O'MELVENY & MYERS LLP

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CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899
TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

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WRITER'S DIRECT DIAL
(213) 430-6670

WRITER'S E-MAIL ADDRESS
tallan@omm.com

Office of the Chief Counsel
Attention: FAA Part 16 Airport Proceedings Docket
AGC-600
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Re: PART 16 COMPLAINT

Atlantic Aviation FBO, Inc. v. City of Santa Monica, California

Dear Sir or Madam:

Pursuant to 14 C.F.R. § 16.23, Atlantic Aviation FBO, Inc. ("Complainant") brings this complaint against the City of Santa Monica, California (the "City"), which is the owner, operator, and sponsor of Santa Monica Municipal Airport ("SMO" or the "Airport"). Given the nature of the violations herein alleged and the urgency with which corrective action is needed, Complainant respectfully requests that the Director issue an order expediting the handling of this matter. *See* 14 C.F.R. § 16.11(b).

This complaint is based on the City's continuing failure and refusal to adhere to its federal obligations, and on the specific actions and conduct alleged hereafter. The City's objectives are now crystal clear: Fight the FAA for "local control" of SMO in the courts and, in the interim, undertake any measure at its disposal to severely curtail or discourage air traffic at SMO. If the City is permitted to take over Complainant's fixed base operation ("FBO") at SMO, as it has resolved to do, it will do all it can to minimize air traffic by limiting fuel sales to commercially-infeasible fuels and by offering substandard services and inconvenient hours.

All communications with respect to this complaint should be addressed to Tad Allan, O'Melveny & Myers LLP, 400 S. Hope St., Los Angeles, CA 90071; (213) 430-6000; tallan@omm.com.

COMPLAINANT

1. Complainant has operated a full service FBO at SMO since 2007, assuming a lease that has been in effect, under several ownerships, since approximately 1986. **Ex. A**

(Declaration of Gregory S. Wain in Support of Atlantic Aviation FBO, Inc.'s Part 16 Complaint Against the City of Santa Monica (hereinafter "Wain Decl.") at ¶ 3). The City is the lessor under Complainant's lease.

2. Complainant is the only full service FBO at SMO. Located on the north side of SMO, Complainant operates from a centrally located ramp with overflow parking as well as a modern building facility with passenger and pilot lounges, conference rooms, offices and other amenities. Complainant provides fuel, overnight parking, hangar space and other services to turbine and piston aircraft that are based at SMO, as well as transient aircraft. In 2015, 13,150 aircraft visited Complainant at SMO, an average of 36 per day. Complainant has 30 full-time employees at SMO, making it one of SMO's largest aviation employers. Wain Decl. at ¶ 4.

3. Complainant's leasehold interest at SMO includes 33 hangars, which Complainant subleases to aircraft owners and others. Wain Decl. at ¶ 5. As explained further below in paragraph 35, until June 2015 Complainant's leasehold interest also included significant office space, which it subleased to VW of America, Inc. at $138,057 per month and to a law firm at $83,953 per month. *Id.*

4. Complainant is the only provider of jet fuel at SMO, and one of only two providers of Avgas. It operates a fuel farm adjacent to its facility, also owned by the City. The fuel farm comprises three underground storage tanks, capable of storing up to 24,000 gallons of jet fuel and 12,000 gallons of Avgas. In 2015, Complainant pumped approximately 2.6 million gallons of jet fuel, and approximately 56,000 gallons of Avgas. In 2015, 494 distinct customers purchased Avgas from Complainant. *See id.* at ¶¶ 6, 10. Complainant's Avgas aircraft customers (including those paying only a ramp fee) generated roughly 2,400 point-of-sale transactions that year. *Id.* at ¶ 10. For the entire duration of Complainant's tenure at SMO, until early this year, the City leased the fuel farm to Gunnell Properties, LP ("Gunnell") another SMO tenant, which, in turn, had a Service and Use Agreement with Complainant pursuant to which Complainant operated the fuel farm on behalf of Gunnell and the City. Since February 29, 2016, however, Complainant has continued to operate the fuel farm under a written Fueling Agreement between Complainant and the City. *Id.* at ¶ 6; *see also* ¶ 63, *infra.*

5. Complainant operates five Jet A refueling trucks at SMO, each with a 5,000 gallon capacity. Complainant also operates one 100LL Avgas refueling truck, with a capacity of 1,000 gallons. All of Complainant's refueling trucks are certified to run on biodiesel fuels, and Complainant's aircraft towing tugs are all electric. Complainant has invested $447,533 in its electric tugs and tow bars. Wain Decl. at ¶ 8.

6. During the nine years that Complainant has operated its FBO at SMO, it has paid rent to the City and has also paid fuel "flowage" fees, which consist of a fixed amount per gallon of fuel pumped by Complainant. In 2015, for example, Complainant paid $16,833 per month in rent and a total of $275,572 in fuel flowage fees. Since 2011, Complainant has also invested $443,205 in repairs, testing, and maintenance for the fuel farm. In addition to the fuel farm, Complainant has made significant and ongoing investments in the business by maintaining and

upgrading the existing facilities and updating its vehicular fleet to the modern, environmentally friendly fueling trucks and tow tugs described in paragraph 5 above. Wain Decl. at ¶¶ 7-9, 11.

7. Like most other aviation tenants at SMO, Complainant's lease expired on June 30, 2015. Wain Decl. at ¶ 10. As further described below, since then, Complainant has operated at SMO under an on-again, off-again Holdover Agreement that last expired on March 31, 2016, and which the City has refused to renew. In early 2015, Complainant undertook to negotiate a long-term lease renewal with the City, and even obtained from the City Council approval for a three-year lease renewal. However, at the end of June 2015 the City terminated all lease negotiations and has refused all of Complainant's efforts to come to a long-term lease arrangement. Complainant is currently operating at SMO without a written agreement of any kind with the City, due to the City's refusal to negotiate a long term lease renewal or even a continuation of the short term Holdover Agreement. *See* ¶¶ 33-43, *infra.*

8. On August 23, 2016, the City Council unanimously adopted a resolution "declaring that it shall be the policy of the City to close the Santa Monica Airport to aviation uses, as soon as legally permitted." **Ex. B**; *see also* August 23, 2016 Santa Monica City Council Meeting ("Aug. 23, 2016 City Council Meeting")[1] at 2:19:46-2:23:15 (adopting resolution). The City Council also unanimously adopted a policy to take over Complainant's FBO, with the intent of operating it as a proprietary FBO. **Ex. B**; *see also* Aug. 23, 2016 City Council Meeting at 2:19:46-2:23:15.

SUBJECT OF THE COMPLAINT

9. SMO is a public-use airport, owned and operated by the City. Approximately 260 general aviation aircraft are based at the Airport and more than 150,000 operations are conducted there each year. *See Nat'l Bus. Aviation Ass'n v. City of Santa Monica*, No. 16-14-04, at 2 (Director's Determination, Dec. 4, 2015).

10. Confirming the vital role that SMO continues to play as a general aviation airport, the Federal Aviation Administration ("FAA") has designated SMO as an airport that supports regional economies by connecting communities to statewide and interstate markets. SMO is located in a congested air traffic area and serves as a reliever airport for Los Angeles International Airport. *Id.*

11. The City is a recipient of Airport Improvement Program grant funds by and through the FAA, including roughly $10 million that was disbursed through 2003. The City

[1] *Available at* http://santamonica.granicus.com/MediaPlayer.php?view_id=2&clip_id=3791.

remains obligated under the terms and covenants accompanying these grants (the "Grant Assurances") through at least 2023.[2]

12. The names and addresses of the responsible persons at the City are: Rick Cole, City Manager, 1685 Main Street, Room 209, Santa Monica, CA 90401; Marsha Jones Moutrie, Esq., City Attorney, 1685 Main Street, Room 310, Santa Monica, CA 90401; Susan Cline, Acting Director of Public Works, 1685 Main Street, Room 116, Santa Monica, CA 90401; Nelson Hernandez, Senior Advisor to the City Manager on Airport Affairs, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405; and Stelios Makrides, Airport Manager, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405.

BACKGROUND

13. The City's course of conduct toward Complainant violates its federal obligations. Its longstanding intention and consistent efforts to close or restrict operations at SMO, notwithstanding these obligations, provide relevant context for the City's current violations and the expectation that the City will continue to ignore those obligations.

A. The City's Efforts to Close or Restrict SMO.

14. It is a matter of well-documented public record that the City has sought for decades to close SMO or, failing that, to so restrict aviation operations at SMO as to effectively bring about its closure. The full history of these efforts, with a particular emphasis on the impacts suffered by SMO aviation tenants, is set forth in the February 5, 2016 Part 16 Complaint filed by *Mark Smith, et al. v. City of Santa Monica*, No. 16-16-02 (the "Smith Part 16 Complaint"). Paragraphs 12-42 of the Smith Part 16 Complaint are incorporated herein by reference. Below is a summary of this history.

15. It is the official "policy of the City of Santa Monica"—adopted unanimously by the Santa Monica City Council (the "City Council")—"to effect the closure of Santa Monica Municipal Airport as soon as possible." **Ex. C**. The City's efforts have been thwarted only by the timely involvement of the FAA, including through other Part 16 proceedings.

16. The City has explored its options to close the Airport since at least 1962. That year, the City Council sought the opinion of the Santa Monica City Attorney as to whether the City could unilaterally "abandon the use of [SMO] as an airport." The City Attorney informed the City that it could not. *See* **Ex. D**. In 1975, the City posed the same question to the California Attorney General. The City received the same answer: its federal obligations precluded it from unilaterally closing the Airport. *See* **Ex. E**.

[2] On August 15, 2016, the FAA issued a Final Decision in *National Business Aviation Association v. City of Santa Monica*, No. 16-14-04 (Final Decision, Aug. 15, 2016), confirming that the Grant Assurances are effective at SMO through 2023.

17. Unable to close SMO outright, the City sought to accomplish this goal by other means—namely, by placing unreasonable and unlawful restrictions on aviation activities designed to undermine SMO's viability as an airport.

18. To that end, the City Council adopted a series of ordinances governing Airport operations, including one banning all jet aircraft operations. That ordinance was struck down by a federal district court and the judgment was affirmed on appeal. *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd* 659 F.2d 100 (9th Cir. 1981).

19. In 1982 the City terminated the leases of SMO tenants, including FBOs. Several tenants filed lawsuits in response, and in 1984, the City and the FAA entered into a comprehensive agreement regarding SMO as a result of the tenant lawsuits. *See* **Ex. F**.

20. In June 2003, the City Council adopted an ordinance promulgating a graduated weight-based landing fee for aircraft weighing over 10,000 lbs. The FAA found that the ordinance violated the City's Grant Assurances, including Assurance 22. *See Bombardier Aerospace Corp. v. City of Santa Monica*, No. 16-03-11 (Director's Determination, Jan. 3, 2005).

21. In March 2008, the City Council banned all Category C and D (jet) operations at SMO. The FAA again found the City to be in violation of its federal obligations, *see In re City of Santa Monica*, No. 16-02-08, a decision upheld by the D.C. Circuit Court of Appeals, *City of Santa Monica v. FAA*, 631 F.3d 550 (D.C. Cir. 2011).

22. In October 2013, the City filed a federal court action, *City of Santa Monica v. United States*, in which it sought declaratory relief that it is not required to keep SMO open in perpetuity. The District Court dismissed the City's complaint on procedural grounds and the Ninth Circuit reversed and remanded. *See City of Santa Monica v. United States*, No. 14-55583, 2016 WL 2849595 (9th Cir. May 16, 2016). The case is currently before the United States District Court for the Central District of California. *City of Santa Monica v. United States*, No. 2:13-cv-08046 (C.D. Cal.).

23. In March 2014, the City Council unanimously adopted the proposals of the Santa Monica Airport Commission (the "Airport Commission") to "continue to pursue City control" of SMO. The Airport Commission recommended that the City Council consider terminating the leases of local flight schools and prohibiting or restricting fuel sales. *See* **Exs. G-H**. The City has followed through on the first proposal and remains committed to the second.

24. On January 6, 2016, the City sought to evict Justice Aviation, the oldest and largest flight school at SMO, eventually filing an unlawful detainer action in Los Angeles Superior Court. On March 14, 2016, Justice Aviation filed a Part 16 complaint, alleging that the City's conduct violated its Grant Assurances. The parties reached a settlement agreement pursuant to which Justice Aviation has ceased its operations at SMO.

25. Since at least 2014, the City Council has directed staff to evaluate how the City can use the regulation of fuel sales to effect closure of SMO. Thus, the City Council directed staff to:

a. "[l]imit sales of aircraft fuels for piston engines to unleaded fuels,"

b. evaluate whether it would be permissible to "cease[] fuel sales outright,"

c. evaluate "the possible termination of third-party fuel sales at the Airport and … the feasibility of the City taking over that function to assure that, as long as aircraft fuel is sold at the Airport, it is the most environmentally sound fuel available," and

d. "look at limiting the fixed based operations (FBO) hours at the airport." **Exs. I-J**.

26. Outright cessation of fuel sales would destroy the Airport's viability, as would a requirement that only "environmentally sound" fuel be sold at SMO. This is a reference to unleaded gas for piston powered aircraft and biofuel for jets. Most piston aircraft are not certified to run on unleaded gas.[3] Although biofuel for jets does exist in small quantities, it is not yet commercially feasible. A mandate to use only biofuel instead of Jet A fuel and unleaded gas in place of 100LL Avgas would severely curtail all aircraft operations at SMO and would threaten a large number of Atlantic customers. Wain Decl. at ¶ 10; *see also id.* (494 distinct customers purchased Avgas from Atlantic in 2015). The City's threatened fuel mandates would also diminish the commercial viability of Complainant's operations at SMO—potentially forcing it out of business—and hinders even short-term business planning. *Id.*

27. In its January 8, 2016 appeal of the FAA's recent Director's Determination that the City remains obligated by its Grant Assurances through 2023, the City confirmed in writing what its conduct strongly suggests: it remains committed to its "long-expressed policy to seek closure of the airport." **Ex. K.**[4] Indeed, in its most recent meeting, the City Council adopted a resolution declaring that the City Council intends to "[t]erminate the use of all and any part of [SMO] for general aviation, and to close the Airport as soon as legally permitted." **Ex. M**; *see also* Aug. 23, 2016 City Council Meeting at 2:19:46-2:23:15 (adopting resolution).

28. Virtually all Airport leases terminated by their terms on July 1, 2015, consistent with the City's belief—now rejected by the FAA—that its grant assurance obligations would expire at that time. Though the City has renewed a number of non-aviation leases at SMO, instead of constructively engaging and negotiating with aviation tenants, as the City's federal

[3] There is no industry-standard unleaded substitute for 100LL Avgas, and various alternative options are still in testing. *See* **Ex. L.**

[4] The FAA rejected the City's contention that the Grant Assurances did not obligate the City through at least 2023. *See supra* n.1.

obligations require, the City has effectively refused to provide lease renewals for aviation tenants. It has offered only month-to-month holdover agreements or, in the case of Complainant, it has required aviation tenants to operate without any written agreement at all.

29. On March 22, 2016, the City Council approved the Airport Leasing and Licensing Policy (the "Leasing Policy")—a policy designed to make the Airport an inhospitable place for Complainant and other aviation-related enterprises to do business. *See* **Ex. Y**; *see also* **Ex. Z**. Just a week prior to the Leasing Policy's passage by the City Council, it failed a vote of approval by the generally anti-aviation Airport Commission, with Commissioners rejecting the policy because it "appears to preclude aviation tenants" and because it "is too vague relative to the tenant selection criteria." **Ex. AA**. Nevertheless, the City Council voted unanimously to approve it, despite the fact that, on its face, it does not even contemplate aviation as a permitted use. *See* **Ex. Y**. By contrast, the policy expressly authorizes 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. *See* **Ex. Z**. In its March 22, 2016 meeting, the City Council had available to it the advisory City Council Report, in which senior City staff summarized the history and current status of SMO. **Ex. AA**. The Report correctly noted that no aviation leases had been renewed, though a number of non-aviation leases had been renewed to June 30, 2018. Other than recommending that the City not give master leases to tenants like Complainant, which has subtenants for the 33 hangars it leases from the City, the Report provided no guidance to the City Council as to how aviation tenants should be treated. Indeed, as of the date of this Complaint, Complainant is unaware of a single SMO aviation tenant that has been given a lease renewal or extension beyond July 1, 2015, when almost all existing aviation leases, including Complaint's, expired.

30. The Leasing Policy's express provisions also implicitly reject the possibility of the City renewing aviation leases. Specifically, the policy prohibits any use involving products "which by nature of the operation is likely to be obnoxious or offensive to the surrounding environment" (*e.g.*, fuel sales), as well as "high intensity uses that are incompatible with the surrounding residential uses" (*e.g.*, aircraft operations). **Ex. Z**. Most striking, the Leasing Policy requires that any lessee use "airport property in a manner that is compatible with City policies," *id.*, yet "[i]t is the policy of the City of Santa Monica to effect the closure of the Santa Monica Municipal Airport," **Ex. C**; *accord* **Ex. M**.

31. To the extent aviation leases are even permitted under the Leasing Policy, it is designed in such a way as to make SMO an inhospitable business environment for aviation enterprises. For instance, notwithstanding the fact that the FAA has determined that SMO must be maintained as an airport until at least 2023, the Leasing Policy provides that "no lease shall have a term that goes beyond June 30, 2018," a date seemingly selected at random. In the Smith Part 16 Complaint, a number of SMO tenants have challenged the City's unreasonable and discriminatory refusal to renew any aviation leases and the stated (now-codified) policy that no such leases may extend beyond July 1, 2018. Complainant reiterates those arguments and incorporates them here by reference. Complainant also incorporates by reference the arguments made in Complainants' answer to respondent's motion to dismiss in the Smith Part 16

proceeding, namely, that the City's Leasing Policy does not conform to its federal obligations and, to the extent the City tries to hide behind it, it is impermissibly vague.

B. The City's Current Unlawful and Discriminatory Actions Against Complainant.

32. The City's conduct toward Complainant, including the promulgation of its blatantly anti-aviation Leasing Policy, is merely another iteration of the City's continued efforts to effect SMO's closure by constricting and choking off SMO's aviation-related businesses.

33. Commencing in March 2015, Complainant began negotiating a lease renewal with the City in anticipation of the June 30, 2015 lease expiration date. Wain Decl. at ¶ 10. At the City's request, on March 18, 2015 Complainant sent a letter to Martin Pastucha, Director of Public Works for the City, setting forth the basic terms desired by Complainant in a lease renewal, including a five-year term. **Ex. N**. Thereafter the parties began to negotiate, with Complainant represented by its counsel Tad Allan and Greg Thorpe, of O'Melveny & Myers LLP and the City represented by Deputy City Attorney Ivan Campbell.

34. In March, April, and May 2015 the parties, through their respective representatives, made substantial progress in their negotiations on the terms of a lease renewal, which would have extended Complainant's lease by three years. Indeed, in its March 24, 2015 meeting, the City Council specifically approved a three-year lease renewal for Complainant. **Ex. O**. The City's initial term sheet, sent to Complainant by letter dated April 20, 2015, provided for "up to three year base term, not to exceed June 30, 2018." **Ex. P**. Draft lease renewals were exchanged by the parties that provided for a three-year term, with no objection from the City to that term. *See* Wain Decl. at ¶ 10. By early June 2015 the negotiation had been reduced to a handful of issues, none of which was the three-year term. However, one of the remaining issues was the City's insistence that Complainant commit to offering only biofuel for jets and a no-lead alternative to 100LL Avgas, even though Complainant had advised the City that such fuels were not yet commercially feasible. *Id.*

35. In mid-June 2015, with no final agreement on a lease renewal and the June 30 expiration date looming, the City asked Complainant to instead enter into a written Holdover Agreement, which terms included (1) a 32.1% rent increase, from $16,833 to $22,226 per month, and (2) that Complainant assign to the City its right, title, and interest in sub-leases with Volkswagen of America, Inc. and a law firm, which were occupying office space included in Complainant's lease. In reliance on the City's representation that it would continue to negotiate a three-year lease renewal, and to continue operating the FBO, Complainant agreed to the City's demands, as reflected in the June 23, 2015 letter from the City to Complainant, signed by both parties (the "June 23, 2015 Holdover Agreement"). **Ex. Q**; Wain Decl. at ¶ 11.

36. Though the City purported to be willing to continue negotiating a three-year lease renewal even after entering into the June 23, 2015 Holdover Agreement, in reality the City had decided not to enter a lease renewal with Complainant on any terms. This position was hinted at in a June 17, 2015 email from Mr. Campbell to Mr. Allan, in which Mr. Campbell explained that

he had made revisions to the draft Holdover Agreement ". . . with the current atmosphere surrounding the airport in mind. I expect this document to be a public record, and therefore thoroughly scrutinized by those interests that do not want the City to execute a lease agreement with Atlantic. Those interests are actively lobbying the mayor and the council specifically against the City's negotiations with Atlantic. The communications are public records and are available upon request." **Ex. R**.

37. In its July 14, 2015 meeting, the City Council again took up the issue of lease renewals for SMO aviation tenants, including Complainant, as well as non-aviation tenants. Though the City Council authorized lease renewals for a number of non-aviation tenants, as to the four aviation tenants up for lease renewals, including Complainant, the City Council voted to postpone any lease renewals and instead directed City staff to perform certain "economic analyses" of these leases, ostensibly because they all contained sub-leases—in Complainant's case, the sub-leases consisted only of its 33 hangars, since Complainant had already assigned to the City its two office tenant sub-leases. **Ex. S**.

38. Following the July 14, 2015 City Council meeting, and continuing to this date, the City has refused to negotiate a lease renewal with Complainant on any terms. The political pressures identified by Mr. Campbell in his June 17, 2015 email to Mr. Allan (**Ex. R**), continued unabated, as exemplified by a December 1, 2015 email from Jonathan Stein, a lawyer representing various interests seeking to close SMO, to City Manager Rick Cole. Mr. Stein said "the goal should be the military doctrine, 'if you have 5 enemies shooting at you, just kill the one you can. Then you have 4 enemies shooting at you.' If you simply get rid of flight operators, total daily flight operations drop, and that is what residents want. The 'Big Three' are Atlantic, Gunnell and its subtenants, and Krueger. Just get whoever you can 'kill', at any time you can . . . . Leave the runway alone. Do not touch it, it is sacrosanct. Then, when all the FBOs are gone, 'spin like a magnet' and attack the runway." **Ex. T**.

39. At its October 27, 2015 meeting, the City Council voted to limit sales of fuel for piston engines to "simply unleaded fuels," despite the fact that no such fuels are certified or available for use in the vast majority of aircraft piston engines. **Ex. I**.

40. The June 23, 2015 Holdover Agreement was set to expire on October 30, 2015. **Ex. Q**. On October 29, 2015, the parties agreed to a one month extension, to November 30, 2015. **Ex. U**. On November 25, 2015, the parties agreed to another one month extension, to December 31, 2015. **Ex. V**. However, in late December 2015 the City orally notified Complainant that it would not extend the Holdover Agreement past December 31, 2015, putting Complainant in the position of operating its FBO without a written lease or agreement of any kind. Wain Decl. at ¶ 12. The City provided no explanation or justification for refusing to extend the Holdover Agreement.

41. As part of the pre-Part 16 Complaint "meet and confer" process that occurred primarily in February and March of 2016 (*see* ¶¶ 58-67, *infra*), Complainant and the City re-entered the Holdover Agreement on March 11, 2016. **Ex. W**. At the City's request, the March 11, 2016 Holdover Agreement again increased Complainant's rent, this time by 80%, from

$22,226 per month to $40,000 per month, backdated to January 1, 2016. Also at the City's request, and over Complainant's objection, the March 11, 2016 Holdover Agreement was structured so that it expired almost immediately, on March 31, 2016. Complainant agreed to the massive rent increase, and the March 31 termination date, on the understanding that the City would continue to renew the Holdover Agreement on at least a monthly basis so that Complainant would no longer be in the position of operating its FBO without a written agreement. Wain Decl. at ¶ 12.

42. At the end of March 2016, Complainant asked the City again to renew the March 11, 2016 Holdover Agreement. **Ex. X**. However, the City did not respond to Complainant's request, and the March 11, 2016 Holdover Agreement expired on March 31, 2016. Since then Complainant has been paying rent of $40,000 per month, and operating its FBO without the benefit of a written agreement. Wain Decl. at ¶ 12.

43. Operating without a lease or even a Holdover Agreement presents serious difficulties for Complainant's complex, sophisticated business at SMO. All of its other FBOs are operated under a lease or written agreement of some kind with the airport owner. Without such an agreement, neither the City nor Complainant has clarity regarding its respective rights and obligations. Moreover, Complainant is unable to plan for future investments or expenditures, jeopardizing potential improvements or safety enhancements that would benefit the airport and the aviation community. Its employees also suffer as a consequence, with no ability to rely on continued potential employment, and no understanding as to when other options should be pursued. The City could, at least theoretically, attempt to evict Complainant at any moment. The City has taken advantage of its dominant bargaining power by extracting advantages from Complainant on both of the occasions that it entered into Holdover Agreements: in the June 23, 2015 Holdover Agreement, the City caused the highly profitable subleases Complainant had with two office tenants to be assigned to the City and the City obtained a significant rent increase from Complainant; and in the March 11, 2016 Holdover Agreement, the City requested and received a near-doubling of rent from what it was in the June 23, 2015 Holdover Agreement, retroactive to January 1, 2016. In both instances, having obtained what it wanted, the City allowed the Holdover Agreements to expire, putting Complainant back into a state of legal uncertainty. Wain Decl. at ¶ 13.

44. On August 23, 2016, the City Council publicly affirmed its intentions as to Complainant by unanimously adopting a resolution declaring it "the policy of the City to close the Santa Monica airport to aviation uses, as soon as legally permitted." **Exs. B, M**; *see also* Aug. 23, 2016 City Council Meeting at 2:19:46-2:23:15. The City Council also determined to take over Complainant's FBO as a propriety operation by December 31, 2016. **Ex. BB**; *see also* Aug. 23, 2016 City Council Meeting at 2:19:46-2:23:15. The City's newly-enacted FBO policy directed the City Manager to serve Complainant with a "Notice to Vacate" by September 15, 2016, and directed the City Manager "to take whatever steps he deems appropriate for the City to offer some or all of the same aeronautical services as were offered by" Complainant. *Id.* The new FBO policy is to remain in effect only through March 31, 2017, *id.*, consistent with the City's stated aim to shutter the Airport as soon as legally permitted, "with the goal of on or

before July 1, 2018," **Exs. B, M**. These actions directly contravene the City's grant assurances that apply through at least 2023.

45. While the exercise of a propriety right is legally permissible in principle, there can be no mistake about the City's goals here: The City plans to use its proprietary rights to accomplish the unlawful goal of effecting the Airport's closure by selling only "environmentally friendly" fuels, which are a non-starter commercially, *see supra* ¶ 26, and by reducing the FBO's hours and quality of service to make SMO less attractive to aviation uses. City Council members are not shy about their plan. One councilmember wrote to a constituent that he favored the City's exercise of its "proprietor's powers" "to make airport travel less convenient and reducing the hours of operation of the FBOs which service aircraft," while the City pursued "local control in the courts." **Ex. CC** (favoring a City takeover of fuel sales "to assure that, so long as aircraft fuel is sold at the Airport, it is the most environmentally sound fuel available"); *see also* **Ex. DD** (Staff Report recommending the "[e]limination of lead fuel"). And still others openly discussed the scheme at their July 26, 2016 meeting. *See* July 26, 2016 Santa Monica City Council Meeting[5] at 1:27:50-1:28:10 (discussing "potential . . . of selling unleaded avgas, the potential for curtailing or eliminating the sale of jet fuel, [and] the potential for curtailing or eliminating the activities of FBOs"); 1:32:49-1:33:09 ("I certainly look forward to our exploring taking control of the fuel distribution because that will allow us to limit the hours of fuel . . . which may discourage some of the later flights [and] it will allow us to phase out the leaded fuel . . . .").

46. Political pressure, even intense political pressure[6], is no excuse for the City Council's decision to exercise its proprietary rights as a means to evict Complainant and close or

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[5] *Available at* http://santamonica.granicus.com/MediaPlayer.php?view_id=2&clip_id=3776.

[6] Mailers were sent to all registered voters in area code 90405 imploring them to come to the City's August 23, 2016 meeting "to speak for eviction of Atlantic Aviation, which accounts for about 90% of all jet flight operations" via the exercise of the City's proprietary rights. **Ex EE**; *see also* **Ex. FF**. That mailer made clear the true purpose of the City's scheme to exercise its proprietary rights: to provide legal cover for the City's ultimate eviction of Complainant, thereby driving away the vast majority of Airport operations. **Ex EE**; *see also* **Ex. FF**. It also advocated residents mail Councilmembers, particularly those up for reelection, encouraging them to vote to exercise the City's proprietary rights as a means to evict Complainant. **Ex EE**; *see also* **Ex. FF**. Some residents did just that. **Ex. EE** ("Please keep your resolution to evict Atlantic Aviation before December 31, 2016."), ("In November, I will be voting for Council members who are firmly committed to an action plan to shut down the airport - now."), ("Please follow the Airport leasing policy which the council has adopted and stop permitting Atlantic Aviation to violate that policy every day. . . . My wife and I and our 18 year old son . . . will be watching your actions closely and they will have a great impact on the decision we make at the ballot box this coming November 8."), ("Evict Atlantic Aviation now!"), ("Vote to evict or suffer the consequences on election day."), ("I urge you to evict Atlantic Aviation at your meeting on August 23, just as in the past you've evicted Justice Aviation. . . . Your actions will have a great impact on the decision Santa Monica voters make at the ballot box . . . ."), ("[I] vote in every election. Please do the right thing and get the jets out of SM Airport ASAP."), ("You elected leaders should be

restrict the Airport to aviation. Whether Complainant is evicted and SMO remains open to aviation should not be subject to the political whims of the City Council and very vocal opponents of aviation at SMO, but to the federal legal requirements that obligate the City and that are stewarded by the FAA.

VIOLATIONS

47. The City is presently in violation of a number of its federal obligations, to the severe detriment of Complainant. Chief among these is Grant Assurance 22, which requires the City to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination."

48. These requirements are statutorily derived, *see* 49 U.S.C. § 47107(a)(1), and part of well-settled federal policy. Both the FAA's Rates and Charges Policy as well as FAA Order 5190.6B require that "[r]ates, fees, rentals, landing fees, and other service charges ... imposed on aeronautical users for aeronautical use of airport facilities . . . be fair and reasonable," and that the terms "be applied without unjust discrimination." 78 Fed. Reg. 55330, 55332 (Sept. 10, 2013); FAA Order 5190.6B § 9.1(a). Importantly, "[t]he prohibition on unjust discrimination extends to types, kinds and classes of aeronautical activities, as well as individual members of a class of operator." FAA Order 5190.6B § 9.1(a).

49. Not only does federal law and policy require the City to enter contracts with reasonable, non-discriminatory terms, but it also requires the City to act reasonably in the negotiation process.

> The sponsor's federal obligation under Grant Assurance 22, *Economic Nondiscrimination*, to operate the airport for the public's use and benefit is not satisfied simply be keeping the runways open to all classes of users. The assurance federally obligates the sponsor to make available suitable areas or space on reasonable terms to those willing and qualified to offer aeronautical services to the public . . . or support services (e.g., fuel, storage, tie-down, or flight line maintenance services) to aircraft operators. . . . *This means that unless it undertakes to provide these services itself, the sponsor has a duty to negotiate in good faith for the lease of premises available to conduct aeronautical activities.*

FAA Order 5190.6B, § 9.7 (emphasis added); *see also id.* at § 9.7(c) ("If adequate space is available on the airport and the sponsor is not already providing identical aeronautical services, Grant Assurance 22, *Economic Nondiscrimination*, requires the sponsor to negotiate in good

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ashamed of yourselves."), ("Follow the airport leasing policy which you adopted which Atlantic Aviation operations violate every day. Get Atlantic out before Dec.31 2016."), ("The City Council should act on August 23rd to evict Atlantic Aviation, which accounts for 90% of jet flight operations."), ("I have read that on August 23, 2016 you will vote on a resolution. We need Atlantic Aviation evicted! (Not just on paper but physically!)").

faith and on reasonable terms with prospective aeronautical service providers."); *id.* at § 9.6(h)(2) ("unless the airport owner is providing such services itself on an exclusive basis, it may not refuse to negotiate for the space and facilities needed to meet such standards by an activity willing and qualified to provide aeronautical services to the public"); *id.* at § 18.6(b); 78 Fed. Reg. at 55332. Thus, the FAA has determined that an "extended period of time and delays in negotiating a lease between [an applicant] and the [Sponsor]" violates these grant assurances. *U.S. Constr. Co. v. City of Pompano Beach*, No. 16-00-14, at 18 n.63 (Director's Determination, Aug. 16, 2001) (quoting *City of Pompano Beach v. FAA*, 774 F.2d 1529, 1538 (11th Cir. 1985)); *see also Martyn v. Port of Anacortes*, No. 16-02-03, at 32 (Director's Determination, Apr. 14, 2003) (finding the sponsor engaged in unjust economic discrimination when it rejected the complainant's proposal to construct a hanger facility, not for "legitimate reasons," but based "on a strong desire to limit growth of the Airport").

50. Neither of these obligations—to ensure reasonable, non-discriminatory rates and to negotiate in good faith—is in any way affected by the City's longstanding wish to close the Airport. As the FAA explained in the context of a pending petition to close an airport: "[A]n airport sponsor's federal obligations are not altered or suspended based on its intent and desire to close the airport." *Jim DeVries v. City of St. Clair*, No. 16-12-07, at 26 (Director's Determination, May 20, 2014); *see also* **Ex. GG** (warning the City not to engage in self-help as a means to close the Airport). Indeed, in that proceeding, the FAA warned the city "that the continued practice of using [its] airport closure petition as a means to dissuade, intimidate, or otherwise turn away potential tenants could potentially be a violation of Grant Assurance 22." *Jim DeVries*, *supra*, No. 16-12-07, at 27.

51. The City is currently in violation of both of these cardinal obligations. First, the City's refusal to offer Complainant *any* written leasing agreement, much less a lease of appropriate duration, is patently unreasonable. By refusing to extend *any* aviation leases, and by refusing to offer Complainant a lease on reasonable terms, the City has contravened its federal obligations.[7] *See* **Ex. GG** (expressing concern over the City's "issuance of leases for several non-aeronautical users, but a practice of not issuing leases to aeronautical users"); *cf. Atl. Helicopters, Inc. v. Monroe Cty., Fla.*, No. 16-07-12, at 31 (Director's Determination, Sept. 11, 2008) ("[s]ponsors must provide aeronautical businesses that meet minimum standards with the opportunity for occupancy with certainty of associated rights to conduct business for appropriate lengths of time, depending on investment requirements and associated costs"); *Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Auth.*, No. 16-02-02, at 32 (Director's Determination, Mar. 7, 2003) (airport authority held to be in violation of Grant Assurance 22 because the airport authority had not offered complainant lease terms commensurate with the remaining terms of the airport authority's lease).

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[7] As explained in greater detail in the pending Smith Part 16 Complaint challenging the City's refusal to extend any non-aviation leases, "the FAA has approved the use of short-term leases for aeronautical business in only limited situations where justified by legitimate circumstances." No such circumstance is present here.

52. The City's refusal to offer any aviation leases also amounts to unjust economic discrimination proscribed by Grant Assurance 22. **Ex. GG** (expressing concern over the City's "issuance of leases for several non-aeronautical users, but a practice of not issuing leases to aeronautical users"). Unlike in *McDonough Properties, L.L.C. v. City of Wetumpka, Ala.*, No 16-12-11 (Final Decision, Jan. 15, 2015), where the sponsor allegedly discriminated against several aviation tenants in favor of a non-aviation user, and where two of the complainants refused even to sign the one-year lease offered to them, here *all* non-aviation users are being favored over *all* aviation users by the City's refusal to offer any aviation lessee a lease extension of any length, and by adopting a leasing policy that names only non-aviation uses as being acceptable to the City. Indeed, whereas in *McDonough*, *supra*, No. 16-12-11, the City's insistence on short-term leases was in furtherance of its goal to expand airport operations, here, the City's refusal to offer any aviation-use leases is in furtherance of its avowed goal of closing the airport.[8] Grant Assurance 22(h) permits the City to establish only "such reasonable, and not unjustly discriminatory conditions to be met for *all* users of the airport as may be necessary for the safe and efficient operation of the airport." The City's blatant discrimination in favor of non-aviation lessees, motivated by its desire to close SMO, contravenes this command. *Skydance Helicopters*, *supra*, No. 16-02-02, at 37-38 (suggesting that "pursuing a leasing policy of encouraging non-aeronautical uses of the airport to reduce the amount of airport property available for commercial aeronautical purposes" contravenes a sponsor's "Federal Obligations"); *U.S. Constr. Co. v. City of Pompano Beach, Fla.* No. 16-00-14, at 21 (Final Decision, July 10, 2002) ("Operating the airport for aeronautical use is not a secondary obligation; it is the 'prime obligation.' This prime obligation includes the opportunity for leaseholders to develop airport property for aviation use.").

53. Second, the City plainly has not negotiated with Complainant in good faith. "Sponsors have the obligation to negotiate in such a way that does not deter potential tenants from doing business with the airport." *Jim DeVires, supra*, No.16-12-07, at 36. But the City has dragged its feet for more than a year, using the negotiating process to exact significant increases in Complainant's monthly rent, all the while refusing to offer any lease terms since July 2015, let alone reasonable ones. As a result of the City's intransigence, Complainant—the *only* seller of jet fuel at SMO—has been put in the untenable position of operating its complex business at SMO without the benefit of a written agreement. The City's conduct must be seen for what it is: a flagrant attempt to marginalize Complainant, the only seller of jet fuel at SMO, as a means to reduce or even to eliminate jet traffic at the Airport.[9]

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[8] Moreover, in *McDonough*, *supra*, No. 16-12-11, the non-aviation lessee was not even treated more favorably because it already had a long-term lease when the challenged short-term leasing policy was instituted.

[9] Complainant has nevertheless undertaken good-faith efforts to work with the City, *see infra* ¶¶ 58-67, for instance, by ensuring conformance with the Leasing Policy's requirement that "all vehicles used inside the Airport Operations Area (AOA) are powered by alternative fuels."

54. The City cannot hide behind its newly-enacted FBO policy to excuse its unlawful conduct. For one, the City failed to negotiate with Complainant in good faith for over a year *before* the FBO policy existed. Moreover, the City's plan to take over Atlantic's operations as a proprietary FBO is quite obviously pretext to effect an unlawful closure of the Airport through "facially" lawful means. *Cf. Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-68 (1977) (a facially-neutral statute passed with discriminatory intent or purpose may be found to be unlawfully discriminatory). The City has made clear that it intends to use its proprietary powers to drive away air traffic by selling only commercially infeasible fuel at inconvenient hours and with substandard service, in contravention of the City's obligation to keep SMO open for public use, including—in fact principally—for aviation uses.

55. Indeed, an airport sponsor has an obligation to "make the airport and its facilities available for public use," FAA Order 5190.6B § 9.1(a), and to operate the airport in such a way that does not deter or foreclose aviation uses—in the City's case, these obligations extend through at least 2023. "The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized for the duration of their useful life or due to inherent restrictions on aeronautical activities." *Nat'l Bus. Aviation Ass'n*, *supra*, No. 16-14-04, at 7. The City's refusal to renew or extend any aviation uses, including Complainant's, as well as its plan to curtail or even eliminate air traffic at SMO by taking over Complainant's FBO with the intent of offering commercially undesirable fuels, by limiting the hours of operation and services offered by the FBO, and by doing everything in its power to discourage aircraft owners and operators from using the Airport, is a clear violation of the City's federal obligations.

56. In sum, there can be no doubt that the City's conduct is unreasonable, unjustly discriminatory, and in contravention of its federal obligations.

IMPACT ON COMPLAINANT

57. Complainant has been directly and significantly affected by the City's violations. The City's refusal to offer Complainant a lease on reasonable terms has forced Complainant to operate its business at SMO without the benefit of a written agreement, substantially and adversely affecting business planning, finances, and Complainant's ability to retain employees. Likewise, the City's ardent refusal to negotiate in good faith has resulted in tremendous uncertainty for Complainant, has deprived it of the benefit of a written lease for many months, and has been used a tool to extract financial benefits for the City (a large increase in Complainant's rent, and an assignment of Complainant's profitable office subleases).

PRE-COMPLAINT RESOLUTION EFFORTS

58. On December 30, 2015, Complainant's counsel Tad Allan sent a letter to Ivan O. Campbell, Deputy City Attorney for the Santa Monica City Attorney's office, advising of Complainant's intent to file this action and requesting an opportunity to meet with the City Manager "in an attempt to resolve the issues giving rise to such a [Part 16] Complaint." **Ex. HH.**

59. On January 8, 2016, having received no response to the December 30 letter, Mr. Allan sent a second letter to Mr. Campbell, stating explicitly that Complainant's request for a meeting with "the City Manager, or some other City representative with authority to address and resolve the issues," was intended to comply with FAR Part 16.21, requiring a good-faith effort "to resolve the disputed matter informally" prior to the filing of a Complaint. **Ex. II**.

60. Mr. Campbell responded to the December 30 and January 8 letters by emails dated January 8 (**Ex. JJ**) and January 12 (**Ex. KK**), accepting Complainant's request for a meeting, which occurred on January 28, 2016 in the office of Rick Cole, City Manager for the City of Santa Monica. Attending the meeting for the City were Mr. Cole, Nelson Hernandez, Senior Advisor to the City Manager on Airport Affairs, Stelios Makrides, Airport Manager, and Mr. Campbell. Attending for Complainant were Mr. Allan, Steve Hirschfeld, Complainant's Vice President, Operations, and Gregory Wain, Complainant's General Manager for Santa Monica Airport.

61. At the January 28 meeting, Complainant offered to forego filing a Part 16 Complaint if Respondent agreed (1) to enter into another renewal of the Holdover Agreement, and continue to renew it as necessary, and (2) to resume good faith negotiations toward a long term renewal of Complainant's lease, picking up negotiations where they left off in May 2015. Though no agreement was reached at the meeting, Mr. Allan confirmed this offer in an email sent to Mr. Campbell on January 29, 2016. **Ex. LL**. Mr. Campbell responded by email on February 2, 2016, saying that Mr. Cole wished to discuss this matter with the City Council at its February 9, 2016 meeting. **Ex. MM**.

62. After the February 9 City Council meeting, Mr. Campbell contacted Mr. Allan and said that the City desired to schedule another meeting with Complainant. Such a meeting occurred at Mr. Cole's office on February 24, 2016. The attendees were the same as at the January 28 meeting with the addition of Joseph Lawrence, another Deputy City Attorney from the City Attorney's office. At the February 24 meeting, the City agreed to enter into another renewal of the Holdover Agreement, and the City also agreed to enter into an agreement with Complainant permitting Complainant to continue to operate the fuel farm at SMO notwithstanding the termination of Gunnell's SMO holdover agreement at the end of that month. Though no agreement was reached on Complainant's request that the City resume good faith negotiations toward a long term lease, Complainant agreed to forego filing a Part 16 Complaint until after the City Council had an opportunity, at its March 22, 2016 meeting, to consider and act upon the proposed Leasing and License Policy for SMO.

63. Shortly after the February 24 meeting, the parties negotiated and agreed upon an Agreement to Provide Fueling Services ("Fueling Agreement"), entered into as of February 29, 2016. **Ex. NN**. The Fueling Agreement provided legal authority for Complainant to continue to operate the SMO fuel farm on behalf of the City, as it had been doing for many years pursuant to its agreement with Gunnell, the prior lessee of the fuel farm. The Fueling Agreement has no expiration date, but is terminable on 30 days' notice by either party. The parties also negotiated and agreed upon a new Holdover Agreement, by letter dated March 11, 2016. **Ex. W**. At the

City's request, this new iteration of the Holdover Agreement nearly doubled the monthly rent paid by Complainant, from $22,225.82 per month to $40,000 per month. Also at the City's request, the Holdover Agreement had a term of only 30 days, and therefore was scheduled to expire at the end of March, absent another renewal or extension.

64. The City Council adopted the Airport Leasing and Licensing Policy (**Ex. Z**) at its March 22, 2016 meeting.

65. It was Complainant's understanding that, pending resumption of long-term lease renewal negotiations, the City would keep renewing the Holdover Agreement at the end of each month, so that Complainant would always be in the position of having a written contract with the City, if only month-to-month. However, at the end of March, the City did not respond to Complainant's email requests asking for another renewal or extension of the March 11, 2016 Holdover Agreement. **Ex. X**. The March 11, 2016 Holdover Agreement therefore expired at the end of that month, and since then Complainant has been operating without a lease or written agreement of any kind. The City has refused to enter into any negotiations regarding a lease renewal.

66. The net result of Complainant's prolonged efforts to resolve its dispute with Respondent is that Complainant is left in exactly the same position it was when it began its discussions. Complainant is still without a written Holdover Agreement entitling it to do business at SMO, and Complainant's requests for a commitment to resume negotiations toward a long term lease have been ignored. All that was accomplished is that Respondent—by agreeing to re-enter the Holdover Agreement only for the month of March—extracted from Complainant a doubling of Complainant's holdover rent, which Complainant is continuing to pay.

67. Accordingly, Complainant hereby certifies pursuant to 14 C.F.R. § 16.21(b) that it has made substantial and reasonable good-faith efforts to resolve the disputed matter informally prior to filing this complaint and that there is no reasonable prospect for resolution of this dispute given the City's conduct.

REQUEST FOR EXPEDITED CONSIDERATION

68. Complainant respectfully requests that the Director issue an order expediting the handling of this matter. *See* 14 C.F.R. § 16.11(b). The City's newly-enacted FBO policy directs the City Manager to serve Complainant with a notice of eviction on September 15, 2016, or soon thereafter, and the City will take over Complainant's FBO as a proprietary operation by December 31, 2016. If the City is permitted to do either, Complainant will be irreparably harmed. Accordingly, this matter warrants expediting consideration.

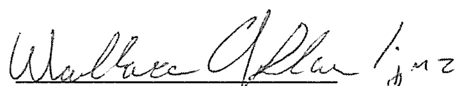
CONCLUSION

For the foregoing reasons, Complainant respectfully requests that the FAA take any and all actions that are necessary and appropriate to ensure that the City is in compliance with its obligations as sponsor of SMO. Specifically, Complainant requests that the FAA issue an order

directing the City (1) to immediately reenter the written Holdover Agreement it previously negotiated with Complainant, (2) to negotiate in good faith with Complainant toward a long-term lease renewal (a minimum of 3 years) at competitive market rates, and without restrictions intended to eliminate or reduce aviation usage of the airport, such as requirements that Complainant only sell aviation fuels that are not yet commercially available or available at a competitive market price, and (3) to maintain the full range of FBO services at the Airport with no limitations or restrictions that will have the effect, intended or otherwise, of limiting air traffic at the Airport.

Dated: September 13, 2016

Respectfully submitted,



Wallace ("Tad") Allan
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000
tallan@omm.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Complaint and supporting documents on the following persons at the following addresses by first-class mail, with a courtesy copy of the Complaint sent by electronic mail:

Rick Cole
City Manager
City of Santa Monica
1685 Main Street, Room 209
Santa Monica, CA 90401
manager@smgov.net

Marsha Moutrie, Esq.
City Attorney
City of Santa Monica
1685 Main Street, Room 310
Santa Monica, CA 90401
marsha.moutrie@smgov.net

Susan Cline
Acting Director of Public Works
City of Santa Monica
1685 Main Street, Room 116
Santa Monica, CA 90401
susan.cline@smgov.net

Stelios Makrides
Airport Manager
City of Santa Monica
Airport Administration Building
3223 Donald Douglas Loop South
Santa Monica, CA 90405
stelios.makrides@smgov.net

Nelson Hernandez
Senior Advisor to the City Manager on Airport Affairs
City of Santa Monica
1685 Main Street
Santa Monic, CA 90401
nelson.hernandez@smgov.net

Dated this 13th day of September, 2016

Wallace ("Tad") Allan