BEFORE THE

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C.

UNITED AIRLINES, INC.,	:	
Complainant,	:	
v.	:	Docket FAA-16-14-____
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,	:	
Respondent.	:	

COMPLAINT OF UNITED AIRLINES, INC. UNDER 14 C.F.R. PART 16 AGAINST THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

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COMPLAINT OF
UNITED AIRLINES, INC. UNDER 14 C.F.R. PART 16
AGAINST THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

I. INTRODUCTION AND OVERVIEW.

1. Under federal law, the Port Authority of New York and New Jersey ("Port Authority") is required to operate Newark Liberty International Airport ("EWR") "for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination." 14 C.F.R. Part 152, App. D, § II.20.[1] In fact, however, the Port Authority operates EWR for its own benefit, contrary to the

[1] *See also* FAA Airport Compliance Manual, FAA Order 5190.6B, App. A. "Airport Sponsor Assurances." § 22.a. ("Sponsor Assurances") (requiring airport sponsors to "make the airport available as an airport for public use on reasonable terms . . .").

interests of the traveling public and the aeronautical users of the airport, imposing excessive, unreasonable, and discriminatory charges to generate huge surpluses that are siphoned off to non-aeronautical operations.

2. In this Complaint under Part 16 of the Federal Aviation Regulations, made pursuant to 14 C.F.R. §§ 16.1, *et seq*., United Airlines, Inc. ("United") requests that the Federal Aviation Administration ("FAA") institute an investigation under 14 C.F.R. § 16.29 into the failure of the Port Authority to comply with its federal grant assurances and other statutory obligations[2] relating to airport fees and other actions at EWR.

3. Specifically, such an investigation is necessary because the Port Authority, as the operator of EWR:

- charges aeronautical users, including United,[3] exorbitant and unreasonable rates;
- uses a fee methodology that is not cost-based and lacks transparency;
- fails to make EWR available on reasonable terms;
- generates excessive surplus revenues in order to subsidize non-aeronautical functions;

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[2] *See* Sponsor Assurances (requiring airport sponsors to comply with a system of sponsor assurances contained in grant-in-aid agreements issued under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. §§ 41701 *et seq*.); *see also* 14 C.F.R. Part 152, App. D. (requiring grant applicants to certify that they will comply with prescribed assurances).

[3] United has standing to file this Complaint as an airline operating at EWR that is "directly and substantially affected by any alleged noncompliance" with the Sponsor Assurances. *See* 14 C.F.R. § 16.23(a).

- improperly diverts airport revenue; and
- unjustly discriminates among aeronautical users

in violation of the Airport and Airway Improvement Act (49 U.S.C. §§ 47101, *et seq*.) ("AAIA"); the Anti-Head Tax Act (49 U.S.C. § 40116) ("AHTA"); FAA, Policy Regarding Airport Rates and Charges, 78 Fed. Reg. 55330 (Sep. 10, 2013) ("Rates & Charges Policy"); the Sponsor Assurances; the Airline Deregulation Act (the "ADA") (49 U.S.C. §§ 41713, *et seq*.); and FAA, Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696 (Feb. 16, 1999).

4. The Port Authority's motivation to charge excessive rates is evident: EWR generates huge surplus revenues above its reasonable costs, which the Port Authority then uses to subsidize its other vast and loss-making non-aeronautical operations. Since 2004, the Port Authority has diverted more than $2 billion from the New York area airports to non-airport uses. Instead of functioning in accordance with its Sponsor Assurances and as a prudent airport proprietor that charges users only what is necessary to cover its aeronautical costs, the Port Authority systematically generates excessive surpluses at EWR through unreasonable fees, and then diverts airport revenues on a massive scale. The Port Authority's limited legal ability to divert airport revenue does not, however, give it *carte blanche* to make airlines pay for its non-airport projects with excessive and unreasonable fees. United and other airlines at EWR, and ultimately the traveling public, pay the price to the tune of hundreds of millions of dollars each year.

5. In fact, the Port Authority exceeds the limits of its right to divert airport revenues. The Port Authority may only use some portion of airport revenues for "general debt obligations or other facilities of the owner or operator." 49 U.S.C. § 47107(b)(2). The Port Authority has violated this restriction repeatedly by using airport revenues to pay for highways, bridges, parks, hospitals, and other facilities that it does not own or operate. The Port Authority currently plans to spend $1.8 billion over a ten-year period to improve roads and bridges it does not own or operate. In 2014 alone, the Port Authority will spend $181 million to repair the Pulaski Skyway and $60 million on the Wittpenn Bridge, structures owned and operated by the State of New Jersey. *See* paragraphs 30-31.

6. The effect of the Port Authority's revenue diversion is to burden United, other airlines, and airline passengers with the costs of the Port Authority's unrelated real estate and surface transportation assets. In passing the AHTA, Congress intended to prevent the undue burden on interstate commerce and the economic harm to airlines and passengers that would result if state and local governments were allowed to raise general revenues on the back of commercial aviation.[4] As the FAA recently stated, "[t]he purposes of the revenue use requirements are to prevent a 'hidden tax' on air transportation, and to ensure that Federal airport grants are used to supplement funding for airport projects and are not simply used to substitute funds diverted to support local non-airport programs."

[4] *See, e.g., Northwest Airlines, Inc. v. County of Kent, Michigan ("Kent County")*, 510 U.S. 355, 363 (1994).

FAA, Policy and Procedures Concerning the Use of Airport Revenue; Proceeds from Taxes on Aviation Fuel, 78 Fed. Reg. 69789, 69790 (Nov. 21, 2013). Yet that is precisely what the Port Authority is accomplishing through its combination of unreasonable rates and revenue diversion.

7. This diversion of revenue away from the Port Authority airports threatens to hamper the airports' ability to undertake needed safety and infrastructure improvements. The Port Authority's own consultants have concluded that the practice of spending airport revenues on unwise real estate ventures and other non-performing assets has led to inadequate resources for investment in vital airport infrastructure and maintenance. *See* paragraph 48. Despite saddling aeronautical users with the highest fees in the nation, the Port Authority's airports paradoxically offer deteriorating facilities, insufficient staffing, and poor customer satisfaction. *Id*.

8. Under federal law, the airfield fees paid by United must be related to recovering the costs of operating and maintaining the airfield and must be transparent and reasonable. *See, e.g.,* Rates and Charges Policy, 78 Fed. Reg. at 55333-35, §§ 2-2.72. Yet, these fees at EWR are set through a hidden "cost-plus" formula that creates a markup of 38% above actual costs. *See* paragraph 36. This formula creates a perverse incentive for the Port Authority to *increase* the expenses included in the rate base, because the more "costs" the Port Authority passes on to the airlines, the more profit it earns. The net effect is that the Port Authority

increases cost components in the rate base and then exacts a significant *ad valorem* premium on top of the already unreasonable cost.

9. The FAA has recognized that accumulation of surplus revenues may warrant an investigation into the reasonableness of rates. *See, e.g.,* Rates and Charges Policy, 78 Fed. Reg. at 55335, § 5.2. EWR typically generates an annual surplus in excess of $160 million. In the five-year period 2007-2011, EWR gave the Port Authority a staggering $1.6 billion in operating cash flow. *See* paragraph 59. This is money the Port Authority collects from United and other airlines, but that far exceeds the costs of operating EWR. At the same time, the airfield fees at EWR are by far the highest in the nation – 59% higher than at the next most expensive non-Port Authority airport (Chicago O'Hare) and even 75% higher than at John F. Kennedy International Airport ("JFK"), which the Port Authority also operates. *See* paragraphs 21-22. These facts alone should give the FAA serious concern about whether the Port Authority is meeting its obligations under federal law and in the Sponsor Assurances. Further, the Port Authority has monopoly power in the New York metropolitan airport market. *See* Section IV.C, below. Simply put, there is no "effective market discipline" that could act as a check on rates at EWR. *See* Rates and Charges Policy, 78 Fed. Reg. at 55335, § 4.2.1.

10. Pursuant to its Sponsor Assurances, the Port Authority has promised that it will operate EWR "for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination." 14 C.F.R. Part 152, App. D., § II.20. In fact, however, the Port Authority operates EWR for its own benefit, and

contrary to the interests of the traveling public and the aeronautical users of the airport.

11. In addition, the unreasonableness of several specific charges at EWR in 2014 merits investigation by the FAA:

- The revised Aircraft Rescue and Fire Fighting ("ARFF") force will increase United's costs at EWR by more than $25 million annually and almost 510% more than in 2012. The Port Authority staffs ARFF with airport police, trained as firefighters, each of whom will cost the Port Authority an average of $242,000 annually in compensation, overtime, and benefits, a sum considerably in excess of the market compensation for firefighters. *See* paragraph 86. The Port Authority's budget for the 2014 ARFF costs includes overtime expense that totals 42% of straight-time expense. The Port Authority will include the entire cost of the ARFF in the EWR rate base, along with a $9 million markup.
- Non-ARFF security costs included in the landing fee total more than $37 million. The Port Authority also charges the airlines a 14% markup on these costs. Security costs have risen 40% since 2010. While security is a necessary cost at all airports, high salaries and benefits, as well as excessive overtime, contribute to unreasonably high expenses at EWR.
- The EWR rate base includes excessive and unreasonable administrative costs, largely the result of unconstrained spending on overtime and other benefits. For example, the seven highest-paid employees in the Port

Authority's Aviation Department in 2013 were non-exempt workers whose total compensation (with overtime) was 209% of their base pay. *See* paragraph 52. In all, United pays millions of dollars more than it should each year because of the Port Authority's unreasonable failure to control its expenses.

12. The Port Authority's rate structure also unlawfully discriminates against aeronautical users of EWR. The Port Authority charges higher Flight Fees for EWR than it does at the other major airports it operates in the New York metropolitan market. There is no economic justification for these higher charges at EWR; in fact, the Port Authority's cost per enplanement is actually higher at JFK than at EWR. *See* paragraph 168. The law provides that "aeronautical fees may not unjustly discriminate against aeronautical users or user groups." Rates and Charges Policy, 78 Fed. Reg. at 55334, § 3. Because it uses EWR as its New York City-area hub, the unjustifiably higher Flight Fee at EWR puts United at a significant competitive disadvantage.

13. Accordingly, United asks the FAA to investigate (i) the entire rate-making structure at EWR; (ii) the reasonableness of the resulting aeronautical fees; and (iii) the extent to which the Port Authority diverts aeronautical revenues at EWR to non-aeronautical functions. United further requests that the FAA order a comprehensive audit of the Port Authority operation of EWR, order the Port Authority to provide complete and detailed financial information to United, and order all other appropriate relief to United.

II. CERTIFICATION.

14. Pursuant to 14 C.F.R. § 16.21(b), United certifies that it has made substantial and reasonable good faith efforts to resolve the disputed matter informally with the Port Authority prior to filing this Complaint and there is no reasonable prospect for timely resolution of the dispute. These good faith efforts, which are detailed in Section IV.F, below, include seeking explanations of the methodology used to calculate the fees; repeated requests for a reduction of the fees in light of the huge revenues produced and the disparity with other Port Authority operated airports; and attempts to have specific charges, such as the ARFF costs, reduced to reasonable levels. United officials have met with Port Authority officials on numerous occasions to resolve this matter without enforcement action, but the Port Authority has been and continues to be unwilling to respond to reasonable requests for information to which United is entitled, make any meaningful reductions to the fees charged at EWR, or otherwise make any structural changes to the rate-making methodology.

III. JURISDICTION.

15. The Federal Aviation Act of 1958, 49 U.S.C. §§ 40101, *et seq.* (the "Aviation Act"), confers broad authority on the FAA to regulate air commerce. Under the AAIA, an airport receiving federal assistance in the form of an Airport Improvement Program grant, such as EWR, must be "available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1). The FAA has a statutory mandate to ensure that airport owners comply with the

Sponsor Assurances, including the obligations to impose only reasonable rates and charges on airport users and to apply such rates in a uniform and non-discriminatory manner. 49 U.S.C. § 47107; *Northwest Airlines, Inc. v. Indianapolis Airport Authority*, FAA Docket No. 16-07-04 (Oct. 7, 2009) ("*Indianapolis Airport*") at 11.

16. The fees at issue result from unilateral actions and decisions of the Port Authority to pass unreasonable and excessive costs on to United. United has not agreed to those charges. The methodology for calculating some of these fees derives from leases dating to the 1970s to which United was not a party but to which it ultimately became a successor-in-interest. *See* paragraphs 33, 117-121. The FAA has authority under 49 U.S.C. §§ 46101 and 46105 to investigate a complaint with respect to unreasonable airport rates and charges deriving from written agreements. *Union Flights, Inc. v. City and County of San Francisco*, FAA Docket No. 16-99-11, 2000 WL 311170, at *14 (Feb. 15, 2000); *Continental Micronesia, Inc. v. Commonwealth of the Northern Mariana Islands and Commonwealth Ports Authority*, DOT Docket No. 5019, 1995 WL 156451, at *10 (Apr. 10, 1995) (noting that FAA could consider airline's challenge to fee imposed by written agreement with FAA); *Delta Airlines v. Lehigh-Northampton Airport Authority*, DOT Docket No. 50264, 1995 WL 262369, at *1 ("we consider the amended complaint [regarding a challenge of rates set by a written agreement] to

be a Part 13[5] challenge and will refer this matter to the Federal Aviation Administration") (May 4, 1995) (same); *see also* Rates and Charges Policy, 78 Fed. Reg. at 55332 (noting under Section C., "Applicability of § 113 of the FAA Authorization Act of 1994" that "a dispute that is not subject to expedited [DOT] procedures [because it is governed by a written agreement], will be processed by FAA under procedures applicable to airport compliance matters in general"). *See also* paragraphs 118-120.

IV. FACTS.

A. BACKGROUND.

1. Relevant Parties.

17. United operates approximately 135,000 departures from EWR annually. United is the carrier with the largest presence at EWR; consequently, the Port Authority's continued imposition of the challenged fees directly and substantially affects United.

18. The Port Authority is a bi-state agency that was established as "The Port of New York Authority" on April 30, 1921, to administer the common harbor interests of New York and New Jersey, pursuant to Article I of the U.S. Constitution, with Congressional consent. In 1972, the agency's name was changed to "The Port Authority of New York and New Jersey" to reflect its role of serving both states. The Port Authority is the operator of multiple federally-assisted

[5] The "Part 13" procedure was the precursor to the Part 16 procedure, first adopted in 1996. *See* 14 CFR § 16.1, *et seq*.

airports, including JFK, EWR, LaGuardia Airport ("LGA"), Stewart International Airport, Teterboro Airport, and Atlantic City International Airport.

19. EWR, the Newark/New York City metropolitan area's first major airport, was built by the City of Newark and opened in 1928. The Port Authority has operated EWR under a lease with the City of Newark since 1947.

20. The Port Authority is the "sponsor" for EWR within the meaning of 14 C.F.R. § 16.3. The Port Authority receives federal financial funds for EWR. Since 2009, the Port Authority has received nearly $280 million in FAA Airport Improvement Program grants related to EWR and the New York City airports.[6]

2. EWR Generates Huge Revenue Surpluses While Charging The Highest Fees In The Nation.

21. At EWR, as at JFK, airlines are charged a "Flight Fee," which is based on take-off weight rather than landing weight, for use of the airfield facilities. EWR's Flight Fee is the highest in the nation. In 2014, the EWR Flight Fee[7] will average $9.98 per 1,000 pounds of take-off weight, equivalent to a landing fee of $11.77.[8] As shown below, this amount far exceeds landing fees at other major airports:

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[6] FAA, Airport Improvement Program (AIP) Grant Histories, *available at* http://www.faa.gov/airports/aip/grant_histories/ (last visited Sept. 3, 2014).

[7] The EWR Flight Fee includes a charge for the AirTrain.

[8] Due to fuel burn, landing weight is, on average, approximately 18% less than take-off weight. Accordingly, to compare the Flight Fee with the more traditional landing fee charged at other airports, it is necessary to multiply the Flight Fee by a factor of 1.18.

AIRPORT	2014 PROJECTED AVERAGE LANDING FEE
EWR	$11.77*
LGA	9.28
CHICAGO O'HARE (ORD)	7.42
JFK	6.71*
DENVER (DEN)	4.67
BOSTON LOGAN (BOS)	4.60
LOS ANGELES (LAX)	4.54
SAN FRANCISCO (SFO)	4.50
WASHINGTON DULLES (IAD)	3.86
WASHINGTON NATIONAL (DCA)	3.60
PHILADELPHIA (PHL)	3.52
HOUSTON (IAH)	2.99
DALLAS/FORT WORTH (DFW)	2.64
MIAMI (MIA)	1.76
ATLANTA (ATL)	0.82
*EWR and JFK Fees converted to equivalent landing fee by multiplying by 1.18. *See* footnote 8, above.	

22. United's Flight Fee costs at EWR have increased 46% since 2012. EWR's Flight Fee is grossly out of line with the landing fees charged by all non-Port Authority airports, and is excessive even compared to JFK and LGA. The exorbitant Flight Fee at EWR cannot be explained away by saying that the New

York metropolitan area is expensive. EWR's fee is 75% higher than the Flight Fee at JFK and 27% higher than at LGA, and all three of these airports are operated by the Port Authority.

23. In its operations at EWR, United competes with airlines serving JFK and LGA. United depends heavily on its EWR hub to serve the New York metropolitan area. In contrast to the 135,000 annual departures from EWR, United operates only 12,500 departures from LGA and 5,500 departures from JFK. Due to the Port Authority's unreasonable charges at EWR, United annually pays approximately $80 million more than it would if it flew its EWR schedule at JFK.[9] This puts United at a significant competitive disadvantage in the New York metropolitan area, one of the most important air traffic markets in the world. *See* paragraphs 70-77.

24. The exorbitant Flight Fee at EWR is a primary driver of the huge revenue surpluses generated at the airport each year. According to the Port Authority's financial statements, EWR's operating revenues and profits for 2009 through 2013 were:

	2009	2010	2011	2012	2013
Revenue	$729,120,000	748,973,000	772,987,000	780,081,000	799,553,000
Operating Profit	214,555,000	218,009,000	245,619,000	241,672,000	239,923,000
Operating Margin	**29%**	**29%**	**32%**	**31%**	**31%**

[9] United's total take-off weight at EWR in 2014 multiplied by the difference between the EWR and JFK rates.

25. In contrast, while JFK and LGA showed operating profits as well, the levels were much lower:

	2009	2010	2011	2012	2013
JFK Operating Margin	**20%**	**23%**	**22%**	**23%**	**22%**
LGA Operating Margin	**15%**	**15%**	**15%**	**13%**	**8%**

26. Thus, the Port Authority's excessive charges at EWR hurt United in two ways. United is forced to spend more for Flight Fees than is reasonable, and United is put at a competitive disadvantage in relation to airlines operating primarily at JFK or LGA.

3. The Port Authority Diverts Staggering Amounts Of Airport Revenues To Subsidize Money-Losing Operations.

27. Under 49 U.S.C. § 47107, the Port Authority enjoys grandfathered status for purposes of limited airport revenue diversion.[10] But the Port Authority has exploited that status far beyond its intended purpose, and diverts hundreds of millions of dollars every year from its airports to non-airport operations. In the words of a former Port Authority Executive Director, the Port Authority treats the airports as an "ATM" and the airlines end up paying for non-aeronautical functions of the Port Authority. *See* paragraph 59. Indeed, as the Port Authority candidly admits in its 2014 Budget, the "facilities that generate net income – *such as the*

[10] Of course, the Port Authority's grandfathered status does not create an exemption from the rule that airport operators may only charge reasonable rates and charges.

airports, tunnels and bridges – along with financial income – help pay for those facilities that have been operating at a loss…" (emphasis added). Exhibit A, p. 10.

28. According to a report by the FAA, in the six year period 2005-2010 the Port Authority diverted a total of more than *$1.7 billion* in airport revenues to non-airport uses, an average of almost $300 million annually. Exhibit B, p. 4. This total was almost *ten times* higher than the amounts diverted by SFO and ORD, the grandfathered airports with the next highest totals. *Id.* At the same time, however, the Port Authority neglected important capital and maintenance requirements at EWR. *See* paragraph 48.

4. <u>The Port Authority Improperly Diverts Funds To Pay For Non-Port Authority Projects</u>.

29. As noted, the Port Authority uses the surplus generated from the unreasonable Flight Fee to subsidize the operation of other Port Authority facilities. But as explained more fully below in paragraphs 171-178, the law permits the Port Authority to use net income from the airports only to pay for its "general debt obligations" or to operate its "other facilities." 49 U.S.C. § 47107(b)(2). The Port Authority, however, improperly spends airport revenues on projects it neither owns nor operates.

30. A recent press release from the Port Authority reveals that it has allocated $1.8 billion for the 2011-2021 period for the "Lincoln Tunnel Access Program," which consists of "the rehabilitation of the Pulaski Skyway, the Wittpenn Bridge and the Routes 1 and 9 truck route connecting Tonnelle Circle in Jersey City

to Interstate 495." Exhibit C, p. 2 (Feb. 4, 2014 Port Authority Press Release re $27.6 B Capital Plan); *see also* Exhibit D (Preliminary Official Statement Dated June 12, 2014, re PA Consolidated Bonds), p. II-54 (earmarking $1.8 billion for "Lincoln Tunnel Access Infrastructure Improvements" between 2011-2021). None of the facilities involved in the "Lincoln Tunnel Access Program," however, is actually owned or operated by the Port Authority. Exhibit A, p. 74 (identifying all Port Authority facilities).[11] The Pulaski Skyway is a roadway consisting of a bridge and causeway that connects Jersey City and Newark (near the Holland Tunnel, not the Lincoln Tunnel)[12] and is owned and operated by the State of New Jersey. Exhibit E (http://www.state.nj.us/transportation/commuter/roads/pulaski/.) The Wittpenn

[11] These facilities are: the Bayonne Bridge, the Goethals Bridge, the George Washington Bridge, the George Washington Bridge Bus Station, the Holland Tunnel, the Lincoln Tunnel, the Outerbridge Crossing and the Port Authority Bus Terminal.

[12] Significantly, as the Port Authority's own in-house counsel noted in an internal memorandum that was published by several news outlets in April 2014, the Port Authority lacks authority to build or repair access roads to the Holland Tunnel. Exhibit I (March 28, 2011 Memorandum from Carlene McIntyre to Christopher Hartwyk), p. 2 ("the Port Authority has no authority in such unification statutes to construct, own, maintain or operate any of the approaches to the Holland Tunnel"). The U.S. Securities and Exchange Commission is investigating whether the Port Authority mischaracterized the Pulaski Skyway in its bond offering documents as an access road to the Lincoln Tunnel. Exhibit J (Matt Flegenheimer, *SEC Conducting Investigation of Port Authority Project,* NEW YORK TIMES (Jun. 13, 2014); Lisa Brennan, *SEC Joins Manhattan DA to Probe Christie's Diversion of Port Authority Funds*, MAIN JUSTICE (Apr. 25, 2014).)

Bridge and Routes 1 and 9 also fall within the ambit of the New Jersey Department of Transportation. Exhibits F – H.[13]

31. As of December 31, 2013, the Port Authority had already spent $121 million on the Lincoln Tunnel Access Program. Exhibit D, p. II-54. The 2014 Budget calls for another $181 million for the Pulaski Skyway and $60 million for the Wittpenn Bridge. Exhibit A, p. 35.

32. Recent media reports also have detailed the Port Authority's longstanding practice of spending millions of dollars annually on other non-Port Authority facilities. *See, e.g.,* Heather Haddon, *Port Authority Funding Under Scrutiny*, WALL ST. J. (Jul. 10, 2014). Exhibit K. According to these media accounts, these *ultra vires* projects are known within the Port Authority as "regional banks." *Id.* The Port Authority has expended tens of millions of dollars in recent years on the New Brunswick Civic Center, the Stevens Institute of Technology (a private college in Hoboken), the Jersey City Medical Center and Independence Park, a Newark space run by Essex County, New Jersey. *Id.* The Port Authority will spend an additional $48 million on regional projects in 2014. Exhibit A, p.11.

5. <u>The Flight Fee Formula At EWR</u>.

33. The formula for calculating the EWR Flight Fee dates to the 1970s. It was included in a lease signed in 1985 between the Port Authority and People

[13] (www.state.nj.us/transportation/commuter/roads/rt7wittpenn/); (www.state.nj.us/transportation/commuter/roads/route1bridge/); (www.state.nj.us/transportation/works/studies/rt9pavement/).

Express Airlines, Inc. covering Terminal C as it then existed (including Terminals C-1 and C-2) at EWR. That lease was assigned to Continental Airlines, Inc. ("Continental") in 1987,[14] and is referred to herein as the "Master Lease." After the merger of Continental and United,[15] United became the successor lessee under the Master Lease. Neither Continental nor United ever negotiated the Flight Fee formula. Acquiescence to the formula was a condition of operating at EWR. Given the Port Authority's monopoly power with respect to the airports in the New York City metropolitan area (*see* Section IV.C below), Continental and United had no choice but to agree to the Master Lease.

34. Under the Master Lease, the Flight Fee is comprised of four components: (1) a Public Aircraft Facilities Charge Factor (the "PAF Charge Factor"); (2) an Airport Services Charge Factor (the "ASF"); (3) a Phase 1A Roadway Charge Factor; and (4) the EWR AirTrain factor. These four factors produce an aggregate Flight Fee rate that is assessed for every 1000 lbs. of maximum take-off weight.

35. The PAF Charge Factor is ostensibly designed to recoup the costs of operating and maintaining the EWR airfield. The ASF captures non-airfield costs that indirectly support airfield operations. The "Phase 1A Roadway Charge Factor"

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[14] People Express ceased to exist as a carrier on February 1, 1987, when its operations were merged into Continental's.

[15] The corporate merger that resulted in Continental and United Airlines, Inc. being owned by the then newly-formed United Continental Holdings, Inc. took place on October 1, 2010. On March 31, 2013, the merger and integration process was completed with the formation of a single legal entity that is now known as United.

is determined based on costs of various roadway projects at EWR. The EWR AirTrain factor captures the annual amortized capital costs and annual operating and maintenance costs of the EWR AirTrain. In contrast to the treatment by the Port Authority of analogous costs at JFK, the costs of the EWR AirTrain that are not offset by certain annual credits are allocated entirely to the airfield. The Port Authority gives the airlines no credit for the parking revenues it receives from the parking garage that is served by the EWR AirTrain (even though the garage itself could not be feasibly used without being connected to the EWR AirTrain).

36. While the Port Authority has always contended that the Flight Fee is designed to recover the direct and indirect costs of operating and maintaining the airfield, the fee is set through a complex and non-transparent formula, the real result of which is that the Port Authority makes a substantial *profit* on the costs included in the Flight Fee rate base. On numerous occasions, Continental and United have asked the Port Authority for detailed information to be able to determine whether such a profit is built into the Flight Fee calculation. Despite the requirements of federal law that rate setting be transparent and that airports provide sufficient documentation to airlines, time after time the Port Authority steadfastly refused to provide any meaningful data, or to acknowledge the profit. But a document created by the Port Authority last year showing the increased ARFF costs plainly disclosed, for the first time, that the profit exists. The document revealed that the ARFF charges at EWR would be "recoverable at 130 percent" from the airlines. Exhibit L, p.1. It was not until this admission by the Port Authority

that United was able to confirm what it had suspected – that the Flight Fee formula contains a hidden markup. Even this admission, however, understated the actual markup charged by the Port Authority. In fact, United calculates that the ARFF charges will be marked up by more than 38%.[16] This markup, which is also added to many other costs in the airfield rate base, transforms the airfield into a profit-making venture for the Port Authority. So, for example, the ARFF expenditures for 2014, already unreasonable, will generate an additional $9 million markup for the Port Authority. Overall, United estimates that the hidden markups cost United $30 million in 2013.

37. For years, the Port Authority has insisted to United that the Flight Fee formula at EWR is cost-based, and would produce a Flight Fee comparable to the formula used at JFK and LGA. The Port Authority recently advised United, however, that the EWR Flight Fee formula costs the airlines $52 million more each year than if the JFK methodology were used at EWR. United's share of that disparity is approximately $37 million annually.

38. The methodology of the Flight Fee drives other unreasonable costs at EWR. For example, one of the cost categories included in the Flight Fee is the Port Authority's cost of labor and other payments related to policing and traffic functions at EWR. Of course, these costs sharply increased as a result of the tragic events of September 11, 2001. The result of these increases at EWR, however, is that United

[16] Costs included in the PAF Charge Factor, including the ARFF charges, are marked up by at least 38%. Costs in the ASF are marked up by at least 14%.

and other airlines have been required not only to shoulder those additional actual costs, but also have been required to pay an extra premium substantially above those actual costs.

39. A Flight Fee methodology that recovers amounts in excess of actual reasonable costs incurred or that actually creates an incentive for the airport operator to spend more than is reasonable and prudent is inherently unreasonable. An appropriate methodology should allow the airport operator to recover only the costs of providing the airfield facilities, without a profit factor. Further, because the result of the Flight Fee is the generation of surplus revenues which are then used for non-airport purposes, United is paying for facilities and assets it does not use and which are unrelated to EWR's aeronautical functions. As a matter of law, this is unreasonable. *See* paragraphs 153-158.

B. THE PORT AUTHORITY'S INSATIABLE NEED FOR MONEY DRIVES EXCESSIVE AIRPORT FEES.

40. The Port Authority charges unreasonable fees at EWR because it has an apparently insatiable need for money to subsidize its other, non-aeronautical operations. The Port Authority's fees at EWR are driven not by airport needs but by decisions designed to solve non-airport problems. The result is that United and other airlines pay not just the costs of EWR, but the costs of unrelated Port Authority assets and even non-Port Authority facilities. The airlines thus pay the price for the Port Authority's unwise choices, inefficiencies, and political influences.

41. For years, the Port Authority's problems in carrying out its mission have given rise to widespread criticism.[17] In August 2011, in response to public criticism, the governors of New Jersey and New York ordered the Port Authority to obtain a comprehensive review and audit of the entire agency, including its finances, operations, and ten-year capital plan. The next year, the primary consultant that undertook this audit, Navigant Consulting, Inc. ("Navigant"), issued two reports – Phase I Interim Report ("Navigant I Report") and Phase II Report ("Navigant II Report")[18] – detailing its findings.

42. According to the Port Authority, the Navigant Reports constitute a "thorough assessment of the Port Authority's current business model, finances, and operations" with "corrective recommendations and measures." *See* Letter from the Port Authority to Governors Christie and Cuomo (Jan. 31, 2012) (Exhibit O). As discussed below, these reports, combined with the agency's publicized and documented problems, confirm the obvious: the unreasonable rates and charges at EWR stem from and enable Port Authority dysfunction, which is rooted in overbroad asset holdings and poor cost controls.

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[17] *See, e.g.,* Jameson Doig, *Restore Integrity at the Port Authority,* N.Y. TIMES (Feb. 20, 2012); Aaron Elstein, *Breaking up the Port Authority is Hard to Do: Why the Agency Endures Despite Political Interference, Scandal and Lots of Red Ink*, CRAIN'S NEW YORK BUSINESS (Jan. 19, 2014).

[18] The Navigant I Report is Exhibit M and the Navigant II Report is Exhibit N.

1. **Asset Overbreadth And Mismanagement.**

43. The Port Authority currently has a vast array of asset holdings segmented into aviation, port commerce, rail transit ("PATH"), tunnels/ bridges/terminals, the World Trade Center project, and various real estate developments. According to Navigant, the Port Authority "has expanded beyond its stated mission as a transportation infrastructure organization and, by fate or design, has also become a major real estate developer and asset owner with investments that dwarf its past holdings . . . with its own . . . police force numbering over 1700 employees." Navigant I Report, pp. 7, 15. This expansion, according to the Port Authority's consultant, has been grossly deficient in "planning and execution." *Id.* at p. 7.

44. As a result, the Port Authority does not manage its diverse holdings in an efficient manner, causing it to make up for these inefficiencies through other means, including the imposition of excessive aeronautical fees. One publicized example of Port Authority mismanagement is the World Trade Center project ("WTC"). The Port Authority, which was not intended to be a real estate developer, has seen its net costs for the WTC balloon from $3.5 billion in 2006 to $7.7 billion in 2012, "representing approximately $14.8 billion of total gross costs, less approximately $7.1 billion in reimbursements by third parties and [other] funding [sources]." Although some of this increase was driven by natural cost growth from the original scope of the WTC, most of it was attributable to timing, planning,

execution, and management related to the Port Authority. Navigant I Report, pp. 36-43.[19]

45. Indeed, most of the Port Authority's asset holdings are losing money. From 2007 through 2011, the Port Authority generated cash from the following: airports (JFK $990 million, LGA $273 million, and EWR $1.3 billion), the George Washington Bridge ($1.3 billion), the Lincoln Tunnel ($167 million) and the Holland Tunnel ($141 million). During that same period, it sustained losses from most of its other assets, including: heliports/Teterboro/Stewart ($65 million loss), the Port Authority Bus Terminal ($479 million loss), PATH ($2.3 billion loss), Port Newark ($317 million loss), Port Jersey ($184 million loss), Howland Hook ($160 million loss), Brooklyn Marine Terminal ($27 million loss) and WTC ($3.1 billion loss). Navigant II Report, p. 14.

46. The resultant $2.5 billion cash shortfall must be borrowed. With respect to the Port Authority's exposure to all debt, it "has more than doubled over the past ten years, from approximately $9.1 billion in 2001 to approximately $19.5 billion at the end of 2011." Navigant I Report, p. 7.

47. Based on the Port Authority's deficiencies in managing its diverse holdings, Navigant recommended that the agency "align its capital strategy with its mission and objectives" and "deploy its capital with proper attention to preservation of its [transportation] infrastructure." Navigant I Report, pp. 7, 17. The Rudin

[19] The Port Authority's true WTC debt burden is understated; Navigant estimates that its real WTC debt exposure will approximate $8.5 billion, not $7.7 billion. Navigant I Report, p. 41.

Center for Transportation Policy & Management reiterated this need in March 2014, similarly stating that the Port Authority must use its financial resources "solely for facilities, services, projects, and programs that are clearly aligned with its core mission."[20] There is no evidence that the Port Authority has heeded or is able to heed this advice.

48. Because the Port Authority loses so much money, it improperly uses airport revenues to offset those losses. This diversion of revenue away from airports threatens to hamper the airports' ability to undertake needed safety and infrastructure improvements and could put them at significant risk of regulatory non-compliance. Specifically, according to Navigant, the draining of revenue from airports is causing:

a. a "historical[ ] struggle[ ] to fix [operational and safety] violations in a timely manner, primarily as a result of budgetary constraints leading to insufficient maintenance staff, and a lack of inventory of the necessary parts, such as lights and signs." Navigant II Report, p. 38.

b. the hampering of "runway safety areas at both ends of every runway . . . Ten of the Port Authority airports' 26 runway ends still must be made compliant [with safety regulations]." *Id.*

[20] Mitchell Moss and Hugh O'Neill*, A Port Authority That Works* (Mar. 2014), p. 22 (Rudin Center For Transportation Policy & Management) (Exhibit P); *see also* Matt Flegenheimer, *Report Traces Authority's Flaws to a Crumbling Business Model,* N.Y. TIMES (Apr. 1, 2014) (Exhibit Q).

c. "the airports to rank among the worst in the country in terms of customer satisfaction. Buildings are nearing obsolescence, infrastructure is deteriorating, and maintenance needs are mounting." *Id.*

49. The harm caused by the Port Authority's diversion of airport revenues has similarly been the subject of political commentary and criticism. *See, e.g.,* Jim Epstein*, Inside the Port Authority*, THE DAILY BEAST (Jan. 21, 2014) ("[the Port Authority's] hodgepodge of assets that no wise technocrat would ever recommend putting under the aegis of one agency . . . allows it to drain money from some holdings to float others . . . Its airports generated $892 million in excess cash in 2011, and yet it can't afford to fund the major capital upgrades needed at La Guardia, Newark, and JFK airports. Instead, the money goes towards sopping up losses elsewhere in the organization, such as the agency's estimated $7.4 billion tab for construction cost overruns at the World Trade Center"). Exhibit R. The conclusions of the Port Authority's own consultant parallel this criticism: "Over the past five years, the Aviation line department has been the only positive free cash flow contributor to the Port Authority but now has some of the largest upcoming capital expenditure needs" which cannot be met due to "budgetary constraints." Navigant II Report, pp. 5, 38.

2. <u>Insufficient Labor Cost Controls</u>.

50. The Port Authority has also been unable to manage its labor costs, a fact directly related to the ARFF and security overcharges underlying the Flight

Fee increase. *See* paragraphs 79-104. The Port Authority's decisions on labor spending directly impact rates and charges at EWR as well as create further need to divert airport revenues to other projects.

51. Throughout the last decade, the Port Authority has employed roughly 7,000 persons. As of January 2012, when the Navigant I Report was issued, ninety-three percent of Port Authority employees made no contribution whatsoever to their healthcare benefit plans, while all New York and New Jersey state employees contributed to their plans. Navigant I Report, p. 5.[21] The average base salaries of these employees "are among the highest relative to peer group"; the total cost of compensation and benefits for the average Port Authority employee is estimated to exceed $143,000 annually. *Id.* at 5, 23. "Add-on" compensation, such as pay based on overtime, vacation exchanges, and longevity programs, constituted an exorbitant 70% of base salaries. *Id.* at 19, 23.

52. The Navigant I Report found that the average salary in the Port Authority's Aviation Department was highest among its peer group of major airports in the country. *Id.* at 25. Data made public by the Port Authority reveal that the seven highest-paid employees in the Aviation Department in 2013 were

[21] In 2012, subsequent to the Navigant I Report, the Port Authority implemented a benefits change to be phased in over 4 years in which non-union employees would be required to contribute to healthcare premiums. *See* Ted Mann, *Port Authority to Cut Bonuses*, WALL ST. J. (Mar. 28, 2012) (characterizing change as "a gesture of reform at an agency under pressure . . . to rein in spending"). Exhibit S.

non-exempt workers whose total compensation was 209% of their base pay.[22] In all, unconstrained overtime and bloated benefit packages result in average pay levels for Port Authority employees that greatly exceed market rates, even in the expensive New York metropolitan area. *See, e.g.,* paragraphs 86, 97, 104.

53. Excessive overtime pay has been a defining characteristic of Port Authority mismanagement for years. In 2006, the Port Authority paid an international management consultant $435,000 to evaluate police staffing practices that had led to a 12% jump over the prior year's already excessive police overtime costs. That year, the consultant concluded that the absence of any overtime cap, "archaic" record-keeping and "lenient" sick time and disciplinary polices were the cause of overtime excesses and required aggressive correction. Ronald Marsico, *Port Authority Officials Fail to Curb Overtime Pay*, NJ.COM (Apr. 26, 2008) (Exhibit T). The following year, police overtime costs increased by another 14%, with the average officer logging in more than 500 hours of overtime. *Id.* In 2009, the Office of the New York State Comptroller initiated a multiple-year audit of the Port Authority. The audit results, issued in August 2011, found that (1) the Port Authority's overtime costs as a percentage of base salaries was actually double its self-declared benchmark of 15%; (2) the Port Authority's 2010 budget goal of reducing overtime "was not communicated or implemented within the Authority"; and (3) there was "no documented justification explaining why the work performed

[22] www.PANYNJ.gov/corporate-information/employee-payroll-information-2013.cfm.

on an overtime basis [by Port Authority police] could not have been performed during the employees' regularly scheduled work hours." Office of the New York State Comptroller, Report 2009-S-87, *Port Authority of New York and New Jersey, Management and Control of Employee Overtime Costs* (Exhibit U), pp. 8, 17. This report, like the prior one, found that Port Authority mismanagement was responsible for excessive overtime costs and recommended that "Authority officials . . . take a much more proactive approach to the management and control of overtime." *Id.* In response, the Port Authority stated that it had "taken a number of actions to further enhance controls over the use and management of overtime across the agency." Letter of Port Authority's Chief Financial Officer dated July 20, 2011 in response to initial draft of 2011 report (Exhibit V).

54. The next year, Navigant reported the same overtime mismanagement and similarly recommended that the Port Authority make "overtime reduction . . . [its] policy focus." Navigant I Report, p. 29. In response, the Port Authority again claimed it had undertaken efforts to control overtime costs. *See* Letter from the Port Authority to Governors Christie and Cuomo (Jan. 31, 2012) (Exhibit O), pp. 2-3 (stating the Port Authority "has already asked . . . executive management to . . . impose stronger controls on overtime").

55. In the two-and-one-half years following this statement, the Port Authority's overtime costs have continued to skyrocket to even higher levels. *See* March 19, 2014 "2013 Overtime Performance" and "2013 Police Overtime Performance" reports issued by the Port Authority Committee on Operations

(showing police overtime hours at 59% over budget in 2013 and civilian overtime hours at 27% over budget) (Exhibit W); July 23, 2014 "Overtime Performance, Second Quarter Results 2014" issued by Port Authority Committee on Operations (showing double-digit percentage increases in 2014 for civilian overtime and police overtime as compared to 2013) (Exhibit X); Steve Strunsky, *Port Authority Overtime Exceeds Second-Quarter Projections*, nj.com (July 28, 2014) (in response to 2014 second quarter police overtime increase of 14% over 2013, Port Authority Board member calls for the hiring of another "consultant" to "rein in the hours") (Exhibit Y).

56. Like the Port Authority's inability to manage its diverse holdings, its inability to manage its labor costs has been the subject of extensive media reporting and criticism. *See, e.g.,* Chris Hawley, *Port Authority Beat Policeman Earns $221,000 A Year*, ASSOCIATED PRESS (Dec. 9, 2011) ("[p]olice at the Port Authority of New York and New Jersey have racked up $41.4 million in overtime this year . . . 66 police officers have made more than $200,000 so far in 2011, thanks to overtime that in many cases has doubled their salaries") (Exhibit Z); *Overtime Payouts For First 3 Months Of 2013 Skyrocket At Port Authority,* CBS NEW YORK (Apr. 24, 2013) (Exhibit AA). By comparison, a NYPD officer earns $90,829.00 annually before overtime after 5½ years of service, and the total compensation for the final rank of Captain is $160,000.00 year. Jason Shueh, *The Average Salary of NYC Police*, eHow.com (Apr. 11, 2014) (Exhibit BB).

3. **Structural Dysfunction.**

57. The Port Authority's capital and labor excesses, which it seeks to subsidize through unreasonable airport fees, are related to its dysfunctional structure. The Port Authority itself recently established a Special Oversight Committee to "examine the governance, structure and operational oversight of the organization and make the necessary recommendations to the full Board of Commissioners." Press Release, Port Authority, *Special Oversight Committee to Hold a Port Authority Reform Panel Discussion in Public Session* (Apr. 17, 2014), www.panynj.gov/press-room/press-item.cfm?headLine_id=1961 (Exhibit CC); *see also* Andrew Tangel and Ted Mann, *Experts to Weigh in on Port Authority Reforms*, WALL ST. J. (Apr. 17, 2014), blogs.wsj.com/metropolis/2014/04/17/experts-to-weigh-in-on-port-authority-reforms/ (Exhibit DD) ("[s]ome have called for cleaving apart the agency, which is controlled by the two states and operates major airports, bridges and bus terminals in the region.")

58. The structural hierarchy of the Port Authority is unique and takes the form of a top-heavy diamond shape, with approximately 60% of its employees sitting in the highest four salary band categories ("Service A," Senior Executive Management, Executive Management and Middle Management). Navigant I Report, p. 28. This top-heavy structure means there are too many decision makers with a too-limited span of control. *Id.* As a result, the Port Authority "is a challenged and dysfunctional organization" that is "inherently resistant to change, lacks effective collaboration between its strategic businesses" and "must conduct a

meaningful, top-to-bottom organizational redesign focused on operating efficiencies and rooted in clearly defined roles and responsibilities, transparency, accountability and aligned incentives." *Id.* at 5.

59. The Port Authority's vast asset holdings and operations also make it an ideal vehicle through which state leaders can fund state projects without formally raising taxes. According to Steven Berger, the agency's former executive director, "[t]he Port Authority has been a money tree, an ATM machine . . . a place [the governors of New York and New Jersey] can go to do projects that they can't get through their budgets." Exhibit R. In the five year period 2007-2011, EWR gave the Port Authority a staggering $1.6 billion in operating cash flow. Navigant II Report, p. 14.

60. In sum, the Port Authority's insatiable need for money, ability to divert airport revenue, decision-making structure, and monopoly power over the New York metropolitan area airports (discussed below), all combine to create the perfect storm for unreasonable rates and charges at EWR. United should not be forced to pay for the inefficiencies and dysfunctions of the Port Authority through unreasonable fees which bear no relation to proper airport costing.

C. THE PORT AUTHORITY HAS MONOPOLY POWER.

61. The Port Authority has monopoly power with respect to the airports in the New York City metropolitan area, the most important market in the United States.

1. The Critical Importance Of The NYC Metro Area Airline Market.

62. The New York City metropolitan area ("the NYC metro area") is the largest airline market in the United States, both for domestic and international travel. Expert Report of Daniel M. Kasper ("Kasper Report") (Exhibit EE), ¶¶ 8-9. As explained in the Kasper Report, "airline market" is measured in terms of origin and destination passengers. *Id.*

63. In 2013, over 61 million domestic passengers traveled to or from the NYC metro area, approximately 50% more than Los Angeles, the second largest domestic airline market in the United States. *Id.* In terms of airline revenue, the NYC metro area accounted for approximately $13.3 billion – 55% more than second-ranked Los Angeles – and 7.2% of all domestic origin and destination revenue nationwide in 2013. *Id.*

64. For international air travel, the NYC metro area is the largest market in the United States by an even wider margin. *Id.* The NYC metro area accounted for over 13.7 million international passengers in 2013 (approximately twice that of Miami, the second largest market for international passenger traffic). *Id.* In terms of origin and destination airline revenue, international travel to and from the NYC metro area accounted for $7.2 billion in 2013 – as much as San Francisco, Los Angeles and Chicago combined – and approximately 15% of all U.S. carrier international revenues. *Id.*

2. **The Port Authority Controls The NYC Metro Area Airports.**

65. The Port Authority operates the three major NYC metro area airports – EWR, JFK and LGA – plus Stewart International Airport. The Port Authority-controlled airports account for over 96% of all air travel to or from the NYC metro area. *Id.* at ¶ 17. Notably, EWR, JFK, and LGA "compete" for the same NYC metro air travelers – data shows that a traveler's proximity to the NYC metro area airports does not dictate his or her airport choice. *Id.* at ¶ 15.

66. There is, of course, no realistic possibility that a fourth major airport will open in the NYC metro area to compete with EWR, LGA and JFK. The market for commercial airport services in general, and in the NYC metro area in particular, is characterized by exceptionally high barriers to entry. *Id.* at ¶¶ 11-12. To begin with, commercial airports exhibit significant economies of scale and scope. *Id.* Airport scale economies (*i.e.,* decreasing unit costs over a wide range of outputs) arise principally from the necessity of making large investments merely to be in a position to serve customers on demand. *Id.* These investments in the case of airports include the acquisition of large parcels of land (typically requiring the use of eminent domain) and the construction of runways, taxiways, access roadways, terminal facilities, towers, runway lighting, and other systems – all investments for which the minimum efficient scale is large relative to demand. *Id.*

3. The Port Authority Exploits Its Monopoly Power To Impose Unreasonably High Fees At EWR.

67. Like other monopolies and like public utilities, airports have long been subject to heightened levels of public scrutiny and regulatory oversight designed to prevent them from abusing their market power by increasing prices above competitive levels, restricting output, or engaging in price discrimination. *See* paragraph 145. These concerns (among others) led Congress to subject airports and their rates and charges to federal regulatory review. Exhibit EE at ¶ 12.

68. The Port Authority, however, has largely managed to avoid regulatory oversight of its formulation of Flight Fee and other airport rates and charges. It has used its market power – monopoly power, really – to impose fees for airlines well above those of other large airport operators. *Id.* at ¶¶ 20-25.

69. The Flight Fee charged at EWR is far higher than the fees charged at other airports. The Flight Fee for a Boeing 737-800 at EWR, for example, is more than double the Flight Fee at comparably-sized airports in other cities such as San Francisco International ("SFO") or Boston Logan International ("BOS"). *Id.* at ¶ 20. SFO and BOS are especially meaningful comparators because, like the Port Authority-controlled airports, SFO and BOS both have limited geographic footprints for expansion and are located in a metropolitan area with a high cost of living. *Id.*

4. The EWR Flight Fee Puts United At A Competitive Disadvantage.

70. The Port Authority's imposition of a higher Flight Fee at EWR than at JFK and LGA puts United at a significant competitive disadvantage. United has

approximately 135,000 scheduled departures from EWR annually, in contrast to its 12,500 scheduled flights from LGA and its 5,500 scheduled flights from JFK.

71. Because JFK, LGA, and EWR are "slot-constrained" airports operating at full capacity throughout most of the day, it would not be possible for United to secure sufficient slots at either JFK or LGA to relocate its hub from EWR in order to take advantage of the lower landing fees at those airports. *Id.* at ¶ 29. Likewise, there are no other airports in the NYC metro area that have the capacity (*i.e.,* terminals, gate facilities, and runway length) to accommodate the hubbing operations of a large network carrier such as United. *Id.* In other words, United cannot mitigate the problem of the higher EWR Flight Fee by merely moving its operations to JFK or LGA.

72. In the highly competitive U.S. airline industry, even small differences in cost can affect market outcomes. *Id.* at ¶ 30. The consequences of the higher EWR Flight Fee are very real. For example, for a typical domestic flight operated using a 737-800 aircraft, the landing fee per enplaned passenger at EWR is 75% higher than at JFK and 21% higher than at LGA. *Id.* Because United has no practical alternative to EWR for its hub in the NYC metro area, it has no choice but to pay the excessive fees the Port Authority charges for access to EWR, even though these fees put United at a disadvantage vis-à-vis other carriers – particularly Delta, American, and JetBlue – that are competing for many of the same passengers via their hubs at JFK and/or LGA. *Id.*

73. As a further example, for a typical long-haul international flight operated using a 777-200 aircraft, the landing fee per enplaned passenger at EWR is 75% higher than at JFK. *Id.* at ¶ 31. This puts United at a competitive disadvantage vis-à-vis Delta and American, and a variety of foreign carriers that use JFK as the base of their long-haul international services to/from the NYC metro area. *Id.*

74. Because Delta, American, and JetBlue each operate hubs at NYC metro area airports with lower costs than EWR, the scope of competitive harm is far reaching. *Id.* at ¶ 32. There are more than 100 destinations worldwide that United serves from the NYC metro area exclusively from EWR in competition with U.S. carriers serving the same destinations from JFK and/or LGA. *Id.*

75. The cost disadvantage United confronts because it operates its NYC metro area hub at EWR is magnified for passengers making connections, since for each round-trip passenger United connects via EWR, United is effectively required to pay the Port Authority's landing fees per passenger twice (once on their outbound flight and again when they return to their destination). *Id.* at ¶ 33. This is particularly relevant in light of the fact that United competes with both American and Delta (as well as a host of foreign carriers) for many of the same international connecting passengers that use the NYC metro area (*i.e.*, EWR or JFK) as their connecting gateway. *Id.* For example, a substantial proportion (26% overall) of all transoceanic international connecting passengers originating from or destined to

points in the eastern United States use either EWR or JFK as their international gateway. *Id.* at ¶ 34.

76. Because United (via EWR) competes directly with American and Delta (via JFK) for many of the same transoceanic connecting passengers that use a NYC metro airport as their connecting point, the substantially higher costs imposed by the Port Authority at EWR vis-à-vis JFK (which are magnified for connecting passengers as mentioned above) put United at a further competitive disadvantage. *Id.*

77. In summary, the disparity between the EWR Flight Fee, on the one hand, and the JFK/LGA Flight Fees, on the other hand, hinders United's ability to compete. United is, therefore, especially vulnerable to the Port Authority's abuse of monopoly power with respect to rates and charges at EWR.

78. The federal regulatory scheme governing airport rates and charges is intended to prevent airports from using their monopolistic position to impose unreasonable charges. When the Rates and Charges Policy was first developed, the Federal Trade Commission, with whom the DOT consulted, noted that "the monopoly power of airport operators requires some pricing regulation." Policy Regarding Airport Rates and Charges, Request for Comments, 60 Fed. Reg. 6906, 6912 (Feb. 3, 1995). As the Rates and Charges Policy notes, "[t]he Department assumes that the limitation on the use of airport revenue and effective market discipline for aeronautical services and facilities other than the airfield will be effective in holding aeronautical revenues, over time, to the airport proprietor's

costs of providing aeronautical services and facilities, including reasonable capital costs." 78 Fed. Reg. at 55335, § 4.2.1. In the New York Metropolitan airport market, however, these two controls – limitation on use of airport revenue and effective market discipline – do not exist.

D. THE PORT AUTHORITY IS CHARGING UNREASONABLE FEES AT EWR.

1. ARFF.

79. The Port Authority's response to the FAA's 2013 investigation into the ARFF functions is yet another example of the pervasive unreasonableness with which the Port Authority treats the airlines that serve EWR. Instead of complying with the FAA's mandates in a thoughtful, efficient manner, the Port Authority seized the opportunity to impose an exorbitant fee increase which unfairly burdens the airlines. As the major airline at EWR, United is particularly disadvantaged by the Port Authority's action because of the 38% markup to the Port Authority embedded in the Flight Fee. EWR bears a disproportionate share of the staggering ARFF fee increase, but had the fewest alleged violations that sparked the FAA investigation.

80. The background behind the underlying ARFF changes is not in dispute. Until 2014, the Port Authority manned its ARFF cadre in an unusual fashion: Instead of hiring firefighters for the ARFF, it cross-trained its police officers to serve both on patrol and as ARFF members. Indeed, until last year, the Port Authority Police Department ("PAPD") ran the ARFF. By chance or design, this structure resulted in opportunities for police officers to obtain significant

overtime pay, first while being cross-trained, and again while working the hours necessary to discharge both their patrol and ARFF duties.

81. The Port Authority was derelict in training its ARFF personnel and in properly documenting the training that it did provide. Numerous violations occurred between 2002 and 2004, which resulted in the Port Authority entering into a Consent Order with the FAA dated February 27, 2006 ("Order"). Pursuant to the Order, the Port Authority agreed "to ensure that all ARFF personnel on the active ARFF duty status at each facility are currently qualified in all areas required under part 139 of the FAR" and "to maintain an accurate training record tracking system at each Port Authority ARFF facility…" Order, recited in paragraph 5 of the Settlement Agreement and Order dated April 8, 2013, between the FAA and the Port Authority ("Settlement") (Exhibit FF).

82. The Port Authority's dereliction continued after the 2006 Order, however, leading to further FAA enforcement activity. The FAA re-examined the Port Authority's ARFF training and record-keeping and again "found substantial and continuing noncompliance by the PANYNJ with training requirements specified in 14 C.F.R. Part 139 for airport rescue and firefighting ("ARFF") personnel…" Settlement, paragraph 3. The FAA's findings led to the 2013 Settlement pursuant to which the Port Authority paid a $3.5 million civil penalty and agreed to take remediation actions, including the creation of a stand-alone ARFF cadre which will report to the Port Authority's Department of Aviation instead of the PAPD.

83. It could reasonably be contemplated that the change in requirements for the ARFF would result in some nominal increase in the Port Authority's operating costs as new personnel are hired and trained. Some of these increased costs might also be expected to be passed on to the airlines serving the New York area airports. But the Port Authority went far beyond the record-keeping and training requirements of Part 139 and insisted on staffing the new ARFF cadre solely with PAPD officers. The decision to man the ARFF cadre with highly-compensated police officers increases costs excessively without providing any greater degree of safety or efficiency over that provided by trained firefighters.

84. United fully supports the Port Authority's compliance with all legal requirements, and of course supports safe and compliant operations at all of the Port Authority's airports. However, the enormous fee increase imposed by the Port Authority, purportedly to cover those costs of compliance, is unreasonable and grossly improper for the reasons explained below.

85. First, the Port Authority plans to use PAPD members as the 280 dedicated firefighters in the new cadre, fulfilling the firefighting duties previously performed by the PAPD. Since this will eliminate the need for 280 police officers, one might reasonably expect a reduction in the police force. That will not happen: The Port Authority plans to maintain the same number of police officers who were providing both police and firefighting services and add the 280 dedicated firefighting policemen to the payroll.

86. Second, the Port Authority's plan to hire existing PAPD members for the ARFF cadre rather than hire new employees at lower compensation rates greatly inflates the cost of the ARFF cadre. The ARFF is staffed with Port Authority Police who are paid even higher than their colleagues performing police duties. Expert Report of Professor David Lewin (Exhibit GG) at ¶ 20. Their mean total compensation in 2013 was $153,000 vs. $133,000 for the other Port Authority officers. *Id.* Third, the Port Authority's compensation and benefit package is excessive compared to the market. The ARFF staffers are paid significantly more than NYC area firefighters. They are paid 40% more than FDNY firefighters and up to 70% more than other metro area firefighters. *Id.* at ¶¶ 19-22. Total ARFF costs to the Port Authority average *$242,000 per firefighter*. Exhibit L.

87. In the Settlement, the FAA specifies that the new "ARFF Cadre Firefighters will perform only ARFF duties and no collateral duties as Police Officers." Settlement, Appendix C, paragraph 2b (the limited exception is that on off days they may engage in limited firearms and other training under state law up to 36 hours to maintain their status as sworn police officers). They are prohibited from performing non-ARFF duties, including police duties, and may not perform overtime for police duties or any non-ARFF function. So, the new ARFF cadre does not need to maintain more than a minimum proficiency in firearms and, since there is now a dedicated ARFF force, non-ARFF members of the PAPD do not need cross-training in ARFF. Despite the FAA's clear intent to separate the two forces, however, the Port Authority will continue to cross-train officers for *both* firefighting

and police duties, paying mandatory overtime for this additional training, regardless of the duty to which the officer is assigned. Only at the Port Authority airports is the ARFF function structured in this manner, providing compelling evidence that the Port Authority's proposed cross-training system is unreasonable and far beyond what industry best practice and the Settlement require.

88. The Port Authority's staffing plan for the ARFF cadre will increase the airlines' costs at the New York area airports by $58 million, a staggering 272% increase in one year. Exhibit L.

89. This increase impacts United disproportionately for two reasons: First, the "cost plus" formula used only for the EWR Flight Fee, and not at either JFK or LGA, means that for every additional dollar of expense incurred at EWR for ARFF, the Port Authority receives a 38 cent markup. Consequently, EWR bears a disproportionate share of the staggering ARFF fee increase.

90. Second, perhaps not by coincidence, ARFF costs are not assigned to the three airports by any rational metric, but instead the Port Authority over-allocates costs to EWR. EWR is burdened with 41% of the new ARFF cost, compared to 33% at JFK, even though EWR had the fewest claimed instances of training violations, and JFK the most, among the Port Authority airports. The increased ARFF costs for EWR for 2014 will be over $33 million. United calculates that, as a result, its share of the additional $58 million in fees attributable to ARFF for all three New York-area airports will be nearly $25 million, while Delta's share will be $7 million, American's $5 million, and JetBlue's $3 million.

91. Similarly, the increase from the 2012 actual to the 2014 budgeted ARFF costs is 137% at JFK and 237% at LGA, but *510%* at EWR, the one airport with a "profit" margin built into the rate methodology. Exhibit L.

92. The airlines did not cause the problems that the FAA addressed during its investigations of the Port Authority. They did not organize the ARFF to report to the PAPD, nor were they responsible for the poor training and improper training records. Once the remediation measures were ordered by the FAA, they were neither asked nor permitted to participate in the process for determining how to comply with them. Yet they are now being forced to accept, and pay for, the Port Authority's unilaterally-imposed exorbitant fee increases.

2. <u>Security Costs</u>.

93. The EWR Flight Fee includes a cost component related to police and traffic functions at the airports other than terminal security and emergency services, such as the ARFF.

94. Since 2010, this cost item has increased by more than 40%, from approximately $27 million to approximately $38 million. Further, due to the hidden markup contained in the Flight Fee formula, these police costs generated an additional $3.8 million in revenue for the Port Authority at EWR in 2013.

95. Port Authority police logged 384,000 hours more overtime than budgeted last year. Payroll data provided by the agency show that 187 Port Authority police officers and supervisors earned more than $200,000 in wages, often doubling their base salaries through overtime and other compensation. *See* Port

Authority of New York & New Jersey, *Employee Payroll Information – As of March 31, 2014, available at* www.PANYNJ.gov/corporate-information/employee-payroll-information-2013.cfm.

96. Eight members of the force made more than $300,000 in wages, including one officer who earned about $331,000, including almost $215,000 in overtime, making him the highest-paid Port Authority employee. *Id.*

97. Port Authority Police are paid significantly more than NYPD officers. Including overtime, mean annual total compensation for Port Authority officers in 2013 was $124,000 vs. $83,000 for NYPD – 49% higher. Exhibit GG at ¶18. For sergeants, the Port Authority mean compensation was 57% higher. *Id.* Port Authority Police are also paid significantly more than police in the NYC metro area (including Northern NJ). *Id.* In 2013, Port Authority officers received 65% more pay, while sergeants were paid 76% more. *Id.*

98. Terminal Security costs at EWR also continue to increase at unreasonable rates. At EWR, United is charged for terminal police on the basis of a cost per "tour." At Terminal C, which is occupied exclusively by United, there are five police tours per day. At Terminal A, where United operates along with other airlines, there are three police tours per day.

99. Since 2010, the average annual cost per tour charged by the Port Authority at EWR has increased by more than 120%. This staggering increase is a result of the Port Authority's excessive wages, benefits, and overtime.

100. All these security cost increases are driven by the fact that the compensation and benefit package of Port Authority police officers is well above market. In addition to the Lewin Report (Exhibit GG), Port Authority police compensation has been analyzed by the Citizens Budget Commission. That agency concluded that compared to officers in Jersey City, New York City, and Newark, Port Authority officers' base pay is 17% to 29% more at two years of service, 22% to 52% more at six years, and 21% to 28% more at twenty-five years. Citizens Budget Commission, *A Comparative Analysis of the Pay of Port Authority of New York and New Jersey Police Officers*, December 2012, pp. 12-15 (Exhibit HH). Yet despite earning higher pay, Port Authority police officers work fewer hours than the officers in any of these municipalities. *Id.* at 15-16 (attributing lower number of hours worked to a greater number of days off and shorter tours; "the municipal forces receive generally fewer vacation days than [Port Authority] officers").

101. Similarly, the hourly pay of Port Authority officers is anywhere between 23% and 215% higher than that of similarly situated federal agents at the Bureau of Alcohol, Tobacco, Firearms and Explosives. *Id.* at 24-27.

102. The Citizens Budget Commission concluded that Port Authority police compensation is excessive and should be closer "to the pay received by officers in other large urban departments in the region." *Id*. at 28.

3. <u>Administrative Costs</u>.

103. The Navigant I Report found that the average salary in the Port Authority's Aviation Department was highest among its peer group of major

airports in the country. *See* paragraph 52. Data made public by the Port Authority reveal that the seven highest-paid employees in the Aviation Department in 2013 were non-exempt workers whose total compensation was 209% of their base pay. *Id.* In all, unconstrained overtime and bloated benefit packages result in average pay levels for Port Authority employees that greatly exceed market rates, even in the expensive NYC metro area.

104. There are countless examples of excessive compensation levels among the Aviation Department employees. Even the media has taken notice of Port Authority gardeners who earn in excess of $100,000 annually. *See, e.g.,* Benjamin Lesser, *103G(reen) thumb*, NY DAILY NEWS (Apr. 24, 2007), Exhibit II. Professor Lewin concludes that compensation paid to employees in the Aviation Department is well over market. Most job titles receive median pay ranging from 50% to 160% more than comparable workers in the NYC metro area. *See* Exhibit GG at ¶¶ 23-24.

E. OTHER UNREASONABLE CHARGES.

105. United believes that there are other specific cost items included within the Flight Fee that are unreasonable. Because of the Port Authority's continuing refusal to provide detailed cost information, however, United cannot identify those items or determine the extent of unreasonableness. United therefore asks that the FAA order the Port Authority to provide sufficient information to United and the FAA such that the FAA and United can make such determination.

106. The Port Authority should also be ordered to provide sufficient information so that the FAA and United can determine:

- the actual costs incurred by the Port Authority in operating and maintaining the airfield at EWR;
- the amount and source of all revenues received by the Port Authority with respect to the airfield at EWR;
- the extent of the surplus generated by the Flight Fee and other airfield charges;
- the extent and sources of any other surplus revenue generated at EWR; and
- the uses to which the Port Authority puts net revenues generated at EWR.

F. UNITED'S GOOD FAITH EFFORTS TO RESOLVE THIS DISPUTE.

107. On July 19, 2013, after the Port Authority announced the huge increase in ARFF fees for EWR, JFK, and LGA, United and the other airlines wrote to the Port Authority, expressing surprise at the astronomical 284% fee increase and disappointment that the Port Authority's Aviation Department staff was purportedly not "authorized" to provide the detailed back-up information the airlines had requested. Exhibit JJ.

108. On September 10, 2013, United wrote to the Port Authority, protesting the ARFF fee increase and again requesting information upon which to base a determination whether or not the increase was reasonable. Exhibit KK.

109. United has had many other communications with the Port Authority to convey United's concern over the cost increases in the 2014 Flight Fee, including the following:

- September 5, 2013 meeting with the Port Authority's then Deputy Director, William Baroni, and staff;
- September 13, 2013 telephone call from representatives of United's Corporate Real Estate Department ("CRE") to the Port Authority to discuss the ARFF costs;
- November 6, 2013 meeting with Port Authority staff regarding ARFF charges;
- November 13, 2013 meeting of the EWR Finance Committee;
- December 4, 2013 meeting of the EWR Airport Affairs Meeting;
- December 30, 2013 meeting between senior representatives of United and the Port Authority;
- January 13, 2014 meeting between CRE representatives and senior representatives of the Port Authority;
- May 20, 2014 meeting of the EWR Finance Committee;
- Between September 2013 and September 5, 2014, Nene Foxhall, United's Executive Vice President, Communications and Government Affairs, had nine meetings and three calls with senior Port Authority representatives, including Deputy Directors William Baroni and Deborah Gramiccioni, and Director of Aviation, Thomas Bosco.

110. On September 15, 2014, in a final effort to resolve this dispute, United wrote to the Port Authority, outlining its concerns and requesting a meeting. Exhibit LL. The letter further advised the Port Authority that if the dispute could

not be resolved, United would have no choice but to seek relief from the FAA under Part 16. The Port Authority responded by letter dated September 26, agreeing to meet (Exhibit MM); United responded on September 30, stating it would follow up with a call to schedule the meeting. Exhibit NN.

111. On October 24 and November 4, 2014, representatives of United and the Port Authority met. At the conclusion of the meeting on November 4, it appeared that the parties were at an impasse. United made one further attempt at resolution through telephone calls from United's Deputy General Counsel to his counterpart at the Port Authority. Unfortunately, however, the parties were not able to resolve their differences. At this point, United has exhausted all avenues for a reasonable resolution with the Port Authority.

V. LEGAL ANALYSIS.

A. THE FAA'S AUTHORITY TO CONSIDER THIS FEE CHALLENGE.

112. As noted, the Aviation Act confers broad authority on DOT and FAA to regulate air commerce, *see* 49 U.S.C. § 40101, *et seq*., and the FAA has a specific statutory mandate to ensure that airports are complying with the Sponsor Assurances enumerated in the AAIA. *See* 49 U.S.C. § 47107.

1. The FAA Has Jurisdiction Under Part 16 To Investigate The Port Authority's Violation Of Sponsor Assurances.

113. The regulations promulgated under Part 16 of Title 14 (Aeronautics and Space) of the Code of Federal Regulations provide that the FAA has the authority to adjudicate certain disputes between air carriers and airport

proprietors. 14 C.F.R. § 16.1(a). Specifically, the FAA is empowered to investigate and adjudicate a complaint that an airport proprietor has violated the binding Sponsor Assurances. *Id.*

114. As shown herein, the Port Authority has violated the federal mandate that "airport fees, rates and charges must be reasonable." 49 U.S.C. § 47101(a)(12); 49 U.S.C. § 47107 (requiring airport sponsors to give assurance that "the airport will be available for public use on reasonable conditions and without unjust discrimination"); *see also* Sponsor Assurances, § 22.a (requiring that the airport proprietor "make the airport available as an airport for public use on reasonable terms").

115. The Port Authority has also violated the Sponsor Assurance that provides that "[e]ach air carrier using [the] airport shall be subject to . . . nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals and other charges…." *Id.*, § 22.e (which implements the Congressional guidance regarding airport fee structures set forth in 49 U.S.C. § 47101(13)).

116. The Port Authority has also violated the Sponsor Assurance requiring airport operators to use "[a]ll revenue generated by the airport…for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers." *Id.* at § 25a. The "grandfather" exception to this Sponsor Assurance allows airport

operators to divert aeronautical revenues if "covenants and assurances in debt obligations issued before September 3, 1982" allowed for such revenue diversion, but only if the funds are used for facilities owned and operated by the airport or for general debt obligations. *Id.* As discussed below, this exception does not apply to the Port Authority's diversion of EWR revenue to facilities that the Port Authority neither owns nor operates.

2. <u>The FAA Has Jurisdiction To Consider Challenges To Rates Set By Written Agreement</u>.

117. An air carrier may challenge rates and charges imposed by an airport proprietor either by initiating an action with the DOT under 14 C.F.R. Part 302 or with the FAA under Part 16. *See, e.g., Air Canada v. Dep't. of Transp.*, 148 F.3d 1142, 1145 (D.C. Cir. 1998) (noting that air carriers have "two administrative options…traditional investigation by the FAA or expedited determination by the Secretary [of the Department of Transportation]…"). Under the expedited Part 302 procedure, the DOT may not consider airport fees set by a written agreement. 14 C.F.R. § 302.601(b)(1).

118. Under the traditional Part 16 challenge procedure, however, the FAA "clearly has authority, under 49 U.S.C. §§ 46101 and 46105, to investigate a complaint with respect to allegedly unreasonable airport rates and charges," including those set by written agreement. *Union Flights, Inc. v. City and County of San Francisco*, FAA Docket No. 16-99-11, 2000 WL 311170, at *14 (Feb. 15, 2000); *Continental Micronesia, Inc. v. Commonwealth of the Northern Mariana Islands and Commonwealth Ports Authority*, DOT Docket No. 50191, 1995 WL 156451, at

*10 (Apr. 10, 1995) (noting that airline could challenge fee imposed by written agreement with FAA); *Delta Airlines v. Lehigh-Northampton Airport Authority*, DOT Docket No. 50264, 1995 WL 262369, at *12.15 (May 4, 1995) (noting that dispute concerned a fee set by a written agreement and transferring the matter to FAA for a Part 13 proceeding).

119. Indeed, the Rates and Charges Policy plainly contemplates that the FAA will investigate fees set by written agreement. *See* Rates and Charges Policy, 78 Fed. Reg. at 55331-32 (noting that "a dispute that is not subject to expedited procedures [because it is governed by a written agreement], will be processed by FAA under procedures applicable to airport compliance matters in general"). The requirements of federal law cannot be waived or abrogated by contract. *Id*., § 1.3 ("the requirements of any law…may not be waived, even by agreement with the aeronautical user").

120. Neither United, nor its predecessor-in-interest, Continental, negotiated the EWR Master Lease. In fact, the Flight Fee formula in the EWR Master Lease was first implemented by the Port Authority in 1972, before the enactment of the Airline Deregulation Act in 1978. United does not know whether any airlines actually negotiated the terms of the Flight Fee formula in 1972 or whether the methodology was simply imposed by the Port Authority. But certainly, neither United nor Continental ever negotiated the Flight Fee methodology. And, as noted above, the Port Authority did not disclose to United the hidden profit embedded in the methodology until 2013.

121. Further, United never agreed – in writing or otherwise – to the ARFF charges or the other unreasonable or excessive charges described above. A charge imposed unilaterally by an airport, but which is calculated under a formula that exists in a master lease, is not a "charge imposed by written agreement." *Miami Int'l. Airport Rates Proceeding*, Docket DOT-OST-96-1965-138, 1997 WL 33631154, at *11 (Mar. 19, 1997) (*"Miami Airport")* (noting that "…we are reluctant to hold that an airline's acceptance of a standard agreement requiring the payment of fees set by the airport must be deemed to constitute the kind of agreement barring an airline from obtaining relief under 49 U.S.C. § 47129…").

B. THE EWR FLIGHT FEE VIOLATES FEDERAL LAW.

1. Overview.

122. The Flight Fee charged to United by the Port Authority at EWR violates federal law because (a) it is unreasonable and discriminatory; and (b) the formula by which the fee is calculated is not transparent.

123. The Flight Fee imposed by the Port Authority is unreasonable in two fundamental respects. First, it generates revenues in excess of the reasonable cost of operating the airfield; the Master Lease actually sets a Flight Fee rate that includes a hidden 38% markup over actual costs. Second, because the Master Lease structures the Flight Fee as a "cost-plus" arrangement, the Port Authority has a disincentive to maintain and operate the airfield in an efficient manner. The resulting Flight Fee is then unreasonably high. Because it has monopoly power, the Port Authority can force United and the other air carriers to pay this unreasonable

Flight Fee, and because the Port Authority can divert its profits at EWR to subsidize its many money-losing off-airport projects, it has an incentive to maximize the fees it charges at EWR. Requiring United to pay fees that subsidize non-airport facilities is also unreasonable. The conclusion that the Flight Fee is unreasonable is amply supported by comparing the EWR Flight Fees to the landing fees charged at other airports.

124. The Flight Fee methodology is not transparent. The Master Lease itself does not reveal that there is a built-in profit component to the Flight Fee. This lack of transparency is compounded by the fact that the Port Authority has failed to share financial information with the airlines.

125. In addition, the Port Authority's overall rate scheme violates federal law because it discriminates, without justification, between users of EWR, on the one hand, and JFK and LGA, on the other hand.

2. <u>The EWR Flight Fee Is Not Reasonable</u>.

a. The EWR Flight Fee Is Not Reasonable Because It Generates A Profit.

126. Under federal law, the fees imposed by an airport proprietor must be reasonable. The governing statutes, regulations, and policies that require that fees be reasonable are as follows:

a. The AAIA provides that an airport receiving federal assistance in the form of an Airport Improvement Program grant, such as EWR, must "be available for public use on *reasonable* conditions and without unjust discrimination." 49 U.S.C. § 47107(a)(1)

(emphasis added). Once an airport accepts a federal grant, the assurance that it will be available on reasonable terms becomes "a binding contractual obligation between the airport sponsor and the federal government." *Indianapolis Airport* at 11.

b. The AHTA provides that state and local governmental entities (including a local airport authority) "may not levy or collect a tax, fee, head charge" relating to the sale of air transportation or related transactions. 49 U.S.C. § 40116(b). An airport authority may impose charges on aircraft operators for the use of the airport facilities, but such charges must be "*reasonable*." 49 U.S.C. § 40116(e)(2) (emphasis added).

c. The FAA Authorization Act of 1994, 49 U.S.C. § 47129, mandated that the DOT publish "regulations, policy statements, or guidelines establishing…the standards or guidelines that shall be used by the Secretary in determining…whether an airport fee is reasonable." 49 U.S.C. § 47129(b)(2). In response, the DOT and FAA published the Rates and Charges Policy, which has been revised from time to time since 1994 and most recently in September 2013. *See* Rates and Charges Policy, 78 Fed. Reg. 55330. The Rates and Charges Policy in turn repeats the reasonability standard prescribed by the AAIA and AHTA: "Rates, fees, rentals, landing fees, and other service charges

('fees') imposed on aeronautical users for the aeronautical use of the airport ('aeronautical fees') must be *fair and reasonable*." Rates and Charges Policy, 78 Fed. Reg. at 55331, § 2 (emphasis added).

d. Sponsor Assurance 22(a) requires that airport proprietors "make the airport available as an airport for public use on *reasonable* terms." Sponsor Assurances, § 22.a (emphasis added).

e. Sponsor Assurance 25 also requires operators to use "all revenue generated by the airport" on the airport, on airport-related facilities or, if a grandfather exception applies, on facilities owned or operated by the airport or on general debt obligations.

127. The law presumes that an airfield fee is unreasonable if it results in a profit for the airport proprietor. As the Rates and Charges Policy explains, "…the progressive accumulation of substantial amounts of surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's obligations to make the airport available on fair and reasonable terms." Rates and Charges Policy, 78 Fed. Reg. at 55335, § 4.2.1; *see also id.* § 5.2 ("[t]he progressive accumulation of substantial amounts of airport revenues may warrant an FAA inquiry into the airport proprietor's application of revenues to the local airport system").

128. Rates, fees, rentals, landing fees, and other service charges should be set in a manner that enables the airport authority to recover the costs of operating

the airport, not to make a profit. *See id.*, §§ 2-2.7.2; FAA Airport Compliance Manual, FAA Order 5190.6B, § 18.8(h) (explaining that "[u]nless users agree otherwise, airfield fees generally may not exceed the airfield capital and operating costs of existing airfield facilities and services…"). A federally-funded airport, after all, belongs to the public; it is not a for-profit enterprise. *See, e.g., Air Cal., Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989) (noting that cases have consistently "classified a municipally owned airport as a public utility."); *cf.* 18 U.S.C. § 956(b) (criminal statute punishing the destruction of an "airport…or other public utility").

129. The Rates and Charges Policy's rule prohibiting excessive profits is in line with the general rule of rate-making that fees should be based on the costs generally incurred. *See, e.g., Public Systems v. F.E.R.C.*, 709 F.2d 73, 81 (D.C. Cir. 1983) ("[r]atemaking is generally cost-based, and it is usually improper to consider 'costs' that a utility does not actually incur"); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 369 (1994) ("*Kent County*") (holding that "a levy is reasonable…if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce").

130. Consistent with the Rates and Charges Policy's admonition that the "progressive accumulation of substantial amounts of airport revenues may warrant an FAA inquiry," (Rates and Charges Policy, § 5.2), DOT has held that "landing fees must be based on costs and that the airport may not charge landing fees that will

cause the airport to generate unreasonable surpluses." *Los Angeles Int'l. Airport Rates Proceeding*, Docket DOT-OST-95-474, 1997 WL 784476, at *20 (Dec. 23, 1997) ("*LAX II*").

131. Notably, in a dispute involving airport charges imposed by the Port Authority with respect to the operation of EWR, the D.C. Circuit affirmed the DOT's ruling that certain capitalized planning costs were unreasonable. *Port Authority of New York and New Jersey v. U.S. Dep't. of Transp.*, 479 F.3d 21, 34-35 (D.C. Cir. 2007) ("*Brendan Airways*"). These charges were unreasonable because, among other reasons, the evidence showed that the Port Authority sought to collect significantly more than it actually spent. *Id.; accord Los Angeles Dep't of Airports v. U.S. Dep't. of Transp.*, 103 F.3d 1027, 1035 (D.C. Cir. 1997) ("*LAX I*") (noting that revenues from aeronautical fees should not exceed the costs of providing airport services).

132. Here, the Port Authority sets its Flight Fee rate-making formula so that it reaps a 38% profit on many costs, and a 14% profit on others. This guaranteed profit may be the envy of the boardrooms of private corporations, but EWR is a public utility and the profit earned by the Port Authority at the expense of United and other airlines is not permissible under federal law.

133. As specific examples of the markup, the Port Authority will collect $9 million in 2014 on top of the ARFF charges, and an additional $3.8 million markup on police and traffic costs.

134. In total, EWR typically generates an annual surplus of more than $160 million. The Port Authority has not disclosed how much of this surplus comes from the Flight Fee, but United believes it may be as much as $50 million. As discussed above, the Port Authority uses this windfall to fund its other projects.

135. The EWR Flight Fee significantly exceeds the cost of operating and maintaining the airfield. This practice of imposing charges on the aeronautical users to generate a substantial annual profit violates federal law. *See* Rates and Charges Policy, 78 Fed. Reg. at 55335 at §§ 4.2.1, 5.2; Airport Compliance Manual, FAA Order 5190.6B, § 18.8(h); *LAX II*, 1997 WL 784476, at *20; *Brendan Airways*, 479 F.3d at 34-35; *LAX I*, 103 F.3d at 1035. *See also* paragraphs 153-158.

b. The EWR Flight Fee Is Not Reasonable Because It Includes Unreasonable Expenditures.

136. Federal law, and the case law interpreting it, defines a "reasonable" landing fee as one that is roughly equivalent to the costs of operating the airfield. The other component of the reasonability of a landing fee is, as one would expect, that the airport proprietor's expenditures in operating the airfield must be reasonable.

137. As explained in the Rates and Charges Policy, "[a]irport proprietors are encouraged to establish fees with due regard for economy and efficiency." 78 Fed. Reg. at 55334, § 2.4.3. In other words, the guidelines prohibit the practice of "gold plating" – an airport cannot make extravagant and unnecessary expenditures and then pass the costs on to the users.

138. The Port Authority operates EWR as a cost-plus enterprise. If the Port Authority includes $1.00 of costs in the PAF Cost Factor component of the Flight Fee, it collects $1.38 from the aeronautical users for a 38 cent profit. And, if the Port Authority spends $2.00, it collects $2.76 from the users for a 76 cent profit. Perversely, the more money the Port Authority spends to operate and maintain the airfield, the more profit it generates.

139. Unsurprisingly, the Port Authority's expenditures on the operation of the airfield are excessive. The ARFF expenditures are a prime example.

140. As noted in paragraphs 79-92, the Port Authority's implementation of the ARFF cadre is unreasonable:

a. The Port Authority plans to hire existing PAPD members as 280 dedicated firefighters to perform the firefighting duties previously performed by the 280 police officers, *but nonetheless plans to hire 280 additional police officers.* This redundant staffing will result in massive and unnecessary labor costs.

b. Although the Settlement plainly provides that ARFF officers may not perform non-ARFF duties, the Port Authority nonetheless is devoting substantial resources to cross-train the officers in firearms and other policing functions. This training will serve no purpose other than to drive up costs, which are borne by the users, including the built-in 38% markup.

c. The average annual cost per ARFF firefighter at EWR is an astronomically high $242,000. This is the result of the Port Authority's decisions to provide wages and benefits that far exceed market rates and to allow excessive overtime.

141. The FAA Settlement does not require the Port Authority to operate the ARFF cadre in this manner. The FAA never, for example, directed the Port Authority to retain all 280 police officers on the ARFF cadre after hiring 280 new dedicated ARFF firefighters. Rather, the Settlement merely required the Port Authority to create a cadre of qualified ARFF firefighters. Nor does the Settlement require the Port Authority to provide training to its ARFF force in police functions. In truth, the Port Authority is using the Settlement as an excuse to cover excessive costs, which will in turn generate a greater profit.

142. The costs associated with airport security and administration are also unreasonably high. *See* paragraphs 93-104. Once again, the Port Authority's decisions to provide wages and benefits that far exceed market rates and to allow excessive overtime result in unreasonable charges to United and the other airlines.

143. There is every reason to believe that the Port Authority's expenditures are unreasonably high in every other facet of the operation of the airfield as well. Unfortunately, the Port Authority has generally refused to share any meaningful data regarding its costs.

144. In summary, the Port Authority's inefficient operation of the airfield – which may be inefficient by design – results in unreasonably high fees and charges in violation of federal law.

c. The EWR Flight Fee Is A Result Of The Port Authority's Monopoly Power.

145. The federal regulatory scheme governing airport rates and charges is intended to prevent airports from using their monopoly power to impose unreasonable charges. As the Rates and Charges Policy notes, "[t]he Department assumes that the limitation on the use of airport revenue and effective market discipline for aeronautical services and facilities other than the airfield will be effective in holding aeronautical revenues, over time, to the airport proprietor's costs of providing aeronautical services and facilities." 78 Fed. Reg. at 55335, § 4.2.1. Indeed, when the Rates and Charges Policy was first developed, the Federal Trade Commission, with whom the DOT consulted, noted that "the monopoly power of airport operators requires some pricing regulation." 60 Fed. Reg. at 6912.

146. As the D.C. Circuit remarked in *Alaska Airlines, Inc. v. Dep't. of Transp.*, 575 F.3d 750 (D.C. Cir. 2009) ("*LAX III*"), the question of whether an airport proprietor is wielding its monopoly power to charge unreasonable rates is "the elephant in the room." *LAX III*, 575 F.3d at 761. In evaluating a challenge to airport rates and charges, the adjudicating agency or court must consider the impact of the airport's monopoly power in setting rates. *Id.*

147. As discussed in paragraphs 65-66, the Port Authority has a monopoly on airports in the NYC metro area, the largest and most important airport market

in the United States for both domestic and international travel. Specifically, the Port Authority operates EWR, JFK, and LGA, which account for over 96% of all air travel to and from the NYC metro area and are the only airports large enough to support any significant operations.

148. The Port Authority exploits its monopoly power to charge an unjustifiably high Flight Fee at EWR. The EWR Flight Fee is the highest in the United States by far – higher even than the JFK Flight Fee, even though the cost per enplanement at JFK is greater than EWR. The EWR Flight Fee, and all the fees charged to the aeronautical users at EWR, far exceed the costs to operate the airfield.

149. As noted, EWR's Flight Fee is higher than the JFK and LGA Flight Fees. Because United operates the vast majority of its flights to and from the New York City metro area out of EWR and United's competitors operate mostly out of JFK and LGA, the unreasonably high EWR Flight Fee puts United at a significant competitive disadvantage.

d. The EWR Flight Fee Is Not Reasonable Because It Is Unjustifiably High Compared To The Landing Fees Charged By Other Airports.

150. When determining whether an airport's fee scheme is reasonable, the DOT and FAA consistently seek to validate the methodology or fee by comparing the practices at issue with those of other airports. *See, e.g., Miami Airport*, at *10; *LAX II*, 1997 WL 784476, at *18; *Bombardier Aerospace Corp. v. City of Santa Monica*, FAA Docket No. 16-03-11, 2004 WL 3198208, at *33 (Jan. 3, 2004)

("*Bombardier*"). In *Miami Airport*, the DOT relied heavily on the evidence regarding the practices of other airports in arriving at its decision that the airport's charges were reasonable. *Miami Airport*, 1997 WL 33631154, at *28.

151. Lest there be any doubt that the Port Authority's Flight Fee at EWR is unreasonably high, one need only look at what other major airports charge. EWR's Flight Fee is dramatically higher than the fee charged at any other airport in the nation. There is no justification for the disparity between EWR's Flight Fee and those charged by other airports.

152. The fact that EWR's Flight Fee is out of step with other airports is powerful evidence that these charges are unreasonable. *See, e.g., Bombardier*, 2004 WL 3198208, at *33 (finding that landing fees were unreasonable based on comparison with other airports).

e. The EWR Flight Fee Is Not Reasonable Because The Fee Is Excessive In Relation To The Benefits Conferred.

153. As explained above, the Flight Fee violates federal law (the AAIA, AHTA, and FAA Authorization Act) because it is not reasonable under the standards set by the Rates and Charges Policy. Prior to the publication of the Rates and Charges Policy, reasonableness was determined by the more general standard used by the Supreme Court in *Kent County*. *See Kent County*, 510 U.S. at 368-69. The *Kent County* standard tests whether a fee violates the Commerce Clause's prohibition of state taxation that unduly burdens interstate commerce. *Id*. at 367.

154. Under *Kent County*, a local tax, fee, or levy passes constitutional muster if the fee "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Id.* at 369.

155. Whereas the *Kent County* standard establishes only a constitutional bare minimum for whether a fee imposed by a local government is compatible with the Commerce Clause, the Rates and Charges Policy articulates specific criteria for fees imposed on aeronautical users by airports. In other words, the Rates and Charges Policy is more stringent than the *Kent County* test.[23]

156. The Flight Fee and other charges paid by United at EWR violate even the less exacting *Kent County* standard because the fees are excessive in relation to the benefits conferred. Specifically, the fees generate surplus revenue that is used to pay for non-aeronautical activities, such as the construction of the World Trade Center or the repair of the Pulaski Skyway. A user fee is not permissible under *Kent County* if it includes an excessive amount of charges for activities or programs that confer no benefit to the user. *See, e.g., Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 87 (2nd Cir. 2009) ("*Bridgeport*") (striking down fee charged to ferry passengers because it was formulated to cover projects that did not benefit ferry passengers).

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[23] In *Miami Airport*, the DOT noted that the Rates and Charges Policy is the controlling standard for whether a fee is reasonable. *Miami Airport*, 1997 WL 33631154, at *11. A fee must still, of course, pass constitutional muster under the Commerce Clause and *Kent County*.

157. *Automobile Club of New York, Inc. v. The Port Authority of New York and New Jersey*, 842 F. Supp. 2d 672 (S.D.N.Y. 2012), is instructive. In that case, the Automobile Club of New York ("AAA NY"), sought to enjoin certain toll increases because they were being used to fund the World Trade Center project. Notably, the Port Authority conceded "the applicability of the Supreme Court's three-prong test, set forth in [*Kent County*], to determine the reasonableness of [the] fees…." *Automobile Club of New York*, 842 F. Supp.2d at 677. The district court, however, denied the plaintiff's motion for preliminary injunction because the plaintiff was unable to prove that the Port Authority was using toll revenues to fund the World Trade Center project. *Id.* at 678.

158. Here, by contrast, the Port Authority openly admits that it diverts revenues from EWR to cover its other, non-aeronautical projects – such as the $14.8 billion dollar construction of the World Trade Center – that provide no benefit to EWR's aeronautical users. Consequently, the Flight Fee and other charges at EWR violate the Commerce Clause under *Kent County*. *See Bridgeport*, 567 F.3d at 86-88.

3. The EWR Flight Fee Violates Federal Law Because The Methodology By Which It Is Calculated Is Not Transparent.

159. Airport proprietors must charge rates in a manner that is "transparent." *See* Rates and Charges Policy, 78 Fed. Reg. at 55335, §§ 3.4 ("[a]llowable costs – costs properly included in the rate base – must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory

rate-setting methodology"), 3.4.1 ("[c]ommon costs…must be allocated according to a reasonable, *transparent* and not unjustly discriminatory cost allocation methodology. . .").

160. The Rates and Charges Policy's rule stating that rate-making formulas must be "transparent" requires the airport to disclose to the airlines all the cost data used to calculate the fees and charges. Indeed, the Rates and Charges Policy identifies certain information that airport proprietors should share with airport users to facilitate "meaningful consultation" regarding rates and charges. 78 Fed. Reg. at 55332, § 1.1.2, App. 1.

161. Courts have interpreted the Rates and Charges Policy to require that airports employ a "transparent, *i.e.* clear and fully justified method of establishing the rate base." *Bombardier*, 2004 WL 3198208, at *13; *see also Brendan Airways*, 479 F.3d at 35 (finding that EWR's cost forecast supplied insufficient information about capital project planning costs to justify fees); *Valley Aviation Services, LLP v. City of Glendale, AZ*, FAA Docket No. 16-09-06, 2011 WL 2274635, *47 (May 24, 2011) ("[t]here must, however, be a reasonable basis for establishing the rates, and the rate requirement must be applied consistently and in a transparent manner…").

162. In fact, the Rates and Charges Policy contains a list of financial information that airports should share with the airport users who must pay the rates and charges. 78 Fed. Reg. at 55332, § 1.1.2, App. 1; *see also American Airlines v. Puerto Rico Ports Authority*, DOT Docket No. 50178, Order 95-46 at 18-19 (Apr. 3,

1995) (directing airport to follow the practice of sharing information, as set forth in the Rates and Charges Policy).

163. Importantly, in a fee challenge involving the Port Authority in 2000, the DOT stated that it was "concerned by the allegations that the Port Authority refused to share financial information with the airlines when the airlines requested justification for the fees." *British Airways v. Port Authority of New York and New Jersey*, Docket DOT-OST-2000-7285-15, Order 2000-5-23, at 10. (May 24, 2000). As the DOT stated, "we expect airports to make information available to the carriers, including historical financial information; economic, financial and/or legal justification for changes in fees; traffic information; and planning and forecasting information." *Id.* at 10-11.

164. Over the years, United has repeatedly asked the Port Authority to disclose the cost data used to calculate the Flight Fee. With few exceptions, the Port Authority has consistently refused to share any meaningful information regarding the specifics of the operational costs of the airfield.

165. At best, the Port Authority's rate setting methodology for calculating the Flight Fee is opaque. The rate setting methodology lacks transparency and therefore violates federal law. *See, e.g.,* Rates and Charges Policy, §§ 3.4, 3.4.1; *Bombardier*, 2004 WL 3198208, at *13; *Brendan Airways*, 479 F.3d at 34; *Valley Aviation Services, LLP*, 2011 WL 2274635, at *47.

4. <u>The EWR Flight Fee Unlawfully Discriminates Against EWR Users</u>.

166. Federal law requires not only that rates and charges be reasonable, but also that charges be imposed uniformly among similar aeronautical users. *See* 49 U.S.C. § 47107(a)(1) (airports must "be available for public use on *reasonable* conditions and *without unjust discrimination*.") (emphasis added); Rates and Charges Policy, 78 Fed. Reg. at 55334, §§ 3 ("[a]eronautical fees may not unjustly discriminate against aeronautical users or user groups") (emphasis added); *Id.* at 3.1 ("[t]he airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport"); Airport Compliance Manual, FAA Order 5190.6B, p. 9-1 ("[a]n air carrier that assumes the same obligations imposed on other tenant air carriers shall enjoy the same classification and status. This applies to rates, fees, rentals, rules, regulations, and conditions covering all the airport's aeronautical activities"); *Indianapolis Airport* at 12 (holding that airport proprietors must "treat in a uniform manner those users making the same or similar use of the airport…").

167. The Port Authority operates all three major airports in the NYC metro area.

168. Air carriers operating out of JFK and LGA, on the one hand, are making similar use of the New York area airport system as those air carriers operating out of EWR, on the other hand. The Port Authority, however, charges higher Flight Fees for EWR than it does for JFK and LGA. There is no economic

justification for the higher fees at EWR; in fact, the Port Authority's cost per enplanement is actually higher at JFK than at EWR. Exhibit EE, ¶ 19.

169. This unjust economic discrimination greatly impacts United, which has a major hub operation at EWR. In fact, the Port Authority's imposition of higher rates and charges at EWR than at JFK and LGA results in significant competitive imbalance that disadvantages United. In summary, the higher Flight Fees at EWR constitute unjust economic discrimination.

5. The Port Authority Illegally Diverts Aeronautical Revenues To Fund Non-Port Authority Facilities.

170. As noted in the FAA's *Policy and Procedure Concerning the Use of Airport Revenue*, "[f]our statutes govern the use of airport revenue: the AAIA [Airport and Airway Improvement Act of 1982]; the Airport and Airway Safety and Capacity Expansion Act of 1987; the FAA Authorization Act of 1994; and the FAA Reauthorization Act of 1996. These statutes are codified at 49 U.S.C. 47101, *et seq*." 64 Fed. Reg. 7696 (Feb. 16, 1999).

171. The regulatory framework of these four closely related statutes can be distilled as follows: Airport operators are eligible for federal funding only if they use aeronautical revenues for the operation or capital improvement of the airports, or the airport-owned facilities that are "directly and substantially" related to the airport. 49 U.S.C. § 47107(b)(1).

172. The law carves out one narrow exception to this rule: the airport operator may divert aeronautical revenues but only if (a) such expenditures are

governed by a "provision enacted not later than September 2, 1982, in a law controlling financing by the airport operator or owner"; and (b) the expenditures are used for "the general debt obligations or other facilities of the owner or operator." 49 U.S.C. § 47107(b)(2). It is this "grandfather" exception that the Port Authority uses to divert hundreds of millions of aeronautical revenues to other projects.[24]

173. The *Policy and Procedures Concerning the Use of Airport Revenue* makes clear that airport revenue may only be diverted only if "the 'grandfather' provisions of 49 U.S.C. § 47107(b)(2) are applicable to the sponsor and the particular use." 64 Fed. Reg. at 7719 (under heading "Expenditures of Airport Revenue by Grandfathered Airports").

174. As discussed above, the Port Authority makes no secret that it diverts airport revenues to fund its non-airport money losing operations. In the Port Authority's own words, the "facilities that generate net income – *such as the airports*, tunnels and bridges – along with financial income – help pay for those facilities that have been operating at a loss…" (emphasis added). Exhibit A, p. 10.

175. The Port Authority also uses airport revenues to fund projects that exceed the limits of the "grandfather" exception. Specifically, the Port Authority spends money on roads, highways and other projects that it does not own or

[24] Notably, "in addition to the prohibition against awarding grants to airport sponsors that have illegally diverted revenue, the FAA considers the lawful diversion of airport revenues by airport sponsors under the grandfather provision as a factor militating against the distribution of discretionary grants to the airport, if the amounts being lawfully diverted exceed the amounts so lawfully diverted in the airport's first year after August 23, 1994." *Policy and Procedures Concerning the Use of Airport Revenues*, 64 Fed. Reg. 7697 (Feb. 16, 1999).

operate. The Port Authority's 2014 Budget, for example, allocates $181 million for improvements to the Pulaski Skyway and $60 million for repairs to the Wittpenn Bridge. Neither are owned or operated by the Port Authority, and neither are listed as Port Authority facilities in the 2014 Budget. Exhibit A [2014 Budget] at p. 74.

176. The Port Authority has also diverted airport revenues to other projects far outside the scope of the "grandfather" exception. The Port Authority has expended tens of millions of dollars in recent years on the New Brunswick Civic Center, the Stevens Institute of Technology (a private college in Hoboken), the Jersey City Medical Center and Independence Park, a Newark space run by Essex County, New Jersey. *See* Exhibit K.

177. The law is clear. Even under the grandfather exception, diversion of airport revenues is limited to debt service and "other facilities *of the owner or operator*." 49 U.S.C. § 47107(b)(2).[25] The Pulaski Skyway is not owned by the Port Authority; it is owned and operated by the New Jersey Department of Transportation. Similarly, the Wittpenn Bridge is not a Port Authority facility, nor are the other civic centers, parks, and hospitals that the Port Authority has funded with airport revenues over the years.

[25] Even if one were to ignore the clear statutory language and allowed the exception to include funding of facilities that are *related* to the operation of the airports, the Port Authority's expenditures still violate the law. Indeed, with regard to the Pulaski Skyway, the Port Authority's own in-house lawyer has opined that, even setting aside issues of revenue diversion, the Port Authority has "no authority. . . to construct, own, maintain or operate any of the approaches to the Holland Tunnel," such as the Pulaski Skyway. Exhibit I, p. 2.

178. The Port Authority's illegal diversion of airport revenues to pay for facilities that it does not own or operate constitutes a distinct and independent violation of federal aviation law.

PRAYER FOR RELIEF

Accordingly, United asks the FAA to investigate (i) the entire rate-making structure at EWR; (ii) the reasonableness of the resulting aeronautical fees; (iii) whether the Port Authority's fees at EWR are discriminatory; and (iv) the extent to which the Port Authority diverts aeronautical revenues at EWR to non-aeronautical functions. United further requests that the FAA order the Port Authority to provide financial information to United, order a comprehensive audit of rate-making at EWR, and order all appropriate relief to United.

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December 10, 2014

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing Complaint of United Airlines, Inc. on the following persons **by personal delivery,** in accordance with the Department's Rules of Practice:

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