlement agreement. *Id.* at 1309-10. The Ninth Circuit concluded that the Indian Nations had a direct interest in the subject of the action - their settlement

agreement - because "Kescoli's action could affect the [Indian Nations'] interests in their lease agreements [with the mining company] and [their] ability to obtain the bargained-for royalties and jobs." *Id.* at 1310.

Petitioners, like the Indian Nations, are parties to the settlement agreement that is a subject of the litigation. Granting the relief requested by the Plaintiffs would deny to Petitioners any ability to obtain the bargained for performance by the other party to the settlement as the FAA would be barred from performing. *See*, *Kescoli*, 101 F.3d at 1309-10.

Given the law in this Circuit that Rule 19(a)(2)(i) and Rule 24(a)(2) "are intended to mirror each other,"[11] the District Court's conclusion that the Petitioners' interests are not harmed until the Settlement Agreement is breached is not within the range of permissible decisions. If the Indian Nations in *Kescoli* are Rule 19 necessary parties, so too the Petitioners, and they are therefore entitled to intervene under Rule 24(a)(2).

The District Court also found that any harm to the Petitioners is contingent upon the occurrence of a series of events[12] that would have to occur prior to the

[11] *Mastercard*, 471 F.3d at 390.

[12] The District Court identified the following events: 1) a ruling in favor of the Plaintiffs; 2) and the FAA or an airport operator prompting a FAA investigation of grant assurance violations by the Town of East Hampton; 3) and the FAA finding a violation; 4) and "the FAA taking enforcement action in a manner deemed by the [Petitioners]…to breach…the 2005 Settlement Agreement." Order at 16-17.

FAA enforcing the subject grant assurances. Order at 16 -17. The District Court found that "this level of contingency weighs against a finding that the [Petitioners] interest in this action is direct." Order at 17. The Petitioners are, in fact, immediately harmed by an unfavorable ruling because they can never thereafter achieve the benefit of their bargain. They have no recourse if the contingencies vest because the matter will already have been decided. It is logically impossible that the present interest of the Plaintiffs in attacking the Settlement Agreement to which they are strangers is sufficient to support jurisdiction while the interest of Petitioners in defending their Settlement Agreement is too contingent to permit its defense.

The District Court relies on *Brennan v. N.Y.C. Board of Education*, 260 F. 3d 123 (2d Cir. 2001) and *Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) to support its conclusion that any harm to the Petitioner' interests is "contingent." Order at 16 -17. The result in *Brennan* is precisely to the opposite effect of the ruling by the District Court. In *Brennan*, the putative intervenors were not parties to the subject agreement, but third parties who claimed their interests would be adversely affected. The intervenors in *Brennan* were in the position of the Plaintiffs in this action, strangers to the contract, not parties to the contract. In the language of *Shields*, they were necessary parties, not indispensible parties. The case involved claims of employment discrimination and

the settlement accorded certain seniority rights to the claimants. Employees not party to the settlement in turn claimed their rights would be adversely affected even though any such impact was in the future and it could not be determined if, whether, when, or how the alteration of the seniority system would affect any of them specifically. *Brennan,* 260 F.2d at 131-32.

The district court denied intervention on the ground that the putative intervenors, "had presumptively obtained their employment status as a result of discrimination, they had no property right in that status, and any adverse effect of the Agreement was remote and speculative." 260 F.3d at 128. Far from upholding the court below, this court reversed and ordered intervention as of right. 260 F.3d at 133. Thus, nothing in *Brennan*, neither the facts nor the result, supports the ruling of the District Court.

Similarly, *Washington Elec. Coop.* involved attempted intervention by a non-party to the subject contract claiming a right against the plaintiff to the proceeds should the plaintiff recover on its contract claim. The putative intervenor was thus in the same position as the intervenor in the *Mastercard* case, a stranger to the contract at issue seeking to inject its own collateral issues into the contract litigation based on claims that it might, or might not, have against one of the contracting parties depending on the outcome of the lawsuit. This court ruled that the intervenor failed to meet any of the conditions of Rule 24(a)(2) other than

timeliness and could not be permitted to inject its own collateral issues into the action. 922 F. 2d at 96. Among other things, the court found that the interest of the putative intervenor was based on a "double contingency": the plaintiffs had to prevail on the merits and a state agency had to decide that the parties represented by the putative intervenor were entitled to a percentage of the plaintiff's recovery. *Id.* at 97. As the action was not for specific property but for money damages, there was nothing that would compromise any claims of the intervenor against the plaintiff should the plaintiff prevail. *Id.* at 98. *Washington Elec. Coop.* thus has nothing whatever to do with this case, because the harm to Petitioners here will already be a certainty if the District Court were to rule that the FAA is barred from performing the Settlement Agreement according to its terms. Petitioners' interest will have been extinguished.

b. The Petitioners' Interests Are Legally Protectable

The District Court did not address whether the Petitioners' interest in the action is "legally protectable" because it found that the Petitioners' interest is contingent. Order at 18, n.7. However**,** the District Court stated that a ruling in favor of the Plaintiffs "will impede the [Petitioners'] ability to argue, in a separate breach of contract action, that the FAA must forebear in enforcing certain grant assurances after December 31, 2014 pursuant to the Settlement Agreement." Order at 18. Furthermore, the Petitioners dismissed with prejudice two lawsuits and an

administrative proceeding in return for the FAA agreeing, *inter alia*, to comply with Paragraph 7. This compels the conclusion that the interest of Petitioners is legally protectable. [13]

C. The Petitioners Have a Clear and Indisputable Right to the Relief Requested Regarding the Permitted Scope of Their Participation as Intervenors

The District Court lacks the authority to limit the Petitioners' role such that they cannot effectively participate in the District Court proceeding or in an appeal. Therefore, the Petitioners have a clear and indisputable right to the requested relief.

1. The District Court Exceeded Its Authority When It Granted Permissive Intervention but Limited the Petitioners' Participation to Filing a Responsive Brief if an Original Party Files a Dispositive Brief

While the appellate courts have accorded district courts substantial leeway in managing civil actions, a fundamental principle of our legal system is that a party is allowed to make use of the Rules of Civil Procedure, the Rules of Evidence, and relevant statutes to prosecute or defend an action. *Cf.*, *Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987). When a district court prevents an intervenor or, for that matter, an original plaintiff or a defendant, from protecting his interests, the court exceeds its authority. *Investment Properties Intern. Limited v. IOS Limited*, 459 F.2d 705, 708 (2d Cir. 1972). That is precisely

[13] Whether such an action must be filed in the Court of Federal Claims or federal district court and the nature of the remedy available to the Petitioners is irrelevant to this proceeding.

the result of the Order. The Petitioners are only allowed to file a responsive brief, and they can do so *only if* an original party files a dispositive brief. Order at 30. The District Court could have denied the request for permissive intervention. It did not do so. It granted permissive intervention and then made it impossible for the Petitioners to protect their interests in the lower court proceeding and during an appeal. For example, Petitioners cannot move the court to supplement the administrative record. In addition, because of the extraordinary breadth of the restriction, they will be unable to raise on appeal any defense that the FAA did not rely upon in the lower court proceeding.

In order to manage the case before it, a district court has discretion under the Federal Rules of Civil Procedure to impose reasonable conditions and restrictions on parties. But the authority granted to district courts under Rule 24 does not include the authority to prevent a party-defendant from actually defending. *Cf.*, *Richardson Greenshields*, 825 F. 2d at 652. Yet, under the Order, Petitioners are literally barred from presenting any defenses.

As nominal parties by permissive intervention, Petitioners are bound by the District Court's final judgment. Hence even a permissive intervenor-defendant must be permitted to defend. Accordingly, Petitioners have a clear and indisputable right to the requested writ of mandamus.

D. The Petitioners Have No Other Adequate Means to Attain the Relief They Seek

The Petitioners seek an order that allows them to participate in the case below as parties pursuant to Rule 24. The Petitioners' appeal of the Order in *Friends of East Hampton Airport, et al. v. Committee to Stop Airport Expansion et al.*, No. 16-931-cv, was dismissed for lack of appellate jurisdiction. Therefore, there is no prejudgment option available to the Petitioners except a writ of mandamus, as contemplated by the concurring opinion of Justices Brennan and Marshall in *Stringfellow*.

Post-judgment appeals will be inadequate. The record for an appeal of the judgment on the merits is established at the trial court level. Except in extraordinary circumstances, appellate courts limit their consideration to the record established below. *IBM v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1976). Appellants are limited to arguments that can be made based on the record established during the trial court proceeding. If the *status quo* is maintained and Petitioners are barred from all but briefs in response to dispositive motions made by the other parties, on appeal the Petitioners would be required to argue based on a record developed almost exclusively, if not entirely, by the Plaintiffs, adverse parties, and the FAA, whom the District Court, correctly, has already ruled does not adequately represent the interests of the Petitioners. The extreme restrictions placed on the Petitioners by the District Court will cause irreparable harm to the Petitioners by preventing them from undertaking an effective appeal. Nothing in the Supreme Court's

jurisprudence relating to the finality rule suggests that if the litigant has an opportunity for a *pro forma* post-judgment appeal, the petitioner has the means to obtain relief without obtaining a writ of mandamus. *Cf.*, *Stringfellow*, 480 U.S. at 378 ([I]t is significant that none of the limitations interfere with CNA's ability to raise its claims on postjudgment appeal.") There is no other adequate means for Petitioners to obtain relief other than by writ of mandamus.

E. Issuance of the Requested Writ Is Appropriate Under the Circumstances

Given the well-settled legal principle that a person who meets the requirements in Rule 24(a)(2) can protect his interests only if made a party to the pending case, it is appropriate for this Court to exercise its jurisdiction under 28 U.S.C. §1651(a) to address the Petitioners' contention that the District Court exceeded its authority and clearly abused its discretion when it ruled the Petitioners are not intervenors of right. *Balintulo v. Daimler AG*, 727 F.3d 174, 187 (2d Cir. 2013).

Furthermore, as Justice Brennan noted in his concurrence in *Stringfellow*, a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor, because the former has an interest in the litigation that it cannot protect without joining the litigation. 480 U.S. at 381-82. (Brennan J., concurring). Deciding whether the Petitioners are intervenors of right is essential to determining the scope of the District Court's discretion in imposing

conditions or restrictions on Petitioners' participation in the action below. *Id.* at 384-85. A ruling now will provide guidance to the District Court in the event it considers, on remand, placing any restrictions on the Petitioners. In order to avoid piecemeal litigation, this Court should decide now that Petitioners are entitled to intervene as of right. *See, In Re Zyprexa Products Liability Litigation*, 594 F.3d 113, 124 (2d Cir. 2010).

In *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964), the Supreme Court recognized that mandamus is an appropriate remedy when the petitioner contends that the lower court exceeded its authority and the petition presents an issue of first impression. This case presents a significant issue of first impression for consideration by this Court: Is it within the scope of the district courts' authority to limit the participation of an intervenor-defendant, who was added to the case pursuant to Rule 24(b), to filing only a responsive brief if a dispositive brief is filed by an original party when that court has found that the original defendant does not represent the intervenor-defendant's interest, and the effect of the restriction, in the event of a ruling for the plaintiff, will be to render it impossible for the intervenor to protect his interests during a post-judgment appeal?

Finally, an order that will result in manifest injustice creates an extraordinary circumstance that renders that case appropriate for the exercise of an appellate court's mandamus jurisdiction. *Balintulo,* 727 F.3d at 187. Due to the

clear and indisputable right of Petitioners to intervene as of right, the breadth of the Order's restriction, and the resulting effect of the Order on the Petitioners' ability to protect their interests in the action below and on appeal, the Order will result in manifest injustice to the Petitioners. This case presents an "extraordinary circumstance" as envisioned by Justice Brennan and, therefore, is an appropriate case for this Court to consider.

V. CONCLUSION

For the reasons set forth above, the Court should grant the requested relief.

Respectfully submitted,

LAW OFFICE OF SHEILA D. JONES

Date: September 19, 2016

By: /s/ Sheila D. Jones

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Certificate of Service

I, Sheila D. Jones, hereby certify under penalty of perjury that on September 19, 2016, that I served, by electronic mail, a copy of this Petition and Memorandum in Support of Writ of Mandamus on Behalf of Committee to Stop Airport Expansion, Pat Trunzo, Jr., and Pat Trunzo III on the respective attorneys for the plaintiffs, the defendants, and the Town of East Hampton in the case below, *Friends of East Hampton Airport, Inc., et al. v. The Federal Aviation Administration, et al.*, Case 2:15-cv-00441-JS-ARL.

In addition, I certify that a copy of the papers will be delivered by courier today to U.S. District Court Judge Seybert at the U.S. District Court for the Eastern District of New York, 100 Federal Plaza, Central Islip, NY 11722.

September 19, 2016

/s/ Sheila D. Jones

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