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.,

Plaintiff,

vs.

PALM BEACH COUNTY, FLORIDA, A POLITICAL SUBDIVISION UNDER THE LAWS OF THE STATE OF FLORIDA, AND BRUCE PELLY,

Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff, MAR-A-LAGO CLUB, L.L.C. ("Mar-a-Lago"), through counsel, hereby responds to Defendant's Motion to Dismiss its Amended Complaint as follows:

Plaintiff, Mar-a-Lago, has stated causes of action for nuisance, trespass, inverse condemnation, and breach of contract. The County is not operating the Airport in the usual, normal or customary manner, and instead substantially all of the flights depart and fly directly over Mar-a-Lago. These operations by the County cause the noise, pollutants and emissions from the planes to invade Mar-a-Lago. This is a nuisance, and a trespass. There are also valid claims for inverse condemnation and breach of contract stated.[1]

[1] While it is true that a similar action was previously filed, that case was voluntarily dismissed without prejudice. As such, the fact that there was a prior action is not relevant to any issue presented here.

PLAINTIFF HAS STATED A CLAIM FOR PUBLIC NUISANCE

The first argument made by the County regarding the nuisance claim is that if the Airport is operating in the usual, normal and customary manner, it's operations cannot be considered a nuisance. However, it is clearly alleged in the complaint that the County is not operating the airport in the usual, normal, or customary manner. As it is hornbook law that these allegations must be taken as true, it is clear that this argument has no validity and a claim for nuisance is stated.

In the Complaint, it is alleged that:

> 31. The normal and customary procedure for departures at PBIA is to have the airplanes depart using routes north of Mar-a-Lago. This is the usual, customary and longstanding procedure in controlling flights departing from PBIA.
>
> 32. However, the County, through its Director of Airports, Bruce Pelly, has directed a change to this normal and customary procedure such that outgoing flights now fly directly over Mar-A-Lago.
>
> 33. In doing so, the Airport and the County are not operating the airport in the usual, normal or customary manner for departing planes. Bruce Pelly applies pressure to the FAA controllers, who are acting as the County's agents and/or employees, to ensure this occurs.
>
> 34. The County has therefore concentrated the noise, vibration and pollution effects of aircraft departures, and arrivals, over the great Mar-a-Lago landmark.

Complaint at 31-34. It is further alleged in the Complaint that the County does not analyze seasonal variations in noise level, and that doing so would be the usual, normal and customary way to operate. See Complaint at 36-38. The Complaint clearly alleges that the operation of the Airport is not usual, normal or customary.

In an attempt to avoid responsibility, the Defendant repeatedly blames the air traffic controllers in an effort to persuade the Court that it is not responsible for the operation of its Airport. The County states that if the aircraft and the pilots are following the controllers instructions, the

Airport is operating in the ordinary and customary manner as a matter of law when it has substantially all of the flights depart over Mar-a-Lago..

The County erroneously argues that *St. Lucie County v. Town of St. Lucie*, 603 So.2d 1289 (Fla. 4th DCA 1992) supports this argument. However, *St. Lucie County* is not on point. First, and most fundamentally, this discussion of normal and customary usage of an airport began when airports were first becoming popular, and many folks were bringing claims against the airports just for their regular operations per se. Under the spirit of the rule, it was not intended to cover situations such as this in which substantially all of the flights are intentionally sent over one area. Stated another way, this case does not involve an issue of whether an airport per se is a nuisance.

Second, the *St. Lucie County* court dealt with a plaintiff seeking an injunction against future expansion of a county airport. *Id.* at 1290. The appellate court overturned the injunction because the proposed expansion was years, if not decades, into the future. *Id.* at 1293. As such, the *St. Lucie County* case is inapposite to the current case. Further, there was no allegation in *St. Lucie County* that the activities of the airport were not usual, normal and customary. *Id.*[2]

The County also cites *Corbett v. Eastern Air Lines, Inc.*, 166 So.2d 196 (Fla. 1st DCA 1964) in support of this argument. However, that case does not support the County's position. In *Corbett*, the court dealt with a claim of private nuisance against four airlines. *Id.* at 201. The *Corbett* court stated that "we are not here passing upon the question whether the proposed amended complaint states a cause of action against the City of Jacksonville. As we view the posture of this appeal, we consider that such a question is not before us for adjudication." *Id.* Further, the court stated that

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[2] The *St. Lucie County* court also stated that the "plaintiffs are not left without a remedy under federal and Florida law. They have a 'takings' claim for the diminution or destruction in value of their property caused by airport operations." *Id.* at 1294. So even normal airport operations can lead to a claim for inverse condemnation.

their holding "does not necessarily mean, of course, that such adjoining landowners may not have a cause of action against the operator of the airport." *Id.* at 203.

The *Corbett* court also cited to *Brooks v. Patterson*, 31 So.2d 472 (1947), which states that "so long as the defendants operate the airport, in the usual, normal and customary manner for operation of airports of this character, it cannot be declared a nuisance." *Id.* at 474. The allegation in this case is that the Defendant has not operated the airport in the usual, normal and customary manner and therefore a claim for public nuisance is stated.

The County also argues that the allegations of Pelly's influence are vague, and cites *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1039 (Fla. 2001) in support. First, the allegations in the Complaint, as discussed *supra*, are very specific. Second, *Flo-Sun, Inc.* is not helpful to the County here. In *Flo-Sun*, the court dealt with a nuisance claim regarding several companies that farmed sugar cane and produced sugar. The allegation was that the production of sugar was done "in a manner that annoys the community and injures the health of the community," including the plaintiffs. *Id.* at 1032. There was further allegation that the government had aided and abetted in the nuisance by failing to enforce existing laws and regulations and providing economic subsidies. *Id.* The court held that these facts were not sufficient to bring the plaintiffs within the egregious and devastating agency errors exception to the primary jurisdiction rule, *and so the case was suspended for review by administrative agency*. *Id.* at 1039. As such, *Flo-Sun, Inc.* is inapplicable to this case.

Further, in the present case, the specific allegation in the Amended Complaint is that the County, through Bruce Pelly, used its influence to have the path of the outbound flights altered so that they go over Mar-a-Lago. This is not some grand conspiracy that is being generally alleged, but rather a specific action by a specific man. As to the allegations in the Amended Complaint, they

must be taken as true for purposes of this Motion. As such, Plaintiff has clearly and specifically stated a claim for public nuisance.

The second argument made by the County regarding Plaintiff's claim for public nuisance is that Plaintiff does not have standing to bring this claim as it has not alleged a special injury different from the general public. This argument is unwarranted as such an injury has been alleged in the Complaint. Specifically, Plaintiff has alleged the following:

> 43. Mar-a-Lago, which was built nearly a century ago in a Mediterranean style construction before the advent of jet aircraft and before the Airport even existed, consists of unique building materials, including porous Dorian stone, antique Spanish tiles, and antique Cuban roof tiles, which were not designed to withstand the corrosive effects of aircraft emissions, such as jet fuel fumes and fuel and oil residue, as well as the vibrations from large jet aircraft and their engines. The Mansion is particularly susceptible to the corrosive bombardment which it is now suffering as a result of the actions of the Defendant.
>
> 44. (a) Over time, aircraft engine fuel combustion bi-products, including hydrocarbons, produce sulfur dioxide (SO2) and nitrogen oxide (NOx), which oxidize in the air to form acid sulfate and acid nitrate. The resulting acid on the edges and other limestone surfaces has caused deterioration of the limestone largely comprising the Mansion.
> (b) Damage will continue because these acid sulfates and nitrates soak into the pores of the materials, including the Dorian limestone, the Cuban terracotta roofing tiles and the 15th century decorative Spanish tiles, and erode them.
> (c) Hydrocarbons are present on the exterior building and decorative materials of Mar-a-Lago. Aircraft flight patterns and the frequency of aircraft flights have been and continue to deposit these hydrocarbons on the structure. These deposits will ultimately become sulfuric and nitric acids, which will erode the surfaces of the structure.
> (d) Aircraft flying over and nearby Mar-a-Lago not only directly contribute to the visual, emotional and sentimental intrusion of the unique historic estate, but are also causing substantial destruction of the material of the structures.
>
> 45. Plaintiff, Mar-a-Lago, has suffered and continues to suffer damages from the actions of the County, including damages resulting from the noise, vibrations, fumes, pollution and other emissions from the aircraft approaching and departing the Airport

> in a single-file route over Mar-a-Lago. The noise and other emissions and pollutants threaten a unique architectural and historical landmark property of national significance.
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> ...
>
> 54. This damage includes, but is not limited to: damages to Mar-a-Lago's physical structure; depreciation in the value of Mar-a-Lago; loss of the use and enjoyment of Mar-a-Lago, and; expenses incurred in attempting to abate the nuisance, including repairs to Mar-a-Lago and associated expert fees.

Complaint at 43-45;54. These are clearly allegations of special injuries to Mar-a-Lago.

In *Town of Surfside v. County Line Land Co.*, 340 So. 2d 1287 (Fla. 3d DCA 1977), the town contended that the plaintiff lacked standing to bring a public nuisance action against a town-operated dump because it had not suffered a peculiar injury distinct from that of the public at large. The Third DCA held that the plaintiff had standing and stated "[t]he 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." *Id.* at 1289 (citing *Soap Corporation of America v. Reynolds*, 178 F.2d 503 (5th Cir. 1950); *City of Miami v. City of Coral Gables*, 233 So.2d 7 (Fla. 3d DCA 1970)). "There was sufficient competent evidence showing that as a result of the dump's operation, appellee's use and value of the subject property was being interfered with." *Id.* Thus, the court held there was standing because interference with private property is an injury not suffered by the general public. There is no case contrary to *Town of Surfside* in Florida. Further, because the standing argument is only applicable to public nuisance claims, the *Town of Surfside* court's rejection of the defendant's argument on these grounds demonstrates that private property owners affected by a public nuisance have standing to sue. Contrary to the County's assertion that this case did not specify whether it was dealing with a public or private nuisance, it states in the first sentence of the decision that "[t]he Town of Surfside appeals an order enjoining in [sic] from accepting at its dump, refuse from outside

corporations, municipalities or entities in this action to enjoin a public nuisance." *Id.* at 1288.

Mar-a-Lago falls squarely within the definition of a party with standing. It has alleged interference with the enjoyment and value of its property. Plaintiff Mar-a-Lago owns a unique parcel of historically significant, commercial land. The impacts to Plaintiff Mar-a-Lago are therefore different in kind than that of the general public.

The county's reliance on *Page v. Niagara Chemical Div. of Food Mach. & Chem. Corp.*, 68 So.2d 382 (Fla. 1953) is misplaced. In *Page*, the plaintiffs were not property owners seeking relief from a public nuisance as a result of the nuisance's interference with their enjoyment of and the value of their private property rights. Instead, they were workers (not property owners) who were employed in the nearby vicinity, and therefore were no different from the general public who were exposed to the noxious gases and chemicals which were being expelled into the air. *Id.* at 383-84.

The Defendant also cites to *Hub Theatres, Inc. v. Massachusetts Port Authority*, 346 N.E.2d 371 (Mass. 1976). This case involved Massachusetts tort law, and had nothing to do with Florida tort law. Further, this case simply held that the expansion of an airport in and of itself cannot be a nuisance under Massachusetts law. *Id.* at 156. The case also said that a claim for inverse condemnation ("a takings claim") was still available. *Id.*

Even if Mar-a-Lago was required to allege more than an interference with the enjoyment and value of private property rights, it has done so in the Complaint. Plaintiff Mar-a-Lago has alleged that it has suffered a "peculiar and unique injury to the architectural, geographic, cultural, aesthetic, and structural characteristics of Mar-a-Lago." The specific damages to the property as alleged in the Complaint are discussed in detail *supra*. These damages are not suffered by the public as a whole, and in any event the pleadings must be taken as true at this stage. Further, there is no other property

in South Florida, or the United States, like Mar-a-Lago, much less a similar property, of similar age, made of similar materials, in the Airport's flight path. As a National Historic Landmark, designated by the U.S. Congress, Mar-a-Lago's injuries as a result of the nuisance are different in kind from the surrounding community.

Plaintiff Mar-a-Lago has adequately established its standing as a property owner which has suffered interference with the enjoyment and value of its property, and a unique injury as a result of the nuisance alleged. Further, the harm resulting to Mar-a-Lago does not merely affect its property value, but its ability to create revenue. *See Harbor Beach Surf Club, Inc. v. Water Taxi of Ft. Lauderdale, Inc.*, 711 So.2d 1230 (Fla. 4th DCA 1998) (water taxi company established a special injury in nuisance claim against a beach club for footbridge over lake because footbridge affected taxi company differently than the general public and resulted in loss of revenue).

PLAINTIFF HAS STATED A CLAIM FOR TRESPASS

To state a claim for trespass, the Plaintiff needs to allege that the County has injured its property without right or authority to do so. *See Guin v. City of Riviera Beach*, 388 So.2d 604,606 (Fla. 4th DCA 1980). Mar-a-Lago has clearly done so in the Complaint. Claims for trespass in the airport context are common. *See, e.g., Burton v. Sonoma International*, 464 So.2d 217, 217 (Fla. 4th DCA 1985) (affirming appellants' right to seek legal remedies, such as suits for trespass, in the event the future use of airport warrants such action); *Foster v. City of Gainesville*, 579 So. 2d 774, 776 (Fla. 1st DCA 1991) ("Thus, inverse condemnation may not afford complete relief to the 'noise-harried' property owners since the only recovery will be damages for diminution in market value. Possible alternative remedies that may supplement the amount of recovery are claims for nuisance, negligence, or trespass"); *Sarasota-Manatee Airport Auth. v. Alderman*, 238 So. 2d 678,

678 (Fla. 2d DCA 1970).

As the Amended Complaint plainly states, the claim for trespass is based upon the noise, vibrations, fumes, pollution and residue, which cause direct physical damage to Mar-a-Lago. As discussed above, the aircraft engine fuel bi-products dropped from low-flying aircraft, caused significant physical damage to Mar-a-Lago. The chemicals oxidize and form corrosive acids that physically eat away at the Mar-a-Lago structure. Plaintiff alleges that these pollutants are excessive, unreasonable, unwarranted and uninvited, and has properly alleged the invasion of Mar-a-Lago without right or authority.

The County argues that no claim for trespass can be stated if the aircraft operate as directed by FAA air traffic controllers. However, this argument is misplaced. While the federal government has exclusive jurisdiction over most navigable airspace, this does not preclude claims for trespass due to the resulting effects of such air traffic. *See Burton,* 464 So.2d at 217; *Foster*, 579 So. 2d at 776. The only case the County cited in supposed support of this argument is *Corbett,* 166 So. 2d 196 at 201. However, its reliance upon *Corbett* is inappropriate. In *Corbett*, the court dealt with a claim of private nuisance against four airlines. *Id.* The *Corbett* court stated that "we are not here passing upon the question of whether the proposed amended complaint states a cause of action against the City of Jacksonville. As we view the posture of this appeal, we consider that such a question is not before us for adjudication." *Id.* Further, the court stated that their holding "does not necessarily mean, of course, that such adjoining landowners may not have a cause of action against the operator of the airport." *Id.* at 203.

If it were true, as the County states on page 1 of its Motion, that the *Corbett* court held that "there is no trespass or private nuisance claim when aircraft operate as directed by air traffic

controllers," and that reasoning would bar a claim against the County in this case, the *Corbett* court would not have left open the claims against the owner of the airport in that matter.

The next argument made by the County regarding the trespass claim is that it cannot prevent the airplanes from going over Mar-a-Lago because the FAA controls flight patterns. Again, this argument misses the mark. As discussed in detail, *supra*, the County, through Bruce Pelly, has operated in such a manner as to influence the FAA flight controllers to change the customary flight paths so that substantially all of the flights go over Mar-a-Lago. In reality, the County does have the ability to control the flight paths, and it has exerted that control so that the flight paths are not done in the usual, normal or customary method. In any event, Mar-a-Lago's allegations must be taken as true at this stage of the case, and clearly, it has stated a claim for trespass in its Complaint.

THE CLAIMS FOR INJUNCTIVE RELIEF IN COUNT I (NUISANCE) AND COUNT III (TRESPASS) ARE NOT PREEMPTED BY FEDERAL LAW

The County contends that federal law preempts injunctive remedies relating to the operation of the Airport. The County is incorrect. The County bears the burden of proving federal preemption. *See Hernandez v. Coopervision, Inc.*, 691 So.2d 639, 641 (Fla. 2d DCA 1997). "The party claiming preemption bears the burden of proof and must establish that Congress has clearly and unmistakably manifested its intent to supersede state law." *Id.* The County has fallen far short of doing so, and this is not the appropriate time in the litigation to offer "proof."

Congress has expressly provided a role for airport owners in regulating airport noise. See Aviation Safety and Noise Abatement Act of 1979 ("ANSA") 49 U.S.C. 47501 et seq. (including provisions that make airport owners responsible for airport noise compatibility planning, including selection of noise abatement and mitigation measures); Airport Noise and Capacity Act of 1990

("ANCA"), 49 U.S.C. 4751 et seq. (specifying airport owners' role in setting and amending airport noise and access restrictions).

"While Congress has recognized the national responsibility for regulating interstate air commerce and federal control is intensive, aircraft operating at municipally-owned airports in Florida are also subject to municipal control. This was recognized by the Supreme Court of Florida in *Brooks v. Patterson*, 159 Fla. 263, 31 So.2d 472 (1947), in which that court held that the City of St. Petersburg was under an affirmative duty, in operating its public airport, to adopt and enforce rules and regulations governing users of the airport in such a manner that interference with neighboring property would be reasonably eliminated." *Corbett*, 166 So. 2d at 204.

The FAA has consistently recognized and encourages this role of municipalities and airport owners. See FAA Aviation Noise Abatement Policy 2000, 65 Fed. Reg. 42802 (July 14, 2000) (describing the roles and legal responsibilities of state and local governments, and airport proprietors, in regulating airport noise after ANCA). Since Congress has expressly provided a role for airport owners in regulating airport noise, there is no preemption. *See Santa Monica Airport Assoc. v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) ("Because Congressional intent not to preempt all regulation by municipal-proprietors is clear, the district court correctly concluded that these ordinances were not preempted."). Further, "[c]ourts applying this standard have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest." *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 806 (5th Cir. 2000).

Plaintiff does not dispute that the FAA must approve changes to flight plans. However, it is Plaintiff's allegation and contention that the customary FAA takeoff route has been changed by the actions of the County, and specifically Bruce Pelly. Therefore, Plaintiff seeks a change back to

something the FAA has already previously approved.

The goal of preemption is consistency, and seeking an injunction for the flights to take off in the usual, normal and customary way does not affect this goal. Dealing with noise issues vis-a-vis airports has always been an endeavor that was not preempted. "Congress repeatedly has declined to alter this cooperative scheme." *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977).

In *Casey v. Goulian*, 273 F. Supp. 2d 136, 137 (D. Mass. 2003), the plaintiffs brought a state law claim for trespass seeking an injunction against the use of a runway next to their property. The defendants in that case contended that the claims were preempted. *Id.* at 139-40. However, the court, following Seventh Circuit precedent, held that there was no complete preemption. *Id.* (citing *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 401-04 (7th Cir. 2001) (stating that the only areas in which there is complete federal preemption are federal labor law and federal pension law. The court in *Vorhees* was dealing with a plaintiff adjacent property owner who sued an airport for an injunction regarding take offs and landings. There the court stated that "[t]here is no such broad language in the Federal Aviation Act specifically prohibiting state and local governments from regulating airflight in any way whatsoever." *Id.* at 404.)

The County relies upon ANCA to support its preemption argument, but the County mischaracterizes that Act. Under ANCA, airport proprietors maintain primary responsibility for promulgating "noise and access restrictions," which must be reasonable, non-arbitrary, and non-discriminatory, and are subject to public and FAA comment. New noise and access restrictions on the operation of stage 3 aircraft require either FAA approval or agreement among all aircraft operators. 49 U.S.C. 47524(c). As the FAA stated in 2003 with respect to ANCA:

> The Act did not alter the fundamental relationship between an airport proprietor and the federal government regarding the regulation of aircraft noise. Instead, it provided a mechanism for an airport to use in proposing access restrictions which are still subject to the subjective limitations of the proprietary powers exception. Furthermore, there is nothing in the legislative history of ANCA which can be interpreted as superseding the long line of preemption cases which both parties have cited in their pleadings.

In re Compliance With Federal Obligations by the Naples Airport Authority, Naples, Florida, FAA Part 16 Initial Decision, June 30, 2003, FAA Docket No. 16-01-15.

Cases after ANCA recognize that airport proprietors retain the authority to enact reasonable noise regulations. *Nat'l Bus. Aviation Assoc. v. City of Naples Airport Auth.*, 162 F.Supp.2d 1343, 1352 (M.D. Fla. 2001); *SeaAir NY, Inc., v. City of New York*, 250 F.3d 183 (S.D.N.Y. 2001) (recognizing proprietor's exception after ANCA); *Clay Lacy Aviation v. City of Los Angeles*, 2001 WL 1941734, at *2 (C.D. Cal. July 27, 2001) ("Municipal airport proprietors may enact noise regulations ... [that are] reasonable, non-arbitrary, and non-discriminatory.").

By requiring FAA approval of a certain class of noise regulations, Congress limited the manner in which proprietors exercise their power, which is not the proper test of preemption. "[F]ederal preemption is a limitation on state power, not the manner in which that power is exercised." *Nat'l Bus. Aviation Assoc.*, 162 F. Supp.2d at 1352. Here, ANCA does not preempt proprietors from promulgating noise and access restrictions for FAA approval; or from promulgating noise and access restrictions to present to aircraft operators outside the FAA approval process; or from establishing noise regulations that do not constitute "noise or access restrictions" under 14 C.F.R. 161.5. There is simply no preemption.

Ten years after ANCA, on July 14, 2000, the FAA published its "Aviation Noise Abatement Policy 2000" See 65 Fed. Reg. 43802 (July 14, 2000). The policy describes at length the roles and

legal responsibilities of state and local governments, and airport proprietors, in regulating airport noise after ANCA. Examples of such descriptions are:

- "Noise relief continues to be a shared responsibility .... Airport proprietors, State and local governments, and citizens have the primary responsibility to address airport noise compatibility planning and local land use planning and zoning." *Id.* at 43803.

- "Where runway use, flight procedure, or air traffic changes are not necessary for operational reasons, but are proposed for noise abatement reasons, the FAA relies on airport proprietors to submit requests for such changes." *Id.*

- "Airport proprietors are the appropriate initiators of such noise abatement proposals because of the liability they bear for noise impacts in the airport environs." *Id.*

- "FAA does not initiate noise abatement procedural changes absent an airport proprietor's request...." *Id.*

- "The FAA will encourage airport proprietors, in consultation with airport users, local planning officials, and the interested public, to implement airport noise compatibility programs that will minimize aviation noise impacts, reduce existing noncompatible land uses around airports, and prevent new noncompatible uses. *Id.* at 43809.

- "Airport noise compatibility planning is the primary tool used by many airport proprietors and local officials to minimize aviation noise impacts in the vicinity of airports." *Id.*

- "The FAA is directed by law to approve airport noise compatibility programs that meet the specified criteria." *Id.*

- "State and local governments, including airport proprietors and planning agencies, are responsible for determining the acceptable and permissible land uses around airports and defining the relationship between specific properties and airport noise contours." *Id.* at 43810.

- "An airport owner's conduct is not preempted as an exercise of its proprietary powers when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate state objective in a manner that does not conflict with the provisions and policies of the aviation provisions of Title 49 of the Unites States Code." *Id.* at 43816.

- "Airport Proprietors are primarily responsible for planning and implementation action designed to reduce the effect of noise on residents of the surrounding area." *Id.* at 43818.

The policy also discusses proprietor responsibility for establishing noise buffers (43804, 43810) and defining noise sensitivity (43810); controlling what types of aircraft use its airports (43817); imposing curfews or other use restrictions (*Id.*); and subject to FAA approval, regulating runway use and flight paths. (*Id.*).

It is absolutely clear that noise abatement is a joint responsibility that has not been preempted. Defendant's ANCA argument is unsupported legal conclusion insufficient to support a motion to dismiss on an issue, i.e. preemption, for which Defendant bears the burden of proof.

The County owns and controls the Airport. The County's position, if accepted, would allow it to completely ignore its common-law obligations to its neighbors and the public, and simply blame the FAA. This is not the law. A claim for nuisance against an airport owner is a valid legal action. *See, e.g., Burton*, 464 So.2d at 217.

The FAA takes the position that it will "make every possible effort to maintain noise abatement procedures that have the community's support." FAA Noise Abatement Policy 2000, 65 Fed. Reg. No. 136 (July 14, 2000) at 43808. The FAA "does not initiate noise abatement procedural changes absent an airport proprietors' request." *Id.* at 43808. The FAA "relies on airport proprietors" as "the appropriate initiators of such noise abatement proposals because of the liability they bear for noise impacts in the airport environs." *Id.* at 43808. Thus, the FAA acknowledges that the County has a duty to minimize harm to others caused by the Airport, and has liability if it does not.

The County also erroneously argues that *St. Lucie County*, 603 So.2d 1289, supports federal preemption of the Plaintiffs' claims. In fact, the *St. Lucie County* court actually stated that state law tort claims against airports are not preempted by federal law. *Id.* at 1294. Further, the *St. Lucie*

County court discussed preemption in the context of an airport that was operating in the usual, normal and customary manner. *Id.* at 1292. In this case, the allegation is that the airport is not operating in the ususal, normal and customary manner, and therefore *St. Lucie County* is inapposite. *National Business Aviation Assoc. v. City of Naples Airport Authority*, 162 F.Supp.2d 1343 (M.D. Fla. 2001), cited by the County, actually supports *Plaintiff's* position. There the court stated that the airport authority was not preempted from making access restriction decisions in the context of banning Stage 2 aircraft. The court stated that "over the years, the Authority has implemented a variety of measures intended to reduce aircraft noise or its effects on Naples residents, including encouraging quieter operating procedures by jets landing at the airport...." *Id.* at 1346. The court concluded by stating the airport was not preempted by ANSA or ANCA and their related regulations from making the restriction decision it made. *Id.* at 1352-54.

The County also cites to *Adams v. County of Dade*, 335 So.2d 594 (Fla. 3d DCA 1976) in support of its argument that there is preemption. However, that case does not mention preemption. Instead, it states that the plaintiffs had a claim for inverse condemnation against the county, but that claim failed because they were not able to show a diminution of value of the property. *Id.* at 595-96.[3]

As has been clearly demonstrated, there is no federal preemption here, and Plaintiff Mar-a-Lago is free to proceed with these state law tort claims.

THE CLAIMS FOR INJUNCTIVE RELIEF DO NOT INVOLVE MATTERS OF GOVERNMENTAL DISCRETION

The County contends that it has no duty to avert a public nuisance or stop an ongoing

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[3] The County also cites *British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75 (2d Cir. 1977). In fact, that case states that "[i]ndeed, since the operator controls the location of the facility, acquires the property and air easements and is often able to assure compatible land use, he is liable for compensable takings by low-flying aircraft."

trespass, and therefore cannot be enjoined from its current actions, because it enjoys governmental discretion in matters of policy and planning.[4] The County is missing the point. No law excuses the County from claims of nuisance and trespass. *St. Lucie County* recognized that injunctive relief will often be appropriate where a nuisance is being caused by an airport.

The County also cites *Rumbough v. City of Tampa*, 403 So.2d 1139, 1141 (Fla. 2d DCA 1981), to support this argument. However, *Rumbough* also provides no basis to excuse the County's behavior. Judicial scrutiny of planning functions of government agencies differs from the judicial review of operational functions of government agencies. "Thus we must consider whether the activity characterized as a nuisance in this case was the result of a discretionary or planning decision rather than a decision on the operational level." *Id.* at 1141. The *Rumbough* court stated:

> As a tool to assist in questions of this type, the court in *Commercial Carrier Corp.* commended the utilization of the test outlined in *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965): "Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. **If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and**

[4] The County states that this argument is only addressed to Plaintiff's requests for injunctive relief.

circumstances involved.

Id. at 1019 (emphasis added).

The basic government policy, program and objective involved in planes leaving the airport is that we need planes for commercial travel, and we need airports for those planes to land and take off from. The issue involved in this case is by contrast operational in that involves the nuts and bolts of how to get the planes to take off or land. Also, the exact path they take is not essential in getting them on or off the ground. Further, the factors involved are beyond the technical aspects of how to get the planes on or off the ground, but are more about how to spread the noise around (or in this case concentrate it), and really has very little to do with the basic policy evaluation involved in the taking off or landing of aircraft.

Rumbough does not excuse trespass or the creation of a nuisance. If an alleged nuisance results from the operations of the government agency, such as the County's operation of the Airport, then a claim for nuisance is permissible. Courts do not intrude on policy decisions such as whether there should be an airport in Palm Beach County, or whether we should allow planes to take off from or land at that airport. But once that political decision has been made, courts must review the operation of such a decision. Otherwise, all actions by the County would be cloaked under the immunity of political discretion.

The County attaches, as an exhibit to its Motion, a County Ordinance purportedly addressing this issue. This is a classic red herring. It appears that this Ordinance is attached in an effort to show that this was a political decision because an Ordinance was passed. If that was the case, any time a nuisance or trespass occurred by a government entity, they could just pass an Ordinance and be deemed immune because of "political discretion." This is not the public policy of Florida as

espoused in the cases cited in the Motion and this Response.

Further, as stated in the cases cited by the County, you can only look to documents outside of the pleadings regarding subject matter jurisdiction if it is a matter of law. This is clearly a factual inquiry. Exhibit A is very vague, and does not mention any specifics. To accept this argument would amount to accepting the testimony of counsel. Also, it puts the cart before the horse in that it is the Plaintiff's allegation that Bruce Pelly was the decision maker, and the County simply accepted his recommendation. Even more importantly, it is not the fact of whether there was an ordinance put in place, but one must look to the factors discussed *supra* in *Rumbough*.

The County also cites to *Adams v. Dade County*, 335 So.2d 594 (Fla. 3d DCA 1976), for the proposition that a court cannot order an airport to conduct a noise study. First, the court specifically noted that the "only issue before the trial court was whether or not plaintiffs were entitled to the damages which they were seeking in this inverse condemnation action." *Id.* at 596. In dicta, the court notes that ordering the implementation of the MIA study regarding noise was a matter for legislative determination. *Id.* However, it does not discuss the specifics of the study, so we have no idea what was to be implemented. *Id.* As such, we need to look to the factors in *Rumbough* rather than speculate as to what the study in *Adams* may have entailed simply because it involved an airport.

As is clear from the argument and cases discussed above, this issue does not involve an area of political discretion. Therefore, the counts for injunctive relief should not be dismissed.

For the same reasons that there is no federal preemption and this is not a political issue, Plaintiff's claims are not barred by the doctrine of primary jurisdiction. As seen in the discussion of the factors in *Rumbough*, *supra*, this issue is not beyond the ordinary experience of judges and

juries. Moreover, there have been many cases cited herein involving airports and injunctions for nuisance and trespass that were not barred by the doctrine of primary jurisdiction. Further, as was discussed in the County's motion, apparently the FAA adopted the County's recommendations so it would not be necessary to defer to the FAA regarding these issues. Finally, the relief sought in Mar-a-Lago's Complaint is for the usual, normal and customary flight patterns that were once used to be used again. There is no need for administrative proceeds in this instance, and the claims for an injunction are not barred.

PLAINTIFF HAS STATED A CLAIM FOR INVERSE CONDEMNATION

To state a claim for inverse condemnation, Plaintiff must allege either "(1) a continuing physical invasion of the property," or "(2) a substantial ouster and deprivation of all beneficial use of the property." *Bakus v. Broward County*, 634 So.2d 641, 642 (Fla. 4th DCA 1993) (citing *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla. 1979); *Division of Admin., State Dept. of Transp. v. West Palm Beach Garden Club*, 352 So.2d 1177 (Fla. 4th DCA 1977)). The standard of "a continuing physical invasion of the property" was the standard espoused by the Florida Supreme Court in *Village of Tequesta*. In *Bakus*, the court specifically held that the plaintiffs were unable to show "a continuing physical invasion of their properties because [defendant] used the alternate runway only temporarily as the main runway." *Id.* at 643-44. It is clear that if the *Bakus* plaintiff had been able to prove a continuous use of the alternate runway, and that planes were continuing to fly over and invade the property, a claim for inverse condemnation would have been found. *Id.* It is clear that Mar-a-Lago has alleged a continuing physical invasion of the property, and has thus stated a claim for inverse condemnation.

The County cites *Fields v. Sarasota-Manatee Airport Auth.*, 512 So.2d 961 (Fla. 2d DCA

1987), in an effort to show a different standard - that the flights need to be in the super-adjacent airspace in order to state a claim for inverse condemnation. However, *Fields* does not stand for this proposition. The reference to super-adjacent airspace in *Fields* was when the court was quoting the trial court's order. Instead, the *Fields* court stated:

> While Florida courts have recognized that airport noise and/or intense vibration produced by low flying aircraft can result in inverse condemnation, the Florida courts have required that a property owner prove either (1) a continuing physical invasion of his property, *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla.1979), or (2) a substantial ouster and deprivation of all beneficial use of his property. *Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club*, 352 So.2d 1177 (Fla. 4th DCA 1977).

Id. at 965.

Further, *Bakus,* a Fourth DCA case that cited to *Village of Tequesta*, reiterated that the standard is that there needs to be a "continuing physical invasion of the property." In fact, the *Bakus* court cited to *Fields*. Also, *Sarasota-Manatee Airport v. Icard*, 567 So.2d 937 (Fla. 2d DCA 1990) cites to *Fields* and states that the standard is "continuing physical invasion of the property." As such, *Village of Tequesta*, *Bakus*, *Icard* and *Fields* all state the standard is "continuing physical invasion," and no case adopts or follows the supposed "standard" discussed in the County's Motion. A continuing physical invasion is exactly what Mar-a-Lago has pled in its Complaint.

The *St. Lucie County* court also stated that the "plaintiffs are not left without a remedy under federal and Florida law. 603 So.2d at 1294. "They have a 'takings' claim for the diminution or destruction in value of their property caused by airport operations." *Id at 1294.* So even normal airport operations can form the foundation of a claim for inverse condemnation. *Id.*

Additionally, contrary to Defendant's argument, Plaintiff has alleged substantial adverse impacts on the property. See discussion *supra*. These impacts clearly are enough to support a cause

of action for inverse condemnation under Florida law. Nevertheless, a significant decrease in the value of the property is all Plaintiff needs to allege in order to state a claim for inverse condemnation, and this has been done.

In *Foster v. City of Gainesville*, the plaintiffs testified, *inter alia*, that residue from the airplanes covers everything in their yards and prevents them from hanging their clothes out to dry, cooking out, and gardening, that vibrations from the flights have caused a cracked window and a fan to separate from the ceiling in one of the homes, and that there was a significant decrease in the value of the properties. 579 So.2d 774, 776 (Fla. 1st DCA 1991). The appellate court held that this was enough to establish a prima facie case for inverse condemnation. *Id.* at 777. These are the same types of allegations made in Mar-a-Lago's Complaint.

The *Foster* court stated that:

> The first case in Florida that recognized a cause of action for inverse condemnation based upon airport operations was *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. 1st DCA 1964). In *Schumann*, this court extensively discussed and relied on *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), *Griggs v. County of Allegheny*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962), *Martin v. Port of Seattle*, 64 Wash.2d 309, 391 P.2d 540 (Wash.1964), cert. denied, 379 U.S. 989, 85 S.Ct. 701, 13 L.Ed.2d 610 (1965), and *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (Or.1962), in reaching its decision to sustain a cause of action on this legal theory. **Those cases hold that the property owner must establish a diminution in value to the property caused by the noise and vibrations of low-flying aircraft to establish an entitlement to inverse condemnation.** *See Martin v. Port of Seattle*, 391 P.2d at 546-47.

Id. at 776-77 (emphasis added). In *Foster*, "the plaintiffs testified that the runway extension caused their property to decrease in value and illustrated the adverse impact the runway extension had on their property by testifying to the substantial problems created by the noise, vibrations and residue. This testimony was competent to prove that a decrease in the market value of the plaintiffs' property

had occurred due to the runway extension, and thus established a prima facie case for plaintiffs in this action." *Id.* at 777.[5] Mar-a-Lago has alleged in the Complaint that there was a decrease in the value of the property.

In *Hillsborough County Aviation Authority v. Benitez*, the plaintiffs testified, *inter alia*, that a residue was deposited upon clothes hanging out to dry, and that a vibration occurs, causing nails to loosen, and these things were caused by the flights overhead. 200 So.2d 194, 196-97 (Fla. 2d DCA 1967). Again, these are the same types of impacts alleged in Mar-a-Lago's Complaint.

In *Young v. Palm Beach County,* 443 So.2d 450, 451 (Fla. 4th DCA 1984), the appellate court overturned the dismissal of a complaint against the airport for inverse condemnation. The allegations in that complaint were that the flights made family and telephone conversations difficult, and watching television difficult. There was also diminished market value of their property. These allegations are even less severe than the physical destruction of Mar-a-Lago alleged in the instant Complaint. Based upon the well-established case law in Florida, it clear that Plaintiff has stated a claim for inverse condemnation.

PLAINTIFF HAS STATED A CLAIM FOR BREACH OF CONTRACT

In the Motion to Dismiss, the County and Mr. Pelly argue that there is nowhere in the Settlement Agreement (Ex. A to the Amended Complaint) does it state that the County or Mr. Pelly were required to achieve maximum adherence to the Preferred Flight Tracks. They rely only on *their*

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[5]In an article written by defense counsel, Eric Pilsk, Airport Noise Litigation in the 21st Century, 11 Issues Aviation L & Pol'y 371 (Spring 2012), he states that "overflight cases today often involve the impairment of a certain quality of life, but not the destruction of any use of property. Given that, it is not surprising that most reported decisions involving commercial service airports seem to deny recovery to homeowners in cases based solely on noise. It would appear that land use controls and noise mitigation programs, as well as advances in jet engine technology, have been effective in eliminating the very worst impacts of noise. ... **If one can identify a trend in the law in this area, it is this shift from protecting the current use and enjoyment of property from impacts that make the property all but uninhabitable to protecting the economic interests of property owners.**

interpretation of the Agreement. No case law is cited in support of their proposition.

In fact, the Settlement Agreement states that "[t]he intent of this Agreement is to attempt to achieve maximum adherence to the Preferred Flight Tracks." See Settlement Agreement at 21. The agreement also states that "the County, the Club and Trump wish to take measures to encourage the FAA to enforce as strict adherence to the Preferred Flight Tracks...." As discussed above, the Amended Complaint states that the County and Mr. Pelly have taken action to have the flights fly closer to Mar-a-Lago, and therefore are in violation of the Settlement Agreement. As such, the Plaintiff states a claim for breach of contract.

WHEREFORE, Plaintiff, Mar-a-Lago Club, LLC, respectfully requests that this Court deny the Motion to Dismiss, and grant it any other and further relief that the court deems just and appropriate in these circumstances.

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Amy T. Petrick, Esq., (Local Counsel for Defendant, Palm Beach County), (apetrick@pbcvgov.org and mjcullen@pbcgov.org), Palm Beach County Attorney's Office, 300 N. Olive Ave., Suite 359, West Palm Beach, FL 33401; W. Eric Pilsk, Esq. (Co-Counsel for Defendant, Palm Beach County), (epilsk@kaplankirsch.com), Kaplan, Kirsch & Rockwell, LLP, 1001 Connecticut Avenue, NW, Suite 800, Washington, DC 20036; and Peter J. Kirsch, Esq. (Co-Counsel for Defendant, Palm Beach County), (pkirsch@kaplankirsch.com), Kaplan, Kirsch & Rockwell, LLP, 1675 Broadway, Suite 2300, Denver, CO 80202 on this 18th day of August, 2015.

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