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	Div. **2** Crtrm.: **Q**

DEFENDANT'S TRIAL BRIEF

Defendant, Mile-Hi Skydiving Center, Inc. (“Mile-Hi”), by and through counsel Anthony L. Leffert of Robinson, Waters & O’Dorisio, P.C., hereby submits the following Trial Brief, and in support thereof states and alleges the following:

A. Statement of Facts.

For purposes of the this Trial Brief, Mile-Hi submits that the following facts are undisputed:

1. Mile-Hi is a Colorado corporation. Mile-Hi is in the business of providing skydiving services and operates out of the Vance-Brand Municipal Airport in Longmont, Colorado (the "Airport").

2. Mile-Hi has conducted its operations at the Airport since 1995. Mile-Hi's operations are approximately 4.6% of all flight operations at the Vance Brand Municipal Airport.

3. All of the Plaintiffs purchased their homes after the Airport was in existence and with full knowledge of its existence and proximity to their homes.

4. In the normal course of its skydiving business, Mile-Hi primarily operates four planes: a DeHavilland Twin Otter ("Twin Otter"), two Beechcraft King Air E90s, and one Cessna Turbo 206.

5. At all times relevant to this litigation, all of the airplanes that Mile-Hi used were properly registered and certificated by the Federal Aviation Administration ("FAA") in their respective categories and classes.

6. On or about April 7, 2007, Mile-Hi entered into an agreement with the FAA (the "Letter Agreement") authorizing Mile-Hi to conduct parachute jumping at the Airport and establishing the procedures Mile-Hi must follow for its skydiving operations. The 2007 Letter Agreement is the most recent version of the written agreement between Mile-Hi and the FAA.

7. The Letter Agreement mandates that Mile-Hi's parachute jumping operations must be confined to a 2 nautical mile radius called a "jump box."

8. The Letter Agreement also provides that Mile-Hi's airplanes must remain within the confines of a designated "flight box" surrounding the Airport, unless otherwise diverted by Denver International Airport Air Traffic Control ("DIA-TRACON").

9. Additionally, the Letter Agreement specifically states that all provisions of the Federal Aviation Regulations ("FAR") Parts 91 and 105 apply to Mile-Hi's flights.

10. Plaintiffs do not allege that Mile-Hi has breached the Letter Agreement. Nor do they allege that Mile-Hi has violated any federal statute or regulation.

11. All of the Individual Plaintiffs' houses are located within the "flight box."

12. During their depositions, the Individual Plaintiffs have stated that the plane which causes the most noise, and is their chief complaint, is the Twin Otter.

13. The Twin Otter operated by Mile-Hi has been noise certified for complying with FAR Part 36, Appendix F. The maximum A-weighted sound level ("dBA") produced by the DeHavilland Twin Otter operated by Mile-Hi in level flight at 1,000 feet above ground level at the highest power in the normal operating range is 77.4 dBA, when adjusted for take-off performance. The limit applicable to this aircraft is 80 dBA and compliance is shown with a margin of 2.6 dBA. This is maximum sound level at its highest power. In fact, the Twin Otter operates within the flight box at a substantially lower dBA.

14. All planes operated by Mile-Hi comply with FAA noise limitations.

15. The Airport has issued Voluntary Noise Abatement Procedures. These Voluntary Noise Abatement Procedures are not promulgated by the FAA or promulgated in connection with the FAA. The evidence at trial will demonstrate that Mile-Hi complies with all of these Voluntary Noise Abatement Procedures.

B. Law of the Case.

Mile-Hi previously filed three motions for summary judgment: one as to the standing of Citizens of Quiet Skies, Inc. ("CQS") to bring claims; one for preemption of the Plaintiffs' claims pursuant to federal law and federal regulations; and one regarding Plaintiffs' remaining claims. These motions were fully briefed and the Court has issued detailed and reasoned decisions regarding each of these motions for summary judgment. Defendant maintains that these are now law of the case and respectfully requests that the Court consider its prior rulings in receiving the evidence of the Parties and making a determination as to Plaintiffs' claims and Mile-Hi's defenses.

It is important to note that the only claims remaining in this case are the Plaintiffs" claims for negligence and private nuisance. The Court has limited CQS to only seeking injunctive relief. The Court also dismissed the Plaintiffs' claims for trespass, negligence *per se* regarding the Boulder noise ordinance, and unjust enrichment. The Plaintiffs have abandoned their claims for negligence *per se* with respect to the Longmont ordinance and their claim *respondeat superior*. (*See* Joint Proposed Trial Management Order at p. 1.) In addition, the Court has ordered that the Plaintiffs may only economic damages for the alleged diminution in value of their homes. (*See* Order: Defendant's Motion in Limine Regarding Evidence of the Plaintiff's Damages dated March 24, 2015.) Finally, the only damages that Plaintiffs identify in the Joint Proposed Trial Management Order are for diminution in value of their homes under theories of negligence and nuisance. They also they seek injunctive relief based on these claims.

The Court previously correctly found that: "Private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of his land. To demonstrate its existence a plaintiff must show that the defendant unreasonably and substantially interfered with the use and enjoyment of his property." (*See* Order on Mile-Hi's Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims dated January 5, 2011 ("Order on Remaining Claims") (citing *Allison v. Smith*, 695 P.2d 791, 793-94 (Colo. App. 1984).) The Court's Order continues: "Unreasonableness is an issue of fact and "[i]n making any determination of unreasonableness, the trier of fact must weigh the gravity of the harm and the utility of the conduct causing that harm. Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." (*Id*. at p. 4 (citing *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001).)

With respect to the Plaintiffs' negligence claim, the Court found: "In the event that the Vance Brand Noise Abatement Procedures were not promulgated under the Code of Federal Regulations, the Court finds that there are federal regulations regarding aircraft noise and therefore the federal regulations are the standard by which Plaintiffs negligence claim must be analyzed." (*See* Order on Remaining Claims at p. 5.) The Court went on to find that there was a

genuine issue of material fact regarding whether the Airport's Voluntary Noise Abatement Procedures had been promulgated pursuant to the Code of Federal Regulations. Therefore, the Court could not determine that issue as a matter of law. Evidence will be presented at trial that the Airport's Voluntary Noise Abatement Procedures are not promulgated under the Code of Federal Regulations and are preempted to the extent that they conflict with federal regulations.

With respect to the issue of preemption of the Plaintiffs' claims, the Court entered an Order on Defendant's Motion for Summary Judgment regarding Preemption of State and Local Laws. The Court found as follows:

> Although local governments "may adopt abatement plans that do not impinge on aircraft operations," Congress has preempted local regulation of the source of aircraft noise. *San Diego Unified Port Dist. v. Gianturco,* 651 F.2d 1306, 1314 (9th Cir. 1981); *see also City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (finding the Noise Control Act reinforces conclusion that FAA in conjunction with EPA has full control over aircraft noise, pre-empting state and local control). Accordingly, the distinction between direct and indirect regulation of aircraft noise is key, meaning local governments or other airport operators may require aircrafts to use certain noise abatement techniques such as utilizing certain equipment or reducing speeds to decrease noise levels. However, a local government or airport operator cannot prohibit an aircraft that is otherwise in compliance with FAA regulations from flying in order to decrease noise levels, as local government and airport operators, pursuant to federal regulations, have no authority to impose such restrictions on aircraft operations.

C. <u>Plaintiffs' Claims are Preempted by Federal Regulations and Statutes</u>.

Plaintiffs' claims are preempted by the pervasive and extensive federal regulations which control aircraft operations including noise. Congress has the power to preempt state and local laws under Article VI of the Supremacy Clause. *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000). "An agency's preemption regulations, promulgated pursuant to Congressional authority, have the same preemptive effect as statutes." *Id*. Federal law preempts state law in three circumstances. "First, Congress can define explicitly the extent to which its enactments preempt state law." *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). Second, "state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id*. at 79 (internal citations omitted). Third, "state law is preempted to the extent that it actually conflicts with federal law … or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (internal citations omitted).

The Federal Aviation Act of 1958 (the "Act") created the Federal Aviation Administration ("FAA") to oversee and regulate use of the United States' airspace. Congress

clearly expressed its intent to preempt the control and regulation of airspace in 49 U.S.C. § 40103(a): "The United States Government has exclusive sovereignty of airspace of the United States." Pursuant to 49 U.S.C. § 44715, "to relieve and protect the public welfare from aircraft noise and sonic boom" the FAA may "prescribe standards to measure aircraft noise and sonic boom and regulations to control and abate aircraft noise and sonic boom." The rules and regulations must be consistent with the highest degree of safety in air commerce and air transportation, economically reasonable, technologically practicable, and appropriate for the particular type of aircraft. *Id*. The FAA's first aircraft noise regulations are codified in 14 C.F.R. Part 36. Part 36 prescribes noise standards for the type certification of subsonic transport category airplanes.

Aircraft noise limits are set forth in Part 36. These federal regulations state that "the noise levels in this part have been determined to be as low as economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply." 14 C.F.R. § 36.5. Plaintiffs seek to enforce their own noise standard for that which the federal government has already carefully considered and regulated. The noise standards in Part 36 explicitly apply to:

> type certifications and changes to those certificates, standard airworthiness certificates, and restricted category airworthiness certificates, for propeller-driven, small airplanes, and for propeller driver commuter category airplanes.

14 C.F.R. § 36.1(a)(2).

Additionally, 14 C.F.R. § 36.501 establishes noise limits for propeller driver small airplanes. This section applies to propeller driven small airplanes applying for new, amended or supplement type certificates after October 10, 1973. *See* 14 C.F.R. § 36.501(a)(1). The Twin Otter at issue in this case, technically called the DHC-6 Twin Otter, received a Noise Certification in July, 1979, certifying that Mile-Hi's Twin Otter airplane complies with the federally regulated noise requirements for noise requirements for propeller-driven small airplanes. Importantly, there is no allegation in this case that Mile-Hi has not complied with these federal regulations or limits. The other planes that Mile-Hi uses in its skydiving operations are also all in compliance with 14 C.F.R. § 36.501.

Congress has also enacted the Aviation Safety and Noise Abatement Act of 1979 ("ASNA"), directing the FAA to establish a single, uniform system of noise measurement; for determining exposure of individuals from airport operations; and to identify land uses that are normally compatible with various exposures of individuals to noise. Accordingly, the FAA promulgated regulations at 14 C.F.R. Part 150 to implement ASNA. Part 150 established the “day-night average sound level” (DNL) as the noise metric for determining the exposure of individuals to aircraft noise. ASNA also provided for federal funding and other incentives for airport operators to prepare noise exposure maps voluntarily and institute noise compatibility programs. Additionally, Congress enacted the Airport Noise and Capacity Act of 1990 ("ANCA"), which mandates that airport sponsors must comply with a national program for review of noise and access restrictions. The FAA regulation that implements ANCA is 14 C.F.R. Part 161.

Finally, sport parachuting, also known as skydiving, is federally regulated pursuant to 14 C.F.R. Part 105, and is a FAA-recognized aeronautical activity. The FAA's primary responsibility with respect to skydiving is the protection of air traffic and persons and property on the ground. Part 105 was developed to accomplish this task. *See* U.S. Department of Transportation, Federal Aviation Administration, Advisory Circular No. 105-2E dated December 4, 2013.

Addressing the issue of a state's ability to regulate aircraft noise, the Supreme Court of the United States has held that "the pervasive nature of the scheme of federal regulation of aircraft noise … leads us to conclude that there is preemption" of state law in this area. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Federal control in this area is "intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands." *Id*. at 633-34. The Court also noted that:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the [FAA] to control noise pollution must be consistent with the 'highest degree of safety. 49 U.S.C. § 1431(d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

Burbank, 411 U.S. at 638-39.

The Plaintiffs' claims are preempted by the Federal Aviation Act, as amended, and by the extensive regulatory scheme that the FAA has promulgated in the area of aircraft noise. The City of Longmont (the "City") is prohibited by federal law from imposing limitations on aircraft operations for the purposes of controlling noise without FAA approval.

Pursuant to ANCA, any airport sponsor that wants to impose mandatory restrictions on stage 2 and stage 3 aircraft must address the applicable requirements of 14 C.F.R. Part 161, Notice and Approval of Airport Noise and Access Restrictions. If the aircraft noise is related to smaller aircraft, federal grant assurance prohibit an airport sponsor, in this case the City, from imposing aircraft operating restrictions for noise purposes. Acceptance of federal funds by the City and the Airport obligates them to make the airport available to all aircraft operators. The City has entered into agreements with the FAA for the acceptance of federal funds for airport development projects and land acquisition pursuant to 49 U.S.C. 47101, *et seq.* The City of Longmont (the "City") has accepted over $4 million in Airport Improvement Program funds since 1982 and has agreed to the specific federal obligations, including a commitment to keep the Airport open and available for public use as an airport.

D. Plaintiffs' Request for Injunctive Relief is Precluded by the Federal Regulatory Scheme.

Under the Airport Improvement Program ("AIP"), a Federal airport aid program, the City has entered into agreements with the Federal Aviation Administration for the acceptance of federal funds for airport development projects and land acquisition pursuant to 49 U.S.C. § 47101, *et seq*.. In exchange for the AIP funds, the City agreed to be bound by specific federal obligations, including Grant Assurance No. 22, Economic Nondiscrimination. This Assurance mandates that the City "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activity, including commercial aeronautical activities offering services to the public at the airport." Also pursuant to Grant Assurance No. 22, the City may establish "such reasonable, and not unjustly discriminatory, conditions ***to be met by all users*** of the airport ***as may be necessary for the safe and efficient operation of the airport***." *See* Grant Assurance No. 22(h) (emphasis added). The City may also "prohibit or limit any given type, kind or class of aeronautical use of the airport ***if such action is necessary for the safe operation of the airport*** or necessary to serve the civil aviation needs of the public." *See* Grant Assurance No. 22(i) (emphasis added).

Additionally, FAA Order 5190.6B, Airport Compliance Manual, provides that federally-obligated airport sponsors must comply with the procedures set forth in 14 C.F.R. Parts 150 and/or 161 before imposing any noise restrictions.

The Plaintiffs' request for injunctive relief is precluded here. The federal statutory scheme provides the exclusive and comprehensive process to measure all airport noise and develop any remediation measures which must be approved by the FAA. The injunction requested by the Plaintiffs, as discussed for the first time in the proposed Joint Trial Management Order, includes significant restrictions on the operations of the Mile-Hi. Specifically, the Plaintiffs request that this Court enter an injunction prohibiting the use of certain aircraft and restrictions on flight times and the numbers of flights. 14 C.F.R. Part 150 establishes the method by which the public at large, or individuals in the public, may address airport noise. It is not by seeking an injunction issued by a state court, but by requesting a detailed noise study to be conducted by the airport operator, in conjunction with the FAA, which includes public participation as well as local governments. The study makes recommendations for remediation measures, if warranted, which must then be approved by the FAA. The entire purpose of Part 150 is to prevent individuals in the community, such as the Plaintiffs, from seeking *ad hoc* and inconsistent injunctions regarding aircraft noise or noise emanating from airports.

Part 150 establishes the single, comprehensive process for airport operators to develop "noise exposure maps" and "noise compatibility programs" to govern noise emissions from public use airports:

> This Part prescribes the procedures, standards, and methodology governing the development, submission, and review of airport noise exposure maps and airport noise compatibility programs, including the process for evaluating and approving or disapproving those programs. It prescribes ***single systems*** for—(a) measuring noise at airports and surrounding areas that generally provides a

> highly reliable relationship between projected noise exposure and surveyed reaction of people to noise; and (b) determining exposure of individuals to noise that results from the operations of an airport. This part also identifies those land uses which are normally compatible with various levels of exposure to noise by individuals. It provides technical assistance to airport operators, in conjunction with other local, State, and Federal authorities, to prepare and execute appropriate noise compatibility planning and implementation programs.

14 C.F.R. §150.1.

Part 150 adopts the day-night average sound level (DNL) as the applicable metric by which to measure community exposure to and annoyance from aircraft noise. *See* 14 C.F.R. §§ 150.7 and 150.9(b). Part 150 also prescribes "a ***uniform*** methodology for the development and preparation of noise exposure maps," which "includes a ***single system*** of measuring noise at airports for which there is a highly reliable relationship between projected noise exposure and survey reactions of people to noise along with a separate single system for determining the exposure of individuals to noise." 14 C.F.R. § A150.1 (emphasis added).

Only after an airport operator has submitted a noise exposure map that the FAA has approved and "in consultation with FAA regional officials, the officials of the state and of any public agencies and planning agencies whose area, or any portion or whose area, of jurisdiction within the [DNL] 65 dB noise contours is depicted on the noise exposure map, and other Federal officials having local responsibility of land uses depicted on the map" can an airport operator promulgate restrictions on aircraft noise pursuant to a "noise compatibility program," which also must be approved by the FAA. 14 C.F.R. §150.23.

One of the purposes of a noise compatibility program is to "bring together through public participation, agency coordination, and overall cooperation, all interested parties with their respective authorities and obligations, thereby facilitating the creation of an agreed upon noise abatement plan especially suited to the individual airport location while at the same time not unduly affecting the national air transportation system." 14 C.F.R. § B150.1(b)(2).

An "airport operator shall evaluate the several alternative noise control actions and develop a noise compatibility program which—

> (a) Reduces existing noncompatible uses and prevents or reduces the probability of the establishment of additional noncompatible uses;
>
> (b) Does not impose undue burden on interstate and foreign commerce;
>
> (c) Provides for revision in accordance with §150.23 of this part.
>
> (d) Is not unjustly discriminatory.
>
> (e) Does not derogate safety or adversely affect the safe and efficient use of airspace.

(f) To the extent practicable, meets both local needs and needs of the national air transportation system, considering tradeoffs between economic benefits derived from the airport and the noise impact.

(g) Can be implemented in a manner consistent with all of the powers and duties of the Administrator of FAA."

14 C.F.R. § B150.5

"The FAA conducts an evaluation of each noise compatibility program and, based on that evaluation, either approves or disapproves the program. The evaluation includes consideration of proposed measures to determine whether they:

(1) May create an undue burden on interstate or foreign commerce (including unjust discrimination);

(2) Are reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses; and

(3) Include the use of new or modified flight procedures to control the operation of aircraft for purposes of noise control, or affect flight procedures in any way."

14 C.F.R. § 150.33(a).

"The [FAA] Administrator approves [noise compatibility] programs under this part, if:

(1) It is found that the program measures to be implemented would not create an undue burden on interstate or foreign commerce (including any unjust discrimination) and are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and of preventing the introduction of additional noncompatible land uses;

(2) The program provides for revision if made necessary by the revision of the noise map; and

(3) Those aspects of programs relating to the use of flight procedures for noise control can be implemented within the period covered by the program and without—

(i) Reducing the level of aviation safety provided;

(ii) Derogating the requisite level of protection for aircraft, their occupants and persons and property on the ground;

(iii) Adversely affecting the efficient use and management of the Navigable Airspace and Air Traffic Control Systems; or

(iv) Adversely affecting any other powers and responsibilities of the Administrator prescribed by law or any other program, standard, or requirement established in accordance with law.

14 C.F.R. § 150.35.

State and local attempts to implement noise regulations, flight-pattern controls, restrictions on night operations, and air safety regulations are all impliedly preempted by the Federal Aviation Act (the "Act"). *See Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (collecting cases). The United States Supreme Court has stated:

> Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are under way. In addition, the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' 49 U.S.C. § 1431(d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638-39 (1973). Accordingly, state and local governments are not able to use their police powers to control aircraft noise by regulating the flight of aircraft. *Id*. at 635.

State courts are preempted from awarding injunctive relief in aviation noise actions "because of the disruptive impact such a remedy would have on air commerce." *Krueger v. Mitchell*, 332 N.W.2d 733, 740 (Wis. 1980). "Allowing state court ordered injunctions to abate an aircraft noise nuisance would have such a severe impact on the free flow of air commerce that such remedy cannot co-exist with the Act. If state courts were allowed to enjoin the operation of all or part of an airport based on nuisances to neighboring property, air commerce would be completely disrupted." *Id.* (finding federal preemption of a private cause of action seeking to enjoin flights over plaintiff's business).

In *Northeast Phoenix Homeowners' Ass'n v. Scottsdale Mun. Airport*, 636 P.2d 1269 (Ariz. App. 1981), a state court found federal preemption of an action seeking to limit flight operations and impose curfew on flights. There, resident landowners whose homes were located under the flight path of airplanes using the Scottsdale Municipal Airport sued the airport and the City of Scottsdale as the owner and operator of the airport alleging that the aircraft flying into the

airport create excessive and unreasonable noise, among other things. *Id*. The landowner plaintiffs sought injunctive relief on theories of trespass, nuisance, and violation of statute regarding flight operations. The plaintiffs sought, among other things, injunctive relief in the form of "reasonable curfew" on the hours of flight operations and prohibitions/mandates concerning certain flight paths.

The trial court dismissed the plaintiffs' claims for injunctive relief because regulation of airport operations through the use of the court's injunctive powers was preempted by pervasive federal law in the area of airport operations and airport noise regulations. The court of appeals affirmed. The appellate court held that a state court has "no power to regulate through its injunctive powers the operation of flights, the methods of landing or takeoff of aircraft, or any other aspect of actual aircraft operation technique or scheduling." *Scottsdale*, 636 P.2d at 1273.

As in *Scottsdale*, the Plaintiffs in this case request the state judiciary, this Court, to use its injunctive power to prescribe regulations and rules relative to airport operations. However, "[t]he *Burbank* preemption holding applies not only to state and local legislation in this area, but also to judicially made rules and regulations governing airport and airline operations. *Scottsdale*, 636 P.2d at 1275 (citing *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975). Mile-Hi is not aware of any case law or any other authority that has upheld a state court's attempt to use its injunctive power to make rules and regulations governing airport or aircraft operations.

The following cases have all been found to involve state or local attempts to regulate the operation of aircraft in navigable airspace, which the respective courts have held to be preempted by federal law:

- Federal preemption of a local ordinance limiting frequency of flights. *Price v. Charter Township,* 909 F.Supp. 498 (E.D.Mich. 1995);

- Federal preemption of state agency's maximum noise levels. *State of Minnesota Public Lobby v. Metropolitan Airports Comm'n,* 520 N.W.2d 388 (Minn. 1994);

- Federal preemption of an ordinance limiting flight operations and imposing curfew on flights. *Gary Leasing, Inc. v. Town Board,* 127 Misc.2d 194, 485 N.Y.S.2d 693 (1985);

- Federal preemption of a local ordinance imposing curfews and limitations on landing patterns. *Harrison v. Schwartz,* 319 Md. 360, 572 A.2d 528 (1990);

- Federal preemption of court order limiting times of flights. *Township of Hanover v. Town of Morristown,* 135 N.J.Super. 529, 343 A.2d 792 (1975);

- Federal preemption of a nuisance action seeking to impose maximum noise levels. *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 735, 306 N.E.2d 562 (1973).

See People ex re. Birkett v. City of Chicago, 769 N.E.2d 84, 94-95 (Ill. App. 2002) (collecting cases).

Any nonfederal attempt to control aircraft noise is preempted if it might affect air traffic flow. *Harrison v. Schwartz*, 572 A.2d at 369 (interpreting *Burbank*, 411 U.S. at 639). Neither the size of the airport nor the recreational nature of flights sought to be regulated precludes a

finding of preemption. *See id*. at 373. Accordingly, neither the fact that the Airport is a relatively small municipal airport without its own air traffic control tower, nor that Mile-Hi does not carry passengers across state lines, have a bearing on the determination of the preemption issue.

E. Plaintiffs' Damages.

The Court has already ordered that the Plaintiffs may only seek economic damages for the alleged diminution in the value of their homes. The Plaintiffs have abandoned any other claims for monetary damages.

"[D]amages are not recoverable for losses beyond an amount that can be established with reasonable certainty." *Acoustic Marketing Research, Inc. v. Technics, LLC*, 198 P.3d 96, 98 (Colo. 2008). "The amount of damages must be established by a preponderance of the evidence with reasonable certainty." *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1201 (Colo. App. 2009) (citing *Mahan v. Capitol Hill Internal Med. P.C.*, 151 P.3d 685, 689 (Colo. App. 2006).

In this case, the Plaintiffs have never disclosed their damages to a degree of reasonable certainty. The Plaintiffs' alleged diminution in the value of their homes is only a "range" of damages based upon Mile-Hi's expert's appraisals. A range of damages does not meet the "reasonably certain" threshold. In addition, there is no evidence that Mile-Hi operations have caused any diminution in value of the Plaintiffs' homes Plaintiffs' expert claims that the Plaintiffs' home have not appreciated at the same rate as other homes but he admits he does not know why and cannot say it is due to Mile-Hi operations. As such, his range of damages is based on speculation.

F. Conclusion.

In summary, the Plaintiffs' requested injunctive relief is prohibited and preempted by federal law. If the Plaintiffs wish to change the noise emissions, flight patterns, and/or curfews of the Mile-Hi, their sole remedy is to convince the Airport or the City of Longmont to conduct a 14 C.F.R. Part 150 noise study and make recommendations to the FAA.

Respectfully submitted this 31st day of March, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Anthony L. Leffert
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Attorneys for Defendant Mile-Hi Skydiving Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2015, a true and correct copy of the foregoing **DEFENDANT'S TRIAL BRIEF** was delivered via *ICCES*, addressed to the following:

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s/Elizabeth Garfield