

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 Sixth Street P.O. Box 4249, Boulder, CO, 80306-4249	DATE FILED: May 5, 2015 3:14 PM CASE NUMBER: 2013CV31563  <p style="text-align: center;">△ COURT USE ONLY △</p>
Plaintiff(s) KIMBERLY GIBBS et al. v. Defendant(s) MILE HI SKYDIVING CENTER INC	
<b>Order Re: Plaintiffs Emergency Motion to Conduct Limited Discovery on the Court Site Visit or in the Alternative to Allow Rebuttal Evidence Before Closing Arguments</b>	

The motion/proposed order attached hereto: DENIED.

This Court has reviewed Plaintiffs' May 4, 2015 Emergency Motion to Conduct Limited Discovery on the Court Site Visit or in the Alternative to Allow Rebuttal Evidence Before Closing Arguments and the Defendant's May 5, 2015 Response.

The evidence in this case closed on April 17, 2015, after a five day trial to the Court, but for the Court's site visit. The Court set forth the parameters of its site visit from the bench on April 17, 2015 and again in its April 22, 2015 written order. Neither party objected to those parameters.

The Court ordered Mr. Nikolai Starrett, the pilot of the plane being flown during the flight visit, to provide an affidavit with demographic information such as take-off time, landing time, passenger load, amount of fuel, as well as a statement as to any reason for a change in flight path if one were indicated due to weather. Said affidavit has been provided to the Court and to the parties via ICCES.

Plaintiff now seeks additional discovery and additional testimony based on Plaintiffs' assertion that the "flight visit did not accurately depict the noise as it is experienced by the Plaintiffs on a regular basis." The purpose of the site visit was not for the Court to hear what the Plaintiff or the Defendant felt was a "routine flight" but for the Court to observe the situation and to utilize such information as the Court finds appropriate in its ruling under the circumstances.

The Court heard significant testimony of Plaintiffs and other witnesses regarding what they perceived as a routine flight patterns and noise levels and shall consider the evidence as a whole, including the site visit, testimony of experts and lay persons and exhibits, when it makes its determination.

The Court finds there is no newly discovered evidence that Plaintiff could not have discovered and provided at trial. In fact, Plaintiff did present evidence by video of what certain Plaintiffs and their expert had observed and heard during the flights of Defendant. Whether the flights that occurred on May 1, 2015 were or were not typical is not "newly discovered" evidence. The Court observed three flights and the Court shall determine what weight to give such observation in light of the weather conditions.

The Plaintiffs' Motion is DENIED. Closing arguments in this case shall proceed at 2:00 p.m. on Wednesday, May 6, 2015. Each side shall be allotted one hour of time.

Issue Date: 5/5/2015



JUDITH L LABUDA  
 District Court Judge

<p><b>DISTRICT COURT, COUNTY OF BOULDER, COLORADO</b></p> <p><b>Boulder County District Court Boulder County Justice Center 1777 6th Street Boulder, Colorado 80302</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiffs:</b> CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER</p> <p><b>v.</b></p> <p><b>Defendant:</b> MILE-HI SKYDIVING CENTER, INC.</p>	<p><b>Case Number:</b> 2013CV031563</p>
<p>Randall M. Weiner, #23871 Annmarie Cording, #42524, Of Counsel <b>Law Offices of Randall M. Weiner, P.C.</b> 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 Fax Number: 720-292-1687 randall@randallweiner.com acording@cordinglaw.com</p> <p>The Law Office of Matthew B. Osofsky, Esq. Matthew Osofsky, #34075 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 <a href="mailto:mosofsky@live.com">mosofsky@live.com</a></p>	
<p><b>PLAINTIFFS' EMERGENCY MOTION TO CONDUCT LIMITED DISCOVERY ON THE COURT'S SITE VISIT OR, IN THE ALTERNATIVE, TO ALLOW REBUTTAL EVIDENCE BEFORE CLOSING ARGUMENTS</b></p>	

Plaintiffs, by and through counsel, Law Offices of Randall M. Weiner, P.C. and The Law Office of Matthew B. Osofsky, Esq., hereby file this Emergency Motion to Conduct Limited Discovery on the Court's Site Visit or, in the alternative, to Allow Rebuttal Evidence Before Closing Arguments (the "Motion"), and in support thereof state:

## CERTIFICATION

*Certificate of Conferral:* Counsel for Plaintiffs conferred with counsel for Defendant, Mr. Anthony Leffert, regarding this Motion. Opposing counsel opposes this motion.

## SUMMARY

1. The Court is presently anticipating the submittal of testimony via affidavit from Defense witness Nikolai Starrett. An affidavit is not competent evidence when the witness is available. C.R.E. 802; *People v. Shifrin*, 11CA1853 & 11CA1881, ¶¶56-57 (Colo.App. 2014).<sup>1</sup> An available witness must testify personally. *See* C.R.E. 804. Plaintiffs are then entitled to an opportunity to confront the witness via cross-examination and to rebut the testimony with additional evidence. *Aspen Properties Co. v. Preble*, 780 P. 2d 57, 58 (Colo. App. 1989) (“A civil litigant’s right to due process of law includes the right to cross-examine witnesses and to have an opportunity for rebuttal.”).

2. Plaintiffs are entitled to present rebuttal testimony with respect to the testimony from the Defense witness as to whether the flights on May 2, 2015 observed by the Court were an accurate representation of a typical parachuting flight. As an offer of proof, Plaintiffs are herewith submitting the affidavits of 14 individuals (four Plaintiffs and ten other residents of Boulder County who witnessed Mile-Hi’s flights on Saturday, May 2, 2015), attached hereto as **Exhibit 1**. In addition, Plaintiffs are submitting WebTrak data showing the routes and altitude of Defendant’s Twin Otter aircraft on Saturday, May 2 and Sunday, May 3, 2015. **Exhibit 2**.<sup>2</sup> *See also* Affidavit of K. Gibbs at ¶ 3, attached at **Exhibit 1**.

3. The Court may recall that WebTrak data has been used by the parties repeatedly during the trial to demonstrate Defendant’s flight activities over Plaintiffs’ homes, including by Defendants. *See, e.g.*, Defendant’s Trial Exhibit JJ at Figure 4 (p. 8).

4. The attached affidavits and WebTrak data demonstrate that Saturday’s flights during the Court’s site visit were not reasonable and typical representations of the noise created by Defendant’s operations. The three Twin Otter flights observed by the Court are as follows: (i) the 3:01 PM flight watched from the Behrens’ home (“Flight 1”); (ii) the 3:30 PM flight observed at the Gibbs’ home (“Flight 2”), and (iii) the 4:14 PM flight also observed at the Gibbs’ home (“Flight 3”) (collectively “the Site Visit Flights”).

5. Specifically, as described in the attached affidavits, and as confirmed by the WebTrak graphics, the Site Visit Flights were atypical in the following ways: i) they gained the majority of their altitude far from the observation sites; ii) they flew atypical paths as depicted in the WebTrak graphics; iii) they generally took 15 minutes to go from takeoff to jump altitude, while the WebTrak data and Defendant’s own web page show that such ascents take 10 minutes;

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<sup>1</sup> Available at [https://scholar.google.com/scholar\\_case?case=13622836933148838957&q=shifrin&hl=en&as\\_sdt=4,6](https://scholar.google.com/scholar_case?case=13622836933148838957&q=shifrin&hl=en&as_sdt=4,6).

<sup>2</sup> On all WebTrack graphics, Defendant’s Twin Otter aircraft is identified by its beacon number, 0331. *See* Defendant Operations and Safety Manual, Bates labeled page number DEF001897, attached hereto as **Exhibit 3**. Defendant’s entire Operations and Safety Manual is also found at Defendant’s Trial Exhibit O.

and iv) the planes flew *several miles* outside of Mile-Hi's flight box, which is why they were not heard for much of their flights.

6. The evidence concerning the manipulation of the Site Visit Flights should be considered by the Court prior to closing arguments on Wednesday, May 6, 2015. Plaintiffs request a continuance of the closing arguments to conduct limited discovery on the Site Visit Flights as set forth herein.

7. In the alternative because the Court cannot accept affidavits as evidence at trial, Plaintiffs request the opportunity to address and submit evidence concerning the anomalies associated with the Site Visit Flights before Wednesday's closing arguments. Plaintiffs request that this Court provide 1.5 hours of time on Wednesday for the parties to divide between them to present site visit-related evidence. The additional time would necessitate adjourning at 5:30 PM instead of 5:00 PM.

### MOTION

8. The parties presented evidence in this case in a bench trial to the Court from April 13 to April 17, 2015. During the course of the trial, the Court aptly determined the need to perform a site visit and issued, *sua sponte*, an order that it will conduct a site visit.

9. The Court described, in writing, the parameters of the site visit in its Minute Order Re: Bench Trial, dated April 22, 2015. Most of the parameters of the site visit were in the direct control of Defendant. For instance, the pilot for the Site Visit Flights was Defendant's chief pilot, Nikolai Starrett. Mr. Starrett testified at trial on behalf of Defendant. Mr. Starrett is responsible for submitting to the Court an affidavit confirming fuel level, the number of passengers, the type of patterns flown, and the speed and RPMs of the Site Visit Flights.

10. After rescheduling the site visit once due to weather, the Court conducted the site visit on Saturday, May 2, 2015. Plaintiffs witnessed the site visit and would testify that the site visit did not accurately depict the noise as it is experienced by Plaintiffs on a regular basis. Plaintiffs' concerns are corroborated by the attached affidavits (**Exhibit 1**) and the attached WebTrak data (**Exhibit 2**).

11. The Site Visit Flights appear to have gained the majority of their altitude far from the observation sites. For example, see Affidavit of R. Bovet at ¶ 3, Affidavit of J. Pollack at ¶ 7, and Affidavit of S. Meyer at ¶¶ 5-7, attached at **Exhibit 1**. This is atypical of Defendant's flight operations. The Court may recall that many witnesses at trial testified that climbing operations take place directly over Plaintiffs' neighborhoods. A number of the affidavits at **Exhibit 1** state that Defendant's flights in the morning and evening on May 2, and Defendant's flights on Sunday, May 3, followed this typical pattern. For instance, see Affidavit of K. Mahoney at ¶ 6, Affidavit of S. Meyer at ¶¶ 3-4, Affidavit of C. Behrens at ¶¶ 3-5, and Affidavit of I. Moore at ¶ 4, attached at **Exhibit 1**.

12. The Site Visit Flights also flew atypical paths as described by witness affidavits (**Exhibit 1**) and as depicted in the WebTrak graphics (**Exhibit 2**). In fact, witnesses who have

observed Defendant's flight operations many times before described one or more of the Site Visit Flights as "very uncommon" (Affidavit of K. Mahoney at ¶ 4, **Exhibit 1**) and "...the first time I have ever witnessed the skydiving planes take this route" (Affidavit of K. Hollister at ¶ 4, **Exhibit 1**).

13. The Site Visit Flights generally took fifteen (15) minutes to go from takeoff to jump altitude, while other WebTrak data and Defendant's own website show that such ascents typically take ten (10) minutes.<sup>3</sup> This indicates that the Site Visit Flights were not climbing at the same rate as typical flights.

14. During Flight 1, the representative of the Defendant at the site visit who was in radar communication with the flight reported that the plane cut back power and stopped climbing as it approached the Behrens' house. It maintained cruising power and speed during the entire time it was over the Behrens' house. It was then reported via radio that the flight was able to resume its climb after departing the vicinity of the Behrens' house. Based on the testimony at trial, this procedure of cutting power back to cruise speeds while over the Plaintiffs' home is not typical.

15. Finally, the Site Visit Flights flew several miles outside of Defendant's flight box, which is why the flights were not easily heard at the site visit locations. Specifically, Flight 2 veered far west of the flight box. One witness, Kathy Hollister, described this flight as going as far west as the Hall Ranch and Heil Ranch open space areas. Affidavit of K. Hollister at ¶ 4, **Exhibit 1**. See also Affidavit of K. Mahoney at ¶ 5, **Exhibit 1**.

16. In Colorado, it is well established that "newly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at the trial," may be grounds for a new trial under C.R.C.P. 59(d)(4). To sustain a motion for a new trial on the grounds of newly discovered evidence: (i) the evidence could not have been discovered in the exercise of reasonable diligence and produced at trial; (ii) the evidence is material to some issue; (iii) and the evidence would probably change the result. *Kennedy v. Bailey*, 169 Colo. 43, 453 P.2d 808, 810 (1969). The new evidence meets these conditions before evidence has even closed. Therefore, there is certainly basis for reopening the case for Plaintiffs to present additional evidence.

17. Defendant will be providing to the Court an affidavit by Mr. Starrett describing the conditions for the Site Visit Flights. Given the Plaintiffs' own observations and the observations of non-party witnesses, additional discovery is necessary to verify or discredit the statements or affidavit by Mr. Starrett. Presently, Plaintiffs have no historic information on fuel loads or the flight weight of MileHi aircraft during a typical flight.

18. The Site Visit Flights represent significant and material new evidence that the Plaintiffs could not have investigated in preparation for trial. Plaintiffs had no way of

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<sup>3</sup> Flight 2 took off at 3:31 PM and reached an altitude of 13,100 feet by 3:46 PM, for a total of 15 minutes. See Exhibit 2, pp. 2c-2f. In contrast, a flight on Sunday afternoon took off at 1:14 PM and reached an altitude of 13,100 feet by 1:21 PM, for a total of 8 minutes. See Exhibit 2, pp. 2m-2n.

conducting discovery with regard to the site visit until after the site visit occurred. Now that the site visit has been completed, it is clear that discovery is necessary as Plaintiffs should be permitted to determine how the site visit was conducted.

19. The Site Visit Flights are new evidence that may have a direct impact on this Court's judgment in this matter. Plaintiffs contend that the Site Visit Flights were, in fact, atypical of Defendant operations. Thus, the actual conditions and methods for the site visit are integral to the case. Absent some relief from this Court, Plaintiffs have no way of exploring, investigating, or even rebutting the evidence presented during the Site Visit or pertaining to it. Plaintiffs must be afforded a fair opportunity to investigate and present rebuttal evidence regarding the site visit as a basic condition of fairness.

20. Evidence has not closed in this case. It is appropriate to address the matter of the site visit evidence now, before the Court hears closing arguments and before the Court enters a judgment.

WHEREFORE, Plaintiffs request the following relief: a continuance of the closing arguments to conduct limited discovery on the Site Visit Flights or, in the alternative, the opportunity for the parties to present site visit-related evidence for a total of one and one half hours before closing on Wednesday, May 6, 2015.

Respectfully submitted this 4th day of May, 2015.

LAW OFFICES OF RANDALL M.  
WEINER, P.C.

*Original Signature on file at  
Law Offices of Randall M. Weiner, P.C.*

By: /s/ Randall M. Weiner  
Randall M. Weiner, #23871  
Annmarie Cording, #42524, Of Counsel

The Law Office of Matthew B. Osofsky, Esq.  
Matthew Osofsky, #34075

#### **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing document was E-Served by the Court-authorized E-System provider to all active counsel of record on ICCES' service list on this 4<sup>th</sup> day of May, 2015:

/s/ Annmarie Cording  
Annmarie Cording

***In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by Law Offices of Randall M. Weiner, P.C., and will be made available for inspection by other parties or the Court upon request.***

Attachment to Order - 2013CV31563