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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA, et al.,)

11)
12 Plaintiffs,)

13 v.)

14 CITY OF SANTA MONICA,)

15 Defendant.)
16

CASE NO. CV 08-2695 GW (Ex)

ORDER GRANTING TEMPORARY
RESTRAINING ORDER AND SETTING
DATES FOR PRELIMINARY
INJUNCTION HEARING; ORDER TO
SHOW CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT ISSUE

17 This matter is before the Court on the Ex Parte Application for Temporary Restraining Order
18 ("Plaintiffs' Application") filed by plaintiffs United States of America and Mary E. Peters, the
19 United States Secretary of Transportation (collectively "Plaintiffs"). The Court has jurisdiction of
20 this matter pursuant to 28 U.S.C. §§ 1331 and 1345 and venue is proper pursuant to 28 U.S.C. §
21 1391(b) and 49 U.S.C. §§ 46106, 46107(b) and 47111(f). Having reviewed the Complaint,
22 Plaintiffs' Application, the opposition of defendant City of Santa Monica ("the City"), and all
23 supporting papers, declarations and exhibits, and other materials in the case file, the Court now
24 GRANTS the requested temporary restraining order and issues an Order to Show Cause why a
25 preliminary injunction should not issue.

26 Plaintiffs have demonstrated that the City has enacted an ordinance that the City originally
27 planned to begin enforcing on Friday, April 24, 2008, but which the parties agreed in oral off-the-
28 record discussions with this Court to forestall pending the instant hearing on Plaintiffs' Application.
See Solco Decl., Exh. 1 at 29-31. The City's ordinance affects the classes of airplanes which may

1 use Santa Monica Airport ("the Airport"). On April 23, 2008, Plaintiffs, concerned that the
 2 ordinance violates various statutory provisions and a settlement agreement reached in 1984 between
 3 the City and the Federal Aviation Administration ("FAA"), issued an interim cease and desist order
 4 ("Interim Order") through Kevin L. Solco, the Acting Director of the Office of Airport Safety and
 5 Standards of the FAA ("Acting Director"). See Solco Decl. ¶ 3 & Exh. 1. The Interim Order
 6 requires that the City: 1) cease and desist immediately from enforcing the ordinance, 2) publicly
 7 withdraw a letter informing airport users of the impending enforcement of the ordinance, and 3)
 8 provide written notice to airport users that the ordinance is in abeyance pending completion of the
 9 administrative process of the FAA. The Interim Order further requires the City to provide copies
 10 to the FAA of the notification sent to users (and a list of users to whom the notification was sent),
 11 and notifies the City of its rights to respond to the Interim Order. See *id.* at 27-28.

12 The Acting Director issued the Interim Order pursuant to 14 C.F.R. § 16.11, as the result of
 13 a delegation from the Administrator of the FAA, who in turn has the right to issue such orders under
 14 49 U.S.C. §§ 40113(a) and 46105(c). Once the Interim Order was issued, it remains in effect "under
 15 its own terms or until superseded." 49 U.S.C. § 46105(a). It may be amended, modified or suspended
 16 by the Secretary or Administrator pursuant to 49 U.S.C. § 46105(a), or the City may apply for review
 17 of the Interim Order by filing a petition for review in the United States Courts of Appeals for the
 18 District of Columbia Circuit or Ninth Circuit, see 49 U.S.C. § 46110(a). If the City files such a
 19 petition, such court has "exclusive jurisdiction" to review the order once the clerk of the court sends
 20 a copy of the petition to the necessary governmental official. See 49 U.S.C. § 46110(b) and (c);
 21 *Foster v. Skinner*, 70 F.3d 1084, 1087-88 (9th Cir. 1995); *Friends of Gateway v. Slater*, 257 F.3d 74,
 22 77 (2d Cir. 2001), *cert. denied sub nom., Friends of Gateway v. Mineta*, 534 U.S. 1128 (2002).

23 The City argues that because it has not filed such a petition, the exclusive jurisdiction of the
 24 D.C. or Ninth Circuits has not taken effect. While that may be true here, that does not mean that, as
 25 a result, this Court has jurisdiction to consider the procedural or substantive merits of the Interim
 26 Order. The statutory scheme plainly rests that power with the Department of Transportation, the FAA
 27 or, if the City files a petition, with the Courts of Appeal. Thus, until the City files a petition before
 28 either the D.C. or Ninth Circuit, jurisdiction over the matter remains at the governmental agency

1 level. The Interim Order itself sets forth the City's procedural rights before the agency. As such, this
 2 Court has no power to adjudicate either the substantive merits or the procedural regularity leading up
 3 to the issuance of the Interim Order and the City's arguments in that respect in response to Plaintiffs'
 4 Application are misplaced. Cf. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535
 5 U.S. 743, 762 (2002).¹ This Court's role is to ensure that the Interim Order is enforced pending
 6 further proceedings on the Order in venues other than this Court, as discussed above. See 49 U.S.C.
 7 §§ 46106, 46107(b) and 47111(f).

8 The City argues that the Court must consider the substantive and procedural merits of the
 9 Interim Order in the course of assessing Plaintiffs' likelihood of success on the merits. Plaintiffs
 10 plainly do not request, by way of this action, that the Court approve of the Interim Order and its terms.
 11 See Complaint ¶¶ 28-31 & Prayer for Relief. Plaintiffs only ask that the Court enforce the Interim
 12 Order pending any further review, either before the FAA or the Circuit Courts of Appeal should the
 13 City elect to proceed down that route. Therefore, this Court is in no position, either under the law or
 14 by invitation, to forecast the merits of the Interim Order and its terms.

15 Accordingly, the Court grants Plaintiffs' Application. See *United States v. Nutri-Cology, Inc.*,
 16 982 F.2d 394, 398 (9th Cir. 1992) ("In statutory enforcement cases where the government has met
 17 the 'probability of success' prong of the preliminary injunction test, we presume it has met the
 18 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding
 19 by Congress that violations will harm the public."); *Civil Aeronautics Bd. v. Carefree Travel, Inc.*,
 20 513 F.2d 375, 385 (2d Cir. 1975).

21 In light of the above discussion, the City is ordered:

- 22 1) To comply with the Interim Order the Acting Director issued on April 23, 2008;

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 24 ¹ Were the Interim Order a final agency action and were the matter before this Court under the Administrative
 25 Procedure Act, then perhaps the conclusion might be otherwise, although the Court does not decide that at this stage.
 26 See *Americopters, LLC v. FAA*, 441 F.3d 726, 735 (9th Cir. 2006) ("[I]f an FAA order is not final, neither we nor the
 27 district court have jurisdiction over the case [under the APA]."); cf. *Village of Bensenville v. FAA*, 457 F.3d 52, 69
 28 (D.C. Cir. 2006); but see *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994). Here, the Interim Order is just that,
 interim, and it remains in effect "under its own terms or until superseded," and may be amended, modified or
 suspended by the Secretary or Administrator pursuant to sections 46105(a) and 46110(a). See *Promptair, Inc. v.*
Hinson, 1996 U.S. dist. LEXIS 17366, *11-12 (N.D. Ill., Nov. 21, 1996) ("The fact that the review sought here is of a
 contemplated FAA action, rather than a completed action, is of no effect. Congress intended that any review of FAA
 action take place in the courts of appeals.") (Emphasis in original).

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2) To cease and desist from the enforcement of the ordinance during the pendency of the FAA's administrative proceedings or any proceedings before the United States Court of Appeal for the D.C. Circuit or Ninth Circuit (except as expressly permitted by such court in connection with this case), with respect to the validity of that ordinance; and

3) To permit Category C and Category D aircraft to operate at the Airport during that same time period to the extent that such aircraft are permitted to do so under federal law.

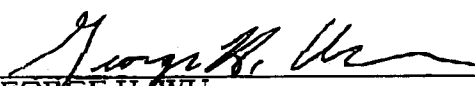
Unless the City wishes to waive the necessity of further proceedings before this Court, the Court sets the following schedule for the Order to Show Cause proceedings:

- If the City wishes to file a brief in connection with the Order to Show Cause, it is to file, provide a courtesy copy directly to the Court, and personally serve such materials no later than 12 p.m. on May 6, 2008; and
- If Plaintiffs wish to file a reply brief, they are to file, provide a courtesy copy directly to the Court's chambers, and personally serve such material no later than 12:00 p.m. on May 12, 2008.

The Order to Show Cause hearing will be held on May 15, 2008, at 8:30 a.m.

IT IS SO ORDERED.

DATED: April 28, 2008



 GEORGE H. WU
 UNITED STATES DISTRICT JUDGE