UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ANALAR CORPORATION, ASSOCIATED AIRCRAFT GROUP, INC., ELEVENTH STREET AVIATION LLC, HELICOPTER ASSOCIATION INTERNATIONAL, INC., HELIFLITE SHARES LLC, LIBERTY HELICOPTERS, INC., SOUND AIRCRAFT SERVICES, INC., and NATIONAL BUSINESS AVIATION ASSOCIATION, INC., Plaintiffs, -against- THE TOWN OF EAST HAMPTON, Defendant.	No. 15-cv-2246-JS-ARL

PLAINTIFF NATIONAL BUSINESS AVIATION ASSOCIATION, INC.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR CONTEMPT

ARNOLD & PORTER KAYE SCHOLER LLP
James D. Herschlein
250 West 55th Street
New York, NY 10017
(212) 836-8000
Attorney for Plaintiff National Business Aviation Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

In 2015, the Town of East Hampton (the "Town") unlawfully imposed certain noise and access restrictions ("the Original Restrictions") at the East Hampton Airport (the "Airport" or "HTO"). Those restrictions were enacted "without complying with the procedures of" the Airport Noise and Capacity Act of 1990 ("ANCA"),[1] ECF No. 87, and were therefore permanently enjoined by this Court on August 7, 2017. As the Second Circuit observed when it reviewed this Court's initial preliminary injunction, "[F]ederal law mandates such laws be enacted according to specific procedures, without which [the Town] cannot claim the proprietor exception to federal preemption." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 137 (2d Cir. 2016). This Court's permanent injunction enjoined the Town from enforcing federally preempted laws. The message was clear: to enact laws restricting airport noise and access, the Town must comply with ANCA.

The Town was undeterred. In flagrant disregard of this Court's order, the Town now makes another attempt to impose virtually identical noise and access restrictions at the Airport (the "Reenacted Restrictions"), again in violation of ANCA. This new attempt is too clever by half: the Town purports to believe that by "closing" the Airport as a *public* airport and then—a mere 33 hours later—"reopening" the Airport as a "*private*" airport, it can sidestep federal law and implement restrictions identical to those the Court previously enjoined. Such a scheme has no basis in law and is contemptuous of this Court's prior ruling. Plaintiff NBAA requests that the Court find the Town in contempt and order it to respect the terms of the injunction.

[1] ANCA is codified at 49 U.S.C. § 47524 *et seq.*

BACKGROUND

I. History of the Instant Litigation

A. Plaintiffs Challenge the Town's 2015 Restrictions

In 2015, Plaintiffs brought suit to challenge the Original Restrictions enacted by the Town in response to complaints of excessive noise at the Airport. Those laws imposed a mandatory curfew on aircraft operations between 11:00 p.m. and 7:00 a.m., an extended curfew on "noisy aircraft" (a classification created by the Original Restrictions) between 8:00 p.m. and 9:00 a.m., and a limitation on "noisy aircraft" from using the Airport more than twice per week during the months of May through September (the "One-Trip Limit"). *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90, 96 (E.D.N.Y. 2015), *aff'd in part, vacated in part,* 841 F.3d 133 (2d Cir. 2016). Violations of the Original Restrictions were punishable by criminal fines and injunctive relief. *Id.*

Plaintiffs argued that both ANCA and the Airport and Airway Improvement Act (AAIA) preempted the Original Restrictions, and that the Supremacy Clause provided a cause of action to enforce their preemption claims. Plaintiffs argued, among other things, that ANCA governs the ability of an airport proprietor to impose noise and access restrictions and preempts local government abilities to impose such restrictions. Therefore, absent compliance with procedural requirements laid out by ANCA (codified at 49 U.S.C. § 47524) and the regulations promulgated pursuant to it, the Town lacked the ability to impose the Original Restrictions.

The Court concluded that while ANCA does not provide for private enforcement, nor does the Supremacy Clause does not provide a cause of action, Plaintiffs' ANCA claims could be heard through an exercise of the Court's equitable jurisdiction. *Friends*, 152 F. Supp. 3d at 102–05. The Court also recognized that, to be constitutional, the Original Restrictions had to be reasonable, non-arbitrary, and nondiscriminatory. *Id.* at 109. Applying this test, the Court enjoined the One-

Trip limit as unconstitutional but denied a preliminary injunction with respect to the curfews, finding that the Town's interest in minimizing noise during the overnight hours outweighed Plaintiffs' interest in preserving their flight schedules. *Id.* at 112. Both Plaintiffs and the Town appealed the Court's order.

B. The Second Circuit Holds the Original Restrictions Violate ANCA and the Court Enters a Permanent Injunction

On appeal, the Second Circuit considered several issues raised by the parties. First, the Second Circuit agreed that the Court had equity jurisdiction to hear Plaintiffs' ANCA claims, because ANCA contains no explicit or implicit limitation on that jurisdiction. *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016) (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)).

Next, the court thoroughly rejected the Town's argument that ANCA's procedural requirements for implementing noise and access restrictions apply only to airport proprietors receiving federal funding. To the contrary, the court found that ANCA "appl[ies] to *all* public airport proprietors *regardless of their funding eligibility*." *Friends*, 841 F.3d at 149. Even without federal funding, the Second Circuit held that "the Airport would not be 'free to operate as it wishes' because the federal statutory limitations appl[y] regardless of whether an airport is subject to grant assurances." *Id.* at 139. The Second Circuit held that the statutory text and legislative history of ANCA confirmed that its procedures are "mandatory and comprehensive," and therefore preempt "local laws not enacted in compliance with them." *Id.* at 151–52.

Having definitively established that ANCA applies to airports regardless of federal funding status, and that ANCA furthermore preempts local laws seeking to impose noise and access restrictions, the Second Circuit remanded the case to this Court for entry of a preliminary

injunction against enforcement of *all* the challenged Original Restrictions: the curfews and the One-Trip Limit. *Id.* at 153–54.

Ultimately, this Court entered a permanent injunction against enforcement of the Original Restrictions because they were preempted by ANCA. ECF No. 87, at 1. The Town is therefore prohibited from enforcing the Original Restrictions unless and until it complies with the procedural requirements of ANCA. *Id.* at 2. Finally, the Court retained jurisdiction over the action "to enforce the terms of the permanent injunction." *Id.*

II. The Town Drafts the Reenacted Restrictions to Again Attempt to Restrict Access to the Airport

Despite this Court's order, the Town persisted in its attempts to impose the same noise and access restrictions at the Airport in complete disregard of ANCA. There can be no doubt that the Town's Reenacted Restrictions differ only in form, not substance, from the enjoined Original Restrictions.

In September 2021, once certain federal grant requirements expired, the Town Board initiated an "Airport Re-Envisioning Project" wherein it held a series of public workshops, supposedly to receive input from community members and other stakeholders about the future of the Airport. But despite ostensibly considering alternative options, the Town's intention from the start was clear—to do exactly what this Court's injunction forbade it to do; that is, impose noise and access restrictions at the Airport without complying with ANCA.

As early as May 2021, the Town's outside counsel blithely asserted that the Town could "accomplish the modified airport if we close it for a measurable amount of time and then we reopen it. Upon reopening, whether it's a public or private airport, we will have the ability to introduce new restrictions as a condition of opening [to] avoid ANCA issues." *See* East Hampton Town Board Work Session, May 11, 2021, https://www.youtube.com/watch?v=8vYV5ZNiIAc, at 7:30.

More than six months later, at an October 19, 2021 meeting, the Town's outside counsel again sketched out the plan of "closure of the [A]irport after the grant assurances expire and the reopening of the [A]irport." Declaration of James D. Herschlein ("Herschlein Decl.") Ex. C (Bill O'Connor. *HTO After Expiration of FAA Grant Assurances,* dated Oct. 19, 2021), at 8. He explained that under this plan, the Town would reopen with "implement[ed] restrictions;" that is, the Town would "implement curfews with enhanced weekend hours," "restrict or create limits on airport use by commercial users (quotas, slots, rationing, lottery, etc.," "refuse permission for certain [] aircraft," and enforce other "noise-based restrictions." *Id* at 19–20.

On December 10, 2021, the Supervisor of the Town of Southampton wrote to the Town Board that the Town's "preferred alternative [to the status quo] is not full closure of the airport, but rather to simply wrest control of operations from the FAA in order to enact" "restrictions," including with respect to noise at the airport. Herschlein Decl. Ex. D (Letter from Jay Schneiderman, Supervisor, Town of Southampton, to Peter Van Scoyoc, Supervisor, Town of East Hampton, dated Dec. 10, 2021), at 2. The December 10 letter also described this maneuver as a "technical closure" intended to extinguish FAA assurances. *Id*. Similarly, news reports described the Town's "goal" as imposing limits on noise and pollution. Christopher Walsh, *East Hampton Likely to Temporarily Close Airport*, East Hampton Star (Oct. 21, 2021).[2]

The Town voted on January 20, 2022 to deactivate and shutter the Airport to the public, effective February 28, 2022. On February 17, 2022, after multiple parties sued the Town to stop its lawless conduct, including its disregard for ANCA,[3] the Town voted to postpone the

[2] *Available* online *at* https://www.easthamptonstar.com/government/20211021/east-hampton-likely-to-temporarily-close-airport.

[3] *See East End Hangars, Inc. v. Town of East Hampton*, No. 602799/2022 (N.Y. Sup. Ct. Suffolk Cty.); *The Coalition to Keep East Hampton Airport Open, Ltd. v. Town of East Hampton, New*

deactivation to May 17, 2022, allegedly to reopen on May 19, 2022. *See* Herschlein Decl. Ex. E (February 17, 2022 East Hampton Town Board Meeting Minutes, Resolution 2022-303), at 50–51.

On May 5, 2022, the Town officially adopted the Reenacted Restrictions—the Rules and Regulations for East Hampton Town Airport, effective May 19, 2022. *See* Herschlein Decl. Ex. F at 1. Under this regime, the use of the Airport is governed by the Town's Prior Permission Required ("PPR") framework, meaning that "no operation may occur at the Town Airport unless such operation is permitted by the Town's PPR framework." These restrictions include: limitations on the operations of "noisy" aircraft; operation-based restrictions (e.g., limitations on commercial operations); aircraft-based restrictions (e.g., a ban on large jets); time-based restrictions for all aircraft (e.g., curfews); and punitive landing fees for all but the smallest fixed-wing aircraft. The proposed rules implementing the restrictions are subject to enhancement "at any time."

If the Reenacted Restrictions are violated, Chapter 75 of the Town Code contains the applicable penalties and enforcement process. Specifically, "any violation . . . shall, upon conviction, be punishable by a fine of not more than $250 or by imprisonment for a term not exceeding 10 days, or by both such fine and imprisonment." Moreover, "the Town may also maintain an action or proceeding in the name of the Town in a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation" of the Reenacted Restrictions.

In essence, the Town plans to throw a curtain over the "old," public airport and then, after a closure of 33 hours, pull off that curtain, revealing—*voilà*—a "new," private airport. The Town

---

York, No. 602801/2022 (N.Y. Sup. Ct. Suffolk Cty.); *Blade Air Mobility, Inc. v. Town of East Hampton*, No. 602802/2022 (N.Y. Sup. Ct. Suffolk Cty.). Both *East End Hangers* and the *Coalition* petitions allege that the Town's actions, besides being arbitrary and capricious, violate ANCA in addition to New York State environmental law. The *Blade Helicopter*, for its part, alleges that the Town's actions violate the public-trust doctrine because the Town had promised to operate the Airport as a public facility *in perpetuity* in exchange for federal funding.

alleges that, because it has supposedly complied with all FAA requirements to deactivate the "old" Airport and activate a "new" airport—and because the "new" airport has a different name—the new airport is somehow different in substance, not merely in form. *See* Herschlein Decl. Ex. G (Bill O'Connor, *East Hampton Airport Update*, dated May 11, 2021), at 4. According to the Town, this "new" airport would be publicly owned but *privately used*, and therefore not subject to ANCA.[4] *See* Herschlein Decl. Ex. C at 14.

This is wrong. The Town has no legal basis to support its veiled attempt to evade federal legislation and a judicial decree.

ARGUMENT

III. The Town Is Violating the Permanent Injunction

This Court's permanent injunction enjoined the Town from enforcing all Original Restrictions because they were preempted by ANCA. As a result, the only way for the Town to reenact the Original Restrictions without violating the injunction is to comply with ANCA. The Town is plainly incorrect that it is *excused* from complying with ANCA merely because it adhered to FAA regulations governing airport closings and re-openings. Even assuming, *arguendo*, that a publicly owned private use airport is somehow exempt from ANCA—which it is not—the conversion of a public airport to a private one is itself an "access restriction" that requires ANCA compliance.

Moreover, the Town's Reenacted Restrictions are identical in substance to the Original

[4] The Town now asserts that, while a publicly owned private-use airport is not subject to ANCA, a privately owned public-use airport would be. This assertion is at odds with its position in this matter. *See* Response and Reply Brief for Defendant-Appellant-Cross-Appellee Town of East Hampton, *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, Nos. 15-CV-2334, 15-CV-2465, 2016 WL 1380979, at *31 (April 4, 2016) (arguing that private airports not receiving federal funding do not need to comply with ANCA).

Restrictions that this Court permanently enjoined it from enforcing. The Town's plan to close the Airport for a mere 33 hours on May 17, 2022, reopen it on May 19, 2022, and have the Reenacted Restrictions come into effect on the very day the Airport reopens is a contorted attempt to escape the rules. Evasion of ANCA's requirements, in flagrant disregard of this Court's permanent injunction, is the *raison d'être* of the Town's plan to close and reopen the Airport. Accordingly, this Court should hold the Town in contempt.

It is true that the injunction enjoins enforcement of the Original Restrictions, rather than the Reenacted Restrictions. But while injunctions are required to "describe in reasonable detail . . . the act or acts restrained or enjoined," Fed. R. Civ. P. 65(d)(1)(C), they are not required to detail every permutation of the enjoined activity. Rather, the purpose of the "reasonable detail" requirement is to provide the enjoined party with proper notice of the prohibited conduct. *See Schering Corp. v. Illinois Antibiotics Co*., 62 F.3d 903, 906 (7th Cir. 1995). Thus, the *Schering* court concluded that, at least in some cases, courts should apply a kind of "substance over form" doctrine to ensure that an enjoined defendant cannot creatively structure behavior in order to sidestep the injunction. *Id.* at 907; *see also Alley v. U.S. Dep't of Health & Hum. Servs.,* 590 F.3d 1195, 1205 (11th Cir. 2009) ("[T]he narrowest conceivable interpretation of an injunction is not necessarily the correct one [because] [o]therwise an enjoined party could assert an overly literal or hyper-technical reading of an injunction in order to slip the restraints that it imposes on that party.").

The Reenacted Restrictions differ in form, not substance, from the enjoined Original Restrictions. The Town admits that, like the Original Restrictions, its planned restrictions are designed with the "objective of *reducing noise* and other environmental impacts." Herschlein Decl. Ex. J (DGEIS Scoping Document), at 1 (emphasis added). The purpose and content of the

restrictions are the same. The Reenacted Restrictions therefore remain contemptuous, regardless of the Town's theatrics to produce a mere difference in form.

A. The Town Plans to Enforce Reenacted Restrictions Essentially Identical to Those Targeted by the Permanent Injunction

The purpose of this Court's permanent injunction was to give effect to the Second Circuit's clear direction that laws regulating airport noise and access require ANCA compliance. *See Friends of the E. Hampton Airport, Inc.,* 841 F.3d at 144–45.

The Town's repeated attempts to regulate airport noise locally—in direct conflict with ANCA and this Court's order—undermine Congress's very purpose in preempting the sphere of airport noise policy. Congress promulgated ANCA "based on findings that 'community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system' and, therefore, 'noise policy must be carried out at the national level.'" *Id.* (citing 49 U.S.C. § 47521(2)–(3)). Without any regard for the impact on surrounding communities, the Town unilaterally imposed the Original Restrictions—it amended the Town Code to restrict "noise from loud aircraft" disturbing the "peace, quiet, [and] repose[.]" *See* Town of E. Hampton Res. 2015-569, at 1. And now again, the Town has reenacted the same noise and access restrictions in a new form. The Reenacted Restrictions, similarly, regulate airport access and "noisy aircraft" to protect the Town's "resort-style community and peaceful way of life." Herschlein Decl. Ex. F at 1.

The Reenacted Restrictions are no different in substance. As the following chart shows, the Original Restrictions and Reenacted Restrictions target identical airport noise and access concerns:

Rule	*Original Restriction*	*Reenacted Restriction*
Mandatory Curfew	Use of the Airport is prohibited between the hours of 11:00 pm and 7:00 am (local time).	Use of the Airport is prohibited between the hours of 8:00 pm and 8:00 am (local time).

Extended Curfew	Use of the Airport is further prohibited for Noisy Aircraft between the hours of 8:00 pm and 9:00 am (local time).	Use of the Airport is further prohibited on weekends and federal holidays between the hours of 7:00 pm and 9:00 am (local time).
One-Trip Limit	Noisy Aircraft are permitted to operate at most one roundtrip per week during the season.	Noisy Aircraft are permitted to operate at most one roundtrip per day during the year.
Roundtrip	A roundtrip is one departure (takeoff) from, and one arrival (landing) at, the Airport.	A roundtrip is one departure (takeoff) from, and one arrival (landing) at, the Airport.
Noisy Aircraft Definition	"Noisy Aircraft" shall mean any aircraft with Effective Perceived Noise in Decibels (EPNdB) of 91.0 or higher.	"Noisy Aircraft" shall mean any aircraft with Effective Perceived Noise in Decibels (EPNdB) of 91.0 or higher.
Noisy Aircraft Classification	The noise signature is defined by the FAA.	The noise signature is defined by the FAA.
Discretionary Classification	In lieu of being deemed a "Noisy Aircraft" based on the noise characteristics published by the FAA, an owner of an aircraft can seek approval through a designation that the sound signature of the aircraft is "not noisy."	In lieu of being deemed a "Noisy Aircraft" based on the noise characteristics published by the FAA, an owner of an aircraft can seek approval through a designation that the sound signature of the aircraft is "not noisy."
Emergency Exemption	The restrictions do not apply to emergency, public, and military operations. If an emergency operation occurs, the operator must provide a statement within 24 hours of such operation attesting to the events giving rise to the operation.	The restrictions do not apply to emergency, public, and military operations. If an emergency operation occurs, the operator must provide a statement within 24 hours of such operation attesting to the events giving rise to the operation.
Fines & Penalties	Any use of the Airport in violation of these restrictions shall be punishable by a penalty or fine of not more than: (1) $1,000 for the first violation (2) $4,000 the second violation (3) $10,000 for the third violation (4) A 2-year ban from use of the Airport for the fourth violation (5) An additional $2,000 for repeat violations within five years (6) An additional fine of the Town's actual costs, or double those costs, where an entity is convicted (7) An additional $10,000 for each violation that a party with an	Any use of the Airport in violation of these restrictions shall be punishable by a penalty or fine of not more than: (1) $1,000 for the first violation (2) $4,000 the second violation (3) $10,000 for the third violation (4) A 2-year ban from use of the Airport for the fourth violation (5) An additional $2,000 for repeat violations within five years (6) An additional fine of the Town's actual costs, or double those costs, where an entity is convicted (7) An additional $10,000 for each violation that a party with an

ownership interest in an aircraft caused, permitted or allowed to occur.	ownership interest in an aircraft caused, permitted or allowed to occur.

The Original Restrictions and Reenacted Restrictions take aim at similar targets: nighttime aircraft use; operations of aircrafts defined as "noisy" based on their noise signature; one-trip limits on the number of flights by noisy aircraft; and fines for noncompliance with such noise and access restrictions. Notably, both the Original Restrictions and Reenacted Restrictions define "noisy aircraft" in a manner distinct from any ANCA classification.

In short, the Town plans to close the airport—a noise and access restriction in itself—and reopen it with identical restrictions to those the Court enjoined. The Court should reject the Town's contrived cleverness and find it in contempt for violating the very purpose of the injunction.

B. The Scope of the Permanent Injunction Encompasses the Town's Scheme

Context is key when establishing whether the text of an injunction fairly covers a particular course of conduct. Even injunctions that do not conform to the requirements of Rule 65 may effectively bind a party if their facial insufficiencies are remedied by clear indications that the party understood their intention and effect. For example, in *Perfect Fit*, the injunction against the defendant, Acme, referenced images of the defendant's infringing products, previously attached as exhibits to the plaintiff's papers—even though Fed. R. Civ. P. 65(d) proscribes "reference to the complaint or other document." *See Perfect Fit Indus., Inc. v. Acme Quilting Co*., 646 F.2d 800, 809 (2d Cir. 1981).. Acme contended that this rendered the injunction too vague for enforcement, but the court rejected this argument—finding it clear from the record in the case that Acme had full knowledge of both the referenced images as well as which of its own infringing products those images implicated. *Id.* The court concluded:

> Thus, although in other circumstances the district court would have been required by Rule 65(d) to attach photocopies of Exhibits 2 and 3 to its injunctive order, as was done with the form of recall letter to be sent, we will not allow Acme, whose own suggested language referred to those exhibits, to excuse its noncompliance on the ground that the May 19 order was impermissibly vague.

Id.

Reading the permanent injunction with its true purpose in mind—prevention of the Town enacting noise and access restrictions preempted by ANCA—reveals that it plainly encompasses the Town's plan. The novelty of the Town's maneuver in closing and reopening the Airport with restrictions identical to those enjoined does not preclude enforcing the injunction against it.

Courts regularly hold that injunctions need not contemplate every avenue an enjoined party might take to circumvent the court order. *See, e.g.*, *Broker Genius Inc. v. Gainor*, 810 F. App'x 27, 34 (2d Cir. 2020) (party enjoined from distributing software program named Command Center held in contempt of injunction when it created and distributed program named "Event Watcher" that "shared all the features of Command Center" save one); *Schering Corp. v. Ill. Antibiotics Co*., 62 F.3d 905 (7th Cir. 1995) (injunction prohibiting sale of liquid drug reached sale of solid-form drug); *Wirtz v. City of S. Bend, Ind*., 838 F. Supp. 2d 835, 841 (N.D. Ind. 2011) (injunction prohibiting city from transferring land to parochial school applicable to city's sale of land to any purchaser when sale "evaluated on the bidder's ability to promote Saint Joseph's High School's construction of athletic fields"); *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996) (injunction entered in 1981 prohibiting distribution of magazine reached distribution of magazine via the internet); *cf. De Simone v. VSL Pharms., Inc.*, 2020 WL 4368103, at *5 (D. Md. July 30, 2020) (granting motion for contempt over defendant's argument that a marketing statement did not violate injunction because a word contained in that statement had a technical meaning that would not violate the injunction); *Manu v. Nat'l City Bank of Indiana*, 321

F. App'x 173, 176 (3d Cir. 2009) (party enjoined from filing a new proceeding in the district court "may not circumvent the injunction . . . by seeking intervention in cases brought by another party").

For example, in *Schering*, the defendant-veterinarian was enjoined from selling unlicensed gentamicin sulfate solution—a liquid—for therapeutic uses. 62 F.3d at 905. Rather than obtain the required license, the defendant continued to sell gentamicin sulfate as a powder instead of a liquid. *Id.* The Seventh Circuit reversed the district court's holding that the wording of the injunction, which referred to the solution, was not broad enough to reach the powder form of the drug, *id.*, reasoning that "the rule of strict construction should not be pressed to a dryly logical extreme." *Id.* at 906. Because the purpose of Rule 65's "reasonable detail" requirement is to provide "clear notice" to the party enjoined, a literal "change in form" cannot escape the scope of the injunction. *Id.* at 906–907. Furthermore, the fact that the defendant actively concealed the sales of powder gentamicin sulfate demonstrated "his consciousness that the form of the drug was immaterial." *Id.*

Here, the Town is attempting to avoid this Court's injunction through a similar "transformation." In the Town's view, by closing and reopening the airport, the Court's proscription evaporates. But the thrust of the injunction was never so narrow: it prohibited the Town from implementing the restrictions at the heart of this case absent compliance with ANCA.

The Town's new restrictions are plainly prohibited by the injunction. True, the injunction is directed at the specific provisions of the Town Code that implemented those restrictions. But prohibiting such restrictions themselves is precisely why this Court enjoined enforcement of the enacting provisions. The Reenacted Restrictions are a difference of form, rather than substance. For instance, the Town could not evade the injunction simply by re-codifying those restrictions in a different portion of the Town Code. *Cf. AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1547, 1548 n.89 (11th Cir. 1986) (providing example that a defendant could not circumvent injunction against

sale of five-ounce chocolate covered ice cream bar by selling 4.9-ounce bar or bar covered with artificial chocolate). And the Town's close-and-reopen plan demonstrates the Town's awareness that it cannot re-impose the Original Restrictions simply through reenacting them with minor variation. Permitting the recodification of substantively identical restrictions through the Town's close-and-reopen strategy would eviscerate the force of the injunction.

C. The Town is Wrong that its Close-and-Reopen Plan Escapes ANCA's Reach

The Town will undoubtedly take the position—as it has done elsewhere—that its actions are legal because ANCA no longer applies once the airport is transformed into a private-use airport (albeit, one that is still publicly owned). By the Town's reasoning, any publicly owned airport could avoid ANCA simply by declaring itself to be "private use." However, that would be fundamentally at odds with the underlying congressional intent, wherein "Congress enacted ANCA for the purpose of establishing a national noise policy." *See Committee to Stop Airport Expansion v. Wilkinson*, 2012 WL 3058626 (N.Y. Sup. Ct. July 5, 2012); *see also* 49 U.S.C. § 47521(2)-(3) ("community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system"; "a noise policy must be carried out at the national level"); Letter from Leonard L. Griggs, Jr., Assistant Administrator for Airports, FAA, to Rex D. Johnson, Director, Hawaii Department of Transportation (July 6, 1992) ("[a] major purpose of ANCA is to prevent the proliferation of uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system"). In other words, ANCA was enacted by Congress to prevent the piecemeal disassembly of the national system of airports via unilateral, parochial restrictions. ANCA was not intended to allow publicly owned airports to avoid its expansive mandates by simply declaring themselves "private-use" and thus no longer subject to the law. The "common sense" interpretation of ANCA is that the statute applies to airports that are publicly owned, and, among other things, prevents them from being converted to private-use

status absent full compliance with ANCA, because the conversion itself would be an access restriction.

Even assuming, arguendo, that ANCA does not apply to private-use airports, there is no legal basis on which the Town can simply declare HTO be "private-use." HTO is a publicly owned airport. The Town plans to close the airport for 33 hours starting on May 17, and to make minor/ministerial changes to the facility (such as acquiring ownership of navigational aids from FAA and slightly modifying the airport's name). However, it will remain the same publicly owned facility, with virtually the same infrastructure. Indeed, the Town does not even genuinely believe that the "new" airport will be a different entity from HTO; e.g., airport tenants have been informed that no changes to their contracts are required.

For the foregoing reasons, the Court should enter an order holding the Town in contempt of the permanent injunction.

Dated: May 14, 2022

By: _____

James D. Herschlein
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
james.herschlein@arnoldporter.com

Attorney for Plaintiff National Business Aviation Association, Inc.