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Trial Court: COUNTY OF BOULDER, COLORADO District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 The Honorable Judith L. LaBuda Case No. 2013 CV 31563	▲ COURT USE ONLY ▲
Appellants: CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **v.** **Appellee:** MILE-HI SKYDIVING CENTER, INC.	Court of Appeals Case Number: 2015 CA 1159
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REPLY 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, I certify that:

The brief complies with C.A.R. 28(g). In contains 5,694 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

//s// Matthew B. Osofsky
Matthew B. Osofsky, #34075

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STATEMENT OF THE CASE

A. Statement of Facts

The Answer Brief ("AB") disputes certain facts presented by Citizens and alleges facts which are not supported by the record.

One of the central points of this case was that Mile-Hi's flights are unlike other Longmont Municipal Airport ("LMO") traffic because: (1) Mile-Hi circles the neighborhood (R. CF 2298, ¶39; R. Ex. 682), while other planes fly away from the airport (R. Tr. 210:5-25); and, (2) Mile-Hi's flights climb for 10,000 vertical feet, whereas other flights rarely climb for more than 2,000 feet. R. Ex. 680. Climbing is what causes noise (R. Tr. 982:13-16).

The record does show that Mile-Hi flies in repeated loops and multiple passes over the same properties during a single flight. Citizens mistakenly referred to "R. CF 682" instead of exhibit "R. Ex. 682," which is a drawing of a "typical" looping flight path. The Court also found that "Mile-Hi's flights involve continuous spiral circles on ascent within the flight box." R. CF 2298, ¶39.

Mile-Hi contends that its flights constitute only 6% of the airport traffic. While the Court made this finding, it is clearly erroneous. Airport manager Tim Barth provided the figure, but admitted on cross-examination that it was inaccurate. R. Tr. 1040:1. Moreover, this statement intentionally misrepresents the air traffic which impacts the community around LMO.

Of the approximately 61,000 operations (a take-off or landing) in 2010, almost half are "itinerant" flights where planes arrive from or fly away from LMO to other airports. R. Tr. 1040:6-12, 1041:1-2. The community noise impact from itinerant flights is minimal because they do not loiter. R. Tr. 210:9-18; 298:1-12; and, 318:3-12. Mile-Hi's flights remain within the community for the entire duration of the flight. R. Tr. 210:9-18.

Of the local operations, over 23,500 are "touch and go" operations of the flight schools that take off under power to an altitude of 1,000 feet, then cut to "minimal power" and cruise around the airport within the "pattern" (R. Ex. 36) to a landing approach. R. Tr. 1041:12-1042:18. These flights climb extremely briefly, and never even leave the airport property.

Deleting itinerant flights and "touch and go" operations leaves 10,500 local flights a year from LMO. Mile-Hi is responsible for more than half of these flights. R. Tr. 1042:19-22.

Mile-Hi responds to the statistic showing that 328 complaints were made by 89 people in one year (R. Tr. 1095:7), 70% of those complaints being about Mile-Hi (R. Tr. 1110:21-1111:1), by contending that most of these came from a group of abnormal malcontents. Actually, the numbers referenced by Plaintiffs already excluded the twenty-two people that Mile-Hi's statistician identified as outside statistical norms. The record shows that <u>in addition</u> to complaints by people Mile-

Hi says should be ignored, 89 other people entered complaints. Applying Barth's 70% figure, there were more than 230 complaints about Mile-Hi in one year from people Mile-Hi did not even contend were outside community norms.

Citizens referred to a graph with data on the dramatic increase in overall flights from 2008 to 2014 that is impossible to "skew" as alleged. Citizens asks this Court to take note that Mile-Hi attempts to show decreased Otter flights from 2006 to 2008 by deceptively treating all Otter aircraft the same. One of the principal points in this case was that the "White Otter" rented by Mile-Hi in 2006 was equipped with a "quiet kit" to reduce noise. R. Tr. 977:23-978:10; 979:15-18. Barth admitted that the Purple Otter, which does not have a quiet kit, is responsible for most complaints. R. Tr. 977:21 to 978:10; 979:4-10.

The Court should also note that the purported noise certification was not a certification of the actual Purple Otter and merely a certificate issued to the manufacturer. R. Ex. M. The Purple Otter was modified (R. Tr. 1423:13) in a manner that Mile-Hi's expert admitted could cause it to exceed the 80 dbl limit applicable to the manufacturer (R. Tr. 1424:24-1425:2). The modified Purple Otter was not tested for compliance. R. Tr. 1425:3-6. Certificates for Mile-Hi's other aircraft were never even disclosed. R. Tr. 1149:1-25.

Finally, Mile-Hi erroneously states that:

> 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.

AB at 4. The statement is facially erroneous because the 65 DNL is not a "limit." It is only used to determine when federal funds may be used for noise insulation in homes. The record reference in support of this statement is testimony by William Kamin, Mile-Hi's real estate appraisal expert, who simply answered "yes" when asked "Did the airport master plan that was approved by the City…. employ the 65 DNL." R. Tr. 1290:7-9. The words "approved" and "employ" were never defined, the Master Plan was not admitted into evidence, and there was no foundation for the leading question. No objection was entered because Kamin, as an expert, may use hearsay documents in forming his opinion. C.R.E. 702. However, his testimony is not competent evidence of the accuracy or contents of the hearsay document. *People v. Bornman*, 953 P.2d 952, 956 (Colo.App.1997).

"[A]n expert may rely upon statements or reports of other persons, and he or she may describe those materials. However, such description is not submitted for the truth of the materials' assertion; they are offered only to explain the witness' opinion." *Id.* "[W]hen presented for this purpose, the statements are not evidence of the matters stated." *Houser v. Eckhardt*, 450 P.2d 664, 668 (Colo. 1968). Thus, the testimony could be admitted to explain Kamin's opinion. However, it was improper for Mile-Hi or the Court to then use it to establish the truth as to whether the Master Plan adopted the 65 DNL.

ARGUMENT

I. The Court erred in finding that federal law completely preempts local control of the defendant's activities.

Unlike the Trial Court, Mile-Hi admits that there is an exception from federal preemption for proprietors of local airports to adopt local noise restrictions. AB at 14. Mile-Hi does not dispute that Longmont is the airport proprietor here, or that Longmont's noise ordinance is a proprietary enactment of the City of Longmont. AB at 14-15.

Mile-Hi vaguely cites to two federal statutes and a federal regulation with *no supporting case law upholding preemption under these authorities of a noise restriction adopted by an airport proprietor*. Mile-Hi also claims that the Longmont Airport's Master Plan so-called "adoption" of the federal 65 DNL noise "limit" supersedes other enactments, including the general Longmont noise ordinance, and for unexplained reasons is the only *proprietary* action by Longmont this Court should consider.

A. Federal law does not preempt Longmont's noise ordinance and noise abatement procedures.

Mile-Hi cites to the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 47501 *et seq.*, and the FAA's 14 C.F.R. Part 150 regulations adopted thereunder, the Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47521 *et seq.*,

and a haphazard string cites of cases it claims pre-empt Longmont's local proprietary enactments here. AB at 9-13.

Citizens have already provided authority and case law that the ASNA was not intended to, and did not, alter the proprietary powers of local governments that own airports. Mile-Hi cites no contrary authority. AB at 9-13. Indeed, Mile-Hi concedes that if a local airport proprietor violates ANCA the penalty is it "cannot receive federal grants under the Airport and Airway Improvement Act of 1982." AB at 14. Mile-Hi cites no case holding that the penalty is federal preemption of the offending enactment.

Instead, Mile-Hi simply makes the conclusory and unsupported assertion that, "[t]he purpose of Part 150 is to prevent individuals in the community from seeking ad hoc and inconsistent limitations regarding aircraft noise." AB at 11. Mile-Hi's statement about "inconsistent limitations" is nonsense because *there is no federal noise limit*. Part 150 contains no *restriction* on aircraft noise. It is a scheme for determining when federal funds will be spent for noise insulation in homes around large commercial airports. R. Tr. 1376:13-17, 1377:4-5; S.Rep. No. 96-52, at 11, 13 (1979), *reprinted in* 1979 U.S.C.C.A.N. 89, 100-02. (Part 150 "provides only grant-in-aid authority").

Moreover, Mile-Hi seems to take it as a given that a uniform scheme of noise regulation that treats rural Longmont the same as the urban community

around Chicago O'Hare is desirable and appropriate. Colorado law directly rejects this "one size fits all" idea. *Pub. Serv. Corp. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (Colorado standard for nuisance is explicitly local and is gauged by "a normal person in the community.").

Of the five cases on preemption cited by Mile-Hi, three are inapposite because they did not involve regulation by a proprietor, but nonetheless explicitly acknowledge the proprietor exception. *State of Minnesota Public Lobby v. Metropolitan Airports Comm'n*, 520 N.W.2d 388, 392 (Minn. 1994)(nonproprietor municipality regulation preempted, but a proprietor, "may restrict the use of its facilities on the basis of noise without running afoul of the preemption doctrine."); *Gary Leasing, Inc. v. Town Board*, 127 Misc.2d 194, 196 485 N.Y.S.2d 693 (1985) (non-proprietor restriction preempted, but a proprietor such as the Port Authority of New York could impose the restriction at issue at Kennedy airport); *Harrison v. Schwartz*, 572 A.2d 528 (Md. 1990). "The proprietor exception … is based on the fact that an airport proprietor may be liable for excessive noise emanating from aircraft that use the airport." *Harrison*, 572 A.2d at 533. A "window of nonpreemption" was left open by the Supreme Court in *Burbank*, *supra*, permitting the airport proprietor "to promulgate reasonable noise regulations." *Id.* Thus, "proprietary regulations of aircraft noise are not preempted." *Id.* Regulations are

only preempted if they "affect the way in which aircraft operate in navigable airspace." *Id*.

The two pertinent cases that seem to support Mile-Hi did so grudgingly while pointing out the problems for local communities. For instance, in *Township of Hanover v. Town of Morristown*, 343 A.2d 792, 794 (N.J. 1975), the Court stated that "Control of noise is of course deep seated in the police power of the States." While stating that federal statutes "leave no room for local curfews or other local controls" the Court went on to say, "[w]hat the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known." In the intervening 44 years, Congress has not provided any remedy for rural communities or people trying to enjoy the outdoors. This indicates that any intent toward complete preemption ultimately failed because the federal scheme did not turn out to be as pervasive as anticipated.

In response to Mile-Hi's string cite, the following are seven examples of proper use of the proprietor exception which demonstrate that the Longmont Ordinance is not preempted.

- *Friends of the E. Hampton Airport, Inc,. v. Town of E. Hampton*, 2015 U.S. Dist. Lexis 83422 *36, *37 (E.D.N.Y. 2015)(upheld proprietor's flight restrictions, including nighttime curfew).

- *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183 (2d Cir. 2001) (City's prohibition of sightseeing air tours from a city-owned seaplane base did not violate the Supremacy Clause).
- *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2nd Cir. 1998) (upheld the city's weekday and weekend curfews, phasing out weekend operations, and reducing overall operations by 47%).
- *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (upheld city proprietor noise restrictions including curfew, a ban on low approaches and a ban on helicopter flight training).
- *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977) (Concorde I) (noise regulations may be imposed by the airport proprietor if they do not create an undue burden on interstate or foreign commerce).
- *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976)(upheld the city's aircraft noise abatement ordinance).
- *Griggs v. Allegheny County*, 369 U.S. 84 (1962)(Airport was responsible for acquiring sufficient land adjacent to the airport to reduce the impact of aviation noise and, if it failed to do so, was liable for resulting damages from aircraft noise).

B. The Court erred in finding that Longmont's ordinance did not apply to airport noise.

Longmont's ordinance 10.20.110 establishes general daytime and nighttime noise limits for residential, commercial and industrial zones of the city. The Court held that noise limits are prohibited by federal law, and therefore, the ordinance was not "intended" to apply to airport activities. R. CF 2302-03, ¶65. Neither the Court, nor Mile-Hi disputes that the plain meaning of the Longmont ordinance does not exempt airport noise. Nonetheless, both proceed on to questions of "intent" without acknowledging well-established Colorado law that precludes such considerations when the meaning of a local ordinance is plain.

Mile-Hi raises three additional arguments, which were not part of the Court's rationale: (i) the Airport Master Plan somehow repealed the ordinance; (ii) that Longmont was obligated to change the ordinance when it accepted federal funds; and, (iii) enforcement of the ordinance would cause an absurd result. All three arguments essentially amount to Mile-Hi stating what they believe Longmont should have done, not what it actually did. There is no evidence that Longmont ever excluded the airport from the general noise ordinance.

1. The Airport Master Plan.

The Master Plan was not introduced into evidence, and as discussed above, the Court was prohibited from determining the contents through expert testimony describing the document. Furthermore, this argument was never raised in the Trial

Court. If it had been, the Master Plan would have become a central exhibit. Thus, all references to the Master Plan should be ignored.

Even if the testimony about the contents is accepted, the lack of definition of terms like "adopted," "approved," or "employed" prevents any inferences as to whether Longmont intended to supplant the general noise ordinance. Longmont could not have "adopted the federal 65 DNL noise limit" because the 65 DNL it is not a noise limit. The Longmont ordinance is the only "limit" in existence around LMO. The 65 DNL standard could not replace it because it places no limit on noise.

Indeed, it is not clear what is accomplished by "adopting" it. The rubric has no function other than to provide federal funding for noise insulation in homes independent of anything Longmont does. Unless Longmont has funds for noise insulation in homes (it does not), "adoption" of the 65 DNL is meaningless.

Moreover, Mile-Hi never explains how the 65 DNL supposedly replaced the ordinance in terms of legislative procedure. An ordinance remains effective under the Longmont Municipal Code until a repealing or modifying ordinance is passed. LMC §1.16.010. There's no indication in the record of any such act.

In sum, this is a novel argument being presented for the first time on appeal. It relies on a document that was so peripheral at the time of trial that it was never

introduced into evidence, and the findings of the Court are not specific enough to determine the import, if any, of the supposed event.

2. Federal funding.

Mile-Hi seems to believe that accepting federal funds acts as a shelter for nuisance activities. Even if Longmont is required to accept nuisance activities in order to receive federal funds, that does not mean it is entitled to host those activities without repercussion. Airport proprietors are clearly liable for excessive aircraft noise. *Griggs*, 369 U.S. at 90. This is precisely why Longmont has proprietor authority to set a general noise limit. Moreover, the Court should not assume that enforcement of the Longmont Noise Ordinance will terminate funding. *Friends of the E. Hampton Airport, Inc., supra* (FAA waived grant assurances to allow local municipality to address aircraft noise).

It is well understood that the federal government uses funding as a means of coercing action in areas it cannot directly regulate under the commerce clause. Using funding a leverage is evidence the federal government recognizes complete preemption would overreach its commerce clause authority, or Congress intended to "to encourage, but not require, compliance with ANCA." *Id.* "[T]he only consequences for failing to comply with ANCA's review program are that the 'airport may not—(1) receive money under [the AAIA]; or (2) impose a passenger facility charge.'" *Id.* (citations omitted).

3. Enforcement of the Ordinance would not close the airport.

Mile-Hi's contention that enforcement of the noise ordinance would close LMO is belied by the fact that the ordinance has been in place since 1992, and the airport has remained open. In fact, there is no evidence that general airport noise was ever considered an issue by the community.

Freytag's opinion that all aircraft exceed 55 dB level on takeoffs and landings is overly general and does not include consideration of distance to possibly affected homes and other buildings. Moreover, noise from takeoffs and landings was not the issue. The issue was Mile-Hi's continuous climbs for long periods after take-off. Mile-Hi is simply stretching for purported "ambiguity" based on speculative hypotheticals to avoid the plain meaning of the ordinance.

Further, Mile-Hi acts as though noise ordinances are enforced in a non-discretionary manner, as though the City actively polices noise and closes any activities that even intermittently violate the limit. That is not reality. In fact, in these circumstances, Mile-Hi is the only operator jeopardized by enforcement because it causes continuous noise (R. Tr. 297:20-298:12) and is responsible for 70% of all noise complaints.

C. Mile-Hi's operations are not part of interstate commerce.

Standard and Preservation: Mile-Hi states that Citizens did not present a standard of review or demonstrate preservation of this issue. Citizens stated that

the Court applied the wrong legal standard, which is de novo review. *Kohn v. Burlington N. & Santa Fe R.R.*, 77 P.3d 809, 811 (Colo.App.2003). The Opening Brief identified the location the issued was directly ruled upon (R. CF, 2301 at ¶54), making it subject to appellate review. *People v. Gordon*, 160 P.3d 284, 286 (Colo.App.2007)(issues ruled upon may be properly considered on appeal.)

Mile-Hi provides no authority for the idea that a locally performed federal contract automatically implies interstate commerce. There is no evidence that Mile-Hi crosses a state line during the performance of its services, and no precedent indicating that performing local services in multiple states implicates interstate commerce.

The fact that Mile-Hi's activities fit within the definition of "air commerce" (49 U.S.C. § 40102(a)(3)) is not relevant because the regulation also defines "interstate air commerce" (49 U.S.C. § 40102(a)(24)), and Mile-Hi does not contend that it meets this definition.

To be clear, Mile-Hi operates a local recreation business; a carnival ride that happen to utilize airplanes. There is no reason why a local government should be prevented from regulating or controlling this local business. The limited federal government cannot prevent the states from acting unless there is an impact on interstate commerce, which only occurs when there is an issue of air safety. *See, SeaAir*, 250 F.3d at 186, n.1. Colorado has no reason to cede authority for

protection of its citizens unless the federal government has a genuine interstate commerce concern, which is not the case here.

Though the argument was never made to the Trial Court, Mile-Hi now contends that its activities involve interstate commerce because of the potential to cause safety issues. However, in the absence of a finding by the Court that the requested injunctions would affect air safety, Mile-Hi cannot connect its activities to interstate commerce. There was no such finding. R. CF 2301, ¶54.

Moreover, federal jurisdiction over safety issues is irrelevant to this matter. With one exception, the remedies sought against Mile-Hi have no potential to effect safety. Limiting the number of flights, limiting hours of operation, requiring use of an FAA approved "quiet kit" already present on other planes Mile-Hi rents, and barring certain types of noisy aircraft for this particular activity are remedies that have zero potential impacts on air safety. In fact, the reduction in air traffic can only benefit air safety.

Mile-Hi's reliance on *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1279 (10th Cir. 1989), is misplaced. The case demonstrates that the FAA addresses safety issues by licensing pilots, and the requested injunctions on Mile-Hi would not intrude on federal control over air safety. The *Hill* Court found that:

> By holding a pilot certificate issued by the FAA, [the pilot] submitted to the FAA's jurisdiction regarding any operation of aircraft under that certificate that may affect safety in air commerce. ... The FAA clearly has jurisdiction to take appropriate action <u>to deter future unsafe</u>

> conduct by Hill or other **certificate holders** if it determines that safety in air commerce requires such action.

Id. at 1281 (emphasis added). The jurisdiction analysis did not find that the intrastate flight itself in *Hill* was interstate commerce. Jurisdiction extended based on consent and safety alone. Mile-Hi's pilots are independent contractors. R. Tr. 1120:22 to 1121:6. The pilots have clearly submitted to FAA jurisdiction with respect to safety. Their compliance with FAA requirements insures safety on all Mile-Hi flights.

The one remedy sought by Plaintiffs which could even arguably impact air safety is an injunction on circling over homes. Mile-Hi argues that it is subject to a restricted flight area, and is therefore required to circle over neighborhoods repetitiously. The Court specifically found that Mile-Hi's agreement with the FAA is voluntary and not required by the FAA. R. CF 2296, ¶32. Imposing a directive to make best efforts to fly in linear climb paths so as to not circle over homes, does not intrude on FAA control because Mile-Hi flies in "uncontrolled airspace." R. Tr. 300:5-14; 301:5-9; 311:24-312:2.

> The airspace around the Airport …, planes may fly under VFR and are not required to speak with DIA TRACON. VFR means that the pilots have the responsibility to "see and avoid" other aircraft.

R. CF 2297, ¶35. Thus, FAA jurisdiction over safety is secured through its certification of the pilots and training on "see and avoid;" not through control of

Mile-Hi's actual flights. The only disclosed expert on piloting, Matthew Robinson, testified that the pilots contracting with Mile-Hi can meet all FAA safety concerns and requirements while flying under the proposed restriction. R. Tr. 312:12- 316:11.

II. The Court erred in disregarding Plaintiffs' damage evidence as speculative.

Damages for annoyance and discomfort are compensable. Compensation for injury resulting from trespass can include the loss of use of the property and discomfort and annoyance to the occupant. *See Burt v. Beautiful Savior Luth. Church*, 809 P. 2d 1064, 1069; *see also Board of County Commissioners v. Slovek*, 723 P.2d 1309 (Colo.1986); Restatement (Second) of Torts § 929(1) (1979).

> ...court must permit an injured landowner to recover damages for "any and all losses that result from the conduct for which the defendant is liable, including the loss of the use of the property, if any, and any separate injuries in the nature of discomfort, annoyance or physical illness.

Calvaresi v. National Development Co., 772 P. 2d 640, 645 (Colo.App.1988) (*citing Slovek*, 723 P.2d at 1318). The Court failed to evaluate monetary damages for noneconomic injuries.

III. The Court erred by using federal standards to evaluate state law nuisance claims.

"[T]here is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2188-89 (2014)(emphasis added). Colorado is entitled to set its own standard for nuisance claims and has done so. *Pub. Serv. Corp. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001)(noise is unreasonable if "a normal person in the community would find it offensive, annoying, or inconvenient." (emphasis added).

Mile-Hi acknowledges that nuisance claims are governed by *Van Wyk*. Mile-Hi also acknowledges that the Court used the 65 DNL metric as "the standard by which Plaintiffs' negligence and private nuisance claims were analyzed." AB at 10. Thus, the parties are in agreement the appropriate legal standard is *Van Wyk*, and the standard applied by the Court was the 65 DNL. If the legal standard and the applied standard differ, then the Court erred.

Mile-Hi states the Schultz Curve (which is the basis for the 65 DNL) was "is the most accurate measure of annoyance caused by airplane noise." AB at 22. In fact, the Schultz Curve did not attempt to measure "annoyance" at all. Mile-Hi attempts to fudge what the Schultz Curve actually measures because it is markedly different than the *Van Wyk* standard.

It was well established that the 65 DNL standard measures the percent of people "highly annoyed"; not simply annoyed per *Van Wyk*. R. Tr. 1415:13-1416:10. Mile-Hi's expert agreed that the 65 DNL did not seek to measure the percent of people offended or inconvenienced at all. *Id.* Thus, it was factually established that the legal standard and the Court's standard differ.

IV. The Court erred in admitting undisclosed expert testimony.

A. Don Dolce.

Mile-Hi falsely attempts to cast Dolce's testimony as factual. Dolce did not collect the complaint data or speak with any complaining party. His testimony did not involve any personal observations of events. Dolce simply conducted an analysis of data for events of which he had no personal knowledge in violation of C.R.E. 602.

Mile-Hi states that, "Dolce was qualified to offer his lay opinions." AB at 26 (emphasis added). Lay witnesses are not presented based on their qualifications; experts are. Mile-Hi made a point of establishing Dolce's background as a statistician and other professional qualifications. R. Tr. 1068:17, 1069:19.

Mile-Hi states Dolce only deducted "invalid complaints." The term "invalid" shows that expertise was applied. The witness himself admitted that he

relied upon his professional background to determine what complaint to exclude. R. Tr. 1079:12-16. Moreover, Dolce opined as a statistician as to what "normal" means. R. Tr. 1094:9, 1095:4, 1096:19, 1097:5, 1098:7-12, 1116:8. A lay person's opinion of normal would be inconsequential. Accepting a statistician's opinion on what constitutes normal was not harmless error.

B. Nikolai Starrett.

Mile-Hi states that Starrett testified, "as Mile-Hi's chief pilot, what constitutes an adverse climb condition and Mile-Hi's compliance with federal regulation." AB at 27. Plaintiffs are baffled by Mile-Hi's insistency that testimony about activities as a professional pilot, technical matters like "adverse climb conditions" or compliance with professional regulations did not involve specialized knowledge. There's a disclosure rule specifically dedicated to when people are called to testify about their professional work. C.R.C.P. 26(a)(2)(B)(II). Mile-Hi did not comply.

C. Terracon Report.

Mile-Hi cites three cases it believes support the admission of the Terracon Report. They do not.

Vento v. Colo. Nat. Bank-Pueblo, 907 P.2d 642, 645 (Colo.App.1995) pertained to reasonable assumptions by experts, and had nothing to do with reliance on other experts.

Gold Rush Inc., Inc. v. G.E. Johnson Const. Co., Inc., 807 P.2d 1169, 1173 (Colo.App.1990) states that the rule allowing experts to rely on other experts was based on "the practical reality," that an expert may need, "to rely on the opinions of experts in other fields." *Id.* at 1174 (emphasis added). It allows for, "reliance on other expert opinions not involving areas of their own expertise." *Id.* In this case, Freytag and Terracon are in the same field.

People v. Bornman, 953 P.2d 952, 956 (Colo.App.1997) indicates that outside data may be used "only to explain the witness' opinion." Freytag's testimony cannot be used to establish the veracity of the Terracon Report. *Houser*, 450 P.2d at 668.

Mile-Hi also makes the bizarre assertion that the "Terracon Report was not offered into evidence to prove the truth of the matter asserted," AB at 28, while simultaneously stating that the report, "reaffirmed what Freytag and Rand found." *Id.* at 29. Obviously, it cannot affirm anything unless it is taken as true and accurate. Regardless, the Court clearly used it for the truth of the matter asserted. R. CF 2299, ¶48 (found the Terracon study credible). Thus, the admission was improper.

V. The Court erred by dismissing claims for trespass.

Plaintiffs contend that the vibrations caused by Mile-Hi are physical damage to the Plaintiffs' properties, because the homes are unfit for their intended purpose

when this physical condition exists. It is well established that sending waves of noise across a stranger's land can "take" his property. *See United States v. Causby*, 328 U.S. 256 (1946); *see also, Jackson v. Metropolitan Knoxville Airport*, 922 SW 2d 860 (Tenn. 1996)(discussion of various states treatment of nuisance and takings due to airport noise).

VI. The Court erred in granting summary judgment on Plaintiffs' claims of unjust enrichment.

Mile-Hi states that, "Plaintiffs have no exclusive legal right to enjoy the outdoors." AB at 34. Plaintiffs agree. Indeed, this affirms the principle Citizens is advocating; that no person has the right to exclude others from outdoor activities. Citizens does not have exclusive rights and neither does Mile-Hi. Plaintiffs proposed an equitable split of time that limits Mile-Hi to weekday business hours, and one weekend day. R. CF 1958. Mile-Hi contends that its use cannot be limited even if it does commandeer exclusive enjoyment of the outdoors.

Mile-Hi argues that allowing it "to conduct its lawful business[1] is not a 'benefit.'" AB at 34. This interpretation of "benefit" is unsupported and conflicts with the basic definition of "any form of advantage." *Ninth Dist. Prod. Credit v. Ed Duggan*, 821 P.2d 788, 801 (Colo. 1991). Mile-Hi clearly derives an economic advantage from continuous operations (as opposed to limited operation).

[1] Mile-Hi states it cannot be penalized for creating noise below the 65 DNL because it is engaging in "legal" activity. Noise above 65 is not "illegal." Thus, noise below that level is not "legal."

Mile-Hi also argues that its conduct is not "unjust" because Plaintiffs knew of the airport. Again, no law is cited. This issue involves disputed facts about the changed nature of operations at LMO. R. CF 881-82. The Court was not permitted to determine whether the conduct was unjust without hearing the totality of circumstances.

Mile-Hi contends that no evidence was presented in response to its Motion for Summary Judgment that Plaintiffs were excluded from the outdoors. This is inaccurate. R. CF 885. Mile-Hi also contends that no evidence was presented on summary judgment or at trial that Mile-Hi could use sound mitigating equipment instead of passing on this cost to local residents. Again, this in inaccurate. R. CF 882.

VII. The Court erred in awarding attorney fees.

A. The Court erred in finding that Plaintiffs' claim for unjust enrichment was substantially frivolous or groundless.

Mile-Hi may disagree on how the terms "benefit" or "unjust" should be interpreted, but Citizens' position is clearly rational. Therefore, the claim was not frivolous. *Janicek v. Obsideo, LLC*, 271 p.3d 1133, 1140 (Colo. App. 2011).

B. The Court erred in its finding that Plaintiffs pursued damages for medical injuries and improperly reversed the findings of the discovery magistrate.

Mile-Hi does not comment on Magistrate Gunning's findings, the preclusive effect of those unappealed findings, or the fact that Judge LaBuda made directly contradictory findings. Thus, this issue should be treated as conceded.

Mile-Hi states that it "repeatedly asked Plaintiffs' counsel whether they intended to pursue this area of damages, to which no response was received." This Court may note the lack of a citation. The record shows nothing to support the accusation. R. CF 247. Indeed, Plaintiffs' description of the precipitating events (R. CF 266) was not challenged by Mile-Hi in the proceedings below. The record shows that Plaintiffs stated they were seeking generic damages for pain and suffering rather than medical injuries (R. CF 2592-96) and Mile-Hi simply ignored the statement.

C. The Court erred in awarding fees for claims of *respondeat superior*.

Mile-Hi states that "Plaintiffs simply dropped [the *respondeat superior* claim] at some point before trial without notice." The fact that Mile-Hi cannot identify when or how the claim was supposedly dropped indicates that it was not. Mile-Hi does not deny that the trial substantively addressed its liability for conduct by its independent contractor pilots. Acting as though the claim was dropped is

form over substance taken to an absurd extreme. It was self-evident that liability for employees or contractors was at issue.

D. The Court erred in refusing to consider a motion pursuant to Rule 59 regarding the amount of fees awarded.

1. The motion for reconsideration and the appeal regarding attorney fee awards were timely filed.

Mile-Hi did not address this issue and it should be treated as conceded.

2. The Court improperly sanctioned Plaintiffs for filing their Rule 59 Motion.

Mile-Hi states that "Plaintiffs have failed to explain how this abundance of case law precluding parties from using motions to reconsider to raise new issues or rehash old arguments should not apply to them." AB at 41. This statement leaves one to wonder how motions for "reconsideration" can be used. All of this "abundant" law was previously shown to be inapposite because it interprets the federal, not the state, rule. Mile-Hi has done nothing to tie the federal cases to the state rule, and no Colorado case even suggests that sanctions for a Rule 59 Motion are appropriate. The Colorado cases that are cited by Mile-Hi provide no support for the sanctions issued.

Denny Const., Inc. v. City and County of Denver ex rel. Board of Water Com'rs, 170 P.3d 733, 740 (Colo.App.2007) pertains to preserving evidentiary objections, which is critical because addressing evidence after a trial raises the

possibility of needing a new trial. Citizens' request to reconsider a post-trial ruling on attorney fees does not.

In *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp., Inc.*, 645 P.2d 868, 869 (Colo.App.1982), there was a stipulation that counsel would present any objections to fees and did not do so in a motion for reconsideration or otherwise. *In re Marriage of Tatum*, 653 P.2d 74, 77 (Colo.App.1982) is another instance of a complete failure to object to the amount of fees before an appeal. Neither case has anything to do with Rule 59. No sanctions were issued in either case.

Rather than an "abundance" of law, Mile-Hi has not cited a single case that supports an award of sanctions for filing a C.R.C.P. 59 Motion.

RESPECTFULLY SUBMITTED this 10th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that on this this 10th day of June, 2016, the foregoing was sent via ICCES, as follows:

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This document was filed electronically pursuant to C.A.R. 30. The original signed pleading is on file and available for inspection at the Boulder offices of The Law Offices of Randall M. Weiner, P.C.