COURT OF APPEALS, STATE OF COLORADO Court Address: Colorado Court of Appeals 2 East 14th Avenue Denver, Colorado 80202 Appeal from Boulder District Court Honorable Judith L. LaBuda, Judge Case No. 2013-CV-31563 **Plaintiffs-Appellants:** CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER v. **Defendant-Appellee:** MILE-HI SKYDIVING CENTER, INC. ***Counsel for Defendant-Appellee***: Anthony L. Leffert, No. 12375 Laura J. Ellenberger, No. 43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, 26th Floor Denver, Colorado 80202 Phone Number: (303) 297-2600 Fax Number: (303) 297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	**▲ COURT USE ONLY ▲** Case Number: 2015 CA 1159
APPELLEE MILE-HI SKYDIVING CENTER, INC.'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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☒It contains 9433 words.

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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ROBINSON, WATERS & O'DORISIO, P.C.

s/Laura J. Ellenberger

Laura J. Ellenberger, No. 43931

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Defendant-Appellee, Mile-Hi Skydiving Center, Inc. ("Mile-Hi"), by and through its attorneys, Anthony L. Leffert of Robinson Waters & O'Dorisio, P.C., submits this Answer Brief.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Mile-Hi is satisfied with the Plaintiffs' Statement of Issues Presented for Review.

II. STATEMENT OF THE CASE

A. Nature Of The Case and Procedural History

Plaintiffs assert a variety of arguments on appeal; the same arguments the trial court rejected on a number of occasions. These arguments are based on disputed factual issues that were presented to the district court at trial and the court resolved in Mile-Hi's favor. Plaintiffs also unsuccessfully argue that the trial court misapplied federal and state law regarding federal preemption in the area of airplane noise.

On Mile-Hi's motions for summary judgment, the trial court dismissed a number of the Plaintiffs' original claims, including: claims asserted by Citizens for Quiet Skies, Inc. ("Citizens") for negligence, negligence *per se*, and trespass (R. CF, pp. 809-810); negligence *per se* with regard to the Boulder County noise ordinance (R. CF, pp. 1000, 1002); and unjust enrichment and trespass as to all Plaintiffs (R. CF, pp. 1006-1007, 1009-1010). Plaintiffs abandoned their

respondeat superior claim sometime after the summary judgment phase and before trial. They also abandoned a claim for damages for mental and physical injuries but only after a year of litigation and substantial briefing on the issue

At trial, Mile-Hi prevailed on the Plaintiffs' remaining tort claims. Following a week long bench trial, the trial court correctly determined: Mile-Hi's skydiving operations do not unreasonably and substantially interfere with the Plaintiffs' use and enjoyment of their homes and do not rise to the level of a private nuisance (R. CF, p. 2302, ¶¶ 62, 64); Plaintiffs were not damaged by the Mile-Hi's skydiving operations (R. CF, p. 2302, ¶ 63); and Mile-Hi did not breach a duty to not operate in a careless or reckless manner; did comply with federal regulations; and had not acted negligently (R. CF, p. 2302, ¶¶ 65-67).

Following judgment, Mile-Hi was granted an award of attorneys' fees pursuant to C.R.S. § 13-17-102 because several of the claims Plaintiffs alleged lacked substantial justification. (R. CF, pp. 2342-2352, 2545-2546). Plaintiffs challenged this award by filing a motion to reconsider pursuant to C.R.C.P. 59, (R. CF, pp. 2567-2574), which the trial denied and found to be groundless. (R. CF, p. 2787) The trial court again awarded Mile-Hi its attorneys' fees for having to respond to yet another groundless motion and attempt by the Plaintiffs to make this litigation unreasonably expensive. (*Id*.) This appeal followed.

B. Statement Of Relevant Facts

To begin, several of the Plaintiffs' citations to the record are inaccurate. While some of these citation are simply error, others are blatant misstatements of the evidence. For example, Plaintiffs' claim that Mile-Hi's flights "frequently conduct repeated loops and multiple passes over the same properties on a single flight" is not supported by the record. (Opening Brief, p. 3.) In this instance, Plaintiffs cited to an irrelevant "wherefore" paragraph of an unrelated motion. (R. CF, p. 682.)

Mile-Hi provides skydiving services out of the Vance-Brand Municipal Airport in Longmont, Colorado (the "Airport"). (R. CF, p. 2294, ¶8.) Mile-Hi has conducted its operations at the Airport since 1995. (*Id.*) Its operations comprise only about 6% of the all flight operations out of the Airport on an annual basis. (R. CF, p. 2296, ¶26.)

Mile-Hi operates four planes for its skydiving operations, including a DeHavilland Twin Otter ("Twin Otter"). (R. CF, p. 2296, ¶29.) Plaintiffs primarily complain about the noise from the Twin Otter, and claim the number of flights by the Twin Otter has "steadily increased" since 2006. This is yet another misstatement of the data presented at trial. Plaintiffs skew the percentage increase calculations by using 2008 as the baseline year, when Mile-Hi's overall flights were the lowest in a decade. The number of Twin Otter flights increased from

2005 to 2007; decreased in 2008; increased in 2009 and 2010; decreased from 2010 to 2012; and again increased in 2013 and 2014. (R. CF, p. 2298, ¶43.) From 2006 to 2014, the number of Twin Otter flights only increased by 20%, not by more than 50% as Plaintiff allege. (R. CF, p. 2298, ¶ 43.) Mile-Hi's overall flights during that time increased by 32%, not the 70% indicated by the Plaintiffs. (*Id.*)

The Airport is a general aviation airport owned and operated by the City of Longmont ("City"). (R. CF, p. 2295, ¶22.) It is part of the National Plan of Integrated Airport Systems and has received over $4.7 million in federal grant funds since 1988 as part of the Airport Improvement Program. (*Id.*) To obtain these grants, the City must, among other requirements, adopt and submit to the Federal Aviation Administration ("FAA") for its approval an Airport Master Plan that is updated periodically. (R. Tr. (4/15/15) p. 925, l. 20-p. 926, l. 13; p. 870, l. 6-19.) The Airport Master Plan, which is drafted and adopted by the City and approved by the FAA, provides the 65 dB DNL is the applicable noise limit for the Airport's activities in accordance with 14 C.F.R. Part 150. (R. Tr. (4/14/15) p. 1290, l. 7-9.) In exchange for the federal grant funds, the City also agreed to be bound by certain "Grant Assurances," which require, among other things, that the Airport remain available to all general operations, including skydiving. (R. CF, p. 2295, ¶22.)

Mile-Hi entered into an agreement with the FAA in 2007 (the "Letter Agreement") authorizing Mile-Hi to conduct parachute jumping at the Airport and establishing the procedures it must follow. (R. CF, p. 2296, ¶31.) The Letter Agreement provides that Mile-Hi's airplanes must remain within the confines of a designated "flight box" surrounding the Airport during a typical skydiving flight, unless otherwise diverted by Denver International Airport Air Traffic Control ("DIA TRACON"). (*Id.*) The flight box is bordered by arrival and departure corridors for Denver International Airport and the Rocky Mountains. (R. CF, p. 2297, ¶33.) This is not, as Plaintiffs' contend, a "self-imposed confined area" but one dictated by the FAA. (Opening Brief, p. 3.)

Citizens for Quiet Skies, Inc. ("Citizens") is a Colorado nonprofit corporation organized and led by Plaintiff Kimberly Gibbs. (R. CF, p. 2294, ¶9.) Citizens purports to represent the interests of a group of citizens concerned with noise produced by Mile-Hi's skydiving operations. (R. CF, p. 77, ¶1.) Ms. Gibbs formed Citizens to set up a bank account for donations to fund Plaintiffs' lawsuit against Mile-Hi. (R. CF, p. 453, ¶6.)

All of the individual Plaintiffs are residents of Longmont and live within the flight box. (R. CF, p. 2294, ¶10.) Most of the Plaintiffs also live within a couple miles of the Airport. (R. CF, p. 2294, ¶¶11-15.) Two of their homes are directly underneath the Airport's primary landing path. (R. CF, p. 2295, ¶16.) Plaintiffs are

a small group who are overly sensitive to airplane noise. The vast majority of Longmont residents are not bothered by noise produced by Mile-Hi's operations.

III. SUMMARY OF THE ARGUMENT

The premise of Plaintiffs' arguments on appeal is that the trial court ruled all local noise ordinances are preempted by federal law as they pertain to airplane noise which is an "overreach" by the federal. The trial court did not hold that federal law preempts all local controls of airplane noise. Instead, it narrowly held that federal law preempts the Longmont noise ordinance as it relates to aircraft. The basis for this ruling was the fact that the Airport Advisory Board adopted the federal noise regulation for airplane noise at 65 DNL, which was then adopted by the City.

Pursuant to 14 C.F.R. Part 150, the 65 DNL metric applies to airplane noise. This regulation directly contradicts the general Longmont noise ordinance of 55 dB. As the airport proprietor, the City adopted the federal noise limitation provided for in FAA regulations. The trial court properly determined that the Longmont noise ordinance does not apply to airport noise. There is no evidence that Mile-Hi has violated this limit of 65 DNL. The evidence demonstrates that the sound readings during Mile-Hi operations were at or less than 30 DNL, which included all other background noise in the area.

The trial court heard extensive evidence about how Mile-Hi's skydiving operations are part of air commerce and interstate commerce. Air commerce is not restricted to interstate flights. Moreover, the trial court heard evidence that Mile-Hi conducts skydiving flights in several states and has federal government contracts for skydiving training. (R. CF, p. 2296, ¶27.) Mile-Hi has a Letter Agreement with the FAA authorizing parachute jumping at the Airport. (R. CF, p. 2296, ¶31.) It is absurd for Plaintiffs to contend that Mile-Hi's operations do not effect interstate commerce.

There is no credible evidence to support Plaintiffs' contention that their home values have been damaged as a result of Mile-Hi's skydiving operations. Plaintiffs' real estate appraiser admitted the rate of appreciation of the homes within the flight box, where Plaintiffs' homes are located, was higher than the appreciation of homes outside the flight box.

The evidence presented at trial is more than sufficient to support the trial court's finding that Mile-Hi's operations do not create a private nuisance and that Mile-Hi has not acted negligently. The lay witness and expert witness testimony from both Plaintiffs' and Mile-Hi's experts support the trial court's finding that Mile-Hi has not unreasonably and substantially interfered with Plaintiffs' use and enjoyment of their homes. (R. CF, p. 2302, ¶62, 64.) No evidence was presented to demonstrate Mile-Hi operates in a careless or reckless manner or does not

comply with the applicable federal noise limit of 65 DNL. (R. CF, p. 2302, ¶65, 2303, ¶67.) The evidence established that if a local government could promulgate ordinances setting the noise restriction for airplanes at 55 dB, as Plaintiffs argue the Longmont Noise Ordinance does, all airports in the United States would have to close.

The sound studies conducted by both Plaintiffs' and Mile-Hi's sound experts demonstrate the noise created by Mile-Hi's skydiving operations are not significantly louder than other background noise in the community. Further, the evidence at trial shows that Plaintiffs, especially their leader, Kimberly Gibbs, are comprised of a small group of people who are overly sensitive to airplane noise and who have made it their mission to shut down Mile-Hi's skydiving operations. Ms. Gibbs has made shuttering Mile-Hi's business her cause célèbre.

From the outset, Plaintiffs have made every effort to make this litigation as expensive as possible for Mile-Hi. The trial court recognized this fact in awarding Mile-Hi attorneys' fees for Plaintiffs' several groundless claims that were dismissed before trial. This theme has continued in Plaintiffs' post-trial activities. Plaintiffs filed a groundless motion to reconsider the trial court's award of attorneys' fees; missed deadlines and failed to adhere to the Colorado Appellate Rules; and made numerous misrepresentations to this Court regarding the and holdings at the trial court level.

IV. ARGUMENT

A. Federal Preemption of Local Controls On Airplane Noise.

1. The Trial Court Correctly Held The Longmont Noise Ordinance is Preempted by Federal Law.

a. Standard of Review and Preservation

Mile-Hi agrees with Plaintiffs that preemption of state and local laws is a question of law reviewed *de novo*. *Kohn v. Burlington Northern & Santa Fe R.R.*, 77 P.3d 809, 811 (Colo.App.2003). However, "[t]he credibility of witnesses, sufficiency, probative effect, and weight of the evidence, as well as any inferences and conclusions to be drawn from the evidence, are all within the province of the trial court when it sits as the trier of fact. Its factual findings will not be set aside on appeal if they are supported by competent evidence in the record." *Lacy v. Rotating Prods. Sys., Inc.*, 961 P.2d 1144, 1146 (Colo.App.1998).

Mile-Hi agrees that Appellants preserved the matter for appeal.

b. The Longmont Noise Ordinance Is Preempted by Federal Law.

The trial court's findings on preemption are not an "extreme position," as Plaintiffs contend. (Opening Brief, p. 9). The trial court's holding in this case is in line with state and federal decisions around the country.

The trial court correctly found that 14 C.F.R. Part 150 adopts the day night sound level average ("DNL") as the sound metric for analyzing the impact of

airplane noise on communities and establishes the average 65 dB DNL as the federal limit. (R. CF, p. 2299, ¶ 45.) The court found the Airport's Master Plan approved by the City adopts the 65 DNL as the noise limit applicable to the Airport's activities. (*Id.*) This metric is the standard by which Plaintiffs' negligence and private nuisance claims were analyzed. (R. CF, p. 2301, ¶ 56.)

Because the City is prohibited by federal law from imposing limitations on aircraft operations to control noise without FAA approval; and because the Airport Master Plan, which was approved by the FAA, adopts the federal 65 DNL limit; the Longmont Municipal Code noise ordinances cannot be applied to regulate aviation noise. (R. CF, p. 2303, ¶ 69.) The case law and evidence support this holding. The trial court did not err as a matter of law in its application of the 65 DNL standard to the facts of this case.

The Federal Aviation Act of 1958 created the 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: "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a). Aircraft noise limits are set forth in 14 C.F.R. Part 36. The regulations establish noise limits for propeller driven small airplanes, like the ones Mile-Hi uses for its skydiving operations. *See* 14 C.F.R. § 36.501. The evidence demonstrates that all

of the planes Mile-Hi uses comply with these and all other applicable federal regulations. (R. CF, p. 2296, ¶ 30.)

Congress 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. The FAA then promulgated 14 C.F.R. Part 150, establishing the DNL as the metric by which to measure community exposure to and annoyance from aircraft noise. *See* 14 C.F.R. §§ 150.7, 150.9(b). The purpose of Part 150 is to prevent individuals in the community from seeking *ad hoc* and inconsistent limitations regarding aircraft noise.

Congress later enacted the Airport Noise and Capacity Act of 1990 ("ANCA"), which mandates that airport sponsors comply with a national program for review of noise and access restrictions. The FAA regulation implementing ANCA is 14 C.F.R. Part 161. ANCA requires any airport sponsor wishing to impose mandatory noise restrictions on aircraft to fulfill the requirements of Part 161, Notice and Approval of Airport Noise and Access Restrictions. 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.

Acceptance of federal funds by the City for the Airport obligates it to make the Airport available to all aircraft operators. (R. Tr. (4/15/15) p. 926, l. 23-p. 927, l. 13.) The City has entered into agreements with the FAA, referred to as "grant assurances," for the acceptance of federal funds for airport development projects pursuant to 49 U.S.C. 47101, *et seq*. The City has accepted over $4 million in Airport Improvement Program funds since 1988 and has agreed to keep the Airport available for public use, including skydiving. (R. Tr. (4/15/15) p. 926, l. 23-p. 927, l. 13.)

The United States Supreme Court 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.

State and local attempts to implement noise regulations, flight-pattern controls, restrictions on night operations, or air safety regulations are impliedly preempted by the Federal Aviation Act. *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (collecting cases). The following cases are also

persuasive as they involve state or local attempts to regulate the operation of aircraft that courts determined to be preempted:

- 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).

c. Longmont Exercised Its Proprietor Rights by Adopting the Federal Noise Limit.

The City adopted the federal noise limit for the Airport and appropriately exercised its proprietor right.

"The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court. Courts have, however, recognized that local proprietors play an extremely limited role in the regulation of aviation." *Arapahoe Cnty. Public Airport Auth. v. FAA*, 242 F.3d 1213, 1222 (10th Cir. 2001) (citations omitted).[1] A narrow exception to federal preemption "has been carved out for state and local governments who own airports." *Banner Advertising v. City of Boulder*, 868 P.2d 1077, 1083 n.6 (Colo.1994).

This "proprietor exception" permits a local municipality, in its proprietary capacity, to adopt "reasonable, nonarbitrary and non-discriminatory regulations of noise and other environmental concerns at the local level." *Nat'l Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81, 88 (2d Cir. 1998)* (internal citations omitted). However, if a proprietor adopts airport noise restrictions that do not comply with ANCA's notice and approval procedures, the subject airport is cannot receive federal grants under the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, *et. seq*. *See* 49 U.S.C. 47526.

As the airport proprietor, the City adopted 65 DNL in its Airport Master Plan, approved by the FAA, as the noise restriction for the Airport's activities. (R.

[1] Plaintiffs cite *Arapahoe Cnty. Public Airport Auth. v. Centennial Express Airplanes, Inc.*, 956 P.2d 587 (Colo.1998) to support their airport proprietor argument. Following the Colorado Supreme Court's decision, however, the Tenth Circuit held the airport's ban on scheduled passenger service at issue in that case was preempted by federal statute and the Supremacy Clause. *See Arapahoe Cnty. Public Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001).

CF, p. 2299, ¶ 46.) This metric, not the Longmont noise ordinance of 55 dB, applies to Mile-Hi's skydiving activities. If it applied to the Airport's activities, the Longmont noise ordinance would effectively preclude any airplane from flying in or out of the Airport, and would, therefore, be an impermissibly unreasonable noise regulation.

2. The Trial Court Properly Determined Longmont's Noise Ordinance Does Not Apply to Airport Noise.

a. Standard of Review and Preservation

Mile-Hi agrees the interpretation of an ordinance is a question of law subject to *de novo* review. *Wells v. Lodge Props., Inc.*, 976 P.2d 321, 325 (Colo.App.1998).

Mile-Hi agrees that Appellants preserved the matter for appeal.

b. The Longmont Noise Ordinance Does Not Apply to Aircraft in Flight.

Jack Freytag testified that every airport in the country would have to be closed if noise at the 55 dB level was found to create a nuisance, as all aircraft exceed 55 dB on takeoff and landing. (R. Tr. (4/17/15) p. 1384, l. 24-24.) Applying the Longmont Noise Ordinance to the Airport's activities would therefore create an absurd result. There is no evidence that the City intended the noise ordinance, which limits noise created by ground activities, to apply to the Airport's operations, especially considering the it adopted the 65 DNL limit in other regulations.

The City, with the FAA's approval, determined that the federal 65 DNL metric is the noise limit applicable to the Airport's activities. (R. CF, p. 2299, ¶ 45.) The trial court correctly held that it is this metric, not the Longmont noise ordinance, that applies in this case.

3. Mile-Hi's Operations Are A Part of Interstate Commerce.

a. Standard of Review and Preservation

Appellants failed to state the applicable standard of review for this issue.

An inquiry into whether Mile-Hi's business and operations affect interstate commerce is a mixed question of fact and law. *United States v. Laton*, 352 F.3d 286, 290 (6th Cir. 2003). When reviewing a mixed question of fact and law, the reviewing court defers "to the trial court's credibility determinations and will disturb its findings of historical fact only if they are clearly erroneous and not supported by the record." *Martin v. Union Pac. R.R. Co.*, 186 P.3d 61 (Colo.App.)

Plaintiffs also failed to indicate if and where this issue was preserved for review. Accordingly, this argument should not considered. *People v. Syrie*, 101 P.3d 219, 223 n.7 (Colo.2004) (reviewing courts do not address issues that have not been sufficiently preserved in the trial court.)

b. Mile-Hi's Skydiving Operations Are Part of Air Commerce and Interstate Commerce.

The trial court properly held that Mile-Hi's skydiving operations are part of air commerce and interstate commerce. (R. CF, p. 2301, ¶ 54.)

The scope of "air commerce" includes not just "interstate, overseas, or foreign air commerce" but also "any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." 49 U.S.C. 40102(a)(3); 14 C.F.R. § 1.1. Aircraft operations carrying skydivers fall within the definition of "air commerce" because those operations use aircraft that directly "affect or may endanger safety in interstate air commerce." *Id.; Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1279 (10th Cir. 1989) (helicopter pilot's purely intrastate flights subject to FAA's jurisdiction). Thus, the definition of air commerce is "clearly not restricted to interstate flights occurring in controlled or navigable airspace." *Hill*, 886 F.2d at 1280.

Mile-Hi conducts skydiving flights in several states and has federal governmental contracts for skydiving training. (R. CF, p. 2296, ¶ 27.) All of the airplanes that Mile-Hi uses are registered and certified by the FAA in their respective categories and comply with FAA noise limitations. (R. CF, p. 2296, ¶ 30.) Mile-Hi's Letter Agreement with the FAA authorizes it to conduct parachute jumping at the Airport. (R. CF, p. 2296, ¶ 31.) The Letter Agreement provides that Mile-Hi's airplanes must fly within a designated "flight box" surrounding the Airport for its normal skydiving operations, unless otherwise diverted by DIA TRACON. (R. CF, p. 2296, ¶ 31.) The flight box is bordered on two sides by

arrival and departure corridors for DIA. (R. CF, p. 2297, ¶ 33.) These facts demonstrate that Mile-Hi's operations directly affect safety and national air traffic flow.

The trial court's conclusion that Mile-Hi's skydiving operations are part of air commerce and interstate commerce is supported by this competent evidence in the record. (R. CF, p. 2301, ¶ 54.)

B. The Trial Court Properly Found No Credible Evidence Supports Plaintiffs' Damages Claims.

1. Standard of Review and Preservation

Mile-Hi disagrees with Plaintiffs that the applicable standard of review is *de novo*. "The trial court, as fact finder, has broad discretion in determining the amount of damages, and its decision will not be disturbed on appeal absent an abuse of discretion." *Carder, Inc. v. Cash*, 97 P.3d 174, 185 (Colo.App.2003). While the standard by which damages are calculated is a matter of law reviewed *de novo*, a trial court's determinations regarding the sufficiency and causation of Plaintiffs' claimed damages constitute factual findings. *Loveland Essential Group, LLC v. Grommon Farms, Inc.*, 251 P.3d 1109, 1114 (Colo.App.2010) ("We review *de novo* the district court's application of governing legal standards; however, the district court has the sole prerogative to assess the amount of damages…"); *Vento v. Colorado Nat. Bank-Pueblo*, 907 P.2d 642, 646 (Colo.App.1995) ("In determining issues of causation of injury, the trier of fact is vested with broad

discretion..."). When experts disagree about the measure of damages, reviewing courts must defer to the trial court's findings. *Buckley Powder Co. v. State*, 70 P.3d 547, 559 (Colo.App.2002) .

Plaintiffs do not indicate how or when this issue was preserved for appeal.

2. There is No Evidence That Mile-Hi's Skydiving Operations Caused Diminution in Value to Plaintiffs' Homes.

The trial court found Plaintiffs' presented no credible evidence that they had been damaged by Mile-Hi's skydiving operations. The evidence presented was insufficient to demonstrate that Mile-Hi's operations caused any diminution in value of Plaintiffs' homes. (R. CF, p. 2302, ¶ 63.) This finding is supported by the testimony of Plaintiffs' expert, Robert Myers, and Mile-Hi's expert, William Kamin. (R. CF, p. 2300, ¶¶ 52, 53.)

Mr. Myers did not perform any appraisals for his analysis; had never performed an appraisal in the Boulder County area; and had never before written an expert report regarding diminution in value due to aircraft noise or airports. (R. Tr. (4/14/15), p. 610, l. 22-p.164, l. 6.) Mr. Myers was unable to attribute any diminution in the value of Plaintiffs' homes to Mile-Hi's operations versus other airport noise or market factors. (R. CF, p. 2302, ¶ 63; R. Tr. (4/14/15), p. 617, l. 18-p. 618, l. 21; p. 622, l. 6-21; p. 630, l. 5-p. 631, l. 24.) Mr. Myers' market analysis revealed that houses within Mile-Hi's flight box increased at a higher

percentage than any other areas he studied. (R. Tr. (4/14/15) p. 627, l. 3-15; R. Ex. 42, p. 1065.)

The trial court also heard testimony from Mile-Hi's appraisal expert, Mr. Kamin, who actually performed appraisals of each of the Plaintiffs' homes, concluded that no diminution in the value of their homes could be attributed to Mile-Hi's operations. (R. Tr. (4/17/15), p. 1308, l. 2-p. 1312, l. 3; R. Ex. NN, pp. 722-723.) ("[T]here is no measureable diminution in value to any of the give subject properties that is directly attributable to the operations at [the Airport] or those of Mile-Hi Skydiving.")

The trial court gave greater weight to Mr. Kamin's extensive and well-researched expert opinion and found Mr. Myers' range of damages, on the other hand, was speculative. Accordingly, the trial court's factual findings on the insufficiency, speculative nature, and lack of causation regarding Plaintiffs' claimed damages should not be set aside as these findings are supported by competent evidence in the record. *Lacy*, 961 P.2d at 1146.

Plaintiffs' unsubstantiated allegations that Mile-Hi's operations made their house shake, caused them loss of enjoyment of their homes, or had lost income related to horse boarding were not presented to the trial court. (Opening Brief, p. 19.) Plaintiffs failed to timely disclose any calculation of economic damages beyond their diminution of value of property theory. (R. CF, p. 1940.) The trial

court excluded evidence of alternative economic damages claims due to the Plaintiffs this failure. (*Id*.) It was the Plaintiffs' own failure to comply with the disclosure rules that precluded them from recovering these alleged economic damages.

C. The Trial Court Rightly Held That Mile-Hi's Operations Do Not Create a Private Nuisance.

1. Standard of Review and Preservation

Mile-Hi agrees the trial court's findings with regard to nuisance are a mixed question of law and fact. Whether a trial court has applied the correct legal standard is a matter of law subject to *de novo* review. *Freedom of Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dept.*, 196 P.3d 892, 897-98 (Colo.2008). With respect to a nuisance claim, the reasonableness and degree of interference are questions of fact that will not be disturbed unless clearly erroneous. *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo.2001). Additionally, "[t]he credibility of witnesses, sufficiency, probative effect, and weight of the evidence, as well as any inferences and conclusions to be drawn from the evidence" are all findings of fact subject to the abuse of discretion standard. *Lacy*, 961 P.2d at 1146.

Mile-Hi agrees that this issue has been preserved for review.

2. The Trial Court Properly Analyzed Federal Standards In Connection With The Plaintiff's Nuisance Claim.

"Federal preemption of the standards of care can coexist with state … tort remedies." *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361, 368 (Colo.2001) (quoting *Abdullah*, 181 F.3d at 375.)

Plaintiffs complain that the trial court should not have considered the Schultz Curve in connection with Plaintiffs' nuisance claim. The Schultz Curve was created in 1978 and adopted by the FAA as it is the most accurate measure of annoyance caused by airplane noise in communities around the country. (R. Ex. JJ, p. 678-679.) Mr. Freytag testified about the extensive research and surveys that went into developing the Schultz Curve by a host of experts. (R. Tr. (4/17/16), p. 1368, l. 1-p. 1371, l. 14.) While Plaintiffs contend that the trial court wrongly considered this standard, they suggest no viable alternative.

Plaintiffs contend because 89 people complained 328 times about airport noise in one year, and that 70% of these complaints were about Mile-Hi, that the Court should have found normal people in the community are annoyed by Mile-Hi's skydiving operations. Of these complaints, the majority of them came from Ms. Gibbs and other supporters of Citizens at Ms. Gibbs' urging. (R. Tr. (4/16/15), p. 1095, l. 9-13.) Many complaints were made on days when Mile-Hi was not even flying. (R. Tr. (4/16/15), p. 1104, l. 14-21.) Contrary to Plaintiffs' argument, this evidence supports the trial court's conclusion that Plaintiffs are a only a small

group who are overly sensitive to airplane noise. (R. CF, p. 2295, ¶19; p. 2301, ¶58.) The Court's findings of fact on this issue are supported by the evidence and should not be affirmed.

3. Mile-Hi's Skydiving Operations Do Not Constitute a Private Nuisance.

The trial court analyzed Plaintiffs' nuisance claim under Colorado law, and applied the test as stated in *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377 (Colo.2001). "A claim for nuisance is predicated upon a substantial invasion of a plaintiff's interest in the use and enjoyment of his property when such invasion is … intentional and unreasonable…" *Van Wyk*, 27 P.3d at 391; Order at ¶ 1. An "unreasonable" interference must be "significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id*. at 391; Order at ¶ 2.

Analyzing all of the evidence, including the sound studies by Plaintiffs' and Mile-Hi's experts, the trial court found the noise produced by Mile-Hi's operations is not offensive, annoying, or inconvenient to a degree significant enough that a normal person in the community would consider it unreasonable. (R. CF, p. 2301, ¶ 58; p. 2302, ¶ 64.) Mr. Freytag conducted studies near two of the Plaintiffs' homes and found that DNL values for the two sites from all noise sources were 55.3 and 56.7 DNL, well within the normally accepted range for residential communities. (R. Ex. JJ, p. 677.) These measurements include noise from other

aircraft flying in the area. (R. Ex. JJ, p. 677.) The noise level produced by just Mile-Hi's planes was 30.2 DNL to 32.2 DNL. (R. Ex. JJ, p. 677.) Mr. Freytag concluded that the noise exposure contribution from Mile-Hi was less than 0.1 dB to the overall noise environment, which is negligible when compared to all aircraft noise in the area. (R. Ex. JJ, p. 687.) Mr. Rand, Plaintiffs' sound expert, conducted a sound study which was consistent with Mr. Freytag's findings. (R. CF, p. 2299, ¶ 50.)

Weighing this evidence, the court determined "simply because a certain noise level is irritating or frustrating to a small group of people" does not make it significant enough to rise to the level of a nuisance in these circumstances. (R. CF, p. 2301, ¶ 58.) Further, the court stated, "Though the Individual Plaintiffs may at times find the noise to be irritating or frustrating, the Court finds the gravity of harm to Plaintiffs in this matter is not significant or severe." (R. CF, p. 2301, ¶ 58.) The trial court found the utility of Mile-Hi's "legitimate business" that "complies with FAA regulations and provides tax revenue and recreational and other services to the community outweighs Plaintiffs' concerns of noise, particularly when Plaintiffs moved into an area known to have an airport in close proximity and the particular noise from Mile-Hi was in the low 30 DNL level for flyovers." (R. CF, p. 2301, ¶ 58.) These findings regarding the reasonableness and degree of interference with the Plaintiffs' use and enjoyment of their homes are

supported by the evidence and should not be disturbed on appeal. *See Van Wyk*, 27 P.3d at 391.

D. The Trial Court Properly Admitted Lay Witness Opinion Testimony And The Terracon Report.

1. Standard of Review and Preservation

Mile-Hi agrees that evidentiary rulings regarding the admissibility of evidence are analyzed under an abuse of discretion standard. *Palazzi v. City of Brighton*, 228 P.3d 957, 962 (Colo.2010). "A trial court has considerable discretion in deciding the admissibility of evidence, and an abuse of that discretion occurs only when its ruling is manifestly arbitrary, unreasonable, or unfair." *Martin v. Union P. R. Co.*, 186 P.3d 61, 68 (Colo.App.2007), *rev'd on other grounds*, 209 P.3d 185 (Colo.2009)).

Mile-Hi agrees that Plaintiffs preserved this issue on appeal with respect to each of their three evidentiary disputes.

2. Don Dolce.

The trial court properly admitted Don Dolce's lay testimony and spreadsheets he created to analyze noise complaints made to the Airport in his role as the Chairman of the Airport Advisory Board. The trial court admitted the spreadsheets as business records of the Airport. (R. Tr. (4/16/15), p. 1079, l. 17-p. 1080, l. 5.)

Mr. Dolce was a lay witness who served as the Chairman of the Airport Advisory Board. (R. CF, p. 2298, ¶ 42.) In connection with this position, Mr. Dolce prepared calculations and spreadsheets regarding airport noise complaints. (R. Exs. S and T, pp. 366-373.) Calculating airport noise complaints on a spreadsheet and deducting out invalid complaints is not expert testimony. The trial court limited Mr. Dolce's testimony to a factual explanation of how he created the spreadsheets and the data he included or excluded. (R. CF, p. 2097; R. Tr. (4/16/15), p. 1089, l. 14-p. 1090, l. 1.) It also allowed Mr. Dolce to offer opinions based on his own perception which were not scientific, technical, or based on specialized knowledge. (R. CF, p. 2097; R. Tr. (4/16/15), p. 1089, l. 14-p. 1090, l. 1.)

Mr. Dolce is not a specialist in the field of airport noise complaints. His spreadsheets and computations are the product of a process of reasoning familiar in everyday life. (R. Ex. S, p. 366.) As the Chairman of the Airport Advisory Board, Mr. Dolce was qualified to offer his lay opinion regarding noise complaints lodged with the Airport. Mr. Dolce testified that his calculations showed members of Citizens made up approximately 75% of the complaints made to the Airport regarding Mile-Hi in 2013. (R. CF, p. 2298, ¶ 42.) This testimony required a simple arithmetic calculation, as did his testimony that 1,149 of 1,582 total

complaints in 2013 were filed by Steve Jennings, a supporter of Citizens. (R. CF, p. 2298, ¶ 42.)

This testimony did not cross over into the realm of an expert opinion involving areas of scientific, technical, or other specialized knowledge under CRE 702. The trial court did not abuse its discretion by admitting Mr. Dolce's testimony pursuant to CRE 701 and spreadsheets pursuant to CRE 803(6).

3. Nikolai Starrett.

Plaintiffs claim that the trial court improperly admitted expert testimony of Nikolai Starrett, the chief pilot for Mile-Hi at that time. As the chief pilot, Mr. Starrett was responsible for training pilots, hiring, dismissing flight crews, and scheduling pilots. (R. Tr. (4/16/15), p. 1221, l. 2-11.) Over Plaintiffs' counsel's objection, the trial court permitted Mr. Starrett to testimony regarding Mile-Hi's flight patterns based on his personal knowledge gained in his role as Mile-Hi's head pilot. (R. Tr. (4/16/15), p. 1223, l. 17-p. 1226, l. 13.) Mr. Starrett also testified regarding the training of Mile-Hi's pilots and their compliance with the Airport's voluntary noise abatement guidelines. (R. Tr. (4/16/15), p. 1226, l. 14-p. 1228, l. 14.) Lastly, Mr. Starrett testified regarding his understanding, as Mile-Hi's chief pilot, of what constitutes an adverse climb condition and Mile-Hi's compliance with federal regulations. (R. Tr. (4/16/15), p. 1235, l. 20-p. 1237, l. 25).

This is all factual testimony based on Mr. Starrett's personal knowledge and experience flying Mile-Hi's planes. Accordingly, the trial court did not abuse its discretion by admitting Mr. Starrett's lay testimony.

4. Terracon Report

The trial court did not abuse its discretion by allowing Mr. Freytag to testify regarding a noise study performed for the City of Longmont by Terracon Consultants, Inc. (the "Terracon Report") or by admitting the report into evidence. (R. Ex. U, pp. 543-582)

As a qualified expert witness, Mr. Freytag was entitled to base his expert opinions upon any facts or data that are made known to him before trial, including the Terracon Report. *See* CRE 703; *see also Gold Rush Inc., Inc. v. G.E. Johnson Const. Co.*, Inc., 807 P.2d 1169, 1173 (Colo.App.1990); *Vento v. Colo. Nat. Bank-Pueblo*, 907 P.2d 642, 645 (Colo.App.1995).

The Terracon Report was not offered into evidence to prove the truth of the matter asserted. *See* CRE 801(c). Similarly, Mr. Freytag did not testify about the contents of the Terracon Report for the purpose of asserting those statements were accurate. Instead, Mr. Freytag's testimony with respect to the Terracon Report was limited to whether its conclusions were consistent with his own, which they largely were. (R. Tr. (4/17/15), p. 1408, l. 3-21; p. 1411, l. 18-p. 1412, l. 15; p. 1413, l. 17-p. 1414, l. 2.) This testimony was not submitted for the truth of the matter

asserted and was properly admitted into evidence. S*ee People v. Bornman*, 953 P.2d 952, 956 (Colo.App.1997) (testimony and admission of report not authored by the expert witness is appropriate where the expert's description is not submitted for the trust of the materials' assertion).

The findings of the Terracon Report only reaffirmed what Mr. Freytag and Mr. Rand found in their own sound studies, that Mile-Hi's skydiving planes were not significantly higher than background noise sources. (R. Tr. (4/17/15), p. 1413, l. 17-p. 1414, l. 2.) Accordingly, even if the Terracon Report and Mr. Freytag's testimony regarding the report should have been excluded, any such error is harmless.

E. The Trial Court Properly Granted Mile-Hi's Motion for Summary Judgment Regarding Plaintiffs' Trespass Claims.

1. Standard of Review and Preservation

Mile-Hi agrees that a trial court's grant of a motion for summary judgment is review *de novo*. *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo.1995).

Mile-Hi agrees that Plaintiffs preserved this issue for appeal.

2. No Issues of Material Fact Precluded the Entry of Summary Judgment on Appellants' Claims for Trespass Against Mile-Hi.

The trial court correctly found that there were no genuine issues of material fact with regard to Plaintiffs' trespass claim and dismissed the claim, entering

summary judgment in Mile-Hi's favor. (R. CF, p. 1006.) "The elements for a tort of trespass are a **physical** intrusion upon the property of another without proper permission from a person legally entitled to possession of that property." *Hoery v. United States*, 64 P.3d 214, 217 (Colo.2003) (citing *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 389 (Colo.2001) (emphasis added).

While a physical intrusion on land possessed by another is a trespass, an intangible entry upon another's land in most situations does not constitute a trespass. *Van Wyk*, 27 P.3d at 389-91. Noise is an intangible invasion of property. *Id*. at 387-88. "[A]n intangible intrusion may give rise to a claim for trespass, but **only if an aggrieved party is able to prove physical damage** to the property caused by such intangible intrusion." *Id*. at 390 (emphasis added).

The Colorado Supreme Court in *Van Wyk* addressed many of the issues raised here and dismissed the plaintiffs' trespass claim for failure to allege "specific physical damage to their property resulting from the intangible intrusions of which they complained." *Van Wyk*, 27 P.3d at 391. There, a group of homeowners brought an action against the Public Service Company of Colorado alleging claims for nuisance, trespass, and inverse condemnation. *Id.* at 381. The primary allegation was that an upgrade to a large electrical line led to increased noise emanating from the operation of the power line. *Id*. at 382. The plaintiffs

claimed the power line emitted "continual, unreasonably loud noises that increase during times of high humidity, rain, or snow." *Id*. at 391.

Pursuant to the holding in *Van Wyk*, Plaintiffs trespass claim fails as a matter of law because there is no evidence that the alleged noise created by Mile-Hi's skydiving operations caused any physical damage to their properties. *Id*. at 390; *see also Trask v. Nozisko*, 134 P.3d 544, 554 (Colo.App.2006) (no evidence to support plaintiff's trespass claim where claim was "reduced to [the plaintiff's] displeasure with shouting that can be heard from her property.")

Not one of the Plaintiffs testified during deposition or at trial that his or her property has been physically damaged by the alleged noise. In fact, all of the Plaintiffs affirmatively stated that none of their real or personal property has been damaged by the alleged noise created by Mile-Hi's airplanes. (R. CF, pp. 668-670, ¶¶ 25, 27, 29. 33, 35, 36, 38, 39.) Neither a "pushing" effect on eardrums nor physical vibrations without evidence of resulting physical property damage support Plaintiffs' trespass claim. (Opening Brief, p. 29.) Though Plaintiffs argue that vibrations should constitute a physical invasion into their homes, this argument is contrary to well-established Colorado law. As in this case, the plaintiffs in *Van Wyk* argued that their windows vibrating and vibrations in their homes from the operation of an electrical line constituted a physical trespass. *Van Wyk*, 27 P.3d at 381-82. The Colorado Supreme Court rejected this argument.

While a trespass claim based on vibrations caused by noise may be viable, this type of intangible trespass claim can only survive where the plaintiffs can show some physical damage to their property. *Van Wyk*, 27 P.3d at 390. Plaintiffs' contention that vibrations, themselves are physical damages to Plaintiffs' properties is not supported by Colorado law, nor do they cite any authority for this argument. Therefore, the trial court did not err by dismissing Plaintiffs' trespass claim on summary judgment.

F. The Trial Court Properly Granted Mile-Hi's Motion for Summary Judgment Regarding Plaintiffs' Claim for Unjust Enrichment.

1. Standard of Review and Preservation

Mile-Hi agrees that a trial court's grant of a motion for summary judgment is review *de novo*. *Aspen Wilderness Workshop*, 901 P.2d at 1256. However, even if the trial court erred by granting Mile-Hi's motion for summary judgment and dismissing Plaintiffs' unjust enrichment claim, this Court may affirm the trial court's ruling on any grounds that are supported by the record. *See Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 329 (Colo.App.2009).

2. No Issues of Material Fact Precluded the Entry of Summary Judgment on Appellants' Claim for Unjust Enrichment.

The trial court dismissed Plaintiffs' unjust enrichment claim on summary judgment. (R. CF, p. 1010.) The Court held that although Plaintiffs may suffer in some way from Mile-Hi's activities while Mile-Hi benefits therefrom, there was no

evidence that to show Plaintiffs conferred the claimed financial benefit upon Mile-Hi. (*Id.*) Plaintiffs argue the trial court applied an erroneous test and that Colorado law no longer requires that the plaintiff confer a benefit on the defendant, only that the defendant is benefitted. (Opening Brief, p. 32.) Regardless of the standard applied, however, Plaintiffs' unjust enrichment claim fails as a matter of law and was properly dismissed on summary judgment.

A party is unjustly enriched when it "benefits as a result of an unfair detriment to another." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo.2008). To recover on a claim for unjust enrichment, a plaintiff must show "(1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." *Id*. (quoting *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo.2000)).

Plaintiffs alleged that Mile-Hi "does not have permission from Plaintiffs to fly over their properties." (R. CF, p. 83, ¶¶ 80-81.) Mile-Hi does have permission. The undisputed facts demonstrate that the federal government, through the Letter Agreement with the FAA, granted Mile-Hi permission to conduct its skydiving operations pursuant to the terms of the Letter Agreement and the FAA regulations. That Plaintiffs have not authorized Mile-Hi's flight patterns is irrelevant as Mile-Hi lawfully operates a business under the authority and with authorization of the FAA.

Plaintiffs also claimed, for the very first time in response to Mile-Hi's motion for summary judgment, that Mile-Hi's use of the airspace within the flight box for its parachuting business excludes and prevents Plaintiffs from using the outdoor space of their homes. (R. CF, p. 885.) This argument is specious. Plaintiffs' presented no evidence in response to Mile-Hi's motion for summary judgment to demonstrate that they had been wrongfully excluded from outdoor activities.

Plaintiffs have no exclusive legal right to enjoy the outdoors; nor do they have an exclusive right to the airspace above. Moreover, there is nothing "unjust" about Mile-Hi adhering to the FAA's flight box designation. Nor is it "unjust" for Mile-Hi to fly its planes in the vicinity of an airport Plaintiffs knew existed when they purchased their homes in close proximity thereto. Allowing Mile-Hi to conduct its lawful business is not a "benefit."

Even if the trial court had found that Mile-Hi was benefited in some way by Plaintiffs, the undisputed facts demonstrate that Mile-Hi has not been unjustly enriched at Plaintiffs' expense. No evidence was presented on summary judgment or at trial that Mile-Hi could "[incur] the cost of sound mitigating equipment" instead of [passing] on this cost to local residents." (Opening Brief, p. 32.) Accordingly, even if this Court finds that the trial court erred in dismissing the unjust enrichment claim on summary judgment, any such error was harmless and

dismissal of the claim should be affirmed. *See* C.R.C.P. 61; *see also Fairways Living, Inc. v. North Denver Bank*, 169 Colo. 23, 26, 453 P.2d 190, 191 (1969) (the propriety of summary judgment is mooted by subsequent trial and resolution of factual issues).

G. The Trial Court Did Not Abuse Its Discretion By Granting Mile-Hi An Award of Attorneys' Fees.

1. Standard of Review and Preservation

The determination whether a claim is substantially frivolous, groundless, or vexatious and an award of attorneys' fees is within the trial court's discretion. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 299 (Colo.App.2009). Mile-Hi agrees with Plaintiffs that the amount of an attorneys fee award is reviewed for abuse of discretion. *Id.*

Mile-Hi agrees that issues with respect to the claims for which Mile-Hi was awarded fees was preserved but disputes that Plaintiffs preserved their argument regarding the unreasonableness of the amount of the awarded fees.

Mile-Hi sought an award of attorneys' fees pursuant to C.R.S. § 13-17-102 attributable to defending against the Plaintiffs' substantially groundless and/or frivolous claims. These claims included: (1) claims asserted by Citizens; (2) claims for physical and mental injuries; (3) trespass; (4) negligence *per se* with regard to the Boulder County Noise Ordinance; and (5) unjust enrichment.

"The award of attorney fees is an important sanction available to a court in a civil case to punish an attorney or a party who engages in conduct improperly instigating or prolonging litigation." *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo.1997). Pursuant to C.R.S. § 13-17-102(4), a court "shall assess attorney fees if … it finds that an attorney or a party brought or defended an action, or any part thereof, that lacked substantial justification…" A claim lacks substantial justification if it is "substantially frivolous, substantially groundless, or substantially vexatious." *Id*. A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *Hamon*, 229 P.3d at 299. A claim or defense is groundless if the allegations of the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *Id*. at 300.

2. Plaintiffs' Unjust Enrichment Claim Was Substantially Groundless and/or Frivolous.

Plaintiffs sought leave of the Court to file a Second Amended Complaint solely to add a claim for unjust enrichment claiming that Plaintiffs had conferred a benefit upon Mile-Hi. However, Plaintiffs alleged no facts to support this claim. The trial court correctly concluded that Plaintiffs failed to present any evidence that Plaintiffs conferred a benefit upon Mile-Hi. There was also no evidence that Mile-Hi benefited as a result of an unfair detriment to Plaintiffs. (*See* Section

IV.F.2. above). Plaintiffs' argument on summary judgment that in certain reverse condemnation cases courts have held governmental entities liable for "takings" was inapposite. Mile-Hi is not a governmental entity, and this is not an inverse condemnation/eminent domain case. Plaintiffs' claim for unjust enrichment lacked substantial justification and was factually groundless.

The trial court determined that no facts supported the unjust enrichment claim; that Plaintiffs' argument for an expanded definition of unjust enrichment was not meritorious; and that this claim lacked substantial justification and was factually groundless was not an abuse of discretion. This holding is supported by the record and is not an abuse of discretion.

3. Plaintiffs' Claim for Mental and Physical Injuries Was Substantially Groundless, Frivolous, and/or Vexatious.

All three of the Plaintiffs' complaints alleged that they suffered physical and mental injuries and sought damages for those injuries and related medical expenses when they knew or reasonably should have known no such damages had been incurred. Mile-Hi was forced to engage in discovery to defend these claims. Plaintiffs refused to participate in physical and mental examinations despite their claims of physical and mental injuries. Mile-Hi was forced to file a motion to compel the examinations, which Magistrate Gunning denied as premature. (R. CF, pp. 247-249, 422-424.) Mile-Hi repeatedly asked Plaintiffs' counsel whether they intended to pursue this area of damages, to which no response was received. Even

after each of the Plaintiffs admitted in their respective depositions they had suffered no physical or mental injuries, they continued to pursue these damages. (R. CF, pp. 2347, ¶13-14; pp. 2539-2540.)

In their pleadings, Plaintiffs alleged that they had experienced headaches, stress, sleep disruption because of Mile-Hi and alleged damage to their health, safety, and well-being. (R. CF, p. 80, ¶ 43.) Plaintiffs also alleged that Mile-Hi's conduct had caused them discomfort and annoyance. (R. CF, p. 80, ¶ 61.) Plaintiffs sought damages for past and future pain and suffering, for physical and mental injuries, and for medical expenses. (R. CF, p. 85.) There is no question that Plaintiffs, themselves, put their physical and mental conditions in controversy by seeking claims for relief and damages for physical and mental injuries, past and future.

Plaintiffs had never suffered any mental or physical injuries caused by Mile-Hi's skydiving operations, and they knew this when they filed each of their complaints. They continued to maintain they had suffered such damages for months until they finally voluntarily dismissed these claims on November 3, 2014. (R. CF, p. 658.) By refusing to dismiss their groundless claims for mental and physical damages, Plaintiffs forced Mile-Hi to incur legal fees to defend against them. The trial court's award of fees was proper.

4. Plaintiffs Abandoned Their Respondeat Superior Claim.

Plaintiffs apparently abandoned their claim for *respondeat superior* some time before trial, only after the claim was thoroughly briefed during the summary judgment stage of this litigation. The trial court agreed that forcing Mile-Hi to incur fees related to a claim that Plaintiffs simply dropped at some point before trial without notice to the court or Mile-Hi entitled Mile-Hi to an award of fees incurred in relation to this claim. (R. CF, pp. 2544-2545.)

5. The Trial Court Did Not Abuse Its Discretion In Determining the Amount of the Attorneys' Fee Award.

The trial court had broad discretion to determine the amount of the award of attorneys' fees. Mile-Hi submitted a thorough and detailed accounting of the fees incurred in defending against each of the Plaintiffs' groundless claims. Applying the lodestar method, the trial court thoroughly analyzed the requested amount for each claim. (R. CF, pp. 2545.) The trial court did not abuse its discretion in determining the amount of attorney's fees awarded considering its thorough and detailed analysis. Moreover, Plaintiffs failed to raise any objections regarding the amount of fees requested by Mile-Hi in their response to Mile-Hi's Motion for Attorneys' Fees and, therefore, waived their objection to the reasonableness of the award amount.

6. The Trial Court Properly Sanctioned Plaintiffs' For Their Groundless Motion to Reconsider the Award of Attorneys' Fees

C.R.C.P. 59(a)(3) and (4) provide that a party may move for post-trial relief following entry of judgment for an amendment of judgment. However, "[a] motion to reconsider is not specifically delineated in C.R.C.P. 59, and no other rule or statute establishes a party's right to file such a motion," except in situations not relevant here. *Stone v. People*, 895 P.2d 1154, 1155 (Colo.App.1995). Colorado courts "do not condone the prevalent use in trial courts of post-trial motions for reconsideration. *Id*. at 1155-56.

"A motion for reconsideration is not a license for a losing party's attorney to get a second bite at the apple." *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). These motions "cannot be used to advance [new] arguments that could have been raised in prior briefing." *Grynberg v. Total S.A.*, 538 F.3d 1336, 1354 (10th Cir. 2008). These motions must be "aimed at reconsideration, not initial consideration." *GSS Grp. Ltd. v. Nat'l Part Auth*., 680 F.3d 805, 812 (D.C. Cir. 2012). Moreover, a motion to reconsider does not permit a party to rehash arguments that the Court has previously addressed. *Brown v. Presbyterian Healthcare Servs*., 101 F.3d 1324, 1332 (10th Cir. 1996).

The principle that motions for reconsideration are an inappropriate mechanism to raise new arguments is a corollary of the concept that a party who fails to raise a timely objection waives the objection. *See, e.g., Highlands Ins. Co.*

v. Lewis Rail Service Co., 10 F.3d 1247, 1251 (7th Cir. 1993) (insured waived argument by "failing to raise argument until its motion to reconsider"). This principle is well-established and has been embraced by Colorado courts in a variety of contexts, including in the context of issues first raised in a motion for reconsideration. *Denny Const., Inc. v. City and County of Denver ex rel. Board of Water Com'rs*, 170 P.3d 733, 740 (Colo.App.2007) (and cases cited therein), rev'd on other grounds, 199 P.3d 742 (Colo.2009). When a party does not make a timely objection, it "has no basis to complain as to the amount of attorney fees awarded to [the other party]." *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp., Inc.*, 645 P.2d 868, 869 (Colo.App.1982); *see also In re Marriage of Tatum*, 653 P.2d 74, 77 (Colo.App.1982) (same).

Plaintiffs have failed to explain how this abundance of case law precluding parties from using a motion to reconsider to raise new issues or rehash old arguments should not apply to them. The trial court did not abuse its discretion in awarding attorney's fees for the Plaintiffs' groundless Motion to Reconsider Award of Attorney's Fees as the motion improperly advanced new arguments Plaintiffs should have raised in prior briefing and rehashed arguments the Court had properly denied at least once.

V. CONCLUSION

For the foregoing reasons, Defendant-Appellee Mile-Hi Skydiving Center, Inc. respectfully requests that the Court AFFIRM the trial court's summary judgment orders, Order re: Bench Trial, and orders granting Mile-Hi an award of attorneys' fees against the Plaintiffs.

Respectfully submitted this 6th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2016, I served a true and correct copy of the foregoing **APPELLEE'S ANSWER BRIEF** via the ICCES filing system on the following:

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