IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 50 2015 CA 000086 XXXX MB AA

MAR-A-LAGO CLUB, L.L.C.,

Plaintiff,

vs.

PALM BEACH COUNTY, FLORIDA, A political subdivision under the Laws of the State of Florida, and BRUCE PELLY, Individually,

Defendants.
_____/

DEFENDANTS PALM BEACH COUNTY AND BRUCE PELLY'S MOTION TO DISMISS AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendants Palm Beach County ("the County") and Bruce Pelly ("Pelly") file this Motion to Dismiss Amended Complaint and Incorporated Memorandum of Law, seeking dismissal of Plaintiff Mar-a-Lago Club L.L.C.'s Amended Complaint pursuant to Florida Rule of Civil Procedure 1.140(b) and state as follows:

Introduction of the Parties, Procedural Background and Nature of the Case

1. The County is a charter county and political subdivision of the State of Florida. Am. Compl. at ¶ 2. As part of its functions, the County owns and operates four airports, including Palm Beach International Airport ("PBIA" or the "Airport"). *Id.* at ¶¶ 2, 13. Pelly is the Director of the County's Department of Airports. *Id.* at ¶40.

2. Plaintiff, Mar-a-Lago Club, L.L.C., claims to be a Delaware corporation that allegedly owns title to property within the County's jurisdiction, commonly referred to as "Mar-a-Lago." Am. Compl. at ¶ 1.

3. Over the past 20 years, Plaintiff, its principal, Donald Trump ("Trump"), and entities that have claimed to own an interest in Mar-a-Lago, have sued the County three times in an effort to force the Federal Aviation Administration ("FAA") to change long-established flight procedures for aircraft using PBIA for Plaintiff and Trump's personal benefit. Undeterred by prior settlements, dismissals, and promises not to sue, Plaintiff has refiled those tired claims based on misstatements of law and baseless attacks on the alleged actions of long-serving County and FAA officials. This suit, like the prior suits, does not serve any legitimate purpose, and appears designed to create press buzz for Trump's announced presidential campaign, cocktail party braggadocio, and negotiating leverage while imposing unnecessary expense on the County and taking up this Court's valuable time. Enough is enough. Plaintiff's claims are utterly lacking in merit as a matter of law and should be dismissed.

4. Plaintiff, or a related entity called Mar-a-Lago, L.L.C., L.C., that purported to own Mar-a-Lago at the time, and its principal, Donald Trump, originally filed a virtually identical action on July 19, 2010, as Case No. 502010CA18444XXXX AF (the "2010 Action").[1] The County filed a Motion to Dismiss, and by Order dated November 22, 2010, Judge Marx dismissed the 2010 Action on all counts. Plaintiff filed two amended complaints, which deleted a number of factual allegations and added claims for damages for public nuisance and trespass. The County again filed a Motion to Dismiss. Argument on the Motion to Dismiss was held on July 29, 2011 before Judge Rosenberg. Before Judge Rosenberg ruled on the motion, however, Plaintiff dismissed its complaint voluntarily on August 30, 2011.

5. The current Amended Complaint restates most of the allegations and claims from the 2010 Action, with only minor changes to omit certain factual allegations and a claim to

[1] In its Notice of Related Case, Plaintiff states that "this action was previously filed in case number 502010CA018444XXXX AF," which is the 2010 Action. (D.E. #4).

enjoin the construction of a new runway at PBIA. In its Amended Complaint, Plaintiff has added claims for breach of a 1996 Settlement Agreement between the parties, settling virtually identical claims as those made in the present case. Plaintiff apparently hopes that those largely cosmetic changes to its Amended Complaint combined with outrageous and absolutely false allegations that the Airport Director is somehow influencing FAA air traffic controllers to vector aircraft directly over Mar-a-Lago and that the County and Pelly have breached a Settlement Agreement, will enable its claims to survive a motion to dismiss. They should not.

6. Fundamentally, Plaintiff claims that the established flight patterns – recommended by the County and adopted by the FAA in the 1980s – should be changed for its benefit. Under procedures that have been in place for a generation and have been previously acknowledged by Plaintiff in the 1996 Settlement Agreement, FAA air traffic controllers direct departing jet aircraft in a corridor along the PBIA runway compass heading or other heading necessitated by safety concerns such as weather and traffic, thereby passing near Mar-a-Lago. (Am. Compl. Ex. A, p. 5). Plaintiff does not like that procedure, and Plaintiff and its affiliates have fought that procedure for 25 years. Plaintiff would like the FAA to change the current procedure so that flights would fly farther north after departing PBIA, thereby flying farther from Plaintiff's property. Am. Compl. at ¶¶31-33. The FAA's continued use of the historic procedure, and the County's continued support for the FAA's use of that procedure, allegedly gives rise to six claims for relief: Count I seeks an injunction to abate the public nuisance allegedly caused by the County and Pelly as a result of Airport operations; Count II seeks one hundred million dollars in damages from the County and Pelly, as "alternative and supplemental relief," for the alleged public nuisance; Count III seeks an injunction against the County and Pelly to prevent trespass through "noise, vibrations, fumes, pollution, and residue" from Airport

operations; Count IV seeks one hundred million dollars in damages from the County and Pelly, as "alternative and supplemental relief" for the alleged trespass; Count V seeks damages for inverse condemnation against the County and Pelly based on aircraft overflights; and Count VI alleges that the County and Pelly breached the 1996 Settlement Agreement by failing to ensure maximum adherence to the runway compass heading flight track. Am. Compl. at ¶¶ 46-88.

7. None of Plaintiff's claims has merit. Plaintiff cannot state a claim for trespass or nuisance (Counts I, II, III, and IV) because the current flight departure procedures are lawful, authorized, and part of ordinary aircraft operational procedures, as a matter of law, since pilots follow mandatory FAA air traffic controller instructions. While the allegations regarding Pelly are both false and absurd, even if they were taken as true, they are too conclusory and vague to support Plaintiff's summary allegation that aircraft operations conducted pursuant to those instructions are not lawful or customary.

8. The injunctions sought in Counts I and III are preempted by federal law, which vests complete control of aircraft operations in the FAA.

9. Counts I, II, III, and IV are further barred by the separation of powers doctrine, which does not permit this Court to intrude on the discretion of County and FAA officials to address inherently political and technical decisions regarding noise and air traffic control.

10. Plaintiff's inverse condemnation claim (Count V) fails to allege an invasion of the super-adjacent airspace above Mar-a-Lago and fails to allege the kind of interference with the use and enjoyment of property necessary to state a claim for inverse condemnation. Count V similarly fails to state a cause of action against Pelly, because a private individual cannot inversely condemn property, as a matter of law.

11. Count VI fails to state a cause of action against the County or Pelly for breach of contract, because the 1996 Settlement Agreement does not impose on the County or Pelly any of the obligations that Plaintiff claims Defendants have breached, according to the document's plain terms.

MEMORANDUM OF LAW

I. STANDARD FOR MOTION TO DISMISS

A complaint is subject to dismissal if all allegations within its four corners, when taken as true, fail to state a cause of action. *Smith v. 2001 South Dixie Highway, Inc.*, 872 So. 2d 992, 993-94 (Fla. 4th DCA 2004); *Sovran Equity Mort. Corp. v. Parsons*, 547 So. 2d 1044, 1044 (Fla. 4th DCA 1989). Dismissal is proper where it is apparent from the face of the complaint and its attachments that the plaintiff has not stated a cause of action. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001). As the Fourth District Court of Appeal explained,

> The complaint must set out the elements [of each claim] and the facts that support them so that the court and the defendant can clearly determine what is being alleged. The complaint, whether filed by an attorney or pro se litigant, must set forth factual assertions that can be supported by evidence which gives rise to legal liability. It is insufficient to plead opinions, theories, legal conclusions or argument. Furthermore, the assertions are to be stated simply and succinctly.

Barrett v. City of Margate, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999) (citations omitted).

II. COUNTS I AND II MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM OF NUISANCE

A. The Normal, Authorized Operation Of A Public Airport Cannot Constitute A Nuisance As A Matter Of Law

Plaintiff alleges that the Airport is a nuisance because of the "noise, vibrations, and emissions from jet aircraft" arriving to or departing from PBIA. *E.g.*, Am. Compl. ¶6. Under

Florida law, however, noise and other effects of the normal operation of an airport cannot constitute a nuisance: "The law in Florida about airport operations has long been that the lawful operation of such a facility in the 'usual, normal and customary manner prescribed' cannot constitute a nuisance." *St. Lucie Cnty. v. Town of St. Lucie Vill.*, 603 So. 2d 1289, 1293 (Fla. 4th DCA 1992) (quoting *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 372 (1947)). In order to state a claim for nuisance arising from airport operations, a plaintiff must allege that the airport is neither operating lawfully nor in the usual, normal and customary manner. *Id.* (refusing to enjoin current airport operations, even if they created a nuisance, because operations were in accordance with FAA procedures); *Corbett v. Eastern Air Lines, Inc.*, 166 So. 2d 196, 202-04 (Fla. 1st DCA 1964) (dismissing complaint for private nuisance because aircraft operated pursuant to air traffic controller direction).

Federal law provides that "the United States Government [has] exclusive sovereignty of airspace." 49 U.S.C. § 40103(a). The FAA exercises exclusive control of airspace and navigation. *Id.* at § 40103(b). "By law, the FAA has the sole authority to establish flight operational procedures and to manage the air traffic control system and navigable airspace of the United States." *Aviation Noise Abatement Policy 2000*, 65 Fed. Reg. 43802, 43807 (July 14, 2000). *See also National Bus. Aviation Assoc. v. City of Naples Airport Auth.*, 162 F.Supp. 1343, 1352 (M.D. Fla. 2005) (describing 49 U.S.C. § 40103(a) as "expressly pre-empting, *inter alia,* local regulation of aircraft noise by regulating flight paths.") The FAA has exercised that sovereignty by allowing aircraft to operate above 500 feet or 1,000 feet generally *and lower when necessary for takeoff and landing.* 14 C.F.R. § 91.119 (emphasis added). Moreover, pilots *must* follow instructions given by FAA air traffic controllers. 14 C.F.R. § 91.123(b) ("Except in

an emergency, no person may operate an aircraft contrary to an ATC [Air Traffic Control] instruction in an area in which air traffic control is exercised.")

Although Plaintiff has made conclusory allegations that the flight procedures at PBIA are unlawful and do not follow usual and customary practices, Am. Compl. at ¶¶ 31, 33, 47, 53, Plaintiff does not identify any statutory or common law duty that those flight procedures violate. More importantly, the law provides, and Plaintiff implicitly admits, that the aircraft follow the flight path directed by FAA air traffic controllers. Am. Compl. ¶ 33. Because the FAA has exclusive control over air traffic control procedures and routes, and because pilots are required to follow air traffic controller instructions, aircraft following FAA flight controller instructions are necessarily operating lawfully and in the ordinary and customary manner, as a matter of law. The fact that Plaintiff would prefer that the FAA direct aircraft in a different manner, or that air traffic patterns were different a generation ago, does not make FAA-mandated flight paths unlawful or not customary.

Plaintiff attempts to avoid this bar by spinning a fairy tale theory that Pelly has somehow used undue influence in a personal attack on Donald Trump to compel FAA air traffic controllers to deviate from what Plaintiff alleges to be the "customary" practice of directing flights farther north. Am. Compl. at ¶¶ 31-34; 39-40. This baseless supposition – for which Plaintiff alleges not a single fact and which is actually contradicted by the attachment to the Amended Complaint – is insufficient as a matter of law to raise an issue that aircraft departing PBIA are operating unlawfully.

First, Plaintiff's wild theory does not change the fact the aircraft are following, and must follow, FAA air traffic controller instructions. If, as Plaintiff must concede, pilots must follow air traffic controller instructions, 14 C.F.R. § 91.123, those operations are lawful regardless of

the motivations behind the FAA air traffic controllers' instructions. Second, Plaintiff's concocted story is stated in such conclusory terms that it is insufficient to state a claim of nuisance, as a matter of law. As the Florida Supreme Court explained in affirming the dismissal of a nuisance case premised on misconduct by public officials:

> Respondents' allegations of widespread corruption are conclusory and lacking in the precision necessary for even "notice pleading." Accepting these generalized allegations facially as sufficient would require an extension of logic to the extreme that, not only are the administrative agencies and independent administrative law judges corrupt, but also that district court judges who are in the position to review the decisions of the agencies and administrative judges are also somehow part of this conspiracy. In addition, while states do have primary responsibilities for environmental regulations, state action is subject to oversight by the Federal Environmental Protection Agency. Again, if accepted as facially sufficient, the allegation of a covert conspiracy would require application of logic that the Federal Government is also "aiding and abetting" the alleged nuisance.

Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 1039 (Fla. 2001).

Under *Flo-Sun,* Plaintiff's conclusory and general allegations of official misconduct fail to state the ultimate facts necessary to state a claim for nuisance under Florida law. Plaintiff's case depends on an assertion that Pelly, as Airport Director, in some manner possesses unique and extraordinary power or influence that would enable him to control the actions of federal government employees. But, the Amended Complaint does not so much as offer a hint at what that influence is, what Pelly's extraordinary powers must be, how that power has or would be exercised, or why federal government employees would (or could) bow to such influence. Moreover, Plaintiff's case depends on a complex web of presumptions, again, with zero factual allegations to support it, that there was a grand conspiracy to commit "an attack from the air on Mar-a-Lago, Mr. Trump, the members of the Club and the guests and the public who attend functions at Mar-a-Lago." Am. Compl. at ¶39. Plaintiff's story requires that this Court take

purely on faith, and in the absence of any specific factual allegation, that the Board of County Commissioners, PBIA management, FAA officials and air traffic controllers at PBIA are complicit in this conspiracy, all in derogation of their respective duties to ensure the safety of the thousands of passengers that travel in the aircraft Plaintiff claims fly over Mar-a-Lago. As in *Flo-Sun*, Plaintiff's wildly speculative theory requires the Court to stretch logic to a point well past what summary claims pled could possibly support. The rules of pleading require more than Plaintiff has pled. Accordingly, Counts I and II should be dismissed.

B. Plaintiff Fails To Allege The Kind Of Unique Injury Necessary To Give It Standing To Assert A Public Nuisance Claim

In Count I, Plaintiff seeks an injunction to block an alleged public nuisance. Where the proper government authority does not seek to abate a nuisance, *see* 38 Fla. Jur.2d *Nuisances* § 92 (2011), a private plaintiff must plead a "special injury" in order to have standing to bring action against an alleged public nuisance. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) ("We adhere resolutely to our holding in [prior public nuisance cases] relative to the concept of special injury in determining standing."); *Sarasota Cnty. Anglers Club, Inc. v. Burns*, 193 So. 2d 691, 693 (Fla. 1967) (affirming dismissal of complaint because plaintiffs could not show unique injury). "Special injury" requires a showing that the alleged injuries are different in kind, not merely in degree, from injuries allegedly suffered by the general public. *Sarasota Cnty. Anglers*, 193 So. 2d at 693.

Applying that rule, the Florida Supreme Court recognized long ago that individuals could not maintain a public nuisance action based on common impacts from emissions: "The same fumes, dust and gases which the plaintiffs allege are objectionable to them, would also affect the members of the general public in that area, the pedestrians and motorists traveling in the district, and many other employees who spend their working hours in the area." *Page v. Niagra*

Chemical Div. of Food Mach. & Chem. Corp., 68 So. 2d 382, 384 (Fla. 1953) (affirming dismissal of second amended complaint).

Similarly here, the same aircraft that fly near Mar-a-Lago, necessarily fly near or over other populated areas of West Palm Beach and the Town of Palm Beach, which are subject to the same noise, fumes, and vibrations as Plaintiff. Plaintiff's allegations about how its Mar-a-Lago property may be injured by overflights alleges only that its property suffers a greater degree of injury than other properties, but not that it suffers a different injury altogether. Neither Mar-a-Lago's location near the flight path nor its historic status render the alleged harm to Mar-a-Lago "special" in the manner required by Florida law. Because the noise, fumes and vibrations from aircraft operations would affect all properties near the flight paths in a similar fashion, Plaintiff fails to allege the "special injury" necessary to confer standing to maintain an action for public nuisance.

Under very limited circumstances, a public nuisance claim can be brought by a land owner immediately adjacent to the alleged nuisance based upon interference with its property rights. For example, in *Town of Surfside* v. *Cnty. Line Land Co.,* 340 So. 2d 1287, 1288 (Fla. 3d DCA 1977), a property owner alleged that the improper operation of a municipal garbage dump immediately adjacent to its property constituted a nuisance, based on immediate impacts to the owner's property, including erosion from water runoff, exposure to noxious odors, as well as the proliferation of flies, rats, birds, and other vermin attracted by the dump. In responding to the Town's argument that the case presented neither a proper public nor private nuisance claim, the Court concluded that "interference with the enjoyment and value of private property rights is a special injury justifying a suit by a private individual to enjoin the nuisance." In so holding, the Court did not specify whether the actionable nuisance would be considered private or public; it

simply articulated the unexceptional concept that an adjoining landowner has a nuisance claim against its neighbor when the neighbor's use of the adjoining property causes direct harm to the adjacent landowner's property.

In contrast to *Surfside*, the Florida Supreme Court has long held that nuisance cases premised on the concept of atmospheric pollution, like *Page*, *supra*, cannot support a claim of public nuisance. The present case is governed by *Page,* rather than *Surfside*. Here, all property owners in and near the flight paths would be subject to the same environmental pollution and would suffer the same kind of interference with their property as that alleged by Plaintiff. Plaintiff's allegation that Mar-a-Lago is historic, and therefore more valuable than other properties, or that the limestone from which Mar-a-Lago is constructed is particularly susceptible to environmental harm, relates to the degree of the interference, rather than the kind of interference alleged. To apply the "interference with property" rule here, where many square miles of residential and commercial areas are affected by aircraft overflights, would effectively eradicate the special and particular injury requirement by allowing a plaintiff to frame virtually any public nuisance claims in terms of injury to property. Thus, Plaintiff's claims fail to meet the special injury element of a properly pled private nuisance claim and, therefore, must be dismissed.

III. COUNTS III AND IV MUST BE DISMISSED BECAUSE THEY FAIL TO STATE A CLAIM FOR TRESPASS

Counts III and IV must be dismissed because Plaintiff has failed to plead the elements of a claim for trespass. A claim for trespass must allege that the defendants have used or injured the plaintiff's property without the right or authority to do so. *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980). In the aviation context, this means that there can be no trespass claim if aircraft operate as directed by FAA air traffic controllers. *See Corbett,* 166 So.

2d at 202-04 (dismissing a complaint because there is no trespass or private nuisance claim when aircraft operate as directed by air traffic controllers).[2] *See also Hub Theatres, Inc. v. Massachusetts Port Auth.*, 346 N.E. 2d 371 (Mass. 1976) (dismissing trespass and nuisance claims where overflights were authorized by law).

"The United States Government [has] exclusive sovereignty of airspace." 49 U.S.C. § 40103(a). Thus, Plaintiff does not own the airspace, and certainly cannot exclude aircraft from the airspace. FAA has exercised the federal government's sovereignty by allowing aircraft to operate above 500 feet or 1,000 feet, generally, and lower when necessary for takeoff and landing. 14 C.F.R. § 91.119. Aircraft emission levels are also subject to exclusive federal control, which preempt state and local regulation. 42 U.S.C. § 7571-7573 (federal aircraft emissions standards preempt state standards); 14 C.F.R. Part 34 and 40 C.F.R Part 87 (FAA and EPA regulations setting emissions standards for aircraft). Plaintiff alleges that aircraft fly over or near Mar-a-Lago during landings and takeoff, Am. Compl. at ¶¶31-33, thereby essentially conceding that the aircraft are operating in airspace subject to federal sovereignty and control.

Plaintiff does not allege that aircraft are operating unlawfully by operating in a manner not authorized by FAA air traffic controllers or federal law, or that aircraft are operating below altitudes necessary for takeoff and landing. Thus, the alleged overflights are lawful and permitted by federal law, and Counts III and IV fail to state a claim of trespass.

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[2] The undersigned have been unable to locate a case applying Florida law finding that noise, vibrations and emissions from aircraft operations could ever constitute actionable trespass. Based on the Court's reasoning in *Corbett*, *supra*, it appears that such impacts might possibly constitute a private nuisance *if* the aircraft were not operating in accordance with FAA-approved procedures. In any event, because the aircraft of which Plaintiff complains operated in accordance with FAA flight controller direction, there can be no trespass even if noise, vibrations and emissions could constitute actionable trespass in other circumstances.

IV. PLAINTIFF'S CAUSES OF ACTION FOR INJUNCTION IN COUNTS I AND III ARE PREEMPTED

Plaintiff characterizes Counts I and III as "action[s] for a permanent injunction" against alleged nuisances and trespass. Am. Compl. at pp. 12, 14 (Wherefore Clauses). The nuisance and trespass are allegedly caused solely by the "noise, vibrations, and pollution effects" of aircraft flying near Mar-a-Lago. Am. Compl. at ¶¶ 35, 47, 53. Accordingly, Plaintiff necessarily seeks injunctions to ban aircraft operations near Mar-a-Lago. In addition to being barred by Florida law as discussed above, these claims must be dismissed because they are preempted by federal law that vests in the FAA the exclusive authority to direct aircraft operations in flight.[3]

Congress has explicitly reserved to "the United States Government . . . exclusive sovereignty of airspace." 49 U.S.C. § 40103(a). Congress delegated the control of airspace and air navigation exclusively within the jurisdiction of the FAA. 49 U.S.C. § 40103(b)(2) ("The [FAA] Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for (A) navigating, protecting and identifying aircraft, (B) protecting individuals and property on the ground, [and] (C) using the navigable airspace efficiently. . . ."). The FAA has summarized that law as follows: "By law, the FAA has the sole authority to establish flight operational procedures and to manage the air traffic control system and navigable airspace of the United States." *Aviation Noise Abatement Policy 2000*, 65 Fed. Reg. 43802, 43807 (July 14, 2000). *See also National Bus. Aviation Assoc. v. City of Naples Airport Auth.*, 162 F.Supp. 2d 1343, 1352 (M.D. Fla. 2001) (describing 49 U.S.C. § 40103(a) as "expressly pre-empting, *inter alia,* local regulation of aircraft noise by regulating flight paths.").

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[3] The County recognizes that remedies are not typically subject to dismissal on a motion to dismiss. In this case, however, Plaintiff seeks *only* injunctive relief in Counts I and III. Thus, if Plaintiff is unable to state a valid claim for injunctive relief, it is unable to state any claim. Alternatively, the County respectfully suggests that the Court treat this portion of the Motion to Dismiss as a Motion to Strike the portions of Counts I and III seeking an injunction.

Because the control of aircraft and air navigation is an exclusive federal power, the courts have long held that attempts by entities other than the FAA to control or regulate aircraft flight operations are preempted. *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F. 2d 75, 83 (2d Cir. 1977) ("[L]egitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level."); *National Helicopter Corp. v. City of New York*, 137 F. 3d 81, 92 (2d Cir. 1998) (locally imposed helicopter flight paths were preempted).

Although Plaintiff summarily alleges the County has the primary responsibility for implementing noise control measures, Am. Compl. at ¶ 27, the FAA has the exclusive authority, as a matter of law, to adopt flight procedures to address a noise issue. "[A]ny part of a [noise compatibility] program related to flight procedures [shall be referred to] the Administrator of the FAA. The Administrator shall approve or disapprove that part of the program." Aviation Safety and Noise Abatement Act, 49 U.S.C. § 47504(b)(3). Moreover, the FAA must review and approve other operational restrictions on jet aircraft, Am. Compl. at ¶30 pursuant to the Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47524 *et seq.* ("ANCA"). *See also* 14 C.F.R § 161.301 *et seq.* (regulations implementing ANCA).[4] Thus, the FAA retains the exclusive authority to implement or approve operational restrictions on those aircraft operations about which Plaintiff complains.

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[4] ANCA changed the law as it existed prior to 1990, when airport proprietors retained some authority to address local noise concerns by restricting the types of aircraft that could use their airport, or the time of day of operations, under the so-called "proprietor's exception." *E.g.*, *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F. 2d 100 (9th Cir. 1981) (finding a curfew and other airport operational restrictions not preempted). ANCA limited that authority, and today FAA approval is required for virtually any restriction on aircraft flight operations at a commercial airport such as PBIA that wishes to retain federal aviation grant eligibility. *City of Naples Airport Auth. v. FAA*, 409 F. 3d 431, 433 (D.C. Cir. 2005).

Because the control of aircraft operations, whether for noise abatement or air traffic control, rests entirely within the exclusive control of the FAA, this Court lacks the authority to issue orders that purport to limit or direct how aircraft can operate when arriving at or departing from PBIA. The Fourth District Court of Appeal has recognized this principle, and has acknowledged that courts are preempted from issuing injunctions that may affect flight operations:

> If federal law preempts the authority of states to issue injunctions against the existing, lawful operations of airports, we doubt that it would not similarly forbid injunctions against future operations. It defies reason to suppose that Congress intended to curtail state authority to interfere with airport operations, but that the states could get around the preemption by interfering with the operations before they get underway.

St. Lucie Cnty., 603 So. 2d at 1293.

Plaintiff attempts to evade the bar of preemption by alleging that the County, as airport proprietor, has the legal authority to adopt noise control measures, implying a power to restrict flight operations. Am. Compl. at ¶¶ 22 - 30. Plaintiff's assertions are incorrect as a matter of law, as demonstrated above. Furthermore, allegations of law are insufficient to save a complaint. *Barrett*, 743 So. 2d at 1162-63 ("It is insufficient to plead opinions, theories, legal conclusions or argument.") Although the County could propose or suggest operational changes to address a noise problem, only the FAA can approve and implement changes in flight procedures at PBIA. Moreover, the court lacks the jurisdiction to order the County to implement particular noise abatement recommendations, even when supported by a noise study. *See Adams v. Dade Cnty.*, 335 So. 2d 594, 596 (Fla. 3d DCA 1976) (the trial court exceeded its jurisdiction in ordering implementation of noise study recommendations in an inverse condemnation case relating to airport noise). The County and this Court are preempted from passing laws or issuing

injunctions compelling the kinds of changes Plaintiff seeks here. Accordingly, Counts I and III are preempted by federal law and must be dismissed.[5]

V. THE COURT LACKS JURISDICTION TO INTERFERE WITH INHERENTLY DISCRETIONARY, POLITICAL DECISIONS REGARDING NOISE ABATEMENT AND AIR TRAFFIC CONTROL VESTED IN THE DISCRETION OF THE COUNTY AND THE FAA

A. The Separation Of Powers Doctrine Prevents The Court From Interfering With The Discretionary Decisions Of The FAA And The County Regarding Flight Procedures And Noise Control

Plaintiff's claims are designed to compel a substantive variation from flight patterns that have been in place since the 1980s, so that aircraft will fly farther away from Plaintiff's property. In addition to being baseless under Florida nuisance and trespass law, those claims must be dismissed as intruding into political decisions vested in the discretion of the FAA and the County's Board of County Commissioners. "[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions or the legislative or executive branches of government absent a violation of constitutional or statutory rights." *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 918-19 (Fla. 1985) (holding that governments are immune from tort liability when exercising discretionary functions including the development and selection of policy and how to enforce laws). Further, "[h]ow a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a government body is a matter of governance, for which there has never been a common law duty of care." *Trianon Park*, 468 So. 2d at 919

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[5] Counts I and III should be dismissed for the independent reason that they are directed at the wrong party. Plaintiff's requested injunctions "against" the nuisance and trespass must necessarily be directed at the FAA, which is solely responsible for air traffic control at PBIA, as explained above. The County is powerless to stop, change or otherwise regulate the flights that allegedly harm Plaintiff and an injunction against the County would be a legal nullity since the County could not take any action to implement changes, even if so directed by this Court. This flaw cannot be "cured" by joining the FAA because, as detailed above, this Court is preempted from issuing injunctions that purport to mandate flight procedures.

(finding such discretion immune from suit). Only truly nuts-and-bolts matters, such as driving cars or handling firearms, are subject to suit. *Id.* at 920. *See also Rumbough v. City of Tampa*, 403 So. 2d 1139, 1141 (Fla. 2d DCA 1981) ("[C]ertain discretionary or planning functions of coordinate branches of government should not be subject to scrutiny by judge or jury as to the wisdom of the actions taken.") This principle applies in particular to discretionary decisions regarding airports. *St. Lucie Cnty.*, 603 So. 2d at 1292 (the question of "whether to expand a county airport is essentially a political one.")

These principles bar Plaintiff's claims here. First, Plaintiff does not allege that any conduct by the FAA, the County, or Pelly violates a constitutional or statutory duty. Plaintiff relies solely on alleged violations of common law duties – trespass and nuisance – which are inadequate under *Trianon Park* to block the exercise of discretionary authority.

Second, the current procedure by which FAA air traffic controllers direct aircraft on the runway heading reflects the considered judgment of the FAA, and the recommendation of the County, that such a procedure was preferable to other flight procedures. The FAA, with the support of the County's Board of County Commissioners, adopted this flight pattern – instead of an alternative procedure which would have fanned aircraft over a wide area to the north of the straight-out path – in the 1980s, as memorialized in County Ordinance 85-21 and FAA Order PBI 8400.9E, as part of the County's noise abatement program. Exhibit A.[6] The FAA exercised

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[6] Although a court may not ordinarily look beyond the four corners of a complaint on a motion to dismiss, the Fourth District Court of Appeals recognizes exceptions to the rule, including when the motion to dismiss is based on subject matter jurisdiction. *Mancher v. Seminole Tribe of Florida, Inc.*, 708 So. 2d 327, 328 (Fla. 4th DCA 1998) ("A motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint when it raises solely a question of law.") Plaintiff's requests for injunctive relief are beyond the court's jurisdiction, making it appropriate to look beyond the four corners of the Complaint. *See Adams v. Dade Cnty.*, 335 So. 2d 594, 596 (Fla. 3d DCA 1976) (holding that it was beyond the trial court's jurisdiction to order the county to implement specific noise control

its expertise and judgment in crafting and implementing Order 8400.9E, which sets forth air traffic procedures over which it has exclusive control. The County concurred in that procedure as a result of a federally-authorized noise abatement study, authorized and funded under 14 C.F.R. Part 150, which sets forth a process for airport operators to develop and recommend noise abatement procedures to address noise concerns.[7] As Ordinance 85-21 makes clear, the County's decision to support Order 8400-9E represented a balancing of interests and impacts that is inherently a political decision because a decision in favor of one approach will necessarily reduce impacts for some residents and increase impacts for others.

Under *Trianon Park*, it would be beyond this Court's jurisdiction to order the injunctive relief sought by Plaintiff. As the Third District Court of Appeals explained in refusing to order the implementation of noise study recommendations in an inverse condemnation case relating to airport noise, "the trial court exceeded the bounds of its jurisdiction by going beyond this sole issue and ordering implementation of the MIA study, clearly a matter for legislative determination by the Dade County Board of County Commissioners." *Adams v. Dade Cnty.*, 335 So. 2d 594, 596 (Fla. 3d DCA 1976).[8]

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measures). Accordingly, the County has attached a certified copy of Ordinance 85-21 to this Motion as Exhibit A, and respectfully requests that the Court take judicial notice of same in considering the subject matter jurisdiction arguments advanced herein.

[7] As described above, the FAA has exclusive control over flight procedures and air traffic control at PBIA. Ordinance 85-21 does not impose flight procedures, but adopts as County law the County's recommendations to the FAA concerning flight procedures. The FAA may change Order PBI 8400.9E at its discretion. For purposes of this Motion, however, the use of the runway heading procedure is pursuant to federal law, consistent with the County's recommendation.

[8] To the extent Plaintiff's claims for injunction amount to a challenge to the adoption of Ordinance 85-21 itself, the clams are time-barred and should be dismissed. *Paresky v. Miami-Dade Cnty. Bd of Cnty. Com'rs*, 893 So. 2d 664 (Fla. 3d DCA 2005) (acknowledging a four-year statute of limitations on challenges to a county ordinance).

Third, Plaintiff challenges the discretion exercised by the County's Board of County Commissioners and by FAA officials (who are not even before the Court) 30 years ago in making the recommendation and decision, respectively, to implement the runway heading procedure. Specifically, Plaintiff challenges the discretion of FAA officials, including local air traffic control personnel, as to how to vector passenger aircraft in a safe manner. Even if this Court believes Plaintiff's wild speculation about some secret pact between federal officials and Pelly, Plaintiff's case fails because it challenges the discretionary, legislative judgment of the County's Board of County Commissioners to recommend that the FAA adopt the runway heading procedure, the discretion of the FAA to adopt that procedure, *and* the discretionary authority of FAA air traffic controllers to direct air traffic arriving or departing from PBIA. *Trianon Park* bars the Court from second guessing those discretionary decisions, regardless of Plaintiff's baseless and false allegations about Pelly, and *Adams* bars the Court from ordering the County to take any specific action to address the alleged noise concerns.

B. The Doctrine Of Primary Jurisdiction Provides That The Court Should Refrain From Exercising Jurisdiction When There Are Administrative Procedures To Address The Technical Issues Of Flight Procedures And Noise Abatement

The doctrine of primary jurisdiction further counsels that a court should refrain from exercising its jurisdiction when the issues raised are beyond the "ordinary experience of judges and juries, but within an administrative agency's special competence." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001) (affirming dismissal of complaint for nuisance based on primary jurisdiction). Plaintiff's requests for injunctive relief asks the Court to enjoin the current air traffic procedures at PBIA, but doing so would have significant and serious ripple effects on air safety and air traffic control, not just in the immediate vicinity of PBIA, but in the connecting air traffic corridors throughout South Florida. Decisions about air traffic control are vested in the

FAA's exclusive control, and beyond the Court's expertise and jurisdiction for good reason: the safe control and flight of aircraft is the special, technical expertise of the FAA's air traffic control experts. Similarly, because of the necessarily interconnected nature of flight patterns, the requested injunction necessarily would reallocate to other property owners any noise and other impacts from aircraft overflights. Deciding how best to balance those competing interests, particularly in the absence of all potentially affected parties, is also beyond the Court's expertise.

The alteration of aircraft flight patterns is governed by a complex web of federal laws and regulations, including very specific procedures for airport operators to follow if they wish to develop and propose changes to aircraft operations. *See* Aviation Safety and Noise Abatement Act, 49 U.S.C. §§ 47503, 47504, and its implementing regulations, 14 C.F.R. Part 150 (providing a process for airport operators to study local noise problems and develop recommended solutions for FAA approval); ANCA and its implementing regulations, 14 C.F.R. Part 161 (providing a procedure for grant-obligated airport operators to seek FAA approval of restrictions on aircraft operations to address noise concerns). Any effort to change flight patterns for aircraft arriving or departing PBIA should follow those administrative procedures, where the issues can appropriately be decided by the political and administrative agencies vested with the authority and possessing the requisite technical expertise to address those issues. *See Flo-Sun*, 783 So.2d at 1040. A private tort suit for trespass and nuisance is not the appropriate forum to redesign South Florida airspace, impose new flight procedures, and reallocate the impacts of aircraft overflights.[9]

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[9] In paragraphs 36-38 of the Amended Complaint, Plaintiff asserts, generally, that the "DNL" metric for "assessing noise impacts" is inadequate. "DNL" means "day-night noise levels," and provides a standardized way to depict noise impacts by presenting an annualized average of noise events, with nighttime noise events given additional weighting to reflect the additional impact of nighttime noise. *See* 14 C.F.R. Part 150. App. A. But Plaintiff's assertions

VI. COUNT V FAILS TO STATE A CLAIM FOR INVERSE CONDEMNATION

Plaintiff's claim for inverse condemnation is based on the allegation that aircraft fly over and near Mar-a-Lago, which allegedly affects Mar-a-Lago through noise, vibration and emissions. Am. Compl. ¶¶ 77-78. There is no allegation that the County has occupied or physically encroached on Plaintiff's property in a legally cognizable way and, thus, Plaintiff's allegations are insufficient to state a claim for inverse condemnation.

The Florida Supreme Court has explained that "[w]hen the governmental action is such that it does not encroach on private property but merely impairs its use by the owner, the action does not constitute a 'taking' but is merely consequential damage and owner is not entitled to compensation." *Vill. of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 669 (Fla. 1979). In cases based on aircraft overflights, Florida courts require proof of a "substantial ouster and deprivation of all beneficial use of [plaintiff's] property" or "that aircraft invade the Plaintiffs' super-adjacent airspace causing a direct and immediate interference with the use of the land." *Fields v. Sarasota-Manatee Airport Auth.*, 512 So. 2d 961, 965 (Fla. 2d DCA 1987) (citations omitted).

Federal law differs somewhat: "To establish a taking of an avigation easement, the plaintiff has the burden of proving that . . . [overflights occurred] directly above the subject property, below navigable airspace, and that those flights were of such frequency that they substantially interfered with the use and enjoyment of the underlying land." *Persyn v. United*

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about DNL are not tied to any claim for relief and Plaintiff does not explain how a particular noise measurement methodology is causing a trespass or nuisance. Nor does Plaintiff allege that the County acted unlawfully in using the DNL methodology. Am. Compl. at ¶36. Although Plaintiff alleges that the use of metrics other than DNL is customary and usual at other airports, it does not establish how that is relevant to its claims.

States, 34 Fed. Cl. 187, 196 (1995). Mere exposure to loud noise is insufficient to state a claim. *Id.* at 200-01.

Plaintiff fails to state a claim under either state or federal law. First, Plaintiff does not, and cannot, allege that aircraft invade the "super-adjacent" airspace or fly below the navigable airspace over Mar-a-Lago. *See Hillsborough Cnty. Aviation Auth. v. Benitez*, 200 So. 2d 194, 198 (Fla. 2d DCA 1967) (finding that super-adjacent airspace was between 250-500 feet); 14 C.F.R. § 91.119 (navigable airspace is that which lies above 500 feet, or lower if needed for taking off and landing). Mar-a-Lago is approximately 2.5 miles from PBIA, Am. Compl. at ¶ 6, and Plaintiff does not allege that aircraft are travelling outside federally-regulated navigable airspace or below 500 feet, when not necessary for takeoff or landing, as they pass near or over Mar-a-Lago.

Second, Plaintiff makes only conclusory allegations regarding "substantial adverse impacts," Am. Compl. at ¶¶ 41-42, and fails to allege any ultimate facts that could support those assertions. Those conclusory assertions are inadequate. *Barrett*, 743 So. 2d at 1162-63. Plaintiff only makes a general allegation that overflights "disrupt" activities, Am. Compl. at ¶ 41, and that Mar-a-Lago depends on the ability to use its outdoor spaces and features, *id.* at ¶11. Although Plaintiff uses the term "substantial deprivation" in describing the alleged impacts of overflights, Plaintiff does not plead any ultimate facts that could support a claim of inverse condemnation. For example, Plaintiff does not allege that any activities are cancelled or unable to proceed, that use of the facility for entertaining is impossible due to the interruptions, that speech becomes impossible, that telephone conversations are interrupted, that overflights make visitors run in fear, or that vibrations directly damage the property. *Compare Hillsborough Cnty. Aviation*, 200 So. 2d at 199 *and Foster v. Gainesville*, 579 So. 2d 774, 775 (Fla. 1st DCA 1991)

(noise from overflights frightened plaintiffs, children, and pets, interrupted sleep, and caused hearing damage; vibrations damaged the building and soot made certain outdoor activities impossible). Indeed, Plaintiff's own allegations belie any ability to satisfy the standard for a taking under Florida law when it asserts in the Amended Complaint that it continues to hold charitable and other functions, Am. Compl. at ¶ 12, and that the Mar-a-Lago Club has approximately 450 members, *id.* at ¶ 8. The allegations about the alleged effect of overflights on the limestone are similarly vague and certainly do not state ultimate facts that could demonstrate the kind of substantial interference necessary to support a claim of inverse condemnation.

In short, the allegations of the Amended Complaint show, at most, the kind of "impairment" of use that is insufficient to describe a taking under either Florida or federal law. *Village of Tequesta*, 371 So. 2d at 669 (holding that actions that merely "impair" the use of property but do not appropriate the property are not compensable takings; "damage" alone is insufficient); *Persyn*, 34 Fed. Cl. at 201 (finding that "[t]he mere fact that a property is subject to high noise levels as a result of aircraft operations will not establish liability for a taking if there is no showing that the noise is caused by frequent and low overflights [below the navigable airspace].")

VII. A PRIVATE CITIZEN CANNOT COMMIT AN ACT OF INVERSE CONDEMNATION IN FLORIDA

In addition to the grounds for dismissal set forth above, which apply both to claims against the County and Pelly, individually, there are additional grounds for dismissal that are specific to Pelly as an individual. The Wherefore Clause in Count V seeks relief against Pelly in the form of one hundred million dollars in compensatory damages for the alleged inverse condemnation of Mar-a-Lago resulting from Airport operations. It is black letter law, however, that the just compensation clause of the State and Federal Constitutions is specific to

governmental action. Accordingly, non-governmental defendants cannot be liable as a matter of law for inverse condemnation claims. *See Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 801 F.Supp. 684, 697 (S.D. Fla. 1992) (observing "non-governmental defendants are not liable as a matter of law for an inverse condemnation claim.") Pelly, as an individual, is not a governmental entity and does not personally enjoy the power of eminent domain; therefore, Pelly cannot engage in inverse condemnation and the inverse condemnation claim against him personally cannot lie as a matter of law. Thus, Count V must be dismissed against Pelly with prejudice.

VIII. PLAINTIFF'S BREACH OF CONTRACT CLAIMS FAIL TO STATE A CAUSE OF ACTION UNDER THE PLAIN TERMS OF THE SETTLEMENT AGREEMENT

Interpretation of a contract is a matter of law. *Peacock Construction Co., Inc., v. Modern Air Conditioning, Inc.*, 353 So. 2d 840, 842 (Fla. 1977) (general rule is that interpretation of a contract is a matter of law). When a contract is appended to a complaint, the Court is authorized to consider the contract's provisions and dismiss those claims that contradict the plain terms of the contract upon which the claim is based. *Hunt Ridge at Tall Pines, Inc., v. Hall,* 766 So. 2d 399, 401 (Fla. 2d DCA 2000) ("where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control and may be the basis for a motion to dismiss.") In this case, the plain language of the Settlement Agreement makes clear that neither the County nor Pelly have the contractual obligations that Plaintiff seeks to impute to them; thus, Count VI should be dismissed as a matter of law.

Count VI alleges a breach of contract by the County and Pelly, as an individual, for failure to "achieve maximum adherence to the Preferred Flights Tracks." Am. Compl. at p. 17, ¶85. The breach of contract claim states that the County and Pelly breached the Settlement Agreement when Pelly "coordinated a change to the flight tracks required under the Agreement

so that planes now depart from and arrive at the airport by flying directly over Mar-a-Lago." *Id.* at ¶ 86. While both the County and Pelly deny that either coordinated a change to the flight track, as alleged, a review of the plain terms of the Settlement Agreement demonstrates that neither the County nor Pelly were required to "achieve maximum adherence to the Preferred Flight Tracks" or were prohibited from "coordinating a change to flight tracks." The Settlement Agreement contains a Section entitled "County Actions." Am. Compl., Exhibit A. at p. 10. As part of "the County Actions," paragraph 10 provides that, "in an effort, however, to attempt to encourage the greatest adherence possible [to flight procedures], *the County shall...*" take certain actions. *Id.* at p. 12, ¶10 (emphasis added). The actions required by the County are as follows:

1. The County shall ..."conduct a study of the close-in departure procedures authorized by the FAA. The County shall complete the study in 150 days and allow Trump and the Club's consultant to comment on the study. Am. Compl., Ex. A at p. 10, ¶2.
2. The County shall use its best efforts to work with the FAA "to outline the most aggressive close-in departure procedures that could be implemented at PBIA." *Id.* at ¶3.
3. The County shall issue a Letter to Airmen setting forth the close-in departure. *Id.* at ¶4.
4. The County shall procure and install an Instrument Landing System or equivalent technology for Runway 27R at PBIA. *Id* at p. 11, ¶5.
5. The County shall use best efforts to obtain certification for the technology. *Id.* at ¶6.
6. The County shall ask the FAA to designate PBIA as a pilot project for using GPS in air traffic control. *Id.* at ¶7.
7. The County shall continue to support the fanning of Stage 2 aircraft until such time that the NCP Update is superseded by FAA regulation. *Id.* at ¶8.
8. The County will seek approval for its runway plan only if noise projections show that a particular noise contour will not increase as a result of the extension. *Id.* at ¶9.
9. The County will provide Trump and the Club on a quarterly basis for 5 years following the Settlement Agreement reports regarding noise levels. *Id.* at ¶10.A.

10. The County will provide a "snap shot" of flight paths three times a year for five years after the Settlement Agreement's effective date. *Id.* at ¶10B.

11. The County will provide future revisions of the Noise Exposure Maps. *Id.* at ¶10C.

By its plain terms, the Settlement Agreement limits the obligations of the County with respect to adherence to flight procedures to the 11 specific items set forth in Paragraph 10 of the Settlement Agreement. The Settlement Agreement does not include an open-ended obligation to always take all steps necessary "to encourage the greatest adherence possible [to flight procedures]" as alleged by Plaintiff. In fact, contrary to the allegations in Plaintiff's current pleading, both parties acknowledged in the Settlement Agreement that the County has always taken the position that "it has no authority or capability to enforce the flight procedures...and that adherence to and enforcement of said procedures is the legal obligation solely of the FAA and the airlines operating aircraft at PBIA." *Id.* at ¶10. By its express terms, therefore, the Settlement Agreement precludes the claim asserted here by Plaintiff.

The Amended Complaint does not allege that the County failed to do or refrain from doing any of the 11 specific obligations it undertook in Paragraph 10. Moreover, the general allegation that the County somehow failed "to encourage the greatest adherence possible [to flight procedures]" fails to state a claim because the Settlement Agreement does not, by its plain terms, impose such a duty. Thus, the Amended Complaint fails to state a cause of action regarding breach of contract on the part of the County. Accordingly, Count VI against the County should be dismissed.

For his part, Pelly, as an individual, promised nothing at all regarding flight track adherence by signing the Settlement Agreement. Rather, the only action required by Pelly under the Settlement Agreement is the execution of a release. *Id.* at p. 15, ¶15. That fact creates an additional and independent reason for dismissing Count VI with respect to Pelly. It is clear that

Pelly is only named in the Settlement Agreement because he was personally named in the prior lawsuit and needed to execute a release for the complete resolution of the Lawsuit. Plaintiff's spurious attempt to implead Pelly into the present case reflects that, contrary to Plaintiff's allegations regarding malicious intent on the part of Pelly and the County, it is Plaintiff and its owner, Donald Trump, who have maliciously engaged in a concerted effort over the past 29 years repeatedly to persecute a public official through harassing lawsuits and frivolous claims. The breach of contract claim made against Pelly in Count VI is a continuation of this shameful pattern and should be summarily dismissed as failing to state a cause of action on its face.

WHEREFORE, Defendants Palm Beach County and Bruce Pelly respectfully request that this Court enter an order dismissing the Amended Complaint, and to order other such relief as the Court deems appropriate.

Respectfully submitted, this 20th day of July, 2015.

/s/ Amy Taylor Petrick /s/

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Counsel for Defendant Palm Beach County, Florida
*Motions Pro Hac Vice pending

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via the E-Filing Portal to John B. Marion, IV, Sellars, Marion & Bachi, P.A., 811 North Olive Avenue, West Palm Beach, FL 33401, jmarion@smb-law.com, bblake@smb-law.com, this 20th day of July, 2015.

/s/ Amy Taylor Petrick /s/
Amy Taylor Petrick, Esq.
FBN: 0315590

3 F

ORDINANCE NO. 85-21

AN ORDINANCE AMENDING ORDINANCE NO. 70-1, AS AMENDED, BY DELETING RULE SUBSECTIONS VII(L)(4), (5), AND (6) FROM THE RULES AND REGULATIONS GOVERNING PALM BEACH INTERNATIONAL AIRPORT; BY ADDING A NEW RULE, TO BE NUMBERED VII(L)(4), REQUIRING COMPLIANCE WITH THE RUNWAY USE PROGRAM ESTABLISHED BY THE COUNTY AND THE FEDERAL AVIATION ADMINISTRATION; BY ADDING A NEW RULE, TO BE NUMBERED VII (L)(5), REQUIRING COMPLIANCE WITH CERTAIN NOISE-ABATEMENT TAKEOFF PROCEDURES; BY RENUMBERING CERTAIN OTHER RULES; BY PROVIDING FOR PERIODIC REVIEW OF THE NEW RULES; AND BY PROVIDING AN EFFECTIVE DATE.

AMENDED 78-1
75-20
84-14
85-20
85-34
85-35

WHEREAS, Palm Beach County is the proprietor of Palm Beach International Airport ("PBIA"), and

WHEREAS, complaints and litigation by residents of the communities around PBIA, regarding noise impacts of aircraft operating at PBIA, are a concern to the County, and

WHEREAS, the County's consultants and airport staff have conducted a thorough Noise Abatement and Mitigation Study, with extensive participation by citizens of the noise-affected communities and by representatives of the aviation industry, which study has recommended certain operational controls to lessen the impact of aircraft noise in the communities around PBIA, and

WHEREAS, the County's consultants, airport staff, and the Board of County Commissioners deem the controls imposed by this ordinance to be necessary to achieve the noise abatement goal established by the Development Order for PBIA, as established by Palm Beach County Resolution No. R-82-199, and, together with the other measures recommended by the Noise Abatement and Mitigation Study, to be the most efficient means of achieving that goal with the least incidental impact on commerce, and

EXHIBIT
tabbies
A

WHEREAS, the Noise Abatement and Mitigation Study recommended a runway use program, which program has been approved and implemented by the Federal Aviation Administration, and

WHEREAS, the Noise Abatement and Mitigation Study recommended continued use of the F.A.A./A.T.A. noise-abatement departure profile, and

WHEREAS, the Board of County Commissioners finds this ordinance to be in the best interests of the citizens of Palm Beach County,

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA:

Section 1. Section VII(L) of the Rules and Regulations Governing PBIA, as previously enacted by Ordinance 70-1, as amended, is hereby amended by deleting therefrom the rule subsection numbered 4, dealing with flight tracks of jet, turbine, and heavy piston aircraft after takeoff, and by substituting in its place the following new rule subsection, also to be numbered 4:

"4. Runway use program. Operators of all airplanes landing or taking off at PBIA shall, to the maximum extent possible consistent with safe operations, comply with the County's Runway Use Program, as developed pursuant to F.A.A. Order No. 8400.9 and previously approved by the Board of County Commissioners and by the Federal Aviation Administration, by complying with all instructions received from Air Traffic Control tower personnel. Airplane operators may obtain copies of the Runway Use Program from the Office of the Noise Abatement Officer, Department of Airports."

Section 2. Section VII(L) of the Rules and Regulations Governing PBIA, as previously enacted by Ordinance 70-1, as amended, is hereby further amended by deleting

therefrom the rule subsection numbered 5, dealing with flight over populated areas, and by substituting in its place the following new rule subsection, also to be numbered 5:

"5. Noise-abatement takeoff procedures. Operators of all large aircraft and turbine-powered aircraft taking off from PBIA shall, to the maximum extent possible consistent with safe operations, utilize the F.A.A./A.T.A. noise-abatement departure profile. Operators of such aircraft may obtain copies of the current profile from the Office of the Noise Abatement Officer, Department of Airports. For purposes of this Rule, the term "large" and "turbine-powered" aircraft shall have the same meanings as those applied in Title 14, Part 91, Code of Federal Regulations."

Section 3. Section VII(L) of the Rules and Regulations Governing PBIA, as previously enacted by Ordinance 70-1, as amended, is hereby further amended by deleting therefrom the rule subsection numbered 6, dealing with climb on takeoff and approach on landing, and by renumbering the rule subsections numbered 7 and 8 as rule subsections 6 and 7, respectively.

Section 4. Not later than July 1, 1986, and each succeeding July 1 thereafter, the Director shall submit to the Board of County Commissioners a report stating the recommendations, if any, of the Department of Airports, for revising the Rules enacted by this Ordinance to reflect changes in circumstances during the preceding year. The Director shall also notify the Board of County Commissioners of any amendment to the Code of Federal Regulations which affects the subject

matter of such Rules, or of any amendment to the County's F.A.R. Part 150 Noise Compatibility Program, as soon as practical after such amendment.

Section 5. If any portion of this ordinance shall be adjudicated invalid for any reason, it is the intent of the Board of County Commissioners that the remaining portions of this Ordinance shall nevertheless be given effect.

Section 6. This ordinance shall take effect on August 1, 1985.

APPROVED AND ADOPTED by the Board of County Commissioners of Palm Beach County, Florida, on the 23rd day of July, 1985.

PALM BEACH COUNTY, FLORIDA,
BY ITS BOARD OF COUNTY
COMMISSIONERS

BY: _____
Chairman

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY

BY _____
County Attorney

Acknowledgement by the Department of State of the State of Florida, on this, the 1st day of August, 1985.

Acknowledgement from the Department of State received on the 5th day of August, 1985, at 3:53 P.M., and filed in the Office of the Clerk of the Board of County Commissioners of Palm Beach County, Florida.

Effective Date: August 1, 1985

ORDINANCE NO. 85-21

STATE OF FLORIDA, COUNTY OF PALM BEACH
I, SHARON R. BOCK, Clerk & Comptroller certify
this to be a true and correct copy of the original
filed in my office on JULY 23, 1985
dated at West Palm Beach, FL on 7-25-85
By: _____
Deputy Clerk