



The FAA dismissed the CFR Part16 complaint filed against the city by the “Jet Center” for the following reason: The Jet Center no longer exists so it does not have standing to file a complaint. The Aircenter (TriState) was never formally denied an opportunity by the city to build hangars (because it never applied) so its petition to be added to the Jet Center filing was rejected as TriState had no standing to file the complaint.

The FAA did inform TriState (see page 26 of the ruling) should it seek to build hangars and should the city refuse the permits they could file a Part 16 complaint, without all the procedural steps normally required prior to filing. This would be permitted because of the already on the record file against the city. The FAA, with this dismissal, provided the city with a “face saving “ gesture, but has also clearly cautioned the city to permit the hangars to be built (if the Aircenter/ TriState asks) to avoid a second Part 16.

The cost of associated legal fees exceed \$400,000. That money, spent from the airport fund, is gone. Stay tuned for the rest of the story, which will be told in about a year, when the Department of Transpiration OIG reports on its recent audit of how airport funds have been spent.

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

Venice Jet Center, LLC,

Complainant

v.

City of Venice,

Respondent

FAA Docket 16-09-05



ORDER OF DISMISSAL

I. Introduction

This matter is before the Federal Aviation Administration (FAA) based on a complaint filed in accordance with the Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 C.F.R. Part 16 (Part 16).

Venice Jet Center, LLC, (Complainant/VJC) has filed this Complaint against the City of Venice, Florida (Respondent/Airport/City).¹ Complainant alleges that the Respondent, as sponsor of the Venice Municipal Airport, has engaged in activity contrary to its Federal obligations. Specifically, the Complainant alleges that the Respondent has failed to comply with Grant Assurance 1, *Sponsor's Violation of Federal Law*, Grant Assurance 5, *Preserving Rights and Powers*, Grant Assurance 19, *Operation and Maintenance*, Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 23, *Exclusive Rights*.

Based on pleadings and other evidence contained in the record of this proceeding, the FAA finds the Complainant does not presently have standing to bring this Complaint, and the Complaint, therefore, is dismissed with prejudice.² The FAA's decision in this matter is based on applicable Federal law and FAA policy, and review of the pleadings and supporting

¹ While Venice Jet Center, LLC, is named as the Complainant in this matter and is described as having filed this Complaint, this matter was initiated by Burton W. Wiand, a Receiver appointed by the United States District Court, Middle District of Florida, to represent the interests of Venice Jet Center, LLC, the circumstance of this appointment being more fully described herein. The Director has concluded that Burton W. Wiand (Receiver) is the Complainant. References to the Complainant in this Order, therefore, may include the term "he," "him," or "his."

² As discussed below, the motion of Tristate Aviation Group of Florida, LLC (Tristate) to intervene and be joined as a Co-Complainant is denied and dismissed except that Tristate is granted leave to file its own complaint regarding actions taken by the City against it since November 2009.

documentation submitted by the parties, which comprise the Administrative Record reflected in the attached FAA Exhibit 1.

The bases for the Order denying and dismissing Tristate's Motion to Intervene and be joined as a Co-complainant, dismissing VJC's Complaint, and granting Tristate leave to file its own Complaint with respect to actions taken by City against Tristate since November 2009 are set forth herein.

II. Parties

A. The Airport and its Federal Obligations

The Venice Municipal Airport is a public use airport located in Venice, Florida. The Respondent City of Venice, which has seven City Council members that include the Mayor, is the sponsor of the Venice Municipal Airport. The Airport was conveyed to the City in June, 1947 by the United States under the Surplus Property Act of 1944, as amended.³ FAA records indicate the planning and development of the Airport has been financed with funds provided by the FAA under the Airport Improvement Program (AIP) authorized by the Airport and Airway Improvement Act of 1982, as amended, now recodified as 49 U.S.C. § 47107, *et seq.*

B. Complainant

According to the record, "The Complainant VJC is a Florida limited liability company, of which Arthur Nadel was previously a managing member. On January 27, 2009, Burton W. Wiand was appointed by the United States District Court, Middle District of Florida, Tampa Division to serve as the Receiver over a number of entities, including the VJC." FAA Exhibit 1, Item 1, Exhibit 1. The Complaint alleges, in part, that the Airport has unjustly discriminated against VJC by prohibiting VJC from building four hangars contrary to a lease agreement between VJC and the City. The Complaint alleges that the Airport opposes continued services and support, including but not limited to, the construction of the four hangars that would allow operation of certain jet and turbo-prop aircraft.

On February 1, 2010, attorneys for Tristate Aviation Group of Florida, LLC (Tristate) filed a Motion to Intervene and for Joinder as Co-Complainant. The Motion alleges that Tristate entered into an Asset Purchase Agreement with the Receiver to purchase the assets of VJC.

³ The Venice Municipal Airport is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153. The deeds are dated June 10, 1947, July 7, 1948, March 9, 1955, December 10, 1956, August 21, 1957, and May 25, 1959, and provide (expressly or by incorporation), in relevant part, that ". . . the property transferred hereby . . . shall be used for public airport purposes, and only for such purposes, on reasonable terms and without unjust discrimination." These deed covenants are similar to the Federal grant assurances that are also imposed upon the Respondent. While the enforcement of the obligations is identical, the remedies for violation differ (for example, violations of the Surplus Property Act may result in a reverter of the property, whereas a violation of a grant assurance may affect AIP grants to an airport).

On January 20, 2010, a United States district court judge issued an order⁴ approving the sale of the assets of Venice Jet Center, “a company in Receivership,” and the transfer of the lease between VJC and the City of Venice, to Tristate Aviation Group of Florida, LLC.⁵

III. Background and Procedural History

A. Venice Municipal Airport

The Venice Municipal Airport is a public airport located within the boundaries of the City of Venice, located on the west coast of Florida. The airport was built in the early 1940’s as a World War II flight training base whose ownership was transferred from the federal government to the City of Venice in 1947. The airport does not have an air traffic control tower and does not have regular scheduled airline service. It has two intersecting runways, each approximately 5,000 feet in length. The airport’s web site states that it has one fixed base operator (FBO⁶), Suncoast Air Center, aircraft maintenance businesses, Sarasota Avionics International and Florida Flight Maintenance, and Agape Flights, a relief ministry organization.⁷ It further states that the airport supports a significant amount of business traffic and flight training activity. The airport operational statistics reflect that there are 212 aircraft, including 3 jet aircraft, based at the airport. For the 12-month period ending October 21, 2008, the reported aircraft operations were: 93,865 local general aviation, 78,315 transient general aviation, 545 air taxi, and 110 military. FAA Exhibit 1, Item 24.

B. Venice Jet Center

Prior to August 8, 2005, the FBO operating at the Venice Municipal Airport was Triple Diamond Jet Center. On August 8, 2005, Triple Diamond Enterprises, LLC, entered into an Asset Purchase Agreement with Arthur Nadel for, among other things, the sale of the fixed base operation to Arthur Nadel or his assignee. The agreement effectively transferred the assets of Triple Diamond Enterprises, LLC, to Mr. Nadel or his assignee, including two

⁴ *Securities and Exchange Commission v. Arthur Nadel, et. al.*, Case No. 8:09-cv-87-T-26TBM, United States District Court, Middle District of Florida, Tampa Division, signed by Richard A. Lazzara, United States District Judge on January 20, 2010. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit C.

⁵ The order also stated, “Tristate Aviation Group of Florida, LLC, is entitled to all rights, benefits, and interests of the tenant in the Lease and the leasehold estate arising there under and assumes all obligations of the VJC as tenant there under. Said rights shall include the right of Tristate Aviation Group of Florida, LLC, to be substituted in the VJC’s stead in the proceeding before the FAA (FAA Docket No. 16-09-05). However, as the Receiver has acknowledged in his Reply filed this day at docket 320, the approval of this assignment of the VJC’s interest in the Part 16 proceeding presently pending before the FAA does not divest the FAA of the independent right to determine the issue of standing in that proceeding nor is the Court’s approval intended to confer standing on Tristate Aviation Group of Florida, LLC, in that proceeding.” FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit C, paragraph 3), at page 3.

⁶ A Fixed Base Operator is defined as “A business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, and flight instruction.” FAA Advisory Circular 150/5190-6, Exclusive Rights, January 4, 2007, at Appendix 1, paragraph 1.1i

⁷ http://www.venicegov.com/Files/Airport/Econ_impact_brochure.pdf

hangars, equipment and the assignment of a lease agreement between the City and Triple Diamond Enterprises, LLC. FAA Exhibit 1, Item 12, Exhibit B.

Articles of Organization dated April 18, 2006, incorporating Venice Jet Center, LLC, as a Florida corporation bear the signature of a managing member of VJC, Arthur Nadel. FAA Exhibit 1, Item 12, Exhibit C.

On May 23, 2006, the City entered into a lease agreement (Lease) with Venice Jet Center, LLC. FAA Exhibit 1, Item 1, Exhibit 3. The Lease permitted VJC to “[c]onduct any commercial aeronautical activity permitted under the Minimum Standards for Commercial Aeronautical Activities at Venice Municipal Airport . . .” FAA Exhibit 1, Item 1, Exhibit 3, page 8, paragraph 14. Paragraph 45 of the Lease provided, “On or before May 31, 2011 the lessee shall, at lessee’s sole expense, demolish the two aircraft hangars currently located on the premises; design, permit and construct an aircraft hangar consisting of at least 10,000 square feet; and apply a new Northern Mediterranean exterior finish to the administration building currently located on the premises.”

The Airport’s minimum standards for commercial aeronautical activities contained several provisions relating to construction of additional facilities. Section 5.A. of the Minimum Standards for Commercial Aeronautical Activities states, “Any proposed construction of facilities developed by the Operator will be subject to the approval of the Venice Municipal Airport and the City of Venice . . .” FAA Exhibit 1, Item 1, Exhibit 4, page 3 of 17. Paragraph 5 of the Minimum Standards for Fixed Base Operators states, “All fixed base operators shall satisfy the City that they are technically and financially able to perform the services of such fixed base operations before any lease of property for such an operation shall be executed.” FAA Exhibit 1, Item 1, Exhibit 5, paragraph 5, page 1 of 7. Paragraph 8 of the Minimum Standards for Fixed Base Operators states, “No construction of any kind shall be done at the Venice Airport without the prior approval of the City and, if necessary in the opinion of the City, the Federal Aviation Administration, or its successor governmental agency, and no such approval shall be granted unless such construction and design is consistent with the architecture and the master plan Section 7-1b for the development of Venice Airport.” FAA Exhibit 1, Item 1, Exhibit 5, paragraph 8, page 2 of 7. Paragraph 10 of the Minimum Standards for Fixed Base Operators states, “Hangars constructed for the rental of space for aircraft storage or for aircraft and engine repair, shall not be less than 6400 square feet in floor area. A fixed base operator in any category may, if sufficient land and area is leased from the City, construct such a hangar or hangs (*sic, hangars*) in a location satisfactory to the City and engage in the business of rental of space for aircraft storage. The quality and design of all hangars to be constructed is subject to approval by the City.” FAA Exhibit 1, Item 1, Exhibit 5, paragraph 10, page 2 of 7.

Venice Jet Center, LLC, fulfilled the terms of the lease to demolish and replace two hangars. The two hangars have been razed, two replacement hangars have been built, and the Mediterranean façade of the existing administration building has been completed. FAA Exhibit 1, Item 1, Exhibit 3, page 25, paragraph 45.

Beginning in about June 2008, representatives of Venice Jet Center, LLC, held a series of meetings with city officials about building new hangars on its leased property. Letters

reflect that Venice Jet Center, LLC, specified the number, type and placement of the hangars it proposed to construct on the leased property in August 2008. FAA Exhibit 1, Item 7, Exhibits 3 through 12. In a letter dated August 18, 2008, Venice Jet Center officials asked to present its plan to build four hangars to the Venice City Council for approval. FAA Exhibit 1, Item 7, Exhibit 9.

At no time during the ensuing four months did the City take any action to consider the application of Venice Jet Center, LLC.⁸ FAA's Orlando Airport District Office (ADO) received an informal complaint from Arthur Nadel in this matter on September 2, 2008. FAA Exhibit 1, Item 1, Exhibit 10. The informal complaint alleged, among other things, that the City failed to follow the terms of the Lease thereby violating the minimum standards, discriminating against VJC, and causing exclusivity and unfair competition. Pending action by the City Council, in November 2008 Venice Jet Center, LLC, applied to the City of Venice for permits to build four hangars. FAA Exhibit 1, Item 7, Exhibit 10.

In a letter dated December 4, 2008, a planning specialist at the FAA's Orlando Airport District Office wrote to the Interim Manager of the City of Venice stating that the "City of Venice appears to be unnecessarily delaying the expansion of the Venice Jet Center . . . which is inconsistent with the federal grant assurances and the Surplus Property Deed restrictions." FAA Exhibit 1, Item 1, Exhibit 12. On December 29 the FAA responded to VJC's informal complaint under 14 C.F.R Part 13: "[y]our application to expand at the Venice Municipal Airport has not been included on the City Council agenda for approval, and the FAA believes you are being unnecessarily delayed. This position was communicated to the Interim City Manager, Dr. Nancy Woodly, on December 4, 2008." The FAA further stated: "[i]t appears we will be unable to assist you with an informal resolution to this complaint, as the City of Venice is unwilling to address your application for expansion [I]f you are unable to resolve this matter informal, you are free to file a formal Part 16 complaint."

C. Receivership

In January 2009, VJC managing member Arthur Nadel, was indicted on a series of charges of fraud. On January 21, 2009, a United States district court judge appointed Burton W. Wiand as the Receiver of the assets of a number of entities controlled by Arthur Nadel. FAA Exhibit 1, Item 7, Exhibit 2. On June 3, 2009, the Receiver's authority was extended to administer the assets of the Venice Jet Center, LLC. FAA Exhibit 1, Item 1, Exhibit 1.

On February 26, 2009, the 2009 Limited Liability Company Annual Report filed with the Florida Secretary of State changed the Registered Agent of Venice Jet Center LLC from Arthur Nadel to Burton W. Wiand. FAA Exhibit 1, Item 25. Previous to this, Arthur Nadel was listed as the Registered Agent and Managing Member of Venice Jet Center LLC. FAA Exhibit 1, Item 12, Exhibit C, numbered 7 of 7 pages.

After his appointment, the Receiver continued VJC's efforts to informally resolve the matter. For example, on February 2, 2009 the Receiver submitted a written request to the

⁸ It does not appear that the City provided any formal written denial to the Venice Jet Center, LLC.

Mayor on behalf of VJC requesting the City to release its hold on the project to build hangars, which had been pending for nine months. Exhibit 1, Item 1, Exhibit 15.

In a letter dated February 19, 2009, the FAA clarified that the hangars could be built in the area proposed by VJC: “[t]he City of Venice may and should approve the construction of hangars in the area you mention. The land is designated for aeronautical use, and the FAA even processed a ‘pen and ink’ change to the 2000 Airport Layout Plan incorporating hangars in this vicinity In accordance with previous advice concerning airport compliance matters, this proposal should be forwarded to this office without delay.” Exhibit 1, Item 1, Exhibit 16. On May 18, 2009, after a series of attempts to resolve the matter informally and exchanges of letters with the parties, the Orlando ADO advised Burton W. Wiand by email message that informal resolution was concluded without success. FAA Exhibit 1, Item 1, Exhibit 21. Mr. Wiand then filed a formal complaint under 14 CFR Part 16, which was received by the FAA on July 6, 2009.

D. Tristate Aviation

On November 16, 2009, the Receiver signed an Asset Purchase Agreement (Agreement) with Tristate. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 1. The Agreement effectively transfers certain assets (most having to do with the FBO) held by the Receiver to Tristate. It also transfers “the Seller’s rights, title, and interest in the action styled *Venice Jet Center, LLC v. City of Venice*, FAA Docket No. 16-09-05.” FAA Exhibit 1, Item 14, Exhibit A, Exhibit 1. Tristate purchased the assets of VJC from the Receiver for \$300,000 along with certain obligations to a creditor, Northern Trust, N.A. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 1. Under the agreement the Receiver remains liable for up to \$50,000 of legal expenses in the Part 16 proceeding. VJC, which is an active corporation, remains liable in the event Tristate defaults on the lease.

On December 29, 2009, Tristate’s Managing Director, Donald Kretchman, met informally with City Council representatives to discuss the transfer of the lease from VJC to Tristate and Tristate’s request to build four hangars at the airport. Mr. Kretchman’s sworn declaration states, “On December 29, 2009, on behalf of Tristate, I met with City of Venice officials at City Hall around 10 a.m. to informally discuss the hangar dispute (among other issues related to Tristate’s becoming the lessee under the lease between the Venice Jet Center, LLC and the city of Venice). Present at the meeting on behalf of the City were Isaac Turner, Nancy Woodley, Jeff Snyder, and Wayne Hall (filling in for Bob Anderson, city attorney). Possible resolutions to the hangar dispute were discussed in good faith but the dispute was not resolved. The hangar discussions concluded with my telling the City of Venice that Tristate intended to build the hangars in their originally planned location.” FAA Exhibit 1, Item 18, Exhibit A, paragraph 2.

On January 5, 2010, Mr. Kretchman testified before the City Council which was meeting to decide, among other topics, whether to approve transfer of the lease from VJC to Tristate. FAA Exhibit 1, Item 16, Exhibits II and III. Tristate and the City provide markedly different accounts of this meeting. The City quotes statements made by Mr. Kretchman during this meeting as evidence that Tristate was ambivalent and uncertain about the hangar

project. FAA Exhibit 1, Item 16. In response, Tristate submitted Mr. Kretchman's sworn declaration attesting that his statements were taken out of context. He explained "My response to Sue Lang's comment ... related to financial pro formas. I was trying to get across the point that the business was viable even without the new hangars using current traffic levels, as the City seemed very hung up on how we'd make it work where others had failed. While trying to be amenable, I never once said I didn't intend to build the hangars. In response to her comment that hangar demand was down, I said 'I want to leave the possibility (to build hangars) open' because I hadn't done any 'independent evaluation.'" FAA Exhibit 1, Item 1, 8, Exhibit A, paragraph 4.⁹

During the meeting the City Council voted to approve the transfer of the lease from VJC to Tristate but did not address whether Tristate could build new hangars. FAA Exhibit 1, Item 18, Exhibit A.

On January 6, 2010 the City consented in writing to assignment and assumption of the lease by Tristate. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit B. The court Order dated January 20, 2010, approving the Assignment specifically states, "[T]he approval of this assignment of the VJC's interest in the Part 16 proceeding presently pending before the FAA does not divest the FAA of the independent right to determine the issue of standing in that proceeding nor is the Court's approval intended to confer standing on Tristate Aviation Group of Florida LLC, in that proceeding." FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit C.

On February 9, 2010, Mr. Kretchman presented a statement to the City Council. FAA Exhibit 1, Item 18, Exhibit A, paragraph 6, and Exhibit B. The statement addressed "a variety of issues I feel council should give serious consideration." Mr. Kretchman reiterated his right to build the hangars as planned by VJC in that statement: "Reclassification of the Airport as B-II would diminish, rather than develop, aviation services provided by the Airport to the public and would significantly undermine the value of Tristate's lease. According to calculations, the City has now spent over \$700,000 (including the proposed sums to DY¹⁰ before your review today) of which over \$300,000 is for fighting the Part 16 complaint over the hangars which are our right to build."¹¹

Tristate has assumed the role that VJC once had in conducting business at the Venice Municipal Airport as an FBO. Tristate now operates the FBO at the Venice Municipal Airport as Suncoast Air Center.¹² FAA Exhibit 1, Item 20.

⁹ According to Mr. Kretchman's sworn declaration, one city council member pointed out that they were not there to discuss hangars, they were there to approve or deny the lease transfer. FAA Exhibit 1, Item 18, Exhibit A, paragraph 5.

¹⁰ "DY" refers to DY Consultants, the aviation planning and engineering firm contracted by the City as a consultant for VNC.

¹¹ However, the "attached statement" does not mention the City's refusal to approve the construction of the hangars.

¹² http://www.venicegov.com/Municipal_links/Airport/operations.htm and <http://www.suncoastaircenter.com/Florida-airport-FBO.htm>, both current on August 9, 2010

In its opposition to the City's motion to dismiss the complaint, Tristate stated "Tristate is...being prevented from building hangars on its leasehold." FAA Exhibit 1, Item 18, Exhibit A. In the sworn declaration attached to this pleading, Mr. Kretchman attests, "Thus, Tristate is now the lessee under the lease and has every intention to build the hangars as proposed." FAA Exhibit 1, Item 18, Exhibit B. Tristate also submitted a November 12, 2009, Herald Tribune article reporting the sale of VJC to Tristate, which states:

Unresolved is the fate of the four hangars for which Wiand has fought with the city for approval since taking over the Jet Center this year. Kretchman said the hangars will have to be built where they are designated on Nadel's plans. Some council members have insisted that they be located farther from a residential area near Airport Avenue. We "have to have hangar access from the street," Kretchman said. "The value is not the same if they are built in the interior" of the airport." FAA Exhibit 1, Item 18, Exhibit C.

According to the minutes of the Venice City Council Meeting dated January 5, Mr. Kretchman responded in a similar fashion to a question from the Mayor:

But I did tell Mr. Turner he asked that question, matter of fact, one of his first questions in our initial meeting last week [December 29, 2009], how do I feel about the hangars? Its' (sic) a matter of fact, not opinion, the hangars do not hold the same intrinsic value if they are moved to an interior portion of the airport vs (sic) where they have been permitted and planned currently. FAA Exhibit 1, Item 16, Exhibit III.

The chronological order of the filing of the pleadings in this case is as follows:

July 6, 2009, the FAA received the Complaint.¹³

July 10, 2009, FAA issued the docketing Notice.

July 23, 2009, the Respondent moved for an extension of time to file an Answer.

On July 27, 2009, the Complainant filed its opposition to Respondent's Motion to extend the time to file its Answer.

On August 3, 2009, the FAA issued a Notice of Extension of Time to file an Answer

On September 2, 2009, the Respondent filed its Answer and affirmative defenses.

On September 2, 2009, the Respondent filed a Motion to Dismiss the Complaint.

On September 10, 2009, the Complainant filed a Motion to Extend time to file its Reply.

¹³ The Certificate of Service contained in the Complaint is undated.

On September 30, 2009, the Complainant filed its Reply to the Answer and Motion to dismiss.

On October 5, 2009, the Respondent filed a Motion for extension of time to file its Rebuttal.

On October 7, 2009, the FAA granted an extension of time for the Rebuttal.

On October 28, 2009, the Respondent filed its Rebuttal to the Complainant's Reply.

On February 1, 2010, Tristate Aviation Group of Florida LLC moved to intervene and for Joinder as Co-Complainant.

On February 18, 2010, the Respondent filed a Motion to Dismiss and opposition to Tristate Aviation Group Motion to Intervene and for Joinder as Co-Complainant.

On February 22, 2010, Tristate Aviation Group filed an Opposition to the City of Venice's Motion to Dismiss.

On February 24, 2010, the Complainant filed a Response to the City's Motion to Dismiss.

IV. ISSUES

The FAA is responsible for adjudicating airport compliance matters involving Federally-assisted airports arising under the Airport and Airway Improvement Act (AAIA) of 1982, as amended; certain airport-related provisions of the Federal Aviation Act of 1994, as amended; the Surplus Property Act, as amended; predecessors to those acts; and regulations, grant agreements, and documents of conveyance issued or made under those acts. [*See, FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, 14 C.F.R. Part 16] In accordance with this mandate, this Order of Dismissal and Director's Determination addresses the following issues:

1. Whether VJC as represented by the Receiver, Burton W. Wiand, has standing as the Complainant in this matter, and,
2. Whether Tristate Aviation Group of Florida LLC may intervene in this matter and be joined as a Co-Complainant.

The analysis and determination regarding the foregoing two issues is dispositive of this case and this matter is properly resolved with a determination as to standing. *America West Airlines, Inc. v. Burnley*, 838 F.2d 1343, (DC Cir. 1988), *Levine v. Vilsack*, 587 F.3d 986, (9th Cir. 2009)(where the Petitioner clearly fails to establish the necessary elements of standing it is unnecessary to reach the substantive issues.).

As developed below, the Director finds that VJC, as represented by the Receiver, Burton W. Wiand, lacks standing as the Complainant in this matter.¹⁴ The Director also finds that Tristate Aviation Group of Florida, LLC may not intervene. While Tristate may not be joined as a Co-Complainant, it has standing to file its own complaint if it can show that it otherwise meets the requirements of Part 16.

FAA's decision in this matter is based on the applicable Federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties and reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

V. APPLICABLE LAW AND POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of Airport facilities. In each such program, the Airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its Airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by Airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the Airport.

Title 49 U.S.C. § 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.¹⁵ FAA Order 5190.6B, *Airport Compliance Manual* (FAA Order 5190.6B), issued on September 30, 2009, provides the policies and procedures to be followed by the

¹⁴ The Receiver had standing to file the Part 16 complaint on behalf of VJC.

¹⁵ *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

As this decision is essentially procedural in nature, the grant assurances relevant to the issues raised in the Complaint are set forth in FAA Exhibit 2 attached to this decision.

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving federal grant funds or the transfer of federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. FAA Order 5190.6B is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. FAA Order 5190.6B analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10 (August 30, 2001) (Final Decision and Order) (*Wilson*)]

There is no private right of action under the Airport and Airway Improvement Act of 1982, as amended, now recodified at 49 U.S.C. §47101 et seq. Arrow Airways, Inc. v. Dade County, 749 F.2d 1489 (11th Cir. 1985); Four T's, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909 (8th Cir. 1997). Only the FAA may enforce the grant assurances and it has a statutory responsibility to do so. See also Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213, 1220 (10th Cir. 2001) (noting “[t]he FAA's interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest”), and American Airlines v. City of Dallas, 202 F.3d 788 (5th Cir. 2000). See also, New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 167,169 (1st Cir. 1989)(“In other words, in insuring compliance with [49 U.S.C. 47107, the statutory grant assurances], it is up to the Secretary to decide what is necessary and satisfactory.”).

The Part 16 process is not used to settle contract disputes between litigants. As the District of Columbia Circuit Court of Appeals stated in Boca Airport v. FAA:

*The petitioner offers no reason why it would have been irrational for it to rely on the Florida state courts — rather than the FAA — to provide a forum for enforcement of the contractual obligations created by the lease amendment. But whether Boca Aviation acted rationally or irrationally is beside the point. As the FAA found, the sole ‘intent of the Director’s Determination in the Boca Jet case was to eliminate an exclusive rights violation at the airport.’ Hence, ‘[w]hether the option exercised by the Authority in following through on its plan to develop the 15 acres violated a specific issue of contract law between [Boca Aviation] and the [Authority] is a matter for a state court to decide; a Part 16 complaint is not the right forum to resolve that issue.’ Boca Airport Inc v. Federal Aviation Administration, 389 F. 3d 185, 191 (DC Cir. 2004)(citing, Boca Raton Jet Center, Inc. v. Boca Raton Airport Auth., FAA Docket No. 16-97-06, at *3 (1997) (Director’s Determination))*

Monetary damages are not permitted under the Part 16 process. Such action is beyond the authority of the FAA. See, Brown Transport Co. v. City of Holland, Michigan, FAA Docket No. 16-05-09, at 9 (2006)(Director's Determination); Martyn v. Port of Anacortes, Washington, FAA Docket No. 16-02-03 at 46 (2003)(Director's Determination).

FAA Order 5190.6B outlines the standard for compliance, stating, “A sponsor meets commitments when: (1). The federal obligations are fully understood; (2). A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor’s commitments; (3). The sponsor satisfactorily demonstrates that such a program is being carried out; and (4). Past compliance issues have been addressed.” [See FAA Order 5190.6B, ¶2.8.(b.)

Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the

interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.

The Complaint and Appeal Process

Pursuant to 14 C.F.R. § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant(s) shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint(s) shall also describe how the complainant(s) directly and substantially has/have been affected by the things done or omitted by the respondent(s). [*See*, 14 C.F.R. § 16.23(b)(3-4)]

A Complaint may be dismissed if the Complainant lacks standing to bring the complaint.¹⁶ A Complainant lacks standing if it has not been substantially affected by any alleged noncompliance by an airport sponsor. 14 C.F.R. § 16.23(a). *See, Committee to Stop Airport Expansion, et. al., v. Town of East Hampton*, FAA Case No. FAA-02-12981-9, FAA Docket No. 16-02-04, June 24, 2002.

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the Complaint. In rendering its initial determination, the FAA may rely entirely on the Complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [*See*, 14 C.F.R. § 16.29]

Subparts A, B and C are applicable to complaints filed where a hearing is not permitted or requested in accordance with 14 C.F.R. §16.31(d), and/or Subpart E. Subparts A, B and C as related to non-hearing complaints do not provide a process for intervention. Subpart F (entitled “Hearings”) specifically allows a person to intervene as a party under 14 C.F.R. §16.207(a).

¹⁶ Title 14 C.F.R. § 16.25 Dismissals. Within 20 days after the receipt of the complaint, the Director will dismiss a complaint, or any claim made in a complaint, with prejudice if:

* * *

(c) The complainant lacks standing to file a complaint under §§16.3 and 16.23. The Director's dismissal will include the reasons for the dismissal.

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedures Act (APA) and federal case law. The APA provision [*See*, 5 U.S.C. § 556(d)] states, “(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” [*See also*, Director, Office Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994) and Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998)] Title 14 C.F.R. § 16.229(b) is consistent with 14 C.F.R. §16.23, which requires the Complainant to submit all documents then available to support his or her complaint. Similarly, 14 C.F.R. § 16.29 states that, “(e)ach party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance.”

Title 14 C.F.R. § 16.31(b-d), in pertinent parts, provides that “(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant.” In accordance with 14 C.F.R. § 16.33(b) and (e), upon issuance of a Director’s determination, “a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;” however, “(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable.”

Title 14 C.F.R. § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator’s final decision and order, as provided in 49 U.S.C. § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. §§ 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

The Respondent has filed a Motion to Dismiss the Complaint alleging that the Complainant fails to allege or prove facts showing that the City is in violation of any of its federal obligations; the Complainant lacks standing to bring this action; and the Complaint is not ripe. The Respondent argues that the Receiver admits that he does not know when he will build the proposed hangars, he does not know how many hangars may be built, and he does not know the location, size, or configuration of the hangars. Without this information the City argues that no determination can be made regarding compliance with the minimum standards.

The Respondent City further contends that the Receiver cannot take the place of VJC in this action. It argues that VJC is not directly and substantially affected by the City’s inability to approve hangar construction at this time and that VJC cannot bring this action in behalf of a future owner who may or may not want to build these hangars.

The Complainant replies that it does have standing to bring this action. He argues that both he (the Receiver) and VJC are directly and substantially affected by the City's actions. He argues that VJC has been denied access to the airport through the City's denial of its hangar application, VJC has been discriminated against, and that VJC has been negatively affected and devalued by the City's anticompetitive and monopolistic activities.

The City rebuts stating that Part 16 proceedings were never intended to address anti-competitive and monopolistic activities, with the exception of granting exclusive rights to any entity to provide aeronautical services. The City argues that VJC/Receiver is not the real party in interest regarding the hangars because the hangar project will be built, owned and operated, if at all, by some other, as yet unknown [at the time the Rebuttal was filed] new owners of VJC.

A. Whether VJC as represented by the Receiver, Burton W. Wiand, has standing as the Complainant in this matter.

The Complainant (VJC/ Receiver) had standing to file and pursue the complaint. However, the Complainant's sale of VJC's assets to Tristate requires the Director to review whether that standing continues. The Director finds that the Complainant, Burton W. Wiand, presently lacks standing because, among other requirements, he has sold all of VJC's airport assets to Tristate. The lease has been assigned to Tristate and the Receiver is not a tenant and no longer has any contractual relationship with the Airport. Accordingly, the Complainant is no longer directly and substantially affected by the alleged grant noncompliance within the meaning of 14 C.F.R. § 16.23(a).

The City argues that neither the Receiver nor Tristate have standing to file a complaint under 14 C.F.R. § 16.23(a). This section states:

A person directly and substantially affected by any alleged noncompliance may file a complaint with the Administrator. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. 47107(b).

When the Receiver filed the Complaint on behalf of VJC, VJC was directly and substantially affected by the alleged actions of the City in that VJC had entered into a lease with the City that provided certain rights and privileges to VJC. FAA Exhibit 1, Item 1, Exhibit 3. The lease incorporated the Airport's Minimum Standards that allowed an FBO to construct hangars with approval by the City. FAA Exhibit 1, Item 1, Exhibit 3, page 8, paragraph 14. The City was required as a condition of its federal grant assurance obligations to make the airport available to VJC as a fixed base operator on reasonable terms, without unjust discrimination. The City was required to permit VJC to build additional hangars on the same terms as other similarly situated aeronautical users. VJC could have been harmed or substantially affected if the City were to apply unreasonably its own minimum standards, or unjustly discriminate in denying VJC's application for approval to build additional hangars. Throughout the traditional pleadings stage (from the filing of the

Complaint in July 2009 to the filing of the Respondent's Rebuttal in October 2009) the Receiver, acting on behalf of VJC, had standing to pursue the complaint.

Circumstances changed, however, on November 16, 2009, when the Receiver signed an Asset Purchase Agreement (Agreement) with Tristate, transferring certain assets (most having to do with the FBO) held by the Receiver to Tristate. The Receiver no longer had any interest in VJC once it sold VJC's assets. Subsequently, on February 1, 2010, Tristate moved to intervene in the proceeding and to be joined as a Co-Complainant. Respondent City's motion to dismiss and opposition to Tristate's motion (February 18, 2010), Tristate's Response (February 22, 2010), and Complainant's Response to the City's Motion to Dismiss (February 24, 2010) followed.

In its Response to the City's Motion to Dismiss, the Receiver argues on behalf of VJC that despite the sale of VJC's assets to Tristate, VJC has standing because it continues to be directly and substantially affected by the City's non-compliance with the grant assurances. The Receiver argues:

1. The sale of assets was merely a sale of assets and did not result in the liquidation, dissolution, or closing of VJC. According to the Receiver, "[VJC] remains active and its rights as a company remain intact." FAA Exhibit 1, Item 19, paragraph II.
2. Since VJC is still liable under the lease, it necessarily has an interest in the outcome of the proceeding.
3. VJC has an additional interest in the outcome of the proceeding – there is a debt owed by Tristate to VJC and payment of that debt will depend upon profitability of the purchaser's operations and, in part, its ability to construct the hangars.

The City argues that the Complaint should be dismissed because VJC is no longer a tenant or user of the airport and that its claims are moot. Specifically, the City argues:

1. VJC will have no assets and no continuing business other than the collection of the promissory note that is a part of the sale.
2. The requirement of Tristate to make payments to VJC is not contingent in any way upon Tristate being granted the right to construct hangars at the airport.
3. If the receiver were to continue to pursue the Part 16 case, he would arguably violate his obligations to the Court and to the victims of the Nadel fraud, as he would be expending Receivership funds with no prospect of a benefit to the Receivership.
4. Neither the Receiver nor VJC are directly and substantially affected by the City's refusal to approve the construction of the hangars because VJC, through the Receiver, has sold all of its airport assets to Tristate, is no longer a tenant on the airport, and neither the Receiver nor VJC have any financial interest in the outcome of this case (VJC's only financial interest in the case is not dependent upon the

outcome but rather relates to a credit of up to \$50,000 that VJC is obliged to apply to Tristate's future payments to VJC based on amounts Tristate actually spends in trying to resolve the issues with the City).

5. The sale of Tristate was only for the assets of VJC, not for the corporate entity itself.
6. VJC no longer has an interest in the assets it conveyed to Tristate.
7. There is no longer a dispute between the airport sponsor and Complainant regarding alleged grant assurance violations that directly and substantially affect Complainant.

Analysis of the Arguments Made by the Receiver/VJC.

The Receiver presented three arguments:

1. The sale of assets was merely a sale of assets and did not result in the liquidation, dissolution, or closing of VJC. According to the Receiver, "[VJC] remains active and its rights as a company remain intact." FAA Exhibit 1, Item 19, paragraph II.

Venice Jet Center, LLC, no longer operates as an FBO at the Venice Municipal Airport. FAA Exhibit 1, Item 20. All of the assets held by the Receiver for the benefit of VJC have been transferred to Tristate. FAA Exhibit 1, Item 14, Exhibit 2, Exhibit C. The Lease between the City and VJC has been assigned in total to Tristate. FAA Exhibit 1, Item 14, Exhibit 2, Exhibit C.¹⁷ Accordingly, neither VJC nor the Receiver has an interest in the Lease and/or the airport, and neither has a contractual relationship with the City.¹⁸ It appears that any action that the City could take in this matter would not and could not affect VJC or the Receiver in any way relating to these Part 16 proceedings.

The Receiver provided a statement of the facts, including copies of the proposals he submitted to the Airport, which, together with a copy of the minutes of the City Council in the record, reflect the City's constructive decision to not approve the Complainant's proposal to build four hangars. The Receiver may have been directly and substantially affected by the City's decision to deny VJC the right to construct four hangars. However, subsequent to that time, the Receiver divested himself of the lease and any claim of the right to construct hangars. Generally, a receiver no longer has standing when the subject of the receivership is sold. *Kohl v. Fusco*, 164 Misc.2d 431, 435, 624 N.Y.S.2d 509, 511 (1994) ("Upon the sale of the subject [assets] herein, the receiver no longer had standing to maintain this proceeding in the absence of a further order of the court"). In the present case, the Receiver, as a person who alleged he was directly and substantially affected by being denied the right to build hangars by the Airport, and who has now lost any substantive

¹⁷ The Asset Purchase Agreement transferred the Assets held by the Receiver to Tristate but not the name, rights, or VJC corporation itself. As such, neither VJC nor the Receiver are operating or apparently intend to operate an FBO at the Venice Municipal Airport. As discussed previously, Tristate has established an FBO at the airport under the name of "Suncoast Air Center."

¹⁸ Complainant argues that VJC remains liable under the City's acceptance of the assignment of the lease; however, as discussed in detail in section VI. A. 2, *infra*, any such monetary interest does not create an independent basis for standing under Part 16.

interest in said lease or relationship to the Airport, has lost his standing to maintain a complaint under Part 16. Appalachian Star Ventures, Inc., v. Tri-City Airport Commission, FAA Docket No. 16-96-02 (October 22, 1997) (Final Decision and Order).

The Director agrees with the City's arguments and finds that it is immaterial that VJC was not liquidated, dissolved or closed. The sale of all the assets of VJC and the transfer of the lease to Tristate extinguished any interest VJC may have had in the alleged refusal of the Airport to approve hangar construction. The Complainant does not substantiate why it would benefit VJC in this proceeding to be an "active" corporation (as opposed to, *e.g.*, a liquidated, dissolved or closed corporation) or what rights attach to it with the status of a company in this proceeding. Also, the Complainant has not explained why having intact rights (as a corporate structure), alone, would provide it with standing to continue this suit when it has lost its nexus with the Airport through the sale. The Director concludes that VJC is not functioning at the Venice Airport as any entity (corporate or otherwise) and that despite retaining its corporate structure, it lost standing because it is no longer directly and substantially affected by the actions of the Airport.¹⁹

While VJC and the Receiver retained a minimal financial interest in the sale, we are persuaded by the City's arguments that this link is insufficient to continue standing for VJC and the Receiver under Part 16. Under the Asset and Purchase Agreement, the Receiver and VJC are obligated to apply a credit of up to \$50,000 to Tristate's future payments to VJC based on amounts Tristate actually spends in legal fees pursuing, among other claims, the Part 16 claim with the City.²⁰ We agree with the City that this financial interest is independent of the outcome of the Part 16 proceeding in the sense that monetary interests are not redressable under Part 16. If Tristate were to prevail, the corrective action plan would only compel the airport to comply with its grant assurances, not to pay legal fees. Accordingly, VJC and the Receiver cannot continue Part 16 standing here by agreeing to remain liable for monetary damages. Liability to reimburse legal fees alone is not enough to cause VJC and the Receiver to continue to be directly and substantially affected by the alleged violations of the Airport's grant assurance obligations.

2. Since VJC is still liable under the lease, it necessarily has an interest in the outcome of the proceeding.

¹⁹ VJC has not retained the same corporate structure throughout the pendency of this Part 16 proceeding. It is now being managed by a receiver, it is unknown who retains ownership of its stock, it is divested of all of its assets, and it is highly unlikely that under these circumstances that VJC will ever become a viable FBO again. As such it does not have standing. See, City Communications, Inc., v. City of Detroit, 888 F.2d 1081 1086, (6th Cir.1989)(A corporation must retain its corporate structure throughout the pendency of the suit to maintain standing), and Safir v. Dole, 718 F.2d 475, 481, (D.C. Cir. 1983)(Standing, since it goes to the very power of the court to act, must exist at all stages of the proceeding, and not merely when the action is initiated or during an initial appeal).

²⁰ The Promissory Note specifies, "Maker shall have the right to offset amounts due and payable under this Note, up to Fifty Thousand Dollars and No/100 (\$50,000), for legal and all other expenses and costs actually incurred by Maker in an effort to resolve any and all disputes with the City of Venice, including the current Part 16 Complaint." FAA Exhibit 1, Item 14 Exhibit A, Exhibit 1, Exhibit B.

The Director finds that any monetary liability VJC retains under the lease is insufficient to confer standing upon VJC under Part 16. The Director finds that VJC does not presently have a liability to the Airport under the lease unless Tristate defaults, in which case it becomes a matter among VJC, Tristate and the City to resolve. The thread of VJC's liability based upon a possible default by Tristate is not enough to allow VJC to retain standing. If Tristate were allowed to build the hangars there would not appear to be any benefit to VJC. If Tristate were not allowed to build the hangars, again, VJC would not, under the terms of the lease assignment or the sale of its assets, be affected. The Complainant has not substantiated its allegation that it has an interest in the outcome of this proceeding. Indeed, Tristate confirms in its Motion to Intervene, "[VJC] will have no assets and no continuing business other than the collection of payments of the promissory note that is part of this sale." FAA Exhibit 1, Item 14, Exhibit A, at footnote 7.

Even if the Receiver and VJC retain liability in the event Tristate defaults on the lease, this residual monetary interest in the lease does not create present standing for either party. As monetary claims are not covered by Part 16, any such interest does not render the Receiver and VJC directly and substantially affected by the actions of the Airport. See VI, A. 1, above.

The fact that the Receiver does not currently have a lease agreement with the Airport does not automatically preclude it from being directly and substantially affected by any alleged noncompliance. However, the Complainant must meet and continue to meet the requirement of § 16.23(b)(4) by providing a brief description of how he was affected. *Cf., Jetaway Aviation, Inc., v. Montrose County, Colorado*, FAA Docket No. 16-08-01 (July 2, 2009) (Director's Determination), at p. 46. The Receiver updated the pleadings in this matter by informing the FAA that he has sold his interest in said lease through the Asset Purchase Agreement to Tristate. FAA Exhibit 1, Item 19.

3. VJC has an additional interest in the outcome of the proceeding – there is a debt owed by Tristate to VJC and payment of that debt will depend upon profitability of the purchaser's operations and, in part, its ability to construct the hangars.²¹

First, the debt owed to VJC does not confer an interest to VJC to the degree that would allow VJC to have standing simply because it is a creditor. See, *Mid-State Fertilizer Co., et. al., v. Exchange National Bank of Chicago, et al.*, 877 F.2d 1333, 1340 (11th Cir. 1989)

Second, that the possibility of Tristate not being able to build the hangars, thereby causing it to default on the sale, which would result in shifting the liability to VJC, is too remote to allow VJC to retain standing. VJC appears to make the assumption that if Tristate does not build the hangars, Tristate will not be profitable and thereby default on the sale. There is nothing in the record to support this assumption. Mr. Kretchman states that the City's refusal to allow the hangars to be built is causing harm to Tristate. FAA Exhibit 1, Item 18, Exhibit A. But he does not explain what that harm would be. The degree of that "harm" is

²¹ VJC's Counsel is in error when he states that the debt is owed from Tristate to VJC. The Promissory Note clearly lists the "Payee" as Burton W. Wiand, and not VJC. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 1, Exhibit B.

never described and we cannot assume that the harm would be causing Tristate to default on the terms of the sale. VJC appears to assume in its argument that if Tristate defaults on the sale, VJC will somehow be affected. The Director concurs with the City and finds that the Complainant's argument is not persuasive. The purpose of the Receivership was to search for and liquidate the assets of Nadal's companies and distribute the proceeds to the investors. FAA Exhibit 1, Item 1, Exhibit 1. The record herein does not describe what will happen to the money derived from the sale, but it can be expected that the proceeds of the sale of VJC's assets to Tristate will benefit the victims of the Nadel fraud and the secured creditors of his defunct companies. The Record herein does not include a future business plan for VJC; however, based on the Receivership's purpose, the Director can surmise that the proceeds will simply not be plowed back into VJC to build it up to operate as an FBO at another airport let alone at Venice. Thus, the logical conclusion drawn by the Director is that VJC does not now and will not have an interest in the outcome of the proceeding.

In summary, the Complainant in this case is no longer directly and substantially affected by the alleged actions by the City. Because neither VJC nor the Receiver is presently directly and substantially affected by the alleged actions of the City in violation of its grant assurance obligations, they do not have standing to continue this proceeding. Appalachian Star Ventures, Inc., v. Tri-City Airport Commission, FAA Docket No. 16-96-02 (October 22, 1997) (Final Decision and Order)

B. Whether Tristate Aviation Group of Florida LLC may intervene in this matter and be joined as a Co-Complainant.

Tristate has moved to intervene and be joined as a Co-Complainant in this case. FAA Exhibit 1, Item 14.

In Tristate's February 1, 2010 Motion to Intervene, it argues that the FAA should permit Tristate to intervene in the proceeding for the following reasons:

1. On November 16, 2009, the Receiver entered into an Asset Purchase Agreement (APA) with Tristate for the purchase of VJC's assets. As part of the APA, VJC agreed to transfer its rights, title, and interest in the Part 16 action.
2. Legal or equitable claims arising from a contract are freely assignable in the absence of a valid anti-assignment provision and such an assignment confers standing on the assignee. Tristate cites two federal cases and one state case to support this proposition.
3. The Receiver's December 11, 2009 Motion for Approval of the Sale of Assets included sought the court to approve the APA and to transfer all of VJC's rights to Tristate, including the right to be substituted for VJC in the Part 16 proceeding. "Clearly the Federal Court agreed that the part 16 action claims are assignable." FAA Exhibit 1, Item 18.

4. Tristate has been directly and substantially affected by the City's noncompliance because it purchased VJC's assets and interest, including the right to develop the property and the City's efforts to restrict development on the leasehold are in violation of these rights.
5. The requests to build hangars are still pending and have not been approved.
6. The dispute still exists and the City continues to violate its grant assurances. Tristate remains being prevented from building hangars on its leasehold in violation of the grant assurances.
7. Tristate has complied with the 14 C.F.R. 16.21 informal resolution requirement because it has had informal meetings with the City to discuss the hangar dispute, including a meeting held on December 29, 2009.

The City argues that Tristate does not yet have standing because it has not shown how it has been directly and substantially affected and because it has not yet presented a proposal to the City to build hangars on its site or given the City the opportunity to evaluate the proposal based on the facts and circumstances as they relate to Tristate. The City states that any claim Tristate may assert is unripe as there is no actual controversy between Tristate and the City; the City indicates that it has not prohibited Tristate from any aeronautical activity. The City also argues that Part 16 does not permit intervention of a new party; that Tristate has not satisfied the requirements of Part 16 to attempt informal resolution; and that Tristate cannot rely on common law rules regarding assignment of contract claims or 'chooses in action' to establish standing to assert either VJC's or its own claims.

Addressing the Movant's points above individually:

1. On November 16, 2009, the Receiver entered into an Asset Purchase Agreement (APA) with Tristate for the purchase of VJC's assets. As part of the APA, the VJC agreed to transfer its rights, title, and interest in the Part 16 action.

To have standing to file a Part 16 complaint, the complainant must demonstrate that it is "directly and substantially affected" by the alleged noncompliance. 14 C.F.R. §16.23(a). Tristate states in paragraph 10 of its Motion that it is directly and substantially affected by the actions of the Respondent City. However, Tristate does not describe how it is directly and substantially affected by virtue of purchasing VJC's assets and interests. Simply purchasing VJC's assets alone does not transfer the direct and substantial effect of the City's action on VJC to Tristate.

Tristate's motion to intervene further states that Tristate has purchased the right to develop the property and, in paragraph 10, that the City has made efforts to restrict the development of the leasehold. Yet, nowhere in the Asset Purchase Agreement, lease, or any other document transferring any interest does it state that a right to develop property was conveyed to Tristate. Even if such a right had been conveyed, any claim that Tristate has against the City for violation of its rights under the lease or other contract is a matter of

lease or contract interpretation not within the scope of Part 16. Tristate's allegations that it purchased the right, title, and interest of VJC in the Part 16 action and that it now has the right alone to pursue the Part 16 claim are not accepted by the Director. As discussed herein, the assignment alone does not confer standing – Tristate must prove that it has been directly and substantially affected by the actions of the Airport.

Tristate appears to claim that the City unjustly discriminated against it by denying Tristate a right granted to similarly situated aeronautical users to expand at the airport. VJC argued in its Complaint (and it appears that Tristate adopts this position) that similarly situated tenants were allowed to build hangars when VJC (Tristate) was not. On this record the Director has no choice but to find that this claim is not ripe for review. There is no clear evidence that Tristate took sufficient concrete actions on its own behalf to build the hangars as designated by the Complainant. Stated differently, there is insufficient evidence to show that the City was required under its local procedures and minimum standards to consider the application that the Complainant submitted as that of Tristate.

The City was on notice that Tristate desired and intended to build the hangar project in the location proposed by the Complainant.²² It is undisputed that Tristate's Managing Director met with City Officials in late December 2009 to request City approval to build four hangars. Further, the Managing Director of Tristate attested under oath that Tristate "has every intention to build the hangars as proposed." FAA Exhibit 1, Item 18, Exhibit A. The Herald Tribune reported "Kretchman said the hangars will have to built where they are designated on Nadel's plans." FAA Exhibit 1, Item 18, Exhibit B. However, based on other statements made by Mr. Kretchman, it is unclear whether Tristate sought to build the hangars in the near term or merely asserted the abstract right to do so as an option in the future.

During the January 5 meeting of the City Council, Mr. Kretchman stated that he wanted to leave the possibility to build the hangars open because he had not done an independent study. Given that Mr. Kretchman was seeking City Council approval to assume the lease during that meeting, the Director declines to accord Mr. Kretchman's statements the weight and "waffling" characterization advocated by the City. While Tristate, in its request to join this Complaint, appears to want to step into the shoes of VJC, it cannot do so. Tristate must show that the City has unjustly discriminated against it independently and not by virtue of an asset purchase. The record lacks evidence demonstrating that Tristate actively pursued the hangar project and was rejected by the city in an unjustly discriminatory manner, which precludes a finding that Tristate has standing.²³

2. Legal or equitable claims arising from a contract are freely assignable in the absence of a valid anti-assignment provision and such an assignment confers standing on the

²² The City was certainly aware of Tristate's interest in pursuing VJC's pending application by virtue of Tristate's purchase of VJC's rights and interests in this Part 16 proceeding.

²³ Tristate is granted leave to file a complaint alleging (if it so chooses) that the Airport unjustly discriminated against it by allowing other tenants who provided no financial data to build hangars when Tristate is now required to provide the data (if that requirement so exists).

assignee. Tristate cites two federal cases and one state case to support this proposition.

In its motion Tristate states that it agrees with the allegations and legal position set forth in the Complaint and is entitled to all rights and interests arising from the assigned Lease. The objective of a Part 16 proceeding, as set forth in Section V above, is for the FAA to ensure that airport sponsors comply with their federal grant assurance obligations. Complainants have no private right of action under the Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. § 47101, et seq., or Part 16 to sue airport sponsors for noncompliance. Only the FAA has authority to enforce sponsor grant obligations. Four T's, Inc. v. Little Rock Mun. Airport Com'n, 108 F.3d 909, 916 (8th Cir. 1997); Northwest Airlines, Inc. v. County of Kent, 955 F.2d 1054, 1058-1059 (6th Cir. 1992), 510 U.S. 355 (1994); Thermco Aviation, Inc., v. County of Los Angeles, FAA Docket No. 16-06-07 (Dec. 17, 2007) (Final Decision and Order). For similar reasons neither monetary benefits nor equitable relief are available remedies to complainants in Part 16 proceedings. Therefore, parties to Part 16 proceedings cannot assign or transfer the right to receive any monetary benefit or equitable relief. See, Drake Aerial Enterprises, LLC v. City of Cleveland, FAA Docket No. 16-09-02, at footnote 8, (February 22, 2010) (Director's Determination) (The FAA's Part 16 airport enforcement proceeding is an administrative proceeding designed to determine an airport sponsor's compliance with its Federal obligations. It does not create a right of private action. Accordingly, there is no mechanism for making complainants whole or awarding damages.)

Tristate relies upon Data Consultants, Inc. v. Traywick, 593 F.Supp. 447 (D.C. Md. 1983), as authority for allowing Tristate, as the lease assignee, to intervene in this Part 16 proceeding. However, Traywick is distinguishable because it involved an assignable monetary (stock) interest. Here, the Complainant has no private right of action or monetary interest that can be assigned to a third party under Part 16. Accordingly, the Director finds that Traywick is not controlling precedent here. See also, L-3 Communications Integrated Systems v U.S., 84 Fed. Cl. 768 (2008)(In post-award bid protest by L-3 Communications for bid preparation and proposal costs, and not an injunction, the court held that L-3 was an interested party and had standing to pursue costs under the Administrative Dispute Resolution Act because L-3 was the complete successor in interest to Raytheon's Aircraft Integration Systems (AIS) Business Unit, the actual disappointed offeror that submitted the bid. Because L-3 acquired Raytheon's AIS Business Unit *in toto* by operation of law, the Anti-Assignment Act does not bar L-3 from pursuing its monetary claim.)

Tristate also cites American Medical Assoc. v. United Healthcare Corp., 2007 WL 1771498, 16-17 (S.D.N.Y. 2007) and Esposito v. CPM Insurance Services, Inc., 50 Conn. Supp. 283, 286-87 (Sup. Conn. 2006) to contend that the Receiver legitimately assigned his rights and interests in the Part 16 action. These cases are also inapposite. Tristate specifically cites United Healthcare for the proposition that the assignment did not have to reiterate Tristate's rights under the lease in writing. However, as discussed above, Part 16 relates to sponsor grant compliance, not private rights and monetary interests. The content of the assignment is irrelevant because Part 16 claims are generally not assignable to other parties in these circumstances. Even if Part 16 claims could be assigned to successors-in-

interest as a result of corporate mergers, consolidations, and reorganizations, where in essence the relationship continues with the same entity in a different form, the claim here was not ripe for assignment because the Part 16 had not been adjudicated. Compare, L-3 Communications Integrated Systems, *supra*.

Tristate cites CPM Insurance's discussion of how the concept of assignment evolved. Nothing in that discussion changes the Director's analysis and conclusion that the Receiver's assignment of the Part 16 claim was ineffective to confer standing upon Tristate. The Director accordingly concludes that Tristate cannot rely on common law rules regarding assignment of contract claims or claims in lawsuits to establish standing to assert either VJC's or its own claims. However, Tristate may have standing to file a Part 16 complaint based upon the actions of the Airport with respect to Tristate since November 2009. 14 C.F.R. §16.23(a). Denying and dismissing Tristate's motion to intervene and join and a co-Complainant, while granting Tristate leave to file a complaint regarding actions taken by the City since November 2009, will provide that opportunity.

3. The Receiver's December 11, 2009 Motion for Approval of the Sale of Assets sought the court to approve the APA and to transfer all of VJC's rights to Tristate, including the right to be substituted for VJC in the Part 16 proceeding. "Clearly the Federal Court agreed that the part 16 action claims are assignable." FAA Exhibit 1, Item 18.

This argument is based upon a misunderstanding of the court Order. The court Order dated January 20, 2010, approving the Asset Purchase Agreement specifically states, "the approval of this assignment of the VJC's interest in the Part 16 proceeding presently pending before the FAA does not divest the FAA of the independent right to determine the issue of standing in that proceeding nor is the Court's approval intended to confer standing on Tristate Aviation Group of Florida LLC, in that proceeding." FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit C. The court clearly recognized the FAA's primary jurisdiction to determine the validity of the assignment for purposes of Part 16.

Tristate was assigned and the City agreed to the assignment of the Lease between VJC and the City. FAA Exhibit 1, Item 14, Exhibit A, Exhibit 2, Exhibit B. The Lease granted VJC (and Tristate by assignment) the right to conduct commercial activities (Item 14 of the Lease) but it did not address the specific project of constructing the four hangars at issue here. The Asset Purchase Agreement between the Receiver and Tristate further specifically states that the assets were sold on an "AS IS" "WHERE IS" basis (pages one and five of the Agreement). Nothing in the Agreement or any other document relating to the sale of the assets to Tristate mentions the assignment of the right to build four hangars on airport property. While the Agreement did specify, "Seller shall sell, transfer, and deliver to Buyer... (3) the Seller's rights, title, and interest in the action styled *Venice Jet Center, LLC, v. City of Venice*, FAA Docket No: 16-09-05," it did not specify that any party, including VJC and the Receiver, had a transferable right to build four hangars. Further, the court approving the Agreement specifically clarified that Tristate could not acquire such standing if such standing was not found by the FAA. (See, footnote 4, herein).

Without any assignment of this right (if any existed) between VJC and Tristate, Tristate cannot now step into the shoes of VJC to claim it is entitled in the same respects as VJC to construct the hangars. Precedent requires that a person claiming injury by way of an assignment must be the beneficiary of that assignment. See, McKinney v. Anheuser Busch, Inc., 951 F.2d 360, 362 (9th Cir. 1991), citing Murphy v. Allstate Ins. Co., 17 Cal.3d 937, 943-44 (1976)(the [assignee] may not assert a breach of contract claim arising from the [assignor's] agreement. Because the Assignees were not parties to that agreement, they do not have standing to assert a breach of contract claim unless they are third party beneficiaries.) Our record here is void of any evidence showing that Tristate is a beneficiary of the lease between VJC and the City. Case law further supports the fact that assignees cannot assume the assignor's role unless some court has allowed the substitution. Kohl, supra, at 437, 513 (“The fact that [a law] entitles the grantee the same remedies that the grantor (receiver) had with respect to the [respondent's obligations], it does not mean that the grantee automatically steps into the shoes of the grantor in the midst of a legal proceeding without a formal act of substitution or joinder.”) In short, Tristate cannot become the Complainant (or a Co-Complainant) solely by virtue of an assignment.

As discussed in more detail under VI. B. 1, above, the Director concludes that Tristate lacks standing because there is insufficient evidence to show that it has presented a written proposal or taken any other action on its own behalf to seek approval to build the four hangars. We do not reach whether Tristate has been prohibited from any aeronautical activity because Tristate has leave to file its own complaint regarding the City's actions since November 2009. Tristate may have standing to file its own Part 16 complaint, but, as discussed herein, Tristate has not met the threshold to qualify as a Complainant, and it has not yet shown that it has been directly and substantially affected by actions of the Airport so as to confer standing at this time. Tristate would have to make that showing in any Part 16 complaint.

In part because Tristate sought to stand in the shoes of the Complainant rather than submitting its own complaint, there is insufficient evidence in this record to determine whether the Airport has unjustly discriminated against Tristate.

The Director finds that while the assignment of the Lease does not, in itself, qualify Tristate to be a (Co) Complainant in this matter, Tristate may have standing if it can show that it was directly and substantially affected by the Airports actions. As explained below, Tristate's motion to intervene and join as a co-Complainant is denied and dismissed except that Tristate is granted leave to file a Part 16 action with respect to actions taken by the City against Tristate since November 2009. As discussed elsewhere, if Tristate were to file a new Part 16 complaint, the FAA would deem the evidence submitted in this proceeding as sufficient to prove that Tristate has already met the informal resolution requirement of 14 C.F.R. §16.21(a).²⁴

4. Tristate has been directly and substantially affected by the City's noncompliance because it purchased VJC's assets and interest, including the right to develop the

²⁴ However, Tristate would still need to make a certification under §16.21(b). See footnote 26.

property and the City's efforts to restrict development on the leasehold are in violation of these rights.

Simply purchasing the assets and interests of VJC does not confer standing upon Tristate; Tristate must prove in its own right that it was directly and substantially affected by the City's action. The "right to develop the property" was a general term contained in the minimum standards and apparently afforded all tenants who signed a lease with the City. The "right to develop the property" certainly has not vested. The City had not granted VJC any specific right to construct the four hangars and Tristate, at this point, is no further along than VJC in acquiring the right to build these four hangars. Also see the discussion above, regarding Tristate's purchase of VJC assets and interest.

5. The requests to build hangars are still pending and have not been approved.

This is addressed in detail under VI. B, 1 and 3, above.

The record to be developed by Tristate, should it file its own complaint, may include, *e.g.*, a letter or other evidence showing that it adopted the Complainant's pending application or submitted its own proposal and application, updated building permit applications (FAA Exhibit 1, Item 7, Exhibit 10 – VJC Building permits dated November 7, 2008), blueprints, financial data, and construction details, etc. At that time, any subsequent refusal by the City, without sufficient justification, to allow Tristate to build the hangars may result in a finding that the City is in violation of its grant assurances.

6. The dispute still exists and the City continues to violate its grant assurances. Tristate remains being prevented from building hangars on its leasehold in violation of the grant assurances.

The FAA finds that Tristate is not directly and substantially affected by alleged noncompliance by the City at this time. This is because in our view, there is no evidence to show that Tristate has what could be considered the equivalent of a formal application before the City seeking permission to construct the four hangars. The City is clearly on notice of Tristate's intentions but on this record the FAA cannot find the City has unreasonably applied its minimum standards. Because there is not currently an application or letter or other functional equivalent (nor plans, diagrams, details, blueprints, building permits, etc.), there can be no dispute within the meaning of Part 16 at this time, nor is there a Part 16 complaint before the agency in which Tristate is a party. As a result, we cannot determine whether the City is preventing Tristate from constructing hangars on the airport.

In the record, there is insufficient evidence to conclude that Tristate meets the minimum financial requirements under the Lease and under the Aeronautical Activities Minimum Standards Document or the FBO Minimum Standards Document to allow it to construct the hangars. Accordingly we do not reach whether similarly situated activities have been approved without such a showing. Although there is evidence that Tristate seeks to pursue VJC's pending application, there are no copies in the Record of updated applications for building permits and no evidence that these permits remain valid. Tristate has not submitted

any diagrams, blueprints, schematics or plans for the location, size, materials description or construction methods for the hangars.

Given these deficiencies in the record, and the lack of a formal application or functional equivalent by Tristate to the City, the City's inaction cannot be considered unjust discrimination.²⁵ However, should Tristate choose to file an application with the City to construct the four hangars, given the record, the FAA would expect the City to act promptly on Tristate's application. If the City were not to approve the application, the FAA would expect the City to clearly articulate the reasons and provide adequate justification for the denial. At that time, of course, Tristate could file a Part 16 complaint with the FAA if it believed that the City was unreasonably withholding the right to construct the hangars.

7. Tristate has complied with the 14 C.F.R. §16.21 informal resolution requirement because it has had informal meetings with the City to discuss the hangar dispute, including a meeting held on December 29, 2009.

The City argues that Tristate has not satisfied the requirements of Part 16 to attempt informal resolution. Under Part 16, a complainant must "initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance." 14 C.F.R. §16.21(a). These efforts may include mediation, arbitration, the use of a dispute resolution board, or other form of third party assistance. FAA Airports District Offices routinely assist parties with informal resolution. Under 16.21(b), the complainant must "certif[y] that substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint have been made and that there appears no reasonable prospect for timely resolution of the dispute." The certification must include a brief description of the party's efforts to obtain informal resolution.

As discussed above, the FAA does not consider Tristate to have a pending Part 16 complaint before the agency. Therefore, any argument that it has met the informal resolution requirement is moot at this point. Tristate must independently meet the Part 16 standing requirements. The Director finds that Tristate does not meet the minimum qualifications of Part 16 to be a Complainant in this matter at this time.²⁶ However, were Tristate to file an application to construct the hangars that VJC had applied to construct, and if the City were to unreasonably delay acting on the application or unreasonably deny Tristate's application to construct the hangars, and if Tristate then chose to file a Part 16

²⁵ Again, the record lacks any written application of Tristate to construct four hangars at the Venice Airport. The record also contains no assignment of any application that VJC or the Receiver may have submitted to the City for the construction of the four hangars. Notwithstanding that the District Court's Order states that the interests, rights and obligations of VJC under the Lease are transferred to Tristate, no application for the construction of four hangars was transferred to Tristate. The Director notes that the District Court Order states that the interests, rights and obligations in this Part 16 action are assigned to Tristate but acknowledges that standing is an issue for the FAA to decide.

²⁶ Based upon the record thus far the Director finds that the exchange between Tristate and the City on December 29, 2009, and other communications meet the requirements of 14 C.F.R. §16.21(a), "Pre-complaint Resolution," and that the certification required under 14 C.F.R. §16.21(b) is all that is required to move beyond the informal resolution stage should Tristate decide to pursue this action further.

complaint, the FAA would deem Tristate to have met the 16.21(a) informal resolution requirement. The FAA would do so based upon the various efforts Tristate has made since November 2009, contained in this record, to converse with the City on its desire to construct the hangars that VJC had desired to construct. These efforts included the December 29, 2009 meeting with City officials. However, in its Part 16 complaint, Tristate would still be required to include the certification required in section 16.21(b), certifying that substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint have been made and that there appears no reasonable prospect for timely resolution of the dispute.

Therefore, the Director hereby denies and dismisses Tristate's motion to intervene and join as a co-Complainant. As stated elsewhere, the FAA grants Tristate leave to file its own Part 16 complaint were the City to unreasonably delay acting on an application filed by Tristate to construct the hangars or unreasonably deny Tristate's application to construct the hangars.

The City also argues that Part 16 does not permit intervention of a new party. Regarding the motion by Tristate to intervene, it should be noted that Part 16 does specifically address intervention. Because the term "intervention" is specifically used in the regulations found at Part 16, it is a term of art that Tristate appears to use in its pleadings intentionally. Proceedings conducted under 14 C.F.R. §16.201 *et. seq.*, allow intervention when a hearing has been ordered by the Deputy Chief Counsel. However, the facts, issues and pleadings presently before the Director do not trigger the requirements for a hearing to be held in this matter and, therefore, the procedures applicable to that hearing process are not applicable here.²⁷ Even if the triggering events of §16.201(a) were to have occurred, Tristate would not qualify to be an intervener because its financial interests could be adequately addressed by the parties in that Tristate may look to the City and/or VJC to resolve damages it may incur in this matter. 14 C.F.R. §16.207(b). Because the rules do not permit intervention at this point the Director finds that Tristate is barred from intervening in this matter.

In conclusion, neither VJC nor the Receiver may transfer a right for Tristate to act as the Complainant in this matter. Such a right does not exist in the regulations and certainly is not transferable under Part 16 proceedings. Tristate must qualify under the rules of Part 16 to act in its own behalf in filing a Part 16 complaint by, among other things, demonstrating that it is presently directly and substantially affected by the Airport's alleged noncompliance. 14 C.F.R. §16.23(a). Tristate may not simply step into the shoes of VJC to complain that the Airport is in non-compliance of its grant assurance requirements.

The Complaint was not dismissed within 20 days of the filing of the Complaint because at that time the Receiver had not yet divested VJC of its assets or the lease. The regulations specify that a complaint be dismissed within 20 days if the complainant lacks standing to file the complaint.²⁸ While 14 C.F.R. § 16.25 specifies a time limit of 20 days to dismiss a

²⁷ That is, no finding has been made against the airport sponsor as to which the sponsor has the right to request a hearing. 14 C.F.R. § 16.201, *et. seq.*

²⁸ 14 C.F.R. §16.25(c)

complaint for standing, case law and the principles of *locus standi*²⁹ compel this Complaint to be dismissed notwithstanding the requirements of the regulation. *See, America West Airlines, Inc. v. Burnley*, 838 F.2d 1343, 1344 at footnote 5 (DC Cir. 1988) (The Court dismissed America West's complaint based upon Article III standing without having the need to reach the requirements for standing in the antitrust statutes); *Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009)(The Court first addressed the issue of standing and remanded the case for dismissal thereby precluding the need to address the substantive issues).

VII. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions and responses by the parties, and the entire record, herein, and the applicable law and policy and for the reasons stated above, the Director finds that the Complainant (VJC/Receiver) presently lacks standing to bring this Complaint. Further, the Director finds that Tristate may not intervene or be joined as a co-Complainant in this matter. However, Tristate may have standing to file its own complaint. Accordingly, Tristate is granted leave to file its own complaint with respect to actions taken by the City against it since November 2009. Again, Tristate is advised that should it file this Part 16 complaint the FAA will consider it to have met the requirements of 14 C.F.R. §16.21(a) and that the certification of §16.21(b) would fulfill the requirements to have completed informal resolution. However, as noted, Tristate would still need to show that it has been directly and substantially affected by the City in accordance with §16.23(a).

ORDER

ACCORDINGLY, it is ordered that:


1. The Complaint filed by VJC/Receiver is dismissed with prejudice;³⁰
2. The motion of Tristate to intervene and be joined as a co-Complainant is denied and dismissed except that Tristate is granted leave to file its own complaint with respect to actions taken by the City against Tristate since November 2009; and
3. All other motions not specifically granted herein are denied.

²⁹ The right to bring an action or to be heard in a given forum; standing.

³⁰ As set forth herein, the Director was not required to reach a decision on the merits of the case in that it was dismissed for standing on procedural grounds. Letters from the FAA to the Airport such as those contained in FAA Exhibit 1, Item 1, Exhibits 16 and 18, indicate that the Airport appeared to delay its decision to allow this hangar construction, possibly discriminating unjustly against VJC. [December 4, 2008, FAA letter to the City: "The FAA agrees that the City of Venice appears to be unnecessarily delaying the expansion of Venice Jet Center." And the December 29, 2008, FAA letter to the City: "The delays created by the City of Venice appear to be restricting aeronautical access to the airport, which is inconsistent with Federal grant assurances and Surplus Property Deed restrictions."] In this regard the Airport is advised that notwithstanding the decision herein, its failure to timely process a tenant's request to build hangars may result in a finding of a violation of the Airport's grant assurances if a Part 16 complaint is filed or if an investigation is initiated.

RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 U.S.C. § 46110.³¹ A party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports pursuant to 14 C.F.R. §16.33(b) within thirty (30) days after service of the Director's Determination.



Randall S. Fiertz
Director
Airport Compliance & Field Operations

September 1, 2010

Date

³¹ See also 14 C.F.R. § 16.247

Index of Administrative Record
FAA Exhibit 1

Venice Jet Center, LLC, Complainant

v.

City of Venice, Florida

Docket No. 16-09-05

- Item 1** Part 16 Complaint, undated, received by the FAA, Docket section on July 6, 2009, listing Venice Jet Center, LLC as the Complainant and City of Venice, Florida, as the Respondent. The Complaint had attached a List of Exhibits as follows:
- Exhibit 1 – Order Appointing Receiver Over VJC.
 - Exhibit 2 – Sponsor Grant Assurances.
 - Exhibit 3 – VJC’s Lease.
 - Exhibit 4 – Aeronautical Activities Minimum Standards Document.
 - Exhibit 5 – FBO Minimum Standards Document.
 - Exhibit 6 – Composite Exhibit : Venice Herald Tribune, Venice Gondolier Sun and Sarasota Herald Tribune Articles.
 - Exhibit 7 – Lang’s Emails to Kit McKeon Dated December 6, 2007.
 - Exhibit 8 – Lang’s Correspondence to Nancy Woodyly dated September 24, 2008.
 - Exhibit 9 – Complaint for Declaratory Relief and Injunction.
 - Exhibit 10 – VJC’s Informal Complaint to FAA.
 - Exhibit 11 – City’s Response to VJC’s Informal Complaint to FAA.
 - Exhibit 12 – FAA Letter Dated December 4, 2008.
 - Exhibit 13 – Kaplan Kirsch & Rockwell Legal Opinion.
 - Exhibit 14 – FAA Letter Dated December 29, 2008.
 - Exhibit 15 – Receiver’s Letter Dated February 2, 2009.
 - Exhibit 16 – FAA Letter Dated February 19, 2009.
 - Exhibit 17 – Receiver’s Letter Dated February 25, 2009.
 - Exhibit 18 – FAA Letter Dated March 3, 2009.
 - Exhibit 19 – Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A. Legal Opinion.
 - Exhibit 20 – Receiver’s Letter Dated May 4, 2009.
 - Exhibit 21 – Email From the FAA Dated May 18, 2009.
- Item 2** FAA Notice of Docketing, dated July 10, 2009.
- Item 3** Respondent’s motion dated July 23, 2009 for an extension of time to file an Answer.
- Item 4** Complainant’s opposition dated July 27, 2009, to Respondent’s Motion to extend the time to file its Answer.
- Item 5** FAA Notice of Extension of Time to file an Answer dated August 3, 2009.
- Item 6** Respondent’s Answer and affirmative defenses dated September 2, 2009.
- Item 7** Respondent’s Motion to Dismiss the Complaint dated September 2, 2009.
- Exhibit 1 Indictment, United States v. Arthur G. Nadel

- Exhibit 2 Receiver's Declaration in Support of the Unopposed Motion to Expand the Scope of the Receivership
- Exhibit 3 6/25/09 Letter from Receiver to R. Anderson
- Exhibit 4 7/1/09 Letter from Catherine M. Lang to Sen. Mel Martinez
- Exhibit 5 7/21/09 Letter from Receiver to R. Anderson
- Exhibit 6 6/16/08 Letter from E.G. Boone to City Clerk
- Exhibit 7 7/1/08 Letter from E.G. Boone to Mayor
- Exhibit 8 7/14/08 Email from N. Woodley to Venice Jet Center
- Exhibit 9 8/18/08 Letter from Venice Jet Center to Mayor
- Exhibit 10 11/7/08 Building Permit Applications for Hangars by VJC
- Exhibit 11 Excerpts of City Council Meeting Minutes
- Exhibit 12 2/04/09 Letter from R. Anderson to R. Henry, FAA ADO
- Exhibit 13 FAA Approved ALP
- Exhibit 14 Schematic of VJC Proposed Hangars overlaid on ALP Detail
- Exhibit 15 Ethics Commission Order
- Exhibit 16 Receiver's Third Interim Report, Filed on 8/17/08
- Exhibit 17 6/13/08 Letter from E.G. Boone to City Clerk
- Exhibit 18 6/23/08 Letter from M. Black to E.G. Boone
- Item 8** Complainant's Motion dated September 10, 2009, to Extend Time to File Reply.
- Item 9** Complainant's Reply dated September 30, 2009, to the Answer and Motion to Dismiss.
 - Exhibit 1 Land Use Inspection Report
 - Exhibit 2 Master Plan, Venice Municipal Airport, September 2000.
 - Exhibit 3 Declaration of E.G. Boone.
 - Exhibit 4 Letter dated September 14, 2009, to Secretary Tom Pelham from A.C. Schmieler.
 - Exhibit 5 Google Map.
 - Exhibit 6 T-Hanger (sic) Waiting List Policy.
- Item 10** Respondent's Motion for extension of time to file its Rebuttal dated October 5, 2009.
- Item 11** FAA's letter dated October 7, 2009, granting an extension of time allowing Respondent to file its Rebuttal.
- Item 12** Respondent's Rebuttal dated October 28, 2009, to the Complainant's Reply.
 - Exhibit A Settlement Stipulation – Sunshine Act Lawsuit
 - Exhibit B Asset Purchase Agreement
 - Exhibit C Articles of Organization of Venice Jet Center, LLC
 - Exhibit D Excerpt: Venice City Council Meeting: 1/13/09
 - Exhibit E Draft Lease
 - Exhibit F Documentation of AIP Grant for Reconstruction of Runway 13-31
 - Exhibit G Documents Related to Recommissioning of Runway 13-31
 - Exhibit H Lead Bearing Capacity of Runways
 - Exhibit I Preliminary Traffic Data – March – August 2009
 - Exhibit J List of AIP Grants for Venice Municipal Airport.
 - Exhibit K Documentation of AIP Grant for Design Work for Rehabilitation of Runway 4-22

- Item 13** FAA letter dated January 8, 2010, to Mr. Isaac Turner from Bart Vernace.
- Item 14** Tristate Aviation Group of Florida LLC motion dated February 1, 2010, to intervene and for Joinder as Co-Complainant.
- Exhibit A Motion for Approval of the Sale of the Assets of the Venice Jet Center and Agreement With Northern Trust, N.A.
 - Exhibit 1 Asset Purchase Agreement
 - Exhibit A Assets
 - Exhibit B Promissory Note
 - Exhibit D Bill of Sale
 - Exhibit 2 Agreement Regarding claims and Obligations
 - Exhibit A Receivership Assets & Liabilities With Northern Trust, NA
 - Exhibit B Consents to Assignments by city of Venice
 - Exhibit C Court Order approving sale and transfer to Tristate
- Item 15** FAA's letter dated February 16, 2010, extending the time for the City's response to the Motion of Tristate Aviation Group of Florida LLC
- Item 16** Respondent's Motion dated February 18, 2010, to Dismiss; and opposition to Tristate Aviation Group Motion to Intervene and for Joinder as Co-Complainant.
- Exhibit I The City of Venice's Response to Receiver's Motion for Approval of Sale of the Assets of the Venice Jet Center and Agreement With Northern Trust, N.A.
 - Exhibit II Venice City Council Meeting – January 5, 2010, 3:28:42
 - Exhibit III Venice City Council Meeting – January 5, 2010, 3:11:41
 - Exhibit IV Receiver's Unopposed Request for Leave to File Complaint Pursuant to Title 14 C.F.R. part 16
- Item 17** Respondent's Motion dated February 18, 2010, for Leave to File Documents
- Item 18** Tristate Aviation Group of Florida LLC's Opposition dated February 22, 2010, to City's Motion to Dismiss.
- Exhibit A Sworn Declaration of Donald Martin Kretchman of Tristate. Attachment – Mr. Kretchman's written statement to the City Council meeting on February 9, 2010.
 - Exhibit B November 12, 2009 Newspaper article quoting Tristate's stated position regarding the hangars.
- Item 19** Complainant's Response dated February 24, 2010, to the City's Motion to Dismiss.
- Item 20** Letter dated March 24, 2010, to Robert C. Anderson, Esq., from Richard L. Richards.
- Item 21** FAA Order dated February 25, 2010, extending time for further action and closing the record.
- Item 22** Letter dated March 26, 2010, to Richard L. Richards, Esquire, from Robert C. Anderson
- Item 23** FAA Order dated April 21, 2010, extending time for further action.
- Item 24** FAA Airport Master Record, FAA Form 5010-1, April 8, 2010.
- Item 25** 2009 Limited Liability Company Annual Report, Venice Jet Center, LLC

FAA EXHIBIT 2

The grant assurances relevant to the issues raised in the Complaint are the following:

The Airport Sponsor Assurances and Deed Covenants

The AAIA, 49 U.S.C. § 47107, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Pursuant to 49 U.S.C. § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 U.S.C. § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, “Sponsor’s Obligations.” Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

The City of Venice is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153. A Surplus Property Deed provides, in relevant part, that “. . . the property transferred hereby . . . shall be used for public airport purposes, and only for such purposes, on reasonable terms and without unjust discrimination.” These deed covenants are the same as the Federal grant assurances discussed below and that are also imposed upon the Respondent. Our analysis and enforcement of the obligations is identical.³²

Grant Assurance 1, *General Federal Requirements*

Grant Assurance 1, General Federal Requirements, implements the provisions of Title 49 U.S.C., 47107, and states, in pertinent part

“[The Airport Sponsor] will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines and requirements as they relate to the application, acceptance and use of Federal funds for this project, including but not limited to” specifically listed Federal legislation and Federal regulations.

Among the list of Federal legislation and regulations included in this grant assurance is 49 U.S.C. subtitle VII, as amended, 42 U.S.C. §§ 4321 *et. seq.*, 14 C.F.R. Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings, 14 C.F.R. Part 150, Airport Noise Compatibility Planning, and 49 C.F.R. Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Grant Assurance 5, *Preserving Rights and Powers*

Grant Assurance 5, *Preserving Rights and Powers*, implements the provisions of Title 49 U.S.C. 47107, and requires, in pertinent part, that the sponsor of a federally obligated airport

³² See footnote 3.

“...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.”

The FAA Order 5190.6B describes the responsibilities under Grant Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [See FAA Order 5190.6B, Sec. 6.3(b)]

Grant Assurance 19, Operation and Maintenance

Grant Assurance 19, “Operation and Maintenance,” implements 49 U.S.C. § 47107(a)(7), and requires, in pertinent part, that the sponsor of a Federally-obligated airport assure:

“a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:

- (1) Operating the airport’s aeronautical facilities whenever required;*
- (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,*
- (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.*

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

b. It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.” [See FAA Order 5190.6B, Sec. 7.3]

Assurance 22, Economic Nondiscrimination

The owner of any airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination* deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

“...will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [(a)]

b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-

(1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and

(2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.

h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6B, Sec. 14.3.]

FAA Order 5190.6B describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See FAA Order 5190.6B, Chapter 9]

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See FAA Order 5190.6B, Sec. ¶9.1.(a)]

Grant Assurance 23, Exclusive Rights

Federal grant assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

“...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.”

“...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...”

“...will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code.”

In FAA Order 5190.6B, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See FAA Order 5190.6B, Sec. 3-9 (e).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* FAA Order 5190.6A; Section 3-9(c).]