[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL BUSINESS AVIATION ASSOCIATION, INC.; SANTA MONICA AIRPORT ASSOCIATION, INC.; BILL'S AIR CENTER, INC.; KIM DAVIDSON AVIATION, INC.; REDGATE PARTNERS, LLC; WONDERFUL CITRUS LLC, Petitioners, v. MICHAEL P. HUERTA, Administrator, and FEDERAL AVIATION ADMINISTRATION, Respondents.	No. 17-1054

RESPONDENTS' MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF A REVIEWABLE FAA ORDER

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27(g), Respondents Michael P. Huerta and the Federal Aviation Administration (FAA), move to dismiss the petition for review for lack of a reviewable FAA order. The petition for review invokes this Court's jurisdiction under 49 U.S.C. § 46110(a), which authorizes direct review of an order issued by the FAA. Here, however, there is no FAA order that could be the subject of the petition for review. Instead, petitioners seek to challenge a consent decree recently entered by the District Court

for the Central District of California, which resolved disputes between the City of Santa Monica (City) and the FAA that were pending before the district court and the Ninth Circuit. *See* Stipulation and Order/Consent Decree, *City of Santa Monica v. United States,* Case No. 13-cv-08046 (C.D. Cal. Feb. 1, 2017) (ECF No. 57) (Consent Decree) (copy attached to this motion). Counsel for petitioners oppose this motion.

STATEMENT

1. Petitioners seek to challenge a Consent Decree that was recently approved by the District Court for the Central District of California. The Consent Decree approved a settlement that resolved two cases pending within the Ninth Circuit, both of which concerned the City's obligations with respect to the operation of the Santa Monica Airport (Airport).

First, the Consent Decree resolved litigation pending in the District Court for the Central District of California. *See City of Santa Monica v. United States of America,* No. 13-cv-08046 (C.D. Cal.) (*Central District Litigation*). That litigation concerned the City's obligations under a legal instrument by which the United States transferred to the City its interests in the property on which the Airport is located, pursuant to the Surplus Property Act of 1944. The FAA had taken the position that the instrument obligated the City to operate the Airport in perpetuity, whereas the City had taken the position that any obligations under the instrument had expired decades ago. *See City of Santa Monica v. United States*, 650 F. App'x 326, 327-28 (9th Cir. 2016) (describing the dispute).

The City commenced the *Central District Litigation* in 2013, when it filed a complaint under the Quiet Title Act, 28 U.S.C. § 2409a (2000), which permits a party to sue the United States to resolve a disputed property claim. The district court granted the government's motion to dismiss the suit on statute of limitations grounds, but the Ninth Circuit reversed and remanded for an evidentiary hearing, holding that the statute of limitations question was intertwined with the merits of the title dispute. *See City of Santa Monica*, 650 F. App'x at 329. That dispute remained pending before the district court at the time it entered the Consent Decree.

Second, the Consent Decree resolved a petition for review pending before the Ninth Circuit that concerned the duration of certain grant conditions applicable to the Airport. S*ee City of Santa Monica v. FAA*, No. 16-72827 (9th Cir. Feb. 13, 2017) (*Ninth Circuit Litigation*). In 1994, the City accepted a grant from the FAA for various improvements to the Airport. As is standard for such grants, the grant agreement specified that the City must operate the Airport for twenty years from the date of the grant. In 2003, the City and the FAA executed a grant amendment that increased the original grant amount. In response to the City's efforts to close the Airport, Airport tenants filed an administrative complaint with the FAA, pursuant to 14 C.F.R. Part 16, seeking a ruling that the grant amendment re-started the City's twenty-year obligation to operate the Airport and that the City was therefore obligated to operate the Airport until 2023. Final Agency Decision and Order, *National Bus. Aviation Ass'n v. City of Santa Monica*, FAA No. 16-14-04 (Aug. 15, 2016). The FAA issued an administrative

decision concluding that the grant amendment triggered a new twenty-year obligation through 2023, *id.,* and the City petitioned for review of that decision in the Ninth Circuit.[1]

2. On January 30, 2017, the FAA and the City executed a settlement agreement that, if approved by the district court, would resolve their disputes regarding the operation of the Airport. *See* Stipulation and Order/Consent Decree, *Central District Litigation*, (C.D. Cal. Jan. 30, 2017) (ECF No. 52) (Settlement Agreement). The Settlement Agreement provided that the parties would jointly seek entry of the Consent Decree. *Id.* at 8. If the district court declined to enter the Consent Decree, however, the Settlement Agreement provided that "this Agreement shall be of no force and effect and may not be used by either Party for any purpose whatsoever." *Id.* at 9.

Shortly after the FAA and the City first sought entry of the Consent Decree, a group of Santa Monica residents filed a notice stating an intention to move to intervene in the *Central District Litigation* to challenge the proposed settlement. *See* Resident Groups' Notice of Emergency Ex Parte Mot., *Central District Litigation* (C.D. Cal. Jan. 31, 2017) (ECF No. 53). On February 1, 2017, the district court rejected that

[1] The Consent Decree also resolved a pending administrative proceeding. In 2015, the City ceased entering into leases with Airport tenants who provide aeronautical services, and FAA issued a Notice of Investigation into whether the City's actions violated its federal obligations, among other issues. Notice of Investigation, *In re Compliance with Fed. Obligations by the City of Santa Monica*, FAA Dkt. No. 16-16-13 (Sept. 26, 2016).

challenge, concluding "that intervention is not merited at this late stage" and that the Consent Decree was "not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Order, *Central District Litigation* (ECF No. 56) (copy attached to this motion). Accordingly, the district court signed and approved the Consent Decree, and it was entered on the docket. *Id.*

As entered by the district court, the Consent Decree permits the City to shorten the length of the Airport's runway to 3,500 feet so long as the City complies with applicable notice provisions. Consent Decree at 8-9. The City, for its part, agrees to operate the Airport until December 31, 2028. *Id.* at 11. The Consent Decree thereby "resolve[d] all claims by the Parties that have been brought, or could have been brought" in the *Central District Litigation*, the *Ninth Circuit Litigation*, and the pending administrative proceedings brought by the FAA against the City. *Id.* at 8. It further provided that the FAA and the City would jointly move within thirty days for dismissal of the *Ninth Circuit Litigation* but indicated that the FAA did not have authority to require private parties to withdraw their administrative complaints and that the FAA must therefore consider any complaints not withdrawn. *Id.* at 7-8.

On February 13, 2017, pursuant to the terms of the Consent Decree, the FAA and the City jointly stipulated to the dismissal of the *Ninth Circuit Litigation*. Stipulated Mot. to Voluntarily Dismiss, *Ninth Circuit Litigation* (9th Cir. Feb. 13, 2017). That

same day, the Ninth Circuit dismissed that petition for review. Order, *Ninth Circuit Litigation* (9th Cir. Feb. 13, 2017) (copy attached to this motion).

ARGUMENT

The petition for review invokes this Court's jurisdiction under 49 U.S.C. § 46110(a), which provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . or the Administrator of the Federal Aviation Administration . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit" within sixty days. As this Court has explained, judicial review under section 46110 is limited to "review of final agency orders." *Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438-39 (D.C. Cir. 1976) (discussing 49 U.S.C. § 1486 (1963), the predecessor to section 46110). "To be deemed 'final' and thus reviewable as an order under 49 U.S.C. § 46110, an [FAA] disposition 'must mark the consummation of the agency's decisionmaking process,' and it 'must determine rights or obligations or give rise to legal consequences.'" *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (quoting *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007)).

There is no final FAA order for the Court to review in this case. The only order that can be said to "determine rights or obligations or give rise to legal consequences," *Safe Extensions, Inc.*, 509 F.3d at 598 (quotation marks omitted), is the Consent Decree entered on February 1, 2017. But the Consent Decree is an order of

the District Court for the Central District of California, not an order of the FAA. It was "sign[ed] and approve[d]" by the district court on February 1, 2017, after that court independently determined that the consent decree was "fair, reasonable and adequate to all concerned." Order, *Central District Litigation* (ECF No. 56) (quotation marks omitted). And it expressly provides that the district court shall have jurisdiction to enforce its provisions, including by injunctive relief. Consent Decree at 12.

If petitioners desire to challenge the Consent Decree, they can attempt to seek relief from the Central District of California—the court that actually reviewed and approved the settlement—and perhaps appeal to the Ninth Circuit (steps that would require them to demonstrate, among other things, that they have standing and grounds for intervention). Courts have repeatedly held that consent decrees are appealable orders of a district court. *See, e.g.*, *Pigford v. Glickman,* 206 F.3d 1212, 1216-17 (D.C. Cir. 2000) (reviewing on appeal a district court's approval of consent decree); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (holding that court of appeals had jurisdiction to review consent decree on appeal of intervenor-defendant); *see also Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001) (contrasting private settlement agreements with "the judicial approval and oversight involved in consent decrees"). Petitioners have not yet sought to intervene to appeal the Consent Order to the Ninth Circuit or to obtain relief from the Central District of California, and the

FAA takes no position at this time on the likely outcome of such actions. In any event, it is clear that Congress has not vested review of the Consent Decree in this Court.

Nor is the Settlement Agreement, which preceded the Consent Decree, a final FAA order. As this Court has repeatedly recognized, a reviewable order of the FAA must "'determine rights or obligations or give rise to legal consequences.'" *Safe Extensions, Inc.*, 509 F.3d at 598 (quoting *City of Dania Beach*, 485 F.3d at 1187). But the Settlement Agreement, which merely provided that the City and the FAA would seek district court approval of the Consent Decree, did not determine rights or give rise to legal consequences. To the contrary, the non-final nature of the Settlement Agreement is underscored by section I of that agreement, which expressly stated that the agreement would "be of no force and effect" in the event the district court did not enter the Consent Order. Settlement Agreement at 9.[2] Because of its provisional nature, the Settlement Agreement is closely akin to an FAA letter of intent, which this Court has held unreviewable under section 46110 because such a letter "merely states

[2] This case differs from *Tur v. FAA*, 104 F.3d 290 (9th Cir. 1997), where the Ninth Circuit concluded that a settlement agreement in which an individual agreed not to apply for an airman's certificate for two years was a reviewable FAA order. *Id.* at 292-93. The settlement agreement in *Tur* was not a consent decree signed by a district court, nor was it merely a preliminary agreement to seek such a decree. Instead, the settlement agreement in *Tur* was the agency document that finally determined an individual's rights and was not docketed by a court. *See id.* at 292.

an intention to obligate," and "does not itself adversely affect [parties] but only affects their rights adversely on the contingency of future administrative action." *Village of Bensenville v. FAA*, 457 F.3d 52, 68-69 (D.C. Cir. 2006) (quotation marks and alterations omitted).[3]

Petitioners' broad view of an FAA order is particularly unwarranted in this case, because the consequence of that interpretation would be to make this Court the arbiter of a Consent Decree that resolved two cases pending before and within the Ninth Circuit. As discussed above, the first case—a dispute about the City's obligations to maintain the Airport under an instrument of transfer—had previously been heard by the Ninth Circuit, which remanded the case to the district court for further proceedings. *See City of Santa Monica*, 650 F. App'x at 326. On remand, the district court entered the Consent Decree at issue here. The second case—a dispute over the City's obligation to maintain the Airport under FAA grant conditions—was pending before the Ninth Circuit at the time the Consent Decree was entered. The Ninth Circuit dismissed that case on February 13, 2017, following a stipulation of dismissal filed by the parties in accordance with the terms of the Consent Decree. *See* Order, *Ninth Circuit Litigation*.

[3] The Settlement Agreement also did not purport to resolve FAA administrative proceedings initiated by private parties. To the contrary, it explained that FAA must still "consider any [administrative] complaints not withdrawn." Settlement Agreement at 9.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review because there is no final FAA order for the Court to review.

Respectfully submitted,

ALISA B. KLEIN

s/ Tyce R. Walters

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FEBRUARY 2017

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,333 words.

/s/ Tyce R. Walters

TYCE R. WALTERS
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Service was accomplished on all counsel through the CM/ECF system.

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ADDENDUM

Attachment A:

Stipulation and Order/Consent Decree, *City of Santa Monica v. United States,* Case No. 13-cv-08046 (C.D. Cal. Feb. 1, 2017) (ECF No. 57) (Consent Decree)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CITY OF SANTA MONICA, Petitioner, v. UNITED STATES OF AMERICA, et al. Respondent.	Civil Action No. 13-CV-8046-JFW (VBKx)

STIPULATION AND ORDER/CONSENT DECREE

It is stipulated by and between the undersigned parties by their respective attorneys that:

1. The Court has jurisdiction over each of the parties, and venue of this action is proper in the United States District Court for the Central District of California.

2. The City of Santa Monica (the City) filed this case seeking to quiet title to certain properties and the United States disputes these claims. Live controversies exist between the parties including these and other issues.

3. The parties consent to the Court's entry of the Settlement Agreement in the form attached to this Stipulation and Order/Consent Decree.

4. The parties' execution of this Stipulation and Order/Consent Decree and the Settlement Agreement shall settle and resolve any and all claims of the City arising from the events giving rise to the allegations described in the Complaint in this action and in certain other proceedings between the parties, as provided in the Settlement Agreement.

5. Neither this Stipulation and Order/Consent Decree nor the attached Settlement Agreement shall be construed to preclude the United States or the Federal Aviation Administration from bringing an action against the City for any violation(s) of any laws, regulations or orders other than those addressed in the Settlement Agreement.

6. In the event that the proposed Settlement Agreement is not entered pursuant to this Stipulation and Order/Consent Decree, this Stipulation shall become null and void and shall be of no effect whatever, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

For the Federal Aviation Administration:

_____

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_____
WILLIAM V. O'CONNOR, JR.

Dated: January _____, 2017

ORDER

IT IS SO ORDERED by this Court, this 1st day of February, 2017, at Los Angeles, California.

_____
Honorable John F. Walter
United States District Court
For the Central District of California

SETTLEMENT AGREEMENT/CONSENT DECREE BETWEEN THE FEDERAL AVIATION ADMINISTRATION AND THE CITY OF SANTA MONICA

The United States of America, acting through the Federal Aviation Administration (FAA) and the City of Santa Monica, CA (City) (collectively, the Parties) enter into this Settlement Agreement (Agreement), by and through their undersigned representatives, to resolve the disputes outlined below and pertaining to the operation of the Santa Monica Municipal Airport (Airport or SMO). This Agreement, once signed by the FAA and the City, shall be presented to the U.S. District Court for the Central District Court of California (U.S. District Court) for entry as a Consent Decree.

Background

Airport Property & Runway

SMO is generally composed of two parcels of property.

1. *First Parcel*. The first parcel consists of approximately one hundred and seventy acres that the City of Santa Monica (City) leased to the U.S. government during World War II. (This parcel is referred to herein as the First Parcel and is more fully described as the premises referred to as "Clover Field, Santa Monica Municipal Airport" in the leases, as modified, that are referred to in that certain Instrument of Transfer, dated as of August 10, 1948, between the United States of America and the City that was recorded at Book 28055, Pages 211 through 222, inclusive, in the Official Records of Los Angeles County, California (the IOT).)

2. *Second Parcel*. The second parcel consists of approximately eighteen acres with respect to which the United States of America duly executed a Quitclaim Deed dated April 8, 1949, and recorded at Book 30037, Pages 364 though 370, inclusive, in the Official Records of Los Angeles County, California (the Quitclaim Deed), conveying its interests in said parcel to the City. (This parcel is referred to herein as the Second Parcel.) (The First Parcel and the Second Parcel, together with any other right, title and interest in any premises, structures, improvements or other property conveyed by the United States of America to the City in the IOT or the Quitclaim Deed, are collectively, referred to herein as Airport Property).

Airport Runway. The Airport's current runway of 4,973 feet occupies land in both the First Parcel and Second Parcel , and also includes adjoining land that the Douglas Aircraft Company conveyed to the City by grant deed in 1945.

District Court Litigation

On August 10, 1948, pursuant to the Surplus Property Act of 1944 (SPA), the U.S. Government and the City executed an "Instrument of Transfer" (IOT) by which the U.S. Government surrendered its leaseholds and which the U.S. Government contends imposed certain restrictions on the future use of the Airport property including that:

> the land, buildings, structures, improvement and equipment in which this instrument transfers any interest shall be used for public airport purposes for the use and benefit of the public, on reasonable terms and with unjust discrimination and without grant or exercise of any exclusive right . . . .

The IOT further provides that "the restrictions . . . shall run with the land . . . ." and requires that:

> the entire landing area . . . be maintained for the use and benefit of the public at all times in good and serviceable conditions, provided, however, that such maintenance shall be required as to structures, improvement, facilities and equipment only during the remainder of their estimated life . . . .

On April 8, 1949, the U.S. government effected a Quit Claim Deed, transferring its interests in all or substantially all of the Second Parcel to the City.

On October 31, 2013, the City sued the FAA under the Quiet Title Act regarding the meaning and effect of the IOT. *City of Santa Monica v. United States of America, et al.*, Case No. CV 13-08046 JFW (VBKx). The City's claim seeks, in part, a declaratory judgment providing that the City has unencumbered title to the Airport Property.

On February 13, 2014, the U.S. District Court dismissed the City's claim based on the statute of limitations. However, on March 11, 2016, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's dismissal and remanded the case to the District Court. Trial is currently set for August 29, 2017.

Circuit Court Litigation

On June 27, 1994, the City accepted a $1,604,700.00 federal grant for certain improvements at the Airport pursuant to the terms of a grant agreement that the Parties agree remained in effect for twenty years. On August 27, 2003, the City and the FAA executed a grant amendment that provided $240,600.00 in federal funds to the City. The Parties dispute whether the terms of the grant remain in effect for twenty years from the date of the acceptance of the amendment or for twenty years from the date of the acceptance of the initial agreement in which case they have expired.

In response to a complaint filed pursuant to 14 C.F.R. part 16, on August 15, 2016, the FAA issued a Final Agency Decision (FAD) holding that by accepting the additional funds, the grant expiration date was extended until August 27, 2023. *Nat'l Bus. Aviation Assoc., v. City of Santa Monica*, FAA Docket No. 16-14-04. The City sought review of the FAD in the U.S. Court of Appeals for the Ninth Circuit. *City of Santa Monica v. FAA*, Case No. 16-72827 (9th Cir.).

Federal Administrative Proceedings

The FAA issued a Notice of Investigation (NOI) to determine, in part, whether the City is violating its federal obligations to provide access to the fixed based operators (FBOs). *In re Compliance with Fed. Obligations by the City of Santa Monica,* FAA Docket No. 16-16-13. The NOI is based on the City's handling of the tenancy of the Airport's FBOs, the possible ban on the sale of unleaded fuels, and the City's declared intent to provide certain aeronautical services at SMO on an exclusive basis (proprietary exclusive). The City filed a response to the NOI asserting that it has fully complied with its obligations in regard to these matters.

On December 12, 2016, the FAA issued an Interim Cease and Desist order ordering the City to cease and desist from removing the FBO's until the FAA issues a final agency decision under the NOI. No final decision has been reached regarding the NOI.

NOW, THEREFORE, in consideration of the mutual covenants and other consideration described herein, the the Parties agree it is in the interest of the public and civil aviation to AGREE as follows:

I. COMPLETE SETTLEMENT OF ALL CLAIMS

Within 30 days of this Agreement's execution, the Parties shall jointly move in *City of Santa Monica v. United States of America, et al.,* Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.), for entry of this Agreement as a Consent Decree and for a stay of the the litigation pending the decision on the Consent Decree. Also within 30 days of this Agreement, the Parties shall jointly move to stay *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.), pending the entry of the Consent Decree. Within 14 days of the entry of the Consent Decree, the City shall dismiss with prejudice *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.). Furthermore, the Parties agree that entry of the Consent Decree shall resolve all pending disputes at issue in *In re Compliance with Federal Obligations by the City of Santa Monica,* FAA NO. 16-16-13 (U.S. Dep't of Transp., Fed. Aviation Admin.), and that the FAA shall therefore dismiss the NOI.

In addition, the FAA shall send a letter in substantially the form of Exhibit A to this Agreement to private parties that have filed Part 16 complaints raising issues within the scope of this Agreement requesting that the parties withdraw those complaints. The Parties acknowledge that the FAA does not have authority to require private parties to withdraw their Part 16 complaints

and that the FAA must consider any complaints not withdrawn. Thus, the Parties further acknowledge that no action of a private party in a Part 16 proceeding can constitute a breach of this Agreement.

Unless modified by the court having jurisdiction over the Consent Decree, the Decree shall expire on December 31, 2028. The Parties agree that the expiration of the Decree shall have no effect on the terms or condition of this Agreement, which terms or conditions shall survive the expiration of the Decree.

Further, the Parties agree that this Agreement upon entry of the Consent Decree shall resolve all claims by the Parties that have been brought, or could have been brought, in *City of Santa Monica v. United States of America, et al.,* Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.), *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.), or *In re Compliance with Federal Obligations by the City of Santa Monica,* FAA NO. 16-16-13 (U.S. Dep't of Transp., Fed. Aviation Admin.), including all the Parties' actual or potential claims pertaining to the past operation of the Airport by the City pertaining to tenants, non-tenant aircraft and FBOs.

If one of the Parties alleges a breach of the terms or conditions of this Agreement, the exclusive venue for remedying such a breach shall be the court having jurisdiction over the Consent Decree.

In the event the court in *City of Santa Monica v. United States of America, et al.,* Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.) does not enter the Consent Drecree as-written, the Parties shall confer and, as soon as feasible, decide whether to move the court to enter a modified Consent Decree. If the Parties have not reached an agreement on the form of the revised Consent Decree within 30 days, the Parties shall jointly move to lift the stays of litigation in *City of Santa Monica v. United States of America, et al.,* Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.) and *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.). The FAA shall also at that time resume proceedings in *In re Compliance with Federal Obligations by the City of Santa Monica,* FAA NO. 16-16-13 (U.S. Dep't of Transp., Fed. Aviation Admin.). In such event each Party agrees that this Agreement shall be of no force and effect and may not be used by either Party for any purpose whatsoever.

II. RUNWAY

A. Runway Length. The Parties agree that the Airport's runway shall have an operational runway length of 3,500 feet. The 3,500 foot distance shall not include the runway safety areas that shall be constructed and maintained at both runway ends. The runway safety area may include an engineered materials arrestor system (EMAS) at the City's option. The Parties further agree that the Airport shall accomodate aircraft operations that can safely take off

and land on a runway of the agreed-on length. Prior to the initiation of shortening the runway, the City shall comply with the 30 day notice provisions of 14 C.F.R. Part 157.5(b)(2).

B. Costs to Shorten the Runway. The costs to shorten the runway, including but not limited to the installation of EMAS, shall be borne by the City. If sought by the City, the FAA will provide technical support to the City through the FAA's Office of Airports to assist in obtaining federal funds to support the shortening of the runway, as consistent with federal laws, regulations and the availability of funds.

C. Environmental Studies. The City shall be responsible for complying with its state and federal environmental requirements related to its planning and implementation of modifications at SMO. The City's responsibility shall include the cost of conducting any necessary environmental studies or other requirements under the National Environmental Policy Act (NEPA). 42 U.S.C. §4321 *et seq.*

III. USE AND RELEASE OF PROPERTY

Consistent with the ultimate configuration of the runway pursuant to Section II, the FAA agrees that prior to closure of the Airport, the City may use the property no longer needed for the the Airport with a shortened or reconfigured runway, taking into consideration standard safety areas, including the use of EMAS, for non-aeronautical uses that are safe and compatible with the operation of the Airport. Such land shall be subject to an avigation easement for the period the airport is operated which shall be recorded contemporaneously with any instrument releasing such property. A copy of the form of avigation easement is attached hereto as Exhibit B. This agreement does not constitute FAA approval of any particular future use.

IV. CITY'S PROPRIETARY EXCLUSIVE RIGHT

A. FAA's Acknowledgement of the City's Right

The City may exercise its proprietary exclusive right to provide aeronautical services at SMO, including but not limited to the sale and into-plane delivery of all types of aviation fuels, in accordance with generally-applicable rules governing the exercise of proprietary exclusive rights.

B. City's Obligations

The City shall provide any proprietary exclusive aeronautical services at SMO (i) in conformance with the standard of grant assurance 22 (ii) on reasonable terms at reasonable rates, and (iii) during all hours that such services would normally be provided at comparable general aviation airports, taking into account permissible curfews provided for in section V. The City further agrees that, if the City does not fully provide a type of service at any point in time and a private FBO desires to provide such a service, that operator shall have reasonable access to the airport on commercially reasonable terms and in conformance with the standards of grant assurance 22. See 79 Fed. Reg. 18755 (April 3, 2014).

C. Timing of the City's Exercise of Its Right

Subject to the City's right pursuant to subsection D, below, the City will not implement any proprietary exclusive operations, as defined above, until the work to shorten the runway, as provided in Section II above, is complete.

D. Leases for Private Aeronautical Service Providers Prior to the City's Exercise of Its Right

Leases offered to all tenants providing aeronautical services shall be on reasonable terms and in substantially the same form as that attached as Exhibit C. For purposes of this Agreement, the phrase "reasonable terms" shall mean terms that are customary and usual at similarly situated and sized general aviation airports.

The City shall offer all current tenants providing aeronautical services leases of no less than three (3) years with reasonable terms appropriate to the aeronautical service usually and customarily provided such service at similar facilities, including but not limited to tenant investment and financing requirements.

The City shall also offer leases to all prospective tenants providing aeronautical services for which there is space at SMO subject to reasonable terms and consistent with the standards of grant assurance 22, provided the City is not itself providing such services on a proprietary exclusive basis.

Any and all leases providing aeronautical services may, at the City's election, be subject to termination upon six months written notice of the City's exercise of its proprietary exclusive right to provide the category of services otherwise being provided by private FBOs, provided the City is ready, willing, and able to fully provide such aeronautical service in accordance with applicable law.

V. AIRPORT CURFEW

The City may submit an application for enhanced curfews consistent with 14 C.F.R. part 161 (Part 161). Review of such an application shall be conducted under the procedural rules and subject to the substantive standards applicable to all Part 161 applications submitted to the FAA, which shall not be affected by this Agreement. Review of any decision made in connection with such an application shall be conducted exclusively in the same manner as, and in the same forum as, review of any decision made in connection with a Part 161 application submitted to the FAA. That is, this Agreement shall not affect the form or substance of such a review. Notwithstanding any other provision of this Agreement, judicial review of FAA's decision and record thereof with regard to any Part 161 application submitted by the City shall be within the exclusive jurisidiction of the applicable U.S. Court of Appeals.

VI. DURATION

The City agrees to operate the Airport consistent with its obligations set forth in this Agreement until December 31, 2028, unless an earlier date is agreed to by the Parties. Any subsequent decison by the FAA to release the Airport at an earlier date shall be made consistent with the standard of 49 U.S.C. § 47153. The obligation to operate the Airport until December 31, 2028 shall be binding on any subsequent purchaser of Airport Property. Within 90 days of a Consent Decree embodying this Agreement taking effect, the City shall cause this Agreement to be recorded in the property records for the County of Los Angeles, California.

Without limiting the express terms of this Agreement, the FAA agrees that the Airport Property shall be released from all covenants, reservations, restrictions, conditions, exceptions and reservations of rights imposed under the IOT and the Quitclaim Deed and the grant assurances imposed in 1994 upon the effectiveness of this Agreement and to provide such notice as required under 49 U.S.C. §47153(c). Upon the City's request, the FAA shall execute, acknowledge and deliver from time to time any instruments reasonably necessary requested by the City appropriate to evidence the release of the Airport Property from all such covenants, reservations, restrictions, conditions, exceptions and reservations of rights. The Parties shall record any instruments necessary to effectuate this provision.

The City's operation of the Airport until December 31, 2028 shall conform with (i) the standards set forth in grant assurances 19, 22, 23, 24, 25, and 30; and (ii) all applicable state and federal operational, maintenance, and safety standards. For purposes of this paragraph, the substantive standards of grant assurances 19, 22, 23, 24, 25, and 30 shall apply until December 31, 2028.

If the City enters into future grant agreements with the FAA, then it shall also be bound by those terms as provided for in any such grant agreement in addition to any applicable the standards expressly set forth in this Agreement.

If the City does not enter into future agreements with the FAA that continue to require the City to operate the Airport after December 31, 2028, the Parties agree that the City may, in its sole discretion at any time on or after January 1, 2029, cease to operate the Airport as an airport and may close the Airport to all aeronautical use forever, subject only to the applicable 30 day notice requirements set forth in 49 U.S.C. § 46319(a) and 14 C.F.R. Part 157.5(b)(2).

VII. UNLEADED FUEL

The FAA is committed as a matter of national aviation policy to support the development and use of unleaded aviation gas appropriate to the operation of piston aircraft where commercially and technically feasible. The FAA agrees to consider any demonstration project the City may seek to implement pertaining to the use of unleaded fuel. Nothing in this Agreement shall allow the City to restrict the sale of leaded aviation fuel for as long as the FAA authorizes use of such fuels within the United States.

VIII. MISCELLANEOUS PROVISIONS

A. Enforcement. The Parties reserve the right to judicially enforce any terms or provisions of this Agreement.

B. Consent Decree. The terms of this Agreement shall be memorialized and embodied in a consent decree to be filed in *City of Santa Monica v. United States of America, et al.*, Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.) in the form attached as Exhibit D. The court shall have jurisdiction to issue injunctive relief only as to the provisions of sections II, III, and IV. Further, the court shall have jurisdiction to enforce the provisions of sections II, III and IV as to any successors, transferees, licensees, agents, heirs, and assigns of the City's interests in, operation of, or sponsorship of SMO. The court shall not have jurisdiction to subject the Parties to penalties or sanctions for any alleged violations of its obligations in this Agreement.

C. Own Costs. Each Party shall bear its own costs, including attorney fees.

D. Authority. The representatives of each Party hereby certify that he or she is duly authorized to enter into the Agreement. The City represents that it has the full authority to perform all of the acts and obligations it has agreed to perform under the terms of this Agreement. The United States, acting though the Department of Justice and the FAA represents that the FAA has the full authority to perform all of the acts and obligations it and the United States of America has agreed to perform under the terms of this Agreement.

E. Copies and Counterparts. It is contemplated that this Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together constitute one and the same document. Facsimiles, hard copies, and scanned electronic copies of signatures, including scanned electronic copies sent by email, shall constitute acceptable, binding signatures for purposes of this Agreement.

F. Defense of This Agreement. The Parties agree to vigorously and actively defend this Agreement, any resulting Consent Decree, and all terms embodied therein as fair and reasonable, to vigorously and actively defend the same against any challenge by any individual or entity. The Parties further agree not to undermine directly or indirectly this Agreement, any resulting Consent Decree or any terms set forth therein for so long as this Agreement or any resulting Consent Decree remains in effect.

G. Modification. This Agreement may be supplemented, amended, or modified only by the mutual agreement of the Parties, and, once the Consent Decree is entered, only with the approval of the court No supplement, amendment, or modification of this Agreement shall be binding unless it is in writing and signed by all duly authorized representatives of each Party.

H. Successors or Assigns. This Agreement and any resulting consent decree shall be binding upon and inure to the benefit of the Parties and their respective successors, transferees, licensees, agents, heirs, and assigns. Prior to any change of the sponsor of SMO or to the identity of the holder of any operating certificate related to the operation or sponsorship of SMO the City shall obtain the written agreement of such new entity to be bound by the terms of this Agreement and any resulting consent decree.

I. Precedent. Nothing in this Agreement shall constitute an admission concerning any allegation, claim, or defense at issue in in *City of Santa Monica v. United States of America, et al.*, Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.), *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.), or *In re Compliance with Federal Obligations by the City of Santa Monica*, FAA NO. 16-16-13 (U.S. Dep't of Transp., Fed. Aviation Admin.), and this Agreement has no precedential effect as to any other dispute between the Parties or between either the City or the FAA and any third party. This Agreement is made in light of the unique circumstances of this case and the uncertainty of the specific matters resolved hereby. Nothing herein shall be construed to be an admission of liability or as an interpretation of the validity or terms or provisions of any other instruments or contracts.

J. Release. Upon the entry of the Consent Decree, the Parties and all their heirs, administrators, representatives, attorneys, successors, and assigns, hereby release, waive, acquit, and forever discharge each other and all their respective officers, employees, and agents from, and are hereby forever barred and precluded from prosecuting, any and all claims, causes of action, and/or requests for relief asserted in *City of Santa Monica v. United States of America, et al.*, Case No. 13-CV-8046-JFW (VBKx) (C.D. Cal.), *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827, (9th Cir.), and *In re Compliance with Federal Obligations by the City of Santa Monica*, FAA NO. 16-16-13 (U.S. Dep't of Transp., Fed. Aviation Admin.), as well as any and all claims, causes of action, and/or requests for relief, whether or not made, against any Party that could have been raised in those matters, with the exception of proceedings to enforce this Agreement or the Consent Decree.

K. No Third Party Rights. This Agreement is not intended to create, and does not create, any third-party beneficiary rights, confer upon any non-party a right to enforce or sue for an alleged breach of the Agreement, or generate any other kind of right or privilege for any person, group, or entity other than the Parties.

L. Effective Date. This Agreement shall be effective upon the date the Court enters an order approving this Agreement.

For the Federal Aviation Administration:

_____

Reginald C. Govan
Chief Counsel
Federal Aviation Administration

For the Department of Justice

JOYCE BRANDA
Acting Assistant Attorney General

EILEEN M. DECKER
United States Attorney

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Dated: _____

For the City of Santa Monica:

Attest:

_____ _____

Rick Cole
City Manager

Denise Anderson-Warren
City Clerk

_____

Joseph Lawrence
Interim City Attorney

Dated: _____

Approved as to form:

_____

William V. O'Connor
Morrison & Foerster LLP
12531 High Bluff Drive | San Diego, CA 92130-2040
P: +1 (858) 720.7932
WOConnor@mofo.com
Dated: _____
Attorneys for the City of Santa Monica

IT IS SO ORDERED.

Signed February 1, 2017, at Los Angeles, California

_____

Honorable John F. Walter
United States District Court
For the Central District of California

Attachment B:

Order, *City of Santa Monica v. United States,* Case No. 13-cv-08046 (C.D. Cal. Feb. 1, 2017) (ECF No. 56)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 13-8046-JFW (VBKx)** Date: February 1, 2017

Title: City of Santa Monica *-v-* United States of America, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER RE: STIPULATION AND ORDER/CONSENT DECREE [filed 1/30/2017; Docket No. 52]**

On January 30, 2017, the parties filed a Stipulation and Order/Consent Decree, notifying the Court that they had settled this action and seeking the Court's approval of the Settlement and Consent Decree. On January 31, 2017, resident groups Sunset Park Anti-Airport, Inc. and SMO Future ("Resident Groups") filed a Notice of Emergency Ex Parte Motion for: (1) Permission to Intervene; and (2) Objection to Settlement and Consent Decree ("Notice"). The Resident Groups' Notice is not itself an ex parte application seeking relief; rather, it states that the Resident Groups *will* make an emergency ex parte application seeking to intervene and object to the Settlement and Consent Decree.

On February 1, 2017, Plaintiff City of Santa Monica filed a Response to the Resident Groups' Notice, arguing that the Notice is not properly before the Court, and that the attempt to intervene should be denied. On February 1, 2017, Defendants United States of America, the Federal Aviation Administration, and Michael P. Huerta (collectively, "Defendants") filed a Statement Regarding Notice of Motion to Intervene, concurring with Plaintiff City of Santa Monica's Response.

The Court agrees with Plaintiff City of Santa Monica and Defendants, and concludes that intervention is not merited at this late stage. The Court has reviewed the Settlement Agreement/Consent Decree Between the Federal Aviation Administration and the City of Santa Monica [Docket No. 52] and concludes that the Settlement Agreement/Consent Decree "is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Coalition for a Sustainable Delta v. McCamman*, 2011 WL 1332196, at *4 (E.D. Cal. Apr. 6, 2011) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982)).

Accordingly, the Court signs and approves the Order/Consent Decree.

IT IS SO ORDERED.

Initials of Deputy Clerk sr

Attachment C:

Order, *City of Santa Monica v. FAA*, No. 16-72827
(9th Cir. Feb. 13, 2017)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF SANTA MONICA, Petitioner, v. FEDERAL AVIATION ADMINISTRATION, Respondent.	No. 16-72827 FAA No. 16-14-04 Federal Aviation Admin, Federal Aviation Admin ORDER

Pursuant to the stipulation of the parties (Docket Entry No. 28), this petition for review is voluntarily dismissed. Fed. R. App. P. 42(b). The parties shall bear their own costs and attorneys' fees on appeal.

A copy of this order shall serve as and for the mandate of this court.

FOR THE COURT

By: Stephen Liacouras
Circuit Mediator

sl/mediation