IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, et al.,

Plaintiffs,

v.

NORMAN Y. MINETA, et al.,

Defendants

Case No. 1:05CV00654-RWR

DEFENDANTS' MOTION TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, hereby move, pursuant to Rule 12(b(1), Federal Rules of Civil Procedure, for an order dismissing this action. The grounds for this motion are that the Court lacks subject matter jurisdiction over some of plaintiffs' claims. In support of this motion, the Court is respectfully referred to Defendants' Combined Opposition to Plaintiffs' Application for Preliminary Injunction and Memorandum in Support of Their Motion to Dismiss and for Summary Judgment that is filed herewith.

In the alternative, defendants hereby move, pursuant to Rule 56, for summary judgment. The grounds for this motion are that defendants are entitled to judgment as a matter of law and that there are no disputed issues of fact material to that entitlement. In support of this motion in the alternative for summary judgment, the Court is respectfully referred to Defendants' Combined Opposition to Plaintiffs' Application for Preliminary Injunction and Memorandum in Support of Their Motion to Dismiss and for Summary Judgment that is filed herewith; to the

Statement of Material Facts as to Which There Is no Genuine Issue that is also filed herewith; and to the Declarations and Exhibits Filed herewith.

Respectfully Submitted,

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DEFENDANTS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE ARE NO GENUINE ISSUES

Pursuant to Local Rule 7.1(h), defendants Norman Y. Mineta, Secretary of the United States Department of Transportation, and Marion C. Blakey, Administrator of the Federal Aviation Administration, hereby submit the following statement of material facts as to which there are no genuine issues with regard to their motion for summary judgment:

1. Pursuant to Office of Management and Budget (OMB) Circular No. A-76 and the Federal Activities Inventory Reform (FAIR) Act of 1998, agencies are directed to classify, on an annual basis, all activities performed by government personnel as either commercial or inherently governmental. See Hennigan Decl. ¶¶ 2, 8.

2. Once an agency decides that a function is commercial, it must then determine, through a competitive cost comparison, which commercial activities should be performed by government personnel and which should be performed by a private entity. Id. ¶ 8.

3. In 2001, President Bush placed the Competitive Sourcing Initiative on his President's Management Agenda in an effort to expand competitions under OMB Circular A-76. Id. ¶ 9.

4. The Initiative required that federal agencies do a cost comparison (to determine if the function could be performed more efficiently by a private company) or directly convert 15% of its commercial activity inventory (using the calendar year 2000 FAIR Act Inventory as a baseline), and that this be accomplished by the end of fiscal year (FY) 2003. Id.

5. To meet this requirement of 15% for FY 2003, FAA would need to complete a cost comparison for, or convert at least 1,101 full-time-equivalent positions. Id.

6. It is widely recognized that the current Automated Flight Service Station (AFSS) system is unduly expensive and inefficient due to the large number of separate AFSS facilities and because the system utilizes outdated technology. See Courain Decl. ¶ 8.

7. Several internal and external studies, conducted from 1996 through 2001, found that the FAA could provide Automated Flight Service Station (AFSS) services differently and in a more cost effective manner. See Hennigan Decl. ¶ 10.

8. These studies include (i) the 1996 and 2001 Office of Inspector General (OIG) reports regarding the efficiencies and cost savings to be realized from restructuring and consolidating the services performed at automated flight service stations, and (ii) the April 1998 Flight Service Architecture Working Group Report which concluded that AFSS facilities were not meeting the user demand

and efficiently providing flight services. Id. ¶¶ 11-13.

9. In its 2001 report, the OIG estimated that the FAA could realize cost savings of nearly $500 million over seven years by consolidating the FAA's existing 61 automated flight service stations. See Exhibit 11 at 1.

10. In addition, the OIG determined that consolidation of the existing automated flight service stations could be accomplished "without degradation to safety or service." Id.

11. In early 2002, the FAA classified most of the functions performed by Flight Service Specialists as commercial and included these functions on the agency's draft 2002 FAIR Act inventory. Id. ¶ 6.

12. Based on the 1996, 1998, and 2001 reports and in accordance with OMB Circular A-76, the FAA asked a contractor, Grant Thorton, LLP, to conduct a feasibility study to help determine whether the AFSS function was suitable for competition. Id. ¶ 14.

13. The FAA excluded Alaska from the feasibility study due to the unique nature and requirements of aviation in Alaska. Id.

14. The feasibility study, completed in July 2002, determined that the AFSS function was a strong candidate for competitive sourcing because (i) private companies could accomplish the work; (ii) private companies were interested in bidding for and performing the work; and (iii) outsourcing would not compromise safety or homeland security. Id. ¶ 15.

15. On August 21, 2002, the FAA selected the Flight Service function for competitive

sourcing. Id. ¶ 16.

16. In September 2002, the FAA transmitted to the Department of Transportation (DOT) a list of functions to be included on the 2002 FAIR Act inventory. This list included most of the functions performed by Flight Service Specialists. Id. ¶ 6.

17. In March 2003, the National Association of Air Traffic Specialists (NAATS) challenged the FAA's inclusion of Flight Service Specialists in the agency's 2002 FAIR Act inventory. Id. ¶ 17.

18. In April 2003, the FAA denied NAATS' challenge and NAATS appealed to the DOT. Id. ¶¶ 18-19.

19. On May 9, 2003, DOT upheld the FAA's decision and concluded that the functions of Flight Service Specialists were commercial in nature. Id. ¶ 20.

20. Neither the age nor the retirement eligibility of the workforce played a role in the FAA's decision to (1) designate the AFSS function on the 2002 FAIR Act inventory; (2) identify the AFSS function for a feasibility study; and (3) competitively outsource the AFSS function. See Hennigan Decl. ¶ 23.

21. Even if the agency had been aware of and considered the age or retirement eligibility of the AFSS workforce, the agency still would have taken the same actions because there was a legitimate business reason for taking them. Id.

22. In December 2003, the FAA announced that the functions performed at the automated flight service stations (excluding those in Alaska) would be bid for competition pursuant to OMB Circular No. A-76. See DeGaetano Decl. ¶ 3;

Hennigan Decl. ¶ 21.

23. The FAA received five proposals, including the bid made by the Most Efficient Organization (MEO), the FAA's in-house bid. See DeGaetano Decl. ¶ 4.

24. In mid-January of 2005, the FAA's Source Selection Authority (SSA) was given the drafts of the Source Selection Evaluation Board (SSEB) Report, the Technical Evaluation Report (TER), and the Cost Evaluation Report. Included with the draft TER was Appendix B, the detailed analysis of the technical strengths and weaknesses of each proposal, and Appendix C, the detailed technical discussion items. Id. ¶ 5.

25. The SSA reviewed each of these appendices, focusing his attention on the SSEB Report, the Technical Evaluation Report and the Cost Evaluation Report. As he had requested, these reports did not disclose the names of the Potential Service Providers (PSPs) and instead referred to the PSPs by number (PSP 1, PSP 2 and so forth). Id.

26. The SSA also carefully reviewed the Screening Information Request, which contained the work requirements for the AFSS services and instructions to PSPs. Id.

27. The reports were the culmination of months' worth of effort by ten (10) evaluators/advisors with cost expertise and fifty (50) evaluators/advisors with technical expertise. The evaluation teams contained a rich mixture of technical expertise and training as well as hands-on-experience with and knowledge of FAA air traffic operations. Over twenty-five percent (25%) of the Technical Evaluation

Team members had thirty (30) or more years of professional experience. Id. ¶ 6.

28. In February 2005, after conducting a detailed analysis of each proposal submitted for consideration, the FAA selected Lockheed Martin as the vendor to perform the functions of automated flight service stations (excluding those in Alaska). Id. ¶¶ 4-5.

29. The selection decision was made on a "best value" basis, which is defined as "the combination of the impact of the overall benefits, risk, and cost for the delivery of effective flight services to support safe and efficient flight." Id. ¶ 7.

30. The savings anticipated by the FAA from the public/private competition versus maintaining the existing service is 2.2 billion dollars. See Kansier Decl. ¶ 25.

31. Neither the age nor the retirement eligibility of the existing AFSS workforce was a factor in the FAA's decision to select Lockheed Martin as the contractor. See DeGaetano Decl. ¶ 8; Kansier Decl. ¶ 26.

32. Indeed, the agency official responsible for making the selection of Lockheed Martin did not even know the identity of the successful bidder until after the decision had been made. See DeGaetano Decl. ¶ 8; Kansier Decl. ¶ 17.

33. Even if the agency was aware of and had considered the age or retirement eligibility of the workforce, the agency still would have selected Lockheed Martin's proposal because it represented the best value to the agency. See DeGaetano Decl. ¶¶ 7-8.

34. Following the February 1, 2005 award of the AFSS contract to Lockheed Martin, Agency Tender Official (ATO), James H. Washington, filed a contest on behalf

of the Most Efficient Organization to challenge the contract decision. See Washington Decl. ¶ 5.

35. The ATO did not allege that age was a factor in selecting Lockheed Martin as the contractor. Id.

36. In March 2005, the principal named plaintiff in this suit, Kathleen A. Breen, filed a separate contest and also intervened in the ATO contest. See Exhibit Y at 3.

37. Plaintiff Kathleen A. Breen filed the contest as the agent for the majority of the affected FAA employees. Id.

38. The FAA appointed Judge Edwin B. Neill of the General Services Board of Contract Appeals to serve as the Special Master to make findings and recommendations on the resolution of the contest. Id.

39. On June 28, 2005, Judge Neill issued a 99-page decision rejecting plaintiffs' claims in their entirety. Id.

40. On July 20, 2005, the FAA Administrator issued an Order adopting Judge Neill's findings of fact and recommendations in full. See Exhibit Z.

41. The Order provided that to the extent that the decision is subject to review, "such review shall be sought in accordance with Title 49, United States Code § 46110." Id.

42. Neither the age nor the retirement eligibility of the AFSS workforce was a factor in the FAA Administrator's July 20, 2005 Order. See Blakey Decl. ¶ 5.

43. The primary function of Flight Service Specialists is to provide a variety of meteorological and aeronautical information to assist pilots in planning a safe

flight. Flight Service Specialists do not separate or control air traffic. See Sheridan Decl. ¶ 4.

44. While the specialist is required to use interpretive and judgment skills, he or she does not have the authority to resolve a situation outside the bounds provided by the guidance materials. Id. ¶¶ 4, 6.

45. Many private companies provide some of the services similar to the Flight Services. In addition, major air carriers have an in-house operations department that provides services similar to those provided by Flight Service Stations. Id. ¶ 12.

46. Flight Service Specialists do not have policy-level decision-making authority or the ability to bind the Government to one course of action over another, in the performance of their duties. Id. ¶¶ 4, 6, 8.

47. With the increasing ability and demand for some services previously provided by AFSS to be provided on-line, a significant reduction in the number of offices providing such services will achieve substantial savings. Id.

48. The FAA issued RIF Notices on July 22, 2005 to all AFSS employees covered by the Lockheed Martin contract who would be separated from employment with the FAA after October 3, 2005. See Williams Decl. ¶ 6.

49. The Notices provided information about the grievance and appeal processes. Id.

50. On February 18, 2005, the FAA certified all AFSS employees covered by the Lockheed Martin contract as "surplus," effective February 22, 2005. Id. ¶ 4.

51. Upon receipt of the RIF Notice, an employee is designated as “displaced.” Id. ¶ 6.

52. Surplus/displaced employees are entitled to a wide variety of benefits and career transition services from the FAA. See Williams Decl. ¶¶ 8-15; Reyna Decl. ¶ 12.

53. In addition, with respect to staffing, Lockheed Martin's overall objective is to retain as many persons in the incumbent workforce as possible consistent with the staffing requirements of the new system. See Courain Decl. ¶ 25.

54. To that end, Lockheed Martin proposed to make job offers to all AFSS employees and to guarantee three years of employment to all full-time regular employees who are currently assigned or who are projected to be assigned to any of the 20 continuing facilities in Lockheed's proposal. Id.

55. To staff the three new Hub facilities, Lockheed Martin intends to give employees at the facilities to be closed the first opportunity to relocate to one of those new facilities. Id.

56. Moreover, Lockheed Martin will hire all incumbent employees at their present FAA pay rates, including locality pay, and they will receive 100% of current vacation benefits and a package of other Lockheed Martin employment benefits. Id.

57. For those employees currently assigned to sites slated to close during the transition period (and who would therefore be terminated at the time of site closing unless they are relocating to a Hub facility), Lockheed Martin offered, among other things, a $5,000 signing bonus, a laptop computer valued at $2400, and another $5,000 bonus for staying through the completion of their duties at the closing site. Id. ¶ 26.

58. For incumbent employees at the 17 continuing AFSS sites, Lockheed Martin offered, among other things, the $5,000 signing bonus, the laptop computer, and a three-year employment guarantee. Id. ¶ 27.

59. Similarly, for incumbent employees relocating to a Hub facility, Lockheed Martin offered the $5,000 signing bonus, the laptop computer, a relocation package valued at up to $50,000, a completion bonus for staying through a least one year at the new location of 20% of base compensation, and a three-year employment guarantee. Id.

60. In addition, all incumbents at the 20 continuing facilities will be eligible to share in up to 20% of the "award fee" that Lockheed Martin will be eligible to receive from the FAA for successful contract performance. Id.

61. Lockheed Martin's proposed staffing plan projects a gradual reduction in the number of AFSS specialists over the course of the transition and base periods of the contract. Id. ¶ 28.

62. Lockheed Martin will be able to perform the same workload with fewer specialists because of the ability to use the highly integrated FS21 system to perform workload balancing, and through use of other technology innovations and new system efficiencies. Id.

63. Most of the specialist staffing reduction will occur during transition as Lockheed Martin closes the 41 facilities. That process is scheduled to commence on April 1, 2006. Id. ¶ 29.

64. After these initial reductions, Lockheed Martin projects further decreases in the

specialist population based on natural attrition (i.e., leave for a new job, retirements, death, disability, etc.). Id.

65. Lockheed Martin plans to hire new specialists to replace members of the incumbent workforce only to the extent that an insufficient number of specialists accept its employment offers for any location or that natural attrition reduces the number of specialists below required levels. Id.

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Dated: August 23, 2005

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Plaintiffs	)	Civil Action No. 1:05-cv-00654-RWR
v.	)	
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Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs are experienced and valuable employees who provide a needed service to general aviation pilots. Unfortunately, the system and structure through which plaintiffs' employer, the Federal Aviation Administration ("FAA"), delivers "Flight Services" to its general aviation customers has become outmoded. Much of the work consists of providing pre-flight weather and flight-related information to customers who increasingly can obtain much the same information themselves through the Internet and other modern technologies. With 58 offices across the continental United States, Hawaii, and Puerto Rico providing information that modern technology now allows to be distributed in a more centralized fashion, the FAA's sprawling system for providing Flight Services is a relic of the 20th century that costs taxpayers $25 every time a plaintiff picks up the telephone to provide service.

In accordance with the President's Management Agenda identifying competitive sourcing of commercial activities as a major government-wide initiative to improve government performance, the FAA, pursuant to the FAIR Act, Pub. L. No. 105-270, § 2, 112 Stat. 2382 (reprinted at 31 U.S.C. § 501 note), conducted an open competition among a number of private enterprises and a group seeking to keep the services delivered within an FAA-based structure. Lockheed Martin fairly won the competition, and entered into a $1.9 billion dollar contract with the FAA. Central to Lockheed's plan to deliver services more efficiently is its ability to continue to use the Flight Service specialists who have served the FAA. On the date when what plaintiffs repeatedly call the "mass RIF and job eliminations," e.g., Pl. App. at 94, take place, every plaintiff who wants a job with Lockheed will have one.

Plaintiffs argue that, in turning over the managerial responsibility to operate the Flight Service function to a private company that can do the job more efficiently and that will make use

of workers from the pre-existing workforce, the FAA somehow violated the portion of the Age Discrimination in Employment Act ("ADEA") that applies to the federal government, 29 U.S.C. § 633a. Over and over again, plaintiffs cite three supposed indicators of FAA's bias, and it is striking how far any of them are from supporting any claim of actual age bias. First, plaintiffs accuse the FAA of being in favor of "'workforce flexibility'" and "'enhanced productivity,'" Pls' App. 48, 71, citing Pls' Ex. 14 at 3-4. Of course it is. The government ought to be interested in achieving flexibility and productivity. The ADEA is no enemy of those goals, and nothing in the ADEA even remotely suggests that employers are required to embrace an ethic of rigid inefficiency. Second, plaintiffs say that the FAA "equated the older workforce with one that is in need of an 'upgrade.'" Pls' App. at 70-71, 83, 94, characterizing Pls' Ex. 51. In fact, Exhibit 51 says that it is the "stations [that] are in disrepair" and cites the need to "upgrade our equipment and our service." Finally, plaintiffs rely most heavily on a non-decisionmaker's drawing attention to a "retirement eligible workforce." Pls' Ex. 50. But this was merely a way of noting – after the decision to subject Flight Services to competition had been made – how the impact of the competition on some within the workforce would be lessened because some employees would be eligible to receive retirement benefits from the government and go to work for a private vendor, if one was selected. Declaration of Johann Kansier, Director of FAA's Office of Competitive Sourcing ("Kansier Decl."), attached hereto as Exhibit A.

And even those members of the Flight Service workforce who are not already eligible to both receive a federal pension and still work at Lockheed will not suffer the kind of extraordinary irreparable harm that would be required to support a preliminary injunction. The kinds of harms that employees who lose a job sustain (and many of these plaintiffs are merely switching employment from the FAA to Lockheed, not losing employment altogether) may generally, and

here would be, made good by final relief and need not and ought not be preliminarily enjoined as a matter of public policy that has been recognized for more than three decades. Sampson v. Murray, 415 U.S. 61, 90 (1974). Plaintiffs attempt to show more specialized harm involving employees who will relocate. In a modern, mobile economy and society, these are far from the first employees who are faced with a choice whether to move for a job, and the harm from such relocation would thus not be extraordinary and irreparable even if it were imminent. It is not imminent since relocation will not be required until April 2006 at the earliest. See Declaration of Daniel J. Courain, Vice President, Business Process Services, Lockheed Martin Corporation ("Courain Decl."), attached hereto as Exhibit B, ¶ 29.

Plaintiffs' contentions about the harm of relocating overlooks two other points. First, Lockheed is paying generous bonuses and relocation allowances to those asked to relocate. Courain Decl. ¶ 27. Second, relocation would have been required whether or not the FAA had made the challenged decision to allow a private bidder to manage these services: as plaintiffs themselves admit, "[a]ll of the internal and external proposals available to the FAA . . . would have consolidated" facilities, Pls' App. at 88 (emphasis added), and the proposal favored by plaintiffs in particular "proposed an aggressive consolidation down to four facilities," id. at 88-89. Lockheed, by contrast, is preserving jobs at 20 facilities. Thus, Lockheed's bid requires less relocation than the alternative supported by plaintiffs.

In contrast to the lack of irreparable harm to plaintiffs, a preliminary injunction would impose truly irreparable harms on the FAA, Lockheed, and the public interest. Lockheed is in midstream in conducting the overdue reorganization of the way in which Flight Services are delivered. The people and resources devoted to setting up the new structure cannot be placed in suspended animation by an injunction and spring back into action without missing a beat years

hence when the injunction is lifted. Instead, much of the groundwork, planning, and implementation resources that have already been poured into this project will be irreversibly lost. Kansier Decl. ¶ 23. As a result, the FAA, which Lockheed will look to make good the sunk costs of the investments a preliminary injunction will cause it to lose, will sustain millions of dollars of losses, see id., that plaintiffs – who say they cannot post even a modest bond – are unlikely to make good.

Accordingly, plaintiffs are not entitled to injunctive relief both because the balance of hardships is tilted strongly against their claims of irreparable harm and because they have shown no likelihood of success on the merits. Indeed, plaintiffs' claims are so clearly devoid of merit that the action should be dismissed, or, in the alternative, the Court should enter summary judgment for defendants.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The longstanding policy of the federal government has been to rely on the private sector to supply the products and services the government needs. OMB Circular No. A-76 (Revised 1999), "Performance of Commercial Activities," at ¶ 4(a).[1] For many years, the federal government has distinguished between "inherently governmental activities" and "commercial activities" for purposes of determining when an agency must use only federal workers to perform

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[1] This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957, and 1960, and subsequently through guidance documents, policy letters and handbooks issued by the Office of Management and Budget (OMB). OMB Circular No. A-76 is OMB's principle policy guidance on this topic. Initially issued in 1966, OMB Circular No. A-76 was revised in 1967, 1979, 1983, 1999, and 2003. See OMB Circular No. A-76 (Revised 1999) at ¶ 4(b). The 1999 version of OMB Circular No. A-76 was in effect at the time of the challenged decisions except for the competition itself, which ended in February 2005. We therefore cite primarily to the 1999 version of OMB Circular No. A-76.

its activities or when it may use private sector workers. Pursuant to OMB Circular No. A-76 and the Federal Activities Inventory Reform (FAIR) Act of 1998, agencies are directed to classify, on an annual basis, all activities performed by government personnel as either commercial or inherently governmental. For suitable commercial activities, agencies are to determine, through a competitive cost comparison, which commercial activities should be performed by government personnel and which should be performed by a private entity. OMB Circular No. A-76 (Revised 1999), available at http://www.dla.mil/j-3/a-76/OMBCircularA-76.html (last visited Aug. 23, 2005), at ¶¶ 5, 8-10; FAIR Act, Pub. L. No. 105-270, § 2, 112 Stat. 2382 (reprinted at 31 U.S.C. § 501 note).

The FAIR Act essentially codified the administrative definition of "inherently governmental" function contained in OMB Circular No. A-76 and embodied in OMB's Office of Federal Procurement Policy (OFPP) Letter 92-1, dated September 23, 1992 ("OFPP Policy Letter 92-1"), available at http://www.acqnet.gov/Library/OFPP/PolicyLetters/Letters/PL92-1.html (last visited Aug. 23, 2005). The FAIR Act defines an "inherently governmental function" as a function "that is so intimately related to the public interest as to require performance by Federal Government employees." FAIR Act, § 5(2)(A). See also OMB Circular No. A-76 (Revised 1999) at ¶ 6(e); OFPP Policy Letter 92-1 at ¶ 5. Both the FAIR Act and OMB's guidance explain that inherently governmental functions are "activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements." FAIR Act, § 5(2)(B). See also OMB Circular No. A-76 (Revised 1999) at ¶ 6(e);[2]

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[2] In May 2003, OMB revised OMB Circular No. A-76 to state that inherently governmental activities require the exercise of "substantial" discretion. Current OMB Circular

OFPP Policy Letter 92-1 at ¶ 5. In contrast, services or products that merely support inherently governmental functions are commercial activities. OMB Circular No. A-76 (Revised 1999) at ¶ 6(e).

Building on the exercise of discretion as the distinguishing feature of inherently governmental functions, the FAIR Act further states:

> An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as --
>
> (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; [or] . . .
>
> (iii) to significantly affect the life, liberty, or property of private persons . . . .

FAIR Act, § 5(2)(B). OFPP Policy Letter 92-1 provides the following guidance as to the meaning of the exercise of discretion:

> While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. . . . [T]he mere fact that decisions are made by the contractor in performing his or her duties . . . is not determinative of whether he or she is performing an inherently governmental function.

OFPP Policy Letter 92-1 at ¶ 7(a).

Once an agency determines that a function is commercial, the presumption in accordance with OMB Circular A-76 is that the function should be provided by the private sector unless it is less expensive for the government to continue to perform that function using its own personnel. To make that determination, the agency conducts a competition to compare the cost of performing the function in-house with the cost of contracting the function out for performance by

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No. A-76 (revised 2003) at Attachment A, ¶ B(1)(b), available at http://www.dla.mil/j-3/a-76/OMBCircularA-76New.html (last visited Aug. 23, 2005).

the private sector.[3] OMB Circular No. A-76 recognizes that cost comparisons are not required for commercial activities meeting certain conditions. OMB Circular No. A-76 (Revised 1999) at ¶ 8. The government may continue performing a commercial activity when, inter alia, the activity involves the performance of a core capability related to the agency's mission. OMB Circular No. A-76 Revised Supplemental Handbook at Ch. 1(C)(3), available at http://www.dla.mil/j-3/a-76/A-76SupplementaryHandbookPart%20I.html#1C (last visited Aug. 23, 2005).[4]

Under the FAIR Act, interested parties may challenge an agency's classification of an activity as commercial. FAIR Act, § 3. The FAIR Act provides for an administrative challenge to the inclusion or omission of an activity from an agency's commercial activities inventory. FAIR Act, § 3(a). The challenge is submitted to the agency, and the agency designates an official who must decide the challenge within 28 days. FAIR Act, § 3(d). An interested party may appeal an adverse decision to the head of the agency. FAIR Act, § 3(e).

II. FACTUAL BACKGROUND

A. Background on Flight Service Specialists

The FAA currently operates 61 Automated Flight Service Stations (AFSSs) and 14 part-time Flight Service Stations (FSSs). There are currently 58 AFSSs in the continental United States, Hawaii and Puerto Rico, and 3 AFSSs in Alaska. The 14 part-time FSSs are not

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[3] Such a competition is also referred to as “competitive sourcing.”

[4] The current version of OMB Circular No. A-76 provides a series of reason codes to be used to explain an agency's rationale for government performance of a commercial activity. Reason Code A applies to a "commercial activity [that] is not appropriate for private sector performance pursuant to a written determination by the CSO [competitive sourcing official]." OMB Circular No. A-76 (Revised 2003) at Attachment A, ¶ C.

automated and are all in Alaska. Declaration of Paul J. Sheridan ("Sheridan Decl.), attached hereto as Exhibit C, at ¶ 2.

The function of the Specialist in an AFSS or FSS is to provide meteorological and aeronautical information primarily to general aviation pilots to assist them in planning a safe flight. Id. ¶ 4. The general aviation pilot is one who owns his or her own plane and does not provide commercial or charter passenger services. Id. ¶ 5. During flight, Flight Service Specialists provide real-time weather advisories and updates on navigational aids to pilots. Id. ¶ 4. Flight Service Specialists also coordinate aircraft flight plans with other facilities, initiate search and rescue activities when aircraft fail to arrive at destinations, and provide assistance to pilots who are lost or disoriented. Id.

The duties and responsibilities of the Flight Service Specialist differ significantly from those of an Air Traffic Controller in a Terminal or En Route position. Terminal controllers, located at airport towers or terminal radar approach controls (TRACONs), direct and control aircraft operating at or near airports. Their main responsibility is to organize the flow of aircraft into and out of the airport. Relying on radar and visual observations, they closely monitor each plane to ensure a safe distance between all aircraft and to guide pilots safely. En route controllers control aircraft outside the airport terminal airspace and observe and control the airplanes in their airspace on radar. Flight Service Specialists primarily support the general aviation community and do not direct, separate or control air traffic. Id. ¶¶ 7, 8.

The cost to the FAA of providing the Flight Service function is over $500 million a year. Each time a Flight Service Specialist picks up the phone to provide service, it costs the taxpayer an average of $25. The cost of this service comes out of the FAA's budget, the majority of which comes from the Aviation Trust Fund. The Aviation Trust Fund is fed mainly by taxes on air

passenger tickets. The Aviation Trust Fund is currently in dire straights, due to the financial distress of the aviation industry. See Text of Prepared Remarks of Administrator Blakey AOPA Speech, at 2, attached hereto as Exhibit D.

B. The FAA's History of Contracting out Air Traffic Control Services to the Private Sector

The FAA has, for many years, contracted with private companies to staff air traffic control towers at smaller airports. See June 12, 2002 Statement of DOT on Amendment of Executive Order on Air Traffic Organization, attached hereto as Exhibit E. In 1982, the FAA began contracting out air traffic services at low activity towers as a result of the Professional Air Traffic Controllers Organization strike. In 1993, Vice President Gore's National Performance Review endorsed the Contract Tower Program as an effective means of reinventing government services. See April 12, 2000 OIG Report on Contract Towers: Observations on FAA's Study of Expanding the Program, at Executive Summary, attached hereto as Exhibit F. Currently, there are 226 towers in the Contract Tower Program. Declaration of Wanda Reyna ("Reyna Decl."), attached hereto as Exhibit G, at ¶ 11. The Department of Transportation (DOT) Office of the Inspector General (OIG) has concluded that contract towers are comparable in quality and safety to FAA-operated towers and can be operated less expensively than FAA-operated towers. See Sept. 4, 2003 OIG Report, Safety, Cost, and Operational Metrics of the FAA's Visual Flight Rule Towers, at 1-2, attached hereto as Exhibit H; April 12, 2000 OIG Report on Contract Towers: Observations on FAA's Study of Expanding the Program, at introductory memo (Ex. F); May 18, 1998 OIG Report on Audit of Federal Contract Tower Program, at Executive Summary, attached hereto as Exhibit I. Congress has expressly approved the Contract Tower Program. See 49

U.S.C. § 47124; April 12, 2000 OIG Report on Contract Towers: Observations on FAA's Study of Expanding the Program, at Executive Summary (Ex. F).[5]

The Department of Defense also uses private companies to provide air traffic control services at a number of towers it operates. See Determination as to the Inherently Governmental Nature of Certain Air Traffic Control Services (July 12, 2002), at 1, attached hereto as Exhibit K. Many countries that formerly provided air traffic control as a government service, such as Canada, Germany, Great Britain, and Australia, now obtain these services from a commercial entity. Id.

C. The FAA's Decision to Compete and Award the Flight Service Function to a Commercial Entity

1. Numerous Studies of the Flight Service Function Conclude That it Is Ripe for Reform

By the time the FAA made the decision to conduct the AFSS A-76 competition in Augut, 2002, it was a well-documented fact that the agencies' AFSSs and FSSs were in need of a major overhaul. An internal FAA working group, the Inspector General for DOT, and outside agencies and organizations all studied the Flight Service function and came to the conclusion that the Flight Service operation was a bloated organization that suffered serious operational and cost inefficiencies. Various strategies were proposed for fixing it, ranging from enhancing automation systems to consolidation of AFSSs, to having the private sector perform the entire Flight Service function.

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[5] The National Air Traffic Controllers Association challenged the FAA's decision to privatize certain air traffic control towers, and that litigation is ongoing. The court in that case recently held that Level I air traffic control is not an inherently governmental function, as a matter of law, based on 49 U.S.C. § 47124(b) (directing Secretary to continue and extend Contract Tower program). See National Air Traffic Controllers Association v. Mineta, Case No. 99CV1152 (N.D. Ohio Feb. 4, 2005) (not on Westlaw, opinion attached hereto as Exhibit J).

In January, 1978, the FAA published its Flight Service Station Automation Master Plan ("Master Plan"). One of the objectives of the Master Plan was to improve the efficiency and productivity of the expensive and labor intensive Flight Service Station network by consolidating 318 FSSs into 61 automated FSSs. See OIG Audit Report, Management Advisory Memorandum on Acquisitions for Automated Flight Services, at 2 (Dec. 16, 1996), attached hereto as Exhibit L. A series of FAA Flight Service working groups recommended additional consolidation of Flight Service Stations, finding that 61 AFSSs were still too many stations to efficiently meet user demand, and formulated plans for implementing further consolidation of facilities and systems. See Flight Service Architecture Core Group Report at ¶ 1.3 (April 30, 1998), attached hereto as Exhibit M.[6] These analyses and recommendations were made between 1995 and 1998. Id.

Building on the early work of the FAA's Flight Service working groups, the Inspector General for the Department of Transportation issued a report in December, 1996, in which he observed that the FAA had an opportunity to substantially reduce flight service operating and acquisition costs by consolidating AFSSs and exploring the potential of providing flight services in other ways. OIG Audit Report, Management Advisory Memorandum on Acquisitions for Automated Flight Services, at 2-4 (Dec. 16, 1996) (Ex. L). The OIG's analysis of AFSSs revealed wide variations in operating and cost efficiencies among FAA regions. Id. at 5-7. The OIG concluded that the FAA could significantly reduce costs by performing comprehensive efficiency analyses of the existing AFSSs and implementing consolidation. In support of this

[6] The April 30, 1998 Flight Service Architecture Core Group Report also refers to recommendations of further efficiencies within Flight Service made by the General Accounting Office and the National Civil Aeronautics Review Commission. See Flight Service Architecture Core Group Report at ¶ 1.1 (April 30, 1998) (Ex. M).

conclusion, the report discussed a 1995 study by the FAA's Western Pacific Region Air Traffic Division, conducted in partnership with plaintiffs' union, the National Association of Air Traffic Specialists, to determine the feasibility of further consolidating AFSSs. That study projected a 10-year net savings of $19.1 million from consolidation. Id. at 7. The OIG additionally found that current technology was not an impediment to consolidation and observed that from a technological standpoint, "it is possible to provide the entire flight service function from a single facility." Id. at 8.

Beyond recommending additional consolidation, the OIG recommended that before the FAA awarded a contract for a new automation system known as OASIS, the FAA "[c]omplete an extensive evaluation of the private sector providing the full range of flight services from the pre-flight function to entire flight service function." Id. at 10. The OIG explained as follows:

> In our opinion, FAA also needs to include an alternatives analysis of the private sector providing the full range of flight services from the pre-flight function to the entire flight service function. We note that the flight service function could be provided similar to FAA's Contract Tower Program (Government owned/contractor operated). . . . Besides the Governmen owned/contractor operated type program, the flight service function could also be provided as a contractor owned/contractor operated operation. For instance, the current DUATS [Direct User Access Terminal Service] service is owned and operated by a contractor. We visited two potential OASIS vendors who stated that providing the entire flight service was technologically feasible and were very willing to provide the service. . . .
>
> All pre-flight and most in-flight services can be performed in the commercial sector. After extensive analysis, FAA may find that a few functions such as search and rescue, customs and law enforcement support, and emergency services may need to be kept in-house. However, these functions account for a very low volume of transactions and could be performed from a single site or possibly at other FAA facilities . . . . Notwithstanding the potential political and union pressure opposing the private sector providing the flight service function, FAA, before making an OASIS contract award[,] should perform an extensive evaluation of the full range of alternatives.

Id. at 8-10.

In 2001, the OIG issued another review of ways to improve efficiency and obtain cost savings in the Flight Service program. In a report issued on December 19, 2001, the OIG estimated that the FAA could save nearly $500 million over seven years by consolidating the FAA's existing 61 AFSSs into 20 sites, in conjunction with the planned deployment of OASIS. See OIG Report on Automated Flight Service Stations, at 1 (Dec. 7, 2001), attached to Pl. App. at Pl. Exh. 11). The OIG determined that consolidation of the AFSSs could be accomplished without any negative effect on safety or service for the following reasons:

> – Services provided by flight service specialists are increasingly being replaced by on-line flight services accessed directly by users – the improved technology of OASIS will enhance on-line access to services such as better weather displays and automatic flight plan processing;
>
> – FAA has already consolidated over 315 flight service stations into the current 61 sites with no adverse impact to safety or service;
>
> – Internal FAA studies have concluded that 61 sites are not necessary to meet current and future demand for flight services and recommended reducing the number of automated flight service stations by over half;
>
> – Critical in-flight services, such as enroute weather briefings, would be maintained under a consolidation strategy; and
>
> – Users have stated that they do not object to consolidation, provided there are automated technologies, such as OASIS, in place to maintain existing levels of service.

Id.

2. The President Establishes Competitive Sourcing as an Administration Priority

When President George W. Bush came into office in 2001, he identified competitive sourcing as a major initiative of his Administration. In 2001, the Administration released the President's Management Agenda, in which President Bush designated competitive sourcing of commercial activities as one of five major, government-wide initiatives to improve government

performance. See President's Management Agenda at 17-18, attached hereto as Exhibit N. The competitive sourcing initiative was based on the fact that nearly half of all federal employees perform tasks that are readily available in the commercial marketplace, and that "competition between public and private sources remains an unfulfilled management promise." Id. at 17. The President's Management Agenda noted that "[r]ecent competitions under OMB Circular A-76 have resulted in savings of more than 20 percent for work that stays in-house and more than 30 percent for work outsourced to the private sector." Id. at 18. In order to realize these savings, the Administration instructed agencies to meet the goal for 2002 of completing competitions on 5% of commercial activities and an additional 10% for 2003. Id. at 18.

Agencies have broad discretion to determine the types of commercial activities to be competed. See Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner (OMB July 2003) at 4, attached hereto as Exhibit O. In order to meet the 15% requirement, the FAA needed to complete a competition on at least 1,101 full-time equivalent positions. Declaration of John Hennigan ("Hennigan Decl."), attached hereto as Exhibit P, at ¶ 9.

3. The FAA Directs That a Study Be Prepared on the Feasibility of Competitively Sourcing the Flight Service Function

In early 2002, the FAA prepared a draft FAIR Act inventory for 2002 that identified the Flight Service Specialist function as a commercial activity. See Hennigan Decl. ¶ 6. In 2002, the FAA identified the Flight Service function as a candidate for competitive sourcing. Id. The Flight Service function was considered to be a strong candidate for competitive sourcing primarily because of the conclusions reached in the 1996 and 2001 OIG reports regarding the efficiencies and cost savings to be realized from restructuring the provision of AFSS services.

See Grant Thornton Feasibility Study at 1 (July 12, 2002), attached hereto as Exhibit Q; Hennigan Decl. ¶ 14.

The FAA hired Grant Thornton LLP to conduct a feasibility study to help the FAA determine whether to initiate a public-private competition, pursuant to OMB Circular No. A-76, for the Flight Service function. Hennigan Decl. ¶ 14. Grant Thornton identified the specific activities performed by Flight Service specialists and assessed the feasibility of competing each activity with the private sector. Grant Thornton evaluated each primary activity based on four criteria related to the feasibility of subjecting the activities to competitive sourcing: (1) the impact that the private sector's provision of the activity would have on FAA's mission; (2) the availability of commercial sources to perform the activity; (3) any security risks associated with the activity being performed by the private sector; and (4) any personnel issues that may impact on the feasibility of competing the activity. Grant Thornton Feasibility Study at 4-5 (Ex. Q). Additionally, Grant Thornton conducted market research to help determine industry availability to perform the various activities. (Id. at 8-11). Grant Thornton identified a number of companies in the private sector with both the interest and capability to perform the Flight Service primary activities. Id.

As set forth in its July 12, 2002 feasibility study report, Grant Thornton concluded that most of Flight Service primary activities were feasible to subject to a public-private competition pursuant to OMB Circular No. A-76. Grant Thornton found that there was a potential risk inherent in having some activities provided by a commercial source, but concluded that those risks were not substantial enough to warrant excluding the activities from a competitive sourcing study. Id. For example, providing international customs notifications and support to law enforcement agencies have a risk of compromising sensitive law enforcement and security data.

However, since these concerns could be addressed by requiring that potential commercial sources obtain security clearances, the activities were deemed feasible for competition. Id. at 17.

4. The FAA Selects the Flight Service Function for Competition

In August, 2002, the FAA selected the Flight Service function for a competitive sourcing study. In an August 21, 2002 memorandum, Chris Bertram, FAA's Chief Financial Officer, notified the Acting Administrator of his decision to proceed with a competitive sourcing study, based on Grant Thornton's conclusions that a substantial number of Flight Service personnel perform commercial activities, that private industry has the capability and interest in performing the Flight Service function, and that having a private company do so would not compromise aviation safety or homeland security. See Memo from Chris Bertram to Acting Administrator (Aug. 21, 2002), attached hereto as Exhibit R. Mr. Bertram explained that the competitive sourcing study of the Flight Service function "is a central part of our effort to meet the requirements of [the President's competitive sourcing] initiative" as set forth in the President's Management Agenda. Id. Mr. Bertram also stated that the competitive sourcing study would not include the Flight Service function in Alaska, due to the unique nature and requirements of aviation in Alaska. Id.; see also Hennigan Decl. ¶ 16.

5. The FAA Includes Activities Performed by Flight Service Specialists in its 2002 FAIR Act Inventory of Commercial Activities

The Department of Transportation included many of the activities performed by Flight Service Specialists in its 2002 FAIR Act inventory of commercial activities. The designation of Flight Service activities as either commercial or inherently governmental tracked the conclusions of the Grant Thornton feasibility study. See Memo from Steven J. Brown to CFO at 1 (April 9,

2003), attached hereto as Exhibit S. The FAA explained its decision to list most of the functions performed by Flight Service Specialists as commercial as follows:

> These functions are defined by detailed, precise instructions and guidance set out in numerous FAA orders, including 7110.10, Flight Services; 7610.4, Special Military Operations; 7900.5, Surface Weather Observing; 7930.2, Notices to Airmen, and others. The functions performed by FAA specialists support the FAA's mission of aviation safety and security. The discretion afforded any FSS specialist in the performance of his or her duties, however, is bound by the instructions and guidance in these orders and other material. While the specialist is required to use interpretive and judgment skills, he or she does not have the authority to resolve a situation outside the bounds provided by the guidance materials. Similar functions are provided by contractors worldwide, and some are performed by contractors in the United States for non-Federal entities. In summary, there is no policy-level decisionmaking, no ability to bind the Government to one course of action over another, in the performance of these activities.

Id. at 1-2. While some FSS and AFSS positions had been listed on the FAA's 2000 and 2001 FAIR Act inventories, the activities of the Flight Service Specialists, for the most part, did not appear on the inventory until 2002. Hennigan Decl. ¶ 6.

Also included in the Department's 2002 inventory of commercial activities were activities involving the separation and control of air traffic, but these were identified as core capabilities not subject to cost comparison. See Memo from Administrator Blakey to Air Traffic Terminal and Center Employees (Dec. 19, 2002), attached hereto as Exhibit T.

On March 4, 2003, the Union representing Flight Service Specialists, the National Association of Air Traffic Specialists, challenged the FAA's inclusion of activities performed by Flight Service Specialists in its 2002 Fair Act inventory, pursuant to the FAIR Act. See NAATS FAIR Act challenge, attached hereto as Exhibit U; FAIR Act, § 3. They argued that Flight Service activities are inherently governmental because they relate to the core mission of the

agency to maintain and enhance aviation safety and security, and because they significantly affect the life or property of private persons. NAATS FAIR Act challenge (Ex. U).

On April 10, 2003, the FAA rejected NAATS's FAIR Act challenge. The FAA explained that NAATS's position that any activity that pertains to an agency's mission is inherently governmental is unsupported by the FAIR Act, OMB Circular No. A-76, or any other guidance. Furthermore, while the services provided by Flight Service specialists affect aviation safety and security, their actions are bound and directed by a web of pre-established federal regulations, FAA Orders, rule and procedures surrounding and defining the actions and authority of the specialist. The specialist does not have the authority to bind the United States to take or not to take some action. See FAA response to NAATS's FAIR Act challenge (April 10, 2003), attached hereto as Exhibit V.

NAATS appealed the FAA's decision to the DOT, pursuant to § 3(e) of the FAIR Act. DOT upheld the FAA's decision in a thoughtful, nine-page written opinion addressing all of NAATS's arguments. See DOT letter to NAATS President Walter Pike (May 9, 2003), attached hereto as Exhibit W. DOT concluded that with the exception of those activities identified by the FAA as inherently governmental, the duties of Flight Service Specialists fall into the category of providing support to the agency's mission, which may be considered commercial under OMB Circular No. A-76, rather than actually performing an inherently governmental function. DOT also reasoned as follows:

> While Flight Service Specialists perform activities that include the use of professional judgment and expertise, they do not have the authority to provide that advice outside of a myraid of FAA regulations, policy and procedures with respect to how air traffic control services are to be performed. Thus, they do not exercise discretion in applying Federal Government authority in the manner contemplated by the FAIR Act. . . . The Flight Service Specialists do not have the discretion to

modify or ignore FAA regulations or policy or to commit the Government to a course of action that differs from that contained in agency regulations or policy.

Id. at 7.

6. The FAA Conducts the AFSS Public-Private Competition and Awards a Contract to Lockheed

In December, 2003, the FAA began an A-76 public-private competition for the services provided by the 58 AFSSs in the continental United States, Puerto Rico and Hawaii. See Hennigan Decl. ¶ 21. That competition ultimately culminated in a contract being awarded to Lockheed on February 1, 2005.

a. The FAA Carefully Evaluated All Proposals

After issuing a Screening Information Request in May 2004 to obtain bids for the contract, FAA employees competed against four private companies to propose a solution to AFSSs which reduces costs and improves the AFSS service without diminishing safety. See Kansier Decl. ¶ 8. The technical proposals were received in August 2004 and the cost proposals a month later. These proposals were evaluated by a Technical Evaluation Team ("TET") and Cost Evaluation Team ("CET"), respectively, that produced reports to the Source Selection Evaluation Board ("SSEB") listing strengths and weaknesses of the various proposals.[7] Id. ¶¶ 11-16. The reports "were the culmination of months' worth of effort by 10 evaluators/advisors with

[7] The TET considered the proposals on four technical factors listed in the solicitation: (i) Phase-in; (ii) Staffing and Management; (iii) Service Delivery; and (iv) Performance Management. Kansier Decl. ¶ 14. The CET evaluated proposals on total cost, compliance with the solicitation, cost reasonableness, cost realism, and total cost of ownership. Id. ¶ 15. The TET, CET, and SSEB Reports as well as the evaluation guides all contain highly sensitive proprietary information. FAA will submit these document, to the extent the Court desires them, upon a request from the Court and entrance of a protective order.

cost expertise and fifty evaluators/advisors with technical expertise." Declaration of Dennis Degaetano, ("Degaetano Decl."), attached hereto as Exhibit X at ¶ 6.

The SSEB conducted an independent comparative evaluation of the various proposals and the reports of the TET and CET. Kansier Decl. ¶ 17. Under the solicitation, the ultimate award was to go to the "best value" for the government, which was defined as "the combination of the impact of the overall benefits, risk and cost for the delivery of effective flight services to support safe and efficient flight." Id. ¶ 13. Applying this standard, the SSEB drafted a report making a recommendation on the award of contract to the Source Selection Authority ("SSA"), Dennis Degaetano. Id. ¶ 17. The SSEB recommended that Lockheed be awarded the contract but identified Lockheed and the other proposals with unique numbers not by name, so that the SSA would not know in advance who would be receiving the contract. Id.; Degaetano Decl. ¶¶ 5-7.

The SSA accepted the SSEB recommendation because the recommendation "was sound, rationally based on an impartial and thorough evaluation, and was in all other aspects arrived at in accordance with the competition's evaluation criteria." Degaetano Decl. ¶ 7. After carefully reviewing not only the SSEB report, but the technical and cost evaluation team reports, the SSA decided that vender number 2 (which was Lockheed) had made the offer, which was the best value to the government. Id.

b. Lockheed's Proposal

The core of Lockheed's plan was to reduce the number of locations where the AFSS services are provided from 58 locations down to 3 primary hubs in new buildings near existing locations and 17 cities in existing locations. See Courain Decl. ¶ 19. Additionally, Lockheed relied on substantial improvements to technology that allowed for the gradual reduction in the number of AFSS employees during the transition while maintaining service levels. See id. ¶¶

22-25 (describing the FS21 system and technological upgrades). Another key facet of the Lockheed proposal was that it made "job offers to **all** AFSS employees and . . . **guarantee[d]** three years of employment to all full-time regular employees who are currently assigned or who are projected to be assigned to any of the 20 continuing facilities in our solution." Id. ¶ 25 (emphasis in original). "Of the approximately 2300 FAA employees who were in the incumbent AFSS workforce when [Lockheed] began the phase-in, 2119 applied for employment with Lockheed and received offers. Of those offers, 2018 were accepted and only 70 were declined." Id. ¶ 33.

The period between the award of the contract in February 2005 and the RIF, which is due to occur in early October 2005, is the "phase-in period." The phase-in period will allow Lockheed to gear up to take over responsibility of these job functions after the RIF, while simultaneously allowed the FAA to gear down and cease making long term investments in the dated system and has been ongoing for about seven months. Id. ¶¶ 12, 31. The phase-in period involves "facility and operational assessments of all current AFSS system elements; Human Resources ("HR") activities relating to transition of the current FAA workforce to private employment; leasing and construction of the new Hub facilities; and continuing integration and customization of the FS21 system." Id. ¶ 32. "At the beginning of the phase-in, 2027 of the 2300 FAA employees in the incumbent workforce were specialists" and "1960 of those specialists applied for and received an offer of employment with Lockheed Martin" while "1880 specialists formally accepted those offers in writing and 59 formally declined the offers" Id. ¶ 34. Lockheed has "offered 1224 of them a three-year employment guarantee." Id. ¶ 35. While Lockheed is on schedule, there is still much to do in the phase-in period to complete human resources training, including open houses in August and September 2005, and continued "work

on the Hub facilities, continue preparations for the upgrade and modernization of the 17 continuing AFSS facilities, and continue customization and systems integration work on the FS21 system." Id. ¶ 37-39.

Once the RIF is effective after October 3, 2005, there is an 18 month transition period. As of that date, the Lockheed will take over operations at the existing facilities with all of the current employees who have accepted offers. During the transition period Lockheed will introduce the FS21 operational system and complete renovations of the facilities that are being retained. Id. ¶ 41. It is also during the transition period that the number of facilities will be reduced from the current 58 to the 3 hubs and 17 other facilities. See id. ¶ 19. Thus, 41 facilities will ultimately close during the transition period. See id. Thus, "[m]ost of the specialist staffing reduction will occur during transition as we close the 41 facilities" but "[t]hat process is scheduled to commence on April 1, 2006." Id. ¶ 29 (emphasis added). The planning for the remaining phase-in period has already occurred and a great amount of effort has already been expended regarding the transition period, which would require tremendous effort and cost to change at this late stage. See id. ¶ 43-53 (discussing the planning done to date and harm that would flow from an alteration of the transition schedule).

Over 95% of current AFSS employees will be employed with Lockheed as of the effective date of the RIF. Lockheed provided a minimum $5,000 signing bonus for every person agreeing to work for Lockheed. Id. ¶ 26-27. Plaintiffs currently working at locations that will eventually close receive an additional $5,000 completion bonus. Id. ¶ 26. Moreover, plaintiffs choosing to relocate receive an additional bonus of 20% of their base compensation. Id. ¶ 27. These bonus payments are only one aspect of the generous benefits plaintiffs are entitled to after the RIF. Lockheed agreed to match current incumbent salaries, including locality pay increases

offered by the federal government, id. ¶ 25, and advanced each incumbent 40 hours of sick leave on the first day of employment and the right to accrue vacation at the rate identical to the government rate. Agency Tender Official James H. Washington, et al. v. FAA, 05-ODRA-00342C and 05-ODRA-00343C (consolidated) (June 28, 2005) (hereinafter "Neill ODRA Opinion")[8] at 23 (describing Lockheed's proposal), attached hereto as Exhibit Y. Additionally, Lockheed provided a generous 401K retirement plan. Each Specialist is also eligible to share in up to 20% of the "award fee" that Lockheed will be eligible to receive from the FAA for successful contract performance. Courain Decl. ¶ 27. Lockheed provided every specialist with a laptop computer valued at $2400. Id. ¶¶ 26-27. Lockheed's offer also provided plaintiffs 100% tuition reimbursement and corporate career opportunities with Lockheed for all employees, including temporary hires. Finally, relocating plaintiffs are entitled to a relocation package from Lockheed totaling up to $50,000, which includes broker registration, trips to find new homes, temporary living expenses, closing costs on real estate transactions, moving household goods, a temporary allowance at the new location, and spousal job assistance. Id. ¶ 27; see Neill ODRA Opinion at 23 (describing Lockheed's proposal). While the Lockheed plan does plan for staff reductions, over the course of the transition period, "[m]ost of the specialist staffing reduction will occur during transition as we close the 41 facilities" which "is scheduled to commence on April 1, 2006." Id. ¶ 29. "After those initial reductions, [Lockheed] projected further decreases in the specialist population based solely on natural attrition (i.e., leave for a new job, retirements, death, disability, etc.)." Id.

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[8] The redacted version of Judge Neill's ruling is attached. FAA will submit the unredacted version of this opinion, which contains sensitive proprietary information, should the Court request and after a protective order is entered.

7. Judge Neill Squarely Rejected All A-76 Contests to the FAA's Contract Award to Lockheed

Following the February 1, 2005 award of the contract to Lockheed, Agency Tender Official James H. Washington filed a contest on March 11, 2005, to challenge the contract decision. On March 14, 2005, the principal named plaintiff in this suit, Kate Breen, filed a separate contest and also intervened in the Agency Tender Official contest. The FAA appointed Judge Edwin B. Neill of the General Services Board of Contract Appeals to serve as the Special Master to make findings and recommendations on the resolution of the contests for the Office of Dispute Resolution for Acquisitions (ODRA). The original and supplemental contests raised numerous issues and alleged inter alia that the FAA was biased against the incumbent Most Efficient Organization (MEO) proposal or in favor of Lockheed and that the FAA either did not give sufficient weight to the strengths of the MEO proposal or failed to properly analyze costs and other problems with the Lockheed proposal. Judge Neill's ruling rejected these claims in their entirety. In so doing, Judge Neill made 136 findings of fact and rejected plaintiffs' claims of bias, Neill ODRA Opinion at 45-49, 62-65 (finding no individual or institutional biases) and errors in evaluation of the proposals various strengths and weaknesses, see id. at 72-86 (concluding that the TET's decisions were rationally based) & 86-96 (addressing price reasonableness, cost realism, and claims that Lockheed's bid had a variety of unrealistic costs). Judge Neill held that SSEB undertook a careful review of the reports and that the SSEB and SSA made a reasonable best value judgment in choosing Lockheed, concluding that "the objections of the contesters to the SSEB's recommendation and to the SSA's final selection to be without merit." Id. at 98-101.

Marion Blakey, Administrator of the FAA, adopted Judge Neill's findings of fact and recommendations in full on July 20, 2005. See FAA Order No. ODRA-05-348 (July 20, 2005), attached hereto as Exhibit Z. This order denied plaintiffs' (and Agency Tender Official's) contests and is appealable only to the appropriate court of appeals within 60 days of the opinion. Id. (citing 49 U.S.C. § 46110, which provides for exclusive review in the courts of appeals).

8. The FAA initiated an RIF of all AFSS positions covered by the AFSS A-76 Competition

On July 6, 2005, the FAA initiated an RIF of all AFSS positions covered by the AFSS A-76 competition. Declaration of George W. Williams, Jr. ("Williams Decl.) at ¶ 5, attached hereto as Exhibit AA; Declaration of James H. Washington ("Washington Decl.") at ¶ 4, attached hereto as Exhibit BB.. Neither age nor retirement eligibility was a factor in beginning the RIF. See Washington Decl. ¶ 6. Plaintiffs received formal RIF notice on July 22, 2005, that all AFSS positions covered by the Lockheed contract would be separated from employment with the FAA after October 3, 2005. This notice provided affected plaintiffs with rights to appeal. Plaintiffs may file a claim with the Merit Systems Protection Board within 30 days after the RIF or, if the claim relates to a complaint of discrimination a claim with the Equal Employment Office within 45 days. Id.; See Attachment A to RIF Notice (July 22, 2005)

Members of the NAATS Bargaining Unit also have the right to file a grievance under their collective bargaining agreement within 20 days of receiving the RIF notice. All employees may use the FAA's internal procedure, the Guaranteed Fair Treatment process, and file an appeal within 10 days of receipt of the RIF notice. See Attachment A to RIF Notice (July 22, 2005).

9. FAA Has Made Great Efforts to Mitigate Any Negative Effects of the RIF on the Incumbent Workforce

On February 18, 2005, all AFSS employees covered Lockheed contract were certified as "surplus," effective February 22, 2005. See Williams Decl. ¶ 4. This made them eligible for a wide variety of benefits that FAA provided.

First, the FAA contracted with FPMI Solutions to establish a Career Transition Assistance Center providing web-based and telephonic services with professional career counselors and job developers. The services include providing job outplacement services, one on one counseling sessions on resume writing and development, job networking, interview coaching and techniques, and financial management resources.[9] Id. ¶ 9.

Second, employees certified as surplus are also eligible to participate in Preferred Placement Programs (PPPs). Id. ¶ 11. The FAA established one PPP for vacancies within the Air Traffic Organization and another for vacancies within the FAA but outside the Air Traffic Organization, which are described in AHR Policy Bulletins. Under the PPPs, surplus employees receive priority on all internal job vacancies and selecting officials must provide written justification to higher level officials if they do not select a surplus/displaced employee. All internal vacancy announcement dates were extended and the area of consideration included surplus/displaced employees. The ATO also issued a separate nationwide vacancy announcement for Air Traffic Control Specialists at certain facilities within the terminal option for which the area of consideration was limited to only surplus/displaced employees.

[9] FAA also allowed employees certified as surplus to use up to 16 hours per pay period to engage in career transition activities. Id. ¶ 10. Employees who accept employment with Lockheed may received eight hours per pay period to search for employment with the federal government. Id.

Furthermore, the FAA created an age exemption program that allows surplus/displaced employees to apply for ATCS positions in the terminal and en route options for which they would not otherwise be qualified. Id. ¶¶ 11-12.

Third, when the formal RIF notices issued in late July 2005, the affected employees became designated as "displaced." Id. ¶ 6. As displaced employees, they became eligible for the FAA's Selection Priority Program (SPP). Id. ¶ 15. Under the SPP, displaced employees must be selected for all external FAA vacancies within the commuting area if well-qualified for the position before a non-FAA candidate continuing for two years beyond their separation date. Id. Moreover, eligibility for displaced employees to participate in the SPP, is not be affected by initial acceptance (or declination) of Lockheed's job offer. Id. Finally, the FAA increased its coordination with the other federal agencies to assist in the placement of displaced employees find federal employment. Id. ¶ 19. In light of these extraordinary efforts, the FAA alone had made at least 229 job offers to surplus/displaced AFSS employees through these programs as of August 19, 2005. Id. ¶ 13.

Finally, FAA has made an extra effort to reach out to the existing AFSS employees in a variety of ways. Teams of human resources professionals have visited all 58 AFSS facilities twice to brief affected employees and employment and retirement options, career transition, RIF procedures, federal employment benefits and entitlements (unemployment, terminal leave, severance pay, interchange agreement). Id. ¶ 17. FAA also established twelve help desks staffed with human resources professionals to answer similar questions. Id. The FAA also expanded its Employee Assistance Program (EAP) by adding resources to accommodate initial counseling services to employees designated as surplus and their families and to provide on-site seminars at

the 58 AFSS facilities affected. Id. ¶ 18. The EAP is available to retirees and separated employees for six months after separation. Id.

III. PROCEDURAL POSTURE

On March 31, 2005, plaintiffs filed their original complaint in this action, and on June 24, 2005, plaintiffs filed a First Amended Complaint. Plaintiffs are 834 individual, named plaintiffs who claim to be currently employed by the FAA as Flight Service Specialists. They further allege that they are all over 40 years of age and are adversely affected by the FAA's decision to competitively source the Flight Service Specialist job function to the private sector. Plaintiffs claim that the FAA's decision to contract out the Flight Service Specialist job function to the private sector, pursuant to OMB Circular No. A-76, discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 633a. Plaintiffs assert both disparate treatment and disparate impact theories of liability under the ADEA.

On July 26, 2005, plaintiffs filed an Application for Preliminary Injunction, seeking to enjoin RIF, effective after October 3, 2005, of all Flight Service Specialists.

ARGUMENT

I. LEGAL STANDARDS

A preliminary injunction is an extraordinary remedy and a drastic and unusual measure that "should be sparingly exercised." Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (internal quotation marks omitted); Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985). Preliminary injunctive relief should be limited to those situations where a party must act to maintain the status quo in order to prevent immediate and irreparable injury until the lawsuit can be determined on the merits. Sullivan v. Murphy, 478 F.2d 938, 964 (D.C. Cir. 1973). In the absence of irreparable injury, a preliminary injunction should be denied. See

CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (where plaintiff "has made no showing of irreparable injury . . . [this] alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting" a request for injunctive relief).

A plaintiff seeking preliminary injunctive relief must demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. See Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989). "In deciding whether to grant an injunction, the district court must balance the strengths of the requesting party's arguments in each of the four required areas." CityFed Financial Corp., 58 F.3d at 747. In this case, plaintiffs fail to meet any of these requirements.

A court must dismiss a case when it lacks subject matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P. A motion to dismiss under Rule12(b) should be granted when "plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." Kowal v. MCI Commun. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court "may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted); see also Artis v. Greenspan, 223 F. Supp. 2d 149, 152 n.1 (D.D.C. 2002). While the complaint must be construed liberally, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts, see EEOC

v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997), it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence. See Am. Farm Bureau v. Envtl. Prot. Agency, 121 F. Supp. 2d 84, 90 (D.D.C. 2000).

Finally, summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243 (1986). The moving party will be entitled to judgment as a matter of law where the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. See Fed. R. Civ. P. 56(c)); Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). To defeat a summary judgment motion, "a plaintiff must have more than a scintilla of evidence to support [his] claims." Freedman v. MCI Telecommunications Corp., 255 F.3d 840, 845 (D.C. Cir. 2001) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)).

II. PLAINTIFFS CANNOT ESTABLISH A CLAIM OF DISPARATE TREATMENT UNDER THE ADEA.

Defendants are entitled to judgment as a matter of law because plaintiffs cannot make out a prima facie case of age discrimination under the ADEA, nor can they sustain their burden of showing that the reasons advanced by the FAA for its actions are untrue or pretextual. Much of plaintiffs' disparate treatment argument rehashes arguments that plaintiffs previously made and lost before the agency. Plaintiffs' attempt to misuse the ADEA to collaterally attack the agency's findings and decisions must be rejected. The Court should grant summary judgment in favor of defendants on plaintiffs' disparate treatment claim and deny plaintiffs' application for preliminary injunctive relief.

A. Standards for Disparate Treatment Liability under the ADEA

In a disparate treatment claim under the ADEA, liability depends on whether age "actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). A disparate treatment claim under the ADEA cannot succeed unless age "actually played a role in [the employer's decisionmaking process] and had a determinative influence on the outcome." Id. Proof of discriminatory motive is critical in a disparate treatment case. Id. at 609. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." Id. at 610.

Plaintiffs concede that there is no direct evidence that the FAA's challenged decision was based on age, so they rely on the McDonnell Douglas burden-shifting framework for presenting indirect evidence of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[10] Under that framework, to make out a prima facie case of intentional age discrimination, "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982). A court is required to credit only reasonable inferences to be drawn of age discrimination, not any conceivable inference of age discrimination that a plaintiff proposes. Parker v. Federal Nat. Mortg. Ass'n, 741 F.2d 975, 980 (7th Cir. 1984). An inference of discrimination is created if the plaintiff shows that he or she (1) belongs to the statutorily protected age group (persons 40 or older), (2) was qualified for the position, (3) was

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[10] Although the McDonnell Douglas framework was developed for Title VII cases, it also applies to ADEA claims. See, e.g., O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996); Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982); Clifton v. Federal National Mortgage Assn., 36 F. Supp. 2d 20, 25 (D.D.C. 1999).

terminated, and (4) was disadvantaged in favor of a younger person. Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1155 (D.C. Cir. 2004); Koger v. Reno, 98 F.3d 631, 633 (D.C. Cir. 1996); Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 342 (D.C. Cir. 1983); Cuddy, 694 F.2d at 857.

If the plaintiff establishes a prima facie case, the defendant must come forward with a legitimate, nondiscriminatory reason for its actions. Finally, if the defendant meets its burden, the burden shifts back to the plaintiff to prove that the defendant's asserted legitimate reason is a mere pretext, and thus the defendant acted with discriminatory intent. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff on the basis of age remains with the plaintiff at all times. Koger, 98 F.3d at 634; Arnold v. U.S. Postal Service, 863 F.2d 994, 996 (D.C. Cir. 1988); Coburn, 711 F.2d at 342; Cuddy, 694 F.2d at 857.

B. Plaintiffs' Prima Facie Case Fails Because There Are No Facts Sufficient to Create a Reasonable Inference of Age Discrimination

1. Plaintiffs' References to the Retirement Eligibility of the AFSS Workforce Do Not Raise a Reasonable Inference of Age Discrimination

The evidence to which plaintiffs point as giving rise to an inference of age discrimination does no such thing.[11] First, plaintiffs claim that "the FAA has stated in no uncertain terms that it took this action because the largely older FS Controllers are supposedly a retirement eligible workforce[,]" citing to plaintiffs' Exhibits 50 and 51. See Pl. App. at 70. As set forth below, the inference that plaintiffs draw from Exhibits 50 and 51 is entirely unwarranted and unreasonable. Indeed, the facts before the Court show that the retirement eligibility of the AFSS workforce played no role in the challenged decision. Moreover, even if the FAA did base its decision in part on the retirement eligibility of the AFSS workforce – which the uncontroverted record shows it did not – that would have been perfectly permissible under the ADEA and would not raise a reasonable inference of age discrimination.

Plaintiffs' Exhibit 50 is a document that was authored by Joann Kansier, the Director of FAA's Office of Competitive Sourcing. The Office of Competitive Sourcing ran the AFSS

[11] Plaintiffs ignore entirely the fourth prong of the prima facie case. See Pl. App. at 70. They assert, correctly, that they do not need to show that their positions have been filled by someone outside their protected class, citing O'Connor, 517 U.S. at 312, but they ignore the different requirement, left intact by O'Connor, that they show that substantially younger, similarly-situated employees were treated more favorably. See id. at 313; Clifton, 36 F. Supp. 2d at 25. In cases that involve job eliminations, as opposed to job replacements, as does the instant case, this requirement looks at the employee most similarly situated to the plaintiff and examines the age disparity, if any, between the plaintiff and that "comparator" employee. Clifton, 36 F. Supp. 2d at 25. As plaintiffs acknowledge, the FAA has treated all Flight Service Specialists the same, regardless of age – they will all be RIF'ed as of Oct. 4, 2005. Plaintiffs vaguely allege that Flight Service Specialists are the "FAA's oldest workforce, with 92 percent of the FS Controllers being 40 years of age or older, " but they fail to identify the other workforces to which they are comparing themselves, they fail to validate the basis of comparison, and they do not establish that those other employees are similarly-situated to plaintiffs. Pl. App. at 72.

public-private competition pursuant to OMB Circular No. A-76 after the agency decided to conduct it. The decision to subject the AFSS function to a public-private A-76 competition was made before the formation of the Office of Competitive Sourcing and before Ms. Kansier became involved with the competition. Kansier Decl. ¶ 3. Ms. Kansier wrote the text for the graphic on Exhibit 50 as part of her briefing materials for persons and organizations interested in the AFSS competition. Id. ¶¶ 18-20. The document thus was created after the decision to subject the AFSS function to a public-private A-76 competition was made. It is a public relations, briefing document, not a business analysis or justification for the agency's decision. Id.

Consistent with its promotional purpose, Exhibit 50 shows the internal and external influences that converged to create an opportunity for the agency to restructure and improve the AFSS function through the A-76 competition process. Id. ¶ 21. Ms. Kansier used the phrase "retirement eligible workforce" in this document to describe a benefit of the A-76 competition for many affected employees, and in this way to assuage the concerns of members of Congress and others about the potential adverse impact of the A-76 competition on the AFSS workforce. Id. Ms. Kansier's purpose in using this phrase in this graphic was to convey the fact that many of the employees to be affected by the outcome of an A-76 competition would be eligible to retire and therefore stand to collect a federal retirement annuity as well as a salary from a private company (and this is exactly what is happening under the terms of the Lockheed contract). Id. Ms. Kansier's intent was to convey the idea that a significant portion of the AFSS workforce would be eligible to receive a windfall as a result of the A-76 competition. Indeed, the other bullet points that appear in the same grouping as the phrase "retirement eligible workforce," on the right side of the graphic, are also ways in which the AFSSs would benefit from an A-76 competition.

For example, workloads will be more evenly balanced, efficiencies will be achieved, and aging facilities and equipment will be modernized.[12] See Ex. 50, to Pl. App.

The fact that a large percentage of the AFSS workforce was eligible to retire is a neutral fact that does not raise an inference of age discrimination. An employer can have a range of legitimate reasons for talking about and considering the retirement eligibility of its employees which do not reflect the type of age-based stereotyping that the ADEA prohibits. See, e.g., Rowan v. Lockheed Martin Energy Systems, 360 F.3d 544, 548-49 (6th Cir. 2004) (statements indicating that high percentage of most critical workers were reaching retirement eligibility were motivated by perfectly legitimate concern about mass exit of highly skilled workers, not by a bias against age); Barney v. White, 2001 WL 1776885 at * 9 (S.D. Ind. Dec. 11, 2001) (fact that Army staff talked to employees affected by base closure about retirement eligibility, which was important factor to many employees' individual decisions, falls well short of plaintiff's contention that Army staff believed that all employees who were eligible to retire should retire).[13] Ms. Kansier used the phrase "retirement eligible workforce" to show that many employees would

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[12] Federal guidelines authorize agencies conducting an RIF to survey employees eligible for retirement as a means of using voluntary retirement to lower employee complements and thereby reduce the number of employees affected by the RIF action. See Decker v. Dept. of Health & Human Services, 40 M.S.P.R. 119, 133 (M.S.P.B. 1989) (citing 5 U.S.C. § 8336(d) and Office of Personnel Management guidelines). These guidelines corroborate Ms. Kansier's explanation that she used the phrase "retirement eligible workforce" in Exhibit 50 to communicate the ameliorating effects that retirement eligibility has in connection with an RIF.

[13] In the context of age discrimination, a word or phrase cannot be considered in the abstract, but rather it must be evaluated based on context. See, e.g., Hayman v. Nat'l Academy of Sciences, 23 F.3d 535, 539 (D.C. Cir. 1994) (speaker's explanation of his use of the term "deterioration" with respect to plaintiff's work performance shows use of term does not create reasonable inference of age discrimination); Mereish v. Walker, 359 F.3d 330, 337 (4th Cir. 2004) (finding no age animus when employer's comments were placed in context; for example, "aging" referred to technological skills, not the actual ages of the terminated employees).

benefit from the agency's decision to conduct an A-76 competition for AFSSs, not as code for a bias against age. Her uncontroverted explanation of the use of the phrase in Exhibit 50 forecloses the creation of a reasonable inference of age discrimination from the phrase.

Just because retirement eligibility correlates with age does not make it a prohibited topic of conversation or basis for an employment decision under the ADEA. The Supreme Court squarely held in Hazen Paper, 507 U.S. at 611-13, that an employer does not violate the ADEA by making an employment decision motivated by factors other than age, even if the motivating factor is correlated with age. Such a decision "would not be the result of an inaccurate and denigrating generalization about age" and "the attendant stigma would not ensue." Id. at 612. Courts have specifically applied Hazen Paper to hold that employment decisions motivated by retirement eligibility do not constitute age discrimination. See, e.g., EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 952 (8th Cir. 1999); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995); Dilla v. West, 4 F. Supp. 2d 1130, 1142-43 (M.D. Ala. 1998). In Dilla, the court held – with respect to the same air traffic controller retirement scheme at issue in this case – that even where retirement eligibility directly correlates with age, it does not violate the ADEA for an employer to consider it so long such consideration is not based on inaccurate and stigmatizing age-based stereotypes.

In addition, Ms. Kansier, the author of the phrase "retirement eligible workforce" in Exhibit 50, was not the decisionmaker for the challenged agency action. Her function was to implement the AFSS A-76 competition. See Kansier Decl. ¶¶ 1, 3. She did not make the decision to include Flight Service Specialists on the FAIR Act inventory of commercial activities; she did not make the decision to subject the AFSS function to an A-76 competition; and she did not make the decision to award the AFSS contract to Lockheed. All of these

decisions were made by other decisionmakers in the agency, and the decisions to list AFSS function as commercial and to run the AFSS A-76 competition were made prior to Ms. Kansier's involvement with the competition. Id. Thus, Ms. Kansier's reference to the "retirement eligible workforce," even if it had the discriminatory meaning that plaintiffs impute to it (which it does not), cannot form the basis of liability in this action. See EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 953 (8th Cir. 1999) (allegedly discriminatory remarks held too remote in time to be of probative value); May v. Shuttle, 129 F.3d 165, 173 (D.C. Cir. 1997) (no liability under ADEA where making of remarks was not involved in decision-making process); Hall v. Giant Food, Inc., 175 F.3d 1074, 1079-80 (D.C. Cir. 1979) (where person who made allegedly discriminatory remark was not involved in decisionmaking process, and where remark was made after challenged decision was made, remark was not probative of discriminatory intent).

As with Ms. Kansier's use of the phrase "retirement eligible workforce," Administrator Blakey's comment that almost 40% of flight service employees are eligible to retire does not raise a reasonable inference of age discrimination. See Exhibit 51 attached to Pl. App. As an initial matter, plaintiffs mischaracterize the Administrator's comments. She did not discuss "three dilemmas" that the AFSS competition was aimed at solving – "operation costs, aging facilities/equipment, and the retirement eligible workforce." See Pl. App. at 47-48. Plaintiffs seriously distort the Administrator's remarks, as their own transcript of those remarks shows. The Administrator said:

> Each time one of our specialists picks up the phone, it costs the taxpayer an average of $25. Nationwide the bill comes to over a half billion dollars a year, a number that includes salaries for about 2,700 employees. We also know that most of our automated flight service stations are in major need of repair. Almost 40 percent of flight service employees, they're eligible to retire. So here's the dilemma: how can we save money and upgrade our equipment and our service to you at the same time?

Exhibit 51 attached to Pl. App.

Nor did Administrator Blakely equate the retirement eligibility of the AFSS workforce with one that needs to be "upgraded" or "repaired." Declaration of Marion C. Blakey ("Blakey Decl.") at ¶¶ 2-3, attached hereto as Exhibit CC. The text on its face shows that she used these words to describe the equipment and physical plant of AFSS facilities and the technology used to provide AFSS services, not the people who work at AFSSs. Id.; see also Exhibit 51 attached to Pl. App. Her reference to the 40% of AFSS employees eligible to retire was intended solely to address concerns about the impact on the AFSS workforce of a potential outsourcing of the function to a private entity, just as was Ms. Kansier's reference to the retirement eligibility of the workforce. Blakey Decl. ¶ 4. The Administrator was voicing a concern for her employees, not a discriminatory animus against them. The retirement eligibility of the workforce did not play a role in the decision she made regarding the AFSSs, and plaintiffs have not introduced a scintilla of evidence to the contrary. Blakey Decl. ¶ 5. Moreover, the existing workforce was to be retained under any possible outcome of the A-76 competition.

2. Neither the FAA's Air Traffic Controller Workforce Plan, Nor the FAA's Implementation of That Plan, Raise a Reasonable Inference of Age Discrimination

Nor does the FAA's Air Traffic Controller Workforce Plan, or the agency's implementation of that plan, create a reasonable inference of age discrimination.[14] See Pl. App. at 71-72 (citing plaintiffs' Exhibit 14 at 3-4). Plaintiffs' claim that the phrases "workforce flexibility" and "enhanced productivity" in the Controller Workforce Plan are "stereotypical

[14] The FAA's Controller Workforce Plan is a comprehensive human capital workforce strategy to determine the most effective method for addressing the need for more Terminal and En Route Controllers due to the anticipated retirement of a large portion of that workforce. It was mandated by Congress. See Reyna Decl. ¶ 7.

remarks that are often associated with younger employees" is meritless. Their case citations for this proposition have nothing to do with the use of these terms. See Pl. App. at 71-72 (citing Machinchick v. PB Power, Inc., 398 F.3d 345, 353 (5th Cir. 2005) (making general observation that age stereotyping remarks may give rise to inference of age discrimination) & Threadgill v. Spellings, 377 F. Supp. 2d 158, *6-7 (D.D.C. July 15, 2005) (analyzing term "new blood")). There is nothing illicit in the use of such generic, business terminology as "flexibility" and "productivity" in a human resources workforce plan. See Carroll v. Lujan, 1992 WL 26024 at * 5 (D.D.C. Jan. 31, 1992) (rejecting plaintiff's argument "that the defendant's criterion of 'flexibility' in making the selection is in reality a code word for age discrimination"). It is wholly unreasonable to read any age-based animus into these terms, in isolation or in the context in which they are used in the document, which is as follows:

> FAA controllers now staff some 315 federally operated facilities throughout the country, ranging from small towers to large air traffic control centers. They guide aircraft that use 600 commercial airports and 3,300 smaller public-use airports. Since America's aviation system continues to expand, there's no question that we need to provide an adequate number of air traffic controllers to make it flow smoothly. But it's not a simple case of hiring to fill a slot. The plan contemplates new ways to make the best use of the taxpayer's investment. Each of the efforts described in this plan provides workforce flexibility, enhanced productivity and greater efficiency. Our current workforce will also benefit from greater job advancement opportunities, flexible work schedules, and better training.

Exhibit 14 at 4, attached to Pl. App. (emphasis added).

Moreover, the Controller Workforce Plan is separate from, and unrelated to, the agency's decision to outsource the AFSS function. The Controller Workforce Plan relates only to the terminal and en route controller workforces, not to the Flight Service Station workforce. See Reyna Decl. ¶ 7. There is simply no nexus between the terms "workforce flexibility" and

"enhanced productivity," as used in the Controller Workforce Plan, and the challenged agency decision.

Nor does the fact that the FAA has not looked exclusively to the Flight Service Specialist pool to fill the demand for Terminal and En Route controllers raise a reasonable inference of age discrimination. Plaintiffs criticize the FAA for hiring "new, younger students [for controller jobs] rather than older, experienced FS controllers . . . ." See Pl. App. at 72. However, for a variety of reasons, the FAA cannot simply import the Flight Service workforce en masse into the terminal and en route controller workforce. Reyna Decl. ¶¶ 8-14. All Flight Service Specialists are not qualified for all terminal and en route controller positions in which the controller separates and controls air traffic. Id. ¶ 6. While the Flight Service Specialist has experience providing weather, flight planning, and other services to pilots, their experience is not directly transferable to terminal and en route controller positions, which require specialized skills that Flight Service Specialists, for the most part, lack. Id. Flight Service Specialists cannot move into positions as terminal or en route controllers without extensive training and certification. (Reyna Decl.). However, new hires for controller jobs who need training must be brought onboard consistent with training classroom availability and availability of on-the-job training resources. Id. ¶¶ 6-8. These facts, along with other logistic hiring issues, constrained the FAA's ability to reserve all controller jobs for displaced Flight Service Specialists. Id. ¶¶ 8-14.

The FAA did reserve approximately 120 terminal controller positions for displaced Flight Service Specialists, through the Preferred Placement Program.[15] Id. ¶ 7. These positions were in

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[15] In addition to these reserved positions, Flight Service Specialists could apply for any other terminal or en route controller vacancy, any vacancy within the Air Traffic Organization, or any vacancy within the FAA, and were given priority consideration under the preferred placement programs established to assist them. Reyna Decl. ¶¶ 8-14.

level 6, 7 and 8 terminal towers, which fit best with Flight Service Specialists' experience. Id. ¶ 10. Budget constraints, not age discrimination, capped the number of positions that could be made available to the displaced Specialists, because they earn more than new hires. Id. ¶ 7. And to the extent that the FAA has hired new controllers who are younger than plaintiffs, that is an inescapable function of the fact that there is a maximum age requirement of 30 for all new hires for controller positions involving the active separation and control of air traffic, not a function of age discrimination. See 5 U.S.C. § 3307(b); DOT DPM Letter No. 338-4, Maximum Entry Age for Air Traffic Controllers (Mar. 14, 2000).[16]

3. Plaintiffs Have Presented No Statistical Evidence to Make a Prima Facie Showing of Disparate Treatment

In support of their disparate treatment claim, plaintiffs allege that the FAA discriminated against them on the basis of their age because "[a]pproximately 92 percent of Flight Service [Specialists] are federal employees over the age of 40" and because "the Flight Service [Specialist] workforce is older than other FAA workforces not contracted out." See Pl. App. at 14-15, 72. Accepting these statements as true for purposes of this motion only, they are insufficient to establish a prima facie case of disparate treatment.

Proof of disparate treatment requires a showing that the employer treats some people less favorably than others because of their age. See Hazen Paper, 507 U.S. at 609; Evans v. Atwood,

[16] The FAA has no obligation under the ADEA to place displaced Flight Service Specialists over the age of 40 in other FAA jobs. Stacey v. Allied Stores Corp., 768 F.2d 402, 408 (D.C. Cir. 1985). Plaintiffs have not asserted in the instant case a refusal-to-hire ADEA claim alleging that they have not been hired for air traffic controller jobs because of their age; their claim is that their positions are being eliminated, and they are being terminated because of age. See First Am. Compl. at ¶¶ 49-50. Nor have plaintiffs submitted proof that would meet the elements of a refusal-to-hire ADEA claim, such as individualized proof that plaintiffs applied for controller jobs, were qualified for those jobs, were rejected from those jobs, and were disadvantaged in favor of younger persons with respect to those jobs.

38 F. Supp. 2d 25, 29 (D.D.C. 1999). Statistical evidence may be offered as part of the evidentiary showing to establish a prima facie case of disparate treatment. See Palmer v. Shultz, 815 F.2d 84, 90 (D.C. Cir. 1987); Lu v. Woods, 717 F. Supp. 886, 890 n.16 (D.D.C. 1989).

Here, the allegation that 92% of AFSSs are over 40 years of age or that AFSSs are the oldest workforce at the FAA has no relevance to the disparate treatment inquiry. To begin with, the allegation is overly simplistic and unsubstantiated. Even if true, plaintiffs' allegation has no probative value because the average age of the federal workforce is approximately 46 years. See President's Management Agenda at 11 (Ex. N). In addition, plaintiffs' allegations have no relevance to the issue of disparate treatment because virtually all of the positions at AFSSs will be eliminated, in terms of the government's employment of them, through the RIF. Thus, plaintiffs cannot demonstrate that the FAA treated older Flight Service Specialists any differently from younger Flight Service Specialists on the basis of age. Because the FAA treated everyone the same by eliminating the job function altogether, plaintiffs cannot proceed on a disparate treatment theory. See, e.g., Mereish, 359 F.3d at 338 (finding no age discrimination where an entire department was eliminated through a position-wide RIF); Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1270 (8th Cir. 1987) ("In a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated . . . ."); Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986) ("Without the demonstration of a need for the same services and skills that [plaintiff] possessed, the conceptual underpinnings of *McDonnell Douglas* crumble.") (italics in original).

4. Plaintiffs' Claim That the FAA Deviated from Established Policy and Practice in its Decisions about the Flight Service Function Is Baseless and Does Not Raise a Reasonable Inference of Age Discrimination

Plaintiffs' claim that the FAA deviated from its established policies and practices in deciding to outsource the Flight Service function, and that this raises a reasonable inference that this decision was based on age, is unfounded. (Pl. App. at 73-76). Plaintiffs argue that the FAA acted arbitrarily and contrary to its own practices when it designated AFSS functions as commercial, when it decided to conduct a feasibility study on conducting an A-76 competition on AFSS functions, and when it assessed the A-76 bids. These arguments amount to an impermissible collateral attack on administrative decisions, for a variety of reasons set forth in section III infra.

In any event, these arguments fail on the merits. The FAA's decision that most of the activities performed by Flight Service Specialists are commercial, not inherently governmental, was a sound application of the FAIR Act, OMB Circular No. A-76, and other OMB guidance, as the FAA and DOT explained in rejecting plaintiffs' union's administrative challenge to this decision. (See Memo from Steven J. Brown to CFO at 1 (April 9, 2003); FAA response to NAATS's FAIR Act challenge (April 10, 2003); DOT letter to NAATS President Walter Pike (May 9, 2003)). Plaintiffs' argument that their function is inherently governmental because Flight Service Specialists significantly impact on the life and property of private citizens misconstrues the FAIR Act, OMB Circular No. A-76, and other OMB guidance. The defining feature of an inherently governmental function is not that it is important or that it affects peoples' lives; commercial entities perform many such functions every day under contract with the government. Rather, it is that the activity involves the act of governing, or the exercise of discretion in applying Federal Government authority. FAIR Act, § 5(2)(B); OMB Circular No. A-76 (Revised

1999) at ¶ 6(e); OFPP Policy Letter 92-1 at ¶ 5. Thus, an inherently governmental function is not any activity that significantly affects the life or property of private citizens, but only those activities involving "the interpretation and execution of the laws of the United States" to significantly affect the life, liberty, or property of private persons. FAIR Act, § 5(2)(B). See also plaintiffs' Ex. 13 at 2. Flight Service Specialists do not perform inherently governmental activities because "[w]hile Flight Service Specialists perform activities that include the use of professional judgment and expertise, they do not have the authority to provide that advice outside of a myraid of FAA regulations, policy and procedures with respect to how air traffic control services are to be performed. Thus, they do not exercise discretion in applying Federal Government authority in the manner contemplated by the FAIR Act." (DOT letter to NAATS President Walter Pike at 7 (May 9, 2003)). Even terminal and en route controllers, who are responsible for separating and controlling air traffic, do not perform inherently governmental functions. See Memo from Administrator Blakey to Air Traffic Terminal and Center Employees (Dec. 19, 2002); Reyna Decl. ¶ 11 (discussing Contract Tower Program).[17]

Nor did the FAA deviate from established policies and practices by changing its treatment of AFSS function on its 2000-2002 FAIR Act inventories. See Pl. App. at 73-74. While the FAA had listed some AFSS full-time equivalent positions as performing commercial activities in its 2000 and 2001 inventories, that number significantly increased in 2002 as a result of the agency's decision to identify the activities performed by most Flight Service Specialists as commercial. Hennigan Decl. ¶ 6. That decision was based on the reasonable determination that

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[17] Flight Service Specialists are clearly not involved in the "regulation of the use of space, oceans, navigable rivers and other natural resources." OMB Circular No. A-76 (Revised 1999) at ¶ 6(e)(1) (emphasis added). See Pl. App. at 73. They provide services to pilots in accordance with policies, procedures and regulations; they do not fashion those regulations.

these functions were commercial not inherently governmental, and the functional analysis prepared by Grant Thornton in its feasibility study, which FAA subject matter experts validated. See April 9, 2003 Steven Brown Memo at 1 (Ex. S). In short, the agency had sound, legitimate reasons for adding certain Specialist activities to its 2002 FAIR Act inventory, and its doing so does not constitute an unjustified departure from normal practice. See Pl. App. at 75-76.[18]

Plaintiffs' complaint about the FAA's decision to hire Grant Thornton to conduct a feasibility study to help the FAA determine whether to initiate an A-76 competition for the Flight Service function is that it was a "precipitous, unverified" study and that "it targeted Flight Services for the mass RIF and job eliminations instead of completing a thorough agency-wide assessment of its various services to identify all of the areas of its operations that were suitable for private bidding." Pl. App. at 74-75. Contrary to plaintiffs' assertions, the feasibility study, which was not required, demonstrates the FAA's thorough and conscientious approach to the decision as to whether to conduct an A-76 competition on the Flight Service function. The numerous reports and studies recommending fundamental change within Flight Services more than adequately justified the agency's decision to engage Grant Thornton to do a feasibility study regarding Flight Services. Hennigan Decl. ¶¶ 10-14. Those reports and studies revealed Flight Service to be an obvious candidate for a competitive sourcing competition to determine how to more efficiently and effectively provide the service. There was no reason to doubt the conclusions of Grant Thornton, and plaintiffs provide no such reason here. In fact, much of what Grant Thornton concluded was independently supported by the numerous internal and external

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[18] The FAA exempted the Flight Service Station function in Alaska from the AFSS competitive sourcing study based on the unique nature and requirements of aviation in Alaska. See Memo from Chris Bertram to Acting Administrator (Aug. 21, 2002) (Ex. R).

studies on Flight Service Stations, and it is well known that private companies and the major air carriers provide services similar to Flight Services. Sheridan Decl. ¶ 12. In addition, FAA subject matter experts, both in headquarters and in the field, did validate Grant Thornton's functional analysis. See April 9, 2003 Steven Brown Memo at 1 (Ex. S).

Regarding plaintiffs' assertion that the FAA should have done an "agency-wide assessment of its various services to identify all of the areas of its operations that were suitable for private bidding," the FAA did conduct an agency-wide assessment of employee functions to determine which activities are commercial and which commercial activities should be subject to a cost comparison. That is what the FAIR Act directs agencies to do every year, and that assessment resulted in the FAA's FAIR Act inventory. The FAA did not deviate from this practice, it complied with it. There is no requirement or standard practice that the agency conduct a feasibility study on any function in carrying out its FAIR Act obligations, and plaintiffs have cited to none. The agency's decision to conduct one on Flight Service was rational and well within its management discretion.

Finally, Judge Neill addressed and rejected the specific ways in which plaintiffs claim that the FAA prejudicially assessed the A-76 bids. See section III.B.2, infra. He did so in a thorough, 99-page opinion in which he applied expertise in government contracting law to the issues raised. This Court lacks jurisdiction to revisit those issues here. Id.

5. Plaintiffs' Claim That the Challenged Agency Action Was Intended to Reduce the Number of Older Flight Service Specialists Who Accept Employment with Lockheed Is Equally Baseless

Plaintiffs' assertion that "the FAA believes that its plan will significantly reduce the number of older, over-40 FS [Flight Service] Controllers" who ultimately go to work for Lockheed is nothing short of preposterous. Pl. App. at 76. The mere fact that the contract with

Lockheed requires some employees to relocate has no bearing on the FAA's intentions with respect to Flight Service Specialists over 40. It was universally recognized and accepted – including by plaintiffs – that a major consolidation of AFSSs was going to take place. The plan that plaintiffs themselves put forth as part of the MEO proposed a much more substantial consolidation of facilities than the Lockheed plan and would have required more extensive relocation of the workforce. See Pl. App. at 88-89; Courain Decl. ¶ 21. Moreover, the FAA's contract with Lockheed requires Lockheed to offer jobs to any and all Flight Service Specialists who want them. In fact, the deal benefits the older Flight Service employees the most, in that those who are eligible for retirement can double-dip by collecting a federal annuity and a Lockheed paycheck, and can keep working longer than they could if they remained FAA employees subject to mandatory retirement. The Lockheed contract provides those eligible to retire with every incentive to relocate, take jobs with Lockheed, and obtain a significant financial gain.[19] While the contract does not require Lockheed to provide Flight Service employees with a lifetime guarantee of employment, this aspect of the contract applies to all Flight Service employees regardless of age, and does nothing to establish that the FAA "made discriminatory assumptions and acted on those assumptions" in structuring the Lockheed contract. Pl. App. at 76.

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[19] Plaintiffs' citation to the December, 2001 OIG report is disingenuous. Pl. App. at 76 (citing plaintiffs' Ex. 11 at 10). The OIG opined that it was unlikely that many Flight Service Specialists who were eligible to retire would chose to relocate in an agency consolidation of AFSSs, and that therefore the OIG was using a low estimate of relocation costs in its consolidation analysis. However, this assumption about the choice a retirement-eligible Specialist would make when faced with relocation is predicated on a very different set of benefits than retirement-eligible Flight Service Specialists stand to receive under the Lockheed contract. The Lockheed contract allows retirement-eligible Specialists who choose to work for Lockheed to obtain a financial gain for years to come, as well as other benefits, whereas relocating to maintain the Specialist's existing government job does not.

6. Plaintiffs' Argument That the FAA Rejected Equally Effective, Nondiscriminatory Alternatives Cannot Raise a Reasonable Inference of Age Discrimination

Plaintiffs' argument that an inference of discrimination is raised by the FAA's rejection of equally effective, nondiscriminatory alternatives is meritless. Pl. App. at 77. The alternatives to which plaintiffs refer all involved some level of consolidation of AFSSs and projected savings. Under plaintiffs' own theory, downsizing the AFSS function through a consolidation strategy in which the employees remain government employees would not be any less "discriminatory" than downsizing the AFSS function by contracting the service out to a private entity who in turn consolidates it. According to plaintiffs' theory of the case (which defendants of course dispute), the Flight Service function would still have been "targeted" for such downsizing because of age. Even assuming arguendo that plaintiffs may have been less adversely affected under the alternatives they point to, they would still have been selected for one of the consolidation alternatives based on age (according to their theory), and the chosen alternative still would have had a disparate impact on them as a workforce (again according to plaintiffs' theory). Plaintiffs' argument thus fails because the alternatives they propose are not in fact less "discriminatory" alternatives.

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There is no evidence to create a reasonable inference of age discrimination in this case. Plaintiffs' prima facie case thus fails. The Court should deny plaintiffs' application for preliminary injunction with respect to plaintiffs' disparate treatment ADEA claim and grant summary judgment to defendants on that claim.

C. The FAA Had Legitimate, Nondiscriminatory Reasons for Competitively Sourcing the Flight Service Function

Even if the Court were to find that plaintiffs have met their burden of establishing a prima facie case of age discrimination, there can be no serious question that the FAA had legitimate, nondiscriminatory reasons for subjecting the Flight Service function to an A-76 competition to determine the most efficient way of providing the service, for awarding a contract to Lockheed as the result of that competition, and for initiating an RIF in conjunction with that contract. The FAA's decisions with respect to the Flight Service function were justified on both a micro and a macro level, in terms of finding a solution to the well-documented need to reform Flight Services, responding to agency budgetary constraints, and complying with the Administration's directive to conduct cost comparisons for a certain percentage of the workforce.

1. The FAA Chose the Flight Service Function for an A-76 Competition Because of the Well-Documented Finding That Flight Services Could Be Performed More Efficiently and at a Lower Cost

By the time the FAA selected Flight Services for an A-76 competition, it was an uncontroverted fact that there was an opportunity to substantially reduce the high cost of the Flight Service operation and improve the Flight Service product. The FAA was spending approximately half a billion dollars a year for Flight Services. Each time a Flight Service Specialist picked up the phone to provide service, it cost the taxpayer an average of $25. Moreover, the FAA was becoming increasingly unable to afford the high cost of this service as Aviation Trust funds shrank in response to the airline industry's post-September 11, 2001 financial distress. See Blakey AOPA Prepared Remarks (Ex. D).

Study after study had recommended consolidation of the 61 AFSSs as a way to save money, based on the decreasing demand for the services provided by AFSSs, technological

efficiencies, and a widespread recognition that 61 AFSSs were too many. During the 1995-98 timeframe, a series of internal FAA working study groups determined that 61 AFSSs were not required to meet user demand and efficiently provide flight services. See Flight Service Architecture Core Group Report, at Executive Summary & ¶ 1.3 (Ex. M).

In December, 1996, DOT's Inspector General specifically identified Flight Services as a candidate for some level of commercialization or privatization. The OIG issued an audit report in which he concurred in the consolidation of AFSSs as a "first step" in the process of determining the most cost-effective manner of provided flight services. See 1996 OIG Report at 4 (Ex. L). The introduction to the report noted the public demand for reinventing government to make it more businesslike and better managed. Id. at 2, citing Vice President Gore's Third Report of the National Performance Review, "Common Sense Government: Works Better and Costs Less". "Reinvention must consider a wide range of options, including the consolidation, restructuring or reengineering of activities, and privatization options." Id. The OIG presented the case for comprehensive analysis and reform of Flight Services by documenting operating and cost inefficiencies in the agency's provision of Flight Services. The OIG further criticized the agency's analysis for its procurement of a new automation system (the OASIS system), in that the FAA did not analyze the alternative of the private sector providing the full range of flight services. Id. at 8-9. He then made a persuasive case for some form of commercialization of flight service functions, noting the success of the FAA's Contract Tower program, the private sector's interest in providing flight services, the technological feasibility of the private sector providing flight services, and the cost savings to be realized from the private sector providing flight services. Id. at 8-10. The OIG concluded by recommending that the FAA complete an extensive evaluation of the private sector providing the full range of flight services. Id. at 10.

A second report by DOT's OIG, issued in December, 2001, again concurred in consolidation of AFSSs as a way to achieve significant cost reductions without compromising safety or security. See Dec. 2001 OIG report (Ex. 11 to Pl. App.). The declining demand for AFSS services, increasing demand for these services to be provided on-line, improved technology, and savings to be achieved are all cited in support of consolidation. Plaintiffs' union, the NAATS, also proposed significant consolidation of AFSSs to achieve cost savings. See Pl. App. at 77.

Based in part on these studies and recommendations, and against the backdrop of the agency's increasing inability to afford the costly Flight Service operation, the FAA decided to subject Flight Services to an A-76 public-private competition. Hennigan Decl. ¶ 16. The purpose of such a competition is to determine whether the private sector can provide a product or service that the government currently provides in a more cost effective manner. See President's Management Agenda at 17-18 (Ex. N); Blakey AOPA Prepared Remarks, at 2 (Ex. D). An A-76 competition was an appropriate, obvious tool for the FAA to use in deciding how to provide the best Flight Service product to the public at the least cost to the taxpayer. Neither the age nor the retirement eligibility of the AFSS workforce played any role in the FAA's decision to subject Flight Services to an A-76 competition. Hennigan Decl. ¶ 23.

It is well established that reducing costs and improving efficiency are legitimate nondiscriminatory reasons for an employer's action in an ADEA case. See, e.g., May, 129 F.3d at 173 (outsourcing entire department to save money was a legitimate nondiscriminatory reason for furloughs); Armendariz, 58 F.3d at 150-51 (defendant had legitimate nondiscriminatory reasons for discharging employee pursuant to decision to achieve cost savings by outsourcing employee's sales territory to independent broker service); Woroski v. Nashua Corp., 31 F.3d 105,

109 (2d Cir. 1994) (defendant had legitimate nondiscriminatory reasons for employment action taken in course of downsizing to improve profitability); Coburn, 711 F.2d at 343 (defendant had legitimate nondiscriminatory reasons for terminating employee pursuant to RIF instituted to reduce surplus management personnel in effort to cut costs); Nelson v. Long Lines Ltd., 335 F. Supp. 2d 944, 963 (D. Iowa 2004) (elimination of positions during RIF in order to improve efficiency justified by legitimate nondiscriminatory reasons). The desire to reduce the cost of providing the Flight Service function and improve the Flight Service product were legitimate nondiscriminatory reasons for the FAA's decision to conduct an A-76 competition for the Flight Service function.

2. The FAA's Decision to Conduct an A-76 Competition for Flight Services Was Based on the Determination That it Was Feasible to Successfully Compete the Flight Service Function

In 2002, the FAA proposed the Flight Service function for competitive sourcing primarily as a result of the conclusions reached in the 1996 and 2001 OIG reports. See Grant Thornton July 2002 feasibility study at 1 (Ex. Q). The FAA then engaged a consultant, Grant Thornton, to study the feasibility of successfully competing Flight Service activities with the private sector under an A-76 competition. Grant Thornton analyzed the private sector's willingness and ability to perform the various Flight Service activities, as well as any security, mission accomplishment, and personnel constraints on the private sector's performance of these activities. Grant Thornton concluded that most Flight Services activities were commercial in nature and could in fact be successfully competed with the private sector. Grant Thornton's conclusions were consistent with the success of the FAA's Contract Tower program, in which the FAA contracts with private companies to staff air traffic control towers at smaller airports, as well as with the findings of the

OIG regarding the interest and capability of the private sector to perform the service. See 1996 OIG Report at 9 (Ex. L).

The determination that Flight Service could in fact be successfully competed with the private sector was an important part of the agency's decision to conduct such a competition, and was a legitimate nondiscriminatory reason for that decision. Hennigan Decl. ¶ 16.

3. The FAA Subjected Flight Services to an A-76 Competition in Compliance with the Administration's Competitive Sourcing Initiative

The business need to reduce costs and improve efficiency within Flight Services dovetailed with the FAA's need to comply with the Administration's directive that it subject a certain percentage of its workforce to cost comparisons under OMB Circular No. A-76. The need to comply with the Administration's competitive sourcing initiative was clearly a driving force behind the agency's decision to run the AFSS A-76 competition when it did. See Memo from Chris Bertram to Acting Administrator (Aug. 21, 2002); Hennigan Decl. ¶¶ 9, 16; Grant Thornton Feasibility Study at 1 (Ex. Q). Compliance with such a government-wide, neutral directive from the White House is surely a legitimate nondiscriminatory reason for the FAA's action. See Evans, 38 F. Supp. 2d at 33 (holding that compliance with Clinton Administration's effort to "right-size" the government was legitimate nondiscriminatory reason for agency RIF).

4. The FAA Awarded the Contract to Lockheed Because its Bid Provided the Best Value to the Government

As Judge Neill concluded in his lengthy opinion rejecting plaintiffs' contest to the Flight Services contract decision, the FAA awarded the Flight Services contract to Lockheed because its bid offered the best value to the government. Neither the age nor the retirement eligibility of the AFSS workforce played any role in the selection of Lockheed. DeGaetano Decl. ¶ 8. The

contract award to Lockheed, and the resulting RIF to implement the contract award, were therefore based on legitimate nondiscriminatory reasons.

Defendants have met their burden of articulating legitimate, nondiscriminatory reasons for the challenged action. The burden therefore shifts back to plaintiffs to discredit the FAA's explanation. See Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1289 (D.C. Cir. 1998); Evans, 38 F. Supp. 2d at 33.

D. Plaintiffs' Arguments That the FAA's Legitimate Nondiscriminatory Reasons Are Pretextual Are Meritless

Plaintiffs' arguments that the FAA's legitimate nondiscriminatory reasons "are neither legitimate nor the real reasons [for its action], and are a pretext for discrimination" are redundant of their prima facie "evidence" of an inference of age discrimination. See Pl. App. at 80-93. For instance, plaintiffs again claim that the FAA's decision was based on the retirement eligibility of the workforce and that this suggests age discrimination; plaintiffs again challenge the FAA's designation of Flight Service Specialist activities as commercial activities; plaintiffs again complain about alleged improprieties in the bid process and bid evaluation process, such as the FAA's risk assessment and cost-savings estimates; and plaintiffs again criticize the FAA for not adopting supposed "nondiscriminatory" alternative proposals, including their own. The Court should reject these arguments for all of the reasons already stated above. We will not reiterate those reasons here, but will instead focus on the few new points raised in this section of plaintiffs' brief.[20]

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[20] Plaintiffs' first argument that the FAA's legitimate nondiscriminatory reasons for its action are pretextual consists of a challenge to a nonreason for the decision – the retirement eligibility of the AFSS workforce – and can be dismissed on this ground alone. See Pl. App. at 80-84. As demonstrated above, neither the age of the workforce, nor the high percentage of AFSS employees eligible to retire, was a factor in any aspect of the challenged decision. The

Plaintiffs claim that the FAA cannot rely on the requirements of the Administration's competitive sourcing initiative as a reason for its action because the Administration did not require the FAA to choose Flight Services for an A-76 competition. Pl. App. at 84-85. That is true, but irrelevant. The Administration did require the FAA to take OMB Circular No. A-76 seriously and to complete competitions on 15% of commercial activities by 2003. This requirement was a driving force behind the FAA's decision to conduct the AFSS A-76 competition. The mere fact that the FAA was not required to select Flight Services in particular for an A-76 competition does not negate the fact that its selection of Flight Services for an A-76 competition was motivated by the need to comply with the Administration's competitive sourcing initiative.

Plaintiffs claim that the FAA's reliance on OIG reports and "unnamed" FAA studies to support its decision to subject Flight Services to competition is pretextual because those studies and reports only recommended consolidation, and only consolidation accomplished through attrition, not the competitive sourcing of the function to a private entity, and because the FAA failed to implement the recommendations contained in those studies and reports. This argument, however, ignores the 1996 OIG report, which forcefully argued that the agency should study the option of commercializing or privatizing the full range of Flight Services, and which was a primary reason why the FAA proposed Flight Services for competitive sourcing. See Grant Thornton Feasibility Study at 1 (Ex. Q); see also Hennigan Decl. ¶¶ 11, 14, 16. It also ignores the fact that the FAA is implementing the recommendation of consolidation of AFSSs through

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agency's reasons for the decision are clearly set forth in the documents and declarations cited above. Plaintiffs' reliance on Exhibit 50 to establish that the retirement eligibility of the workforce was a reason for the decision is unfounded, as the exhibit itself and the declaration of its author establish. (Kansier Decl. ¶¶ 18-22; see section II(A)(1), supra).

the Lockheed contract – such consolidation is in fact a key element of Lockheed's plan for taking over the function and achieving cost savings. The FAA's decision to implement consolidation through Lockheed's proposal, not through the MEO proposal, has been affirmed by Judge Neill and is not reviewable by this Court. See section III.A infra.[21] The fact that the FAA did not implement consolidation immediately after it was recommended by various groups does not impugn the FAA's motives or timing. There are obviously many legitimate factors that influence an agency's decision to implement massive reform on the scale of the AFSS competition, including the competitive sourcing requirements in the President's Management Agenda. Finally, plaintiffs' argument that the FAA studies upon which it relies are "unnamed" is contradicted by plaintiffs own brief, which cites three FAA studies, by name, on the very page after plaintiffs make their claim that the studies are unnamed. Pl. App. at 87-88. These were studies of FAA's Flight Service working groups which recommended consolidation of AFSSs to more efficiently meet user demand.

E. Plaintiffs Have Failed to Satisfy the Requirements for a Mixed Motive Claim, and the Evidence Supports a Same-Decision Affirmative Defense

Plaintiffs' reliance on a mixed motive claim, see Pl. App. at 93-97, is misplaced because they fail to prove the claim and because the FAA has established an affirmative defense on the record showing that it would have reached the same decision irrespective of age.

[21] Plaintiffs' argument that the FAA could have achieved upgrades to AFSS facilities and equipment, cured workload imbalances, and obtained efficiencies by accepting their own proposal is another variant of their collateral attack on the agency's selection of Lockheed's proposal. Pl. App. at 88-93.

1. Plaintiffs' Fail to Establish That Age Played Any Part in the Decisions Which They Challenge

Mixed motive analysis relates to the evidentiary burdens of the plaintiff and the defendant when an employer relies on both permissible and impermissible considerations in taking an adverse employment action. The doctrine relates only to a disparate treatment claim, because motive is an element of that claim (whereas motive is not at issue in a disparate impact claim). The doctrine holds that "when a plaintiff . . . proves that [a protected status] played a motivating part in an employment decision, the defendant may avoid a finding of liability . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [protected status] into account." Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).[22] The plaintiff has the threshold burden, and that burden is the burden of proof (i.e., by a preponderance of the evidence). See id. at 246, 251; McDonnell Douglas , 411 U.S. at 802-04.. "[T]he plaintiff retains the burden of persuasion on the issue whether [a protected status] played a part in the employment decision. . . ." Id. at 246.

Plaintiffs' reliance on this doctrine fails at the outset because there is no evidence that age played any part in the agency decisions which they challenge. Plaintiffs rely entirely on two documents – Exhibits 50 and 51 – to support their claim that age played a motivating part in the fundamental decision they challenge, i.e., the decision to subject their job functions to an A-76 competition. See Pl. App. at 95-96. No recognized measure of the weight of evidence could support plaintiffs' implication that the off-hand comments in Exhibits 50 and 51 could carry

[22] The reasoning of the Court hinged on language in Title VII. Price Waterhouse, 490 U.S. at 241. We assume arguendo for purposes of mixed motive analysis in this brief only that the principles enunciated apply here, but note that the terms of the federal employment and the private sector provisions are different. Compare 49 U.S.C. § 2000e-16(a) with id. § 2000e-2(a).

plaintiffs' burden of proof in the face of the documented legitimate non-discriminatory reasons for the decision to subject the AFSS function to a public-private A-76 competition.[23] As demonstrated above, see section II.A.1 supra, the references to the retirement eligibility of the workforce in Exhibits 50 and 51 were made after the decision to conduct the AFSS A-76 competition was made, were not references to the agency's reasons or motivations for this decision, and were not, in any event, a reference to age.[24] Plaintiffs have failed to adduce any evidence that age was considered at the time of the decision which lies at the core of their complaint. See Price Waterhouse, 490 U.S. at 241 ("[t]he critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made*") (emphasis in original); see id. at 250 (the inquiry relates to the reasons for the action "at the moment of the decision").[25]

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[23] Under the most commonly accepted interpretation of Price Waterhouse, see Desert Palace, Inc. v. Costa, 539 U.S. at 95 (citing cases), “the evidentiary rule . . . developed to shift the burden of persuasion in mixed-motive cases [is] appropriately applied only where a disparate treatment plaintiff ‘demonstrated by direct evidence that an illegitimate factor played a substantial role’ in an adverse employment decision.” Id. at 102 (O'Connor, J., concurring), quoting Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring).

[24] “[S]tray remarks in the workplace, while perhaps probative of [a discriminatory animus], cannot justify requiring the employer to prove that its [employment] decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard . . . . What is required is ... direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.” Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring) (internal citation omitted).

[25] As discussed in section III(D), infra, the agency decisions that plaintiffs challenge are not adverse employment actions actionable under the ADEA.

2. The FAA Is Entitled to Judgment Because it Has Established a Same-Decision Affirmative Defense

"[A]n employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." Price Waterhouse, 490 U.S. at 242. This showing, the Court held, establishes "an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." Id. at 246. If this defense were proven, then the employer "shall not be liable." Id. at 242.[26] While the defense is not implicated here because plaintiffs have failed to carry their threshold burden of proving that there was a mixed motive and the decision was based even in part on age, even if the plaintiffs have carried that burden then the defense is proven here.

The only evidence before the Court relating to the considerations taken at the actual time of the decision at issue shows that there is no reference to age. See section II.B, supra. Indeed, the only evidence on which plaintiffs rely – post-decision public relations documents – also do not refer to age. In fact, they do not even purport to refer to the factors that actually were

[26] In response to the Price Waterhouse decision, Congress amended Title VII (i) by establishing an alternative for proving that an unlawful employment practice has occurred, i.e., proof that race was a "motivating factor" rather than a substantial factor (as both concurring Justices and all three of the dissenting Justices in Price Waterhouse thought is required), and (ii) by limiting the effect of the affirmative defense to a restriction on relief, i.e., establishing the affirmative defense no longer "absolve[s] [the employer] of liability" in Title VII cases. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003); See also Porter v. Natsios, 414 F.3d 13, 18 (D.C. Cir. 2005). Plaintiffs' repeated citations to Desert Palace, See, e.g., Pl. App. at 93, is unavailing in this case because that decision relates to the amendment to Title VII, and that amendment does not apply to the ADEA. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105, 107, 102d Cong., 1st Sess. (Nov. 21, 1991) (amending 42 U.S.C. § 2000e-2 (Title VII), but not amending the federal employment provision of the ADEA, 29 U.S.C. § 633a, in this respect); see also 29 U.S.C. § 633a(f) (federal government personnel actions "shall not be subject to" any other ADEA provision).

considered at the time of the decision, but rather they refer to a post-hoc explanation of the effects of the decision on a group that could legitimately have been considered in any event in making the decision, i.e., the retirement eligible workforce.

In contrast, the FAA has adduced proof that age was not considered in making the decision. But to provide a response to plaintiffs' argument, the FAA has also adduced proof that establishes a bar to liability in the case. The FAA has submitted a sworn statement that, had age had been considered, the FAA nevertheless would have reached the same decision:

> [E]ven if I had been aware of the age or retirement eligibility of the AFSS workforce and had considered the age or retirement of the workforce, I still would have taken the same actions [regarding the AFSS A-76 Competition] to comply with the president's Management Agenda and because there was a legitimate business reasons for taking them.

Hennigan Decl. ¶ 23. This showing by the FAA satisfies the Supreme Court's standards of proof:

> [T]he employer should . . . present some objective evidence as to its probable decision in the absence of an impermissible motive. . . . The very premise of a mixed-motives case is that a legitimate reason was present . . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Price Waterhouse, 490 U.S. at 252. The FAA has adduced extensive objective evidence of the reasons for its decision, it is a premise of plaintiffs' own argument about mixed motive that a legitimate reason was present and the evidence shows it was present, and the only evidence before the Court shows that the same decision would have been made based on legitimate nondiscriminatory reasons. Accordingly, defendants have established an affirmative defense that bars liability on plaintiffs' disparate treatment claim.

III. PLAINTIFFS CANNOT COLLATERALLY ATTACK PRIOR ADMINISTRATIVE DECISIONS UNDER THE GUISE OF AN ADEA CLAIM

Though styled as an ADEA suit, plaintiffs' first amended complaint and application for preliminary injunction seek to collaterally attack administrative decisions that are separate and distinct from the underlying age discrimination claim. In various places in their preliminary injunction argument, plaintiffs challenge (1) the FAA's award of the AFSS contract to Lockheed, claiming that the FAA prejudicially assessed the A-76 bids and conducted faulty risk and cost assessments (see, e.g., Pl. App. at 75, 77, 85, 89-93, 100); (2) the FAA's decision to include Flight Service Specialist activities in its 2002 FAIR Act inventory, which decision was upheld against plaintiffs' administrative FAIR Act challenges to it, see, e.g., Pl. App. at 73-74, 85; and (3) the FAA's decision to conduct the AFSS A-76 competition, see, e.g., Pl. App. at 74. Plaintiffs cannot collaterally attack these decisions through the vehicle of the instant ADEA suit.

A. This Court Lacks Jurisdiction over a Challenge to the FAA's July 20, 2005 Order Rejecting Plaintiffs' Challenge to the FAA's Decision to Award the AFSS Contract to Lockheed

As part of their ADEA suit, plaintiffs seek to challenge the FAA's decision to award Lockheed a contract to assume responsibility over the functions performed at automated flight service stations. The final agency decision on this point is embodied in the FAA's July 20, 2005 Order in which the FAA Administrator adopted the special master's June 28, 2005 findings and recommendations. However, as demonstrated below, this Court lacks jurisdiction to review final agency orders regarding procurement matters. See 49 U.S.C. § 46110.

FAA's Office of Dispute Resolution for Acquisition (ODRA) has a comprehensive administrative scheme in place for handling challenges to A-76 bid competitions. See ODRA Procedural Rules for Contests of A-76 Competitions. These procedural rules complement

ODRA's procedural regulations for procurement matters, such as bid protests and contract disputes. See 14 C.F.R. § 17.1. Under this scheme, A-76 Contests are resolved through FAA's dispute resolution system. See Contest Rule (CR) 7(a). ODRA either makes findings and recommendations or delegates this task to a special master. See CR 7(d). The findings and recommendations are then referred to the FAA Administrator, who renders the agency's final decision in the matter. See CR 16. The Administrator's decision, in turn, is a final agency order subject to review only in the United States Courts of Appeals. See CR 17(a); 49 U.S.C. § 46110(a).

In this case, after a public solicitation and competitive bidding process, the FAA awarded Lockheed a $1.9 billion contract to assume responsibility over the functions performed at automated flight service stations. Kathleen Breen, president of NAATS, timely filed an A-76 Contest as the agent for a majority of the affected employees. See Neill ODRA Opinion at 3 (Ex. Y). Upon receiving plaintiffs' A-76 Contest (along with a separate Contest filed by the Agency Tender Official who submitted the government's in-house bid), the Director of ODRA appointed a special master, who is an Administrative Judge with a lifetime appointment to the General Services Administration Board of Contract Appeals. Based upon the findings and recommendations of the special master, the FAA Administrator denied both A-76 Contests in their entirety in an Order dated July 20, 2005.

Plaintiffs now seek to collaterally attack the FAA's July 20, 2005 Order adopting the special master's findings and recommendations. Such a challenge is subject to the exclusive jurisdiction of another court. Congress vested exclusive jurisdiction in the United States Courts of Appeals to review final agency orders regarding procurement matters. Section 46110(a) provides:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or . . . the Administrator of [FAA] with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). An order falling under § 46110 is within the "exclusive jurisdiction" of the courts of appeal, 49 U.S.C. § 46110(c)), and the district court's jurisdiction is preempted by the statute. See Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992).

In a case virtually identical to this one, the D.C. Circuit in Carey v. O'Donnell, 506 F.2d 107, 110 (D.C. Cir. 1974), held that the district court lacked jurisdiction over an ADEA claim that sought to challenge the final order of an administrative agency which was subject to review only in the courts of appeal. The D.C. Circuit explained that plaintiffs' complaint, "although couched in terms of violations of . . . the ADEA," constituted an impermissible "collateral attack" on a final administrative order. Id. See also J.A. Jones Management Services v. FAA, 225 F.3d 761, 762 (D.C. Cir. 2000); Multimax, Inc. v. FAA, 231 F.3d 882 (D.C. Cir. 2000).

Therefore, this Court lacks jurisdiction over the FAA's July 20, 2005 Order adopting the special master's findings and recommendations.

B. The Doctrine of Collateral Estoppel Precludes Plaintiffs From Challenging The FAA's July 20, 2005 Order

Even if this Court finds that it has jurisdiction under 49 U.S.C. § 46110, the doctrine of collateral estoppel precludes plaintiffs from challenging the FAA's July 20, 2005 Order. The doctrine of collateral estoppel, also known as issue preclusion, is a procedural, common-law rule developed by courts to determine when the policy of avoiding repetitious litigation should make an issue previously decided by an adjudicatory body binding in subsequent federal court

litigation. See Allen v. McCurry, 449 U.S. 90, 94-96 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979). Collateral estoppel applies not only to judicial adjudications, but also to determinations made by agencies other than courts, when such agencies are acting in a judicial capacity. See Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979). The seminal case on the application of collateral estoppel based on administrative adjudications is United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). In Utah Constr. & Mining Co., the Supreme Court unanimously held that factual issues previously decided in an administrative adjudication may be given preclusive effect when the "administrative agency [was] acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Id. The Supreme Court has explained that "giving preclusive effect to administrative factfinding serves . . . both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." University of Tennessee v. Elliott, 478 U.S. 788, 798 (1986).

1. The Requirements Set Forth In Utah Constr. & Mining Co. Are Met In This Case

Here, the special master's findings and recommendations should be given preclusive effect because the criteria set forth in Utah Constr. & Mining Co. are satisfied, namely (1) that the special master acted in a judicial capacity, (2) that the special master resolved disputed issues of fact properly before it, and (3) that the parties had an adequate opportunity to litigate.

First, the special master acted in a judicial capacity when he considered plaintiffs' A-76 Contest because the dispute was heard before an administrative judge in an adversary proceeding in which all parties were represented by counsel. See Boeing Petroleum Services, Inc. v.

Watkins, 935 F.2d 1260, 1261 (Fed. Cir. 1991) (describing the General Services Administration Board of Contract Appeals as a "quasi judicial" body).

Second, as evidenced by the special master's findings and recommendations, the special master resolved disputed issues of fact properly before it. Indeed, the special master made 136 separate findings and noted:

> The contesters in these two cases have challenged virtually every phase of this procurement once proposals were submitted. They have questioned the adequacy of discussions, the reasonableness of the technical evaluation, the accuracy of the cost evaluation, the validity of the SSEB deliberations, and the correctness of the SSA's performance decision.

See Neill ODRA Opinion at 61 (Ex. Y). In addition, ODRA has been given explicit statutory authority to appoint special masters to "adjudicate" such issues and jurisdiction to resolve such disputes. See 49 U.S.C. § 46110(d)(4). Thus, fact-finding issues of this nature clearly fall within the scope of a special master's duties. See CR 15(b).

Third, plaintiffs had a full and fair opportunity to litigate the A-76 Contest at the administrative level. Plaintiffs had no fewer than three attorneys representing them before the special master. Further, plaintiffs had hired an independent consultant. Plaintiffs also took the deposition of two FAA witnesses as part of discovery. These depositions were in addition to providing extensive documents to plaintiffs in discovery. See, e.g., Bowen v. United States, 570 F.2d 1311, 1322 n.30 (7th Cir. 1978) (finding that the parties had a full and fair opportunity to litigate the issues in the administrative proceeding under the Federal Aviation Act where they had the right to introduce oral and documentary evidence, to cross-examine witnesses, to take depositions and serve written interrogatories, to appeal from the administrative law judge's decision to the full National Transportation Safety Board, and to appeal the NTSB's decision to the Court of Appeals).

Plaintiffs also have had a full and fair opportunity to litigate the A-76 Contest because of the potential to seek judicial review of the administrative adjudication. By statute, final agency orders issued by the FAA are reviewable in the United States Courts of Appeals. See 49 U.S.C. § 46110(a). To the extent that the FAA's July 20, 2005 Order is subject to review, the FAA Administrator informed plaintiffs that "such review shall be sought in accordance with Title 49, United States Code § 46110." See FAA Order at 2 (Ex. Z). The fact that plaintiffs have elected not to seek review of the FAA's July 20, 2005 Order is immaterial because it is the potential for judicial review that is key, not whether it is actually exercised.[27] See Utah Constr. & Mining Co., 384 U.S. at 422 (preclusive effect given to an administrative decision on the ground that both parties had "an opportunity to seek court review of any adverse findings") (emphasis added); Misischia v. Pirie, 60 F.3d 626, 630 (9th Cir. 1995) (plaintiff had an "adequate opportunity to litigate" because "[h]e had an opportunity, which he chose not to take, for judicial review").

Hence, to the extent plaintiffs now seek to use this forum as an attempt to re-litigate the FAA's July 20, 2005 Order adopting the findings and recommendations of the special master, they are precluded from doing so under the doctrine of collateral estoppel.[28]

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[27] Although the 60-day deadline for submitting a petition in the Court of Appeals has not yet expired, see 49 U.S.C. § 46110(a), the filing of the instant suit and the application for preliminary injunction, in which plaintiffs so vigorously attempt to collaterally attack the special master's findings and recommendations, suggests that plaintiffs do not intend to seek review in the Court of Appeals. More importantly, the fact that plaintiffs continue to have a possible avenue of judicial review available to them counsels against undertaking a review of any of the administrative findings.

[28] The exception enunciated by the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974), and Chandler v. Roudebush, 425 U.S. 840, 845-48 (1976), that federal employees are entitled to *de novo* judicial review of their discrimination claims, is inapplicable here because discrimination was not in issue at the administrative level and because none of the administrative findings has any relevance to plaintiffs' ADEA claim. Even assuming that age discrimination was at issue or that the special master's findings pertain to an essential

2. Plaintiffs Have Already Unsuccessfully Litigated Many Factual Issues And Claims Before Judge Neill

To the extent that the Court decides to conduct a de novo review of the A-76 Contest, Judge Neill's findings and recommendations should be afforded great deference. Plaintiffs had the opportunity to fully litigate these issues at the administrative level, conduct discovery, including depositions of FAA officials, and all parties were represented by counsel. In addition, these administrative proceedings are clearly different in kind than the administrative proceedings in a typical ADEA case because Judge Neill was focused on the propriety of a contract award, not plaintiffs' claims of discrimination. For these reasons, the Court should admit Judge Neill's findings and recommendations and accord it great weight. See Alexander, 415 U.S. at 60.

Plaintiffs' application for injunctive relief seeks a second bite at the apple. Plaintiffs raise several factual issues and claims that they unsuccessfully presented to Judge Neill in several contests to the FAA's decision to award the contract to Lockheed. But Judge Neill squarely rejected plaintiffs' claims in their entirety. See Neill ODRA Opinion at 98-101. The FAA's Administrator adopted this ruling six days before plaintiffs sought injunctive relief from this Court. The following summarizes the factual assertions and claims that plaintiffs raise in this action and which Judge Neill considered and rejected. They fall within three general categories – claims that: (i) there were prejudicial errors in the bidding process, (ii) the FAA was biased in favor of the Lockheed proposal or against the MEO proposal, and (iii) the FAA made improper considerations as to the costs of the two proposals.

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element of plaintiffs' ADEA claim, the administrative decision still "may be admitted as evidence and accorded such weight as the [district] court deems appropriate." See Alexander, 415 U.S. at 60.

First, plaintiffs argue that their preferred MEO proposal had numerous strengths and few weaknesses and that FAA ignored some key strengths, that Lockheed's proposal was not subjected to as rigorous a critique because it purportedly had obvious flaws, and that both the Lockheed and MEO proposals had similar timetables. See Pl. App. at 25-28. Judge Neill's opinion clearly demonstrates that the evaluators found strengths and weaknesses for all the proposals. See, e.g., Neill ODRA Opinion at 19 (Finding 44) & 67-70 (describing strengths and weaknesses and how they were determined to be "influential"). While plaintiffs assert FAA ignored the key strength of its "retention of incumbent workforce," Pl. App. at 26, this is simply wrong as Judge Neill's opinion shows. The TET's evaluation of the MEO proposal specifically lists this as an "influential strength" of the proposal, see Neill ODRA Opinion at 29, but Lockheed's proposal also received significant strengths for its recruitment and staffing plans based on generous compensation and benefits packages and commitment to hire everyone who wanted a job. Id. at 30. While plaintiffs' complain here (as they did before Judge Neill) that the MEO had special knowledge of the job function, workload fluctuations, and other staffing issues but that Lockheed would have to compile a new workforce, Pl. App. at 26-28, the FAA considered this in its evaluation of Lockheed and concluded at the end of the day that Lockheed was the best value for the contract. Judge Neill, in turn, examined each of the four factors that the TET determinations covered and concluded that the TET's finds were neither disparate in treatment nor irrational. See Neill ODRA Opinion at 72-86 (concluding that the TET's decisions were rationally based). Finally, Judge Neill concluded that (i) the SSEB "undertook a careful review" of the TET/CET reports "including Appendix B," id. at 99, which plaintiffs here rely on so heavily, and the proposals and ultimately awarded the contract to Lockheed; (ii) the "SSEB proceeded to make a comparative assessment, technical factor by technical factor, of the various

technical benefits and risks, see id.; see also Findings 134, 136; and (iii) the SSEB and SSA made a reasonable best value judgment in choosing Lockheed at the end of the day, id. at 98-101.

Second, plaintiffs repeatedly assert that the FAA acted with bias – either in favor of Lockheed or against the MEO – in awarding the contract. See Pl. App. at 29-30. Plaintiffs squarely presented this issue to Judge Neill, who rejected it in its entirety. See generally Neill ODRA Opinion at 45-49, 62-65 (finding no individual or institutional biases). More specifically, plaintiffs allege that FAA was biased against the MEO proposal because FAA claimed the existence of a union was an influential weakness, despite an alleged TET conclusion to the contrary, that was not found within the Lockheed proposal. Pl. App. at 30. But Judge Neill concluded that the TET did find a union negotiation weakness, and that it was substantiated and rational. Neill ODRA Opinion at 31-32, 77-79 (discounting plaintiffs' claim of "egregious" "disparate treatment" of TET's consideration of similar weaknesses in both the MEO and Lockheed proposals"). Importantly, Judge Neill concluded that the SSEB rejected the TET's finding on that weakness and did not consider it in its award recommendation. Id. at 55-60. Plaintiffs also cite FAA's bias in "FAA's assessment of proposed technologies." Pl. App. at 29-30, 55, 75. But Judge Neill rejected this claim because the TET was qualified to assess the technology and rationally evaluated the competing solutions and the strengths and weaknesses assigned such that the overall evaluation results had a rational basis consistent with SIR and AMS. Neill ODRA Opinion at 40-44 (evaluation of Lockheed FS-21 system), 73-74 (limited value of incumbency in MEO solution), 80-84 (rational technical evaluation results).

Third, plaintiffs claim that FAA had their thumb on the scale because Lockheed was not assessed technical or cost risks, Pl. App. at 29, 38-40. Thus, plaintiffs complain that the FAA did not address the "realism" of the labor mix and that the FAA did not request new wage

determinations from the Department of Labor or properly assess the Lockheed proposal for costs. See id. at 38-40. But this again ignores that plaintiffs presented these precise issues to Judge Neill who found the FAA's evaluation of technical and cost issues entirely reasonable. Neill ODRA Opinion at 86-96 (addressing price reasonableness, cost realism, and claims that Lockheed's bid had a variety of unrealistic costs). With regard to plaintiffs' assertion that Lockheed's wage costs were too low with respect to new hires because it used a GS-9 value instead of a GS-12, Step 5, Pl. App. at 38-39, plaintiffs made the identical claim to Judge Neill, who specifically considered and rejected it finding that "it was reasonable of the CET to conclude that Lockheed's proposed labor rates were realistic." See Neill ODRA Opinion at 89-91 (rejecting plaintiffs' challenge to unrealistic labor costs). With regard to Department of Labor issue, it was proper to not attach the wage determination because it was not known and Judge Neill specifically concluded that it was "wholly inappropriate for the CET to conclude that a cost risk exists with regard to the Lockheed proposal based upon what the DOL may or may not say." See id. at 91-92 (discussing "Cost Risks Associated with the Wage Determination"). The Court should at the very least accord Judge Neill's decision great deference and reject these collateral attacks against Judge Neill's careful and reasoned decision.

C. Plaintiffs' Challenges to the FAA's Decisions to List Flight Service Specialist Activities on its 2002 FAIR Act Inventory and to Subject AFSSs to an A-76 Cost Competition Are Untimely under the ADEA

In their ADEA suit, plaintiffs also seek to collaterally attack the FAA's decision to classify the activities of Flight Service Specialists as not "inherently governmental." This determination led Flight Service Specialists to be included on the FAA's 2002 FAIR Act inventory. NAATS challenged this decision administratively under the FAIR Act, and those challenges were denied. To the extent plaintiffs now seek to collaterally attack the agency's

decisions concerning the inclusion of Flight Service Specialists on the FAIR Act inventory, such a claim is untimely in the context of an ADEA suit.

The ADEA provides two avenues for obtaining relief for federal employees seeking judicial redress for discriminatory acts by employers. See Stevens v. Dep't of Treasury, 500 U.S. 1, 5-6 (1991). The first is through the administrative process, 29 U.S.C. § 633a(b), and the second is by filing suit directly in district court, 29 U.S.C. § 633a(d). The latter option requires compliance with certain statutory notice requirements:

> When the individual has not filed a complaint concerning age discrimination with the [EEOC], no civil action may be commenced by any individual under this section until the individual has given the [EEOC] not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.

29 U.S.C. § 633a(d) (emphasis added).

Here, plaintiffs chose to bypass the administrative process and file suit directly in district court. See First Am. Compl. ¶¶ 17-18 (citing 29 U.S.C. § 633a(d)). In an effort to demonstrate their compliance with the statutory notice requirements of § 633a(d), plaintiffs contend that they provided the requisite notice to the EEOC on February 8, 2005 for nine of the named plaintiffs and "on either March 1, 2005 or April 21, 2005" for the remaining named plaintiffs. Id. Accepting these statements as true, plaintiffs' notices are untimely because they were filed with the EEOC more than 180 days after the FAA's inclusion of flight service specialists on the 2002 FAIR Act inventory and more than 180 days after the DOT's final decision of May 9, 2003 denying NAATS' appeal. Therefore, insofar as plaintiffs seek to challenge the FAA's decision to include flight service specialists on the 2002 FAIR Act inventory, this claim is untimely under the ADEA. For these same reasons, plaintiffs' challenge to the FAA's decision to subject Flight Services to an A-76 cost competition, made in August, 2002, is untimely under the ADEA's 180-

day statute of limitations. See Memo from Chris Bertram to Acting Administrator (Aug. 21, 2002); see also Memo from Chris Bertram to Walter Pike, President of NAATS (Aug. 21, 2002).[29]

D. The Prior Administrative Decisions Cannot Be Collaterally Attacked Because They Do Not Constitute Adverse Personnel Actions Under The ADEA

Apart from the reasons discussed above, plaintiffs cannot collaterally attack administrative decisions leading up to the RIF because those prior decisions do not constitute adverse "personnel actions" under the ADEA. 29 U.S.C. § 633a(a).

Under the ADEA, federal employees "must show that they have suffered an adverse personnel action in order to establish a prima facie case under the McDonnell Douglas framework." Brown v. Brody, 199 F.3d 446, 455 (D.C. Cir. 1999).[30] In the D.C. Circuit, "an employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment

[29] Nor is the doctrine of equitable tolling available to plaintiffs. See Harper v. Georgetown Univ., 748 F. Supp. 6, 7 (D.D.C. 1990) (noting that a district court's equitable power to toll should be exercised only in "extraordinary and carefully circumscribed instances") (quoting Mondy v. Sec'y of the Army, 845 F.2d 1051, 1057 (D.C. Cir. 1988)). Here, the FAA's inclusion of flight service specialists on the 2002 FAIR Act inventory put plaintiffs on notice that their positions were eligible for competition. The fact that the FAA did not actually compete the positions until a later date does not warrant equitable tolling because plaintiffs knew or should have known of the operative facts upon which they now rely to challenge their inclusion on the FAIR Act inventory. See, e.g., Cocke v. Merrill Lynch & Co., 817 F.2d 1559, 1561 (11th Cir. 1987) (holding that the 180-day period is equitably tolled "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights") (citation omitted); but see Stover v. EEOC, 673 F. Supp. 522, 524 n.3 (D.D.C. 1987) (applying equitable tolling where the plaintiff "could not appreciate the adverse or discriminatory nature of his transfer until the RIF was announced").

[30] Although Brody was a Title VII case, "[c]ourts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims . . . This is so because these statutes often use the same 'terms and conditions' language to proscribe discriminatory employment practices." Brody, 199 F.3d at 456 n.10.

opportunities such that a reasonable trier of fact could find objectively tangible harm." Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (citing Brown, 199 F.3d at 457). When conducting this inquiry, courts focus on "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating . . . [and not] interlocutory or mediate decisions having no immediate effect upon employment conditions." Taylor v. FDIC, 132 F.3d 753, 764 (D.C. Cir. 1997) (citations omitted) (emphasis added). Consequently, the touchstone of an adverse employment action is the presence of tangible harm to the employee. See Hussain v. Principi, 344 F. Supp. 2d 86, 95-96 (D.D.C. 2004).

This inquiry "calls for a comparative judgment: what was the [employee's] situation immediately before the alleged adverse personnel action, and what was the situation after it?" Currier v. Postmaster Gen., 304 F.3d 87, 88 (D.C. Cir. 2002). Unless the contested action adversely affected the employee's pay, benefits, job responsibilities or produced a similar harm, it cannot be considered an adverse employment action. See Forkkio, 306 F.3d at 1131. Thus, the mere fact that an agency undergoes a reorganization does not necessarily mean that its employees have been subject to an adverse employment action. See id.; Ware v. Billington, 344 F. Supp. 2d 63, 78 (D.D.C. 2004) (noting that the existence of an RIF was irrelevant when the proposed restructuring produced no harm to plaintiff). Similarly, "an unrealized risk of a future adverse action, even if formalized, is too ephemeral to constitute an adverse employment action." Russell v. Principi, 257 F.3d 815, 819-20 (D.C. Cir. 2001) (holding that a low performance evaluation that exposed a federal employee to a higher risk of an RIF was not an adverse personnel action).[31] Thus, to rise to the level of an adverse personnel action, the contested action

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[31] The logic of the prudential standing requirement is analogous. See Roshan v. Smith, 615 F. Supp. 901, 905 (D.D.C. 1985) ("[W]here a plaintiff seeks to rely on threatened as opposed

must produce tangible harm that altered the employee's conditions of employment. See Currier, 304 F.3d at 88-89.

Here, plaintiffs cannot establish a prima facie case by alleging broadly that the agency's decisions leading up to the RIF were improper. Instead, plaintiffs must prove tangible harm to individuals; it is not enough to allege that the agency made decisions concerning positions. See Forkkio, 306 F.3d at 1131. The only adverse personnel action undertaken by the FAA is the RIF. Neither the agency's inclusion of flight service specialists on the FAIR Act inventory nor its decision to compete the job function satisfy the standard. Nor was the bid award to Lockheed an adverse employment action.

To begin with, none of the steps preceding the RIF can properly be characterized as "personnel" decisions. Their character was inherently administrative, relating to the organization of the agency and its operations. Moreover, even if these decisions could be considered "personnel" actions, no tangible harm to individual employees stemmed from them. In all three instances, individual employees' pay, benefits, and job responsibilities remained constant throughout; the conditions of their employment the day after the action were the same as the day before it. See Currier, 304 F.3d at 88. While the plaintiffs may argue that the individual decisions that led to the RIF each fostered "materially adverse consequences affecting . . . [their] future employment opportunities," Forkkio, 306 F.3d at 1131, at the time each decision occurred

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to existing injury [for standing purposes], the plaintiff must demonstrate that the injury to him would be immediate, concrete and specific, rather than merely conjectural and hypothetical."). For example, in Andrade v. Lauer, 729 F.2d 1475, 1481 (D.C. Cir. 1984), the D.C. Circuit held that the "highly speculative" nature of the contested harm—an allegedly forthcoming RIF—precluded litigation of the issues. The court also noted that "the vague possibility of future layoffs," without an indication of specific action, was insufficient to make the case appropriate for judicial resolution. Id. at 1482 n.10.

it posed only "an unrealized risk of a future adverse action [that], even if formalized, [was] too ephemeral to constitute an adverse employment action," Russell, 257 F.3d at 819-20 (emphasis added).

Consider each decision in turn. First, the agency's designation of the activities performed at automated flight service stations as commercial harmed no one. While it may have raised the possibility that the positions at these stations would later be considered for competition, competed, contracted to private employers, and eventually eliminated, such a risk is too attenuated and too speculative to create an adverse employment action. See Russell, 257 F.3d at 819-20. Notably, other positions within the FAA and other government agencies have been designated commercial without later being subject to competition. See Pl. App. at 19 (acknowledging that "7,345 employees within the FAA were performing so-called commercial activities in 2000" yet the vast majority of these positions were not competed); OMB Circular No. A-76 at A-3 (listing reason codes for not subjecting job functions designated as "commercial activities" to competition). As these examples demonstrate, nothing about the designation itself changes the employees' conditions of employment: their pay, benefits, and responsibilities are not at all altered. See Forkkio, 306 F.3d at 1131. No individual employee can point to tangible harm stemming from the agency's action. Id. Conversely, permitting every individual employee holding one of these job functions to challenge the commercial designation – through an ADEA claim – would unjustifiably preempt the proper administrative mechanisms.

Second, the FAA's decision to initiate a public-private competition left no employee worse off. As the plaintiffs' acknowledge, if the Most Efficient Organization (MEO) bid had prevailed, the vast majority of plaintiffs would have remained employed by the federal government and retained their pay, benefits, and positions. See Pl. App. at 26 ("[T]he MEO

proposal had the unique benefit of . . . 'retaining the . . . incumbent workforce.'"); Ex. 10 at 11-12; Ex. 28 at 178. Thus, with one viable outcome of the cost competition clearly not adverse to the employees' interests, it is difficult to consider the decision to conduct that competition as an adverse personnel action. The risk that another bid might prevail is too speculative and "ephemeral" for the initial decision to compete to constitute the requisite harm. See Russell, 257 F.3d at 819-20.

Third, the bid award to Lockheed was not an adverse employment action because, at the time of the award, no individual harm was realized. In fact, immediately after the award, the FAA certified the positions at automated flight service stations as surplus, thereby entitling employees at these stations to a preference for other agency positions. See Williams Decl. ¶ 11. Such lateral transfers, when pay and benefits remain constant and responsibilities remain similarly high, do not amount to adverse employment actions. See Brody, 199 F.3d at 457. As of August 19, 2005, the FAA had made at least 229 job offers to AFSS employees. See Williams Decl. ¶ 13. While the award of the contract to Lockheed may result in an RIF, the affected employees in these positions must demonstrate individual harm. Some employees will be subject to termination, some will retire, and others will transfer within the FAA. Thus, after the award to Lockheed, neither the FAA nor the plaintiffs could identify who is adversely affected by the agency's actions for purposes of a discrimination action.

Finally, characterizing inherently administrative actions that precede an RIF as "adverse personnel actions" would be inconsistent with congressional intent. Most notably, such a view would permit employees to contest agency actions far removed from the type of "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating," Taylor, 132 F.3d at 764 (citation omitted), that the ADEA was designed to

confront. As a result, the Court should focus on the adverse personnel action at issue – the RIF – as plaintiffs presently fail to allege any other adverse personnel action sufficient to establish a prima facie case under the McDonnell Douglas framework.

IV. THERE IS NO GENUINE ISSUE OF MATERIAL FACT TO SUPPORT, AND THEREFORE NO LIKELIHOOD OF SUCCESS ON THE MERITS OF, PLAINTIFFS' DISPARATE IMPACT CLAIM

A. This Court Lacks Jurisdiction Over Plaintiffs' Disparate Impact Claim Because Congress Did Not Waive the Federal Government's Sovereign Immunity for Age Discrimination Claims Based on the Disparate Impact Theory of Liability

Plaintiffs' disparate impact claim should be dismissed because the statute that prohibits discrimination on the basis of age in federal employment, 29 U.S.C. § 633a, does not authorize a disparate impact claim against the federal government. Congress waived the federal government's sovereign immunity only for discrimination "based on age," not for facially-neutral practices which have a disparate impact on employees over the age of 40.

It is "axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983) (citations omitted). The bar of sovereign immunity applies even when purely equitable relief is sought. See, e.g., Jaffee v. United States, 592 F.2d 712, 717 n.10 (3d Cir. 1979) (citations omitted).

Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (citations omitted). A waiver of sovereign immunity must be definitively and unequivocally stated and cannot be enlarged beyond the boundaries that the statutory language plainly requires. United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992); Forman, 271 F.3d at 296. Any waiver of immunity must be "construed strictly in favor of the sovereign." Ruckelshaus v. Sierra Club, 463 U.S. 680,

685 (1983) (citing McMahen v. United States, 342 U.S. 25, 276 (1951)). Further, when construing such a waiver, the court must resolve all ambiguities in favor of preserving the government's immunity from suit. See, e.g., Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Williams, 514 U.S. 527, 531 (1995). Absent a waiver of sovereign immunity, a district court lacks jurisdiction over claims against the United States. See, e.g., Mitchell, 463 U.S. at 212.

Plaintiffs' complaint names Secretary of the Department of Transportation, Norman Mineta, and the Administrator of the FAA, Marion Blakey, in their official capacities, as defendants. First Am. Compl. ¶¶ 13, 14. Thus, this is an action against the United States and, therefore, is subject to the defense of sovereign immunity. See Hawaii v. Gordon, 373 U.S. 57, 58 (1963). Because the federal sector ADEA does not explicitly create a cause of action for disparate impact claims, such claims against the United States are barred by sovereign immunity.

1. The Text of the Statutory Prohibition on Age Discrimination in Federal Employment Does Not Contain or Support a Waiver of Immunity for Disparate Impact Claims

a. The ADEA Provision Applicable to Federal Employees Is More Limited Than the ADEA Private Sector Provisions

Enacted in 1967, the ADEA originally applied only to actions against private employers. In 1974, Congress expanded the scope of the ADEA to include state and local governments and federal government employees. While Congress brought state and local governments within the ADEA's reach by simply expanding the term "employer" in the ADEA, it added an entirely new, more limited section, § 15 (codified at 29 U.S.C. § 633a), to address age discrimination in federal employment. Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 68 (2000); Lehman v. Nakshian, 453 U.S. 156, 166-67 (1981). Thus, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector . . . ." Lehman, 453 U.S. at 166-67; see also 29 U.S.C. §

633a(f) (federal government personnel actions "shall not be subject to" any other ADEA provision (subject to exceptions not pertinent here)).

The federal sector provision of the ADEA requires simply that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be free from any discrimination based on age." 29 U.S.C. § 633a(a). The requirement that employment decisions by federal employers be made free from any discrimination "based on age" speaks most naturally to a prohibition against intentional age discrimination (disparate treatment claims), not to facially-neutral practices which have the effect of a disparate impact on employees over 40 years of age (disparate impact claims). The Supreme Court has explained the distinction between disparate treatment and disparate impact theories of employment discrimination as follows:

> ‘Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims that stress ‘disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)). There is no language in § 633a(a) that implies that Congress contemplated that it was waiving immunity with respect to disparate impact claims (as opposed to intentional discrimination against an individual); much less is there any language in the statute that expressly and unambiguously waives such immunity.

b. The Supreme Court's Interpretation of the Private Sector ADEA Provision Precludes Inferring a Cause of Action Based on the Disparate Impact Theory From the Federal Employment ADEA Provision

The Supreme Court recently held that the section of the ADEA that applies to the private sector implicitly authorizes disparate impact claims. Smith v. City of Jackson, __ U.S. __, 125 S. Ct. 1536, 1540 (2005). As a threshold matter, the statutory language and scheme that the Court interpreted in Smith is significantly different from that prohibiting age discrimination in federal employment: as set forth more fully below, the terms of the federal sector ADEA terms are narrower than the private sector ADEA provision at issue in Smith and the wording of the federal employment provision, and its legislative history, make clear that is directed only to intentional disparate treatment. In addition, the Court was not constrained in its interpretation of the private sector provision by the heightened standards applicable to construing waivers of sovereign immunity. Smith is thus distinguishable from the instant case because it did not address the issue of whether Congress waived immunity for disparate impact age discrimination claims against the federal government. Nevertheless, the Court's reasoning in Smith actually supports the conclusion that Congress did not intend the language of the federal sector ADEA claim to encompass disparate impact claims.

i. The Smith Rationale

At issue in Smith was 29 U.S.C. § 623(a), which makes it unlawful for a private employer:

> (1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]

The Court found an implied right of action based on the disparate impact theory under subsection 2 of these provisions for three principal reasons.

First, the Court found that the second subsection of the ADEA private sector disparate impact provision, § 623(a)(2), is comparable to the private sector provision of Title VII. Because the language of § 623(a)(2) is identical to language in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII), which the Court had previously held in Griggs v. Duke Power Co., 401 U.S. 424 (1971), did not require a showing of discriminatory intent, the Court held that § 623(a)(2) supports a disparate impact claim in which proof of discriminatory intent is not required. Smith, 125 S. Ct. at 1540-42 & n.6. The Court carefully limited its finding of a disparate impact claim to subsection (a)(2), and expressly excluded subsection (a)(1) from the scope of its conclusion. The Court emphasized the "key" textual distinction between the two clauses of §623(a), i.e., that subsection (1) of § 623(a) "does not encompass disparate impact liability" because "[t]he focus of the section is on the employer's actions with respect to the targeted individual." Smith, 125 S. Ct. at 1542 n.6.

Second, the Smith Court reasoned that the existence of the RFOA provision in § 623 which expressly permits any "otherwise prohibited" action where the differentiation is based on reasonable factors other than age, 29 U.S.C. § 623(f)(1), supports the conclusion that § 623(a)(2) authorizes disparate impact claims. Smith, 125 S. Ct. at 1543-44. This provision would be superfluous if the ADEA authorized only disparate treatment claims, since in disparate treatment cases, if an employer in fact acted on a factor other than age, there would be no liability in the first place. But the RFOA provision does have a role to play in disparate impact cases, in which

"the allegedly 'otherwise prohibited' activity is not based on age." Id. at 1544. In other words, the RFOA provision is addressed to an element of a claim that is absent from a disparate treatment claim, i.e., an action by an employer for a non-discriminatory reason. Since this element appears only in disparate impact claims, the Court reasoned that the statute, by addressing claims based on non-discriminatory motives in the RFOA provision, implies that the disparate impact claim was created in § 623(a)(2).[32]

Third, in support of its conclusion that § 623(a)(2) authorizes disparate impact claims, the Court noted that the EEOC had issued regulations interpreting the ADEA as authorizing relief on a disparate impact theory. Smith, 125 S. Ct. at 1544.

ii. The Smith Rationale Does Not Apply to the Federal Employment Provisions of the ADEA

Importantly, the Court in Smith was not construing a waiver of sovereign immunity and therefore was not constrained by the rule that waivers of sovereign immunity be express, not implied. The Court's analysis is clearly one of finding an implied right of action for a disparate impact claim in § 623(a)(2) notwithstanding the absence of an express provision creating such a claim. The method of finding an implied claim used in Smith is unavailable in this action because of the government's sovereign immunity. But even if this Court were permitted to employ a similar analysis with respect to § 633a, none of the Smith Court's three reasons for finding an implied right of action for a disparate impact claim in § 623(a)(2) apply to § 633a.

First, § 633a(a) – the federal employment provision – is not identical to, or even patterned after, § 703(a)(2) of Title VII, thus Griggs does not compel reading disparate impact liability into

[32] The disparate impact claim that the RFOA provision limits had to be found in § 623(a)(2), if at all, because the Court said § 623(a)(1) "does not encompass disparate impact liability." Smith, 125 S. Ct. at 1542 n.6.

§ 633a.[33] In addition, as a provision that is directed to intentional acts against individuals, § 633a is akin to § 623(a)(1), which "does not" create a disparate impact claim. Smith, 125 S. Ct. at 1542 & n.6.

Second, in contrast to the two-pronged language of §§ 623(a)(1) and (2), § 633a(a) simply prohibits discrimination "based on age." The language of § 633a(a) (prohibiting discriminatory "personnel actions against employees") is addressed to the same conduct as that used in § 623(a)(1) (prohibiting actions that "discriminate against any individual"), i.e., § 633a(a) focuses on personnel actions taken by an employer toward individual employees, and it is expressly directed to action taken for a single motive, i.e., "based on age." Unlike § 623(a)(2), the federal employment section does not refer to an employer's action to "classify" groups of employees and the effect of such classifications on individual employees. See Smith, 125 S. Ct. at 1542 n.6. Similarly, unlike § 623, there is no RFOA provision in § 633a, which, applying the Smith Court's reasoning, indicates that § 633a authorizes only disparate treatment claims. See id. at 1543-44. Indeed, there is nothing in the private sector provisions of the ADEA that could create an inference of an implied right of action for a disparate impact claim under the federal employment provision because the federal provision specifically and emphatically bars the application of the private provisions of the ADEA: "Any personnel action of any . . . agency . . . shall not be subject to, or affected by, any provision of this chapter, other than . . .[§ 633a]." 29 U.S.C. § 633a(f) (subject to an exception, not pertinent here, relating to the applicable age threshold). Third, in the absence of any support in the language or structure of the federal sector statute, it is

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[33] Congress modeled § 633a(a) after a different section of Title VII, the section which extended the protection of Title VII to federal employees. See 42 U.S.C. § 2000e-16(a); Lehman, 453 U.S. at 163-64.

not surprising that there are no EEOC regulations interpreting § 633a(a) as authorizing disparate impact claims.[34]

Accordingly, there is no express or implied waiver of sovereign immunity in § 633a for disparate impact claims of age discrimination against the federal government.

2. The Legislative History of the Federal Sector ADEA Provision Confirms That Congress Did Not Intend to Waive Sovereign Immunity for Disparate Impact ADEA Claims Against the Federal Government

The legislative history of the federal sector provision of the ADEA demonstrates that Congress intended to prohibit the type of intentional discrimination based on age that is actionable under a disparate treatment theory of liability, and did not intend to create a cause of action based upon the type of conduct that disparate impact claims address.

a. Senate and House Statements and Reports Related the Federal Employment ADEA Provision to Inherently Intentional Conduct

On March 9, 1972, Senator Bentsen introduced the original legislation that would eventually become the federal sector provision of the ADEA. See S. 3318, 92d Cong. (1972); 118 Cong. Rec. 7745-46 (1972) (statement of Sen. Bentsen). This initial bill would have simply expanded the definition of "employer" in the ADEA to include federal, state and local governments. Id. In introducing the bill, Senator Bentsen cited mounting evidence of disparate treatment of older workers, e.g., that "the hiring and firing practices of governmental units discriminate against the elderly, frequently pressuring them into retiring before their productive days are over." 118 Cong. Rec. 7745. He discussed various forms of disparate treatment on the

[34] Other than a statement of general policy, see 29 C.F.R. § 1614.101, the only reference to federal employment in EEOC ADEA regulations relates to statutory prerequisites to waivers of rights in settlements, see 29 C.F.R. § 1625.22(a)(4). This is not to suggest that the EEOC is empowered to promulgate a regulation that creates a right of action against the government otherwise barred by sovereign immunity, or that such a regulation would be entitled to deference.

basis of age, including cases in which older federal employees were ignored or harassed by their superiors or subjected to special memos directed to "aging employees;" laws and regulations that prohibit the hiring of anyone over an arbitrary age, such as 45; and "documented instances in which Government employees have been flatly told or indirectly pressured to retire solely because of their age." Id. Senator Bentsen considered these inherently deliberate "pressures directed against older Government employees" to be "flagrant examples of age discrimination in employment" that should be outlawed. Id.

On May 4, 1972, Senator Bentsen resubmitted a revised version of his bill as an amendment to the Fair Labor Standards Amendments of 1972. See 118 Cong. Rec. 15,894-95. This bill retained the expanded definition of "employer" in the ADEA to include state and local governments, but provided a new and distinct section of the ADEA prohibiting age discrimination in federal employment. When he resubmitted his bill, Senator Bentsen again referred to evidence of intentional discrimination, i.e., the "mounting evidence that government employees are being discriminated against on the basis of their age." Id. at 15,894 (emphasis added). In subsequent remarks on the bill, the Senator explained that the bill was needed to bring federal employees within the scope of the ADEA, referring to the provision of the ADEA that makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 118 Cong. Rec. 24,397 (1972) (emphasis added). This is the subsection of § 623(a) that correlates with disparate treatment claims, not disparate impact claims. See Smith, 125 S. Ct. at 1542 & n.6; Hazen Paper, 507 U.S. at 609. Senator Bentsen also highlighted President Nixon's message on aging, in which President Nixon described discrimination based on age as "cruel and self-defeating" and as "destroy[ing] the spirit of those who want to work[.]" 118 Cong. Rec.

24,397. These words comport with the type of intentional discrimination that forms the basis of disparate treatment claims. Without minimizing the real-world consequences of disparate impact discrimination, facially-neutral policies can hardly be described as "cruel" or "self-defeating," or as "destroying" the employee's "spirit."

Although Senator Bentsen's amendment passed unanimously in the Senate, it died in the House along with the rest of the Fair Labor Standards Amendments of 1972 over disagreements concerning the minimum wage. See 119 Cong. Rec. 2648 (1973). Senator Bentsen reintroduced the legislation the following year. When he reintroduced the legislation, Senator Bentsen defined age discrimination as discrimination that occurs "when an employee's qualifications for being hired, promoted or paid are determined primarily on the basis of his age rather than on the merits of his performance." Id. He provided the following examples of conduct in federal employment to which the bill's prohibition on age discrimination would likely apply:

> if employees are subject to pressures from their administrators to retire as the result of so-called ‘reduction in force' orders cutting employment, if they are harassed by being repeatedly transferred, if they are denied their right to ‘bump' employees with less experience when personnel cutbacks are ordered, or indeed, if they are subject to psychological pressures from their superiors urging them to retire before their time, they may be the victims of age discrimination.

Id. The employees in these examples are discriminated against because of their age; they are not merely the victims of facially-neutral practices that fall more harshly on certain employees. Senator Bentsen also expressed a concern that "the main burden of [cutbacks in government personnel] not fall upon older workers simply because they have attained a certain chronological age." Id. Again, this sounds in disparate treatment liability, not disparate impact liability. Senator Bentsen's bill passed the Senate but was dropped in conference. 119 Cong. Rec. 28644 (1973).

Once again, Senator Bentsen reintroduced his bill, again referring to evidence of "arbitrary" age discrimination in federal employment such as training programs that are "off limits" to employees over the age of 45 and employers' harassing and pressuring older employees to retire. 119 Cong. Rec. 28644. This bill was ultimately enacted into law as part of the Fair Labor Standards Act Amendments of 1974. See Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55, 74-75. Senator Church, Chairman of the Senate's Special Committee on Aging, remarked on the Senate floor that the legislation would give the Civil Service Commission responsibility for enforcing the prohibition against age discrimination in the federal sector. 120 Cong. Rec. 4706 (1974). Senator Church commented that this enforcement power was important because of evidence received by his Committee that older employees had been "singled out in some agencies for an early exit from their Government jobs." Id. at 4706-07. The most recent evidence of "agism" to surface, Senator Church noted, was a "report that the Pentagon is seeking authority to force certain personnel in responsible positions to retire at age 55. Justification for such authority is made in terms of the ‘worsening' manpower problems of an aging work force." Id. at 4707. These comments reinforce the intentional nature of the discrimination to which the federal sector ADEA law was directed.

The legislative history on the federal sector ADEA provision contained in the House Report of the Education and Labor Committee, although scant, also supports the conclusion that the provision was aimed at eradicating intentional discrimination against federal employees based on age. The short passage in the House Report on the "nondiscrimination on account of age in government employment" provision included in the Fair Labor Standard Amendments of 1974, quotes the following text from President Nixon's 1972 message on aging:

> Discrimination based on age – what some people call 'age-ism' – can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [sic] the contribution they could make if they were working.

H.R. Rep. No. 93-913 (1974), 1974 U.S.C.C.A.N. 2811, 2849. Discrimination based on evil motive directed to a person's unique status as an individual presents a quintessential disparate treatment claim. See Hazen Paper, 507 U.S. at 610 (a disparate treatment claim arises when "the employee's protected trait actually played a role in that [decisionmaking] process and had a determinative influence on the outcome") (emphasis added). The House Report thus made clear that Congress added new federal employment provisions to the ADEA for the purpose of prohibiting intentional age discrimination.

b. The Different Legislative Purposes of Title VII Show That Congress Did Not Intend the Federal Employment ADEA Provision to Include Disparate Impact Claims

This legislative history, which is so clearly concerned with eliminating coercive or intentional age discrimination in the federal government, stands in stark contrast to the legislative history of the provision of Title VII which protects federal employees from discrimination based on race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-16(a) ("Title VII's federal sector provisions"). Although Congress patterned § 633a(a) after Title VII's federal sector provisions, see Lehman, 453 U.S. at 163-64, its aim was markedly different. The report prepared by the House's Education and Labor Committee that accompanies the 1972 amendments to Title VII, which extended Title VII's protections to the federal government, shows a concern with eliminating "systematic discrimination" which results in a "disproportionate distribution of minorities and women throughout the Federal bureaucracy . . . ." H.R. Rep. No. 92-238, at 23

(1971), reprinted in U.S.C.C.A.N. 2137, 2158-59. Congress cited statistical evidence showing that minorities and women are excluded from large numbers of government jobs, particularly at the higher grade levels, and criticized the Civil Service Commission for approaching employment discrimination as "primarily a problem of malicious intent on the part of individuals." Id. The Committee further alluded to the type of tests and requirements that the Supreme Court held unlawful under a disparate impact theory of employment discrimination in Griggs. The Committee stated as follows:

> Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment.

Id. While Congress embraced the disparate impact theory for Title VII claims, it did not do so for ADEA claims: "[w]hile the congressional sponsors of Title VII's federal-sector provisions wholeheartedly endorsed the Griggs disparate impact doctrine, the sponsors of the ADEA federal-sector provisions seemed to deliberately avoid saying anything that could possibly be construed as endorsing § 633a disparate impact liability." George O. Luce, Comment, Why Disparate Impact Claims Should Not be Allowed Under the Federal Employer Provisions of the ADEA, 99 Nw. U. L. Rev. 437, 469 (Fall 2004).

These contrasting legislative histories compel the conclusion that the ADEA federal-sector provision does not imply a basis for disparate impact liability. While the language of 29 U.S.C. § 633a(a) tracks the language of 42 U.S.C. § 2000e-16(a), the legislative histories of the two statutes make clear that the disparate impact theory of liability recognized under §

2000e-16(a), see, e.g., Talev v. Reinhardt, 662 F.2d 888, 891-92 (D.C. Cir. 1981), was not intended by Congress to extend to the ADEA.

c. The Sole Decision Analyzing the Applicability of Disparate Impact Under the ADEA Is Inapposite and Does Not Survive the Supreme Court's Decision in Smith

The legislative history for § 2000e-16(a) also undermines the reasoning of the only court, to our knowledge, to analyze the § 633a disparate impact question.[35] In Lumpkin v. Brown, 898 F. Supp. 1263, 1271 (N.D. Ill. 1995), the court recognized a disparate impact theory under § 633a based solely on the fact that § 633a was enacted three years after the "well-publicized" Griggs decision. The court was guided by Judge Easterbrook's dissenting opinion in Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987), in which Judge Easterbrook relied upon the RFOA provision to read disparate impact liability out of § 623. Judge Easterbrook had observed that "'[t]he ADEA was enacted in 1967, before the first of the disparate impact cases (Griggs, in 1971), so we cannot be confident that the [ADEA] adopts this method.'" Lumpkin, 898 F. Supp. at 1271 (quoting Metz, 828 F.2d at 1216). The Lumpkin court found that the opposite reasoning applied to § 633a – that is, that because § 633a was enacted after Griggs, § 633a should be viewed as incorporating the disparate impact theory. As the contrasting legislative histories described above demonstrate, however, it would in fact be erroneous to presume that Congress

[35] Other courts have addressed whether a disparate impact theory is actionable under the ADEA in federal employment cases, but treated the cases as private sector cases for all relevant purposes, failing to analyze the sovereign immunity question or the separate and distinct nature of § 633a. See, e.g., Evans v. Atwood, 38 F. Supp. 2d 25, 29-30 (D.D.C. 1999); Arnold v. U.S. Postal Service, 649 F. Supp. 676, 679-81 (D.D.C. 1986), rev'd on other grounds, 863 F.2d 994, 998 (D.C. Cir. 1988) (not reaching issue of whether disparate impact theory extends to ADEA because merits did not support a finding for plaintiffs on their disparate impact claim). In Palmer v. United States, 794 F.2d 534, 538 (9th Cir. 1986), the Ninth Circuit assumed in dicta that a disparate impact claim would be available in an ADEA case against the federal government without analyzing the issue.

incorporated disparate impact liability into § 633a from the mere fact that Griggs had been on the books for three years when § 633a was enacted. Congress certainly knew how to express an intent to incorporate disparate impact liability into an employment discrimination statute when it wanted to – it did just that in the Committee report that accompanies § 2000e-16. Conversely, Congress' silence on the matter in the text of § 633a and its legislative history show that Congress did not intend to incorporate disparate impact liability into § 633a.

Lumpkin also has no vitality after Smith. The Lumpkin court's reasoning consists entirely of its prediction that the Court of Appeals for the Seventh Circuit would recognize a disparate impact theory under § 633a, and that prediction is based entirely on Judge Easterbrook's dissenting opinion in Metz. 898 F. Supp. at 1271. However, the Supreme Court in Smith came to the opposite conclusion of Judge Easterbrook – that the RFOA provision supports reading disparate impact liability into, not out of, § 623. See Smith, 125 S. Ct at 1544. Smith stands for the proposition that the disparate impact claim under § 623(a) is predicated on § 623(a)(2) and the RFOA provision. Congress plainly decided to omit both of these provisions from the federal sector ADEA provision, § 633a. Therefore, the rationale of Lumpkin cannot survive Smith. Accordingly, § 633a cannot be construed to imply a right of action for disparate impact liability.

B. Defendants are Entitled to Summary Judgment Because Plaintiffs Have Presented No Statistical Evidence to Make a Prima Facie Showing of Disparate Impact

Even if this Court finds that sovereign immunity does not apply, defendants are entitled to summary judgment on plaintiffs' disparate impact claim on the merits. To prove a prima facie case of disparate impact, a plaintiff must show that the challenged practice, although facially neutral, has a discriminatory effect on a protected group. See Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). In other words, a plaintiff must identify "the specific employment practice that

is challenged," demonstrate that the practice in question caused an adverse impact on the protected group, and show that the statistical disparities are "sufficiently substantial" to raise "an inference of causation." See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-95 (1988). Once plaintiffs establish a prima facie case, the burden shifts to the employer to produce evidence demonstrating a "business justification" for its employment practices. See Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 658-59 (1989) (noting that "at the justification stage of [] a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer") (citations omitted).

Plaintiffs fail to meet these burdens. Plaintiffs have presented no statistical evidence to make a prima facie showing of disparate impact. Statistics are usually the principal focus of a prima facie case of disparate impact. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987 (1988) ("evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities"); Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (in a disparate impact case, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants") (quotations omitted). The Supreme Court has held that plaintiffs not only must show that there are statistical disparities to establish a prima facie case, but they must "begin by identifying the specific employment practice that is challenged." See Watson, 487 U.S. at 994. "Once the employment practice at issue has been identified," a plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [elimination] of [] jobs [] because of their membership in a protected group." Id.

In support of their disparate impact claim, the plaintiffs contend that they can establish a prima facie case because:

> The FAA, which operates 15 Offices and organizations (and even more lower-level divisions and services) across nine Regions, employs an estimated 47,329 people, including 16,858 Controllers in its three Air Traffic Services (Tower, Route, and Flight). See Ex. 9 at 29. However, the FAA targeted only one division – Flight Services – for a RIF, and as a result, an estimate 1,935 FS Controllers will be terminated from their federal employment on October 3, 2005. See Ex. 1 at ¶ 6. Of those FS Controllers, approximately 1,770 (92 percent) are 40 years of age older, and they are by far the oldest workforce within the FAA. See Ex. 1 at ¶ 6. This disparity in age will cause the FS Controllers to suffer a significantly disproportionate impact as a result of Defendants' discriminatory plan.

Plaintiffs' Application for Preliminary Injunction at 100-01; see also First Am. Compl. ¶ 50. As demonstrated below, the mere allegation that 92% of AFSSs are over 40 years of age says nothing about the age of other employees at the FAA whose positions could have been outsourced or about whether a statistically significant disparity even exists.

In this case, there are three distinct events leading up to the RIF and the impact of each can be separately measured. The first is the FAA's decision to designate certain activities as commercial and others as inherently governmental. The relevant statistical population at this stage encompasses all employees. The second selection practice is the FAA's determination of which commercial activities are feasible to outsource. The relevant population at this stage consists of all employees performing those activities deemed commercial. The third selection practice is the FAA's decision to compete. At this last stage, the relevant population consists of those employees performing activities that have been deemed commercial and feasible to outsource.

It is well established that the burden falls upon the plaintiffs not only to identify which of the three practices they seek to challenge but also to measure the impact of each. See Watson,

487 U.S. at 994. As the Supreme Court recently observed in Smith v. City of Jackson, __ U.S. __, 125 S.Ct. 1536 (2005):

> [I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.

Id. at 1545 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989)) (internal quotations omitted) (emphasis in original). Here, as in Smith, the plaintiffs "have done little more than point out that the [RIF] at issue is relatively less generous to older workers than to younger workers." Id. They have not identified any specific employment practice that has an adverse impact on older workers. Nor have they attempted to identify the appropriate population for statistical comparison. Having failed to satisfy their burden, the plaintiffs cannot establish a prima facie case of disparate impact under the ADEA. Accordingly, this Court should grant defendants' motion for summary judgment. See Csicseri v. Bowsher, 862 F. Supp. 547, 574 (D.D.C. 1994) (entering judgment for defendant where plaintiffs failed to isolate and identify the specific employment practices which they believed caused discriminatory impact).

Moreover, even if plaintiffs had met their burden of establishing a prima facie case of disparate impact by identifying the specific employment practice having a disparate impact upon them, and by presenting statistical evidence showing that the disparities are sufficiently substantial, neither of which have they done, defendants have successfully rebutted any such prima facie case by demonstrating that the challenged agency action is supported by legitimate business reasons. See section II.B supra.

V. BECAUSE PLAINTIFFS' CLAIMED INJURIES ARE ENTIRELY COMPENSABLE OR WHOLLY SPECULATIVE, AND PLAINTIFFS FAIL TO ESTABLISH IMMINENT "EXTRAORDINARY" INJURIES, THE COURT MUST DENY INJUNCTIVE RELIEF

Although plaintiffs have not shown a likelihood of success on the merits, the Court should deny injunctive relief for two other reasons.

First, plaintiffs are not entitled to injunctive relief because they have not demonstrated any irreparable injury. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (holding that the essential basis of injunctive relief in federal courts has "always been irreparable harm and inadequacy of legal remedies"); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The key word in this consideration is irreparable.") (emphasis added). Indeed, a plaintiff's failure to show an irreparable injury is more than sufficient reason to deny a preliminary injunction. CityFed Financial Corp., 58 F.3d 738, 747 (D.C. Cir. 1995); Dodd v. Fleming, 223 F. Supp. 2d 15, 20 (D.D.C. 2002). Because plaintiffs' claimed injuries are compensable, non-imminent, or wholly speculative, these injuries, if any occur, are not irreparable. "Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Va. Petroleum Jobbers Ass'n, 259 F.2d at 925; Moore v. Summers, 113 F. Supp. 2d 5, 24 (D.D.C. 2001).

Second, enjoining federal personnel actions, such as this one, is an available remedy only if plaintiffs show the "extraordinary" nature of the case and need for such relief. See Sampson v. Murray, 415 U.S. 61, 90 (1974); Jordan v. Evans, 355 F. Supp. 2d 72, 77 (D.D.C. 2004) (plaintiffs seeking injunctive relief in an employment discrimination action "must make ‘a more stringent showing of irreparable injury'"); Bonds v. Heyman, 950 F. Supp. 1202, 1212 (D.D.C. 1997). This case, however, presents commonplace injuries often found in changes to federal

personnel plans. In short, plaintiffs have utterly failed to demonstrate even an irreparable injury, let alone meet their heightened burden under Sampson, and no injunction should issue.

A. Plaintiffs Will Not Suffer Any "Irreparable Injury"

Plaintiffs must "substantiate the claim that irreparable injury is likely to occur," and "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." Wisconsin Gas, 758 F.2d at 674 (internal quotations and citations omitted, emphasis in original). As set forth below, plaintiffs cannot demonstrate that the claimed harms are irreparable injuries.

Plaintiffs' claimed injuries fall within two categories, neither of which are irreparable as a matter of law. First, the bulk of plaintiffs' claimed injuries are inherently economic and therefore subject to compensation or corrective relief such that there is an adequate remedy at law because "economic loss does not, in and of itself, constitute irreparable harm." Id. Indeed, FAA agrees that if plaintiffs ultimately prevail they will not lose a dollar of pay, their retirement or pension credits or other federal benefits. See Williams Decl. ¶ 20 (explaining that FAA has the authority and ability to rectify each of the claimed economic injuries if plaintiffs were able to prevail on the merits). Second, plaintiffs' claimed injuries relating to the relocation of jobs with Lockheed are speculative and attenuated as opposed to being "both certain and great," "actual and not theoretical" and "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas, 758 F.2d at 674 (internal quotations and citations omitted, emphasis in original). Finally, plaintiffs have not established that plaintiffs who accept employment with Lockheed will be harmed at all. Injunctive relief should therefore be denied.

1. Because Plaintiffs' Claimed Economic Injuries are Compensable or Subject to Other Corrective Relief if Plaintiffs Prevail, Injunctive Relief Should Not Issue

Plaintiffs set forth a litany of alleged injuries flowing from the RIF.[36] But most of those injuries have an inherently economic character, demonstrating that they are capable of compensation or other corrective relief should plaintiffs ultimately prevail. This is unsurprising. "It is practically universal jurisprudence in labor relations in this country that there is an adequate remedy for individual wrongful discharge after the fact of discharge . . . because the remedy by way of reinstatement and back pay is well established and is universally used." Garcia v. United States, 680 F.2d 29, 31 (5th Cir. 1982) (citation omitted). Indeed, an examination of plaintiffs' alleged injuries demonstrates that plaintiffs have adequate remedies through back pay, reinstatement, and other available remedies under the ADEA.

Plaintiffs point to "job losses," Pl. App. at 56, loss or reduction of retirement or pension benefits, id. at 41, 45, loss or reduction of annuities, id., loss of health insurance, id. at 42, 46, loss of cost of living adjustments, id. at 57, and loss of sick leave and holiday pay, id. Because these sorts of injuries are losses of "money, time and energy," they are capable of compensation, they are inherently economic. See Va. Petroleum Jobbers Ass'n, 259 F.2d at 925. For this reason, they are "[m]ere injuries" that "are not enough" to qualify as irreparable. See id.

Loss of wages or increased working hours has been held as not irreparable injury. See Davenport v. Int'l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 367 (D.C. Cir.1999) (increasing

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[36] Here, given the nature of Lockheed's agreement to the 95% of plaintiffs who have accepted Lockheed employment, it is questionable whether most plaintiffs will suffer any harm. See also Part II.A.3, infra. For example, employees eligible to retire with FAA may take the employment with Lockheed as well as enjoy their retirement pay, and receive two paychecks. Moreover, unlike employment with the FAA, which is restricted by statute to workers under the age of 56, new Lockheed hires may continue their employment.

flight time of flight attendants while "eliminating attendants' per diem pay and hotel allowances" is "not irreparable") (citing Sampson, 415 U.S. at 90); see also E.E.O.C. v. State of New Jersey, 620 F. Supp. 977, 996 (D.N.J. 1985) (reduction of pay due to forced early retirement is not irreparable injury). Similarly, Judge Urbina recently rejected claims that irreparable harm occurred because of "reduced pensions" or that workers near retirement would need to work longer hours. Int'l Ass'n of Machinists & Aerospace Workers v. Nat'l Mediation Bd., 374 F. Supp. 2d 135, 142 (D.D.C. 2005). Even large losses of income that would likely lead to forced property sales or the loss of medical insurance benefits is not generally an irreparable injury. See, e.g., Morgan v. Fletcher, 518 F.2d 236, 239-40 (5th Cir. 1975) (reversing an injunction based on a reduced "salary represent[ing] 45% of [] family's income, a loss of which would probably lead to foreclosure of [family] home [and] the loss of medical insurance benefits" because harms were not irreparable). Likewise, being forced to pay costly insurance premiums, even if there is a claim that they are unrecoverable, has been held as insufficient to constitute irreparable harm. Carabillo v. Ullico Inc. Pension Plan & Trust, 355 F. Supp. 2d 49, 54-55 (D.D.C. 2004). Psychological or psychic harm due to lost employment is not an irreparable injury. Soldevilla v. Sec'y of Agriculture, 512 F.2d 427, 430 (1st Cir. 1975). The loss of reputation or career potential are equally insufficient to constitute irreparable injury. See Veitch v. Danzig, 135 F. Supp. 2d 32, 36 (D.D.C. 2001) (loss of salary and benefits and damage to professional reputation not sufficient to demonstrate irreparable injury).

Similarly, "the requisite irreparable harm" necessary for injunctive relief "is not established in employee discharge cases by financial distress or inability to find other employment, unless truly extraordinary circumstances are shown." Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983); Ekanem v. Health and Hospital Corp. of Marion County,

589 F.2d 316, 321 (7th Cir. 1978) (concluding that the inability to obtain other employment is not irreparable harm because a terminated employee has an adequate remedy at law by way of monetary compensation). Here, plaintiffs have not established substantial financial harm that only injunctive relief could avoid. Instead, they have resorted to parading horribles of financial disasters that are patently speculative and unlikely to develop in the distant future, if ever. See Part II.A.2, infra (discussing the speculative nature of plaintiffs' claimed harms as a reason to deny injunctive relief).

Congress, through the ADEA, gave the court the authority to grant "such legal or equitable relief as will effectuate the purposes of this chapter" against FAA. See 29 U.S.C. § 633a(c)). Courts have repeatedly recognized that "purposes of the ADEA are to make persons whole for injuries suffered as a result of unlawful employment discrimination and to restore [those] persons to the position where they would have been if the illegal discrimination had not occurred." See, e.g., Stolzenburg v. Ford Motor Co., 143 F.3d 402, 407 (8th Cir. 1998) (citation and internal marks omitted); Villescas v. Abraham (Dep't of Energy), 285 F. Supp. 2d 1248, 1255 (D. Colo. 2003). Restoring all economic losses, as the ADEA allows, is by definition an adequate legal remedy to the plaintiffs' claimed economic harms.

The FAA's declaration buttresses the conclusion that plaintiffs' claimed injuries are "mere injuries" that have an adequate remedy at law that are "not enough" to qualify for injunctive relief. See Va. Petroleum Jobbers Ass'n, 259 F.2d at 925. The FAA affirms that it "has the authority and ability to make Plaintiffs whole should they prevail on the merits of this case subsequent to the RIF taking place on October 3, 2005." Williams Decl. ¶ 20. Indeed, the FAA confirms that each claimed economic harm plaintiffs list would be rectified by way of an appropriate ADEA award such that:

> the FAA would reinstate the Plaintiffs; restore wages lost during the time they were separated from FAA employment, including missed overtime, holiday and other premium pay as permitted by law, and locality pay increases that were awarded; restore annual leave and sick leave they would have accrued during the separation period; make the appropriate employer contributions to the applicable retirement systems, including to Thrift Savings Plan (TSP) accounts; allow Plaintiffs to make appropriate employee contributions to the applicable retirement systems, including TSP accounts and credit the time lost during the separation period towards their retirement, including creditable service towards the special retirement provisions for air traffic controllers known as "good time," if applicable. Plaintiffs would receive earnings/losses on both employee and employer contributions to TSP accounts for the separation period.

Id.

Plaintiffs therefore have an adequate remedy at law for all economic claimed economic harms.

Finally, any harm to the plaintiffs who have chosen to work with Lockheed (and indeed those who have decided against such work)[37] is brought about by their own independent choice. While plaintiffs' choices alter the economic impact the RIF, their choice to work with Lockheed changes the "temporary loss of income which may be recovered later [that] does not usually constitute irreparable injury" even "under traditional Rule 65 standards." See DeNovellis v. Shalala, 135 F.3d 58, 63-64 (1st Cir. 1998) (recognizing that an employees' independent choice of whether to accept a transfer merely alters the temporary loss of income or other damages that are recoverable if plaintiff prevails). The decision of the subset of plaintiffs that have foregone the opportunity to work with Lockheed is, at bottom, simply a choice to incur a larger "temporary loss of income" or other benefits should they prevail. Notably, Lockheed's bid proposal guaranteed employment for every plaintiff that applied. Because the Court can fashion corrective

[37] In fact, by declining such offers of employment with Lockheed they have not met their duty to mitigate harm.

relief that is more than sufficient to ameliorate plaintiffs' economic harms, if any, there is no reason to issue injunctive relief.

2. Because Plaintiffs Rely Upon Speculative or Attenuated Injuries, Injunctive Relief is Inappropriate

Injunctive relief should be denied because plaintiffs' application and exhibits set forth a myriad of speculative, attenuated, and hypothetical injuries that will not occur for years, if ever.

First, the Court should note that the transition to Lockheed is phased-in and that Lockheed has expended tremendous efforts on the complicated plan to take over these positions. The phase-in period will allow Lockheed to gear-up to take over responsibility of these job functions leading up to the effective date of the RIF, while simultaneously allowed the FAA to gear down and cease making long term investments in the dated system; this process has been ongoing for about seven months already. Courain Decl. ¶¶ 12, 31. The phase-in period involves "facility and operational assessments of all current AFSS system elements; Human Resources ("HR") activities relating to transition of the current FAA workforce to private employment; leasing and construction of the new Hub facilities; and continuing integration and customization of the FS21 system." Id. ¶ 32. The chief difference starting October 4, 2005, which is when the phase-in period ends and the transition period begins, is only that the employees will report to Lockheed, not FAA, in the same locations while receiving the same pay. Id. ¶ 25. The transition period will ultimately see a reduction in the number of existing facilities from 58 to 3 hubs and 17 other refurbished facilities that are in locations where existing facilities are located. Id. ¶ 19. While "[m]ost of the specialist staffing reduction will occur during transition as [Lockheed] close[s] the 41 facilities" that are not being retained, "[t]hat process is scheduled to commence on April 1, 2006," id. ¶ 29 (emphasis added), – approximately six months after the RIF occurs.

Second, Plaintiffs themselves place the potential harms they could face under the rubric of "a future plagued by uncertainties," See Pl. App. at 61 (emphasis added), although to describe these injuries as "uncertain" is generous. Injunctive relief is available only in cases of "certain and great" harms that are "actual not theoretical." See Wisconsin Gas, 758 F.2d at 674. Plaintiffs cite no authority for the proposition that uncertainty is a certain harm.

Instead of setting forth real instances of harm that are imminent and flow directly from the October 3, 2005 RIF, plaintiffs rely on theoretical harms. Plaintiffs point to possible changes in parent care in nursing homes or child care issues such as "years rebuilding a support network" and possible harms that might result from finding "a new therapist" or leaving behind "particularized medical and hospital-specific programs." Pl. App. at 62. Plaintiffs even go so far to speculate on "death or relapse" as harms or the possibility that plaintiffs' side businesses will fold at some point in the distant future if plaintiffs agree to relocate to work with Lockheed. Id. at 62-63. Plaintiffs even vaguely allude to damages to national security. Id. at 64. None of these harms are "certain" or "actual" as required by Washington Gas, 758 F.2d at 674. None of these harms are of such "imminence" that they are directly tied to the October 3, 2005, agency action as required by Washington Gas. Id. Furthermore, plaintiffs' reliance on the lack of guaranteed employment, and their claim that after "three years of promised employment" Lockheed could terminate their employment, Pl. App. at 108 (emphasis added), fall within the same category of speculative, non-imminent harm that injunctive relief is an improper remedy to guard against.

Plaintiffs notably fail to allege when these harms flowing from relocation will occur, or whether they will occur at all, with respect all plaintiffs. Plaintiffs' omission is understandable given that such claimed injuries are wholly removed from the simple fact that starting on October 4, 2005, the only change will be that plaintiffs' employer will be Lockheed and not the FAA.

Because plaintiffs' alleged harms are so attenuated and disconnected from the RIF after October 3, 2005, they are not irreparable and do not support an injunction.

Indeed, Judge Huvelle recently rejected similar arguments that attenuated or anticipated "life choices" that might flow from a challenged action constitute irreparable harm. See Ass'n. Of Flight Attendants-CWA v. Pension Benefit Guaranty Corp., 372 F. Supp. 2d 91, 100-01 (D.D.C. 2005). Plaintiffs in Association of Flight Attendants sought an injunction to prevent defendants from instituting proceedings that would have involuntarily terminated the flight attendants' pension plan. Similar to the sort of claimed injuries in the case at bar, the flight attendants cited "significant life choices that cannot easily be reversed" including "relocating to a new residence" due to lower pension income, and decisions to resign that would cause them to lose seniority that could not be easily fixed or where it "would be difficult to reinstate" plaintiffs. See id. Judge Huvelle concluded that such "life choices" and "economic injuries" are not irreparable injuries. Id. at 101 (citing Washington Gas, 758 F.2d at 674). Judge Huvelle reasoned that such "anticipated 'injuries documented on this record – the forced sale of a house, a boat or stock [] do not rise to the level of 'irreparable' harm necessary to warrant the extraordinary remedy of a preliminary injunction.'" Id. at 101 (quoting Boivin v. U.S. Airways, Inc., 297 F. Supp. 2d 110, 118-19 (D.D.C. 2003)) (emphasis added). Furthermore, Judge Huvelle discounted many claimed injuries because they were not "sufficiently imminent to warrant a preliminary injunction." Id. Plaintiffs' claimed injuries here are on par with the attenuated, economic injuries that Judge Huvelle found insufficient to grant injunctive relief.

3. Because Of Their Decision To Accept Employment With Lockheed, The Vast Majority of Plaintiffs Will Suffer No Appreciable Harm And May In Fact Benefit From The RIF

A careful examination of the benefits of employment with Lockheed casts serious doubt on Plaintiffs' assertions that the RIF will cause even mild economic harm.

a. The RIF Entails No Massive "Job Losses" Because Plaintiffs Overwhelmingly Accepted Employment

"Of the approximately 2300 FAA employees who were in the incumbent AFSS workforce when [Lockheed] began the phase-in, 2119 applied for employment with Lockheed Martin and received offers. Of those offers, 2018 were accepted and only 70 were declined." Courain Decl. ¶ 33. Thus, over ninety-five percent of current FAA employees have accepted job offers from Lockheed. It is therefore demonstrably incorrect that the RIF entails "massive job losses," as plaintiffs claim. Pl. App. at 56. Because there is a phase-in transition to Lockheed's plan of consolidation, "[m]ost of the specialist staffing reduction will occur during transition" after the 41 phased-out facilities close, which "is scheduled to commence on April 1, 2006" roughly six months after the October 3, 2005 RIF. Courain Decl. ¶ 29. Hence, the closure of facilities is not "imminent."

b. Plaintiffs Receive Substantial Retention Bonuses and Other Benefits in the "Land Soft Package"

All plaintiffs accepting employment received substantial bonuses from Lockheed. Lockheed provided a minimum $5,000 signing bonus for every person agreeing to work for Lockheed. Courain Decl. ¶¶ 26-27. Plaintiffs currently working at locations that will eventually close receive an additional $5,000 completion bonus. Id. ¶ 26. Moreover, plaintiffs choosing to relocate receive an additional bonus of 20% of their base compensation. Id. ¶ 27. These bonus payments are only one aspect of the generous benefits plaintiffs are entitled to after the RIF.

Lockheed agreed to match current incumbent salaries, including locality pay increases offered by the federal government, id. ¶ 25, and advanced each incumbent 40 hours of sick leave on the first day of employment and the right to accrue vacation at the rate identical to the government rate. See Neill ODRA Opinion at 23 (describing Lockheed proposal). Additionally, the Lockheed proposal provides a 401K retirement plan. Id. Each specialist will also be eligible to share in up to 20% of the "award fee" that Lockheed will be eligible to receive from the FAA for successful contract performance. Courain Decl. ¶ 27. Lockheed will provide every specialist with a laptop computer valued at $2,400. Id. ¶¶ 26-27. Lockheed's offer also will provide plaintiffs 100% tuition reimbursement and corporate career opportunities with Lockheed available to all employees. Finally, relocating plaintiffs will be entitled to a relocation package from Lockheed totaling up to $50,000, which includes broker registration, trips to find new homes, temporary living expenses, closing costs on real estate transactions, moving household goods, a temporary allowance at the new location, and spousal job assistance. Id. ¶ 27; see also Neill ODRA Opinion at 23 (describing Lockheed's proposal). Finally, as opposed to continued employment with the FAA which has a statutory age restriction, plaintiffs may continue their employment with Lockheed beyond the age of 56.

This generous package, which plaintiffs omit in their claims of harm, plainly can offset any economic harms they would incur. Plaintiffs stand to gain a financial advance by signing-on with Lockheed, as well as being able to collect federal retirement benefits, as evidenced by the greater than 95% acceptance rate for incumbents.

c. Similar Harms Would Have Occurred Under The RIF Option That Plaintiffs Supported, But With Larger Numbers Of Relocations And Less Compensation

Plaintiffs' reliance on relocation and consequential harms flowing from consolidation of offices is undermined by their own proposal. Plaintiffs themselves acknowledge that "[a]ll of the internal and external proposals that were available to the FAA . . . would have consolidated the AFSS" offices. Pl. App. at 88. While Lockheed's proposal had 3 hub locations and 17 others, the MEO proposal, which plaintiffs say should have been accepted instead, "proposed an aggressive consolidation down to four facilities." Id. at 88-89. Thus, under plaintiffs' own MEO proposal, relocations, and the speculative harms plaintiffs' allege, likely would have occurred in far greater numbers than under the Lockheed plan. Relocation was therefore inevitable under any scenario once the FAA recognized that, whether the offices were privately or publicly run, there were simply too many.

4. The Absence Of Compensatory Relief Under The ADEA Provides No Basis For Injunctive Relief

Plaintiffs' cite the lack of compensatory damages under the ADEA as constituting the absence of an adequate remedy at law. Pl. App. at 103-04. But the absence of compensatory damages (presumably damages for emotional distress) cannot be a basis to enter injunctive relief for two reasons.

First, plaintiffs' argument is inconsistent with the limitations on injunctive relief in employment situations. Plaintiffs' argument contradicts the principle that injunctive relief may only issue in employment cases upon a showing that the case is "extraordinary." See Sampson, 415 U.S. at 90. If plaintiffs' argument were correct, then an ADEA plaintiff would be entitled to injunctive relief in every case upon an allegation of age discrimination. After all, in each age

discrimination case, the ADEA proscribes compensatory relief. Similarly, injunctive relief would necessarily issue in other discrimination cases, because it would never be certain that Title VII's $300,000 limit on compensatory damages would make a plaintiff whole. Plaintiffs' argument proves too much. The very fact that injunctive relief in employment cases is exceedingly rare, and not the rule, demonstrates the fallacy of plaintiffs' argument.

Second, Congress chose the remedial measures in the ADEA that included back pay, front pay, reinstatement, promotion, etc., but not compensatory damages. See 29 U.S.C. § 633a. In fact, Congress went so far as to limit the court's "jurisdiction to grant such legal or equitable relief" to means that would "effectuate the purposes of this chapter." Id. (emphasis added). Having provided for compensatory damages in Title VII, Congress evidently considered the emotional stress associated with discrimination based on age to be too attenuated from the central "purpose" of the legislation to merit corrective action. Consequently, the unavailability of compensatory relief under the statute cannot justify a preliminary injunction.

B. Plaintiffs Have Not Satisfied The Heightened Test For Preliminary Injunctive Relief That Applies In Cases Involving Federal Personnel Actions

In Sampson v. Murray, the Supreme Court established a heightened standard for injunctive relief in federal personnel cases, like the case at bar. 415 U.S. at 83. Sampson involved a claim by a probationary federal employee that her proposed discharge was not in accordance with civil service procedures. The employee sought a preliminary injunction prohibiting any further action until the completion of her administrative appeal. The requested injunction issued based upon perceived irreparable injury to both the employee's income and reputation. The Supreme Court reversed. It held that the alleged injuries fell "far short of the

type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." Id. at 91-92.

Sampson recognized that it would be the exceedingly rare case where injunctive relief was appropriate to halt federal personnel decisions. Id. at 92 n.68 ("Such extraordinary cases are hard to define in advance of their occurrence."). Sampson also imposed a mandatory, heightened burden on the plaintiffs to demonstrate that a case was sufficiently "extraordinary" to overcome a court's reluctance to enjoin federal employment decisions. Id. at 83 ("[T]he Court of Appeals was quite wrong in applying to this case the traditional standards governing more orthodox 'stays'"). Judicial reluctance to impose injunctive relief stems from three principles: (i) the availability of the administrative process to remedy claims regarding federal employment, (ii) the fact that "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs,'" and (iii) a general unwillingness to enjoin any employment decisions. Id. at 83-84. Thus, plaintiffs' burden is to demonstrate irreparable harm that is "sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases."[38] Id.

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[38] Sampson was not a discrimination case and the D.C. Circuit has yet to address whether Sampson's higher standard extends to cases that involve claims of discrimination. See Wagner v. Taylor, 836 F.2d 566, 576 n.66 (D.C. Cir. 1987) (declining to answer the question). But several district courts in this Circuit that have considered the issue in recent years have indicated that the more stringent Sampson standard applies to all employment cases against federal defendants where injunctive relief is sought. See Jordan, 355 F. Supp. 2d at 77 (plaintiff "must make 'a more stringent showing of irreparable injury'); Bonds, 950 F. Supp. at 1212 ("this court finds that a more stringent showing of irreparable injury is required when a plaintiff, even in a Title VII case, seeks a preliminary injunction against the federal government in the personnel area"). Indeed, plaintiffs' failure to meet the normal injunctive relief standard means that the Court need not address whether the Sampson standard applies, see, e.g., Moore, 113 F. Supp. 2d at 18 (declining to decide whether Sampson applies), even though plaintiffs' brief acquiesces in its application. See Pl. App. at 102-03.

Finally, the Sampson Court noted that many commonly claimed injuries would not support injunctive relief of a federal employment action. Sampson therefore held that commonly occurring harms caused by "external factors" often associated in the discharge of employees that are "not attributable to any unusual actions relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual." Id. at 92 n.68 (emphasis added) (citing "insufficiency of savings or difficulties in immediately obtaining other employment" as illustrative examples). The kinds of harms plaintiffs here rely on are harms to pensions, retirement credits, loss of leave, etc., that are clearly economic in nature and compensable. See Pl. App. at 106-11. Sampson identified these kinds of economic harms as insufficient to enjoin federal employment decisions because they are not extraordinary.

Plaintiffs, however, principally rely upon the reasoning of Gately v. Comm. of Mass., 2 F.3d 1221 (1st Cir. 1993), to support their claimed entitlement to injunctive relief for their vague claims that they will be harmed because their skills will stagnate or that they will lose their remaining working years. See Pl. App. at 106-07. Gately does not help plaintiffs. In Gately members of the Massachusetts Department of State Police sought a preliminary injunction against the enforcement of a mandatory retirement age. The First Circuit affirmed a preliminary injunction partially on the grounds that the plaintiffs were not seeking interim injunctive relief pending completion of an administrative process. Gately, 2 F.3d at 1233. But the plaintiffs in Gately, in stark contrast to plaintiffs here, did not have any administrative remedies available to pursue their claims. Id. at 1233 & n.8. The First Circuit specifically distinguished Gately from "those cases in which . . . [it had] applied a Sampson heighten standard" based upon a plaintiff's failure to exhaust available administrative remedies, as opposed the one before it involving a plaintiff with no administrative remedies. Id. (citations omitted). Plaintiffs here have

administrative remedies available to raise their ADEA claims relating to the RIF after it occurs to either the MSPB or EEOC. They also can attempt to appeal the Administrator's order to the courts of appeals. Indeed, plaintiffs unsuccessfully challenged the FAA's award of the contract to Lockheed to the Board of Contract Appeals and could appeal that decision to the Circuit Court. Plaintiffs could have continued their administrative challenges but instead filed for injunctive relief six days after their initial challenge was rejected when FAA's Administrator adopted the Neill ODRA Opinion. In any event, the administrative remedies available to plaintiffs, individually or collectively, precludes their reliance upon Gately's limited holding.

Plaintiffs' ADEA challenge must establish "extraordinary circumstances" to justify preliminary injunctive relief of a federal employment decision. Jordan, 355 F. Supp. 2d at 82 (citation and internal marks omitted). Citing Bonds, plaintiffs suggest that the subjective importance of the FAA positions to the plaintiffs meets the Sampson standard. Pl. App. at 112-13. This is wrong. Plaintiffs place great weight on the Bonds case notwithstanding its key factual differences that render its holding inapplicable here. First, in Bonds Judge Lamberth granted interim injunctive relief, but he did so based on a well-developed record and after discovery had concluded. See Nichols v. Agency for Int'l Development, 18 F. Supp. 2d 1, 5 (D.D.C. 1998) (distinguishing Bonds). These factors are clearly lacking here. Second, it is plain from Judge Lamberth's opinion that the Court concluded that injunctive relief was warranted because the RIF challenged affected a single employee, and because of that employee's unique circumstance. Bonds, 950 F. Supp. at 1215 (discussing a "58 year-old woman" who worked at the Smithsonian "for nearly 40 years" with "no college education, and worked her way up from a typist to a program analyst" but who would not likely "ever find work approaching what she now does, if she could find work at all"). Plaintiffs here do not remotely resemble the plaintiff in

Bonds. Judge Lamberth's ruling is clearly limited to the unique facts presented there and does not indicate an injunction is appropriate here.

Plaintiffs therefore have not demonstrated that this is the type of "extraordinary case" whose circumstances "so far depart from the normal case" of injury that a grant of injunctive relief would be appropriate. Sampson, 415 U.S. at 92 n.68 (quoted in Bonds, 950 F. Supp. at 1211). If anything this case presents the ordinary, not extraordinary, case. The litany of claimed harms in plaintiffs' brief typify the "common" harms caused by "external factors" that would occur in virtually every case of a change in federal personnel plan.[39] Id.; see also Veitch, 135 F. Supp. 2d at 36 (noting that loss of salary, benefits and to reputation are "no more than are typical in instances of the termination of any government employee"). The Supreme Court has already held that these kinds of harms do not entitle one to injunctive relief. See id. Indeed, in Pollis v. New School for Social Research, the District Court for the Southern District of New York analyzed a challenge to an employer's mandatory retirement requirement system and concluded that injunctive relief would only be appropriate where "the resultant non-economic effect upon the employee of the employer's adverse action must have about it an extra dimension which distinguishes the case from those of all other employees similarly situated." 829 F. Supp. 584, 601 (S.D.N.Y. 1993). Applying a lower standard "would open the floodgates to preliminary injunctions in a manner that . . . [the Supreme Court concluded] is contrary to law." Id. The

[39] Plaintiffs list the claimed harms as: (i) the statutory remedies under the ADEA are insufficient, Pl. App. at 105; (ii) there would be "no . . . positions . . . to return to," id. at 105-06; (iii) loss of skill level, id. at 106; (iv) loss of remaining working years due to intervening retirement eligibility, id.; (v) loss of early retirement credits, id. at 107; (vi) loss of federal employment and relocation, id. at 108-09; (vii) harm to pension, retirement, or benefits, id. at 109-11; and (viii) the subjective importance of their jobs, id. at 112-13.

plaintiffs' claims do not rise to an extra dimension that distinguishes their situation from ordinary cases where employees are terminated.[40]

VI. ENJOINING THE RIF WOULD IMPOSE A SUBSTANTIAL HARM ON THE FAA AND LOCKHEED, AND WOULD SEVERELY HARM THE PUBLIC INTEREST

Entering an injunction would substantially harm both FAA and Lockheed and would be contrary to the public interest. Therefore, injunctive relief should be denied. See generally Serono Labs, 158 F.3d at 1317-18.

A. Both The Federal Defendants And Lockheed Would Be Substantially Harmed If Injunctive Relief Were Granted

Plaintiffs' assertions that neither the FAA nor Lockheed will suffer substantial harm are demonstrably incorrect. Pl. App. at 113-16.

1. FAA Would Suffer Substantial Monetary Harm If An Injunction Issued

The FAA has substantially conformed its operations to the plan for Lockheed to take over operations as of October 4, 2005. Consequently, "the FAA has refrained from making any improvements for the past two years in anticipation of the contract award." Kansier Decl. ¶ 23. Because the AFSS system has long been scheduled for phase-out at this time, the FAA has not expended the long-term upkeep costs that would have been necessary to continue to maintain the AFSS system as it currently operates. Indeed, such funds are not available: the FAA has "no money in the proposed budget of the agency for making capital improvement in the AFSS environment because of the anticipated transition to a new service provider." Id.; see also Courain Decl. ¶ 50 (discussing the "outmoded" and "not being adequately maintained" system

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[40] Plaintiffs point to loss of employment by the federal government that the RIF will entail. While that may qualify as an injury, loss of federal employment alone cannot be irreparable because the ADEA itself provides reinstatement as a possible remedy that the Court could order, meaning that an adequate remedy at law exists.

currently employed by FAA and that "FAA is naturally counting on Lockheed Martin to address current system issues as soon as we assume responsibility for the AFSS system on October 4"). FAA has also expended large efforts "to place affected employees and [has] been delaying release dates for those selected for other positions [in the FAA] as long as possible" so that the timing of the release of employees to other jobs would "coincide with an October 4, 2005 transition date." Sheridan Decl. ¶ 14.

Enjoining the RIF will force the FAA to pay Lockheed under its contract and also to pay independently to maintain an outdated and inefficient system. Kansier Decl. ¶ 23 ("A suspension of the transition to Lockheed Martin would produce substantial hardship to the FAA in terms of lost efficiency . . . and millions of dollars."). As stated in the Kansier Declaration, "the FAA is already liable to Lockheed Martin for its Phase-in work (approximately $5 million)." Id. These monetary costs to FAA of delaying the RIF are therefore substantial and do not even include, the opportunity costs of lost "anticipated savings" that the gains in efficiency would create for FAA. Id. ¶ 25. Over a ten year period the projected savings of the "public/private competition is 2.2 billion [U.S.] dollars over what the existing service would otherwise cost." Id.

2. FAA Would Suffer Substantial Programmatic Harms if an Injunction Issued

The Supreme Court and the D.C. Circuit have stressed the importance of granting the government "the widest latitude in the dispatch of its own affairs." Sampson, 415 U.S. at 83; Bishop v. Wood, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."); Andrade v. Lauer, 729 F.2d 1475, 1483 (D.C. Cir. 1984) (noting the courts' "general reluctance to interfere in the finely-articulated statutory/regulatory scheme governing federal personnel

practices"). Obviously, any delay would adversely constrain the latitude conferred by these doctrines on the FAA to structure its personnel affairs and in fulfilling its mission. Indeed, delaying the implementation of the RIF would prevent the agency from completing the reorganization, and harms the FAA in several ways.

It is the general policy of the United States Government and the FAA to "rely on the private sector for needed commercial services" because they are "subject to the forces of competition" that will "ensure the American people receive maximum value for their tax dollars." See OMB Circular A-76, ¶ 4. The FAA has been considering competitive sourcing of these positions for years and has devoted extensive resources in soliciting and then considering the various bids, including plaintiffs' in-house bid. Over three years ago, the FAA began studying the feasibility of competitive sourcing the AFSS positions. See Feasibility Study, Federal Aviation Administration (July 12, 2002). This review culminated in a FAA announcement of a public-private competition for these services on December 19, 2003. To accomplish its mandate under OMB Circular A-76, FAA conducted a comprehensive solicitation process. The FAA studied these proposals for a number of months before announcing that it had awarded the contract to Lockheed in accordance with the established solicitation criteria in February 2005. Enjoining the long-planned transition to Lockheed will harm the FAA by failing to recognize: the FAA's considered judgment to award the contract to Lockheed, the extensive latitude FAA enjoys in contracting decisions, and the fact FAA (and Lockheed) have substantially relied upon the contract in ordering its affairs. See Sheridan Decl. ¶ 14; Kansier Decl. ¶ 21.

The Court should also carefully note that Judge Neill's opinion that explained some of FAA's harms when he rejected the plaintiffs' challenge to the bid contest. In so doing, he made specific findings of fact that FAA's stated goals in soliciting competition for the AFSS positions

were to (i) "deliver timely and accurate information to support safe and efficient flight;" (ii) "ensure quality services are delivered while carrying out the mission of the AFSS;" (iii) "ensure customer needs are met;" and (iv) "achieve significant process improvements to lower costs and maximize operational efficiency of the AFSS." See Neill ODRA Opinion at 5 (Finding 2) (emphasis added). Delaying the RIF will therefore inhibit the attainment of these goals and will require the FAA to maintain, and the public to endure, an outdated and inefficient system that is not the best value for the taxpayers. Kansier Decl. 23. Indeed, the FAA was required under the solicitation to accept the "'best value,'" which is defined as "'the combination of the impact of the overall benefits, risk, and cost for the delivery of the effective flight services to support safe and efficient flight.'" Id. at 8 (Finding 16). Judge Neill upheld the FAA's decision to accept Lockheed's bid for these services, noting that the agency decisionmakers "undertook a careful review" of the reports during the RIF process and that the strengths and weaknesses of the various proposals accurately identified and properly considered by FAA officials. Id. at 98-101.

A preliminary injunction will therefore seriously harm the FAA's effort to comply statutory mandates and the President's Management Agenda by "delay[ing] the timeline for a systematic upgrade of the AFSS system" and imposing a system that is less efficient and effective than the one chosen by FAA officials. See Sheridan Decl. ¶ 14 ("The system to be put in place by Lockheed Martin represents a more efficient one, with much better technology and reliability than the current system."). Id. An injunction preventing the transition would "present a considerable operational challenge to the FAA" and "would have a substantial adverse effect on the technological efficiencies that are forecasted to be gained." Id.; see also Am. Fed'n of Gov't Employees v. OPM, 618 F. Supp. 1254, 1265 (D.D.C. 1985) (refusing to enjoin OPM regulations and recognizing "it would neither be equitable nor in the public interest to force a return to the

old regulations" because an injunction would "cause yet another disruption in the orderly administration of the government" and because the new system "reflect[s] a conscious policy decision").

Likewise, Lockheed, which has been in the midst of the phase-in period of the contract for seven months and has now more closely examined the existing technology FAA uses, fully agrees that "both the facilities and the technology supporting the current AFSS system are urgently in need of modernization" and that the technological and facility upgrades will "provide substantial process and safety improvements to users of the NAS, all at a much lower cost than under the current system." Courain Decl. ¶ 41. These benefits will be on hold should an injunction issue, harming FAA and the public interest.

The FAA (and the public) will therefore be denied the programmatic benefits of the transition to Lockheed and in the efficiencies that Lockheed will provide in providing these services. Kansier Decl. ¶ 23 ("the increased efficiencies and better service from the new automation and improved physical facilities would be unattainable" in the absence of the Lockheed contract). Even plaintiffs' MEO proposal recognized the need for consolidation and the efficiencies it would give the FAA, and "proposed an aggressive consolidation down to four facilities." Pl. App. at 88-89. Any injunction would harm FAA now because it would derail the consolidation timetable for both the length of the injunction and for the period afterwards when FAA has to again transition to Lockheed under the contract. Courain ¶ 42 (stating that a suspension of phase-in and transition activities for any significant period "would require substantially more time to complete those activities than the time that currently remains in [Lockheed's] schedule" and "would actually negate much of the effort already expended"). This

is a long-planning and highly structured transition that will be thrown into complete disarray by an injunction at this late stage, harming all concerned.

3. Any Delay to the RIF Would Harm Lockheed's Phase-In/Transition Plan

In addition to substantial harm to the FAA, injunctive relief would also harm Lockheed, the successful bidder for the positions covered by the RIF, although many of these costs will in turn be passed along to the FAA and the tax payers. The harm caused by an injunction would be manifested by (i) losses to what Lockheed has already expended in the current phase-in period and (ii) lost facilities and leases.

First, the "seven months of intensive preparation to transition the federal workforce" during the phase-in period is drawing to a close. Courain Decl. ¶ 43. Lockheed has been intensively planning for this transition that "involves almost 2000 FAA employees who are scheduled to become Lockheed Martin employees on October 4, 2005." Id. Lockheed's efforts would essentially be "wasted" because if Lockheed resumed the phase-in activities "after any substantial hiatus, [Lockheed] would be forced to restart the entire HR process from the beginning in order to identify the persons still in the incumbent workforce at that time, resolicit applications from those employees, assess the new circumstances of each employee, and make new offers on a new timeline." Id.

In addition, there are approximately 190 Lockheed employees and another 60 employees of Lockheed's subcontractors actively working on the phase-in process who are slated to support the transition. Id. ¶ 46. About 100 of these employees "are particularly critical to the continued success of the program" because they participated in Lockheed's preparation of the winning proposal to FAA and have intimate knowledge of the complicated phase-in and transition plans. Id. But Lockheed could not keep these employees idled during an indeterminate injunction and

"would have no choice but to attempt to reassign most of the 190 Lockheed Martin employees to other duties and projects, some of them in other Lockheed Martin units." Id. ¶ 47. Losing this knowledgeable and experience workforce "would be devastating to Lockheed Martin's capability to complete the phase-in and transition activities on anything like the current schedule." Id. ¶ 48.

Second, Lockheed has "made lease commitments for the three Hubs for the entire contract period of performance, and ha[s] expended substantial sums to construct and outfit those facilities." Id. ¶ 44. And "a lengthy suspension of contract performance would force [Lockheed] to surrender the leases and begin the leasing and construction process anew after a future resumption of work under the contract." Id. Lockheed would therefore "likely lose the leases on the Hub facilities" that "will have a significant impact on [Lockheed's] transition plan." Id. ¶ 45. This would make resumption of the phase-in and transition plans all the more costly for Lockheed, FAA, and the taxpayers and would harm each in turn.

Lockheed has also already "conducted extensive education and outreach efforts, including face-to-face meetings, with the general aviation community to introduce [Lockheed's] new system capabilities and to explain how the AFSS system will operate in the future." Id. ¶ 53. An indefinite suspension caused by an injunction would therefore lead to "uncertainty and confusion in the general aviation community about the future of the AFSS system" and "would undermine confidence in the system.” Id.

"In sum, the combination of the need to replicate the HR process, rehire and retrain the existing contractor workforce, and reestablish the Hub facilities that are the core of the new system would mean that [Lockheed] would largely have to start over again if . . . asked to resume work after a substantial period of work stoppage under a court order." Id. ¶ 49. Lockheed "estimate[s] that [they] would require at least eight months to resume and complete the phase-in

and 26 months to fully implement [the] solution and complete the transition." Id. In turn, these harms would be placed squarely upon the backs of both the FAA and the public-at-large to the detriment of both.

B. The Public Interest Would Be Harmed By Enjoining The RIF

The public interest does not favor the issuance of a preliminary injunction in this case. Many of the considerations of harm to the FAA detailed above demonstrate that injunctive relief would harm the public interest. Indeed, requiring the FAA to retain an outdated and inefficient personnel system would be antithetical to the public interest and wasteful of public resources. This conclusion is magnified given the fact that Judge Neill has already determined that the FAA properly awarded this contract to Lockheed because it represented the "best value." Moreover, if the Court were to grant injunctive relief in this case, it would establish a harmful precedent in Government personnel cases involving reorganizations within agencies for the sake of efficiency. The kinds of harms plaintiffs allege in this case plainly are implicated in virtually every change to a federal personnel system. To order injunctive relief under the circumstances of this case would curtail agency flexibility and federal agencies' directive under OMB Circular A-76 to guard the public fisc. Thus, injunctive relief would deter agency efforts to try to fashion solutions to duplicative operations. The public interest would not be well-served by such a result and would send a message to government agencies.[41]

[41] It is patent that the government's and Lockheed's injuries – in contrast to plaintiffs' – are truly irreparable. Given plaintiffs' admission that they will be unable even to post more than a nominal bond, Pl. App. at 118-120, it is very unlikely that plaintiffs would be able to repay the government and Lockheed for the losses sustained as a result of the injunction. For the consequences of that injunction upon the FAA, Lockheed, and the public interest, plaintiffs seek to be literally irresponsible.

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that the Court grant judgment in favor of defendants on all of plaintiffs' claims and deny plaintiffs' Application for Preliminary Injunction.

Dated: August 23, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2005, a true and correct copy of the foregoing Defendants' Combined Opposition to Plaintiffs' Application for Preliminary Injunction and Memorandum of Law in Support of Their Motion to Dismiss and Motion for Summary Judgment was served upon plaintiffs' counsel of record at the address listed below:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, et al.,	)
	) Civil Action No.
Plaintiffs	) 1:05-CV-00654-RWR
	)
NORMAN Y. MINETA, et al.,	)
Defendants.	)
	)

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