UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of Compliance With Federal Obligations by the City of Santa Monica, California	FAA Docket No. 16-16-13

CITY OF SANTA MONICA'S RESPONSE TO INTERIM CEASE AND DESIST ORDER

The City of Santa Monica (the "City" or "Santa Monica") hereby submits this response and request to vacate the FAA's Interim Cease and Desist Order dated December 12, 2016 (the "Order").[1] The Order should be vacated because the City is not bound by any federal obligations—grant assurance or otherwise—and, even if it were, the FAA lacks the authority to issue the Order. FAA exceeded its authority and deprived the City of due process by failing to observe procedures required by the very statute and regulation upon which the Order purports to be based, 49 U.S.C. § 46105 and 14 C.F.R § 16.109. Those laws and others make clear that, in the absence of a safety emergency, FAA may not issue a Cease and Desist Order without first providing notice and an opportunity for a hearing. *See also* 49 U.S.C. § 46101(a)(4). No safety emergency exists here, as the FAA tacitly concedes in its Order, yet the FAA did not provide the City with a hearing. This deprivation of the City's due process renders the Order illegal, unenforceable, and void.

[1] The City incorporates by reference its Response to the Notice of Investigation and all exhibits submitted therewith, which was filed in Docket No. 16-16-13 on November 2, 2016. The City also incorporates by reference its objections, responses, and all documents served on the FAA in response to the FAA's Subpoena for Documents, which was served on the City on September 26, 2016.

The Order must also be vacated because the FAA has not met its burden of showing irreparable harm. The FAA has recognized that an Interim Cease and Desist Order, like a preliminary injunction, is "extraordinary relief [that] is appropriate only in extraordinary circumstances." *Pro-Flight Aviation, Inc. v. City of Renton*, FAA Docket No. 16-15-03, Order at 2 (Sept. 1, 2015). Thus, for such an order to issue, the burden is on the FAA to show, among other preliminary-injunction factors, that irreparable harm will be suffered in the absence of the Order. *Id.* 2–3. The FAA has not, and cannot, make such a showing. To the contrary, the Order purports to maintain the status quo, even though the City has already (numerous times) committed to the FAA that it will not "act to remove" the FBOs until such time as the City is prepared to commence lawful proprietary exclusive FBO services. (Order at 1, 5.) The City's assurances render the Order unnecessary, and rebut any allegation of irreparable harm. Moreover, it is well established that purely economic harms, like those at issue here, are not irreparable.

The Order suffers several other procedural and substantive deficiencies which necessitate its vacatur. Procedurally, it purports to raise new issues as "under investigation" in the NOI when, in fact, those issues have never been part of the FAA's investigation in this proceeding. Substantively, it ignores the well-founded positions taken by the City in its NOI response,

contains multiple factual inaccuracies, and mischaracterizes the City's actions. The Order should be vacated.[2]

I. BACKGROUND

The complete background of the present proceeding is set forth in the City's response to the FAA's NOI and will not be repeated here. The City has previously leased space at SMO to two FBOs, Atlantic Aviation and American Flyers. (Exs. 1 through 9, Atlantic Lease and Modification and Holdover Agreements; Ex. 10, American Flyers' Lease.) Both Atlantic's and American's leases have expired. Both are still operating at SMO as holdover tenants.

Since 1984, the City has carefully calibrated its leasing practices to ensure that its aeronautical tenants were never granted leasehold interests that extended beyond the date on which the City was entitled to cease operating SMO as an airport—July 1, 2015. As stated in the NOI, "the leases for most or all aeronautical tenants at SMO expired in July 2015." (NOI, Facts and Analysis at ¶ 1.) This is consistent with the City's grant obligations, as well as the terms of the 1984 Settlement Agreement, which makes clear that the City is only required to maintain SMO as a public use airport until that date.

On March 22, 2016, the City adopted a Leasing Policy that emphasized that the City Council seeks to have an airport tenant mix that "comports with any applicable legal requirements." (Ex. 11, Santa Monica Leasing Policy.) Consistent with the City's position since

[2] The City disputes the FAA's contention that the City is obligated by federal grant assurances or has any of the other federal obligations enumerated in the NOI and the Order. Thus, the City responds to the Order under protest; the City contends the FAA lacks authority to bind the City or require the City to act. Disputes regarding the City's federal obligations are pending before the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California. By responding to the Order, the City does not waive any claims or defenses that it may assert in those or other proceedings. The City reserves all rights and does not waive any argument regarding the FAA's characterizations of applicable law.

1984, the Leasing Policy provided that leases may be month-to-month, that existing tenants would be given the opportunity to submit a lease application, but that the City is under no obligation to offer lease agreements. The City is unaware of any authority that could require it to enter into long-term lease agreements with airport tenants under these circumstances. And the FAA lacks the authority to order the City to do so.

On August 23, 2016, the City Council adopted a resolution to close SMO "when legally permitted[.]" (Ex. 12, August 23, 2016, City Council Resolution.) As part of the Resolution, the City Council resolved to "[a]t all times honor its legally binding contractual obligations, and applicable legal requirements regarding the Real Property and the Airport[.]" (*Id.*) The Resolution further directs the City Manager to "implement the 'Policy for Establishing Public Proprietary 'Fixed Base Operations' And Providing Other Aeronautical Services at The Santa Monica Airport.'" Notably, the Resolution was made "in the public interest of protecting the public health and welfare and [was] not intended to [be] contrary to any applicable laws or regulations." (*Id.*)

Also on August 23, 2016, the City adopted a "Policy for Establishing Exclusive Public Proprietary 'Fixed Based Operations' and Providing Other Aeronautical Services at the Santa Monica Airport." (Ex. 13, August 23, 2016, Policy for Establishing Exclusive Public Proprietary "Fixed Based Operations" and Providing Other Aeronautical Services at the Santa Monica Airport.) The Policy authorized the City Manager to take the "steps he deems appropriate for the City to offer some or all of the same aeronautical services as were offered by the Airport FBOs." (*Id.*) The Policy does not contemplate an interruption or diminution in FBO services at SMO.

The recommendation to adopt the Proprietary Exclusive FBO Policy was made in the August 23, 2016, City Council Report. (Ex. 14, August 23, 2016, City Council Report.) That

Report acknowledged the "many legal challenges . . . now pending" that concern SMO. (*Id.* at 2.) The Report recognized that both the outcome of the City's action to quiet title and the City's appeal of the Associate Administrator's decision in the NBAA Part 16 Proceeding may impact the City's ability to close SMO to aeronautical uses in the near future. (*Id.* at 3, 14-17.) The Report stated that subject to legal requirements, the City "intends to" begin plans for "[c]reating a City of Santa Monica Fixed Based Operation and eliminate the current providers." (*Id.* at 3.)

The Report further discussed the City's plans for and FAA rules governing proprietary exclusive FBOs (even though the City does not believe it is bound by those obligations), noting that the City will run the FBO with City employees and resources and the private FBO providers will be eliminated when City staff are ready to assume those duties:

> FAA regulations permit cities to operate an FBO provided the operation is done ***with city employees and resources***. Hence, it is legally permitted and there are examples of city run FBOs, including the City of Naples, Florida. As part of our due diligence, staff will examine issues related to: fuel farm operations, employee recruitment, training and retention, equipment, costs and revenue, and liability. The two private FBO providers will be eliminated ***when City staff are ready to assume the duties*.**

(*Id.* at 18–19 (emphases added).)

In light of the City Council Report and Resolution, the City has begun planning to operate a proprietary exclusive FBO. Developing these plans and implementing a proprietary exclusive FBO are fully within the City's rights. As the FAA Compliance Manual makes clear, "the FAA will not substitute its judgment for that of the airport sponsor in matters of administration and management of airport facilities." (FAA Compliance Manual, Section 2.4(b).) This is particularly pertinent here.

Part and parcel of the City's planning is being prepared to remove the current FBO holdover tenants, who have—by all accounts—refused to work with the City for an orderly

transition of their premises when the City is ready to do so. This includes the filing of two separate Part 16 proceedings (duplicative of the NOI) against the City related to the City's plan to offer proprietary exclusive FBO services and remove the FBOs from the premises. All matters to date concerning eventual removal of the FBOs have been adversarial. The City, therefore, must assume that even when the City is ready to begin providing proprietary exclusive FBO services, the FBOs will not voluntarily leave SMO.

Accordingly, on September 15, 2016, in accordance with the City Council's direction, the City presented American and Atlantic with a Notice to Vacate their respective premises. (Ex. 15, Notice to Vacate to American Flyer; Ex. 16, Notice to Vacate to Atlantic Aviation.) Pursuant to state law, the City provided "30-day notice terminating [the] month-to-month" tenancies. (*Id.*) The Notices serve to preserve the City's rights to initiate eviction proceedings against American and Atlantic under applicable state law, but do not themselves begin the eviction process. The Notices are a prerequisite to the eventual eviction of the FBOs, akin to a notice that their leases have expired. As part of prudent and orderly management of SMO, the City must begin the eviction process now so that it can move quickly to recover possession of the premises occupied by the two private FBOs, which have contested the City's plans every step of the way, when it is ready to assume proprietary exclusive FBO operations.

On September 26, 2016, the FAA served a Notice of Investigation under Part 16 on the City of Santa Monica concerning alleged violations of grant assurances 22 and 23, as well as the Civil Aeronautics Act of 1938 and the Surplus Property Act ("SPA"). Along with the NOI, the FAA presented the City with two subpoenas: a subpoena seeking the production of documents, as well as a subpoena seeking testimony from a City employee with knowledge of the City's intentions with regard to the Airport.

On November 3, 2016, American and Atlantic filed Complaints for Injunctive and Declaratory Relief in the Superior Court of California, Los Angeles, seeking to prevent the City from filing unlawful detainer proceedings against them until the FAA completed its investigation under the NOI. (Ex. 17, American Complaint; Ex. 18, Atlantic Complaint.) The FBOs also filed *ex parte* requests for temporary restraining orders that would prevent the City from filing unlawful detainer complaints. The court denied the requests for temporary injunctive relief, and set a hearing on an Order to Show Cause regarding a Preliminary Injunction for December 1, 2016.

On November 4, 2016, the City filed unlawful detainer proceedings against the FBOs. (Ex. 19, Unlawful Detainer Complaint against American Flyers; Ex. 20, Unlawful Detainer Complaint against Atlantic Aviation.) .

On December 1, 2016, the Parties stipulated to continue the hearing concerning the Preliminary Injunction until January 3, 2017. (Ex. 21, Minute Order Continuing Hearing Date.) The Court nonetheless indicated in a tentative ruling that it would deny the requested preliminary injunctions, finding that the FBOs have not alleged viable claims. (Ex. 22 Atlantic Tentative Ruling at page 7; Ex. 23, Ameriflyers Tentative Ruling at page 9.) The FAA issued the Order less than two weeks later, serving the Order on the City on December 13, 2016.

The Order provides the same relief sought by the FBOs in the Superior Court. It orders the City to "immediately CEASE AND DESIST from acting to remove [the FBOs] from SMO until the FAA issues a final agency decision on the NOI."

II. THE INTERIM CEASE AND DESIST ORDER MUST BE VACATED BECAUSE SANTA MONICA IS NOT BOUND BY FEDERAL OBLIGATIONS

The Order (and indeed, the entire NOI proceeding) is based on the fundamental error that the City—with regard to the airport—is bound by federal obligations. It is not.[3]

A. The City is Not Bound by Grant Assurance Obligations

The purported basis for the Order is violations of grant assurances 22 and 23. (Order at 2, 3; Appendix at 1-3.) This is a false basis. The City's federal grant assurance obligations ended in 2014. As the City has explained at length in its brief to the Ninth Circuit in *City of Santa Monica v. Federal Aviation Administration*, Case No. 16-72827, the City is not presently bound by any grant assurance obligations.[4]

1. The 1994 Grant Agreement

This history of the City's grant obligations is well documented. On June 29, 1994, the City signed an agreement, entitled "Grant Agreement," prepared by the FAA, in which it accepted an AIP grant to fund certain airport enhancements, including the construction of a blast wall necessary to prevent jet blasts and debris from reaching residential areas. (Ex. 24, 1994 Grant Agreement.) The FAA designated the anticipated improvements as "Project No. 3-06-0239-06" and the Grant Agreement itself as "Contract No. DTFA08-94-C-20857." The Grant Agreement calculated the federal government's "maximum obligation" with respect to the work to be performed as $1,604,700. The Grant Agreement also acknowledged, however, that there

[3] The City incorporates by reference all pleadings, files, briefs and papers filed in the United States Court of Appeals for the Ninth Circuit in *City of Santa Monica v. Federal Aviation Administration*, No. 16-72827. It also incorporates by reference all pleadings, files, briefs and papers filed in the United States District Court for the Central District of California in *City of Santa Monica v. United States*, No. 13-cv-08046.

[4] To the extent the Order is based on alleged federal obligations arising from the grant agreement, the basis for that authority is in dispute and subject to a pending appeal.

might be "future grant amendments which may increase the foregoing maximum obligation," and provided that the "[f]inal determination of the United States share [of the project] will be based upon the final audit of the total amount of the allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs." (*Id.*) The Grant Agreement further "incorporated" the "Assurances" attached to the contract, making them "a part" of the agreement. Because of Assurance B(1), the City knew when it accepted the 1994 Grant Agreement that any obligations it incurred necessarily would expire twenty years later, on June 29, 2014, at the latest.

2. Amendment No. 1 to the 1994 Grant Agreement

In 1999, the City and the FAA executed "Amendment No. 1" to the 1994 Grant Agreement. This amendment modified the Grant Agreement's description of the contemplated "airport development" to reflect changes in the work to be performed. (Ex. 25, Amendment No. 1 to Grant Agreement.) The amendment continued to refer to the Grant Agreement using the same contract number (DTFA08-94-C-20857), and to the project using the same project number (3-06-0239-06). And the FAA confirmed in a decision issued the following year that the City's grant assurances were still set to expire in 2014 as the Grant Agreement had provided. Director's Determination at 23, *SMAA v. City of Santa Monica*, FAA Docket No. 16-99-21 (Nov. 22, 2000) ("To the extent that Complainants . . . seek to prevent the future closure of the Airport or require the City to operate the Airport beyond July 1, 2015, that is a local land use matter. . . . When the City's last grant agreement expires in approximately 2014, the AIP grant sponsor assurances will no longer require the City to operate the Airport as an airport.").

3. Amendment No. 2 to the 1994 Grant Agreement

Due to necessary changes during construction of the blast wall and other improvements, the City incurred costs in completing the project exceeding those the parties initially estimated. Although the costs of the original project increased, the nature of the project facilities did not change nor did their useful life. Accordingly, in September 2002, the City sought reimbursement for an additional $240,600—a "modification to the grant" that the City asserted would defray the cost overruns on the completed project so the City could use its funds to "more effectively enhance and improve the overall condition and safety of the public-use areas of the Airport." (Ex. 26, City Request for Modification.)

Subsequently, on August 23, 2003, the City and the FAA executed "Amendment No. 2" to the 1994 Grant Agreement. Like Amendment No. 1, Amendment No. 2 used the same contract and project numbers as the original grant. (Ex. 27, Amendment No. 2 to 1994 Grant Agreement.) As requested, the amendment increased the grant amount by $240,600. This sum was 14.99% of the federal share of the project calculated in the Grant Agreement, just slightly less than the 15% limit specified by Congress for upward adjustments to preexisting grants. 49 U.S.C. § 47108(b)(3)(A).

The amendment made no other changes to either the Grant Agreement or the project it covered. Rather, Amendment No. 2 expressly provided that "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect." (*Id.*)

4. The Grant Obligations Expired in 2014

The 1994 Grant Agreement itself unambiguously set forth a 2014 expiration date. The City accepted the FAA's grant offer to fund the project in question in June 1994. Assurance B(1), which was incorporated into the Grant Agreement, provided that the City's obligations

would not "exceed twenty (20) years from the date of the acceptance." Because the City accepted the grant offer in June 1994, its obligations could not have extended past June 2014.

Amendment No. 2 did not change this end date. To the contrary, Amendment No. 2 modified the 1994 Grant Agreement in only one respect, providing that the "maximum obligation stated on page 2, condition 1 [of the 1994 Grant Agreement] is hereby increased by $240,600.00, from $1,604,700.00 to $1,845,300.00." (Ex. 27, Amendment No. 2.) Such a modification had been expressly contemplated in the 1994 Grant Agreement itself, which, in recognition of the possibility of cost overruns of the sort that ultimately occurred, provided that a "[f]inal determination of the United States' share [of the project] will be based upon the final audit of the total amount of the allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs."

Amendment No. 2 also expressly disclaimed any substantive change to the 1994 Grant Agreement. Most significantly, it stated that "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect." (Ex. 27, Amendment No. 2.) Because one of the 1994 Grant Agreement's most important "terms and conditions" was that any obligation imposed by the Grant Agreement would expire in no more than 20 years, Amendment No. 2 thus made clear that the 2014 maximum expiration date "remain[ed] in full force and effect."

Additionally, the parties' conduct confirms that they both recognized when they executed Amendment No. 2 that Amendment No. 2 did not restart the 20-year clock on the City's obligations. The FAA had just recently confirmed that Amendment No. 1 did nothing to extend the City's grant obligations, concluding in a 2000 Director's Determination that the Grant Agreement would expire in 2014. Director's Determination at 23, *SMAA*, FAA Docket No. 16-99-21. And in 2003, the FAA likewise did not claim or even suggest that Amendment No. 2

represented a "new grant offer." To the contrary, the FAA gave every indication that it was treating Amendment No. 2 as an ordinary amendment to a grant offer, just like Amendment No. 1—which had not extended the City's grant obligations. In its report to Congress, the FAA confirmed Amendment No. 2's status as an ordinary amendment to a preexisting grant. The FAA did not list its reimbursement to the City in the category of "new grant agreements." 2003 Report to Congress at 11. Instead, the agency included those funds as part of the $123 million dispersed that year for "increases in existing grant agreements."

Accordingly, the City's grant assurance obligations have ceased, and cannot be the basis for the FAA to issue the Order. The Airports Council International ("ACI"), which represents the state, regional, and local government bodies that own and operate the principal commercial airports in North America, agrees: "the 2003 Amendment clearly modified the maximum financial obligation of the United States while leaving all other terms of the 1994 Grant Agreement intact," including its duration. (Ex. 28, ACI Amicus Brief.) Because the City's grant assurance obligations have expired, alleged violations thereof cannot be the basis for the Order.

B. The City Is Not Bound By Other Federal Obligations

The Appendix to the Order also asserts that the City is bound by SPA Obligations pursuant to a 1948 Instrument of Transfer ("1948 IOT"), and that the FAA is empowered to issue the Order on that basis. (Appendix at 3-4.) Not so. First, the FAA does not have the authority to determine *whether* SPA restrictions apply to the Airport Property. That authority is vested in the District Court which is currently presiding over this very dispute. *See City of Santa Monica v. United States*, No. 13-cv-08046. Second, even if the FAA somehow had such authority (which it plainly does not), there is no basis for the FAA to make the determination that SPA

obligations attach to the property underlying SMO under the circumstances presented here because the United States never had title to the property that it argues is so restricted.

1. The FAA Cannot Make a Determination that the City is Bound by Obligations Under the SPA

Without any citation to authority, the FAA bases its Order, at least in part, on the SPA and the 1948 IOT issued thereunder. (Appendix at 3-4.) The FAA, however, lacks the power to determine *whether* the City is bound by SPA obligations in the 1948 IOT. That determination is to be made by the District Court under the Quiet Title Act. *See* 28 U.S.C. § 1346(f) ("The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States"). The FAA cannot disturb the district court's jurisdiction or circumvent the court's fact-finding process by attempting to bootstrap SPA issues into this proceeding. *See Cardiosom LLC v. United States*, 115 Fed. Cl. 761, 769 (Ct. Fed. Claims 2014) ("[T]he task of determining a federal court's jurisdiction falls to the court, not an agency."); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (explaining that the delegation of power to an agency to administer a statute does not empower that agency to "regulate the scope of the judicial power vested by the statute"); *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1285 (11th Cir. 2012) ("[T]he Court owes no deference to an agency's interpretation of a statute that defines this Court's subject matter jurisdiction.") (quoting *Sierra Club v. Leavitt*, 355 F.Supp.2d 544, 548 (D.D.C. 2005)); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038–39 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*."); *Lopez–Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) ("[T]he fact that courts defer to the INS's construction … of deportation does not mean that similar deference is warranted

with respect to the enforcement of this court's jurisdictional limitations. . . . [T]he determination of our jurisdiction is exclusively for the court to decide.").

This principle holds true even where there is a "regulatory role" for the agency. *Cardiosom LLC*, 115 Fed. Cl. at 769. The delegation of duties concerning regulations "is limited to precisely that subject and does not extend by its terms or placement to any implication of authority to the agency to 'regulate the scope of the judicial power.'" *Id.* Simply put, an agency like the FAA is not permitted to "bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co.*, 494 U.S. at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973)).

Here, the FAA is vested only with the power to make compliance determinations when there are "applicable" federal obligations. Indeed, under 49 U.S.C. § 47151(b) "the Secretary may ensure *compliance* with an instrument conveying an interest in surplus property." The Airport Compliance Manual reiterates this point, noting specifically that "[r]esponsibility for monitoring and ensuring airport sponsor *compliance with applicable federal obligations* is vested in the Secretary of Transportation and delegated to the FAA"; it further provides that "Public Law (P.L) No. 81-311 specifically imposes upon FAA the sole responsibility for determining and enforcing *compliance* with the terms and conditions. . . ." (Ex. 29, FAA Order 5190.6B at 1-6 and 1-7.) However, nothing in the statutes, regulations, or the Airport Compliance Manual permits the FAA to make determinations as to *whether* obligations attach to real property where, like here, such obligations are disputed and are the subject of pending litigation over which a district court has "exclusive original jurisdiction." 28 U.S.C. § 1346(f).

2. The City Is Not Obligated Under the Surplus Property Act

Even if the FAA somehow had such authority (which it plainly does not), there is no basis for the FAA the make the determination that SPA obligations attach to the property underlying SMO given the circumstances because the United States never had title to the property.

a. The City Acquires the Airport Property

In 1926, Santa Monica acquired title to certain parcels of unimproved land that now constitute most of the property known as SMO. Between 1926 and 1949, the City acquired additional smaller parcels that make up the rest of the property (the "Airport Property").[5]

b. The City Leases the Airport Property to the United States

On May 27, 1941, President Franklin D. Roosevelt issued Presidential Proclamation 2487, which declared that the United States was faced with an "unlimited national emergency" that required "military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere." (Presidential Proclamation 2487, available at: https://research.archives.gov/id/299968.) Thus, in December 1941, to aid in the war effort, the City leased the Airport Property to the United States. The United States' leasehold at SMO was accomplished through two separate leases covering two adjoining parcels of land. (Ex. 30, The Golf Course Lease; Ex. 31, the Runway Lease.) The two leases were denominated the "Golf Course Lease" and the "Runway Lease."

Under the leases and supplements thereto, the terms of the City's leases to the United States extended until 12 months after the termination of Proclamation 2487. (Ex. 32,

[5] Other notable acquisitions include a 1945 grant from Douglas Aircraft and a 1949 Quitclaim deed from the United States (which is *not* subject to any SPA restrictions).

Supplement No. 1 to Runway Lease; Ex. 33, Supplement No. 2 to Runway Lease; Ex. 34, Supplement No. 1 to Golf Course Lease; Ex. 35, Supplement No. 2 to Golf Course Lease.)

On December 27, 1944, the City and the CAA entered in to a Form AP-4 Agreement. Under the AP-4 Agreement, the CAA would improve the landing area and other unidentified areas of SMO at its sole discretion. (Ex. 36, AP-4 Agreement, at 3.) The AP-4 Agreement made clear that "all improvements made under the Project shall be the sole and absolute property of the [City]" and that the AP-4 Agreement was "effective upon award of any construction contract for any portion of the Project . . . and to continue in full force and effect during the useful life of the improvement made under the Project[.]" (Ex. 36, AP-4 Agreement, at 2, 3.)

In exchange for the CAA's investment in SMO, the City agreed that it would keep SMO open for use as a public airport only for the "useful life of the improvements made under the Project." (Ex. 36, AP-4 Agreement, at 3.) The City also agreed that it would not compromise its fee simple ownership in SMO for the duration of the AP-4 Agreement, including that it would not unilaterally enter into "any deed, lease, operation or management agreement, or other instrument affecting the airport[,] or any portion of facility thereof or interest therein, even though the other party to the transaction is the Government." Congress subsequently determined that "the useful life of all AP-4 improvements expired by 1969." (FAA Order 5190.6B, FAA Compliance Manual, Section 8.3(b).). Thus, all improvements made under the AP-4 Agreement are "the sole and absolute" property of the City and, in any event, their useful life has expired. (Ex. 36, AP-4 Agreement, at 5.)

c. The United States Surrenders its Leasehold Interest

At the end of World War II, the United States determined that it was no longer necessary to maintain a presence at the Airport Property to protect Douglas. Accordingly, the United States and the City modified both the Runway and Golf Course Leases through a Supplement

Number 2 to each lease. (Ex.33, Supplement No. 2 to Runway Lease; Ex. 35, Supplement No. 2 to Golf Course Lease.) Under the second supplements, entered into on July 15, 1946, the United States stopped maintaining and operating the Airport Property and stopped paying rent to the City. (Ex. 33, Supplement No. 2 to Runway Lease; Ex. 35, Supplement No. 2 to Golf Course Lease.) Thus, since 1946, the City has continuously maintained and operated SMO.

On July 29, 1946, the War Assets Administration ("WAA") issued Form SPB-5 Declaration of Surplus Real Property, declaring as surplus the United States' leasehold interest in the Runway Lease and Golf Course Lease. (Ex. 37, Form SPB-5 Declaration of Surplus Real Property.) On January 9, 1947, the United States made the determination that its 168 acre *leasehold* interest at the Airport Property, along with any improvements, should be disposed of under the SPA. (Ex. 37, Form SPB-5 Declaration of Surplus Real Property; Ex.36, AP-4 Agreement; Ex. 38, ORPD Memoranda dated January 9, 1947.)

On August 10, 1948, the United States officially surrendered its leasehold interest in the Airport Property to the City pursuant to the Instrument of Transfer ("IOT"). (Ex. 39, 1948 IOT.) Pursuant to the standard IOT language employed by the WAA, the IOT purports to include restrictions on *the interest* transferred thereunder, including non-discrimination and public use requirements. (Ex. 39, 1948 IOT.)

On April 28, 1952, President Truman proclaimed that the national emergency declared in 1941 no longer existed and terminated Proclamation 2487. Accordingly, the already surrendered Runway and Golf Course Leases expired, by their own terms, on April 28, 1953.

d. The 1984 Agreement Supersedes Any Restrictions in the 1948 IOT

The history of the 1984 Settlement Agreement is also well documented. In the 1960s, the first civilian jets began using SMO, imposing a severe noise impact on adjacent neighborhoods.

Operations at SMO also reached an all-time high and City residents began expressing concerns about the impact of increased air traffic on their health and well-being. In response to the rising tide of resident apprehensions, various aviation associations began objecting to plans to close or substantially limit operations at SMO. The FAA recognized and responded to these concerns in an April 1971 letter to the then Senior Vice President of the Aircraft Owners and Pilots Association. The FAA stated that once the City's then-existing grant assurance obligations ended, "Santa Monica Airport is vulnerable to being discontinued and its land used for non-airport purposes." (Ex. 40, 1971 FAA Letter.)

In June 1981, the City Council adopted Resolution No. 6296, declaring its intention to close SMO as soon as legally possible. (Ex. 41, Santa Monica City Council Resolution No. 6296.) Thereafter, in 1983, the City adopted a new Master Plan for the Airport Property. (Ex. 42, 1983 Airport Master Plan.) Resolution No. 6296 and the new Master Plan prompted several Part 13 administrative actions against the City. As a result, the FAA negotiated with the City concerning SMO's operations, culminating in the signing of a "Settlement Agreement" in 1984 ("the 1984 Agreement"). (Ex. 43, 1984 Agreement.) The 1984 Agreement expressly provides that all prior agreements between the City and the United States concerning SMO shall be interpreted consistent with the 1984 Agreement and that the City is required to operate SMO as an airport only until July 1, 2015. The 1984 Agreement also "releases the City and this parkland . . . from any and all conditions, covenants, and restrictions imposed by the [IOT]." (*Id.*)

e. The 1948 IOT Does Not Restrict the City's Use of the Airport Land[6]

As set forth above and in the United States District Court for the Central District of California in *The City of Santa Monica v. United States*, No. 13-cv-08046, the 1948 IOT does not restrict use of the City's land. The 1948 IOT sets forth conditions and restrictions, including non-discrimination and reasonable access restrictions that purport to "run with the land." (Ex. 39, 1948 IOT.) But these restrictions are invalid. And even if valid, they can only attach to the interests transferred under the IOT, namely, the now-expired leasehold interests of the United States and the now valueless easements, improvements, and chattel that may have been transferred thereunder, if any. Thus, the plain meaning of the IOT is that if the City had parted with the interests conveyed under the IOT, the new owner would have to use them "for public airport purposes." It does not mean that the City's Land—which the United States never owned and did not convey in the Instrument of Transfer—must forever be used for "public airport purposes." And, even if it did mean that (which it does not), the 1984 Agreement expressly released the City from any such obligations.

Moreover, the supposed restrictions regarding "exclusive rights" contained in the 1948 IOT, by their own terms, do not apply the City. In the 1948 IOT, the City is defined as the "PARTY OF THE SECOND PART." (Ex. 39, 1948 IOT at 1.) The 1948 IOT requires the "PARTY OF THE SECOND PART" to abide by various restrictions, including not granting an "exclusive right" as defined in the 1948 IOT. (Ex. 39, 1948 IOT at 4, ¶ (1).) "Exclusive right" is defined by the 1948 IOT:

[6] Even if the IOT did bind the City's use of the Airport Property, which it does not, American Flyers is located on a parcel of land that is *not* subject to the IOT at all and thus this alleged source of federal obligations is inapposite to American Flyers.

> That no exclusive right for the use of the airport at which the property transferred by this instrument is located shall be vested (directly or indirectly) in any person or persons to the exclusion of others in the same class, the term "exclusive right" being defined to mean
>
> (1) any exclusive right to use the airport for conducting any particular aeronautical activity requiring operation of aircraft;
>
> (2) any exclusive right to engage in the sale or supplying of aircraft, aircraft accessories, equipment, or supplies (excluding the sale of gasoline and oil), or aircraft services necessary for the operation of aircraft (including the maintenance and repair of aircraft, aircraft engines, propellers, and appliances).

(Ex. 39, 1948 IOT, at 5, ¶ (4).)

Given that the City is defined in the 1948 IOT as the "PARTY OF THE SECOND PART," it becomes clear that the "exclusive right" provision does not apply to it, and instead only binds the City from granting an exclusive right to "any person or persons." Moreover, even if it is assumed that the City can be considered a "person or persons," the exclusive rights prohibition only applies insofar as the City would grant the exclusive right to "the exclusion of other [person or persons] in the same class." As there are no other municipalities (or other government entities) that could reasonably assert the right to provide aeronautical services at the Airport, the exclusive rights prohibition does not apply. Put another way, the City is in "a class of one" for these purposes, and thus the exclusive rights prohibition cannot attach as there is no risk of the City granting an exclusive right "to the exclusion of others in the same class." Simply put, as the drafter of the 1948 IOT, had the United States intended the exclusive rights prohibition to apply to the City, it would have expressly stated so.

Thus, there are no presently existing federal obligations which bind the City's use of the airport or require that the airport property be used for airport purposes. There is no violation of any requirement that can form the basis for the cease and desist order.

III. THE INTERIM CEASE AND DESIST ORDER MUST BE VACATED BECAUSE THE FAA LACKS AUTHORITY TO ISSUE THE ORDER

Regardless of whether the City is bound by federal obligations, which it is not, the Order must be vacated because the FAA lacks authority to issue the Order under its own regulations. The FAA altogether failed to provide the City with a hearing in advance of issuing the Order as required by law. Accordingly, the Order is *ultra vires* and unlawful.

As the basis for its authority to issue the Order, the FAA cites 49 U.S.C. § 46105 and 14 C.F.R § 16.109. (Order at 1 and n.1.) Although these provisions may be read to permit the FAA to issue cease and desist orders, they *require* that a hearing be had in advance of the FAA issuing any such order. Specifically, under 14 C.F.R. § 16.109(a), the FAA is required to "provide the opportunity for a hearing if, in the Director's determination, the agency issues or proposes to issue . . . a cease and desist order . . . ." Despite the plain language of the regulation, the City was afforded no opportunity for a hearing before the Order was issued. Indeed, the City was not even given the chance to be heard *at all* in advance of the Order, not in person, writing, or otherwise.

Congress also plainly required the FAA to provide both "notice and an opportunity for a hearing" before issuing "an order to compel compliance," like the Order at issue here. 49 U.S.C. § 46101(a)(4). Section 46101(a)(4), which is entitled "Order to Compel Compliance After Notice and Hearing," states: "After notice and an opportunity for a hearing . . . , the Secretary of Transportation, Under Secretary, or Administrator shall issue an order to compel compliance with this part if the Secretary, Under Secretary, or Administrator finds in an investigation under this subsection that a person is violating this part." 49 U.S.C. § 46101(a)(4). Again, the FAA failed to give Santa Monica notice and an opportunity to be heard before issuing the Order.

The FAA cannot establish that it was permitted to bypass the notice-and-hearing requirements. The FAA may only bypass these required adjudicatory procedures and issue an "emergency order" to preserve the status quo where an emergency relates to "safety." Congress expressly limited the FAA's authority to issue emergency orders to situations where "an emergency exists related to safety in air commerce [that] requires immediate action." 49 U.S.C. § 46105(c). Under this statute, the FAA is permitted to "issue orders immediately to meet the emergency, with or without notice and without regard to this part" or the requirements of the Administrative Procedures Act.[7] *Id.* If such an emergency exists, the provision requires the FAA, after issuing the order, to "begin a proceeding immediately about an emergency under this subsection and give preference, when practicable, to the proceeding." *Id.*

Under the canon of statutory construction, *espressio unius est exclusio alterius*, where Congress legislates a specific, limited exception for emergency orders relating to safety, such authority is not granted for any other aviation purpose. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied."); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) ("explicit listing of exceptions" considered indicative of Congress' intent to preclude "courts [from] read[ing] other unmentioned, open-ended, 'equitable' exceptions into the statute").

[7] The necessary implication of § 46105(c) is that FAA cannot issue orders without providing a hearing. A contrary reading would read the statutory and regulatory hearing requirements out of existence and render the emergency order provision superfluous, and thus must be rejected. *See, e.g., Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (Courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

That a specific exception was enumerated for safety-related emergency orders necessarily compels a finding such orders are not appropriate absent a safety related emergency. Here, the FAA did not find any safety-related emergency in the Order. At most, the FAA found that third-party vendors of goods and services at SMO may suffer economic injury due to SMO's actions. Economic injury is not a matter of safety, is not an emergency, and does not provide any basis for depriving SMO of due process. In fact, courts routinely find that economic injury standing alone is not a sufficient basis for equitable relief in any capacity. There is no statutory basis for the emergency Order.

IV. THE INTERIM CEASE AND DESIST ORDER MUST BE VACATED BECAUSE THE FAA HAS NOT DEMONSTRATED IRREPARABLE HARM

The Order must also be vacated because the FAA did not and cannot meet its burden of showing irreparable harm.

The FAA has recognized that an Interim Cease and Desist Order, like a preliminary injunction, is "extraordinary relief [that] is appropriate only in extraordinary circumstances." *Pro-Flight Aviation, Inc. v. City of Renton*, FAA Docket No. 16-15-03, Order at 2 (Sept. 1, 2015). Accordingly, for such an order to issue, the burden is on the FAA to show, among other factors, that irreparable harm will be suffered in the absence of the Order.[8] *Id.* 2–3. Consistent with this requirement, in *City of Renton*, for example, the FAA declined to issue an interim CDO because it found that the complainant had "failed to demonstrate irreparable harm justifying extraordinary relief." *Id*. at 3.

[8] To obtain a preliminary injunction, a moving party "must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Here, the FAA has not met its burden of showing that the extraordinary relief of an Interim Cease and Desist Order is merited. There are no safety concerns warranting the Order. And the City has taken no *actions* that violate any purported federal obligation. (*See* City of Santa Monica's Response to NOI.) To the contrary, the City has already informed the FAA that it will not "act to remove" the FBOs from the premises until such time as it is prepared to provide the legally required proprietary exclusive FBO services. (Order at 5.)

Even assuming that the FBOs would suffer immediate economic harm without the Order, such purely economic harm is not irreparable, except in narrow circumstances not applicable here. *See Sampson v. Murray*, 415 U.S. 61, 89–91 (1974) (reversing injunction against firing of probationary government employee because loss of earnings is not irreparable harm); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) ("Purely economic harms are generally not irreparable, as money lost may be recovered later, in the ordinary course of litigation.").

Absent irreparable harm, of which the FAA has alleged none, there is no basis for the "extraordinary" measure of the Order. The Order should be vacated.

V. THE ORDER MUST BE VACATED BECAUSE IT IS OTHERWISE DEFICIENT

The order is also deficient in that it is factually inaccurate and states that certain issues are being investigated through the NOI that are not actually under investigation in the NOI proceedings. Issuing the Order on these bases violates the due process rights of the City because it has not been given an opportunity to address the issues in the underlying NOI proceedings. Worse yet, through the Order, the FAA reverses certain positions taken in the NOI.

Specifically, the Order states that "*[w]hether* the City may avail itself of a proprietor's exclusive right to provide aeronautical services is one of the issues being investigated in the

NOI." (Order at 2.) It continues that the City's plans may not be "permissible at all[.]" (Order at 4.) But the NOI unambiguously recognizes that the City possesses the right to implement such services. The NOI states "*[t]he City may exercise an exclusive right to operate FBO services.*" (NOI at 7, ¶ 18.) This direct and unexplained reversal of position renders the Order unsupported, arbitrary, capricious, and leaves the City without clarity as to the FAA's position, and without the ability to meaningfully respond.[9]

The Order also ignores the well-founded positions taken by the City in its response to the NOI. The City reiterates those positions here:

- None of the City's actions violate grant assurance 22, including the leasing policy, the notices to vacate, and the unlawful detainer complaints. (NOI Response at 29-33.)

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[9] As explained above and in the district court proceedings in *City of Santa Monica v. United States*, No. 13-CV-08046, the restrictions in the 1948 IOT are not binding on the City and are invalid. They are also outside the FAA's jurisdiction. Assuming, however, that the City is somehow bound by restrictions in the 1948 IOT (which it is not) and the restrictions are valid (which they are not), the City is still not restricted from exercising an exclusive right to provide fuel services at SMO, which would justify the removal of American and Atlantic from the premises which they currently occupy.

The Order relies on the following language in the IOT: "that…the land, buildings structures, improvements and equipment in which this instrument transfers any interest shall be used to public airport purposes for the use and benefit of the public on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right…" (Appendix at 4, citing 1948 IOT at 4.) The FAA noticeably omits the later portion of that same paragraph, which provides that this restriction applies only to an "exclusive right" as that term is defined in subparagraph (4). (Ex. 39, 1948 IOT at 4 ("for use of the airport within the meaning of the terms "exclusive right" as used in subparagraph (4) of the next succeeding paragraph.").)

Subparagraph (4) provides that the term "exclusive right" means "(2) any exclusive right to engage in the sale of supplying of aircraft, aircraft accessories, equipment, or supplies (***excluding the sale of gasoline and oil***) or aircraft services necessary for the operation of aircraft (including the maintenance and repair of aircraft, aircraft engines, propellers, and appliances)." (Ex. 39, 1948 IOT at 5 (emphasis added).) The sale of gasoline and oil – e.g. fuel—is accordingly outside any restriction contained in the IOT related to the City's ability to exercise an exclusive right (again, assuming such restriction applies at all and is valid, which the City disputes).

- None of the City's actions violate grant assurance 23, including the eventual removal of the FBOs or the City's planned proprietary exclusive FBO operation. (NOI Response at 33-39.)

The City therefore disputes the findings and conclusions on which the FAA purports to base the Order. Because there has been no violation of the City's purported federal obligations, which the City disputes even exist, the Order is without factual or legal basis.

VI. THE ORDER CONTAINS FACTUAL INACCURACIES AND MISCHARACTERIZES THE CITY'S ACTIONS

The Order is also misleading. The Order's factual inaccuracies and mischaracterizations are summarized in the Table below.

The FAA's Statement	The City's Response
"The airport is located in a highly congested air traffic area and services as a critical reliever airport for Los Angeles International Airport (LAX), which is located seven miles to the south." (Order at 1.)	The FAA's position is unsupported. The FAA has developed no factual record to show that present day SMO acts as a "critical reliever" for LAX. The only authority cited by the FAA to support this position is a decision from a circuit court from 2011, which stemmed from conduct in 2008 and cited the 1984 Agreement as its factual predicate. These are not sufficient factual bases to support the Order in 2017.
"Closure of SMO will contribute to significant congestion of air navigation in the greater Los Angeles region and impose a significant burden on the flying public. Restrictions at SMO would place a significant and detrimental burden on both regional and interstate commerce." (Order at 1.)	The FAA's position is factually unsupported. There is no record to establish that closure at the present time would "contribute to significant congestion" or "impose a significant burden."

The FAA's Statement	The City's Response
The City has taken "unremitting efforts to evict from SMO critical aeronautical service providers[.]" (Order at 1.)	As the City has explained on a number of occasions, the City is preparing to implement proprietary exclusive FBO services at the physical locations at SMO where American and Atlantic are presently operating. Removal of these tenants from these physical locations is necessary to allow the City to provide fuel services. The City will not remove the tenants from these locations until such time as it is ready to commence providing its planned proprietary exclusive services. This City has not taken any "unremitting efforts." There is also no factual basis for the statement that the tenants are "critical aeronautical service providers."
The City has a "hostility to the sale of leaded aviation fuel necessary for flight of today's aircraft in clear contravention of law[.]" (Order at 1.)	This is factually inaccurate. An August 23, 2016, City Council Report discussed the potential transition from leaded fuel to viable alternatives. The Report stated that there was a viable alternative for "an estimated 65 percent of the propeller aircraft fleet based at SMO." (Ex. 14, August 23 City Council Report at 19.) The Report stated that leaded fuel should be "phased out completely as soon as ***legally possible.***" (*Id.*) In place of the leaded fuel, the Report recommended "the sale of unleaded fuel" in order to curtail potential negative health impacts associated with the Airport. The City merely seeks to protect its citizens and comply with applicable law.

The FAA's Statement	The City's Response
"[W]hile the City's airport leasing policy provides for a broad collection of uses, the majority of which are incompatible with an operating airport, the obvious use category that the leasing policy fails to include is aviation." (Order at 1.)	Since 1984, the City has carefully calibrated its leasing practices to ensure that its aeronautical tenants were never vested with leasehold interests that extended beyond the date on which the City believes it was entitled to cease operating SMO as an airport—July 1, 2015. This is consistent with the City's grant obligations, as well as the terms of the 1984 Settlement Agreement, which makes clear that the City is only required to maintain SMO as a public use airport until that date. On March 22, 2016, the City adopted a Leasing Policy that emphasized that the City Council seeks to have an airport tenant mix that "comports with any applicable legal requirements." (Ex. 11, Santa Monica Leasing Policy.) Consistent with the City's position since 1984, the Leasing Policy provided that leases may be month-to-month, that existing tenants would be given the opportunity to submit a lease application, but that the City is under no obligation to offer lease agreements. The City is unaware of any authority that could require it to enter into long-term lease agreements with airport tenants under these circumstances. Despite that the City is entitled to close the airport, the City's Leasing Policy does not prohibit aviation uses, and provides that existing tenants, including aviation tenants, would "be given the opportunity to submit a lease application to the City."
"The City indicates no intention of providing a flight school. Accordingly, the City's desire to provide "aircraft refueling" and "aircraft repositioning" services cannot and does not justify its eviction of American Flyer's flight school services." (Order at 3.)	The City is preparing to implement proprietary exclusive FBO services including but not necessarily limited to aircraft refueling and repositioning. The fueling services must necessarily take place at the physical location where American presently operates, because that is where the fuel pump is located. Accordingly, the City has grounds to remove American from that physical location at SMO in order to exercise its right to offer fuel on a proprietary exclusive basis. In any event, the City will not seek to enforce any judgment obtained in the UD Action until such time as the City believes it can commence operations of its proprietary exclusive FBO. (Ex. 44, November 4, 2016 Letter R. Cole to R. Govan.)

The FAA's Statement	The City's Response
Aircraft refueling and aircraft repositioning services "are not congruent with the aeronautical services Atlantic currently provides. As we concluded with regard to American Flyers, because the City does not plan to assume *all* the aeronautical services offered by Atlantic, Atlantic retains a right to access the airport on commercially reasonable terms, to provide aeronautical services." (Order at 4.)	The services Atlantic provides are undisputed. It operates a ramp with overflow parking, as well as a building with passenger and pilot lounges, conference rooms, offices, and other amenities. Atlantic provides fuel, overnight parking and hangar space to turbine and piston aircraft that are based at SMO, as well as transient aircraft. (Atlantic Aviation Part 16 Complaint, para. 2.) The services the City will provide through its proprietary exclusive FBO are plainly "congruent" with those offered by Atlantic. The City is preparing to implement proprietary exclusive FBO services including but not necessarily limited to aircraft refueling and repositioning. These services will necessarily take place at the physical location where Atlantic presently operates. In any event, the City will not seek to enforce any judgment obtained in the UD Action until such time as the City believes it can commence operations of its proprietary exclusive FBO. (Ex. 44, November 4, 2016 Letter R. Cole to R. Govan.)
"As evidence of its readiness and preparation, the City points to its Fixed Base Operator Workplan. However, its Workplan is less than two pages, undated, unsigned and states that its purpose it so 'provide an overview of the estimated timelines in completing the task[s] identified prior to the City assuming management of the FBO at Santa Monica Airport." (Order at 4.)	This mischaracterizes the evidence submitted by the City concerning its planned proprietary exclusive FBO. The City submitted nearly 500 pages of documents describing its plan, which included descriptions for the number of employees and job classifications required; type of training for FBO employees; the amount of equipment and their specifications for lease; the regulatory requirements necessary for fuel dispensing and fuel farm management; and; cost analysis. Since that time, the City has continued to further develop its plan. The City has and does expressly reserve it right to supplement its NOI submissions in this regard, because the City's plans continue to advance.

The FAA's Statement	The City's Response
"Based on the City's own response to the NOI, its plans, if permissible at all, are far too nascent to justify removal of the airport's main service provider." (Order at 4.)	As the City's explained in its NOI response, the NOI was premature because the City was the "planning stages" of implementing proprietary exclusive FBO services. The City cannot be blamed because the FAA issued the NOI and the Order prematurely. Moreover, the City submitted nearly 500 pages of documents describing its plan, which included descriptions for the number of employees and job classifications required; type of training for FBO employees; the amount of equipment and their specifications for lease; the regulatory requirements necessary for fuel dispensing and fuel farm management; and; cost analysis. Since that time, the City has continued to further develop its plan. The City has and does expressly reserve it right to supplement its NOI submissions in this regard, because the City's plans continue to advance.
"We also note that in its own Part 16 proceeding, Atlantic filed a motion for the FAA to issue an Interim Cease and Desist Order blocking its eviction. The City had until September 29 to respond to Atlantic's motion. The FAA notes that the City, for whatever reason, chose not the oppose Atlantic's motion." (Order at 4-5.)	This is factually inaccurate. As set forth in the City's December 16, 2016 Letter (Ex. 45), the City plainly opposed Atlantic's motion for a cease and desist order.

The FAA's Statement	The City's Response
"The FAA's legal interpretations of the grant assurances are subject to a level of review that is "highly deferential," and its interpretations are presumed valid. FAA's conclusions may be overturned "only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Appendix at 1, n. 3.)	The FAA's legal interpretations are not necessarily entitled to any deference whatsoever by a reviewing court. Contracts are supposed to be interpreted according to their plain terms, but the FAA has transformed the amendment's "remain in full force and effect" clause into one that said the City's obligations shall be extended, and converted the Grant Agreement's provision guaranteeing the City's obligations would not "exceed twenty (20) years" into a provision stating that they would endure for 29 years. Contracts are supposed to be interpreted according to the contemporaneous intentions of the parties, but the FAA has previously disregarded unrebutted evidence that both parties understood the 2003 amendment to leave the City's grant obligations unchanged, instead substituting the FAA's hindsight assessment of what it now wishes the amendment had accomplished. And contracts are supposed to be construed against the drafter—even where, as here, the drafter is the federal government; instead, the FAA erroneously declared its own interpretation of ordinary contractual terms entitled to deference despite the fact that where, as here, interpreting a contract does not require the interpretation of an underlying statute, no deference to an agency's interpretation of that contract is warranted. *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004); *see, e.g.*, *Clay Tower Apartments v. Kemp*, 978 F.2d 478, 480 (9th Cir. 1992) ("[T]he parties executed a contract, and our inquiry focuses on the contractual requirements. This focus does not demand deference to HUD's statutory interpretation."). The FAA's position also seems to be premised on the assumption that it will prevail before the Ninth Circuit in a highly contested matter that has yet to be reviewed outside the agency, much less by an Article III Judge. *City of Santa Monica v. FAA*, No. 16-72827 (9th Cir.).
Appendix Sections I.A.a and I.A.b (Appendix at 2-3.)	The City disputes that it is bound by any grant assurance obligations and reserves all of its rights to dispute any and all legal arguments made by the FAA related to the City's grant assurance obligations.

The FAA's Statement	The City's Response
Appendix Section I.B (Appendix at 3-4.)	As set forth herein, the FAA lacks jurisdiction to make determinations whether the City is bound by any SPA obligations. The City disputes that it is bound by SPA obligations. Moreover, the restrictions contained in the 1948 IOT are invalid. The City also disputes the FAA's characterization of the 1948 IOT, which the FAA merely summarizes out of context, taking only bits and pieces and putting them together without setting forth the document as a whole.
"From 1941 to 1946, the United States extensively improved Clover Field, including but not limited to the construction of a concrete runway, taxiway, hangars, and a control tower." (Appendix at 3.)	There is no evidence to support these facts, and the City disputes them. In fact, between 1941 and 1946 the City made significant investments in the Airport Property to support the war effort and protect Douglas employees that lived and worked in the community. Furthermore, the City invested a significant amount of its own funds into the Airport and collected only nominal rent from the United States. (No. 13-CV-08046, Compl. at ¶ 27.)
"On October 27, 2015, the City council voted to (i) include provisions in SMO leases that limit the sale of aircraft fuels for piston-engine aircraft to 'simply unleaded fuels' and fuels for turbine-engine aircraft to biofuels to other sustainable fuels by a date or dates certain; and (ii) include provision in flight school leases that prohibit lessees from suing leaded duels for flight training." (Appendix at 4, ¶ 1.)	The City Council's October 27, 2015, action is taken out of context by the FAA because there have been developments since that time. For example, an August 23, 2016, City Council Report discussed the potential transition from leaded fuel to viable alternatives. The Report stated that there was a viable alternative for "an estimated 65 percent of the propeller aircraft fleet based at SMO." (Ex. 14, August 23 City Council Report at 19.) The Report stated that leaded fuel should be "phased out completely as soon ***as legally possible.***" (*Id.*) In place of the leaded fuel, the Report recommended "the sale of unleaded fuel" in order to curtail potential negative health impacts associated with the Airport. The City merely seeks to protect its citizens and comply with applicable law.

The FAA's Statement	The City's Response
On March 22, 2016, the City Council approved an Airport Leasing and Licensing Policy. The policy expressly: (i) authorizes the use of SMO for "parks and open space, arts/cultural, creative space, professional theaters, museums, artist studios, art galleries, photograph studios," and restaurants, among other non-aviation uses; and (ii) prohibits any use involving products "which by nature of the operation is likely to be obnoxious or offensive to the surrounding environment," as well as "high intensity uses that are incompatible with the surrounding residential uses." The policy, although addressing leases at an airport, never mentions aeronautical uses, but does provide a catch-all category for "uses required by law." (Appendix at 5, ¶ 2.)	Since 1984, the City has carefully calibrated its leasing practices to ensure that its aeronautical tenants were never vested with leasehold interests that extended beyond the date on which the City believes to be was entitled to cease operating SMO as an airport—July 1, 2015. This is consistent with the City's grant obligations, as well as the terms of the 1984 Settlement Agreement, which makes clear that the City is only required to maintain SMO as a public use airport until that date. On March 22, 2016, the City adopted a Leasing Policy that emphasized that the City Council seeks to have an airport tenant mix that "comports with any applicable legal requirements." (Ex.11, Santa Monica Leasing Policy.) Consistent with the City's position since 1984, the Leasing Policy provided that leases may be month-to-month, that existing tenants would be given the opportunity to submit a lease application, but that the City is under no obligation to offer lease agreements. The City is unaware of any authority that could require it to enter into long term lease agreements with airport tenants under these circumstances. Despite that the City is entitled to close the airport, the City's Leasing Policy does not prohibit aviation uses, and provides that existing tenant, including aviation tenants, would "be given the opportunity to submit a lease application to the City."
"American Flyers and Atlantic filed separate Part 16 complaints with the FAA on September 21 and September 13, respectively. See 14 CFR Part 16. Both parties have likewise filed motions for the FAA to issue a Cease and Desist Order to block their evictions. The City did not oppose either motion, and the time to file such an opposition expired on September 29 with regard to Atlantic's motion and October 1 for that of American Flyers'." (Appendix at 5.)	This is factually inaccurate. As set forth in the City's December 16, 2016 Letter (Ex. 45), the City plainly opposed Atlantic's motion for a cease and desist order.

The FAA's Statement	The City's Response
"The City's leasing policy provides for a broad collection of uses but, despite its application to an operating airport, fails to include aviation uses." (Appendix at 6.)	Since 1984, the City has carefully calibrated its leasing practices to ensure that its aeronautical tenants were never vested with leasehold interests that extended beyond the date on which the City believes to be was entitled to cease operating SMO as an airport—July 1, 2015. This is consistent with the City's grant obligations, as well as the terms of the 1984 Settlement Agreement, which makes clear that the City is only required to maintain SMO as a public use airport until that date. On March 22, 2016, the City adopted a Leasing Policy that emphasized that the City Council seeks to have an airport tenant mix that "comports with any applicable legal requirements." (Ex. 11, Santa Monica Leasing Policy.) Consistent with the City's position since 1984, the Leasing Policy provided that leases may be month-to-month, that existing tenants would be given the opportunity to submit a lease application, but that the City is under no obligation to offer lease agreements. The City is unaware of any authority that could require it to enter into long term lease agreements with airport tenants under these circumstances. Despite that the City is entitled to close the airport, the City's Leasing Policy does not prohibit aviation uses, and provides that existing tenant, including aviation tenants, would "be given the opportunity to submit a lease application to the City."
Appendix Sections III and IV. (Appendix at 7.)	The City disputes the FAA's contention that the City is obligated by federal grant assurances or has any of the other federal obligations enumerated in the NOI and the Order. Thus, the City responds to the Order under protest and reserves all rights; the City contends the FAA lacks authority to bind the City or require the City to act. Disputes regarding the City's federal obligations are pending before the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California. By responding to the Order, the City does not waive any claims or defenses that it may assert in those or other proceedings. The City reserves all rights and does not waive any argument regarding the FAA's characterizations of applicable law, including the characterizations contained in Sections III and IV of the Appendix.

The FAA's Statement	The City's Response
Appendix Section V. (Appendix at 8.)	This section mischaracterizes the City's evidence related to its planned proprietary exclusive FBO as "bare bones." Not so. The City submitted nearly 500 pages of documents describing its plan, which included descriptions for the number of employees and job classifications required; type of training for FBO employees; the amount of equipment and their specifications for lease; the regulatory requirements necessary for fuel dispensing and fuel farm management; and; cost analysis. Since that time, the City has continued to further develop its plan. The City has and does expressly reserve it right to supplement its NOI submissions in this regard, because the City's plans continue to advance.
Appendix Section VI. (Appendix at 8-9.)	The City agrees that the "transition from privately- to sponsor- proffered aeronautical services should be amicably coordinated." However, the private entities have contested the City's action every step of the way, despite the City's assurances that it will not remove the tenants until such time as it is ready to commence its proprietary exclusive FBO services. The City's actions have not been precipitous. In fact, it is the FAA's premature NOI that was issued in a precipitous manner. As the City explained in its NOI response, the NOI was premature because the City was in the "planning stages" of implementing proprietary exclusive FBO services. The City cannot be blamed because the FAA issued the NOI and the Order prematurely. Moreover, the City submitted nearly 500 pages of documents describing its plan, which included descriptions for the number of employees and job classifications required; type of training for FBO employees; the amount of equipment and their specifications for lease; the regulatory requirements necessary for fuel dispensing and fuel farm management; and; cost analysis. Since that time, the City has continued to further develop its plan. The City has and does expressly reserve it right to supplement its NOI submissions in this regard, because the City's plans continue to advance.

The FAA's Statement	The City's Response
Appendix Section VII. (Appendix at 9-10.)	The City disputes the FAA's characterization of the City's actions. The City has acted as a reasonable and prudent land owner and airport proprietor preparing to implement proprietary exclusive FBO operations. In any event, the City will not seek to enforce any judgment obtained in the UD Action until such time as the City believes it can commence operations of its proprietary exclusive FBO. (Ex. 44, November 4, 2016 Letter R. Cole to R. Govan.) The FAA does not address the City's commitment in this regard.

VII. CONCLUSION

The Order should be vacated because the City is not bound by any federal obligations—grant assurance or otherwise—and, even if it somehow were, the Order is arbitrary, capricious, and beyond FAA's statutory authority. The FAA has also deprived the City of due process by issuing the Order without notice or hearing on the issues raised by the Order and raising new issues in the Order for the first time.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, the foregoing document was served on the U.S. Department of Transportation, Federal Aviation Administration via U.S. Mail and Electronic Mail to:

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