DISTRICT COURT, COUNTY OF BOULDER, COLORADO **Boulder County District Court** **Boulder County Justice Center** **1777 6th Street** **Boulder, Colorado 80302**	**▲COURT USE ONLY▲**
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.	**Case No.** 13CV031563 **Division:** 2 **Courtroom: Q**
PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	

Plaintiffs proceed to trial on claims of private nuisance, negligence and negligence *per se.*

FINDINGS OF FACT

I. NEGLIGENCE

1. Adverse reaction to aircraft noise is a commonly understood issue among aviators.

2. Frank Casares testified that he was aware of the increase in complaints about the operations of his company by no later than 2010.

3. There is a recognized duty among aviators to take reasonable measures to mitigate the adverse impacts of noise on property owners. This duty inures to the benefit of both property owners and the aviation community.

4. The FAA permits local restrictions based on noise concerns in particular areas. The standard of care among aviators requires consideration of local conditions.

5. The Dehavilland Twin Otter aircraft has been the predominate airplane flown by the Defendants since 2007 (the "Purple Otter"). Noise mitigating equipment, principally composed of four-bladed propellers, is available for this aircraft. Defendant was familiar with this equipment because it rented Twin Otter aircraft from Skydive Arizona which were equipped with four-bladed propellers (the "White Otter"). The White Otter is quieter than the three-bladed propeller configuration and the Purple Otter.

6. Plaintiffs and other residents began to be concerned by airplane noise after the Defendant started to use the Purple Otter.

7. Defendant does not own any aircraft and leases the Purple Otter. Defendant has the ability to lease an appropriately equipped Twin Otter.

8. Significant noise reduction can be achieved by "flying friendly" which, in part, means reducing the power of the engines after take-off. Reducing power after takeoff is a common procedure in aviation for reduction of noise. The Longmont Municipal Airport's (LMO) noise abatement procedures state that pilots should reduce power at a safe altitude after takeoff. The airport proprietor expects pilots to make good faith efforts to follow these procedures.

9. The FAA explicitly authorizes local airports to establish noise abatement procedures. 14 C.F.R. Part 150, NCP Checklist, § IV(A)(4) ("Voluntary Flight Procedures"). LMO's noise abatement procedures were promulgated pursuant to that authority.

10. Good faith efforts to comply with noise abatement procedures are part of the standard of care for aviators operating out of LMO.

11. Defendant does not reduce power after takeoff to a significant enough extent to reduce noise heard by people on the ground. Witnesses for Plaintiffs, including two pilots (Dave

Shenk and Gary Rubin) who own hangers at the airport and are not parties to the suit, testified that there is no audible reduction in power for Defendant's flights from take-off to drop altitude.

12. The LMO noise abatement procedures state that pilots should not fly in patterns that repeatedly overpass the same residential neighborhoods. The diagrams of "typical" flight patterns contained in Mr. Freytag's report and the testimony of numerous Plaintiff witnesses indicate that Defendant often flies in patterns that repeatedly overpass Plaintiffs' residences during a single flight.

13. Defendant's flights have significant characteristics that are different from other flights in the area. Defendant's aircraft fly under climbing power for over 12,000 vertical feet of climbing. Other aircraft achieve a cruising altitude at 2,000 to 4,000 and significantly cut back on engine power at that point.

14. Defendant's flights remain within a confined area and frequently involve repeated loops and multiple passes over the same properties. Other aircraft climb while flying straight in one direction, and tend to fly away from the airport and the Plaintiffs' community. Of the approximately 61,000 operations out of LMO in 2010, approximately 34,000 were planes based at LMO. The rest are "itinerant" and involve planes that fly away from LMO to other airports.

15. Of the approximately 34,000 local operations, over 21,000 are "touch and go" operations of the flight schools. Touch and go flights take off under power to an altitude of 1000 feet, then significantly cut power and cruise around the airport to a landing approach. These flights may never leave the airport "traffic pattern" (Exh. C), and they do not create a significant noise impact on the community.

16. Defendant's operations comprise a high percentage of the overall airport operations which actually impact the local community. Less than 13,000 operations were

conducted out of LMO by local aircraft which fly beyond the confines of the airport traffic pattern. Defendant was responsible for over 5000 of these operations.

17. During summer weekends, Defendant represents the *majority* of the significant local airport traffic. Richard Stewart, an Airport Advisory Board member from 1999 to 2008, stated in his testimony that community members complain more about Mile-Hi than other airport users because "they fly more than anyone else."

18. In 2014, Defendant conducted 80% of its flights between April and September, and approximately 60% of those flights occurred on weekends. On summer weekend days, Defendant conducted as many as 54 flights (108 operations) and they conducted twenty flights or more on all but two weekend days last summer.

19. The unique characteristics of Defendant's flight patterns mean that the Defendant's planes create more noise than other operations, within a more confined area and for longer periods of time.

20. Defendant could fly straight "out and back" patterns to the west and north periodically to provide respite between the normal flight patterns that overpass Plaintiffs' properties.

21. LMO is an uncontrolled airport. There is no control tower. Take-offs and landings are performed at the discretion of pilots and are not determined by Air Traffic Control (ATC) at Denver International Airport (DIA) or any other control tower.

22. The airspace around LMO is Class E and G airspace. In Class E airspace, planes may fly under Visual Flight Rules (VFR) and are not required to speak with ATC. VFR means that the pilots have the responsibility to "see and avoid" other aircraft. Planes within Class E airspace are not even required to have transponders identifying their location to ATC except

within the "Mode C" zone (Exh. JJ at Figure 3) around DIA that ends to the west and north of LMO.

23. Defendant can follow the normal procedure of "notifying" ATC of an operation between 1 and 24 hours prior to a flight, or by providing written notification for up to a year listing a scheduled series of operations. C.F.R 14(F) §§105.25(a)(3)&(c). The Letter of Agreement (Exh. K) acts as a substitute for the notification process described in the FAA regulations, which would be more cumbersome for Defendant. The Agreement is merely a convenience for Defendant.

24. Yancy O'Barr, on behalf of the Terminal Radar Approach Control (TRACON) facility at DIA, 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 it and can operate without it. *Id.* at 35:24-36:20 & 37:3-6. Moreover, Defendant already has the right to fly outside the box regardless of the Agreement. *Id.* at 8:14 to 9:2. Defendant's own operation manual (Exh. O) describes preferred flight patterns that go outside of the box to the west.

25. Defendant's flights can safely traverse the arrival corridor for DIA to the north. The corridor can be busy during some periods but may not be used at all during others. Communications with ATC can alleviate any risk associated with climbing to the north of LMO. Flight separation under VFR rules is properly and safely the responsibility of the pilots. Other aircraft routinely cross the corridor without apparent difficulty (Exh. JJ at Figure 4). One of Defendant's "typical" flight patterns (*Id*. at Figure 1) enters the corridor.

26. Traffic in the corridor is typically in Class A airspace above 18,000 feet. The Defendant 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). Defendant normally conducts operations under VFR.

27. Defendant has both the duty and the ability to fly in patterns that do not repeatedly fly over the same properties. Defendant's actual flight patterns do not comport with the patterns in its own operation manual, and it does not document deviations in its flight manifests as required by the manual.

II. NEGLIGENCE *PER SE*

28. The maximum noise levels allowed under Longmont Code § 10.20.100 in residential areas is 55 db(A). Witnesses all agree that Mile-Hi aircraft routinely exceed 55 db(A). In a single flight, Defendant can exceed the noise limit ten times.

29. As the proprietor of the airport, the City of Longmont is permitted to establish reasonable noise restrictions. The noise restrictions of Longmont Code § 10.20.100 have exclusions but do not exclude aviation noise.

III. NUISANCE

30. Andrew Hill, a former pilot for Defendant, testified that he witnessed Mr. Casares purposely causing noise. The act is consistent with other conduct of Mr. Casares such as sending "I Love Airplane Noise" bumper stickers to the Plaintiffs.

31. Defendant's activities interfere with Plaintiffs' quiet enjoyment of their properties, and the interference is unreasonable. The interference is significant enough that a normal person in the community would find it offensive, annoying, or inconvenient. The City, County, and State all agree that noise in excess of 55 db(A) is generally excessive for rural areas.

32. The "Schultz Curve," which is the basis for FAA noise limits, does not measure the percentage of people who would be annoyed, offended or inconvenienced by the Defendant's

activities. It uses a heightened standard of "highly annoyed" instead of the Colorado criteria for nuisance.

33. The difference between background noise and a noise event is significant to whether people experience annoyance. The greater the difference, the stronger the adverse reaction. This "Time Above dbA Threshold" (Exh. 21) is one of the "supplemental metrics" used by the FAA. People in rural areas tend to be more annoyed by a 55 or 65 db(A) noise event than people in urban areas. Mr. Freytag admitted that most of the surveys were sent to people in urban areas around major metropolitan airports. The "Schultz Curve" averages reactions among predominantly urban and some rural communities. It does not isolate or established the reactions of people in rural communities that are similar to the Plaintiffs'.

34. Robert Rand was the only witness who attempted to isolate the background noise in the area. All other experts measured the average noise in the area. Based upon the ANSI "L90" standard for measurement, the background noise in the community is 37 db(A).

35. The Schultz Curve does not represent state of the art acoustic science. It has not been substantively revisited since the FICON analysis in 1991. *See* Exh. 21. At that time, there were no new metrics of sufficient scientific standing to displace the "DNL" metric. In the intervening 23 years, additional studies have been conducted with respect to tones and low frequency noise.

36. The specific characteristics of the noise from Defendant's operation will tend to cause more annoyance than other noise events typical of the area. Certain tones are known to be particularly annoying even at low energy levels, and can cause speech interference. This reflects common experience with low energy but highly annoying noises such as mosquitos. Noise from Defendant's activities include discrete tones which are known to cause speech interference.

37. The low frequency characteristics of the noise created by Defendant penetrates into the interior of homes and creates a "pushing" feeling on the eardrum. The data presented to the Court showing the noise events in one second increments provided the most accurate depiction of what people experience in the neighborhood. In contrast, hourly (Freytag) or five minute (Terracon) averages comingle noise events in a manner that does not reflect what people actually experience because people do not hear averages; they hear and react to noise events.

38. To measure interference with the use of property, it is appropriate to look specifically to the times when people are attempting to use their property. This was conceded by Mr. Freytag. Using an eight flight per day yearly average does not measure the actual interference from the 20 to 54 flights that occur during the times the Plaintiffs are most likely to use and enjoy their back yards.

39. Defendant's activities would and do cause normal people in the community to experience annoyance, offense and inconvenience. Even taking into account the purported "outliers," there were still 234 complaints made to LMO about Defendant in 2014. This alone indicates that normal people are annoyed, offended or inconvenienced, especially considering the several reasons that complaints may be underreported.

IV. DAMAGES

40. Plaintiffs' and Defendant's experts referred to studies on airport noise in the Los Angeles and Chicago areas, which showed a financial impact on adjacent neighborhoods.

41. The evidence shows that at least six different realtors recognized impacts from Defendant's noise.

42. Plaintiffs' expert, Mr. Myers, compared two neighborhoods to determine the financial impact of Mile-Hi's noise on Plaintiffs' property values, one which contained the

majority of Plaintiffs' homes and was highly impacted by Mile-Hi's operations, and an adjacent neighborhood further east which was less impacted. Mr. Myers compared the neighborhoods in terms of price per home, price per square foot, and price for above ground square foot. In each case the homes in Plaintiffs' neighborhood appreciated less than homes in the neighborhood next to it.

43. The evidence did not suggest that the difference in average home values between the two neighborhoods was a factor that Mr. Myers' should have accounted for.

44. Mr. Myers calculated the amounts of the reduced appreciation of Plaintiffs' homes as between 5-10% of the value of the homes.

45. This amount is in line with the calculation utilized by Mr. Kamin, Defendant's expert, assuming that Mile-Hi is responsible for 60%, rather than 6%, of the airport noise impact.

46. The Court finds that Mr. Kamin utilized the wrong methodology in his analysis by assuming that there was no significant change in airport operations between the time the Plaintiffs bought their homes and the present.

47. Mile-Hi increased its noise and operations substantially since the late 2000s.

48. In addition, Mr. Kamin's paired sales analysis failed to show that the sales he analyzed were arms-length transactions or that those transactions did not utilize creative financing arrangements that were not recorded. The Court notes his failure to interview the Plaintiffs or their neighbors in the impacted neighborhoods to determine if his assumption, that there was no change in Mile-Hi's operations since the airport opened, was accurate.

CONCLUSIONS OF LAW

I. NEGLIGENCE

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); *Perreira v. State*, 768 P.2d 1198, 1208 (Colo. 1989); *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986).

A. Defendant had a duty to avoid damaging Plaintiffs' property interests.

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 509; *Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989). Colorado courts have recognized a common law duty to properly operate an aircraft so as to avoid foreseeable harm to others. *Huddleston v. Union Rural Elec. Ass'n*, 841 P. 2d 282 (Colo. 1992); *Murphy v. Colorado Aviation, Inc.*, 588 P. 2d 877 (Colo. App. 1978); *Texair Flyers, Inc. v. District Court, First Jud. Dist.*, 506 P. 2d 367 (Colo. 1973). Based on the testimony, the Court finds that the risk of harm caused by excessive noise was clearly foreseeable to the Defendant by 2010, if not earlier. The Court finds credible the testimony of Matthew Robinson that there is a recognized duty among aviators to take reasonable measures to mitigate the adverse impacts of noise on property owners. This was not disputed by Defendant. The Court concludes that Defendant had a common law duty to take reasonable measures to avoid the damages Plaintiffs have suffered.

B. The standard of care must account for the location and circumstances of specific operations.

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* § 288C of Restatement (Second) of Torts (1965); *Yampa Valley Elec. v. Telecky*, 862 P. 2d 252 (Colo. 1993). The fact that Mile-Hi presented a manufacturer noise certification at trial does not show that its airplanes are being operated in an acceptable manner or that they are appropriate for the area. *See* 14 C.F.R. 36.5 ("No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport."). The appropriate standard of care is established by what is considered reasonable among pilots of propeller-driven small airplanes acting within the local or similar communities and seeking to protect others from harm.

C. Defendant breached its duty to take reasonable steps to mitigate the noise of its operation.

The Court finds that Defendant breached the standard of care by (a) operating an inappropriate aircraft or using inappropriate equipment, (b) flying in repeated circles over the community, and (c) flying too aggressively.

The Court finds that noise mitigating equipment, principally composed of four-bladed propellers, is available for the Dehavilland Twin Otter aircraft. Expert testimony on noise readings supports the contention that the four-bladed propellers on the White Otter are quieter than the three-bladed propellers on the Purple Otter. The contention is also supported by the testimony of numerous witnesses. Based upon the fact that Defendant rented and operated appropriately equipped Twin Otter aircraft prior to 2007, and the fact that the only other skydive

operation known to the Court in this case uses the quieter equipment, the Court concludes that use of this equipment is reasonable and necessary in this area.

It is undisputed that LMO's noise abatement procedures state that pilots should reduce power at a safe altitude after takeoff. The Court finds that good faith efforts to follow the procedures are part of the standard of care. It is undisputed that reducing power after takeoff is a common procedure, and thus it is part of the standard of care regardless of whether the noise abatement procedures provide additional support for the standard.

Based on the testimony, Defendant does not appear to consistently follow its own procedures, or the power reduction is simply insufficient to abate the noise. Thus, Defendant has breached the standard of care with respect to reducing power after takeoff so as to abate noise.

The LMO noise abatement procedures state that pilots should not fly in patterns that repeatedly overpass the same residential neighborhoods. Defendant often flies in patterns that repeatedly overpass the same residences during a single flight. The Court finds that the Defendant could fly straight "out and back" patterns to the west and north periodically to provide respite between the normal flight patterns that overpass Plaintiffs' properties. The principle dispute on this issue concerns the "flight box" (or operation area) which is set forth in the Letter of Agreement between the FAA and the Defendant.

There does not appear to be any legal authority for the FAA to require such an agreement within Class E & G airspace. Defendant is merely required to "notify" ATC of its operations. 14 CFR §105. The term "notified" stands in contrast to other sections which require "authorization" or that an operation must be "authorized." §§105.25(a)(1) & (2). The Court finds that the notification process does not require Mile-Hi to receive authorization from the FAA for its activities.

The Court finds compelling the testimony of Yancy O'Barr, on behalf of TRACON (ATC for DIA), that the Letter of Agreement is not required. Defendant apparently already has the right to fly outside the box regardless of the Agreement. Defendant's own operation manual describes preferred flight patterns that go outside of the box to the west (Exh. 6). The Court concludes that the Letter of Agreement is not binding on Defendant's operations. Furthermore, Defendant's flights can safely traverse the arrival corridor for DIA to the north.

Defendant has both the duty and the ability to fly in patterns that do not repeatedly fly over the same properties. Defendant's actual flight patterns do not meet the standard of care.

II. NEGLIGENCE *PER SE*

A party may recover under a claim of negligence *per se* if it is established that the defendant violated the statutory standard and the violation was the proximate cause of the injuries sustained. *Lyons v. Nasby,* 770 P.2d 1250, 1257 (Colo.1989); *Largo Corp. v. Crespin,* 727 P.2d 1098, 1107 (Colo.1986). Defendant's activities exceed the maximum noise levels allowed under Longmont Code § 10.20.100 in residential areas. Violations are evidence of the unreasonable nature of Defendant's conduct and/or establish a basis for a finding of negligence *per se*. *See* C.J.I. 9:14.

The Court does not agree with Defendant's contention that the Longmont Code is inapplicable to its operations. The similar Boulder County Ordinance, 1.01.020(G), and Colorado Revised Statute, §25-12-103(4), specifically state that they do not apply to aircraft noise. The absence of this exclusion in the Longmont Code cannot be regarding as an oversight. As the proprietor of the airport, the City of Longmont is permitted to establish reasonable noise restrictions. *See, British Airways British Airways Board v. Port Authority of New York,* 564 F. 2d 1002, 1011 (2nd Cir.1977). Defendant contends that the Longmont Code exceeds the

authority the FAA grants to proprietors. However, the FAA and the City are not parties to this matter, and the issue of any conflict between these nonparties is not before the Court. Having determined that the 55db(A) limit is applicable to aircraft, the Court must also conclude that Defendant's activities violate the noise restrictions of Longmont Code § 10.20.100.

Defendant's concern that enforcement of the Code will effectively close the airport are misplaced. *De minimus* violations do not warrant injunctive relief. To warrant injunctive relief Plaintiffs had to establish that Defendant's violations created a nuisance. The evidence did not indicate that other aircraft are a nuisance to the neighborhood.

III. NUISANCE

"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. Corp. 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. In this case there was evidence of both. Given the complaints its operations have engendered, Defendant should have been "substantially certain" that its activities would invade the peaceful enjoyment of Plaintiffs' properties since no later than 2010.

Even if there was no intentional conduct by the Defendant, if its activities cause "unreasonable and substantial interference with a plaintiff's use and enjoyment of her property," it would still be liable based upon negligent conduct as described above. *Id.* at 391. Unreasonable means an interference that is "significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id.*

There was substantial evidence that normal people in the community consider Defendants' activities to be offensive, annoying, or inconvenient. In view of the fact that the City, County, and State all agree that noise in excess of 55db(A) is excessive for rural areas, it is not surprising that members of the community would be annoyed with such noise when it is reoccurring up to 54 times a day on weekend days.

Defendant contends that FAA regulations set the standard for "unreasonable" as a matter of law and established science. There is no legal requirement to use the federal 65db day night yearly average (the DNL) as the standards for a common law nuisance claim. The tort arises under Colorado law and is explicitly established by reference to local community standards. Other jurisdictions that have examined nuisance claims against airports have not relied upon the FAA standard. *See, Jackson v. Metropolitan Knoxville Airport*, 922 SW 2d 860 (Tenn. 1996) (analyzing cases from Minnesota, North Carolina, Washington, Oklahoma, Oregon, California, Pennsylvania, and New Hampshire). Although many of the cases pertain to inverse condemnation, *but c.f. Krueger v. Mitchell*, 332 NW 733, 112 Wis.2d 88, 105 (1983), the underlying cause of the taking is consistently nuisance. Colorado law clearly allows for nuisance liability in cases where there is no taking. *Van Wyk*, 27 P.3d at 386-89 and 392-95. There is no logical reason why the standard for nuisance would change based upon whether a taking is involved.

The Court does not find that the DNL is an appropriate measure for determining nuisance noise levels. Nuisance is based upon interference with the use of property. The Defense expert admitted that, to measure interference, you would look specifically to the times when people are attempting to use their property. Mile-Hi's activities occur predominantly on summer weekends,

and using an eight flight per day yearly average does not measure the actual interference during the times people are most likely to use and enjoy their back yards.

Defendant's activities would and do cause normal people in the community to experience annoyance, offense and inconvenience. Defendant neglected to try to show that each of the Plaintiffs are not "normal persons" within the community, with the possible exception of Mr. Dauer, who testified as to his acute hearing. Plaintiffs' particular sensitivities, if they exist, do not disqualify them from seeking redress. Thus, the Court concludes that Defendant's activities create noise that is a nuisance to Plaintiffs.

IV. REMEDIES

A. Monetary Damages

Plaintiffs' claims for monetary damages are not preempted or controlled by federal law. Claims by landowners based upon airport noise have been examined in numerous jurisdictions. *See Jackson v. Metropolitan Knoxville Airport*, 922 SW 2d 860 (Tenn. 1996) (analyzing cases from Minnesota, North Carolina, Washington, Oklahoma, Oregon, California, Pennsylvania, and New Hampshire). The Colorado Supreme Court has specifically recognized that airport owners can be held liable for noise impact on property owners. *Arapahoe County Public Authority v. Centennial Express Airlines*, 956 P.2d 587, 595 (Colo. 1998). Thus, the Court is not preempted from granting Plaintiffs' monetary relief.

The Court finds that, as a result of Defendants' conduct, damages should be awarded to the homeowner Plaintiffs in the amount of their diminished value to their five homes. Although homes in the impacted area have appreciated in value throughout the relevant time periods, "diminished value" incorporates the concept of reduced appreciation when properties have otherwise appreciated. *See McAlonan v. US Home Corp*., 724 P. 2d 78, 80 (Colo.App. 1986).

Both Plaintiffs and Defendants relied upon appraisals prepared by Defendants' expert, Mr. Kamin, and the Court accepts such property values. The Court accepts Mr. Myers' testimony that, as a result of Defendants' operations, the reduced appreciation of Plaintiffs' homes falls between 5-10% of their value. Each of the Plaintiffs also testified as to the damages to their homes. "An owner can testify to the value of his property without being qualified as an expert witness." *Vista Resorts v. Goodyear*, 117 P.3d 60, 69 (2005). The Court finds that such testimony corroborates the testimony of Mr. Myers.

Difficulty or uncertainty in determining the precise amount does not prevent the Court from providing an award of damages. *Peterson v. Colorado Potato Flake & Mfg. Co.*, 164 Colo. 304, 435 P.2d 237 (1967). "The subject of measure of damages is a complicated, and often confusing, one. The general underlying principle, however, is that whoever unlawfully injures another shall make him whole." *Bullerdick v. Pritchard*, 8 P.2d 705 (1932). *See also Cope v. Vermeer Sales and Service of Colo.*, 650 P. 2d 1307, 1308-1309 (Colo.App. 1982).

The Court finds that Plaintiffs are entitled to the midrange of the 5-10% reduced appreciation calculated by Plaintiffs' expert, and hereby awards damages under the "Mid-Point of Damages" set forth below, calculated as follows (from Exh. 43):

Plaintiff	Appraised Value	Range of Damages	Mid-Point of Damages
Behrens:	$ 412,000	$20,600 to $ 41,200	$ 30,900
Dauer:	$ 725,000	$36,250 to $ 72,500	$ 54,375
Yates:	$ 625,000	$31,250 to $ 62,500	$ 46,875
Webel/Bovet:	$1,875,000	$93,750 to $180,750	$137,250
Gibbs/Lim:	$ 430,000	$21,500 to $ 42,000	$ 31,750

B. Injunctive relief

In order to obtain a permanent injunction, a party must show: "(1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3)

the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Langlois v. Board of County Commissioners*, 78 P.3d 1154, 1158 (Colo. App. 2003); *K9 Shrink, LLC v. Ridgewood Meadows Water*, 278 P. 3d 372, 378 (Colo. App. 2011). "A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires." *Colorado Springs Board of Realtors, Inc. v. State*, 780 P.2d 494, 498 (Colo. 1989). Plaintiffs have shown that Defendant is operating its flights in a negligent manner, causing a nuisance, and is negligent *per se*.

Irreparable harm will result to Plaintiffs if the permanent injunction entered herein is not issued. The purpose of the law of nuisance is to prevent a substantial invasion of a plaintiff's use and enjoyment of her property. *Hoery v. United States*, 64 P.3d 214, 222 (Colo. 2003). Mile-Hi has a right to conduct parachute operations. What they do not have a right to do is conduct these operations in a manner that intrudes onto the peaceful enjoyment of Plaintiffs' properties. Plaintiffs will be irreparably harmed if Mile-Hi does not comply with restrictions on its operations.

The injuries to Plaintiffs outweigh any harm that an injunction will cause Mile-Hi. Plaintiffs have an interest, shared by the rest of the community, in not having the use and enjoyment of their properties invaded. The restrictions imposed by the Court on Mile-Hi should not reduce its operations below what existed when the current owner purchased the company. It will allow for balance between Plaintiffs and Defendant in the use of time on weekends which furthers the utility of all activities, without giving preference to the activities of one group.

Finally, issuing the injunction is in the public interest. The public has a strong interest in protecting and preserving property rights from invasions by others. The public also has an interest in insuring that commercial operations that produce excessive noise are conducted in accordance with legal requirements. The requested injunctions would have no effect on the

aviation system. The FAA does not control take-offs or landings from LMO. *See* O'Barr Depo. at 8:19-9:7.

The Court does not need to look to the utility of skydiving generally because Plaintiffs are not requesting an injunction against that activity. Rather, the issue is the utility of allowing Mile-Hi to operate particular planes in a particular manner for unlimited time periods. Mile-Hi's recreational activities do not have more social utility than the Plaintiffs' recreational activities and peaceful enjoyment of their properties.

State law is not preempted by federal law unless it "actually conflicts with federal law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). The injunctive relief requested by the Plaintiffs does not intrude upon federal authority. Cases relied upon by Defendant all emphasize that the FAA will step in when a local restriction impedes the operation of the aviation system, harms a national interest, creates a safety concern or harms interstate commerce.

The injunctions would have no effect on the aviation system. While fractionalized control of the timing of takeoffs and landings may limit the flexibility of FAA in controlling air traffic flow, that concern is not present here because the FAA does not control take offs or landings from Vance Brand. *See* O'Barr Depo. at 8:19-9:7.

There is no safety concern. The relief requested by Plaintiffs would only serve to limit air traffic which could not possibly impede the FAA from "scheduling flights to avoid congestion and the concomitant decrease in safety." *Burbank*, 411 U.S. at 639. Fewer flights by the Defendant cannot increase congestion or safety issues.

The requested injunctive relief will have no effect on interstate commerce. It would only restrict local skydiving operations, and does not prevent the Defendant from taking its services or selling goods interstate. The fact that Defendant's customers may come from other states does

not make Defendant's local activities a matter of interstate commerce, which is established by the transportation of goods or services across state lines. *See* 49 U.S.C. 40102 (a)(24) (defining "interstate air commerce" as aircraft transportation "between" states).

Even if the injunctive relief intruded on FAA authority, the Court is entitled to issue injunctive relief to enforce regulations established by the proprietor. The Court need not decide whether the Longmont Code exceeds the authority granted to an airport proprietor, and there is no reason to anticipate that the FAA would oppose the restriction or that the Federal Courts would find in favor of the FAA if it did object. Indeed, restrictions similar to the ones sought here and issued for similar reasons have been upheld over the objections of the FAA. *City of Naples Airport Authority v. FAA*, 409 F.3d 431, 435 (D.C. Cir. 2005) ("specific noise contours *rests with the local authorities*"); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F. 2d 100, 102 (9th Cir. 1981) (upholding a night curfew on takeoffs and landings and a ban on helicopter flight training); *British Airways v. Port Authority*, 558 F.2d 75, 81 (1977) (Concorde ban upheld); *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89-90 (2d Cir. 1981) (upholding weekend curfews and protecting the local residential community from heliport noise "during sleeping hours").

Based upon the foregoing findings of fact and conclusions of law, the Court finds that Defendants' operations, including up to 45 flights per day on weekend days, from 8:00 AM to Sundown on weekends, with noise levels exceeding Longmont noise standards, is negligent and negligent *per se*. It is a nuisance for the Plaintiffs living beneath Mile-Hi's flight path, when these Plaintiffs are most in need of the respite their homes can provide.

WHEREFORE, Defendant is Ordered to modify its operations as set forth herein, and to pay damages to Plaintiffs as herein described.

Respectfully submitted this 15th day of May, 2015.

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

Original signature on file at the Law Offices of Randall M. Weiner, P.C.

/s/ Randall M. Weiner
Randall M. Weiner, #23871
Annmarie Cording, #42524, Of Counsel
3100 Arapahoe Avenue, Suite 202
Boulder, Colorado 80303
Phone Number: 303-440-3321
Fax Number: 720-292-1687
randall@randallweiner.com
acording@cordinglaw.com

LAW OFFICES OF MATTHEW B. OSOFSKY, ESQ.

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

/s/ Matthew Osofsky
Matthew Osofsky, #34075
3100 Arapahoe Avenue, Suite 202
Boulder, Colorado 80303
Phone Number: 303-440-3321
mosofsky@live.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was E-Served by the Court-authorized E-System provider to all active counsel of record on ICCES' service list on this 15th day of May, 2015.

/s/ Annmarie Cording
Annmarie Cording

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