COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2003-1949

ROBERT F. CASEY, JR., RITA A. CASEY,
DAVID McCOY, AMY McCOY, and
BEVERLY SMITH,
Plaintiffs,

v.

MICHAEL GOULIAN,
EXECUTIVE FLYERS AVIATION, INC.,
CENTER OF MASS. AEROBATICS, LLC,
KENT G. CHRISTMAN,
STEVE S. PENNYPACKER, and
PETER E. BOCON,
Defendants.

MEMORANDUM OF LAW AND STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

In this nuisance action, the plaintiffs seek damages and injunctive relief as a remedy for the defendants' alleged practice of flying airplanes and engaging in airplane aerobatics at various altitudes in the general vicinity of the plaintiffs' homes in Ayer and Groton, Massachusetts. Federal law explicitly permits and extensively controls the defendants' flight activities. As a result of the extensive web of federal regulation, the plaintiffs are preempted from using a state law nuisance action to prohibit these lawful flights. Even if their claims are not preempted, plaintiffs cannot support their nuisance claim under Massachusetts law.

DEFENDANTS' STATEMENT OF UNDISPUTED FACTS[1]

1. The plaintiff Robert F. Casey, Jr. is an attorney. He represents himself in this action *pro se*. He is counsel of record to all of the other plaintiffs. Affidavit of Kevin C. Cain ("Cain Aff."), Exhibit A, at p. 15.[2]

2. The defendant Michael Goulian is an owner/principal of the defendant Executive Flyers Aviation, Inc. ("Executive Flyers"). Executive Flyers is a small, Bedford-based flight-training school that was started in 1964 by Goulian's father. Goulian is a world-class aerobatic pilot and former national aerobatics champion. Cain Aff. ¶ 3.

3. The defendants Christman, Pennypacker, and Bocon formerly were joint owners of a small single-engine airplane, title to which was in the name of the defendant Center of Mass. Aerobatics, LLC. Due in large part to the costs associated with defending this litigation, these defendants were forced to sell their airplane and are no longer airplane owners. Cain Aff. ¶ 4.

4. At all times relevant to this matter, all of the airplanes owned/used by the defendants were in airworthy condition and properly registered with and certificated by the FAA in their respective category and classes of manufacture. Cain Aff. ¶ 5.

5. Federal regulation permits aerobatic flight over non-congested areas above an altitude of 1,500 feet above the surface, non-aerobatic flight over congested areas above an altitude of 1,000 feet above the highest obstacle, over non-congested areas above 500 feet, and

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[1] This statement is submitted pursuant to Superior Court rule 9A(b)(5).

[2] All further exhibit references in this memorandum refer to exhibits attached to the Cain Aff. filed herewith.

over sparsely populated areas or over open water, at any altitude, but not closer than 500 feet to any person, vessel, vehicle, or structure. 14 CFR §§ 91.119(b)-(c), 303.

6. Massachusetts regulation permits acrobatic flight above an altitude of 1,500 feet over non-thickly settled areas, non-acrobatic flight over thickly settled areas above an altitude of 1,000 feet above the highest obstacle, over non-thickly settled areas above 500 feet, and over open country or over open water, no altitude minimum, but not closer than 500 feet to any person, vessel, vehicle, or structure. 702 CMR §§ 4.06-4.07.

7. The plaintiffs allege that the defendants have deliberately engaged in disturbing flights over their homes "with knowledge" that the flights interfered with the plaintiffs' enjoyment of their homes. The plaintiffs do not allege negligence. They do not allege that the noise from the flights is unnecessary. The plaintiffs assert only nuisance claims against all defendants. Exhibit A.

8. The plaintiffs have specifically stated that their claims do <u>not</u> arise out of any violation of the Federal Aviation Regulations. Cain Aff. ¶ 12, Exhibit B, Casey Ans. 3(F)-(H); Exhibit D, Smith Ans. 3; Exhibit E, David McCoy Ans. to Goulian No. 3; Exhibit G, Amy McCoy Ans. 3.

9. The plaintiffs have not produced evidence establishing that the defendants caused damage by blocking sunlight, shaking the ground, dropping or throwing objects from the aircraft, releasing noxious fumes, breaking glass, or other physical damage to property, or diminution of the market value of their land. Some plaintiffs have testified only that there were some vibrations in their home because noise is a form of vibration, and plaintiff Robert F. Casey, Jr. has testified that his windows would sometimes rattle, although Casey admitted they were old windows in an old house and the sensation was not overwhelming. Exhibit H, Tr. David McCoy,

June 14, 2005, p. 118, ln.19- p, 119 ln.1; p. 135 l.6; Exhibit L, Tr. Robert F. Casey, Jr., May 24, 2005, p. 43 ln.5-11.

10. Plaintiffs David McCoy and Robert F. Casey, Jr. both testified that these flights lasted less than 45 minutes. Exhibit F, David McCoy Ans. to Center of Mass. Aerobatics' First Set No. 13; Exhibit K, Robert F. Casey, Jr., February 28, 2005, p. 27, ln. 3-7.

11. Plaintiff McCoy attributes twenty seven flights to the defendant Michael Goulian from June 19, 2001 through October 9, 2003. Exhibit E, D. McCoy Ans. to Goulian No. 6.

12. For the period March 13, 2002 to December 20, 2003, Plaintiff McCoy further attributes 20 flights to defendant Michael Goulian, 37 flights to defendant Executive Flyers Aviation, Inc., and 32 flights to Center of Mass. Aerobatics, LLC. Exhibit F, David McCoy Ans. to Center of Mass. Aerobatics' First Set No. 12. This Interrogatory answer has been incorporated by reference by other plaintiffs in their discovery responses.

13. Plaintiff Beverly Smith has testified that most of the flight training and ground reference maneuvers about which the plaintiffs complain is "coming out of Daniel Webster College." Exhibit M, Tr. Beverly Smith, June 21, 2005, p. 56, ln.12-15.

STANDARD OF REVIEW AND ELEMENTS OF CLAIMS

Summary judgment is appropriate when the record demonstrates that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-716 (1991). Summary judgment is available as to part of an action or claim. Mass. R. Civ. P. 56(a).

The plaintiffs purport to assert nuisance claims. In order to establish nuisance due to noise created by an overhead airplane flight, the plaintiffs must demonstrate that the disputed flights were below the minimum altitudes established by controlling regulation, and were harmful to their property, or to the health, habits, or material comfort of a normal person. See,

e.g., Burnham v. Beverly Airways, Inc., 311 Mass. 628, 631 (1942); Smith v. New England Aircraft Co., Inc., 270 Mass. 511, 518, 531 (1930). See generally Stevens v. Rockport Granite Co., 216 Mass. 486, 488-89 (1914).

The defendants assert that the plaintiffs' claims are preempted by the extensive federal regulation which controls aircraft flight noise levels. See City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1975). State law is preempted if it "disturbs too much" the federal regulatory scheme. French v. Pan Am Express, Inc., 869 F.2d. 1, 6 (1st Cir. 1989). Federal law may impliedly preempt state law either through field preemption, in which a "comprehensive scheme of federal regulation" leaves no room for state action, or though conflict preemption, in which state law "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress." Somes v. United Airlines, 33 F. Supp. 2d 78, 85 (D. Mass. 1999).

ARGUMENT

The Federal Aviation Act and Federal Aviation Administration regulations extensively control the activities of the plaintiffs in this action. By asserting this action, plaintiffs seek to prohibit conduct which the federal law explicitly permits. Consequently, plaintiffs' nuisance action is preempted by the extensive web of federal regulation.[3]

[3] This case was originally filed in this Court and the defendants removed it to the United States District Court for the District of Massachusetts. In the course of granting plaintiffs' motion to remand the case to this Court, Judge Saris concluded that the plaintiffs' claims are not "completely preempt[ed]" by federal law. Casey v. Goulian, 273 F. Supp. 2d 136, 138 (D. Mass. 2003). However, the federal court "carefully distinguished 'complete' preemption—a jurisdictional concept—from preemption on the merits," which is "a defense to the merits of a claim." Id. at 139 (citing Vorhees v. Naper Aero Club, Inc. 272 F.3d 398, 403 (7th Cir. 2001). The federal court in this case explicitly noted that "perhaps defendants have a valid preemption defense on the merits," but the court stated that "defendants will have to address their arguments to the state court." Id. at 140. The defendants do so by the present motion.

I. The Plaintiffs' Claims Are Preempted By Extensive Federal Regulation

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). Indeed, the Court believed the system of noise regulation was "require[d]" to fulfill the safety objectives of the Federal Aviation Act. Id. at 639. The First Circuit has also recognized the "Supreme Court's reasoning regarding the need for uniformity anent the regulation of aviation noise." French v. Pan Am Express, Inc., 869 F.2d 1, 6 (1st Cir. 1989). This analysis and the law of preemption prohibit the plaintiffs' claims in the present case.

The plaintiffs' claims are preempted by the Federal Aviation Act and by its extensive implementing regulations. The power to preempt state law is rooted in the Supremacy Clause of the Constitution. U.S. Const. Art. VI; French, 869 F.2d at 6 (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)). A federal statute may preempt state law by implication where Congress intends "to occupy a given field to the exclusion of state law." French, 869 F.2d at 2. The United States Congress has, in fact, specifically expressed its intent to preempt the control and regulation of airspace by through the inclusion of 49 U.S.C. 40103(a) which states, "The United States Government has exclusive sovereignty of airspace in the United States."

The First Circuit takes a "functional approach" to preemption analysis, focusing on "the effect" which the state law "has on the federal plan." French, 869 F.2d at 2. State law will be preempted "if it disturbs too much the constitutionally declared scheme." Id. Lower courts have distinguished between field preemption, in which a "comprehensive scheme of federal regulation" leaves no room for state action, and conflict preemption, in which state law "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress." Somes v.

United Airlines, 33 F. Supp. 2d 78, 85 (D. Mass. 1999). The plaintiff's claims in the present lawsuit are preempted under either approach.

A. Comprehensive Federal Regulation Governs Aircraft Noise and Safety

"Pervasive" federal regulation of aircraft noise impliedly preempts plaintiffs' attempts to use the state tort system to impose further restriction. See Burbank, 411 U.S. at 633. The purposes of the Federal Aviation Act, the broad powers it grants to the Federal Aviation Administration and its Administrator, and the extensive federal regulations which control aircraft noise each contribute to the comprehensive scheme.

1. The Purposes of the Federal Aviation Act and the Powers Its Conveys

The Federal Aviation Act (the "Act") declares that "exclusive sovereignty" of the airspace of the United States lies with the federal government. 49 U.S.C. § 40103(a)(1); Burbank, 411 U.S. at 626-27 (citing earlier analogous statutory provision). The Administrator of the Federal Aviation Administration is given the power to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." § 40103(b)(1). The Administrator has promulgated specific regulations directed at the aircraft noise at issue in this case.

2. Federal Aviation Administration Noise Regulation

The FAA extensively regulates aircraft noise. Rules set forth in Parts 35 and 36 of 14 C.F.R. establish maximum noise levels for aircraft engines and set certification and airworthiness requirements which impact the amount of noise generated by aircraft. The FAA aircraft noise limits, which govern the planes at issue in this litigation, are explicitly premised on an economic balancing test under which the FAA has already determined the optimum combination of technical feasibility, noise reduction, and cost. In addition, Part 91 of 14 C.F.R. contains

"General Operating and Flight Rules" which include Subpart I -- "Operating Noise Limits." This Subpart limits a number of different flight activities, including the flight activities of agricultural and fire fighting airplanes, supersonic aircraft, turbine and turboprop aircraft. See 14 C.F.R. 91.801 – 91.877. None of these regulations prohibits the flights at issue in this litigation. The minimum safe altitude requirements found in this part regulate noise by prescribing how close aircraft can come to people and buildings on the surface.

Aircraft noise emission limits are set forth in Part 36 of 14 C.F.R. These regulations state that "the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply." 14 C.F.R. § 36.5 (emphasis added). This explicit economic balancing test colors all regulations which pertain to aircraft noise. The FAA explicitly made "no determination" that particular noise levels are acceptable or unacceptable for takeoff and landing.[4] Id. Consequently, the FAA balancing test specifically applies to the precise kind of over flights at issue in this litigation.[5] The plaintiffs in this litigation not only seek to second-guess the agency by redetermining this balance, they effectively seek to trump the FAA balancing test entirely by banning flights which they deem "too noisy."

The noise standards in § 36 explicitly apply to

> type certificates and changes to those certificates, standard airworthiness certificates, and restricted category airworthiness

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[4] None of the flights at issue in this case involve takeoffs or landings.

[5] The majority of the decided aircraft noise cases involve takeoff and landing. These cases are distinguishable from the present case because they involve an area in which the FAA has specifically not regulated noise. See, e.g., Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir. 1988) (noting that state law aircraft noise claims could be advanced if they cover conduct "which federal norms do not govern").

> certificates, for propeller-driven, small airplanes, and for propeller driven commuter category airplanes,

subject to exceptions which are not applicable to the present matter. § 36.1(a)(2). Further, in order to comply with § 36, aircraft must meet "the airworthiness regulations constituting the type certification basis of the aircraft under all conditions in which compliance with this part is shown." § 36.5 Procedures for compliance must be "consistent with the airworthiness regulations constituting the type certification basis of the aircraft." Id.

14 C. F. R. §36.501 specifically establishes noise limits for propeller driven small airplanes. This section is applicable to propeller driven small planes applying for new, amended, or supplemental type certificates after October 10, 1973. § 36.501(a)(1). It also applies to these planes when a standard airworthiness certificate or a restricted category airworthiness certificate is sought if the aircraft has not had flight time before January 1, 1980 § 36.501(a)(2). For covered aircraft, two sets of noise limits have been promulgated. Those planes whose certification tests are completed before December 22, 1998 must comply with appendix F, part D. § 36.501(b). Those planes whose certification tests are not completed before December 22, 1998 must comply with appendix G, part D. § 36.501(c). Parts F and G set forth specific decibel limitations based upon factors including the weight of the aircraft, the date a certificate is sought, and the date on which a plane first had flight time. There is no allegation in this litigation that defendants have not complied with these limits.

Airworthiness standards for the issue of type certificates to propellers are governed under part 35 of 14 C.F.R. § 35.1. Applicants for type certificates "must show that the propeller concerned meets the design and construction requirements" set forth in part 35. Part 35 section 13 sets forth detailed design and construction standards which all contribute to the noise produced by the engine (and which all therefore must comply with the noise limits found in part

36).[6] For example, limitations are placed on types of materials a propeller may be constructed from, § 35.17, and the durability of such materials, §35.19. Further, a variety of tests are prescribed which propellers must pass to demonstrate airworthiness. See §§ 35.31 – 35.47. Compliance with each of these requirements impacts the level of noise an aircraft will produce.

Part 91 of 14 C.F.R. extensively regulates flight activities and contains a number of regulations which explicitly impose further noise restrictions. See 14 C.F.R. § 91.801 – 91.877. These limits generally prohibit sonic booms except in rare circumstances, see § 91.817, and set forth a number of limitations applicable to turbojets, see § 91.801. None of these regulations imposes any further restrictions on the operation of propeller aircraft at issue in this litigation beyond the noise limits imposed by Parts 35 and 36.

Part 91 regulates flight activity and has established minimum flight altitudes which impact how close aircraft may come to the surface. These rules indirectly regulate aircraft flight noise. Comprehensive regulations set minimum altitudes below which (with the exception of takeoff and landing) airplanes cannot travel. 14 C.F.R. § 91.119 provides in pertinent part as follows:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> * * * * *
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be

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[6] Part 36 independently requires that aircraft conform to airworthiness regulations for their type certification bases. § 36.5

> permitted closer than 500 feet to any person, vessel, vehicle, or structure.

14 CFR § 91.303 provides in pertinent part as follows:

> No person may operate an aircraft in aerobatic flight -- (a) over any congested area of a city, town, or settlement;
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> * * * * *
>
> (e) below an altitude of 1,500 feet above the surface . . . .[7]

Absent further restrictions imposed under Part 91, the FAA has judged that flights which otherwise comply with FAA noise and certification requirements operate at acceptable noise levels for air travel in the United States. Therefore, the plaintiffs are preempted from using a state law nuisance action to prohibit what the FAA considers to be lawful flights.

3. The Environmental Protection Agency Is Also Empowered To Promulgate Noise Regulations

Through the Noise Control Act of 1972, Congress also granted the Environmental Protection Agency ("EPA") broad authority to prescribe noise regulations. See 42 U.S.C. § 4905; Burbank, 411 U.S. at 628-29. This statute empowers EPA to promulgate "noise emission standards" for "transportation equipment" and for "any motor or engine (including any equipment of which an engine or motor is an integral part)." § 4905(a)(1)(C). The statute further requires that any standards published under it be "performance standard[s]" which take into account the amount of noise reduction "requisite to protect the public health and welfare," the "magnitude and conditions of use of [the] product," the "best available technology," and the "cost of compliance." § 4905(c)(1). To date, EPA has not exercised this authority by promulgating rules regulating aircraft noise.

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[7] Massachusetts also regulates air-flight altitude in a manner entirely consistent with federal regulation. See Part II, infra.

B. This Comprehensive Web of Regulation Forecloses Plaintiffs' Attempts to Enforce Alternative Standards Through the State Tort System

Courts that have considered the issue have concluded that federal law occupies the field of aircraft safety regulation and therefore state causes of action are preempted. Many courts have recognized the Supreme Court's declaration that "the pervasive control vested in EPA and in FAA . . . leave[s] no room for local curfews or other local controls." Burbank, 411 U.S. at 638. The Eleventh Circuit has found that ordinances prohibiting night operations and proscribing air traffic patterns are preempted. Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983). The Ninth Circuit has also found curfews on aircraft flights preempted. San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981). Other attempts to regulate air safety have also been found preempted. The Third Circuit has found state tort law generally preempted, declaring that "the need for one, consistent means of regulating aviation safety" requires a federal standard to be applied "in determining if there has been careless or reckless operation of an aircraft." Abdullah v. American Airlines, Inc., 181 F.3d 363, 372 (3d Cir. 1999).

In considering the above-cited decisions, the Seventh Circuit has declared that these cases involve issues "which cannot sensibly be resolved by a patchwork of local regulations. It would be unmanageable—say nothing of terrifying—to have local control of flight routes or of flight times. Such things require nationwide coordination." Hoaglund v. Town of Clear Lake, Indiana, 415 F.3d 693, 698 (7th Cir. 2005). The court went on to note that site regulation of airports might present a different question. Id. Notably, the noise at issue in this litigation does not involve takeoff and landing, which is the subject of most noise cases to date, and indeed was the subject of the regulations at issue in Burbank. Instead, the present plaintiffs ask this Court to make the unprecedented step of using local tort law to regulate the flight paths of aircraft. All

the attendant impracticalities and dangers of a patchwork of local controls are called into play by this request.

Indeed, even those courts which have allowed some state court remedies to survive have emphasized the narrowness of the surviving claims. See Bieneman v. City of Chicago, 864 F.2d 463, 472-73 (7th Cir. 1988). The Bieneman court, in considering airport noise claims, noted that "federal law governs much of the conduct" of the airport. Id. at 472 (citing 14 C.F.R part 36). Consequently, a "state court could not award damages against O'Hare Airport or its users for conduct required by these regulations, or for not engaging in noise-abatement procedures that the Federal Aviation Administration considered but rejected as unsafe." Id. at 472-73. Nor could state law be used to "question federal decisions or extract money from those who abide by them" regarding matters such as the frequency of flights, failure to take noise-abatement measures not specifically required, or flight path on takeoff. Id. at 473. Instead, state law claims would only conduct "which federal norms do not govern" or which is "out of compliance with the governing federal rules." Id. The court emphasized that the "essential point" is that "the state may employ damages remedies only to enforce federal requirements . . . or to regulate aspects of airport operation over which the state has discretionary authority." Id.

Local decisions which have found room for state common law causes of action exemplify this trend. Two decisions of the federal district court in Massachusetts find that claims for failure to equip aircraft with automatic external defibrillators are not preempted. Stone v. Frontier Airlines, Inc., 256 F. Supp. 2d 28 (D. Mass. 2002); Somes v. United Airlines, Inc., 33 F. Supp. 2d 78 (D. Mass. 1999). Stone explicitly noted that the question of what safety equipment an aircraft carried did not pertain to "the operational and functional integrity of an aircraft—internally and externally—as it affects passengers and the public." Stone, 256 F. Supp. 2d at 42;

cf. Somes, 33 F. Supp. 2d at 87 (making similar distinction). The plaintiffs in the present case seek to regulate exactly this forbidden area by dictating which flights are permissible and which are impermissible.

Conflict preemption principles also militate against letting the plaintiffs regulate permissible flight paths. This is not a case where federal regulation should establish a floor and states should be permitted to impose additional requirements. Such an approach might be effective in the area of aircraft first aid equipment, where the federal government establishes "minimum" requirements for medical first aid kits aboard commercial aircraft and the state tort system can demand a higher standard of care. Stone, 256 F. Supp. 2d at 43-44; cf. Somes, 33 F. Supp. 2d at 87-88. However, the present case would impose a patchwork of local control which would be inconsistent with and contrary to the applicable federal regulations governing the very same flight activities.[8]

Because the determination of minimum safe altitudes over a given area is, in turn, dependant on whether that area is sparsely populated, uncongested, or congested by federal regulation (open country, not thickly settled or thickly settled by Massachusetts regulation), the very question of the character of the land under which flight is conducted is preempted by federal law. If the determination of the degree of population or congested was determined by state courts or agencies, then the Federal Aviation Administration which Congress has delegated the task of designing and enforcing the Federal Airspace would effectively lose its ability to control the use of the airspace because there would be no way for the FAA to predict or control how land

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[8] The Massachusetts legislature has acknowledged the primacy of Federal law in the aviation field by expressly limiting the power of the Massachusetts Aeronautics Commission to rulemaking which "shall not be inconsistent with, or contrary to, any act of the Congress of the

areas would be defined by state law. The resulting altitude requirements would then be effectively be placed outside federal jurisdiction with the result of compromising the safety function of the FAA because it would not be able to predict flight patterns and aircraft density.

For example, if this Court should exercise state jurisdiction in this case and agree with the plaintiff, David McCoy, that the entire Commonwealth of Massachusetts is a congested area,[9] or that flight training or aerobatic flying at any altitude within hearing should be prohibited over the Town of Ayer, Massachusetts,[10] then the FAA would be faced with a large shifts in flight patterns and airspace density.

Without federal preemption, other states would develop their own standards of acceptable altitudes and permissive areas of flight to create great confusion. It would be impossible for the FAA to issue flight plans and flight clearances if it had to keep track of each state's altitude and flight regime restrictions, especially if restrictions were established by nuisance law suits. There would be no aeronautical chart or other informational source for that could keep track of un-centralized regulation of the airspace by states or by their courts.

Allowing common law nuisance claims to regulate otherwise permissible flight activities in navigable airspace would render the applicable Federal regulations meaningless. Allowing such claims to go forward would substitute the landowner's opinions in place of the FAA's expertise in regulating aircraft safety. During an aircraft's certification process the FAA determines the allowable decibel level of noise which an aircraft engine may generate. This

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United States relating to aeronautics or any regulations promulgated or standards established pursuant thereto." Mass. Gen. Laws ch. 90; § 39.

[9] Exhibit I, Tr. David McCoy, June 17, 2005, p. 131, ln. 4-5.

[10] Exhibit J, Tr. David McCoy, July 28, 2005 p. p.86. ln. 9-23.

noise level is determined with a number of factors considered, including safety. The FAA establishes the altitudes at which certain flight activities may safely take place. The FAA determines the location relative to fixed objects on the ground where certain maneuvers, such as aerobatics, may take place. If this case were permitted to proceed to trial, activities specifically permitted by the Federal Aviation Regulations, such as flight training, aerobatics, and even straight and level flights would be subject to regulation by private property owners who possess little or no appreciation for the complexities of aircraft or the federal airspace system. Clearly nuisance cases seeking recovery for flight activities otherwise permitted by Federal regulation cannot be permitted to proceed as it would substitute largely unsophisticated private property owners in place of the FAA as the ultimate regulator(s).

II. Massachusetts Law Clarifies that Flights In Compliance with Federal Regulations Are Not Actionable

Massachusetts law is entirely consistent with Federal law in the regulation of flight activities in navigable airspace over the geographic boundaries of the Commonwealth. Mass. Gen. Laws ch. 90 § 46 sets forth the general rule restricting the flight of aircraft as follows:

> Flight of aircraft over the lands and waters of this commonwealth, within the navigable air space as defined in section thirty-five, shall be lawful unless at such a low altitude as to interfere with the then existing use to which the land or water or space over the land or water is put by the owner or occupant, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

Navigable air space is defined in chapter 90 § 35 as follows:

> "Navigable air space", air space above the minimum safe **altitudes of flight prescribed by regulation by the commission**. Such navigable air space shall be subject to a public right of air navigation **in conformity with** the provisions of said section and with the regulations and **air traffic rules issued by the commission.**

The Massachusetts Aeronautics Commission (the "Commission") has general supervision and control over aeronautics in the Commonwealth. The commission's rulemaking power is limited by statute to promulgating "such reasonable general or special rules and regulations as it deems necessary; provided, however, that such rules and regulations shall not be inconsistent with, or contrary to, any act of the Congress of the United States relating to aeronautics or any regulations promulgated or standards established pursuant thereto." (emphasis added). Mass. Gen. Laws ch. 90 § 39.

Consistent with the FAA regulation 14 C.F.R. § 91.303, the Commission specifically permits aerobatic flight except when:

> (1) Over thickly settled areas or districts, or over an open-air assembly of persons;
> (2) Within any civil airway or control zone;
> (3) Flight visibility is less than three miles; or
> (4) Below an altitude of 1500 ft. above the surface. 702 CMR 4.06.

The Commission adopts the same minimum safe altitude requirements as established by the FAA in 14 C.F.R. §91.119 in 702 CMR 4.07 which reads as follows:

> Except when necessary for takeoff or landing, no person shall operate an aircraft below the following altitudes, according to designated locations and conditions.
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> (1) General. An altitude which will permit, in the event of the failure of a power unit an emergency landing without undue hazard to persons or property on the surface.
>
> (2) Over Thickly Settled Areas or Districts or Over an Open-Air Assembly of Persons. An altitude of 1000 ft above the highest obstacle within a horizontal radius of 2000 ft. from the aircraft. Rotor craft may be flown at less than the minimum prescribed herein if such operations are conducted without undue hazard to persons or property on the surface and in accordance with 702 CMR 4.07(1).
>
> (3) Over Areas or Districts Not Thickly Settled. An altitude of 500 ft. above the surface. Over open country or over open water,

> unlimited, except that aircraft shall not be operated closer than 500 ft. to any person, vessel, vehicle or structure. Rotorcraft may be flown at less than the minimums prescribed herein if such operations are conducted without undue hazard to persons or property on the surface and accordance with 702 CMR 4.07(1).

Hence, by state regulation, permissible acrobatic (aerobatic) flight conducted in accordance with 702 CMR 4.06 and non–aerobatic flights conducted in accordance with 702 CMR 4.07 cannot be considered "low altitude" flights. Furthermore, flights in conformance with the Commissions regulations cannot be said to be "imminently dangerous." Therefore no violation of G.L. 90 § 46 can be found in this case.[11]

The Supreme Judicial Court several times has considered claims like the plaintiffs' in circumstances analogous to those of this case. These decisions confirm that, as a matter of law, there is no basis for the plaintiffs' claims to the extent that they seek relief in connection with flights above the minimum altitudes established by federal and Massachusetts law and which otherwise comply with applicable regulation.

In Smith v. New England Aircraft Co., Inc., 270 Mass. 511 (1930), the plaintiffs lived in rural Grafton next to an airport. Small aircraft took off and landed there; aircraft were stored and sold there. It was undisputed that the defendants while taking off and landing flew "hundreds" of times over or in the area of the plaintiff's house and adjacent buildings. Also, "the aircraft of the defendants [were] properly licensed and flown in accordance with the regulations of both State and Federal authorities." Id. at 515.

The plaintiffs filed suit seeking an injunction barring the defendants from flying over their land and buildings. The plaintiffs alleged that such flights constituted a nuisance and trespass, and that the defendants had no right to fly their airplanes through the airspace above the

plaintiffs' premises at any altitude, but particularly at low altitudes between 100 and 1000 feet. Id. at 516, 519. The evidence was presented to a Master who prepared a detailed report. The Superior Court confirmed the report and dismissed the plaintiffs' suit.

On appeal, the Supreme Judicial Court discussed the flight-altitude regulations appearing in federal and Massachusetts law. The regulations (similar to current law) permitted flight above 1000 feet over congested areas and above 500 feet over non-congested areas. Id. at 520. As to these regulations, the Court said:

> The act of Congress and the statutes of this Commonwealth by plain implication . . . not only recognize the existence of air navigation but authorize the flying of aircraft over privately owned land.

Id. at 521. The Court then held that the Massachusetts and federal regulations were a valid exercise of the police power, saying:

> Even with the utmost reasonable assumption as to the private rights in airspace of the owner of the underlying land, the provisions of [the governing Massachusetts statute] constitute valid regulations of the flight of aircraft in airspace actually unoccupied by the owner of the . . . land. There are numerous analogies where the invasion of the airspace over . . . land by noise, smoke, vibration, dust and disagreeable odors, having been authorized by the government and not . . . a condemnation of the property although in some measure depreciating its market value, must be borne by the landowner without compensation or remedy. Legislative sanction makes lawful which otherwise might be a nuisance.

Id. at 523 (emphasis added).

The Court concluded that flights by aircraft properly within the regulated airspace is "lawful against the protest of the owner of the underlying land." Id. At 525.

[11] Plaintiffs do not allege "Negligent Operation" as defined in 702 CMR § 4.02.

In Burnham v. Beverly Airways, Inc., 311 Mass. 628 (1942), the plaintiffs were owners of a "country estate" in rural Wenham on land contiguous with the defendant airport. The plaintiffs sued the airport and its principals alleging nuisance and trespass, and seeking damages and injunctive relief. The essential facts were that the airport was used for the taking off and landing of small airplanes, as well as flight training and airplane storage and maintenance. Aircraft taking off from the airport sometimes traveled over the plaintiffs' property at altitudes below 500 feet. Id. at 629-631. After a trial before a Master, the Superior Court entered judgment for the plaintiffs, enjoined flights over their property at altitudes below the 500 foot minimum altitude prescribed by state and Federal law, and awarded $1.00 nominal damages. The defendants appealed. The Supreme Judicial Court framed the issue as whether relief was appropriate as to flights over the plaintiffs' property below 500 feet. Id. at 631.

The Court then discussed Federal and Massachusetts flight-altitude regulations, noting the minimum altitude of 500 feet over areas other than thickly settled/business districts (which governed in that case), and 1,000 feet over such areas. Id. at 634-635. The Court dismissed the nuisance claim but concluded that the trespass finding, injunction, and award were proper as to flights below 500 feet, but not above 500 feet. In pertinent part, the Court reasoned:

> The [flight] altitude statute in expressly providing for the right of navigation above fixed limits by implication negatives the existence of any such general right below those limits . . . .
>
> * * * * *
>
> In accordance with . . . the Smith case and the provisions of [the flight-altitude statute], we hold that harmless flight, in a proper manner, in the exercise of the 'public right of air navigation,' interfering with no existing use, through the 'navigable air space' reasonably established within constitutional limitations by the aeronautics commission is not a trespass upon the land . . . below.

Id. at 635-636.

In Hub Theaters, Inc. v. Massachusetts Port Authority, 370 Mass. 153 (1976), the plaintiffs were the owners/operators of a drive-in movie theater located next to Logan International Airport. After the airport was expanded and its operations and flights increased, takeoffs and landings over the movie theater at "very low altitudes" completely disrupted the theater's operations. The plaintiffs sued alleging nuisance; they did not allege negligence. The Superior Court dismissed the suit and the plaintiffs appealed.

The Supreme Judicial Court affirmed the dismissal of the suit. The Court reasoned in pertinent part as follows:

> The operation and extension or enlargement of Logan by the [Massachusetts Port] Authority, the very activity of which the plaintiffs complain, being expressly authorized by the Legislature, the plaintiffs' action predicated on a nuisance theory must fail. It is a principle of long-standing in the law of the Commonwealth that 'When the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.' Sawyer v. Davis, 136 Mass. 239, 241-242 (1884) . . . In Smith v. New England Aircraft Company, 270 Mass. 511, 523 (1930), involving claims of trespass and nuisance arising out of the operation of an airport, we said: 'There are numerous analogies where the invasion of the airspace over underlying land by noise, smoke, vibration, dust and disagreeable odors, having been authorized by the legislative department of government and not being in effect a condemnation of the property although in some measure depreciating its market value, must be borne by the landowner without compensation or remedy. Legislative sanction makes that lawful which otherwise might be a nuisance.'

Id. at 155-156 (citations omitted; emphasis in original). The Court did note that legislatively sanctioned businesses must be carried on "without negligence or unnecessary disturbance of the rights of others." Id. at 156. However, said the Court, as the plaintiffs had not alleged negligence or unnecessary disturbance, the action was properly dismissed.

Synthesis of the pertinent regulations and the Smith, Burnham, and Hub Theaters decisions yields the following important principles that govern this suit and this Motion:

1. Federal and Massachusetts law expressly authorizes flight over privately owned land at the following altitudes:

(a) 1,500 feet above the surface or higher for aerobatic flights above non-congested/non-thickly settled areas; and

(b) for non-aerobatic flights, 1,000 feet and higher above the highest obstacle in congested/thickly settled areas, over 500 feet in other than congested/non-thickly settled areas, but no altitude restriction in sparsely populated/open country areas or over open water (except not closer than 500 feet to any person, vessel, vehicle or structure.

2. Federal and Massachusetts law authorizing flight over privately owned land makes lawful that which otherwise might be a nuisance, including noise and other disturbances associated with airplane flight.

3. Proper flight consistent with the exercise of the "public right of air navigation" through the "navigable airspace" as defined by the regulations above is not a trespass on the land below such flights, and is not a nuisance.

4. Legislatively sanctioned air flight over private property and above minimum altitude floors is lawful and not actionable notwithstanding that it might otherwise constitute a nuisance.

In accordance with the controlling regulations and the principles established by the Smith, Burnham, and Hub Theatres decisions, the plaintiffs as a matter of law are entitled neither to damages nor injunctive relief with respect to any flights by the defendants above the prescribed altitude floors. Even if it is assumed that the defendants' flights have been noisy, disturbing, and might otherwise constitute a nuisance, the altitude regulations and principles identified by the Supreme Judicial Court as a matter of law excuse from liability those engaging in flights that comply with the regulations. In Smith and Burnham the Court emphasized that legislatively authorized air flight, even if otherwise a nuisance, is not actionable. The Hub Theatres case reaffirmed that position by dismissing nuisance claims based on activities that forced the plaintiffs entirely out of business, because the destructive flights there were legislatively authorized.[12] These authorities squarely apply here and confirm that, as a matter of law, the defendants cannot be liable for flights above the prescribed minimum altitudes.

III. The Plaintiff's Claims Do Not Support a Cause of Action in Nuisance as a Matter of Law

Thus far, the defendants have argued in this memorandum that the they are entitled to judgment in their favor as a matter of law either because (i) federal law preempts the regulation of the airspace and the plaintiffs have chosen not to allege violation of federal law or regulation

[12] The recognition by the Hub Theatres Court that legislatively sanctioned business activity must be carried on without negligence or unnecessary disturbance of the rights of others is immaterial here for two reasons: (1) The plaintiffs have alleged intentional conduct by the defendants, not negligence, and have not alleged that the defendants' flights have unnecessarily disturbed them. Such straight nuisance claims are foreclosed by Smith, Burnham, and Hub Theatres. Nor is this a matter of pleading that the plaintiffs can correct. There is no basis for allegations of negligence or unnecessary disturbance here. Obviously, some noise is a necessary and unavoidable by-product of the operation and flight of an airplane, whether it is engaged in aerobatics or not; (2) Hub Theatres (like Smith and Burnham) focuses on the liability of airport/airplane operators for disturbance/trespass associated with takeoffs and landings (which take place below the

in their complaint, or in the alternative, (ii) Massachusetts regulation and legal precedent require that the plaintiffs must show a violation of state and federal law or regulation governing authorized altitudes and permitted areas of flight. Flight within the regulations create a "safe harbor" upon which pilots must be able to rely.

Should these arguments not persuade this Court, or should the plaintiffs argue that the defendants were at times outside the "safe harbor," the responses to discovery and the deposition testimony in this case, taken in a light most favorable to the plaintiffs, demonstrate the defendants are still entitled to summary judgment. The plaintiffs are unable to show that the flight activities about which they complain rise to the level of nuisance as a matter of law. Taking into consideration all of the flights which the plaintiffs allege were conducted by these defendants, even those which are within the permitted federal and state requirements, the factual elements required to support a claim for nuisance are not present in this case. The lack of frequency of alleged flights, the shortness of duration and the lack of tangible effects of these flights, all admitted by plaintiffs in their answers to discovery, entitle the defendants to summary judgment.

Addressing nuisance claims, the court in Smith noted that there was no real harm to the landowners because the number of flights was not excessive; the sunlight was not obscured; their land was not shadowed; nothing was thrown or fell from the planes onto the plaintiffs' property; the planes gave off no noxious gasses or fumes; and there was no other interference with use of the plaintiffs' land. Smith, 270 Mass. at 525. The court concluded that, even though there were a few instances of flights below the 500 foot minimum in Smith, there was no damage to the

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prescribed minimum altitudes). Here, unlike in those cases, the plaintiffs do not live next door to the airport, so liability for takeoff/landing activity is not at issue.

plaintiffs' property or its use, no showing by the plaintiffs of material discomfort, no nuisance, and no basis for injunctive relief. Id. at 526, 531-532.[13]

The Burnham Court said first that there was no nuisance because of the undisputed finding that the flights did not affect the health, habits, or material comfort of normal people. Id. As to trespass, the Court reviewed its decision in Smith, summarizing its prior ruling as follows:

> [In Smith we] held . . . that [flight-altitude regulations] were more than mere prohibitions upon the aviator and were in effect valid regulations, permissible under the police power, of the property rights of the landowner, establishing as against the latter the right of harmless flight at the required altitude over his land . . . . [We also held] that flights below five hundred feet, including those made in taking off or landing, might amount to trespass . . . . The opinion does not assert that every flight below the level of the five hundred feet permitted by statute and regulation is a trespass . . . .

Burnham, 311 Mass. at 632 (emphasis added). Accordingly, to establish nuisance in this case, the plaintiffs must show damages from flights such as sunlight being blocked by overflying aircraft, shaking of the ground, objects dropping or being thrown from aircraft onto plaintiff's property, the release of noxious fumes, breakage of glass, or other physical damage to property, vibration in the home, or diminution of market values of land.[14] See Smith, at 526, 531-532; Burnham at 631.

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[13] The Court did assume that damages could be available even though injunctive relief was not, but this was only as to trespass due to flights below the statutory altitude floors during the takeoff/landing process, and because the flights were at levels as low as 100 feet over the plaintiffs' property. Id. at 528-532.

[14] In order to carry their burden, plaintiffs would need a private (not public) nuisance by a showing injuries of some special injury of a direct and substantial character other than that which the general public shares. Anderson v. W.R. Grace & Co., 628 F.Supp.1219 (1986). The plaintiffs emphatically argue that the aircraft noise carries over a wide area and that all aerobatic and flight training activity should be banned over the entire Town of Ayer, Massachusetts.

Stated categorically, all of the plaintiffs testified in their depositions that these conditions were not caused by these flights, except to the extent that some of the plaintiffs testified that there were vibrations in their houses because noise is a form of vibration, and excepting testimony by Robert F. Casey, Jr., that windows would sometimes rattle, while admitting that they were old windows in an old house and that the effects were not an overwhelming sensation.[15] These occurrences must rise to the level of severity so as to affect the health, habits, or material comfort of a normal person in order to constitute a nuisance. Id.

Even if the plaintiffs were able to show that the required types of damage or effects of the flights existed, it is well settled in the law of nuisance that they must also show that the acts about which they complain amounted to a substantial interference and must be persistent and unreasonable. Senatore v. Blinn, 342 Mass. 63, 88 N.E.2d 437 (1961). Where the acts of the defendant which interfere with the plaintiff are sporadic, they may not constitute a nuisance. Id

The discovery responses and deposition testimony of the plaintiffs reveal that the number of flights which the plaintiffs attributed to these defendants entitle the defendants to summary judgment, as their claim fails as a matter of law. More specifically, for example, the plaintiff David McCoy lists twenty-seven flights which he attributes to the defendant, Michael Goulian from June 19, 2001 through October 9, 2003. The frequency of flights attributed to Michael Goulian results in less than one flight per month for the time period stated by the plaintiff David McCoy.[16] With regard to duration of flights, Mr. McCoy stated that the flights lasted "up to fort-

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[15] See, e.g., Exhibit H, Tr. David McCoy, June 14, 2005, p.118, ln.20; p. 135, .16; Exhibit L, Tr. Robert F. Casey, Jr., May 24, 2005, p.43, ln. 5-11.

[16] Exhibit E, David McCoy's Ans. to Goulian No. 6. Of those flights, three are listed as "Michael Goulian or Sheldon Apsell (not a party to this action), one flight bears a question mark and one flight list an aircraft other than that owned by Mr. Goulian. Mr. Goulian denies most of the listed flights, but they are included for the purposes of this memorandum, arguendo.

five minutes."[17] At worst, according to these answers, this plaintiff is claiming for flights of less than one hour per month of Michael Goulian.[18]

Similarly, Mr. McCoy, in his Answers to Interrogatories by the defendant, Center of Mass. Aerobatics, LLC, ascribes specific flights from March 13, 2002 to December 20, 2003 to the various defendants as follows:

Michael Goulian:	20 (less than one flight per month)
Executive Flyers Aviation, Inc.	37 (1.8 flight per month)
Center of Mass. Aerobatics, LLC	32 (1.5 flights per month).[19]

The other plaintiffs have incorporated this Interrogatory answer by reference in their answers to interrogatories.[20]

In recognition of the paucity of support for their claim, plaintiffs have resorted to asserting a joint tortfeasor theory to claim that the defendants in this case are liable for the plaintiffs' alleged damages resulting from flights by all pilots who conduct aerobatic flights, training flights and other flights in the Ayer-Groton, Massachusetts area. During one of the days of Mr. Casey's deposition, Mr. Casey indicated that he was not holding these defendants

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[17] Exhibit F, David McCoy Ans. to Center of Mass. Aerobatics' First Set No. 13.

[18] See also Exhibit K, Tr. Robert F. Casey, Jr., February 28, 2005, page 27, ln. 3-7 stating that the flights lasted up to 45 minutes.

[19] As McCoy did not apportion specific flights of the Center of Mass. Aerobatics, LLC aircraft, among the defendants Christman, Pennypacker and Bocon, we assume that the plaintiffs allege that the flights of that aircraft are apportioned among them, resulting in an average flight frequency of one flight per two months for each of those three defendants. All defendants reserve the right to dispute even these few flights.

[20] Five more flights are listed in the answer, but they are attributed to third persons not parties to this action. Including these flights would add one flight every four months.

vicariously liable for the actions of other pilots,[21] but he later, on behalf of himself as a plaintiff, and on behalf of the other plaintiffs, as their counsel, sent defense counsel a letter in which he reversed his statement that he would not attempt to hold the defendants responsible for actions of other parties, and he stated that the plaintiffs were holding these defendants responsible for offending flights of others over a period of years, mostly unidentified, under a joint tortfeasor theory.

Plaintiffs should not be allowed to abuse the court system with such a far-fetched theory. In an attempt to rehabilitate their lack of basis for a claim as a matter of law, plaintiffs invoke the actions of an unknown number of non-parties with whom plaintiffs have no evidence of joint enterprise or common purpose with these defendants. The Massachusetts contribution statute explicitly requires that persons from whom contribution is sought be "jointly liable in tort for the same injury to person or property." Mass. Gen. Laws ch. 231B § 1. Massachusetts courts have recognized the legislature's concern for the "same injury" requirement in the statute. In holding that defendants who are liable on different theories of tort liability could owe contribution to each other, the Supreme Judicial Court pointed out that "[t]he statutory concern is with joint liability in tort for the same injury, not with whether such joint liability is based on the same theory." Wolfe v. Ford Motor Co., 386 Mass. 95, 100 (1982).

The evidence proffered by the plaintiffs falls far short of establishing that the defendants are jointly liable for "the same injury" with other parties. The only support plaintiffs have given for a joint tortfeasor theory is the general and immaterial allegation that "there is a tightly knit aerobatics community," along with statements asserting that aerobatic pilots belong to the

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[21] Exhibit K, Tr. Robert F. Casey, Jr. February 28, 2005, p.68, ln. 19.

International Aerobatics Club.[22] However, the injuries complained of in the present lawsuit include noise and other effects of discrete individual flights by different pilots in different planes following different flight paths and performing different maneuvers days. Any injuries which these flights created are discrete in that they occurred at discrete times on different days, generated different amounts of noise, and had different effects on plaintiffs' property.

Further, Massachusetts case law does not support the broad reading of the work "injury" required by plaintiffs' argument. In Maddocks v. Ricker, the court observed that injury to the client stemming from one attorney's failure to appear for a summary judgment hearing was different from injury from a different attorney's failure to file a claim within the statute of limitations, assuming the grant of summary judgment was error. Maddocks v. Ricker, 403 Mass. 592, 600 n. 11. The Maddocks court did not hold unrelated parties responsible for different injuries, and this Court should not either.

The plaintiffs in the present case cannot identify who caused the injuries which are subject of their complaints. See Payton v. Abbott Labs, 386 Mass. 540, 571 (1982) ("Identification of the party responsible for causing injury to another is a longstanding prerequisite to a successful negligence action."). For example, while the plaintiffs have chosen to name Executive Flyers Aviation, Inc. as a defendant because of its flight training, the plaintiff Beverly Smith testified that she believed that most of the flight training and ground reference maneuvers about which plaintiff complain "is coming out of Daniel Webster."[23] When asked if Ms. Smith had any facts or evidence that Executive Flyers Aviation, Inc., the defendant Michael

[22] Exhibit H, Tr. David McCoy, June 14 2004, p.71, ln.18-19.

[23] Exhibit M, Tr. Beverly Smith, June 21, 2005, p.56, ln.12-15. Daniel Webster is an aviation college with a flight school located in Nashua, New Hampshire. Id.

Goulian, or the other defendants had any influence or control over the flights of Daniel Webster College, Ms. Smith answered in the negative.[24] The responses by the other plaintiffs to similar questions were the same.

With regard to flight training, practice maneuvers and other flying, the plaintiffs are attempting to hold these defendants, especially Executive Flyers Aviation, Inc., responsible for the actions of Daniel Webster College of Nashua, New Hampshire, as mentioned above, and East Coast Aero Club and the Hanscom Aero Club, both located at Hanscom Field in Bedford, Massachusetts, which provide aircraft rental and/or flight training. Mr. McCoy's deposition, again indicates that he does not have any evidence that these defendants have any control over the actions of those businesses, nor of any joint enterprise, commonality of purpose or closeness in time, yet he, along with the other plaintiffs, rely on the actions of unidentified persons and flights schools, not parties to this action in order to support the plaintiffs' claims in this case.[25] Accepting this theory would violate one of the two interests protected by the identification requirement, namely "ensur[ing] that wrongdoers are held liable only for the harm that they have caused." Payton, 386 Mass. 540, 571. Plaintiffs in the present action seek to hold the named defendants responsible for the conduct of numerous unnamed others.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court grant their motion for summary judgment.

[24] Exhibit M, Tr. Beverly Smith, June 21, 2005 p. 137, ln.19 p. 138, ln.16.

[25] Exhibit H, Tr. David McCoy, June 14, 2005, p.84 l.5 – p.85 ln. 6.

Respectfully submitted,

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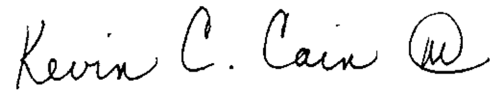
PETER E. BOCON

By their attorneys,



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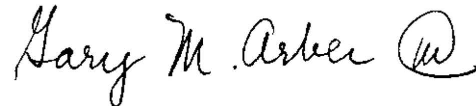

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Dated: September 1, 2005.

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CERTIFICATE OF SERVICE

I, Michael J. Cedrone, attorney for Defendants' Center of Mass Aerobatics, Kent G. Christman, Steve S. Pennypacker and Peter Bocon, hereby certify this 4th day of October, 2005 that I served a copy of the foregoing document by delivery in hand and first-class mail, postage prepaid upon all counsel of record.

Robert F. Casey, Jr., P.C.
6 Lancaster County Road
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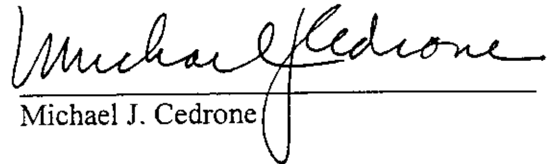

Michael J. Cedrone

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