District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: May 21, 2015 1:23 PM CASE NUMBER: 2013CV31563
Plaintiffs: CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER v. **Defendant:** MILE-HI SKYDIVING CENTER, INC.	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiffs: Randall Weiner, Matthew Osofsky, and Annmarie Cording *Attorneys for Defendant:* Anthony Leffert and Laura Ellenberger	Case Number: 13CV31563 Division: 2 Courtroom: Q
ORDER RE: BENCH TRIAL	

THIS MATTER came before the Court on April 13, 14, 15, 16, and 17, for a five day bench trial. At the close of evidence on April 17, 2015, the Defense moved for a directed verdict pursuant to C.R.C.P. 50; the Court took the motion under consideration. A site visit took place on May 2, 2015. Closing arguments took place on May 6, 2015. The parties were permitted the opportunity to file proposed findings of fact and conclusions of law no more than 20 pages in length, double spaced, no later than 11:59 p.m. on May 15, 2015. The Court, having considered the evidence adduced at trial and the arguments of counsel, enters the following ORDER:

LEGAL STANDARDS

Nuisance

1. "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: (1) intentional and unreasonable; (2) unintentional and otherwise actionable under the rules for negligent or reckless conduct." *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). An "intentional invasion" occurs when the actor purposely caused the invasion, or knew that the invasion "is substantially certain to result from, his conduct." *Id.* at 394.

Unreasonable means an interference that is "significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id.*

Negligence

2. To recover on a negligence claim, a plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages. *United Blood Servs., Inc. v. Quintana*, 827 P.2d 509, 519 (Colo. 1992); *Observatory Corp. v. Daly*, 780 P.2d 462, 465 (Colo. 1989).

3. Generally, a legal duty to use due care arises in response to a foreseeable and unreasonable risk of harm to others. *Quintana*, 827 P.2d at 519. When determining the standard of care in an aviation negligence action, "a court must refer not only to specific [federal] regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner." *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3rd Cir. 1999).

4. A professional standard of care can be a local standard, a standard that refers to the local community and similar communities, or a national standard. *Quintana*, 827 P.2d at 520. Under Colorado law and as a matter of general law, compliance with statute or administrative regulation does not preclude a finding of negligence. *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 591 (Colo. 1984) (*citing* RESTATEMENT (SECOND) OF TORTS § 288C (1965)).

Negligence Per Se

5. To prove negligence per se, the plaintiff must demonstrate that "the defendant violate[d] a statue adopted for the public's safety and the violation proximately cause[d] the plaintiff's injury." *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1166 (Colo. 2002). "[T]he plaintiff must also demonstrate that the statute was intended to protect against the type of injury [plaintiff] suffered and that [plaintiff] is a member of the group of persons the statute was intended to protect. *Id.*

Burden of Proof

6. The Plaintiffs bear the burden of proving by a preponderance of the evidence that Defendant Mile-Hi Skydiving Center, Inc.'s ("Mile-Hi") operations are a private nuisance and/or that Mile-Hi has been negligent.

7. The Plaintiffs have the burden of proving that they have suffered actual damages by a preponderance of the evidence. *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1201 (Colo. App. 2009). The Plaintiffs must establish the amount of damages with reasonable certainty. *Id.* "To satisfy this obligation, a plaintiff must provide substantial evidence which will, when combined with reasonable inferences drawn from the evidence, provide a reasonable foundation for the computation of damages." *Id.*

FINDINGS OF FACT

8. Mile-Hi is a Colorado corporation. Mile-Hi is in the business of providing skydiving services and operates out of the Vance-Brand Municipal Airport in Longmont, Colorado ("Airport"). Mile-Hi has conducted its operations at the Airport since 1995. Frank Casares became the owner of Mile-Hi in 2005 and has operated and managed the business since that time.

9. Plaintiff Citizens for Quiet Skies ("Citizens") is a citizen group headed by Plaintiff Kimberly Gibbs.

10. Plaintiffs Kimberly Gibbs, Timothy Lim, Robert Yates, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer (collectively, "Individual Plaintiffs") are all residents of Longmont in Boulder County, Colorado.

11. Plaintiffs Kimberly Gibbs and Timothy Lim are married and reside together at 7468 Mt. Sherman Road, Longmont, Colorado 80503. Their house, which they purchased in or around January of 2006, is located five to six miles from the Boulder County Airport and approximately five to six miles from the Airport.

12. Plaintiffs John Behrens and Carla Behrens are married and reside together at 904 Little Leaf Court, Longmont, Colorado 80503. The Behrens' house is located one-third to three-quarters of a mile from the Airport, and it is situated under the flight path for airplane landings at the Airport. When the Behrens purchased their home in 2000, they signed a Disclosure Statement acknowledging and agreeing that, due to the proximity of their property to the Airport, there would be aircraft passing over the property. The Behrens also acknowledged that the frequency of aircraft passing over the property may increase in the future. (*See* Exhibit HH.)

13. Plaintiff Robert Yates resides at 6796 Nelson Road, Longmont, Colorado 80503, which is approximately one and a half miles from the Airport and approximately one mile from a takeoff runway for the Airport. Mr. Yates purchased his home in 1971, after the Airport had been established. Mr. Yates owns his home with his wife, who is not a plaintiff in this case.

14. Plaintiff Suzanne Webel resides at 5735 Prospect Road, Longmont, Colorado 80503. Ms. Webel purchased the property on which her home is located in 1996; began construction on the home in 1998; and completed the construction of her home in 1999. Ms. Webel owns her home with her husband, who is not a plaintiff in this case.

15. Plaintiff Richard Dauer resides at 4019 Milano Lane, Longmont, Colorado 80503. Mr. Dauer's house is located approximately two to two and a half miles from the Airport. Mr. Dauer purchased his property in 2001 with his wife, who is not a plaintiff in this case.

16. All of the individual Plaintiffs' houses are located within the "flight box." The Behrens' and Dauers' homes are located in the direct landing path for the Airport.

17. The Individual Plaintiffs testified that the noise from Mile-Hi's operations is continuous, particularly in the summer months, and can be heard from inside their homes with the windows closed. They testified that this noise has led to a significant loss of ability to enjoy their homes as the noise from Mile-Hi's planes, particularly the Twin Otter, has greatly increased in recent years. Each Plaintiff testified he or she believes the value of his or her home has diminished due to Mile-Hi's operations.

18. Ms. Gibbs testified that on weekends Mile-Hi operates constantly from 7:00 a.m. until sunset, with approximately six flights per hour, almost exclusively within the flight box. Ms. Gibbs testified that the turbo prop aircrafts used by Mile-Hi are extremely loud and produce a very irritating tone, particularly when circling over her home. Ms. Gibbs often spends time outside around her home, working in her yard and hiking, but asserts the noise has destroyed her enjoyment of working in her yard and that the noise is inescapable even inside her home.

19. The Court found Ms. Gibbs' testimony, as the primary Individual Plaintiff, to be credible and composed, as related to her own perceptions of the noise disturbance she experienced as a result of Mile-Hi's operations. However, the Court finds Ms. Gibbs is more sensitive to the noise produced by Mile-Hi's operations than the average community member who resides in the flight box.

20. Other individuals residing in the flight box, but not parties to this matter, including Gary Rubin, Dave Shenk, Set Set, Jennifer Skwiot, Steve Jennings (former Longmont resident), Andria Allen, Kathe Hibbard, Geoff Collins, and Judy Hinks testified that Mile-Hi's operations have increased in recent years and the noise produced by Mile-Hi's planes is continuous and problematic.

21. Other individuals who reside in the flight box, including Richard Stewart, Jody Whitmore (former Longmont resident), and Martin Sugg, testified that they do not experience disruptions due to noise from Mile-Hi's operations. Mr. Stewart resides within one mile of the airport and is situated under the flight path for landings at the airport. Mr. Sugg previously resided within one mile of the airport and was situated under the flight path for landings at the airport.

22. The Airport is a general aviation airport. The Airport has received over $4.7 million in Airport Improvement Program ("AIP") federal grant funds since 1988 in exchange for agreeing to be bound by certain Grant Assurances. (*See* Exhibit J.) These Grant Assurances require, among other things, that the Airport remain available to all general aviation operations, including skydiving.

23. All of the Individual Plaintiffs purchased their homes after the Airport was in existence and with knowledge of its existence and proximity of the Airport to their homes. Airport traffic and the traffic from Mile-Hi has increased since the Plaintiffs purchased their

homes. The operation of the Airport and its traffic, including Mile-Hi, has increased significantly since Mr. Yates purchased his home in 1971. The change in noise level experienced by Mr. Yates is the most dramatic of the Individual Plaintiffs.

24. Both Ms. Gibbs and Ms. Webel own condos in the flight box that they rent to tenants. Neither Ms. Gibbs nor Ms. Webel has had any tenant who complained about the noise from Mile-Hi's operations.

25. There are several other airports in the area of the Plaintiffs' homes, including Boulder Municipal Airport, Rocky Mountain Metropolitan Airport, and the Erie Municipal Airport, all of which contribute to noise from planes in the areas of the Plaintiffs' homes.

26. Mile-Hi's operations make up approximately six percent of all flight operations at the Airport annually. However, Mile-Hi's busiest time is from April to September and the vast majority of its flights are concentrated during this time period.

27. Mile-Hi conducts skydiving flights in several states and has federal governmental contracts for skydiving training.

28. Mile-Hi conducts its skydiving operations as a Specialty Based Operator in compliance with leases executed with the City of Longmont ("City") which allow Mile-Hi to conduct up to 50,000 jumps per year. (*See* Exhibits A and B.)

29. In the normal course of its skydiving business, Mile-Hi primarily operates four planes: a DeHavilland Twin Otter ("Twin Otter"), two Beechcraft King Air E90s, and one Cessna Turbo 206. Mile-Hi also at times leases a second Twin Otter airplane from Skydive Arizona for its skydiving operations. The Twin Otter is a commonly used aircraft for recreational skydiving.

30. All of the airplanes that Mile-Hi uses are registered and certificated by the Federal Aviation Administration ("FAA") in their respective categories and classes. All planes operated by Mile-Hi comply with FAA noise limitations.

31. On or about April 7, 2007, Mile-Hi entered into an agreement with the FAA ("Letter Agreement") authorizing Mile-Hi to conduct parachute jumping at the Airport and establishing the procedures Mile-Hi must follow for its skydiving operations. The Letter Agreement mandates that Mile-Hi's parachute jumping operations must be confined to a two nautical mile radius called a "jump box." The Letter Agreement also provides that Mile-Hi's airplanes must remain within the confines of a designated "flight box" surrounding the Airport, unless otherwise diverted by Denver International Airport Air Traffic Control ("DIA TRACON"). The Letter Agreement specifically states that all provisions of the Federal Aviation Regulations Parts 91 and 105 apply to Mile-Hi's flights. The "flight box" extends from the surface of the earth to 17,900 feet above mean sea level. (*See* Exhibits K and L.)

32. Yancy O'Barr, on behalf of the DIA TRACON facility, indicates that the Letter of Agreement is not required. He is unaware of any other such agreement between a parachute operation and any TRACON facility. Transcript of Yancy O'Barr ("O'Barr Depo.") at 13:15-20. Defendant can withdraw from the agreement and can operate without it, but doing so is not recommended. *Id*. at 35:24-36:20 & 37:3-6.

33. The flight box is bordered on the north and south by the arrival and departure corridors for Denver International Airport ("DIA"). Directly to the east of the flight box is Class B Airspace, into which no aircraft departing from the Airport can enter without specific permission from DIA TRACON. Finally, to the west of the flight box is the mountains. (*See* Deposition Transcript of Yancy O'Barr at 8:17-9:14; 10:2-11:13; 54; 5-56:4.) Both Mile-Hi and the Airport's former manager, Tim Barth, have spoken with the FAA and DIA TRACON about the possibility of moving the flight box. The FAA has responded that the flight box cannot be relocated due to the arrival and departure corridors for DIA.

34. Traffic in the corridor is typically in Class A airspace above 18,000 feet. Mile-Hi does not normally operate above 17,500 feet and cannot enter Class A airspace unless it first files a flight plan under Instrument Flight Rules ("IFR"). Mile-Hi normally conducts operations under Visual Flight Rules ("VFR").

35. The airspace around the Airport is Class E and G airspace. In Class E airspace, 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. Planes within Class E airspace are not required to have transponders identifying their location to DIA TRACON except within the "Mode C" zone (*See* Exhibit JJ at Figure 3) around DIA that ends to the west and north of the Airport.

36. Every time Mile-Hi conducts a skydiving flight the pilot establishes communication with DIA TRACON by the time the plane reaches 10,000 feet and maintains that communication until after he contacts TRACON two minutes before the parachutists jump and gives a "jumpers away" call when they jump.

37. The Airport has adopted Voluntary Noise Abatement Procedures ("VNAP"). (*See* Exhibit C.) The VNAP were not promulgated by the FAA or promulgated in connection with the FAA. The VNAP only apply to airplanes within three miles of the Airport. The VNAP do not supersede the responsibility of each pilot for compliance with Federal Aviation Regulations, Air Traffic Control clearances, and operating parameters of the Aircraft Operations Manual. (*See* Exhibit E.)

38. Mile-Hi attempts to comply with the Airport's VNAP to reduce the noise impact of its operations on the residential neighborhoods in Longmont. However, weather and safety issues are its primary concern. Mile-Hi trains its pilots to reduce the plane's power and propeller speed at a safe altitude during each skydiving flight. Mile-Hi's Flight Operations & Safety Manual and its Flight Checklists provide that the propeller RPMs should be reduced at safe altitude. (*See* Exhibits O and P.)

39. While Mile-Hi does have optimal flight paths utilizing each direction of the runway, the flight paths that Mile-Hi follows are determined based upon wind, weather, and air traffic conditions on a flight-by-flight basis. Some of Mile-Hi's flights involve continuous spiral circles on ascent within the flight box.

40. During the site visit on May 2, 2015, Mile-Hi's pilot, Nikolai Starrett, flew Mile-Hi's Twin Otter airplane in the flight paths that were necessary and appropriate for the weather and wind conditions at that time. The cloud cover and flight path on May 2, 2015, reduced the noise the Court heard to a level below the normal level of noise heard from Plaintiffs' homes.

41. The evidence presented during trial was sufficient to find Mile-Hi complies with Vance Brand Airport Rules and Regulations. (*See* Exhibit D.)

42. Don Dolce, the president of the Airport Advisory Board for the Vance-Brand Airport, conducted a statistical analysis of the noise complaints against Mile-Hi for 2014. In his analysis Mr. Dolce determined, based on his own criteria, that certain complaints, including many from the Plaintiffs and other repeat callers, were invalid. The Court finds repeat calls are not necessarily invalid, but demonstrate the particular caller had a concern on more than one occasion. Members of Citizens made up approximately 75% of complaints regarding Mile-Hi to the Airport in 2013. Steve Jennings filed 1,149 complaints out of the 1,582 total complaints in 2013, which the Court finds to skew the validity of the number of complaints. (*See* Exhibit S.)

43. The number of Mile-Hi's Twin Otter flights increased from 2005 to 2007, decreased in 2008, and increased again in 2009 and 2010. The number of Twin Otter flights decreased from 2010 to 2012, and again increased in 2013 and 2014. Mile-Hi's flights from 2005 to 2014 are as follows:

Year	Total Flights	Twin Otter Flights
2005	2,541	691
2006	2,573	1,417
2007	2,146	1,633
2008	1,968	1,173
2009	2,138	1,398
2010	2,508	2,071
2011	2,600	1,123
2012	2,964	1,116
2013	3,010	1,660
2014	3,395	1,704

44. The Federal Government has researched and studied the effects of airplane noise on communities through several intergovernmental agencies. The Federal Government designed a system to assess and control airplane and airport noise. This system includes remedial measures in instances where noise from airplanes or airports is excessive. (*See* Exhibits G, H, I, and JJ.)

45. Federal Regulation 11 C.F.R. Part 150 adopts the day night sound level average ("DNL") as the applicable sound metric for analyzing the impact of airplane noise on communities and establishes the average 65 decibel ("dB") as the federal limit. This 65 dB DNL standard is the standard used by the FAA and the EPA for airplane noise. The DNL metric takes into account low frequency noises.

46. The Airport's Airport Master Plan specifically provides that the 65 dB DNL is the noise limit that applies to airport activities.

47. Based on the Plaintiffs' complaints, former Airport Manager, Tim Barth, took noise readings and performed a noise study at five locations near the Plaintiffs' homes. Mr. Barth testified the noise from Mile-Hi's skydiving planes was not louder than other background noise or other planes flying in the area. (*See* Exhibit F.) The Court found Mr. Barth's demeanor, tone, and testimony was biased in favor of Mile-Hi and against the Plaintiffs and thus gave his testimony and the study minimal weight.

48. The City hired Terracon Consultants, Inc. ("Terracon") to perform a noise survey of Mile-Hi's skydiving operations. Terracon concluded that noise levels attributable specifically to Mile-Hi's Twin Otter and Beechcraft King Air aircraft were not, in general, significantly higher than the background noise sources except in very specific, short duration instances. (*See* Exhibit U.) The Court found the Terracon study credible.

49. Mile-Hi's noise expert, John Freytag, conducted a sound study near two of the Plaintiffs' homes. Mr. Freytag found that the DNL values for the two sites from all noise sources were 55.3 and 56.7 dB, which are within the normally accepted range for residential communities. (*See* Exhibit JJ.) These DNL values include noise from aircraft other than Mile-Hi operating out of the Airport and noise from aircraft operating out of neighboring airports. Mr. Freytag found that the noise level from fly over events was 30.2 DNL to 32.2. DNL. Mr. Freytag further found that Mile-Hi's skydiving operations contributed less than 0.1 dB to the overall noise environment in the area surrounding the Plaintiffs' homes. Mr. Freytag concluded that the noise exposure contribution from Mile-Hi is negligible when compared to all aircraft noise in the area, and in his opinion the noise produced by Mile-Hi would not be unreasonable to the average person in the community. Finally, Mr. Freytag opined that every airport in the country would have to be closed if noise at this level was found to create a nuisance, as all aircraft exceed 55dB on takeoff and landing. The Court found Mr. Freytag's testimony to be well-researched and credible. Mr. Freytag's extensive experience and credentials were directly related to this area of study. The Court gave Mr. Freytag's testimony considerable weight.

50. The Plaintiffs' noise expert, Robert Rand, also conducted a noise study. Mr. Rand calculated a DNL average in the low 30 decibels, which is consistent with Mr. Freytag's findings. Mr. Rand's credentials and experience in this area were not extensive. The Court gave Mr. Rand's testimony less weight than the testimony of Mr. Freytag.

51. Properties around the Airport have appreciated at a faster rate than other neighborhoods in Longmont outside of the flight box.

52. The Plaintiffs' real estate expert, Robert Myers, does not know whether Mile-Hi's operations have specifically caused the Plaintiffs' homes to appreciate at a slower rate than homes in a neighborhood to the east of the flight box. He found that there is a difference in the appreciation rate between the Plaintiffs' homes compared to other surrounding areas, including areas within the flight box, but he could not state that this difference was caused by Mile-Hi's skydiving operations versus airport noise in general or other market factors. Mr. Myers' report shows that homes inside the flight box appreciated at a greater rate than homes outside the flight box. Mr. Myers' findings are as follows:

	Average Sales Price 2008	Average Sales Price 2014	% Increase Price	% Increase Above Grade PSF	% Increase Per Total SF
Plaintiffs' Neighborhood	$346,197	$410,365	18.54%	23.84%	17.79%
Neighborhood Next to Plaintiffs	$267,486	$322,981	20.75%	43.07%	29.71%
Flight Box	$359,411	$444,511	23.68%	18.23%	17.5%
Overall Market Area	$330,731	$407,981	23.36%	17.95%	22.21%

53. Mile-Hi's real estate appraisal expert, William Kamin, analyzed whether there is any measurable diminution in value to any properties located within the flight box around the Airport as a direct result of Mile-Hi's operations. (*See* Exhibit NN.) Mr. Kamin found no data to support that the typical purchaser would change his or her opinion of the value of any of Plaintiffs' properties due to Mile-Hi's operations. Mr. Kamin opined that diminution in value is anything caused by some sort of impact on the property; the Airport is a known or preexisting condition and any difference in value would have proportionally existed at the time the homes were purchased; he located no appraisals of homes in the flight box that have been adjusted because of the proximity to the Airport or Mile-Hi's operations. Mr. Kamin found that there has been no measurable diminution in value of any of the Plaintiffs' homes that is attributable to Mile-Hi's skydiving operations. Mr. Kamin also found that homes inside the flight box appreciated at a faster rate than homes outside the flight box. The Court is persuaded by Mr. Kamin's testimony.

CONCLUSIONS OF LAW AND ORDERS

54. Mile-Hi's skydiving operations are part of air commerce and interstate commerce.

55. In the January 5, 2015 Order Re: Defendant's Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims, this Court stated that "[i]n the event that the noise abatement procedures were not promulgated under the Code of Federal Regulations, the Court finds that there are federal regulations regarding aircraft noise and therefore the federal regulations are the standard by which Plaintiffs' negligence claim must be analyzed."

56. Based on the testimony at trial the Court finds the Airport's Voluntary Noise Abatement Procedures were not promulgated under the Code of Federal Regulations. Therefore, the federal regulations regarding aircraft noise are the standard by which the Plaintiffs' negligence and private nuisance claims must be analyzed. The FAA has determined the standard of reasonableness for airplane noise, and that substantive standard applies in this case. Said standard is the 65dB DNL as set forth in 11 C.F.R. Part 150.

57. "Private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of his land. To demonstrate its existence a plaintiff must show that the defendant unreasonably and substantially interfered with the use and enjoyment of his property." *Allison v. Smith,* 695 P.2d 791, 793-94 (Colo. App. 1984).) "In making any determination of unreasonableness, the trier of fact must weigh the gravity of the harm and the utility of the conduct causing that harm. Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Van Wyk*, 27 P.3d at 391 (citations omitted).

58. The Court finds 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 for those individuals who choose to reside in close proximity to an airport. The Plaintiffs are concerned about noise during daytime and early evening hours, which they believe impacts the use of their backyards and leisure activities. Mile-Hi planes do not typically operate after dusk. 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. An individual may also find it irritating or frustrating to listen to the sound of motorcycles and trucks on nearby streets, to hear lawn mowers throughout the day, to hear children's yells or laughter in a back yard, or hear the loud playing of music from a neighbor's home. But simply because a certain noise level is irritating or frustrating to a small group of people does not equate to the noise being significant enough that a normal person in the community would find it as offensive, annoying, or inconvenient.

59. The Court finds the utility of Mile-Hi conducting a legitimate business that complies with FAA noise regulations and provides tax revenue and recreational and other service to the community outweighs the 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.

60. A local government or airport operator cannot prohibit an aircraft that is otherwise in compliance with FAA regulations from flying in order to decrease noise levels, as local government and airport operators, pursuant to federal regulations, have no authority to impose such restrictions on aircraft operations. (*See* Order re: Defendant's Motion for Summary Judgment Regarding Preemption of State and Local Laws at p. 3.)

61. The FAA's aircraft noise regulations are codified in 14 C.F.R. Part 36. Part 36 prescribes noise standards for the type certification of subsonic transport category airplanes. These federal regulations state that "the noise levels in this part have been determined to be as low as economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply." 14 C.F.R. § 36.5. Additionally, 14 C.F.R. § 36.501 establishes noise limits for propeller driver small airplanes. This section applies to propeller driven small airplanes applying for new, amended or supplement type certificates after October 10, 1973. *See* 14 C.F.R. § 36.501(a)(1). The Twin Otter at issue in this case received a Noise Certification in July, 1979, certifying that Mile-Hi's Twin Otter airplane complies with the federally regulated noise requirements for propeller-driven small airplanes. The evidence establishes that the other planes that Mile-Hi uses in its skydiving operations are also all in compliance with 14 C.F.R. § 36.501.

62. Further, because the federal regulations regarding airplane noise are the standard with which Mile-Hi must comply, and because there is no evidence before the Court that Mile-Hi has violated the federal noise limits, Mile-Hi has not unreasonably and substantially interfered with the Plaintiffs' use and enjoyment of their homes.

63. There is also no credible evidence that the Plaintiffs have been damaged by Mile-Hi's skydiving operations as the evidence was insufficient to demonstrate Mile-Hi's skydiving operations have caused any diminution in value of the Plaintiffs' homes. Plaintiffs' real estate expert, Mr. Myers, claims that Plaintiffs' home have not appreciated at the same rate as other homes but he concedes he does not know the causation of this and cannot find it is attributable specifically to Mile-Hi operations versus other airport noise or market factors. As such, Mr. Myers' range of damages is based on speculation. Mr. Kamin, Mile-Hi's real estate expert, found that there has been no measurable loss in value to any of the Plaintiffs' homes as a result of Mile-Hi's skydiving operations. The Court gives greater weight to Mr. Kamin's testimony.

64. The Court finds the Individual Plaintiffs have not met their burden of proof to establish that Mile-Hi's operations rise to a nuisance level and therefore denies the Individual Plaintiffs' nuisance claim.

65. To recover on a negligence claim, a plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages. *Quintana*, 827 P.2d at 519. When determining the standard of care in an aviation negligence action,

"a court must refer not only to specific [federal] regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner." *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3rd Cir. 1999).

66. The Court finds Mile-Hi owes a duty to the community at large, including the Individual Plaintiffs, to not operate in a careless or reckless manner. The Court finds no evidence to suggest Mile-Hi is operating aircraft in a careless or reckless manner and therefore only applies the federal regulations in assessing this matter.

67. The DNL standard as set forth by the FAA is a national standard for aircraft noise levels, which is the applicable standard in this matter. Neither party presented any evidence to demonstrate that Mile-Hi does not comply with the federal DNL standard. Accordingly, the Court finds no breach of that duty and denies the Individual Plaintiffs' negligence claim.

68. Addressing the issue of a state's ability to regulate aircraft noise, the Supreme Court of the United States has held that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is preemption" of state law in this area. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Federal control in this area is "intensive and exclusive." *Id.*

69. The City is prohibited by federal law from imposing limitations on aircraft operations for the purposes of controlling noise without FAA approval. Therefore the Court finds the Longmont Code § 10.20.100 and 10.20.110 were not intended to protect against the type of injuries Plaintiffs alleged to have suffered. Because the Longmont Code § 10.20.100 and 10.20.110 cannot be applied to regulate aviation noise, the Longmont Code does not apply to Mile-Hi's skydiving operations. The Court accordingly denies Plaintiffs' negligence per se claim.

70. The federal statutory scheme provides the exclusive and comprehensive process to measure airport noise and develop any remediation measures, which must be approved by the FAA. 14 C.F.R. Part 150 establishes the method by which the public at large, or individuals in the public, may address airport noise. It is not by seeking an injunction issued by a state court, but by requesting a detailed noise study to be conducted by the airport operator, in conjunction with the FAA, which includes public participation as well as local governments. The study makes recommendations for remediation measures, if warranted, which must then be approved by the FAA.

71. Part 150 establishes the process for airport operators to develop "noise exposure maps" and "noise compatibility programs" to govern noise emissions from public use airports. Part 150 adopts the day-night average sound level ("DNL") as the applicable metric by which to measure community exposure to and annoyance from aircraft noise. *See* 14 C.F.R. §§ 150.7 and 150.9(b). Part 150 also prescribes a uniform methodology for the development and preparation of noise exposure maps, which includes a single system of measuring noise at airports for which there is "a highly reliable relationship between

projected noise exposure and surveyed reaction of people to noise" along with a separate single system for determining the exposure of individuals to noise. 14 C.F.R. § 150.1.

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

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

CONCLUSION

74. The Court hereby **DENIES** Plaintiffs' claims for nuisance, negligence, and negligence per se.

75. The Court recognizes that this case has produced tension among community members. Many citizens of our community observed all or part of the trial and conducted themselves in a dignified and respectful manner. It is the Court's hope that following a week-long trial, in which both parties were given an opportunity to present their evidence, that the parties, as well as the community members, will accept the ruling of the Court and move forward in a manner that demonstrates courtesy, respect, and consideration for one another.

EXHIBITS

Counsel, for any party represented by counsel, is directed to efile any exhibits offered or admitted at the hearing in accordance with Chief Justice Directive 11-01 and Local Administrative Order 11-102.

DATED: 5/21/15

BY THE COURT

Judith L. LaBuda
District Court Judge