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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL MCKAY, et al.,
Plaintiffs,
v.
CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

Case Nos. 16-cv-03561 NC, 16-cv-03564
NC (CONSOLIDATED)

**ORDER DENYING MOTION TO
REMAND AND GRANTING
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION, WITHOUT LEAVE
TO AMEND**

Re: Dkt. Nos. 12, 24, 27, 61 (McKay);
12, 33, 35, 51, 85 (Schaefer)

NEIL SCHAEFER, et al.,
Plaintiffs,
v.
CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

On a winter day in 1903, on the remote Outer Banks of North Carolina, two
courageous brothers from Ohio launched the age of flight.¹

Yet the age of flight has not been without turbulence. In 1908, a broken propeller
caused Orville Wright to crash his airplane and kill a passenger.² One can imagine that the
Kitty Hawk neighbors were both excited and apprehensive when the first airplane soared
over head.

¹ DAVID MCCOLLOUGH, THE WRIGHT BROTHERS 105 (2015).

² *Id.* at 191-92.

1 In the ensuing century of discovery, airplanes have grown in speed, size, and
2 sound, now carrying passengers and cargo continuously among airports across the globe.

3 One intractable challenge of flight is presented in the two consolidated lawsuits
4 before the court. Plaintiffs are residents of Santa Cruz and San Mateo Counties who own
5 or occupy properties in the flight paths for airplanes descending to San Francisco
6 International Airport (SFO) and San Jose International Airport (SJC). Plaintiffs allege that
7 on March 5, 2015, airplanes began using new flight paths that go over their properties.
8 These new flight paths have caused plaintiffs harm by “dramatically increasing the amount
9 of noise, disturbance and pollution” to plaintiffs and their properties. Plaintiffs also claim
10 the new flight paths have increased the risk of midair collisions.

11 Plaintiffs ask the Court to prohibit further use of the new flight paths and to order
12 reversion to the old flight paths until impacts of the new flight paths can be studied. They
13 also seek an award of damages under California state law to remedy the harms described in
14 the complaints.

15 The Court is entirely sympathetic to the claims of the plaintiffs. The Court does not
16 doubt that the plaintiffs have suffered harm from the airplane “highway in the sky” that has
17 been directed over their homes.

18 The legal question presented is whether this Court has jurisdiction to grant the relief
19 the plaintiffs seek. The federal trial courts are courts of limited jurisdiction, which means
20 there are limits on the power of this Court. The Federal Aviation Administration (FAA)
21 approved and administers the flight paths that are the source of plaintiffs’ complaints.
22 Congress, in enacting 49 U.S.C. § 46110, gave the federal court of appeals exclusive
23 jurisdiction to “affirm, amend, modify, or set aside any part of” a final FAA order.
24 Consequently, this Court must dismiss plaintiffs’ complaints for lack of jurisdiction,
25 because the complaints ask this Court to modify the FAA’s approved flight paths. At
26 bottom, this Court lacks authority to grant plaintiffs the relief they seek.

27

28

1 **I. BACKGROUND**

2 The *McKay* plaintiffs, who are residents in Santa Cruz County, filed their case in
3 Santa Cruz County Superior Court on March 7, 2016. McKay Dkt. No. 1 at 12. On April
4 18, 2016, the *Schaefer* plaintiffs, who are residents of Santa Cruz and San Mateo Counties,
5 filed their case in the same court. Schaefer Dkt. No. 1 at 13. Plaintiffs in both cases want
6 the Court to order defendants to follow the law, grant monetary damages, and to enjoin
7 usage of the SERFR and BRIXX flight paths. McKay Dkt. No. 1 at 28-29; Schaefer Dkt.
8 No. 1 at 20-21. Plaintiffs allege that as of March 5, 2015, defendants began using the
9 SERFR and BRIXX flight paths, which fly over their properties. McKay Dkt. No. 1 at 23;
10 Schaefer Dkt. No. 1 at 16. These “flight paths” are actually “standard terminal arrival
11 routes,” or “STARs,” and are, put simply, air traffic control-coded arrival routes providing
12 procedures to aircraft before reaching an arrival airport. FEDERAL AVIATION
13 ADMINISTRATION, INSTRUMENT PROCEDURES HANDBOOK, Chapter 3.³ In the interest of
14 consistency, the Court will refer to STARs as “flight paths.”

15 Both BRIXX and SERFR are flight paths to SJC and SFO, respectively, proposed in
16 the FAA’s July 2014, Final Environmental Assessment for Northern California
17 Optimization of Airspace and Procedures in the Metroplex (NorCal OAPM).⁴ These
18 proposed flight paths were approved by the FAA in July 2014, in the Finding of No
19 Significant Impact and Record of Decision for the Northern California Optimization of the
20 Airspace and Procedures in the Metroplex (“FONSI/ROD”).⁵ Vice President of Mission
21 Support Services Elizabeth L. Ray signed the FONSI/ROD, which found that the NorCal
22 OAPM project would not have significant environmental impacts. *Id.* The FONSI/ROD
23 stated it was a final decision of the FAA Administrator. FONSI/ROD at 13.

24 According to plaintiffs, for 30 years before, defendants used the BIG SUR flight path.

25 _____
26 ³ Available at [https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/
instrument_procedures_handbook/media/Chapter_3.pdf](https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/instrument_procedures_handbook/media/Chapter_3.pdf).

27 ⁴ Available at [http://www.metroplexenvironmental.com/docs/norcal_metroplex/NorCal
OAPM_FEA_Complete.pdf](http://www.metroplexenvironmental.com/docs/norcal_metroplex/NorCal_OAPM_FEA_Complete.pdf).

28 ⁵ Available at [http://www.metroplexenvironmental.com/docs/norcal
metroplex/NorCal_OAPM_FONSI-ROD.pdf](http://www.metroplexenvironmental.com/docs/norcal_metroplex/NorCal_OAPM_FONSI-ROD.pdf).

1 McKay Dkt. No. 1 at 23; Schaefer Dkt. No. 1 at 16. The BIG SUR path allegedly caused
2 minimal noise complaints, but since SERFR began to be used, “there have been more than
3 one hundred fifty thousand noise complaints from Santa Cruz County filed with SFO
4 concerning” its use. McKay Dkt. No. 1 at 23; Schaefer Dkt. No. 1 at 16. Plaintiffs allege:

5 13. Upon information and belief, many aircraft using the new
6 flight paths routinely fly at altitudes substantially below the
7 designated floor for Class B airspace, fly at substantially higher
8 speeds than allowed by FAA regulations and local noise
9 regulations, and thus often employ loud “speed brakes” as they
10 fly over Plaintiffs’ properties. ... [A]irlines could mitigate the
11 nuisance by flying less or not at all during times that people are
12 likely to be sleeping (e.g. 10pm to 7am), but they choose to not
13 do so. No law or regulation forces them to fly during those
14 times. In fact, no law or regulation forces them to fly at all.

15 14. Since the implementation of the new flight paths, Plaintiffs
16 have experienced a dramatic and unreasonable increase in the
17 amount of aircraft noise, disturbance and pollution in their
18 community - in addition to an unreasonable increase in risk of
19 midair collision due to Class B airspace and airspeed violations
20 over their properties and/or community.

21
22 16. As a result, Plaintiffs’ have been damaged from, without
23 limitation, the increased noise, disturbance, pollution and risk
24 of midair collision as aforesaid.

25 McKay Dkt. No. 1 at 23-24; Schaefer Dkt. No. 1 at 16-17.

26 The plaintiffs allege claims for continuing nuisance, negligence, negligence per se,
27 willful misconduct, and unfair competition against various airlines,⁶ the City and County
28 of San Francisco, and the City of San Jose. McKay Dkt. No. 1 at 12; Schaefer Dkt. No. 1
at 13. Both cases share the same Prayer for Relief, in which plaintiffs seek:

1. An order requiring Defendants’ immediate compliance with
air safety and noise regulations as to altitude and airspeed on
the SERFR and BRIXX flight paths;

⁶ These airlines are United Airlines, Inc., Southwest Airlines Co., Virgin America Inc.,
American Airlines, Inc., Delta Air Lines, Inc., Korean Airlines Co. Ltd., Alaska Airlines,
Inc., Jetblue Airways Corp., Asiana Airlines, Inc., China Airlines, All Nippon Airways
Co., Ltd., and Nippon Cargo Airlines Co., Ltd. Schaefer Dkt. No. 1; McKay Dkt. No. 1
(naming United, Southwest, Virgin America, American, and Delta Airlines as defendants).
Compañía Panameña de Aviación, S.A. and United Cargo Airlines, Inc. were previously
also defendants, but were dismissed. Schaefer Dkt. No. 66.

1 2. An order prohibiting further use of the SERFR and BRIXX
2 flight paths, and reversion to use of the BIG SUR flight path, at
3 least until such time as impacts from the new flight paths, upon
4 Plaintiffs and their communities, are appropriately studied and
5 such impacts reasonably redressed by Defendants;

6 3. An award of monetary damages to Plaintiffs, compensating
7 them for the various harms described above.

8 4. An award of attorneys' fees and costs to Plaintiffs; and,

9 5. Such other and further relief as the court may find
10 appropriate.

11 McKay Dkt. No. 1 at 28-29; Schaefer Dkt. No. 1 at 20-21.

12 Airline defendants removed *McKay* and *Schaefer* from Santa Cruz County Superior
13 Court on June 24, 2016, arguing the complaints raised a federal question, making federal
14 subject matter jurisdiction over these cases appropriate. McKay & Schaefer Dkt. No. 1.
15 All parties in both cases consented to the jurisdiction of a magistrate judge. McKay Dkt.
16 Nos. 4, 16, 18, 26; Schaefer Dkt. Nos. 4, 16, 18, 24, 36, 56, 78. Plaintiffs move to remand.
17 McKay Dkt. No. 61; Schaefer Dkt. No. 85. Defendant Airlines, City and County of San
18 Francisco, and City of San Jose oppose remand, and each filed motions to dismiss the
19 complaints in both cases. McKay Dkt. Nos. 12, 24, 27; Schaefer Dkt. Nos. 12, 33, 35,⁷ 51.
20 At the October 12, 2016 hearing, the Court granted the motion to consolidate these cases.
21 October 12, 2016 Hearing Audio; Dkt. No. 50.

22 **II. DISCUSSION**

23 **A. Removal of *McKay* and *Schaefer* Was Proper Because The Complaints 24 Implicate Significant Federal Issues.**

25 Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins.*
26 *Co. of Am.*, 511 U.S. 375, 377 (1994). Federal jurisdiction lies where a plaintiff raises a
27 federal question on the face of the complaint. 28 U.S.C. § 1331. A defendant may remove
28 a case originally filed in state court to federal district court if the case could originally have
29 been brought in federal court (i.e., if the complaint raises a federal question). 28 U.S.C.

⁷ Defendants China Airlines, Ltd. and Asiana Airlines, Inc. were only sued in *Schaefer*, 16-
cv-03564, not *McKay*, 16-cv-03561.

1 § 1441(a). Here, defendants⁸ removed both cases under § 1441(a) because this court
2 would have had original subject matter jurisdiction, as plaintiffs raise “state law claims in
3 which significant, disputed federal issues are embedded.” Dkt. No. 1 at 3. These issues
4 include aviation safety, management of airspace, and control over aircraft noise. *Id.*
5 Plaintiffs argue remand is proper because no federal issue existed on the face of the
6 complaint, the claims were not “completely preempted,” and defendants could still be sued
7 for state law claims even if they complied with FAA regulations. Dkt. No. 61 at 4-7.

8 “[I]n certain cases federal-question jurisdiction will lie over state-law claims that
9 implicate significant federal issues.” *Grable & Sons Metal Prod., Inc. v. Darue Eng’g &*
10 *Mfg.*, 545 U.S. 308, 312 (2005) (citing *Hopkins v. Walker*, 244 U.S. 486, 490-91 (1917)).
11 Having federal jurisdiction lie over such issues “captures the commonsense notion that a
12 federal court ought to be able to hear claims recognized under state law that nonetheless
13 turn on substantial questions of federal law,” to promote the uniformity a federal forum
14 offers. *Id.* *Grable* provides that removal of a case pleading only state law claims is proper
15 if (1) the “state-law claim necessarily raise[s] a stated federal issue;” (2) if that issue is
16 “actually disputed;” (3) “substantial;” and (4) if that issue is one “which a federal forum
17 may entertain without disturbing any congressionally approved balance of federal and state
18 judicial responsibilities.” *Id.* at 314.

19 Yet being required to interpret federal law is not enough to raise a substantial
20 federal issue. *Victoria v. Metro. Life Ins.*, No. 09-cv-04179 CRB, 2010 WL 583946, at *1
21 (N.D. Cal. Feb. 16, 2010) (citing Civil Procedure Before Trial (Rutter Group) at 2:108).
22 For purposes of *Grable*, a federal issue is one that involves a dispute regarding “the
23 validity, construction or effect of federal law.” *Grable*, 545 U.S. at 313 (quoting *Shulthis*
24 *v. McDougal*, 225 U.S. 561, 569 (1912)) (internal brackets omitted).

25 _____
26 ⁸ For the remainder of this order, the Court will refer to the documents filed before it in
27 *McKay*, 16-cv-03561, unless the documents in *Schaefer*, 16-cv-03564, differ. The Court
28 notes that many identical documents were filed by the parties in *McKay* and *Schaefer*.
Plaintiffs’ attorney is the same in both cases, and there is overlap in the attorneys for
defendants in both cases. Further, the Court will refer to the *McKay* and *Schaefer*
plaintiffs collectively as “plaintiffs.”

1 Following *Grable*, the Supreme Court held that an insurance reimbursement claim
 2 did not raise a federal issue because it was not dispositive of the case, and would only
 3 govern that specific case. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S.
 4 677, 700-01 (2006). The Court formulated a test: a federal question exists if resolution of
 5 that question would both dispose of the case, and be controlling in numerous other cases.
 6 *See id.* at 700. No substantial federal issue will be found where a claim is “fact-bound and
 7 situation-specific.” *Id.* *Ilczyzyn v. Sw. Airlines Co.* illustrates an application of
 8 *McVeigh*’s test as to whether a federal question exists. No. 15-cv-2768 EMC, 2015 WL
 9 5157372 (N.D. Cal. Sept. 1, 2015). There, the court found no substantial federal issue
 10 raised in a wrongful death suit alleging failure to respond to a medical emergency.
 11 *Ilczyzyn*, 2015 WL 5157372, at *2. This is because the court found: “[t]hat the complaint
 12 makes reference to Defendants’ improperly treating the situation as a security problem
 13 (thus potentially implicating TSA rules and regulations) does not make the claim
 14 dependent on a federal issue. Plaintiffs’ claim for wrongful death can stand independently
 15 without implicating TSA rules and regulations.” *Id.* (additionally noting that the federal
 16 regulations cited by the defendants would form a defense for defendant, not part of
 17 plaintiff’s claims).

18 **1. Plaintiffs’ Claims Necessarily Raise a Federal Issue.**

19 In the removal papers, airline defendants argue that plaintiffs raise claims in which
 20 “significant, disputed federal issues are embedded.” Dkt. No. 1 at 3. According to airline
 21 defendants, these issues include aviation safety, management of national navigable
 22 airspace, and control over aircraft noise in that airspace. *Id.* The Court does not agree
 23 with airline defendants’ argument. However, in their opposition to the motion to remand,
 24 these same defendants point out that “the remedies plaintiffs seek require nothing short of
 25 a reassessment, reevaluation and revamping of the NorCal OAPM order.” Dkt. No. 71 at
 26 4. San Francisco also argues plaintiffs’ claims are “inescapably intertwined” with a
 27 collateral attack on an FAA order. Dkt. No. 72 at 7. The Court does agree with these
 28 assertions.

1 A federal issue is raised on the face of the complaint. Plaintiffs complain that the
2 use of the flights paths interferes with their “use and enjoyment of their properties,” and
3 pray for enjoinder of the flight paths’ use. Dkt. No. 1 at 25, 28-29. A request to enjoin
4 the use of the flight paths after the FAA’s approval is tantamount to asking the Court to
5 second guess the validity of the FAA’s decision. The Court may not do so. The FAA “has
6 exclusive sovereignty of airspace of the United States,” and the Administrator has the duty
7 to “prescribe air traffic regulations on the flight of aircraft.” 49 U.S.C. § 40103(a), (b)(2).
8 Here, Vice President of Mission Support Services Ray signed the FONSI/ROD, which
9 found that the NorCal OAPM project—which approved the BRIXX and SERFR flight
10 paths—would not have significant environmental impacts. As to judicial review of that
11 decision, the document states:

12 This FONSI/ROD constitutes a final order of the FAA
13 Administrator and is subject to exclusive judicial review under
14 49 U.S.C. § 46110 by the U.S. Circuit Court of Appeals for the
15 District of Columbia or the U.S. Circuit Court of Appeals for
16 the circuit in which the person contesting the decision resides
17 or has its principal place of business. Any party having
substantial interest in this order may apply for review of the
decision by filing a petition for review in the appropriate U.S.
Court of Appeals no later than 60 days after the order is issued
in accordance with the provisions of 49 U.S.C. § 46110.

18 Therefore, because the FONSI/ROD was a final decision of the FAA Administrator, a
19 collateral challenge to the FONSI/ROD constitutes a challenge to the FAA’s rulemaking
20 under 49 U.S.C. § 40103(b)(2). Therefore, to entertain plaintiffs’ request that the Court
21 enjoin the usage of BRIXX and SERFR pending a review to plaintiffs’ own satisfaction—
22 after an already extensive review by the agency—challenges the validity of the FAA’s
23 actions and its observance of its statutory mandate. This Court may not entertain such a
24 challenge under *Grable*.

25 **2. The Federal Issue is Actually Disputed.**

26 The Court finds that the authorization of BRIXX and SERFR is the but-for cause of
27 this litigation. Plaintiffs’ Prayer for Relief and allegations in the complaints make evident
28 that the validity of approving the flight paths is actually in dispute. *Grable*, 545 U.S. at

1 314.

2 **3. The Federal Issue is Substantial.**

3 For the federal issue to be substantial, the Court must look beyond its importance to
4 the parties in the case before it, and look “instead to the importance of the issue to the
5 federal system as a whole.” *Gunn v. Minton*, 133 S. Ct. 1059, 1066 (2013). The federal
6 issue is substantial because plaintiffs’ state law claims, if granted the relief requested,
7 would create a means for litigants to avoid the jurisdiction of the federal circuit courts
8 under 49 U.S.C. § 46110 by collaterally attacking a final decision of the FAA in the
9 district courts.

10 **4. Subject to 49 U.S.C. § 46110, These Cases May Be Removed Without**
11 **Disturbing Any Congressionally Approved Balance of Federal and**
State Judicial Responsibilities.

12 Even if an issue meets the first three elements of *Grable*, “removal is subject to a
13 ‘possible veto’ where exercising federal jurisdiction is not ‘consistent with congressional
14 judgment about the sound division of labor between state and federal courts governing the
15 application of § 1331.’” *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 675 (9th Cir. 2012)
16 (quoting *Grable*, 545 U.S. at 313). To determine the boundaries of § 1331, a court must
17 make “sensitive judgments about congressional intent, judicial power, and the federal
18 system.” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986); *see also Bank*
19 *of Am. Corp.*, 672 F.3d at 675-76. Lastly, removal must “serve an overriding federal
20 interest.” *Bank of Am. Corp.*, 672 F.3d at 676 (internal citations, quotation marks, and
21 brackets omitted).

22 As already noted, the removal of this case is based on plaintiffs’ collateral challenge
23 to the final decision of the FAA to, among other things, approve BRIXX and SERFR.
24 Plaintiffs’ arguments suggesting the defendants “need not use the flight paths at all,” and if
25 they do must provide the “unreasonably and adversely affected” plaintiffs with “just
26 compensation” underscores this point. Dkt. No. 73 at 4. Plaintiffs’ alternative suggestion
27 that if the flight paths continued to be used, defendants should “adopt measures” to
28 mitigate the damages to plaintiffs likewise make clear these lawsuits challenge BRIXX and

1 SERFR as approved by the FAA. *Id.* The FAA already authorized the use of the flight
2 paths, and demanding “just compensation” for their usage, compensation for past harms, or
3 asking the FAA to adopt additional measure to mitigate any damages to plaintiffs *does*
4 challenge the propriety FAA’s rulemaking and final decision. *Id.*; Dkt. No. 1 at 29.

5 Retaining this case in federal court instead of remanding would not disturb the
6 balance of power between the federal government and the states. Indeed, retaining it
7 would reinforce the proper division between state and federal regulation of air flight, and
8 the procedure for bringing grievances before a federal agency. If the Court were to remand
9 this case to state court, that court would not merely be interpreting and applying federal
10 law, it would potentially be examining the validity of federal regulations and a final
11 agency decision.

12 **5. Plaintiffs’ Other Arguments Against Removal Are Unpersuasive.**

13 In support of their motion to remand, plaintiffs cite to 49 U.S.C.App. § 1506, now
14 49 U.S.C. § 40120(c), to argue that even if defendants are in compliance with the FAA’s
15 regulations, they are still liable to plaintiffs for damages. Dkt. No. 61 at 7-8. Section
16 40120(c), the FAA’s “savings clause,” states: “A remedy under this part is in addition to
17 any other remedies provided by law.” The problem with this argument is that plaintiffs’
18 claims do not “seek to use a state-law remedy for a breach of a federally prescribed
19 standard of behavior.” *Nat’l Fed’n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 731
20 (9th Cir. 2016) (citing *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1007 (9th Cir.
21 2013)). In such a circumstance, the savings clause *would* apply. *Id.* Instead, plaintiffs
22 seek to use state law claims and remedies to challenge the final decision of the FAA. As a
23 result, § 40120 is inapposite here.

24 Lastly, plaintiffs repeatedly cite to *Bearse v. Port of Seattle*, to support the motion
25 to remand. No. 09-cv-0957 RSL, 2009 WL 3066675 (W.D. Wash. Sept. 22, 2009); Dkt.
26 No. 61 at 4-5. In *Bearse*, a group of homeowners sued the Port of Seattle, contending that
27 the addition of a third runway at the Sea-Tac Airport diminished their properties values,
28 entitling them to damages and an injunction. *Bearse*, 2009 WL 3066675, at *1. There, the
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1 court remanded the case to state court, finding that the plaintiffs’ claims were neither
2 completely preempted,” nor did they arise under federal law. *Id.* at *4. *Bearse* is
3 unpersuasive for three reasons. First, for purposes of this case, that court’s examination of
4 complete preemption is irrelevant. Defendants removed this case from state court based on
5 *Grable*, not on the grounds of complete preemption, which the Court in *Bearse* properly
6 found did not exist for cases arising from the Federal Aviation Act, Noise Control Act of
7 1972, or the Airline Deregulation Act of 1978. *Id.* at *3-*4. Second, *Bearse* does not
8 influence the Court’s application of the *Grable* framework to this case because that
9 opinion unduly narrowed *Grable*’s holding without first engaging in the inquiry to
10 determine if a substantial federal issue was raised. *Id.* at *4. Lastly, the facts in this case
11 are easily distinguished from those in *Bearse*, where homeowners challenged the airport’s
12 addition of a runway to the airport and flights above their homes. *Id.* at *1. Here, the
13 origin of flights cannot be traced to the municipal defendants; rather, the culprit of
14 plaintiffs’ alleged harms is the FAA.

15 Accordingly, because plaintiffs seek judicial review of a substantial and actually
16 disputed federal issue that does not disturb any Congressionally-approved balance of
17 power between federal and state judicial responsibilities, the Court finds removal of the
18 cases to federal district court was proper. *Grable*, 545 U.S. at 314. The motion to remand
19 is DENIED.

20 **B. The Ninth Circuit or D.C. Circuit Are The Only Courts That May Hear**
21 **This Case.**

22 Though the Court finds removal proper because the face of the complaint reveals a
23 substantial federal issue, the Court must also consider whether its jurisdiction is displaced
24 by 49 U.S.C. § 46110, which gives the federal courts of appeal exclusive jurisdiction to
25 “affirm, amend, modify, or set aside any part of” a final FAA order. 49 U.S.C. § 46110(a),
26 (c); *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 (9th Cir. 2006). All defendants argue
27 that § 46110 displaces the Court’s jurisdiction. McKay Dkt. Nos. 12 at 2-3, 24 at 17-18,
28 27 at 11-13; Schaefer Dkt. No. 35 (China Airlines, Ltd. and Asiana Airlines, Inc.’s motion
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1 to dismiss). Airline defendants further argue the allegations in the complaint “are
2 inescapably intertwined” with the FAA order, and thus the Court lacks subject matter
3 jurisdiction. Dkt. No. 24 at 9. The airlines liken this case to *Krauss v. F.A.A.*, No. 15-cv-
4 05365 HRL, Dkt. No. 53, 2016 WL 1162028 (N.D. Cal. Mar. 24, 2016), a case recently
5 decided in this district, in which municipal defendants and the FAA were sued for state law
6 tort violations related to the same routes challenged here. There, Magistrate Judge Howard
7 R. Lloyd dismissed the case for lack of subject matter jurisdiction, because under 49
8 U.S.C. § 46110 only federal appellate courts have jurisdiction over challenges to final
9 FAA orders. *Id.* at *4.

10 Section 46110 provides that persons with a substantial interest in an order issued by
11 the FAA “may apply for review of the order” by petitioning the U.S. Court of Appeals for
12 the District of Columbia or the U.S. Court of Appeals for the circuit where the person
13 resides or has its principal place of business. 49 U.S.C. § 46110(a). “The Federal
14 Aviation Act gives the federal circuit courts ‘exclusive jurisdiction’ over requests ‘to
15 affirm, amend, modify, or set aside’ the FAA’s finalized domestic aviation regulations.”
16 *Krauss*, 2016 WL 1162028, at *3 (citing 49 U.S.C. § 46110 and *Americopters*, 441 F.3d at
17 732).

18 However, just as circuit courts do not have exclusive jurisdiction over *every* claim
19 involving the FAA under § 46110, they also cannot grant every type of remedy.
20 *Americopters*, 441 F.3d at 735. Damages are not a remedy under § 46110, so the district
21 court “may have residual jurisdiction” if the circuit court may not hear a claim. *Id.* (citing
22 *Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994). However, *Crist v. Leippe*, clarified that
23 the district court may retain an appeal that “broadly challenge[s] the constitutionality of the
24 FAA’s action,” but that where the appeal is “inescapably intertwined with a review of the
25 procedures and merits surrounding the FAA’s order,” the district court is barred from
26 hearing the claim. 138 F.3d at 801, 803 (9th Cir. 1998) (quoting *Mace*, 34 F.3d at 858).
27 The rationale for prohibiting the district courts from hearing such a claim is to “prevent
28 litigants from using a damages claim as a collateral attack on [an] FAA order.”

1 *Americopters*, 441 F.3d at 736, 738 (a rationale for the “collateral attack doctrine” is
2 preventing the evasion of administrative procedures).

3 The potential distinction between this case and *Krauss* is that plaintiffs deny they
4 challenge the validity of the FAA order authorizing the flight paths. Dkt. No. 61 at 7.
5 Plaintiffs claim they “challenge the Defendants’ own actions and inaction, without regard
6 to whether or not they comply with FAA orders.” *Id.*

7 Plaintiffs’ claims do not at first blush implicate a federal question in themselves,
8 such as that defendants “direct and/or encourage” the planes to fly too fast and below the
9 designated floor. Yet context is critical. The intertwining of the federal issue is made
10 plain by the allegation in the complaints that plaintiffs must weekly endure “hundreds or
11 thousands” of flights over their homes at all hours, “which create unbearably frequent and
12 severe noise and vibration disturbances, pollution from the aircraft, and risk of midair
13 collision.” Dkt. No. 1 at 25. The genesis of these complaints is the flight paths, and so
14 plaintiffs’ state law claims *are* “inescapably intertwined with a review of the procedures
15 and merits surrounding” the FONSI/ROD. *See Crist*, 138 F.3d at 803. Thus, this Court
16 may not entertain plaintiffs’ state law claims for nuisance, negligence, negligence per se,
17 willful misconduct, and unfair competition. The Court need not reach defendants’ other
18 arguments in the motions to dismiss.

19 The cases plaintiffs cite in rebuttal miss the point. Dkt. No. 73 at 3-4. *Elsworth v.*
20 *Beech Aircraft Corp.*, 37 Cal. 3d 540, 549 (1984), for example, was a wrongful death suit
21 where the court found the state could apply its own laws in tort actions against aircraft
22 manufacturers even though federal law completely preempted that field, in part because
23 there was “no irreconcilable conflict between federal and state standards.” Similarly, in
24 *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 872 (1985), the court
25 found state law damage remedies remained available against an airport proprietor though
26 federal law precluded interference with commercial flight patterns and schedules. In
27 neither of these cases were plaintiffs directly or “collaterally” challenging a final decision
28 of the FAA, even though both cases involved aviation.

1 Lastly, the Court notes that San Francisco cited Federal Rule of Civil Procedure 19
2 to argue that the FAA is an indispensable party to this action. Dkt. No. 66 at 9. Because
3 the Court finds that 49 U.S.C. § 46110 by itself deprives the Court of jurisdiction, the
4 Court does not reach the Rule 19 argument.

5 Accordingly, the Court DISMISSES *McKay* and *Schaefer* for lack of subject matter
6 jurisdiction.

7 **C. Granting Plaintiffs Leave To Amend Would Be Futile.**

8 Federal Rule of Civil Procedure 15(a)(1) allows a party to amend its pleading once
9 “as a matter of course” within 21 days of serving it or within 21 days after a response has
10 been filed. After this period, amendment is allowed with leave of court. Fed. R. Civ. P.
11 15(a)(2). The “court should freely give leave when justice so requires,” but need not do so
12 if amendment would be futile. *Id.*; *Foman v. Davis*, 371 U.S. 178, 182 (1962).

13 The gravamen of plaintiffs’ complaints is the objection to the FAA-approved flight
14 paths. Regardless of the attempt to artfully plead state law claims, the Court could not
15 grant plaintiffs relief because the Court lacks jurisdiction to issue an order enjoining
16 aircraft from flying over their homes. Plaintiffs’ state law claims are inescapably
17 intertwined with a substantial federal issue. As a result, the Court finds giving plaintiffs
18 leave to amend would be futile. *Foman*, 371 U.S. at 182.

19 **III. CONCLUSION**

20 Because the Court finds removal was proper, the Court DENIES plaintiffs’ motions
21 to remand. However, the Court also finds it ultimately lacks subject matter jurisdiction
22 over plaintiffs’ claims under 49 U.S.C. § 46110. Accordingly, the Court dismisses this
23 case in its entirety for lack of subject matter jurisdiction WITHOUT LEAVE TO AMEND.
24 The Court will enter judgment and ORDERS the Clerk of the Court to terminate this case.

25 **IT IS SO ORDERED.**

26
27 Dated: December 23, 2016


NATHANAEL M. COUSINS
United States Magistrate Judge