

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 502015CA000086XXXXMB AA

MAR-A-LAGO CLUB, L.L.C., a
Delaware limited liability corporation,

Plaintiff,

-vs-

PALM BEACH COUNTY, FLORIDA, a political
subdivision under the law of the State
of Florida and BRUCE PELLY,
individually,

Defendants.

- - -
PROCEEDINGS BEFORE

THE HONORABLE RICHARD L. OFTEDAL

DATE: October 2, 2015

TIME: 8:59 a.m. - 10:08 a.m.

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APPEARING ON BEHALF OF THE PLAINTIFF:

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SELLARS, MARION & BACHI, P.A.

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BY: JOHN M. MARION, IV ESQUIRE and
JEREMY D. BERTSCH, ESQUIRE

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West Palm Beach, Florida, 33401

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LAW OFFICES OF BRUCE ROGOW

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APPEARING ON BEHALF OF THE DEFENDANT:

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OFFICE OF THE COUNTY ATTORNEY

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BY: AMY PETRICK, ESQUIRE
300 North Dixie Highway, Third Floor
West Palm Beach, Florida, 33401

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KAPLAN, KIRSCH, ROCKWELL

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BY: W. ERIC PILSK, ESQUIRE
1001 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036

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BE IT REMEMBERED, that the following

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proceedings were taken in the above-styled cause Before

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Honorable Richard Oftedal at the Palm Beach County

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Courthouse, 205 N. Dixie Highway, Room 10-B in the City of

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West Palm Beach, County of Palm Beach, State of Florida on

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the 2nd of October, 2015, to wit:

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THE COURT: Okay. So we're all here on Mar-A-Largo

1 and Palm Beach County, correct?

2 MS. PETRICK: Correct.

3 MR. ROGOW: Yes.

4 THE COURT: First order of business, I will just
5 have everybody make their appearances for the record,
6 please.

7 MR. ROGOW: For the Plaintiffs, Bruce Rogow, John
8 Marion and Jeremy Bertsch.

9 THE COURT: Thank you.

10 MR. PILSK: And for the Defendant, Eric Pilsk and
11 Amy Petrick.

12 THE COURT: Thank you. I will tell you all that I
13 think that I have done my homework. It was a lot of
14 reading material, but I think that I read through it all
15 as well as some case law that you cited.

16 I think I'm pretty much up to speed as to what the
17 issues are, so don't feel that you need to repeat
18 everything that you have written. I believe this is the
19 County's motion, so why don't you proceed.

20 MR. PILSK: Thank you, Your Honor.

21 As you say, we're here on the County and Mr. Pelly's
22 motion to dismiss the first amended complaint. The
23 plaintiff has alleged claims in general that it's been
24 injured by aircraft flying over Mar-A-Largo. It pleads
25 claims of public nuisance, trespass, inverse condemnation

1 and breach of contract, and also seeks injunctive remedy
2 for the nuisance and trespass claims.

3 Under the guise of these claims, the plaintiff seeks
4 to redesign the departure procedures of Palm Beach
5 International Airport, to minimize noise impacts upon its
6 property, and seeks to enrich itself \$100 million in
7 damages.

8 In order to justify this relief, plaintiff makes the
9 outrageous and absolutely false claim that the airport
10 director is using undue influence to compel FAA air
11 traffic controllers to direct aircraft -- to deviate
12 aircraft from the normal departure procedures and fly
13 directly over Mar-A-Largo in a personal attack on
14 plaintiff's principal, Mr. Trump.

15 These claims are frankly ridiculous and simply
16 designed to harass the County and Mr. Pelly. For the
17 record, we vehemently deny these allegations. We'll
18 state for the record that FAA traffic controllers alone
19 control the airport departing and arriving at the airport
20 pursuant to long-standing procedures and the airport
21 director cannot and does not influence those procedures
22 at all.

23 On a motion to dismiss however, we don't need to
24 resolve that issue. The fact is that none of plaintiff's
25 claims survive legal scrutiny even at the pleadings

1 stage.

2 Most of the claims -- all of the claims are asserted
3 against both defendants, so to try to break this up in a
4 more efficient way, what I would like to do first is
5 address the two claims where each of the defendants have
6 slightly different responses.

7 Those are the inverse condemnation and the breach of
8 contract claim, and then I'll come back and deal with the
9 claims where the responses are in common.

10 First on behalf of Mr. Pelly, the law is clear and
11 plaintiffs don't dispute that there is no inverse
12 condemnation claim against an individual. Employees,
13 even of states and state agencies, do not have the power
14 of eminent domain.

15 Accordingly, the claim for inverse condemnation
16 against Mr. Pelly simply can't stand as a matter of law
17 and that should be dismissed. Frankly dismiss it with
18 prejudice because there is simply no way to assert that
19 claim against an individual.

20 On the breach of contract claim against Mr. Pelly,
21 the claim -- excuse me, the claim alleges a breach of
22 contract for failure to achieve maximum adherence to the
23 preferred flight tracks, and that is in the amended
24 complaint in Paragraph 85.

25 The plain terms of the settlement agreement

1 demonstrate that Mr. Pelly was not required to achieve
2 maximum adherence to the flight tracks or was he
3 prohibited from doing anything regarding the flight
4 tracks.

5 The language about the maximum adherence is in
6 Paragraph 10 of the amended complaint, and that's
7 attached as Exhibit A to the amended complaint. I have a
8 copy if Your Honor would like to follow along.

9 THE COURT: I'm good. Go ahead.

10 MR. PILSK: Okay. Thank you.

11 Paragraph 10 of the settlement agreement starts by
12 acknowledge that the County has always taken the position
13 that it has no authority. Both parties acknowledge that
14 the County's position is that the County has no authority
15 or capability to enforce the flight procedures, and that
16 adherence to an enforcement of said procedures is the
17 legal obligation solely of the FAA and the airlines
18 operating aircraft at PBIA.

19 Paragraph 10 then goes on to provide in an effort
20 to attempt to encourage the greatest adherence possible
21 to those flight procedures, the County shall take certain
22 actions.

23 Then it specifies three specific actions that the
24 County must undertake which are basically reporting
25 requirements, two of which expired years ago.

1 THE COURT: Mr. Pelly was a signatory to the
2 settlement agreement, right?

3 MR. PILSK: He was a signatory to the settlement
4 agreement, but the obligations they allege here do not go
5 to Mr. Pelly, they're obligations of the County.

6 In fact, the only allegation of Mr. Pelly was to
7 sign the release documents, which he did, and there is no
8 obligation to the contrary.

9 The specific claim of breach they allege simply does
10 not go against Mr. Pelly. There is no basis to assert
11 that it does. The contract says what it says. It's very
12 clear. As a matter of law Your Honor can see that and
13 dismiss the claim.

14 THE COURT: Let's talk about the County then.

15 MR. PILSK: Okay. On the County's side of the
16 breach of contract claim it's actually very similar.
17 Their claim as asserted is that the County has failed to
18 adhere to maximum adherence to the flight procedure -- to
19 the departure procedures.

20 Again, the plain language of the contract does not
21 require that. It requires three specific things to
22 encourage maximum adherence to the flight track. There
23 is no allegation that the County failed to do any of
24 those things.

25 Instead, the allegation is more open-ended that it

1 hasn't done other things that might also have the effect
2 of encouraging compliance with the flight tracks. There
3 simply is no claim -- there is no claim alleged that they
4 have breached -- the County has breached any allegation
5 of the contract.

6 THE COURT: Aren't they taking the position that the
7 County has taken action to have the flights fly close to
8 Mar-A-Largo, and that in itself is a violation of the
9 settlement agreement?

10 MR. PILSK: None of the obligations prohibit the
11 County from doing that. Just within the four corners of
12 the settlement agreement, nothing in the settlement
13 agreement prohibits the County from doing it.

14 Again, the only obligation regarding -- sorry.

15 THE COURT: What about the plaintiff points out in
16 their response that the settlement agreement states that
17 the intent of this agreement is to attempt to achieve
18 maximum adherence to the preferred flight tracks.

19 And the agreement also states that the County, the
20 Club and Trump wish to take measures to encourage the FAA
21 to enforce a strict adherence to the preferred flight
22 tracks.

23 MR. PILSK: Certainly those are quotes. Those are
24 correct, but Paragraph 10 --

25 THE COURT: Doesn't that impose any obligations upon

1 the County in that regard or is that language just
2 aspirational language?

3 MR. PILSK: That specific language is aspirational.
4 The operative language in Paragraph 10 is specific.
5 First of all, it's to encourage maximum adherence not to
6 achieve maximum adherence.

7 Secondly, it sets forth specific obligations that
8 the parties said this is how you will fulfill that
9 obligation. These are the three reporting requirements
10 specified in Paragraphs 10-A, B and C.

11 Those are the only obligations for adherence to the
12 flight procedures. There are I think eight other
13 obligations set forth in the County -- that the County is
14 obligated to under the contract.

15 Again, none of them require an open-ended obligation
16 to achieve maximum adherence to the flight tracks or do
17 anything other than what is specified. You see these are
18 -- if you look this is in the previous pages of the
19 paragraph under County actions.

20 It's conduct studies, to work with the FAA, to
21 outline an aggressive close and departure procedure,
22 issue a letter of airmen, a whole series of basically
23 reporting actions that were taken years ago, but not an
24 open-ended obligation to do everything to achieve maximum
25 adherence.

1 Again, on the face of the four corners of the
2 complaint there is no claims -- there is no obligation of
3 the County to do everything in its power or in fact,
4 anything other than what is specifically identified to
5 encourage adherence to the departure procedures.

6 THE COURT: Okay.

7 MR. PILSK: Now, turning to the claims where the
8 defenses are in common. This is the trespass -- I will
9 start with the trespass and nuisance claims.

10 I want to start with the real core of their
11 allegations here on the undue influence. There is no
12 real argument, and the law is very clear, that there is
13 no nuisance claims for an airport that's operating
14 lawfully in accordance with its ordinary and customary
15 manner.

16 Similarly, there is no -- the law is very clear that
17 a trespass -- there is no trespass action if someone is
18 using the property of another under a claim of right or
19 under a right to use it.

20 Plaintiffs here try to get around that clear law by
21 arguing that the airport director is using undue
22 influence to compel the FAA air traffic controllers to
23 deviate from the normal departure procedures and fly over
24 Mar-A-Largo.

25 Now, to put this claim in context, I want to keep

1 looking at the settlement agreement which is attached to
2 the complaint as an exhibit, and therefore, part of the
3 four corners of the complaint for purposes of the motion
4 to dismiss.

5 Look at the whereas clause because they outline the
6 history of the flight procedures at the airport that puts
7 this claim in context. I'm looking first on page four of
8 the settlement agreement that talks about the -- the
9 whereas clause that talks about the development of flight
10 procedures. It's part of a public Part 150 process to
11 develop a noise compatibility program.

12 Mr. Trump at the time objected to the procedures,
13 objected to the runway heading procedures that's
14 currently in place that would have aircraft going about
15 1,000 feet north of Mar-A-Largo.

16 It refers to the fact that the FAA issues the orders
17 and the FAA enforces those orders. It specifies the
18 current flight path on the runway heading 1,000 feet
19 north of Mar-A-Largo. It also acknowledges that
20 notwithstanding the preferred flight track due to wind,
21 weather and other causes, some transport category
22 aircraft that are departing and arriving at PBIA are
23 varying from the preferred flight track including some
24 aircraft that may be flying in close proximity or
25 directly over Mar-A-Largo or to the south of Mar-A-Largo.

1 Then we get to the language that you quoted earlier,
2 Your Honor, that the County and Trump and the Club wish
3 to take measures to encourage the FAA to enforce a strict
4 adherence to the preferred flight track as safety will
5 allow.

6 Then it recites the County's position that the
7 County does not control or enforce the flight tracks.
8 The point of this is that as long as early as 20 years
9 ago, aircraft were following flight path procedures that
10 departed on the runway heading from PBIA approximately
11 1,000 feet north of Mar-A-Largo and that due to wind,
12 weather and other factors aircraft deviated from that
13 procedure and overflew Mar-A-Largo.

14 There is nothing knew about this. This is part of
15 the customary and legal usage and customary practices at
16 the airport. The gist of the complaint here is that
17 notwithstanding that, notwithstanding that history, that
18 something has changed.

19 That something isn't wind, weather or air traffic
20 control instructions, it's this undue influence by the
21 airport director. In support of that frankly
22 counter-factual assertion because we know plaintiffs
23 effectively concede that aircraft always overflew
24 Mar-A-Largo.

25 Plaintiffs offer no real facts. There is just this

1 conclusory assertion that the airport director has used
2 undue influence to somehow compel the FAA air traffic
3 controllers to do this and it somehow made the FAA air
4 traffic controllers agents of the County.

5 There is no statement of what this influence is, of
6 how it is exercised, who he might have talked to or
7 called, how he influenced other people. Much less how it
8 was exercised, not just over one individual, there is not
9 just one air traffic controller up there, there is an
10 entire staff and supervisors and managers, a whole
11 network of people who manage the flight procedures at
12 PBIA.

13 No facts whatsoever to link their speculative
14 surmise only because aircraft are overflying Mar-A-Largo
15 there must be some nefarious plot to explain it instead
16 of what the history shows, which is that aircraft have
17 always overflowed Mar-A-Largo from time to time due to
18 wind, weather and other factors.

19 The Florida Supreme Court and Flo-Sun make clear
20 that kind of conclusory pleading when you're talking
21 about a complicit, if not conspiracy, among numerous
22 public officials to advocate their own responsibilities
23 in order to achieve some sort of public or inflict a
24 public nuisance or harm against an individual is simply
25 not sufficient.

1 Not under a heightened pleading standard, but under
2 a notice pleadings standard itself. As stated, this
3 conclusory allegation is simply not sufficient to survive
4 review in a motion to dismiss.

5 Even apart from that, turning to the nuisance claim
6 first, as we have laid out in the complaint, the FAA and
7 the federal government have exclusive control over the
8 navigable airspace. They have exclusive sovereignty over
9 the airspace and exclusive control over air traffic
10 controller procedures.

11 The County has no legal role in that process.
12 Pilots are required to obey the FAA air traffic
13 controller's instructions. Everything that happens with
14 departing aircraft is in the hands of either the pilot or
15 the FAA. If the pilots are following FAA instructions,
16 they're obeying the law and the flights are taking off in
17 a lawful manner.

18 There is simply no basis to conclude here that
19 anything is -- on that fact alone, there is nothing
20 unlawful about the way aircraft are flying because
21 they're flying pursuant to FAA air traffic controller's
22 instructions.

23 There is no allegation in the complaint that the air
24 traffic controller's instructions themselves are improper
25 or an abuse of discretion of the controllers.

1 Similarly on the trespass claim, the navigable
2 airspace, including the airspace necessary for taking off
3 and landing, is within the exclusive control of the
4 United States. Aircraft have a right to use that to land
5 and depart from airports under FAA control.

6 Aircraft operate there as a matter of right and
7 there can't be a trespass as a matter of state law.
8 Plaintiffs spend time in their brief trying to
9 distinguish the various cases. We have talked about that
10 in the papers.

11 The fact is they have cited no case where a trespass
12 or nuisance action was found against an airport. For the
13 very simple reason airports operate -- aircraft operate
14 in the navigable airspace lawfully and properly as a
15 matter of law. There simply is no claim under those two
16 theories.

17 Finally, one more point with respect to nuisance and
18 that is the special injury factor. You know, really I
19 think the two parties have narrowed it down. We cite the
20 Page (phonetic) case, an older Supreme Court case that
21 makes it very clear that when you're dealing with a sort
22 of an atmospheric effect that is spread over a wide
23 distance, that there is no special injury because really
24 everybody is affected in the same manner.

25 They rely on the Surfside case that involves the

1 impacts on a particular piece of property by an adjacent
2 municipal dump and draw the broad conclusion from that
3 that any injury to property is per se a special injury
4 that can support a claim for public nuisance.

5 I think that's the wrong rule to follow. I think
6 the way to look at that is ask well, what would the
7 remedy be and how we would enforce it. They ask for an
8 injunction. If you issue an injunction to abate the
9 nuisance to this plaintiff, you are just going to move
10 the impact over to another property owner, and she is
11 going to be in here asking for an junction to abate the
12 nuisance.

13 You move it again, and there will be another
14 property owner. It underscores two I think important
15 points here. One, that there is no special injury
16 because any property owner can make the same set of
17 allegations and allege the same kind of harm from this
18 alleged public nuisance. No ones is fundamentally
19 different. There may be differences of degree, but not
20 in kind.

21 THE COURT: When you say differences in degree so
22 when the plaintiff goes at length in the complaint
23 detailing all of these special attributes about this
24 particular property, that it's a national landmark or all
25 these other kind of things regarding the limestone and

1 the effect that it's having on there as being a unique
2 piece of property, your position is that it's just what?

3 MR. PILSK: Those are particular attributes of those
4 pieces of property. There is nothing to suggest that
5 other properties don't have similar attributes and aren't
6 similarly affected by the noise emissions and vibrations
7 from the aircraft.

8 It's just the effect of the atmospheric pollution on
9 their particular property, but it's affecting everyone in
10 maybe just different degrees. Maybe their property is
11 somewhat more susceptible than other properties, we don't
12 know. They haven't alleged that no one else is affected
13 in the same way. I don't think they can.

14 And I think that's still the problem is what makes
15 them so particularly different in kind. And the law,
16 that is the standard, different in kind, not just degree
17 from others but --

18 THE COURT: I know it's under inverse condemnation,
19 but what about the Foster V. City of Gainesville case
20 they cite?

21 MR. PILSK: I'm sorry, Your Honor, I think that is
22 more of an inverse condemnation.

23 THE COURT: Well, speak about that right now since
24 it's on my mind.

25 MR. PILSK: Okay. Well, I think that the standard

1 in Florida for inverse condemnation is we have to show
2 one of two things.

3 Either substantial ouster and deprivation of all
4 beneficial uses of the property or the aircraft invade
5 the plaintiff's super-adjacent airspace causing direct
6 and immediate interference with the use of the land.

7 Now, they don't plead substantial ouster and
8 deprivation as I understand it. I don't think they can.
9 I mean it's operating -- it seems to be functioning
10 pretty much fine from the pleadings. There hasn't been a
11 substantial ouster.

12 On the second prong though they don't allege that
13 the aircraft invades the super-adjacent airspace. Now,
14 their response brief focuses on the fact that's not a
15 requirement, but every case that is considered in any
16 detail, the application of the general standard for
17 inverse condemnation in the airport context has required
18 that or found invasion of the super-adjacent airspace.

19 THE COURT: As I understand it, and correct me if I'm
20 wrong, but I thought the plaintiff's position was that so
21 long as there is a diminution in value that's satisfied
22 the requirements for inverse condemnation?

23 MR. PILSK: In the airport context that may go to
24 the second prong of substantial deprivation, directly
25 interfering with the use of the land, but not -- but they

1 still have to show diminution in airspace.

2 In the Foster case the flights were as low as 220
3 feet above the plaintiff's property. In Hillsborough
4 County Aviation v. Benitez, the Court there found that
5 the super-adjacent airspace was between 250 and 500 feet
6 above sea level -- above ground, excuse me.

7 THE COURT: Well, the City of Gainesville case, and
8 I'm just reading from the plaintiff's brief, argues that
9 the residue from the airplanes covers everything in the
10 yards, prevents them from hanging their clothes out to
11 dry, cooking out, gardening and the vibrations from the
12 flights caused cracked windows and the fan to separate
13 from the ceiling in one of the homes.

14 There was a significant decrease in the value of the
15 property, and that was found to apparently satisfy the
16 requirements for an inverse condemnation. What is so
17 different about that than what we have here that's
18 alleged?

19 MR. PILSK: Well, first of all, they haven't alleged
20 impacts or anything like that. I mean, they really have
21 been general in nature. They talk about general
22 interference and displeasure, but there is no specifics.

23 There is no indication of -- there is no testimony
24 or rather pleadings about ash being distributed
25 everywhere. There is no testimony --

1 THE COURT: I thought there were allegations about
2 soot and the like that was --

3 MR. PILSK: Just generally that it falls, but no
4 discussion of the impact that it has on the property
5 other than the speculative allegation that it may be
6 causing deterioration of the limestone.

7 This is no discussion of how it's impairing their
8 use of the property, and I think that is really the key.
9 There is no allegation that they're flying solo to avoid
10 the super-adjacent airspace, which again in the Foster
11 case, the flights were as low as 220 above the
12 plaintiff's property.

13 THE COURT: Was that what Foster hinges on the fact
14 that it was 220 feet? Would it make any difference if it
15 was 1,000 feet?

16 MR. PILSK: I think it would under the standard if
17 you're not in the super-adjacent airspace. If they're
18 high above in what is clearly a public airspace and no
19 part of the private airspace, there would be no taking
20 under Florida law. It would just be an impact that
21 wasn't compensable.

22 THE COURT: Okay. Sorry to distract you over to the
23 inverse side.

24 MR. PILSK: No. That's fine. If you look at the
25 other cases, you know, the Hillsborough County Aviation,

1 the noise from overflights frightened the plaintiff's
2 children and pets, interrupted sleep, caused hearing
3 damage, damaged the building and soot and made certain
4 activities impossible.

5 THE COURT: What about the Young case, Young versus
6 Palm Beach County?

7 MR. PILSK: I'm sorry, Your Honor, I don't have that
8 one in front of me.

9 THE COURT: Get back maybe to the inverse
10 condemnation because I am concerned about this inverse
11 condemnation claim.

12 It's cited in Young versus Palm Beach County the
13 appellate court overturned dismissal of the complaint
14 against the airport for inverse condemnation. The
15 allegations in that complaint were the flights were made
16 -- the flights made family and telephone conversations
17 difficult and watching television difficult.

18 If that's all that's necessary it seems to set a low
19 bar for inverse condemnation, does it not?

20 MR. PILSK: Well, again if you -- first you have the
21 super-adjacent airspace requirement which is missing
22 here.

23 Second, the complaint here really doesn't allege the
24 kind of interference with the use that rises even to that
25 level.

1 THE COURT: Well, that super-adjacent airspace issue,
2 was that satisfied in the Young case?

3 MR. PILSK: Your Honor, I apologize but I don't have
4 the altitude in front of me. I can get back to you on
5 that if you would like?

6 THE COURT: Okay.

7 MR. PILSK: I think we have covered the substance of
8 the argument on inverse condemnation. They have simply
9 failed to plead both the invasion of the super-adjacent
10 airspace in enough details and specifics of how their
11 property has been harmed by the overflights to satisfy
12 the interference and use prong of the test. Under both
13 prongs the inverse condemnation claim fails to state a
14 cause of action.

15 The final point then to make relates to the claim
16 for injunctive relief. I understand it's somewhat
17 unusual to seek to dismiss a claim for relief, but they
18 pled them as separate counts.

19 THE COURT: So you're really moving to strike those?

20 MR. PILSK: Yes, Your Honor, for really two basic
21 reasons.

22 One, an injunction to abate the nuisance in effect
23 would be to stop the aircraft from flying over
24 Mar-A-Largo, and that is clearly preempted.

25 The federal government has exclusive control over

1 flight procedures and only the federal government can
2 make changes to the flight procedures. The FAA and the
3 federal government are not parties to this action. There
4 is simply no authority for the County, or frankly for the
5 Court, to order that kind of relief.

6 It really makes sense because, you know, if this
7 Court can afford a remedy to a private plaintiff to make
8 changes to the air traffic control system it effects not
9 just plaintiff and not just other residents under the
10 flight tracks, but more fundamentally it effects the
11 ability of the FAA to control the flight path.

12 Then really where is the end of it at that point.
13 Again, you make this one move for this plaintiff, there
14 is another plaintiff that comes forward making similar
15 claims, and you got to move it again.

16 Suddenly, the Palm Beach County circuit court is in
17 charge of air traffic procedures not the FAA. It's
18 simply preempted by federal law.

19 Similarly, it's contrary to the separation of powers
20 doctrine really for very similar reasons. The decision
21 not just of how to direct air traffic, but how to
22 mitigate noise and how to address noise problems is
23 fundamentally a legislative decision for the political
24 branches, not something that the court -- for the
25 judicial branch.

1 Really plaintiffs themselves make clear in their
2 papers why their injunction claims are barred by this
3 doctrine. They say the factors that are involved are
4 beyond the technical aspects of how to get planes on or
5 off the ground, but are more about how to spread the
6 noise around or in this case concentrate it.

7 It really has little to do with policy evaluation
8 involving the taking off and landing of aircraft. That's
9 in their opposition at 18.

10 This isn't about the technical aspects of taking
11 off, it's about how to allocate the noise. That's really
12 a legislative determination that has to be made by
13 balancing the benefits of the airport and the impacts on
14 different residences, and what is the most effective way
15 to balance those benefits and impacts.

16 The fact is as made clear in the settlement
17 agreement 20 years ago the County went through a very
18 public process to evaluate options and made a decision
19 that is now memorialized in County ordinances.

20 This plaintiff comes in 20 years later and tries to
21 reargue the policy arguments it lost 20 years ago in the
22 guise of a private, nuisance and trespass action.

23 The net effect would simply be to shift the burdens
24 from plaintiff to other residences in the area without
25 even a legislative process, without any opportunity to be

1 heard or defend themselves.

2 This kind of balancing of harms and benefits and
3 allocation of impacts is a matter for the legislative
4 branch not for the judicial branch. The remedy they seek
5 in injunctive relief is simply barred by the separation
6 of powers doctrine.

7 I think, Your Honor, that covers my initial
8 presentation unless you have any questions.

9 THE COURT: I will give you the last word.

10 MR. PILSK: Thank you.

11 THE COURT: Mr. Rogow, good morning.

12 MR. ROGOW: Good morning, Judge. I think that like
13 many cases you have to start with how one looks at it in
14 the prism through which one tries to address these
15 issues.

16 This is not the classic the airplanes are flying
17 from the airport and they're disturbing me. This claim
18 is that they have targeted Mar-A-Largo by virtue of Mr.
19 Pelly's actions influencing the people who are sending
20 the planes out.

21 Let me start with the contract.

22 THE COURT: Can I take you off track for just a
23 second?

24 MR. ROGOW: Yes.

25 THE COURT: Since we're talking about Mr. Pelly, one

1 of the arguments is in terms of abateness and lacks
2 specificity.

3 When I read the complaint, I was at a little bit of
4 a loss to understand what exactly, aside from the
5 allegations of undue influence when it comes to the
6 County and the FAA, what power hold does he have on the
7 federal government?

8 I'm not sure I understand that when I read the
9 complaint.

10 MR. ROGOW: He is the director of the airport so the
11 airport operations are under his control. The flight
12 patterns are not under his control, but our allegation is
13 that Mr. Pelly, through his influence, through his
14 efforts instead of complying with the --

15 THE COURT: What influence?

16 MR. ROGOW: Talking to the people that do -- sending
17 out the flights. Fanning is really what we're after.

18 If they were fanning we wouldn't be in this
19 situation. Mr. Pelly has communicated to the people, to
20 the flight controllers that they shouldn't be fanning,
21 they should be sending these planes out due east which
22 then takes them over Mar-A-Largo.

23 So this allegation which we're making is based upon
24 information that we have where we think that Mr. Pelly
25 has influenced the flight patterns by his relationship

1 and his directorship of the airport.

2 Now, this is something that we're going to have to
3 prove. If we can't prove it, then this case is lost on
4 summary judgment.

5 That is what this case is about. There is no
6 question Mr. Pelly is a signature to the agreement. I
7 mean, the agreement in the first paragraph, the
8 settlement agreement involves Mr. Pelly and says that he
9 is a party to the agreement.

10 Then when one takes a look --

11 THE COURT: How do you respond to that because I
12 think he's a signature only for another reason and that
13 is that apparently he needed to be released as part of
14 the prior lawsuit.

15 MR. ROGOW: Well, whatever his reasons are for being
16 a party, he is a party.

17 In the agreement it talks about -- and Mr. Pelly
18 obviously is an employee of the County and whatever the
19 County is going to be doing here is it's going to be
20 doing through Mr. Pelly.

21 The language is that the County will take measures
22 to encourage the FAA to enforce as strict adherence to
23 the preferred flight tracks as safety will allow. We
24 already discussed that.

25 THE COURT: Reading that language does the County,

1 the Club and Trump wish to take measures to have the FAA
2 to enforce a strict adherence to the preferred flight
3 tracts. It doesn't say Pelly.

4 MR. ROGOW: Pelly is the County in this context in
5 terms of dealing with the airport.

6 THE COURT: Then why name Pelly?

7 MR. ROGOW: Why not name Pelly, is that your
8 question, Your Honor?

9 THE COURT: Well, my question is why name Pelly if
10 the argument is -- well, Pelly is not named here. If
11 it's the County, Pelly, the Club and Trump wish to take
12 measures, it seems to me you would have a stronger
13 argument.

14 It's simply limited to the County, the Club and
15 Trump.

16 MR. ROGOW: That's correct.

17 THE COURT: You make it seem to argue that Pelly
18 breached the agreement, that language.

19 MR. ROGOW: Because Pelly is responsible for carrying
20 out the County's obligations vis-a-vie this agreement
21 with the operation of the airport.

22 THE COURT: I mean, assuming that's true then
23 wouldn't it be sufficient to simply name the County then
24 as you said since Mr. Pelly is an agent who works for the
25 County?

1 MR. ROGOW: Well, we have named obviously the
2 County, so the County is still in no matter what. Pelly
3 is an employee of the County. I think on the breach of
4 contract argument --

5 THE COURT: What would you lose if Pelly fell out of
6 the breach of contract?

7 MR. ROGOW: Nothing on the breach of contract.
8 Nothing on the breach of contract. We can survive
9 without Pelly in the breach of contract.

10 Our reading of the contract, and Pelly being a party
11 to it and the obligation, the obligation is in paragraph
12 eight. Again, it names the County. The County shall
13 continue to support the fanning of the Stage 2 aircraft
14 under the procedures set forth.

15 Now, that is an important part of this agreement.
16 The County shall continue to support the fanning. That
17 is what we're talking about here because the answer is if
18 the County did encourage that and continued to support
19 it, then there would be no breach of contract, but that
20 is the heart of our case.

21 THE COURT: The County says that's just aspirational
22 language.

23 MR. ROGOW: Well, I don't see how it --

24 THE COURT: The real duties and obligations of the
25 County are set forth and enumerated specifically in one

1 through eight or however many it is.

2 MR. ROGOW: But all of those duties are in pursuit
3 of and in pursuance of this promise by the County to
4 support the fanning and to encourage a maximum
5 adherence.

6 What we have here is an allegation that they have
7 done just the opposite. They have not supported and
8 indeed they have discouraged it. So the antithesis of
9 encouraging is discourage, and that is what our complaint
10 alleges that they have discouraged.

11 If they have discouraged under this agreement then
12 they have failed to discontinue to support the fanning,
13 then they are in breach of this contract. That's the
14 breach of contract claim.

15 I think all of this takes us to the important part
16 that this is a targeted kind of action that we're talking
17 about. All of these cases --

18 THE COURT: Can I just interrupt you once more?

19 MR. ROGOW: Yes.

20 THE COURT: I just want to get Mr. Pelly out of the
21 way so we can concentrate on the County.

22 Likewise, do you need Pelly for your inverse
23 condemnation claim?

24 MR. ROGOW: No.

25 THE COURT: Okay.

1 MR. ROGOW: Many of the things that have been argued
2 are issues of fact. Your Honor focused on the issue of
3 fact, can we prove that Pelly did this.

4 For the purpose of this argument we have to assume
5 that the allegations, take the allegations of the
6 complaint as true and therefore, we're faced with what I
7 call a targeted kind of an action.

8 I guess you could frame it this way if one showed
9 that an airport employee was able to achieve the direct
10 flying over of your property, knowing that it was going
11 to cause harm to the property, diminish the value,
12 interfere with the enjoyment of the property, would you
13 be able to state a cause of action.

14 That is what this case is about because we're not
15 trying to effect how the FAA sends out planes except to
16 the extent that we're alleging that the FAA is sending
17 out these planes because of the acts of Mr. Pelly
18 directly over Mar-A-Largo.

19 So the question is is does --

20 THE COURT: Is the argument that Mr. Pelly is in
21 effect exercising some undue influence over the FAA?

22 MR. ROGOW: Yes. Yes. That he is -- when I say
23 undue influence, his actions -- that is the heart of this
24 complaint.

25 His actions have caused the FAA -- and this is

1 something that we have to prove down the line, caused the
2 FAA to not adhere to the fanning procedure but to have
3 this targeted kind of impact upon Mar-A-Largo by virtue
4 of these planes being sent off directly to the east and
5 not being fanned out.

6 If they're fanned out -- the argument that's made
7 about everybody would come here and complain, that is
8 just not so. If they are fanned out under FAA
9 procedures, then everybody is sharing the same noise, the
10 same discomfort, if there is discomfort from that from
11 people who are east of the airport.

12 That is not what this case is about.

13 THE COURT: Why isn't this argument being made to the
14 FAA?

15 MR. ROGOW: Because in this situation we have an
16 agreement with the County so the focus is on the County.

17 Will it reach the FAA at some point? I mean, we
18 don't have to add all of the parties to a case at the
19 beginning.

20 We focused on this because our position is is that
21 the reason this is occurring is because the County has
22 failed to abide by the contract, and Mr. Pelly has taken
23 action that focuses these planes over Mar-A-Largo.

24 THE COURT: It's almost like an indispensable
25 argument -- I mean, an indispensable party. It seems to

1 me that the County seems to be arguing that it's not Mr.
2 Pelly, it's not even the County, it's the FAA who has
3 this -- who is in charge of making these kinds of
4 decisions.

5 So joining the County or joining Mr. Pelly is
6 meaningless without having control over the FAA.

7 MR. ROGOW: Well, they haven't moved to dismiss for
8 failure to join an indispensable party.

9 THE COURT: They haven't used those words, but it's
10 almost that kind of argument they're making to me.

11 MR. ROGOW: You know, like in any case it's an
12 incremental process. I mean, we have a contract here. I
13 understand what their ultimate defense is going to be,
14 it's not us, the FAA is making the decision.

15 We will see what the proof shows with regard to
16 that. The FAA, no question about it, the air traffic
17 controllers do make decisions, but if the air traffic
18 controller's decisions are being influenced by or even
19 directed by Mr. Pelly, then Mr. Pelly and the County have
20 responsibilities.

21 THE COURT: Was there any kind of smoking gun here
22 for this?

23 I mean, is there some kind of memo, e-mail from Mr.
24 Pelly to the air traffic controllers telling them we want
25 you to fly these planes deliberately or direct these

1 planes directly over Mr. Trump's property?

2 Is there anything like that?

3 MR. ROGOW: I don't have it in hand now. I hope to
4 have it as the case progresses. We have information from
5 people at the airport who have given us information that
6 we believe supports this claim.

7 Mr. Marion, I think wanted to address...

8 MR. MARION: Can I speak for a moment?

9 THE COURT: Sure.

10 MR. MARION: I hate to interrupt Mr. Rogow's
11 argument, but we have talked to the air traffic managers.

12 Just so you know, the FAA doesn't care where you
13 take off and land. They don't give a hoot about that.
14 What they care about is whether or not your flight tracks
15 are safe.

16 They have had flight tracks all over the County off
17 the airport runway in the past. They're all safe and
18 they're all approved by the FAA, but the airport
19 proprietor, Bruce Pelly in this instance, has a great
20 deal of influence over the FAA.

21 He can call the FAA on the federal level and say I
22 want to fly these flights directly off the runway and
23 straight east and as long as it's safe, the FAA is going
24 to say fine.

25 The County or the airport proprietor has an

1 obligation to the citizens around the airport to fan
2 noise abatement. Under the statutes and the regulations
3 that is their obligation.

4 If Mr. Pelly decides that he just wants to run that
5 aircraft straight over Mar-A-Largo, he can do it. As
6 long as the FAA says it's safe, they will approve it.

7 What we're saying is that we have talked to people
8 that will assist us in proving that we only fly straight
9 over Mar-A-Largo. We don't fly it anywhere else anymore,
10 and that's in violation of the settlement agreement.

11 THE COURT: So is the assertion that we don't fly it
12 anywhere else, we only fly it over Mar-A-Largo because
13 Mr. Pelly tells us only to fly it over Mar-A-Largo, is
14 that essentially the argument?

15 MR. MARION: The FAA?

16 THE COURT: No, I mean --

17 MR. MARION: The County?

18 THE COURT: I mean you say people.

19 MR. MARION: I have talked to people and that's where
20 the flights are.

21 THE COURT: Is that what they're saying that Mr.
22 Pelly is telling them ignore the fanning and just send
23 these planes right over Mar-A-Largo?

24 MR. MARION: What we have alleged is what we believe
25 we can prove, Your Honor.

1 THE COURT: Well, I mean, what I'm hearing here seems
2 to go beyond what I have read in the complaint as far as
3 the allegations are concerned.

4 MR. MARION: The factual evidence may well go beyond
5 that, Judge. We have pled a bare minimum amount to get
6 this thing going.

7 You know, if we're foreclosed from going and proving
8 what we think we can prove, that will be a travesty.

9 THE COURT: I'm just not sure that the language
10 again that I see in the complaint, which generally is
11 conclusory in nature, undue influence, these kinds of
12 things, whether that is sufficient.

13 Now, again what I'm hearing here goes beyond that.
14 Maybe had those things been alleged in the complaint,
15 maybe that would satisfy the County's requirement for
16 specificity and the Courts.

17 MR. ROGOW: Your Honor, the Flo-Sun case, which is a
18 case they cite for the lack of specificity, has to do
19 with the sugar cane out in West Palm Beach County. There
20 was an administrative remedy.

21 This was a suit -- I think Governor Kirk brought the
22 suit and it ended up before the Supreme Court. I don't
23 think that that is a measure of what is necessary in
24 order to stay the claim.

25 I mean, our claim is a narrow claim.

1 THE COURT: There is also these undue influences,
2 isn't that entirely conclusory?

3 MR. ROGOW: No. It says deliberate and malicious
4 that he has directed this to happen.

5 So in terms of how much do you have to put into a
6 complaint in order to state the cause of action, clearly
7 the elements here of nuisance, trespass and inverse
8 condemnation are met. The answer to Your Honor's
9 question is about Young, and it doesn't talk at all about
10 adjacent properties.

11 THE COURT: I was going to ask you about that.

12 MR. ROGOW: It doesn't. It doesn't mention that.

13 Again, it's not necessary because that is not the
14 nature of this case. This case is a focused case about
15 targeted actions.

16 I mean, as I started at the beginning in terms of
17 the construct here, if there were targeted actions saying
18 fly these planes, and indeed if he could do it. Now, we
19 get back to the ultimate issue.

20 That's why I said that we're going to have to prove
21 this, and if we don't prove this, there is no case. But
22 if he said to the FAA people, I want you to fly these
23 planes directly east and they did because of the reasons
24 Mr. Marion talked about, they don't care as long as it's
25 going in a safe way.

1 If he did that and then it caused the damages that
2 we have alleged, we have stated a cause of action. The
3 question Your Honor is asking is whether or not we can
4 prove the cause of action, but that is the next step in
5 this case.

6 THE COURT: Well, again, I'm not necessarily asking
7 whether you can prove it. I understand the difference.
8 I'm simply asking from a pleading standpoint are the
9 allegations sufficient to withstand a motion to dismiss,
10 that is, are they alleged with requisite specificity that
11 is required?

12 There has got to be some specificity. And what I'm
13 troubled with, as I indicated to you, is simply whether
14 allegations such as directed or undue influence, whether
15 those are sufficient or not.

16 I mean, obviously you take the position that they
17 are?

18 MR. ROGOW: Well, certainly directing, certainly
19 deliberate, certainly malicious, those are specific terms
20 that are tied into what we have alleged he has done and
21 the overarching thing that we allege is that he has
22 directed through the FAA, through his influence with the
23 FAA, to have these planes flying directly over
24 Mar-A-Largo.

25 THE COURT: What influence does he have?

1 MR. ROGOW: He runs the airport. The relationship
2 between the FAA and the airport, of course, is
3 intertwined.

4 THE COURT: So it's almost like he has the same
5 influence I guess as any airport director, right?

6 MR. ROGOW: Well, I can't speak for any airport
7 director. He has been the airport director for a long
8 time.

9 There is no question that the airport works hand in
10 hand with the federal government, with the FAA in running
11 the airport. There are different interests at stake.
12 The FAA's interest is getting these planes out and flight
13 safety.

14 Mr. Pelly's interest are different in terms of the
15 operation of the airport. Certainly noise is an issue
16 for the County. There is no question that this area of
17 noise abatement and noise concern is not preempted. I
18 mean there are cases. Fort Lauderdale Airport has it all
19 the time now on what they do to try to abate noise, but
20 that's in a general concept.

21 That is the difference in this case. This is a
22 specific concept. We're not saying that we want to have
23 a hand in how they decide to fan the aircraft as the
24 aircraft leaves Palm Beach Airport. What we're saying is
25 the aircraft cannot be sent out over Mar-A-Largo because

1 Mr. Pelly is achieving that result in violation of the
2 County's contract, in violation of his obligations we
3 think in terms of noise abatement.

4 THE COURT: Are you seeking the complete prohibition
5 of any aircraft flying over Mar-A-Largo?

6 MR. ROGOW: Pardon me?

7 THE COURT: Are you seeking the prohibition of any
8 aircraft flying over Mar-A-Largo?

9 MR. ROGOW: No. No. No. No. That's not the point
10 of this at all. It goes back to fanning.

11 THE COURT: How many planes can fly over Mar-A-Largo?

12 MR. ROGOW: How many?

13 THE COURT: Yes. In your view what would be the
14 permissible amount?

15 It seems to me you're saying well, there are too
16 many. They can fly some planes, but they're directing
17 too many planes over Mar-A-Largo, we want less planes.

18 MR. ROGOW: We want a procedure that takes care of
19 the aircraft leaving in a fair way that spreads whatever
20 noise or discomfort there may be among all the community
21 that is served by the airport.

22 I can't tell you that I want 10 planes or 15 planes,
23 but if there is fanning because fanning is the answer.
24 That's the reason there is such a thing as fanning. The
25 planes get sent out in a way that doesn't concentrate the

1 noise, the vibrations, the obnoxious fumes in one area.

2 That's what this complaint is about, that is what
3 has happened now. The question is why is it happening.
4 Our complaint alleges that it's happening because Mr.
5 Pelly, as an agent of the County, has caused this to
6 occur.

7 That is really all our complaint is about. So the
8 remedy is not to prohibit planes from flying over
9 Mar-A-Largo because we can't do that. We simply can't do
10 that.

11 The remedy is what is mentioned in paragraph eight
12 of the agreement, fanning. So if they have discouraged
13 that, the opposite of encouraging, if they have failed to
14 support that by the actions of Mr. Pelly, then we have
15 stated a claim.

16 The Foster case, the Gainesville case, obviously
17 they're talking about damage that is measured by the lack
18 of failure to be able to use the property. That, of
19 course, is a situation that is different from ours.

20 Ours is a stronger argument because our argument is
21 that the damage here is directed to Mar-A-Largo. It's
22 not a general airport claim. But if you had a general
23 airport claim that could give rise to an inverse
24 condemnation, obviously the Foster versus City of
25 Gainesville case supports that.

1 The Young case supports that and reverses the case
2 that was dismissed on the complaint because it does state
3 a cause of action. Is it a trespass, yes. Is it inverse
4 condemnation, yes. Is it a breach of contract, yes, if
5 we can prove these things.

6 THE COURT: Okay. Are there any cases that -- and
7 maybe there are and I just missed them or I don't recall
8 them in your brief that have upheld injunctive relief of
9 the sort that you're requesting?

10 MR. ROGOW: I don't know of any case off the top of
11 my head that does that, but here is the other problem,
12 Judge.

13 There aren't any cases that have the targeted claim
14 that we have. All of these airport cases are people
15 being disturbed by the general operation of the airport.
16 That is not what we are talking about. We are talking
17 about people being harmed by the specific acts of the
18 airport director leading to this kind of damage.

19 Assuming we can prove this, could there be an
20 injunction against Mr. Pelly, against the County to
21 enjoin them from interfering with the fanning procedure?

22 I mean, thinking ahead as this case would play out,
23 let's assume the FAA people say Pelly told us to fly it
24 directly east and we're doing it because it works, it's
25 not a problem for us except it is a problem in terms of

1 what the consequences are.

2 So if the FAA people say we'll fan, it's not a
3 problem for us, then the injunction would be aimed at the
4 County saying don't interfere with the fanning.

5 That's really where we want to get back to.

6 THE COURT: I guess I'm still not exactly sure if you
7 were granted the relief that you're requesting in your
8 counts for injunctive relief, what would actually the
9 County be prohibited from doing and would that of itself,
10 without the assistance or cooperation of the FAA, grant
11 you the relief that you're requesting?

12 MR. ROGOW: It would. If the FAA says look, fanning
13 is fine with us and that is what we -- that's what we
14 would perhaps prefer to do, but for whatever reason we
15 have been sending them off directly east over Mar-A-Largo
16 because this is what Pelly wanted.

17 So if the injunction tells the County that you
18 cannot do that, that you have to support fanning, you
19 cannot discourage maximum adherence, then we would have
20 been successful.

21 Then we would be back to fanning. That's where we
22 are. I think what happens is when one looks at this,
23 we're saying that we don't want the planes flying over
24 Mar-A-Largo. We can't say that. We can't control that.
25 I agree we can't control that.

1 THE COURT: Again, if you were granted this
2 injunctive relief, what would that require? Would that
3 then make Mr. Pelly get on the phone with the FAA and say
4 change things now?

5 MR. ROGOW: It would require him to get off of the
6 phone with the FAA and not direct them to do what they're
7 doing which is the source of our complaint.

8 Basically, leave it to the FAA. I mean, the
9 question you asked is should the FAA be in here somehow
10 or other. The answer is if --

11 THE COURT: I'm wondering if you can get the relief
12 that you wanted without the FAA?

13 MR. ROGOW: Yes. Yes. If the case, as it pans out,
14 shows that the FAA does view fanning as a method of
15 minimizing the kind of discomfort that's caused by
16 airport noise, and that is what they would usually do and
17 Mr. Pelly and the County are then prohibited from
18 interfering with the FAA's processes and planning of
19 airplanes, then we would have the remedy that we want.

20 I mean, the remedy that we want is to stop the
21 County from interfering with what the FAA's fanning
22 procedures are. That is the heart of what we have
23 alleged, that he has interfered with that.

24 If he has interfered with that and the consequence
25 of that interference is the planes are now flying over

1 Mar-A-Largo, then stopping the County and Mr. Pelly from
2 that interference would achieve the results that we want.

3 I mean, I hope that I make this very clear that we
4 are not controlling what the FAA -- or seeking to control
5 what the FAA does. There will be times when the FAA will
6 send them directly over Mar-A-Largo, but it will be part
7 of the fanning that goes on in certain situations.

8 I assume there are wind changes and things like that
9 that lead the FAA to send planes north, south, whichever
10 way they want to send them.

11 I don't even know if they take off west. I know
12 they do in Fort Lauderdale, but all of that is up to the
13 FAA. What is at the heart of this case is the
14 interference by the County in violation of the contract
15 and the interference by Mr. Pelly.

16 Again, it's something we're going to have to prove,
17 did he interfere. If the FAA people say listen, this is
18 it, Mr. Pelly never spoke to us, he had no influence on
19 this at all, we decided we always want to send these
20 planes over Mar-A-Largo, if that is the way this case
21 pans out, it's a different problem.

22 It's not this case at all, and there is no relief
23 that you could give us in that situation. But that is
24 not what we think this case is going to turn out to be.

25 From the beginning when they signed this agreement,

1 fanning was the remedy, support fanning. If Mr. Pelly is
2 not supporting fanning, then we have stated a claim for
3 all of these counts because we meet all of the
4 requirements on each of the counts.

5 THE COURT: Anything that you want to add?

6 MR. MARION: Just so Your Honor is clear, the County
7 and Mr. Pelly under the federal regulations have an
8 obligation for noise abatement to the community and the
9 surrounding neighborhood of the airport.

10 He does direct that. He does have influence over
11 whether to go to the FAA and say these are safe fanning
12 flight tracks, is that okay with you. He can go to them
13 and say I have chosen these three or four fanning flight
14 tracts, is that okay with you. Is it safe, yes, then
15 send them there.

16 He has direct influence over that. I just want Your
17 Honor to be clear on that, the County has direct
18 influence over that.

19 THE COURT: Suppose Mr. Pelly didn't think it was
20 safe?

21 MR. MARION: Then why -- I mean, if they used to fan
22 and the FAA said it's safe, that's absurd.

23 He could say that.

24 THE COURT: They used to fan when?

25 MR. MARION: I'm sorry?

1 THE COURT: They used to fan when?

2 MR. MARION: In the past. They fanned in the past.
3 They have stopped fanning, and now all of the flights are
4 going over Mar-A-Largo.

5 THE COURT: Is that as a result of any conditions
6 that have changed, number of flights that are leaving and
7 taking off now or any other condition?

8 MR. MARION: In fact, the more flights there are,
9 Your Honor, the more reason there is for fanning because
10 you can send them off sooner.

11 You can send them off and they fan off to the north.
12 You send one off over Mar-A-Largo, and you send one off
13 to the south. That's the reason for fanning. The more
14 increased traffic, the more reason there is for fanning.

15 So all of that is in the control of the County and
16 Mr. Pelly. I don't want you to be misled, they have a
17 lot of influence over flight tracks. The FAA listens to
18 the County airport operator very carefully. We just need
19 to be able to take these people's depositions.

20 THE COURT: Is there anything stopping you from
21 taking the depositions?

22 MR. MARION: We want to get past this phase, Your
23 Honor, make sure -- you know, make sure that we got --

24 THE COURT: How long has this been filed?

25 MR. MARION: It was filed a year ago.

1 THE COURT: More than a year ago.

2 MR. MARION: It was in January.

3 THE COURT: January?

4 MR. MARION: Yes. There was a motion to dismiss.

5 There was an amendment to the pleadings, then there was a
6 second motion to dismiss.

7 We're trying to get past the pleading stage. We
8 have engaged in discovery.

9 THE COURT: I mean, there is nothing that prevents
10 you from taking discovery.

11 MR. MARION: No. There is nothing to prevent us,
12 Your Honor.

13 THE COURT: Okay.

14 MR. MARION: We have been doing some investigation
15 behind the scenes, I promise you.

16 THE COURT: I'm sure that you have.

17 MR. ROGOW: Paragraph eight of the agreement is the
18 point. That's where fanning shows up in paragraph eight,
19 support the fanning.

20 THE COURT: All right. Thank you.

21 Sir, I will give you the last word.

22 MR. PILSK: Thank you, Your Honor. I will try to be
23 brief. I know you have given us an hour generally of
24 your time.

25 THE COURT: It's interesting issues so go on.

1 MR. PILSK: Well, thank you.

2 The first point I want to make is that from
3 everything that plaintiffs have said is they really don't
4 need Mr. Pelly for either claims. They repeatedly
5 described him as an agent of the County, as an employee
6 of the County.

7 If anything they said is true, you know, we
8 obviously deny, but they can get all the relief they need
9 by simply naming the County as a defendant and not Mr.
10 Pelly. He adds nothing to it.

11 In a sense it turns the idea of the response of a
12 superior on its head by saying we rather have the
13 inferior employee present to be responsible for the
14 action of the principle instead of the other way around.

15 They can get all the relief that they need, if
16 they're entitled to anything, from the County without
17 including Mr. Pelly.

18 THE COURT: Let me ask you this. Going back to the
19 agreement, does paragraph eight impose any obligations on
20 the County?

21 MR. PILSK: No.

22 THE COURT: None?

23 MR. PILSK: Just to support the fanning of Stage 2
24 aircraft. That's an important distinction.

25 THE COURT: There is an obligation then to support

1 fanning to some degree, right?

2 MR. PILSK: Let's look at the language if you don't
3 mind, Your Honor. Shall continue to support the fanning
4 of Stage 2 aircraft under the procedures set forth in the
5 NCP update for PBIA approved by the FAA 1995 until an
6 update is superceded.

7 THE COURT: The argument is that they have breached
8 that agreement or the County breached that agreement by
9 doing just the opposite, not supporting it but in fact
10 discouraging it.

11 If that were the case, would that be a breach of the
12 agreement?

13 MR. PILSK: If they were discouraging the fanning of
14 Stage 2 aircraft, that could be a breach of the
15 agreement.

16 THE COURT: Isn't that what they have alleged?

17 MR. PILSK: No, they haven't.

18 Actually, the word Stage 2 hardly appears in the
19 complaint and that isn't what they have alleged at all.

20 Moreover, as a matter of law --

21 THE COURT: What is Stage 2?

22 MR. PILSK: I just was getting to that. So aircraft
23 have been classified over the years in different stages.

24 They relate roughly speaking to the noise levels on
25 a weight basis. So a bigger aircraft may be rated Stage

1 1, which is the older, the noisiest class of aircraft.
2 They are no more.

3 Stage 2 were slightly more modern, slightly less
4 noisy. Now, we have Stage 3, which is really what all
5 the aircraft are today and some Stage 4. This is the
6 point.

7 In 1990 Congress passed a law, The Airport Noise and
8 Capacity Act that phased out all Stage 2 aircraft over
9 75,000 pounds over the '90s so that by January -- excuse
10 me, December 31, 1989 that fleet was phased out. There
11 are no more commercial Stage 2 aircraft at all.

12 Subsequently, and I don't have the cite at the tip
13 of my tongue, the lighter, below 75,000 pound Stage 2
14 aircraft, have also been phased out. There really aren't
15 any Stage 2 aircraft anymore.

16 That whole point is moot. All the aircraft taking
17 off from Palm Beach, and certainly all the larger
18 commercial aircraft, are Stage 3 aircraft or Stage 4.

19 THE COURT: So your position in a nutshell in regard
20 to paragraph eight, to the extent that the County had any
21 obligation at all to support fanning, was only in regard
22 to these Stage 2 aircraft.

23 They have no obligations under the agreement as it
24 relates to the newer models of the Stage 3 aircraft.
25 They can direct every single one of them over Mar-A-Largo

1 if they want, it wouldn't be a violation of paragraph
2 eight.

3 Is that your position?

4 MR. PILSK: That's correct.

5 Furthermore, and this gets to the point if you go
6 back to the whereas clause which talks generally about
7 the procedures it says very clearly the current preferred
8 flight track, and this is the FAA's preferred flight
9 track, the FAA's order calls for departing and arriving
10 transport category aircraft using PBIA runway 9 left, 27
11 right to fly the runway extended center line which is
12 approximately 1,000 feet north of Mar-A-Largo.

13 No fanning for those aircraft, straight out or...

14 THE COURT: Where are you reading from again?

15 MR. PILSK: This is the whereas clause on page five
16 of the settlement agreement.

17 THE COURT: Continue again, I'm sorry.

18 MR. PILSK: So my point is that the procedure since
19 at least 1995 and before from the FAA, not from the
20 County, the procedure that the FAA implemented was not to
21 fan. That has been their procedure for decades.

22 It wasn't changed by the County. When the County
23 did their noise compatibility program, again it's
24 reflected in the whereas clauses --

25 THE COURT: Was that an issue of fact whether it was

1 or was not changed by the County? I mean, essentially
2 that's what the plaintiff's argument is, give us a
3 chance, let's us show this.

4 MR. PILSK: Again, the whereas clause that is
5 attached to their complaint makes it clear that first of
6 all, the FAA's order preexisted any recommendations by
7 the County. This was the FAA's decision not to fan.
8 This happened 20 years ago.

9 I mean, I don't even know if there is a statute of
10 limitations that would bar it. They have not said
11 anything in the complaint about when this happened.

12 Furthermore, the County's recommendation resulted in
13 a legislative decision about the noise abatement
14 procedures to follow which included using the runway
15 heading procedure instead of fanning, which again is
16 acknowledged in the whereas clauses that while Mr. Trump
17 had opposed the no fanning at the time, that wasn't what
18 the County went with.

19 So now we're just trying to reargue debates that
20 were won and lost over 20 years ago. Is that what the
21 case is about? You know, that seems to me what they're
22 saying.

23 This is re-fighting battles that had been won and
24 lost decades go under the skies of this influence which
25 again they keep saying influence, but it's all buzz

1 words.

2 There are no facts. There are no specifics. There
3 is no indication of what authority any airport director
4 could possibly have over FAA air traffic controllers
5 other than whispering in their ears. There is no
6 allegation that he ever whispered in anyone's ear.

7 It really is just bare bones surmise. Airplanes are
8 flying over Mar-A-Largo, there must be some evil reason
9 for it, give us our relief. That's their claim as it
10 stands now with no facts to connect the dots between the
11 aircraft actually flying and the FAA directing the
12 aircraft and any action by any County employee including
13 the airport director.

14 It's simply insufficient on its face and it should
15 be dismissed. The fact is the suit is a continuation of
16 a lawsuit that was settled in 1995 which raised very
17 similar claims. It filed a very similar suit again in
18 2010.

19 It was initially dismissed by Judge Marx. They
20 amended the complaint, refiled it, dismissed it
21 voluntarily after a hearing on a motion to dismiss in
22 2011. Now, three or four years later they come back and
23 file the same things.

24 Every time they trim the case down, make the
25 allegations vaguer and vaguer. This isn't a game. We're

1 talking about serious allegations against long-serving
2 public employees.

3 It cost public money to defend these claims and for
4 what, so they can amend and make the claims even vaguer
5 again. I think we're at a point, Your Honor, where
6 enough is enough. If they get a right to amend I
7 understand that's their right, but it ought to be with
8 clear direction to allege facts that could possibly
9 support their claim and not bald conclusions.

10 Thank you.

11 THE COURT: Okay. Thank you.

12 MS. PETRICK: Your Honor, if I may just offer the
13 Court because you asked the question about is it a
14 question of fact. I just wanted to call to your
15 attention that in the amended complaint on page five,
16 paragraph 18, plaintiffs acknowledge that only Stage 3
17 operate from Palm Beach International Airport at this
18 point.

19 Stage 2 have been phased out as a matter of federal
20 law. The other citation that I would like to call to
21 Your Honor's attention is on page seven of the amended
22 complaint, and that is at paragraph 31. That substantive
23 paragraph used to stay that fanning was the appropriate
24 customary procedure.

25 It was changed after the County's initial motion to

1 dismiss. And what it now says is that the normal and
2 customary procedure of the departures at PBIA is to have
3 the airplanes depart using routes north of Mar-A-Largo,
4 not fanning.

5 They have dropped the allegations of fanning in
6 response to our initial motion to dismiss as a matter of
7 their pleading. What has been said today is inconsistent
8 with what the pleadings actually reflect.

9 THE COURT: Okay. Thank you. I know I said you
10 would have the last word, but I do want to go back to Mr.
11 Rogow just a second and I do want to address that issue,
12 the issue regarding the agreement again.

13 So if I understand the County's argument, clearly is
14 paragraph eight really is not applicable in this instance
15 because paragraph eight only applies to Stage 2.

16 MR. ROGOW: The difficulty is that paragraph eight
17 was responsive to what was in existence at that time. So
18 it is true that the times have changed with regard to
19 supporting fanning with regard to Stage 2 aircraft.

20 So literally the County is correct that there is not
21 Stage 2 aircraft now. Although, these are factual issues
22 it seems to me that need to be ironed out so the Court
23 would have a real basis for making this decision.

24 THE COURT: I thought it was just argued to me that
25 in your very own complaint you acknowledge that there are

1 no Stage 2 flights anymore?

2 MR. ROGOW: You know, we have said that there are no
3 Stage 2 flights. I don't know that for a fact that there
4 are no Stage 2 flights.

5 I mean, I think Mr. Marion -- are there no Stage 2
6 flights anymore?

7 MR. MARION: I don't believe there are, Your Honor,
8 any Stage 2, but important to the settlement agreement is
9 that the County agreed to the preferred flight tracks, to
10 maximum adherence to the preferred flight tracks.

11 If you look at the settlement agreement it defines
12 those as being -- so if you want to read it literally,
13 more than 4,000 feet north of Mar-A-Largo is where
14 they're going to adhere to and they're not doing that.

15 THE COURT: I thought I just heard the agreement says
16 it goes right over Mar-A-Largo?

17 MR. MARION: No. All you have to do is read the
18 agreement, Your Honor, and you will see.

19 MR. PILSK: The 4,000 foot refers to the Stage 2
20 tracks. It says Stage 2 only in parenthesis very
21 clearly.

22 The other non-Stage 2 flight tracks are runways
23 heading out which is about 1,000 feet north of
24 Mar-A-Largo.

25 THE COURT: I find that where again?

1 MR. PILSK: In that same whereas clause on page five
2 of the settlement agreement.

3 THE COURT: I will take a look at that.

4 Okay. I appreciate all of your arguments. You
5 didn't disappoint me. It was a very good argument. I
6 appreciate it. There are some very interesting issues.

7 Whatever I do in this case I feel I want to write
8 about it a little bit and you will have the benefit of my
9 feelings and my reasoning.

10 Hopefully I won't be too much longer. It shouldn't
11 take me long to get something, but if a long period of
12 time goes by, and by that I mean if in three weeks or so
13 you don't have something from me, I hope it would be
14 shorter than that, I will take no offense to you calling
15 my office and ask where it is.

16 Sometimes things fall through the cracks. I don't
17 think this will be one of them, but it does happen on
18 occasion. So like I said, I take no offense if you want
19 to know where things are and when you might be expecting
20 an order.

21 Anything else that I can help you with today?

22 MR. PILSK: We do have forms orders, which it sounds
23 like you don't need, but we also have envelopes if Your
24 Honor would like.

25 THE COURT: I'll take the envelopes anyway. We'll

1 save the court a few dollars.

2 Okay. Thank you.

3 (Thereupon, the hearing was concluded.)

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STATE OF FLORIDA)
COUNTY OF PALM BEACH)

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Dated this 7th day of October, 2015.

LISA TRIPODI, F.P.R.

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