DISTRICT COURT, COUNTY OF BOULDER, COLORADO Boulder County District Court Boulder County Justice Center 1777 6th Street Boulder, CO 80302	
Plaintiff: CITIZENS FOR QUIET SKIES, INC., KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **Defendants:** MILE-HI SKYDIVING CENTER, INC.	▲ **COURT USE ONLY** ▲ Case Number: **2013CV031563**
Counsel for Defendant Anthony L. Leffert, #12375 Laura J. Ellenberger, #43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, Suite 2600 Denver, CO 80202-1926 Telephone: 303-297-2600 Facsimile: 303-297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	

DEFENDANT'S RESPONSE AND OBJECTION TO PLAINTIFFS' EMERGENCY MOTION TO CONDUCT LIMITED DISCOVERY ON THE COURT'S SITE VISIT OR, IN THE ALTERNATIVE, TO ALLOW REBUTTAL EVIDENCE BEFORE CLOSING ARGUMENTS

Defendant, Mile-Hi Skydiving Center, Inc. ("Mile-Hi"), by and through counsel Anthony L. Leffert of Robinson, Waters & O'Dorisio, P.C., hereby responds and objects to the Plaintiffs' Emergency Motion to conduct additional discovery or to provide rebuttal evidence (the "Motion"), and states and alleges the following:

1. The site visits did not create any "newly discovered evidence" that is material to an issue in this trial that, if admitted, would in any way change the outcome of this case. *See Southeastern Colorado Water Conservancy Dist. v. O'Neill*, 817 P.2d 500, 505 (Colo. 1991). Accordingly, evidence has closed in these proceedings and no basis exists to reopen discovery or evidence at this juncture.

2. "After the evidence is closed, the decision whether to admit supplemental evidence is within the sound discretion of the trial court." *Hoagland v. Celebrity Homes, Inc.*, 575 P.2d 493, 494 (Colo. App. 1977) (no abuse of discretion where trial court refused to hear

supplemental evidence discovered after trial but before entry of judgment). While there is no specific Rule of Civil Procedure that provides for reopening the evidence at this procedural juncture, the test that Colorado courts apply to determine whether "newly discovered evidence" is grounds for a new trial pursuant to C.R.C.P. 59(d)(4) is instructive here:

> C.R.C.P. 59(d)(4) states that a new trial may be granted on the ground of "[n]ewly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at the trial." Our case law, consistent with the text of this rule, has adopted a three-part test for resolving a motion for a new trial based on newly discovered evidence: first, the applicant must establish that the evidence could not have been discovered by the exercise of reasonable diligence and produced at the first trial; second, it must be shown that the evidence was material to an issue in the first trial; and third, the applicant must establish that the evidence, if admitted, would probably change the result of the first trial.

Aspen Skiing Co. v. Peer, 804 P.2d 166, 172 (Colo. 1991). Reopening the case after the close of evidence should be granted only in exceptional circumstances in the interest of assuring a just result. *Southeastern Colorado,* 817 P.2d at 505. The Plaintiffs request to reopen evidence and/or discovery fails pursuant to each of the three prongs of this test.

3. Citing *Kennedy v. Bailey*, 169 Colo. 43, 453 P.2d 808, 810 (1969), the Plaintiffs' argue that the site visits by the Court produced newly discovered material evidence that will probably change the result of this trial.

4. In fact, the site visits were entirely consistent with the other evidence presented at trial regarding the sound made by the Mile-Hi skydiving operations. Plaintiff Kim Gibbs' own videos, taken at her home, are remarkably similar to what the Court witnessed at the site visit. Moreover, the sound produced by the Mile-Hi skydiving flights was consistent with the testimony of Tim Barth and the sound measurements that he took finding that the noise from the Mile-Hi skydiving operations was not significantly higher than the background noise. This evidence was reaffirmed by the City of Longmont's Terracon Report, which found exactly the same results. The Defendant's expert, John Freytag, performed an extensive sound study conducted pursuant to federal regulations and found that the DNL noise measurement for the entire environment was DNL 30 dB. The Plaintiffs' own expert conducted a DNL analysis and found that it was consistent with Mr. Freytag's analysis. All of these objective sound measurements demonstrate that the noise generated by the Mile-Hi Skydiving operations are significantly below the federal regulation limit of DNL 65 dB. There is nothing new or surprising about the amount of noise generated by the Mile-Hi Skydiving planes on Saturday, May 2, 2015, as the site visits were entirely consistent with all of the other evidence in the case, other than the Plaintiffs' subjective beliefs about the noise.

5. The Plaintiffs state that, "The Site Visit Flights are new evidence that may have a direct impact on this Court's judgment in this matter." (Plaintiffs' Motion at ¶ 19.) In fact, the issue before this Court does not involve a subjective determination as to whether the Mile-Hi Skydiving planes generate too much noise. The issue before the Court is an objective analysis of the evidence utilizing the federal regulations which limit airplane noise. This is exactly why there are federal regulations that govern airplane noise so that Courts such as this one are not put in a position of trying to make a subjective determination as to what constitutes too much noise from an airplane flight. The fact is, what the Plaintiffs think, what the Defendant thinks, and, with all due respect, what the Court thinks, as to a subjective view of the noise created by Mile-Hi Skydiving's operations, are irrelevant to any issue in this case. The Federal Aviation Administration has set standards for airplane noise and the enforcement of the DNL 65 dB as the sound metric for the determination of when airplane or airport noise is excessive. Accordingly, the Plaintiffs also fail to meet their burden of showing that the evidence is material. *See Southeastern Colorado*, 817 P.2d at 507 ("To satisfy the materiality requirement, the evidence must be demonstrably germane to the substantive issues involved in the prior litigation and not merely cumulative or contradictory of other previously admitted evidence.").

6. The central theme of the Plaintiffs' Motion is that the flights performed by Mile-Hi Skydiving during the site visits were not "typical flight paths" for its operations. Despite the Plaintiffs' speculation and insinuations, there is no "typical flight path" for the Mile-Hi Skydiving operations. The consistent evidence at trial is that the Mile-Hi flight paths are determined based upon wind and weather. Frank Casares did testify that there are optimal flight paths utilizing each direction of the runway, however, the actual flight paths are determined by wind and weather conditions. That is exactly what happened on Saturday, May 2, 2015. Mile-Hi Skydiving flew its normal operations utilizing both planes as conditions allowed. For the Plaintiffs to insinuate or speculate that Mile-Hi Skydiving somehow changed its flight paths because of the site visits is completely baseless. Based upon the interaction with the Mile-Hi Skydiving employee at the site visits, this allegation is simply not supported. The fact is, the weather and wind conditions dictated the flight paths on Saturday. Denver International Airport was actually shut down for a period of time because of wind shear. The consistent evidence produced at trial is that with low cloud level the sound of the aircraft is louder. While it is certainly possible that there are times when the sound from the aircraft is louder it is entirely likely that there are times when the sound from the aircraft is less when there is no cloud cover.

7. The Court has asked for an affidavit from Nikolai Starrett, the pilot flying the Twin Otter plane on Saturday for the Court's site visits. The Court requested this affidavit and was very specific about the information that it sought. This is not testimony of Nikolai Starrett to be cross examined on, it is specific and detailed information regarding such things as altitude, fuel level, and numbers of skydivers on board. The Plaintiffs were fully aware that the Court would be receiving this information by affidavit and made no objection prior to the flights. Now, because the Plaintiffs say that the sound from the Mile-Hi Skydiving planes was not what they have represented, they are desperately trying to create some excuse. The Plaintiffs have had every opportunity to provide whatever testimony they wished; any video evidence that they wished; or any other evidence that they believe goes to the issue of whether Mile-Hi is violating the federal regulations for sound. The Plaintiffs have failed to do so. There is not one piece of

evidence presented in this case that shows that Mile-Hi Skydiving operations violate any FAA regulations or that the noise from Mile-Hi Skydiving operations is in excess of what is allowed under the FAA regulations. The affidavit of Nikolai Starrett has nothing to do with this analysis and was well known to the Plaintiffs prior to the site visits.

8. The Plaintiffs refer to WebTrak data being used repeatedly during the trial. In fact, the Court has not received any WebTrak data except for two diagrams for two flights on one day which was attached to Jack Freytag's report as the Defendant's expert witness. The Court has not received any other WebTrak data. If the Plaintiffs wanted to produce WebTrak data, they should have done so during the evidence phase of the trial. Despite the obvious questions and concerns regarding the accuracy of the WebTrak data attached to the Plaintiffs' Motion, there is simply nothing before the Court to compare this WebTrak data against. Jack Freytag specifically testified that the diagrams attached to his report were not, "typical flight patterns." The Plaintiffs' own Motion points out significant inconsistencies regarding this so-called WebTrak data. First of all, there is no authentication or foundation for this WebTrak data. The Defendant has had very little time to confirm any of the WebTrak data but specifically takes issues with the Plaintiffs' claims as to what is shown in the WebTrak data. Specifically, the Plaintiffs complain that the planes gained a majority of their altitude far from the observation sites. Of course, as the Court is well aware, they could not take-off on runway 11 to the east southeast and had to depart to the north and west. This was required by the wind and weather conditions.

9. They next complain that Mile-Hi flew an atypical path as is depicted in the WebTrak data. As stated above, there are no typical paths for Mile-Hi planes. The Plaintiffs go on to speculate that Mile-Hi took fifteen minutes to go from take-off to jump altitude while the so-called WebTrak data purportedly shows that the ascents take ten minutes. The Plaintiffs also cite to the Defendants' webpage. The webpage says the plane is capable of an ascent within ten minutes - *with ideal conditions*. The Court is well aware that the take-off and landing conditions on Saturday were far from ideal and it is not surprising that it may have taken five minutes longer to ascend. Finally, the Plaintiffs maintain that the WebTrak data shows that planes flew several miles outside of the Mile-Hi flight box which is why they were not heard for much of the flights. First of all, none of the flights heard by the Court were outside of Mile-Hi's flight box. Secondly, it is true that there Mile-Hi plane flights which were outside of the flight box, however, these were pilot training flights and Mile-Hi is not required to fly in the flight box for pilot training. The Plaintiffs create a similar misperception for the Court when they refer to Exhibit 2C where the Mile-Hi Twin Otter flew outside the flight box for traffic avoidance. What the Plaintiffs do not provide to the Court is the WebTrak flight for the King Air which was flying immediately to the south of the Twin Otter requiring the Twin Otter to fly further west in order to avoid potential conflict. There are explanations for all of the issues raised by the Plaintiffs with respect to the alleged WebTrak data. The Defendant should not be put in a position of having to defend and answer these questions after the evidence has closed. This sort of anecdotal speculation and insinuation by the Plaintiffs is exactly why issues of flight paths, altitudes, and number of jumpers are completely irrelevant to the Court's determination as to whether Mile-Hi is violating any of the FAA noise regulations. This is a desperate attempt by

the Plaintiffs to try garner some support for their subjective beliefs about the noise generated by the Mile-Hi Skydiving operations.

10. The Plaintiffs also allege that the Defendant's representative at the site visits reported that the flight cut back power and stopped climbing as it approached the Behrens' house. (*See* Plaintiffs' Motion at ¶ 14). As the Court was told, the power was cut and the plane stopped climbing because of low cloud cover and proceeded with climbing to drop altitude after clearing the cloud cover. This had nothing to do with being close to the Behrens' home.

11. The fact is that the site visits did not represent new or different evidence that the Plaintiffs could not have investigated in preparation for trial. The Plaintiffs' had Ms. Gibbs' own videos which are entirely consistent with the noise which was generated during the site visits. It was the Defendant who offered these videos into evidence at trial over Plaintiffs' objections. The Plaintiffs had the reports of their own expert who found that the DNL measurement at the Plaintiffs' homes was less than half of the federal regulation limit of DNL 65 dB. The Plaintiffs had the Terracon Report and the Tim Barth noise readings all of which are consistent with the noise which was generated at the site visits. Finally, the Plaintiffs had the opportunity to depose the Defendant's expert who performed a full sound study and found that the noise generated from the Mile-Hi flights was nowhere near the limit set by the federal regulations. The fact that the noise generated during the site visits was not objectionable should not have been and could not have been a surprise to the Plaintiffs or their counsel. It was certainly not a surprise to the Defendant or its counsel.

12. The Plaintiffs have failed to meet their burden of demonstrating any basis, let alone that exceptional circumstances exist, to reopen evidence or to reopen discovery.

WHEREFORE, Defendant Mile-Hi Skydiving Center, Inc. prays this honorable Court will deny the Plaintiffs' Motion and for such other and further relief as the Court shall deem just and proper.

Respectfully submitted this 5th day of May, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Anthony L. Leffert
Anthony L. Leffert, #12375
Laura J. Ellenberger, #43931
Attorneys for Defendant Mile-Hi Skydiving Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2015, a true and correct copy of the foregoing **DEFENDANT'S RESPONSE AND OBJECTION TO PLAINTIFFS' EMERGENCY MOTION TO CONDUCT LIMITED DISCOVERY ON THE COURT'S SITE VISIT OR, IN THE ALTERNATIVE, TO ALLOW REBUTTAL EVIDENCE BEFORE CLOSING ARGUMENTS** was delivered via ICCES, addressed to the following:

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