

US DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

SKYDANCE HELICOPTERS, INC. d/b/a SKYDANCE)
OPERATIONS INC.,)

Complainant,)

vs.)

SEDONA OAK-CREEK AIRPORT AUTHORITY,)

and)

YAVAPAI COUNTY, ARIZONA,)

Respondents.)

DOCKET NO. 16-02-02

PART 16 ANSWER AND MOTION TO DISMISS

Respondent Sedona Oak-Creek Airport Authority d/b/a the Sedona Airport Administration ("SAA"), by counsel and pursuant to 14 C.F.R. § 16.23, submits this Answer to the Part 16 Complaint filed by Complainant Skydance Operations, Inc. d/b/a Skydance Helicopters, Inc. ("Skydance") dated April 9, 2002. SAA further files, as part of its Answer and pursuant to 14 C.F.R. § 16.23(j), this Motion to Dismiss ("Motion").

The Federal Aviation Administration ("FAA") should deny Skydance's requested relief and grant SAA's Motion to Dismiss because (i) there has been no violation of the grant assurances in 49 U.S.C. § 47107(a); (ii) Skydance's Complaint does not reflect, acknowledge or mention SAA's offer of compromise regarding the offending portions of the proposed License Agreement; and (iii) Skydance had no long-term lease with SAA, and therefore, has no standing to complain of SAA's alleged noncompliance because Skydance was not directly and substantially affected by any alleged noncompliance now taking place at the Sedona Airport.

This Answer and Motion is supported the Complainant's Exhibits 1-31 ("Compl. Ex. __"), the following Memorandum of Points and Authorities, and SAA's Exhibits, labeled A through Z, and 1 through 4, ("Exhibit__"), filed contemporaneous with the Answer and Motion.¹

MEMORANDUM OF POINTS AND AUTHORITIES

1. Undisputed Facts.

SAA does not dispute the initial "Factual Background" stated by Skydance. The representations regarding SAA's organizational structure is generally correct. SAA leased from Yavapai County ("County") the Airport property. SAA's Lease with the County ends May 31, 2031 (Compl. Ex 18). It is also true that Skydance, or some affiliated entity of Skydance, signed a lease for hanger and office space at the Sedona Airport on or about February 22, 1994 (Compl. Ex. 2).

On or about April 27, 1997, SAA and Skydance entered into a two (2) year Building, Hangar, Hangar Pad or Tie-Down Lease at the Sedona Airport (hereinafter "the Lease")(Compl. Ex. 4). All of SAA's standard leases are for a two (2) year term.

¹ To avoid confusion and duplication of effort, SAA will rely on a substantial portion of Skydance's exhibits identified as "Compl. Ex." in this Answer and Motion. Nearly all of SAA's exhibits are lettered instead of numbered and are included in the Exhibits Notebook included with this filing.

On or about September 30, 1998, SAA informed Skydance that it was changing its airport commercial use and license fee and that an amendment to the Lease would be necessary (Compl. Ex. 5). On or about March 31, 1999, SAA and Skydance entered into an Lease Amendment and Extension wherein Skydance's Lease was to expire on March 31, 2001 (Compl. Ex. 6).

Unfortunately, this is where SAA and Skydance's agreement as to the facts materially diverge.

2. Pertinent Facts Omitted By Skydance.

Sedona is one of Arizona's premier tourism, recreation, resort, arts and cultural, and retirement centers. The Sedona area is the second most visited site in the State of Arizona after the Grand Canyon.² At an altitude of 4,500', Sedona escapes the desert heat of Southern Arizona.

Sedona has emerged as a major resort destination and tourism center with approximately four million visitors per year. Highway 89A through Oak Creek Canyon was Arizona's first designated Scenic Highway and was named by Rand-McNally as one of the most beautiful drives in America. The view from the air is equally impressive and resulted in a considerable increase in civil aviation traffic at the Sedona Airport. The majority of this traffic is directly attributable to the increase of scenic tour operators. As of August, 2001, there were no less than eight (8) scenic tour operators departing out of the Sedona Airport (Compl. Ex. 27 at fn. 1).

² Source - Sedona Chamber of Commerce Web Site at <http://www.sedonachamber.com>.

In 1998, the SAA Board of Directors ("Board") initiated a nationwide search of a new airport manager to deal with the challenges of ongoing safety, compliance, community relations, tenant administration and management reorganization. The Board wisely choose Edward "Mac" McCall, the then Chief Operations Supervisor for Chicago's O'Hare International Airport.

Mr. McCall's initial assessment of the issue confronting the Board and the Sedona Airport are sufficiently detailed in Mr. McCall's correspondence of September 14, 2001 to Tony Garcia, attached as Exhibit Q, and need not be repeated at length here. It is important, however, that the FAA focus upon Mr. McCall's initial observations of unacceptable safety and business practices as of July, 1999:

In my initial assessment period of the airport I was appalled by the amount of contempt and discourse the airport commercial tenants displayed to each other and the general public not to mention any airport administration official. The airport safety and business practices of many of the commercial tenants was just out right unacceptable. There was wholesale disregard of existing airport regulations, outright stealing of booked passengers from one commercial operator to another, deceptive signage all over the airport, the classic bait and switch technique of used car salesman was routine for tour prices and services, physical blocking of entrance walkways by personnel or vehicles to direct customers from one company to another, harassing solicitation of airport visitors in public areas to the extent of informing these visitors of unsafe pilots or aircraft of a competing company regardless of truth, distribution of NTSB Accident Reports of a competing company, complete disregard for the airport's public relations with the community, attempted sabotage of aircraft and outright physical violence against personnel as well as aircraft."

(Exhibit Q). As the facts below demonstrate, it is inaccurate and incorrect to portray SAA as a bully that sought to impose unreasonable restrictions on airport operations.

The License Agreement, alleged to violate the Grant Assurance, was not imposed in a vacuum. Instead, it was drafted and signed by SAA's other tenants to purposefully quash the wild west mentality that permeated the Sedona Airport's commercial operators.

It is false that SAA and Skydance had only two disagreements. The disagreements, beginning in 1999, involved precisely the conduct Mr. McCall found so objectionable upon his first visit to the Sedona Airport. As Mr. McCall made the transition into his new job, a pilot for Skydance placed nails in and around safety cones on the aviation ramp to cause aircraft damage or personal injury to other tour operators (Exhibit Q). Skydance was warned, albeit informally, that its conduct would not be tolerated.

After Mr. McCall began his employment with SAA, and on or about September 29, 2000, employees of Skydance and another tour operator were involved in a physical altercation that involved actions that could have easily taken a life (Exhibit A). The Sedona Police Department responded and filed an Incident Report (Exhibit B). The incident was sparked when a Skydance pilot failed to land at the designated helipad, and instead, landed a Skydance helicopter directly in front of a competitor's hangar and the Airport restaurant. The rotor wash caused debris to blow into the competitor's hangar causing damage to one of the aircraft (Exhibit B).

On October 9, 2000, at a Special Meeting of the Board, SAA decided to notify Skydance that its two (2) year Lease would not be renewed and therefore would

terminate on March 31, 2001 (Exhibit C). By correspondence dated October 10, 2000, Skydance was informed that its Lease would not be renewed (Exhibit D). Skydance was also instructed, for safety reasons, to use only the helipads located on the Southwest portion of the airport and to cease operating in front of the operations building (Exhibit D). Skydance's competitor's lease was immediately terminated because of the altercation (Exhibit E).

Skydance vigorously complained that SAA's decision to not renew the Lease was unfair, discriminatory and would result in litigation. Skydance hired legal counsel. In correspondence dated October 20, 2000, Skydance stated for the first time that it would refuse to operate from the requested area, and also would refuse SAA's request to use a different ramp for taxiing purposes (Exhibit F). Finally, Skydance threatened SAA with legal action for tortious interference with business if it sought to impose additional safety restrictions on Skydance (Exhibit F).

SAA took steps to initiate Lease termination proceedings, but the ongoing dispute regarding Skydance's operations and SAA's safety concerns was resolved when the parties tentatively agreed to move Skydance's aircraft operations to a new and safer location. As the November 1, 2000, letter from SAA reflects, Skydance agreed to a multitude of operational restrictions to address safety concerns, including (i) restriction of arrivals and departures to a safer taxiway locations; (ii) restriction of arrivals and departures to and from the hangar row via a tug; (iii) removal of aircraft tie down positions to enlarge Skydance's aircraft parking area; (iv) restrictions on

vehicle parking; and (v) an agreement and further promises regarding Skydance's solicitation of customers generally and solicitation of competitor's business (Compl. Ex 7). In exchange, SAA agreed to proceed with initial negotiations regarding a proposed thirty-year lease and construction of a office and hangar facility (Compl. Ex. 7).

In January, 2001, Skydance obtained initial cost estimates for anticipated construction costs (Compl. Ex. 8). However, as of January 23, 2001, SAA and Skydance were still in discussions regarding the size of the proposed hangar, the location of the proposed hanger, and had not yet discussed any additional lease terms or conditions (Compl. Ex. 9).

On or about February 10, 2001, SAA forwarded to Skydance the first draft of the proposed lease (Compl. Ex. 10). The expiration date of the proposed lease was May 31, 2031. As of February 10, 2001, the parties had not agreed on and the proposed lease was silent regarding, among other things, basic rent, location and size of the proposed leased premises and the security deposit (Compl. Ex. 10).

On February 10, 2001, SAA also informed Skydance that it would need to enter into a Commercial Business Operations License ("License Agreement"), but that it was in the process of being drafted (Compl. Ex. 10, 11, and 12). As an accommodation to Skydance, SAA agreed to allow Skydance to remain a tenant pursuant to the Lease pending final negotiations (Compl. Ex. 13). By letter dated March 28, 2001, SAA restated to Skydance that it would consider Skydance a "month-to-month" tenant after

Skydance's Lease expiration on March 31, 2001. (Compl. Ex. 14). Skydance never objected to the offer or its month-to-month arrangement with SAA.

SAA forwarded the License Agreement to Skydance on April 11, 2001 (Compl. Ex. 15). SAA did not hear from Skydance for almost three (3) months. It was not until July 6, 2001, that Skydance responded to the proposed lease and License Agreement (Compl. Ex 16). During this time, Skydance had no long term lease with the SAA and Skydance paid then current monthly rent pursuant to the month-to-month agreement pending negotiations and a final agreement.

SAA received a letter, again from Skydance's legal counsel, on July 6, 2001 (Exhibit G). Accompanying the letter were instructions on the alleged square footage of the entire hangar pad, deletions and additions to the proposed Lease, and a request that the proposed thirty-year lease commence on September 1, 2001 and terminate on September 30, 2031. As to the License Agreement, Skydance alleged:

“. . . the Proposed License you submitted to me for review is not such an agreement - it is unfair, inequitable and clearly contrary to federal law. Indeed, it was so improper and so clearly illegal that we had a difficult time determining if it was mean [sic] as a serious proposal or was submitted as a form of poor joke. 'Surely you jest' was the common reaction when my client shared it with other aviation professionals. . . The attempt to tie the Proposed License to my client's Proposed lease is similarly blatantly discriminatory, unacceptable and we believe that such discriminatory action is prohibited by not only federal law but the governing documents of the airport which you provided to me. Accordingly, we reject any tie of the Proposed License as a precondition to **finalizing the Lease. . .**"

(Exhibit G)(Compl. Ex. 17)(emphasis supplied).

After July 6, 2001, attempted discussions with Skydance to finalize the Lease

and License Agreement were not productive. Skydance took the position that any license, regardless of form or content, would result in discrimination against Skydance.

At that time, it was explained to Skydance that all tenants whose leases were to expire would be required to sign the License Agreement. It is simply false that Mr. McCall allegedly stated that only Skydance on one other operator would be required to sign the License Agreement upon the tenant's lease renewal as alleged at page 7 of the Complaint (Compl. Ex. 16). The FAA's own investigation concluded that as of October 26, 2001, seven (7) other commercial operators had signed the License Agreement without objection, discussion or negotiation. (Compl. Ex. 27).

On July 30, 2001, SAA informed Skydance that it would not be able to enter into a proposed thirty-year lease beginning September 1, 2001, because SAA's own lease with the County expired on May 31, 2001 (Compl. Ex. 18). SAA did offer Skydance the opportunity to enter into SAA's standard form two-year lease and License Agreement (offered to all other tenants) to take effect on or before September 1, 2001 (Compl. Ex. 18). Skydance refused SAA's offer (Compl. Ex. 19).

Although Skydance's August 8, 2001 letter speaks for itself, it is important that the FAA understand it was on this date that Skydance alleged for the first time that it had already entered into a thirty (30) year lease, a question of law SAA steadfastly denied. Skydance also stated that it would "never" enter into any license agreement with SAA (Compl. Ex. 19).

SAA hired legal counsel to attempt to resolve the dispute. As part of this attempt, legal counsel for SAA and Skydance had numerous telephone conversations and exchanged several documents via e-mail (Exhibit H)(Compl. Ex. 21).

Despite warnings that three (3) other tenants had already signed the License Agreement, Skydance asked for and obtained an electronic copy of the License Agreement and unilaterally amended SAA's License Agreement (Compl. Ex. 21). The amendment did not reflect the changes discussed by legal counsel, did not provide the protections sought by SAA, and added an indemnification provision that would have made SAA liable for the negligent acts of Skydance - - something that SAA is not legally obligated to do nor was advisable given Skydance's flagrant disregard for Airport safety procedures.

On August 22, 2001, SAA formally rejected Skydance's proposed changes to the License Agreement and informed Skydance that it would be willing to enter into a ten (10) year lease (Compl. Ex. 22). Skydance responded on August 23, 2001, and again stated that it had already obtained an agreement for a thirty (30) year lease. Skydance then filed a complaint with Tony Garcia at the FAA's Airport Compliance Department (Compl. Ex. 24).

SAA grew frustrated by Skydance's feigned reliance upon a phantom thirty (30) year lease agreement and refusal to discuss other appropriate terms and conditions normally found in a long-term commercial lease. As a result, SAA restated its position

that there was no thirty year lease agreement (Exhibit I).³

On or about August 30, 2001, SAA gave Skydance a notice to quit the Leased Premises pursuant to Arizona law because Skydance's lease had expired on March 31, 2001, and Skydance refused to engage in good faith negotiations for another lease term (Exhibit J). As of August 30, 2001, Skydance had refused SAA's offers of both a two-year and ten-year lease. Because Skydance refused to sign a lease for any length of time, SAA terminated Skydance's month-to-month tenancy granted to Skydance on March 31, 2001.

During this period, however, SAA continued to contact Skydance and urge it to reconsider its position (Exhibit K). Even as of August 30, 2001, SAA was urging Skydance to sign a new lease because SAA did not want to lose a tenant (Exhibit L).

On September 5, 2001, Skydance wrongly accused SAA of a "blanket rejection of [Skydance's] continuing efforts to obtain its long-promised ground lease" (Exhibit M). This left SAA frustrated and confused. Indeed, SAA's offer of August 22, 2001 (Compl. Ex. 22) to contract for a ten (10) year lease was rejected by Skydance only five days before. Skydance seemed more interested in making public records requests of SAA and arguing about the Minimum Standards for Aeronautical Activity (Exhibit M).

³ SAA understood Skydance's previous request to arbitrate to mean that Skydance was requesting Arizona State Court arbitration. SAA saw at the time no reason to arbitrate whether or not Skydance was entitled to a thirty year lease with no signed Lease Agreement. The issue was not fairly debatable. It was not until September 5, 2001, that SAA understood Skydance's request to arbitrate as being made pursuant to 14 C.F.R. § 16, at which time the issue was already squarely before Mr. Garcia.

Perplexed at Skydance's continuing rejection of a long-term ten (10) year lease and contemporaneous allegations of bad faith, SAA offered to accept nearly all of Skydance's proposed changes to paragraph 3 of the License Agreement, which was at that time the only contested and debated paragraph at issue (Compare Exhibit N to Compl. Ex. 21). SAA's concession resulted in a highly modified Paragraph 3 which read as of September 6, 2001, as follows:

"3. **Grant of License.** Licensor grants to Licensee a License to operate its business in the Premises defined above subject to all the terms and conditions herein and all terms and conditions of any Lease applicable to Licensee as Tenant or sub-tenant therein; provided however, the License granted herein is terminable at the will of either party pursuant to the terms and conditions of this License. Nothing herein to the contrary, if either party determines that the other party has (i) taken any action that would be a breach of the License or Lease, or (ii) engaged in any behavior prescribed by the Licensor or Lease, the aggrieved party shall give written notice ("Notice") of the alleged breach or default specifying in reasonable detail the nature of the claimed breach or default and demand for remedy. After receipt of the Notice, the party shall have seven (7) days to cure the claimed breach or default. Licensee acknowledges and agrees that the License to operate its business in the Premises does not grant Licensee any possessory real property rights to or in the Premises, such right being subject to the Parties' Lease."

(Exhibit N). In that correspondence, SAA also explained that its rejection of other proposed changes were based upon SAA's refusal to forego uniformity among SAA's tenants and licensees.

Once again, Skydance rejected outright SAA's offer regarding the proposed lease and the changes to paragraph 3 of the License Agreement (Exhibit O). As the correspondence of September 10, 2001, makes clear, Skydance sought to include in the License Agreement a new Section 34, which contained several promises,

conditions and terms, not discussed nor included in any of the parties' proposed agreements or correspondence. Skydance then requested, once again, that it adopt Skydance's version of the license and then proceed to have the other operators adopt the same license. Skydance argued:

" . . . we simply do not believe that the Authority's [SAA] desire to maintain uniformity is a sufficient reason to continue with inappropriate and unfair provisions. We also believe that it would be desirable to have a uniform License, but believe that the better way to achieve that uniformity is to arrive at a fair and reasonable License, and then adopt that improved License as the uniform document. I am sure that the three operators who are parties to the hold License would be more than willing to agree to accept an improved and fair License, thereby negating any concerns you client might have that those operators would be that they were being subject to discriminatory treatment."

(Exhibit O).

On September 12, 2001, SAA again wrote to Skydance in frustration regarding the rejection of now both the ten (10) year lease and the amended License (Exhibit P).

SAA explained as follows:

"We disagree that it would be in [SAA's] best interest to achieve uniformity among the Leases and Licenses of the Sedona Airport by eviscerating the other Licenses and Leases signed by the three (3) other operators. Obviously, we will entertain any reasonable changes to the License and Lease Agreement, however, your correspondence has failed to articulate any specific objections upon which to base a conversation. Your correspondence apparently seeks to expand the scope of our discussions to matters entirely outside the parties' agreements or understandings."

(Exhibit P)(emphasis supplied).

Meanwhile, Skydance's complaint was already before Mr. Garcia. On September 7, 2001, Mr. Garcia asked that SAA provide a response to Skydance's

complaint (Exhibit Q). SAA cooperated fully and also responded to Mr. Garcia's follow-up request dated October 17, 2001, which provided to the FAA a copy of the Board of Director's minutes approving the License Agreement, a list of tenants who had signed the License Agreement, as well as other information requested by Mr. Garcia.

On September 19, 2001, legal counsel for SAA and Skydance did discuss the License Agreement and Skydance offered to amend its positions and forward them to SAA (Exhibit R). But Skydance did not provide SAA with any proposed changes. SAA did not hear from Skydance until after Mr. Garcia's October decision.

As a further accommodation to Skydance, SAA did represent on September 19, 2001 that it would not take any action to evict Skydance from its month-to-month tenancy until the FAA made a determination as to the License Agreement. SAA represented as follows:

" . . . There are obvious issues that will need to be reviewed by the Board, including your proposed indemnification provision. However, once I receive the changes that we made to the License Agreement, I will forward it on to my client for its review.

In the interim, my client will submit the issues presented in your September 12, 2001 correspondence to the Federal Aviation Administration ("FAA"). My client will ask the FAA to make a determination whether or not the Standard Form License Agreement for Commercial Business Activities at the Sedona Airport signed by three (3) other operators at the Sedona Airport is discriminatory as alleged by Skydance. If the FAA determines that it is discriminatory, we will reconsider our position.

SAA will extend the time your client may occupy the premises until the FAA makes its decision. . .

(Exhibit R).

On October 26, 2001, the FAA found that the standards in the proposed License Agreement were "reasonably attainable and [were] being uniformly applied [and] concluded that the Operation License is not unreasonable or unjustly discriminatory." The FAA further recognized that while Skydance may have "reservations concerning the new [safety] standard, [the FAA] cannot conclude that the Operating License does not comply with grant assurance obligation because it sets the standard above a level at which Mr. Cain [Skydance] would prefer to operate his business at the Sedona Airport" (Compl. Ex. 27).

On October 29, 2001, SAA again requested that Skydance execute the proposed ten (10) year lease and License Agreement (Compl. Ex. 29). Skydance never responded.

On October 31, 2001, Skydance's counsel urged Mr. Garcia to reconsider the FAA's decision based on alleged misrepresentations made by Mr. McCall (Compl. Ex. 28). SAA and Mr. McCall refuted those allegations in correspondence to Mr. Garcia dated November 5, 2001 (Exhibit S).

At the same time, SAA also provided the FAA with documentary evidence that Skydance was engaging in the very behavior that the License Agreement sought to prevent; namely, the unacceptable business practice of stealing other operators' clients and classic bait and switch sales ploys (Exhibit S).

The FAA took no further action. SAA then acknowledged Skydance's October statement that it intended to file a lawsuit in United States District Court seeking an injunction (Exhibit T). Skydance also stated that it would file an administrative appeal of the FAA's October 26, 2001 decision (Exhibit U). SAA made clear, once again, that no lease existed and that SAA expected Skydance to vacate the Airport property by November 12, 2001 (Exhibit V).

As of November 12, 2001, Skydance had still refused to move its helicopter operations to a safe location as originally demanded by SAA back in October, 2000 (Exhibits C & D) and as agreed to on November 1, 2001 (Compl. Ex. 7). More important, Skydance still refused to sign a lease. SAA had not filed suit and had not appealed the FAA's decision, as previously represented. In short, Skydance made the business decision to operate without a lease, operate without a license, operate without seeking legal redress from with the FAA or the courts, and operate in violation of the safety standards repeatedly identified by SAA over the last two years.

On November 13, 2001, Skydance was evicted from the Sedona Airport. Skydance made a demand for return of the leased premises on November 14, 2001 (Exhibit W).

On November 14, 2001, Skydance filed a lawsuit in Verde Valley Justice Court under Arizona's Uniform Landlord and Tenant Act, forcible entry and detainer statutes, for restitution of the leased premises (Exhibit X). SAA filed a Motion to Dismiss Skydance's complaint for, among other things, lack of jurisdiction based on the fact

that Skydance had no written lease agreement with SAA, the Lease Agreement having expired on March 31, 2001. According to statements made by Skydance to the press during the state court litigation, Skydance had voluntarily relocated its business to Minden, Nevada. (Exhibit Y).

The court granted SAA's Motion to Dismiss and found that it did not have jurisdiction (Exhibit Z). A Judge opined in open court that Skydance did not have a lease upon which to argue it was entitled to possession.

On December 13, 2001, Skydance's counsel informed SAA that while it disagreed with the state court decision, it would not pursue the litigation and would rest on the state court's decision (Exhibit 1). After confirmation of Skydance's decision to terminate the litigation (Exhibit 2), Skydance wrote to SAA and made clear that it was going to pursue litigation against SAA for the alleged destruction of Skydance's business (Exhibit 3).

On or about May 8, 2002, Skydance filed a Claim against the County, SAA, SAA's Board of Directors in their individual capacity, and Mr. McCall seeking approximately \$2,502,223.00 for damages arising out of SAA's alleged wrongful termination of lease (Exhibit 4) ("Claim").

3. SAA Complied With The Grant Assurances.

3.1 Paragraph 3 Did Not Waive Skydance's Due Process Rights.

Skydance's Complaint asks the FAA to rule that the License Agreement, as proposed, modified and amended for the benefit of Skydance, is "egregious," "arbitrary," "unfounded" and is therefore unfair and unreasonable. Skydance argues that the License Agreement's "most egregious defect is the power granted to SAA in Paragraph 3 to deem a licensee in default in [SAA's] own discretion and without any ability of the licensee to cure the default" (Compl. p. 12). Skydance then spends the bulk of its Complaint arguing that Paragraph 3 "provides no due process whatsoever" and without a right to cure the alleged default or seek judicial redress, Skydance would forfeit its right operate even though it still owned the leasehold.

Skydance's Complaint conceals from the FAA the fact that Paragraph 3 (the only Paragraph allegedly concerning Skydance at the time and the main focus of the negotiations of legal counsel) was amended, modified and in its final form, granted Skydance considerable rights to cure any default. Contrary to the allegations of the Complaint, in its final form Paragraph 3 did not "waive all rights to appeal" or otherwise prohibit Skydance from seeking judicial relief or administration action by the FAA.

As of September 6, 2001, the allegedly draconian Paragraph 3 read:

"3. **Grant of License.** Licensor grants to Licensee a License to operate its business in the Premises defined above subject to all the terms and conditions herein and all terms and conditions of any Lease applicable to Licensee as Tenant or sub-tenant therein; provided however, the Licence

granted herein is terminable at the will of either party pursuant to the terms and conditions of this License. Nothing herein to the contrary, if either party determines that the other party has (i) taken any action that would be a breach of the License or Lease, or (ii) engaged in any behavior prescribed by the Licensor or Lease, the aggrieved party shall give written notice ("Notice") of the alleged breach or default specifying in reasonable detail the nature of the claimed breach or default and demand for remedy. After receipt of the Notice, the party shall have seven (7) days to cure the claimed breach or default. Licensee acknowledges and agrees that the License to operate its business in the Premises does not grant Licensee any possessory real property rights to or in the Premises, such right being subject to the Parties' Lease."

(Exhibit N). This new Paragraph 3 was the result of many hours of negotiations and discussions of counsel, in addition to a major concession by SAA. However, when SAA offered to address Skydance's concerns and substantially amend and modify Paragraph 3, Skydance simply rejected it without explanation or discussion of what Skydance still found objectionable (Exhibit O at its p. 3 ("my client is not willing to execute the License as proposed by your letter of September 6, 2001"))).

SAA was shocked, frustrated and at a loss to explain Skydance's rejection of Paragraph 3. In short, Skydance repeatedly rejected SAA's acceptance of Skydance's demands without any explanation.

Other than including the right of either party to object to an alleged breach or default, and the reciprocal right of each party to cure the alleged breach of default, Paragraph 3 is exactly the same as Skydance had proposed two weeks earlier! (Compl. Ex. 21). When Skydance rejected the amendment to Paragraph 3, without explanation or discussion, it became clear to SAA that Skydance was attempting to manufacture, pretextually, an economic damage claim against SAA. Upon information

and belief, Skydance had made a business decision between April 11, 2001, when Skydance received the first draft of the License Agreement (Compl. Ex. 15), and July 6, 2001, when Skydance first objected to the first draft of the License Agreement (Exhibit G), to move some or all of its operations its primary base of operations in Minden, Nevada (Exhibit Y). In fact, during the Lease negotiations, Mr. McCall received a telephone call from the Reno-Tahoe Airport seeking a reference for Skydance.

As of August, 2001, Skydance did not voice any substantial objection to Paragraph 7.4.5. Skydance's objections related solely to Paragraph 3 (Compl. Ex. 20).

With Skydance retaining all of its judicial and administrative rights in Paragraph 3, Skydance's new found objections to Paragraphs 4, 6 and 7.4.5, as argued in the Complaint, are without substance. Clearly, if there was a future dispute as to what constitutes "objectionable conduct" or license fees, Skydance could have sought relief from the courts or the FAA. Given Skydance's previous acts, failure to move its aircraft operations to a safer location as repeatedly requested by SAA, and failure to cease from soliciting other operator's customers, it is hard to imagine a situation where Skydance would not know what SAA meant by "objectionable conduct."

SAA continued to negotiate in good faith even after Skydance wrote to the FAA on August 23, 2001 (Compl. Ex. 23). SAA re-urged Skydance to signed the amended License Agreement (with the amended Paragraph 3) and ten (10) year lease on September 12 (Exhibit P), and again on September 19 (Exhibit R). Those letters were

accompanied by telephone conversations with Skydance's counsel urging a resolution. Therefore, SAA's efforts to negotiate a resolution to this dispute continued for nearly a month after Skydance sought the FAA's intervention and decision. SAA even continued to negotiate in good faith after Skydance accused the Board and Mr. McCall of making knowingly false statements to the FAA on September 14, 2001 (Exhibit Q). This is hardly the refusal to negotiate in good faith or the violation of Grant Assurance 22a that Skydance argues.

SAA was obligated to negotiate on reasonable terms. The terms and conditions of the proposed ten (10) year lease and amended License Agreement are commercially reasonable and granted Skydance better economic and operational terms compared to all the other tenants at the Sedona Airport. It is an undisputed fact that all the other tenants at the Sedona Airport have signed SAA's standard form two (2) year leases and signed the original License Agreement without any modifications. Only Skydance made the business decision not to accept those terms. Skydance's repeated refusals to accept SAA's offers does not mean there has been a violation of 49 U.S.C. § 47107. To the contrary, SAA's Exhibits reflect that SAA made every effort to negotiate with Skydance, even if it meant having a lack of uniformity among the operating licenses.

3.2 The Thirty (30) Year Lease Alleged In The Complaint Does Not Exist.

The theme that Skydance has adopted in this administrative action, the Arizona State court proceeding, and the \$2,500,000 Claim is that Skydance and SAA entered into a binding a thirty (30) year lease, and if not, it was because SAA wrongly delayed in providing Skydance with the documents. This is not true. First, there was no intentional delay by SAA. The proposed lease was given to Skydance on February 10, 2001 nearly four (4) months prior to the end of the lease term (Compl. Ex. 10). The License Agreement was delivered on April 11, 2001 (Compl. Ex. 15). Then, three (3) months went by without a word from Skydance.

SAA did not hear from Skydance until July 6, 2001 (Compl. Ex. 17). By then, SAA could not legally offer a thirty (30) year lease because SAA's own lease with the County expires on May 31, 2031 (Compl. Ex. 18). Even so, Skydance asked for a thirty year lease commencing on September 1, 2001, which was something SAA could not give (Comp. Ex. 17).

In response, SAA offered a two year lease (on the same terms as the previous term) and a two year license (Compl. Ex. 18). Skydance rejected that offer on August 8, 2001 (Compl. Ex. 19). In that letter, Skydance stated that it accepted a thirty year lease with a termination date of May 31, 2031. No such offer was ever made for Skydance to accept.

The Complaint restates this false argument at page 12 wherein Skydance alleges: "Although Skydance subsequently agreed to a minor shortening of this period

to correspond to the underlying lease from the County, it is clear that such a long-term commitment was essential to any agreement between SAA and Skydance." Again, SAA never offered a thirty year lease beginning May 31, 2001 and ending May 31, 2031. No such document exists and it is clear that such a long-term commitment would have needed to be in writing to satisfy the requirements for commercial leases under Arizona law.

Under Arizona law, a party cannot enforce an unsigned lease because unsigned leases are unenforceable pursuant to the Statute of Frauds, A.R.S. § 44-101(6), which states in pertinent part:

"No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him there unto lawfully authorized:

6. Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing, subscribed by the party sought to be charged."

Skydance's position that the November 1, 2000 correspondence (Compl. Ex. 7) is a thirty (30) year lease stretches credulity. The scope and plain language of that letter does not contain the terms and conditions required to be in a long term lease, including but not limited to the legal description, and the amount of land (square

footage) subject to the ground lease and therefore minimum monthly rent.⁴ In addition, Mr. McCall is not authorized by the Board or corporate bylaws to enter into a lease and, therefore, the November 1, 2000 letter is not a lease signed by a party with written authority to enter into a lease. All of Skydance's prior leases were signed by SAA's president (Compl. Ex. 2 and 4).

It is not up to the FAA to determine whether a thirty (30) year lease existed. The issue was before Judge Wyles in Arizona, and before granting the Motion to Dismiss he opined from the bench that there was no contract and no lease upon which to adjudicate possession. Skydance then abandoned the state court case (Exhibit Z).

3.3 Without A Lease, Skydance Was Not Directly And Substantially Affected By Any Alleged Noncompliance And Has No Standing.

Skydance was a month-to-month tenant and nothing more (Compl. Ex. 14). As shown above, SAA made every reasonable commercial effort to get Skydance on board and execute a ten (10) year lease and the modified License Agreement. Skydance made the business decision not to renew its lease and not operate at the Sedona Airport (Exhibit Y). With no lease, and therefore no obligation to pay fees or rental, Skydance does not have standing to allege noncompliance with the Grant Assurances. In short, Skydance is a former aeronautical user alleging unjust discrimination. Skydance has no standing to allege any noncompliance and the

⁴ Arizona law specifically requires a precise metes and bounds legal description be attached to a commercial lease, as well as all other material terms necessary to form a contract, including term and expiration date, and minimum rent. *Towers v. Leonard*, 7 Ariz.App. 331, 439 P.2d 303 (App. 1968) *Custis v. Valley Nat. Bank of Phoenix*, 92 Ariz. 202, 206, 375 P.2d 558, 561 (1962).

Complaint should be dismissed.

Skydance does not do business with, or pay fees to rents to, the Sedona Airport. Skydance can hardly be considered to be directly and substantially affected by the any alleged discrimination or revenue diversion because it made the decision not to enter into a long-term lease. Clearly, to retain standing Skydance could have signed a lease and filed its Part 16 Complaint, but Skydance made the business decision to leave the Sedona Airport and move its operations to Nevada.

The facts stated above reflect that the final terms of the proposed lease and license terms were not unfair, arbitrary, or commercially unreasonable. In fact, the terms and conditions offered Skydance were substantially greater than those offered to any other tenant at the Sedona Airport.

Just because Skydance did not like the terms of the proposed lease does not mean there is any unjust discrimination. The facts show just the contrary; Skydance was repeatedly offered a non-standard lease that was eight (8) years longer than all other tenants and a non-standard Long-Term License Agreement that conformed in nearly all respects to Skydance's stated requirements. Skydance rejected these terms, relying instead on its rights to only month-to-month tenancy. SAA terminated those rights pursuant to Arizona state law and Skydance did nothing to contest SAA's ability to terminate the lease or otherwise exclude Skydance from the Sedona Airport. With absolutely no contractual or commercial ties whatsoever to the Sedona Airport or SAA, Skydance cannot and has not argued that it is directly and substantially affected by

the alleged noncompliance. The FAA should dismiss the Complaint for lack of standing.

3.4. It Is Reasonable To Require An Operating License As A Means Of Promulgating And Enforcing Uniform Rules And Regulations.

Even if Skydance has standing, the License Agreement, in its final version as ultimately offered to Skydance, is not unfair, unreasonable or arbitrary when compared with the proposed offers of a two (2) and ten (10) year lease. As shown below, SAA's use of an operating license to address safety concerns and control egregious business practices is precisely the mechanism used in the commercial leasing industry to control tenant behavior and achieve a uniform system of expectations on a multi-tenant property.

In its final form, the License Agreement offered Skydance simply restated, in precise terms, the rules, regulations, conditions and laws upon which an operator should rely in conducting its aviation business. Indeed, even Skydance was "in full agreement that an Operations Agreement, which lays out in clear language the expectations, rights and responsibilities of commercial operators at the airport . . . would be desirable for use at the airport . . ." (Compl. Ex. 17 p. 2).

As of April, 2001, SAA and Skydance did contemplate a longer term lease. Therefore, the first draft of the License Agreement forwarded to Skydance on April 11, 2001, was silent as to the term of the license (Compl. Ex. 15). SAA anticipated that the license would track the duration of the lease - - whatever the final term of the

lease ended up being (See Compl. Ex. 20 and 21).

All of SAA's other tenants have two (2) year leases. The Licenses Agreements signed by those tenants are also for two year terms. Therefore, the issue is not whether it is unfair to offer a license of shorter duration than the Lease because SAA's intent was to have the license term be equal to the Lease term. The issue is whether SAA has the right to increase safety standards and control airport operations via the License Agreement.

An operating license is necessary because SAA may be presented with situations where an operator is not the owner of the leasehold. Subleases and assignments of leases are commonplace in the commercial leasing industry. Without the requirement that all commercial operators operate pursuant to a uniform license, SAA may well find itself in the situation where a subtenant or assignee of a lease can operate below the standards promulgated by SAA and obeyed by the other tenants. This would result in the lack of uniformity in standards and business practices that led to the egregious safety and business practices Mr. McCall found when he became the Airport Manager (Exhibit Q).

Arizona law would require SAA to accept as a subtenant or successor-tenant any commercially reasonable person or entity that could fulfill the economic terms of the tenant's lease at the Sedona Airport. *Campbell v. Westdahl*, Ariz. 432, 436, 715 P.2d 288, 292 (App. 1986) ("landlord may not unreasonably and capriciously withhold his consent to a sublease agreement. The landlord's rejection should be judged under

a test applying a reasonable commercial standard").⁵ As often happens in commercial leases, SAA will be forced in the future to accept an economically viable subtenant even though SAA may not have offered the subtenant a lease on the same terms and conditions and the original tenant. Such is the price the landlord pays for conveying an interest in real property to a tenant.

In this situation, and without a operating license to govern safety and business practices, SAA would be forced to accept a subtenant whose only legal responsibility to SAA would be to abide by the Minimum Standards For Aeronautical Activity, which is precisely the only standard that Skydance represented it would be willing to accept (Exhibit M). Clearly, SAA is entitled to promulgate a uniform safety and operational standard that is greater than Minimum Standard. The idea to bind tenants to a contractual obligation to obey more than the ordinary standard of care is something commercial landlords are doing all over the United States. *See, generally, Negotiating and Drafting Office Leases*, § 8.05 (J. Wood & A. Di Sciullo L.J.P. 2001).

In the last twenty years there has been a move by landlords to incorporate into commercial leases for multi-tenant properties a minimum standard of conduct.

⁵ Section 15.2 of the Restatement (Second) of Property (1977) also takes the position that a landlord cannot unreasonably withhold consent to assignment. This is based upon the axiom of law that disfavors restraints upon the free alienation of real property. Since a leasehold estate for a term of years is an interest in land capable of being transferred, the courts will void any transaction that seeks to place an unreasonable restraint upon the transfer of the leasehold. *Harbel Oil Co. v. Steele*, 83 Ariz. 181, 184, 318 P.2d 359, 361(App. 1970); *Buehman v. Bechtel*, 57 Ariz. 363, 375, 114 P.2d 227, 232 (1941)("One of the principal elements of property is the right of alienation or disposition. This right is one of the essential incidents of a right of general property in movables, and restraints on alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from to hand").

Typically, these are the "Rules and Regulations" of the landlord or property attached as an addendum or exhibit to the lease. *See, generally, Shopping Center and Store Leases*, § 9.03 (E. Harper L.J.P. 2001).

Like the ordinary "Rules and Regulations" for a multi-tenant shopping center, the License Agreement sets forth in detail the rights, remedies, obligations and expectations of the parties. The purpose is not to re-address the minimum standards of the lease, but rather, to promulgate private legislation binding the tenant, and more importantly, its subtenants, assignees, employees and agents, to a uniform standard of behavior that benefits and protects the entire Airport property.

4. The License Agreement's Standards Are Reasonably Attainable, Are Currently Being Met, And Have Resulted In Improved Airport Operations.

It is SAA's prerogative to impose safety and operating standards that exceed the Minimum Standards For Aeronautical Activity, provided however, those standards are uniformly applied. Those standards have been applied uniformly. All tenants whose leases have been the subject of renewal negotiations have signed the License Agreement. The activity and conduct the License Agreement was meant to prevent; namely, "the wholesale disregard of existing airport regulations, outright stealing of booked passengers from one commercial operator to another, deceptive signage all over the airport, the classic bait and switch technique of used car salesman was routine for tour prices and services, physical blocking of entrance walkways by personnel or vehicles to direct customers from one company to another, harassing

solicitation of airport visitors in public areas to the extent of informing these visitors of unsafe pilots or aircraft of a competing company regardless of truth, distribution of NTSB Accident Reports of a competing company, complete disregard for the airport's public relations with the community, attempted sabotage of aircraft and outright physical violence against personnel as well as aircraft" - - has ceased. Revenues at the Sedona Airport have increased over the last three years and are expected to increase in the future. More importantly, no tenant's License Agreement has been revoked and none have complained about the operating standards, other than Skydance. Therefore, there is absolute proof that the License Agreement is not only reasonably attainable, but has positively contributed to the operating and safety standards at the Sedona Airport.

5. Conclusion.

Skydance has purposefully omitted several key facts, including SAA's submission and offer of the revised Paragraph 3 and Skydance's rejection thereof, to further harass SAA. Clearly, the bulk of Skydance's grievances disappear in light of the final version of Paragraph 3 offered to Skydance. Skydance's Complaint is nothing more than a thinly-veiled attempt to make SAA appear to be an unreasonable bully, which it is not.

To the contrary, SAA offered Skydance, albeit under the threats of lawsuits by Skydance's counsel, several long-term leases and a revised License Agreement that conformed substantially to Skydance's request. The Exhibits to this Answer and

Motion reflect that SAA urged Skydance at every conceivable opportunity to remain at the Sedona Airport. The Exhibits also reflect that Skydance made the business decision to reject each and every offer and to relocate its operations to Nevada. It is also clear now that SAA's complaint is nothing more than a procedural tactic to bolster and give credibility to Skydance's feigned \$2,500,000.00 Claim.

Skydance is seeking to hold SAA accountable for its own business decision to remain a month-to-month tenant and have its tenancy terminated under state law. This is not the discrimination to which the Grant Assurances address.

Indeed, Skydance has not and cannot allege in good faith that as a user of the Sedona Airport that it is a person "directly and substantially affected" by SAA's alleged non-compliance. Without a lease, and without any contractual or commercial ties to the Sedona Airport, Skydance has no standing to allege a violation of the Grant Assurances. The Complaint should be dismissed.

Even if Skydance does have standing, there is no credible argument that the License Agreement, in its final form, is anything but fair. Skydance's Complaint must be seen as nothing more than the desperate act of a disgruntled former tenant who blatantly disregarded safety standards and recommendations at the Sedona Airport because it thought it deserved special treatment. Indeed, it is unreasonable and perhaps bizarre to expect an Airport operator like SAA to grant a long-term lease to a tenant who blatantly refuses reasonable requests to modify its operations to address on-going safety concerns without the imposition of some rules and regulations above and beyond the Minimum Standard. The passage of time has now revealed that

Skydance was more interested in concocting, pretextually, an economic damage Claim than abiding by the safety standards sought to be imposed by SAA.

SAA is entitled to assurances from its commercial operations tenants that they will conduct themselves according to the rules and regulations of the Sedona Airport, as promulgated from time to time by SAA, with the sole purpose to eliminate the wild west mentality and free for all Skydance and another former tenant fostered, enjoyed, and sought to maintain for their own personal economic gain. The existing License Agreements signed by all commercial tenants whose leases have come up for renewal accomplish SAA's stated goal in a fair and reasonable manner. There is no discrimination and no violation of the Grant Assurances. For the foregoing reasons, Skydance's Complaint should be dismissed, or in the alternative, the FAA should issue an Order finding no violation of 49 U.S.C. § 47107.

RESPECTFULLY SUBMITTED this 20th day of May, 2002.

SPECTOR LAW OFFICES, P.C.

By 

Richard Spector
Spector Law Offices, P.C.
4020 N. Scottsdale Rd. Suite 300
Scottsdale, Arizona 85251
(480) 941-0221

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the executed original and three (3) copies of the foregoing Answer and Motion, with exhibit book, to be personally delivered, via Federal Express to:

OFFICE OF CHIEF COUNSEL
ATTN: FAA PART 16 Airport Proceedings Docket (AGC-610).
FEDERAL AVIATION ADMINISTRATION
800 Independence Avenue, SW
Washington, DC 20591

I further certify that on this date I have caused true copies of the foregoing Answer and Motion, with exhibit book, to be personally delivered, via Federal Express to the following :

Marshall S. Filler
John Craig Weller
FILLER & WELLER, PC
117 North Henry Street
Alexandria, VA 22314

Yavapai County Board of Supervisors
Attn: Dave Hunt, Esq.
1015 Fair Street
Prescott, AZ 86035


