

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPT.
C.A. NO. 2003-1949-L

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.)

**PLAINTIFFS= OPPOSITION TO
DEFENDANTS= JOINT MOTION FOR SUMMARY JUDGMENT**

Now come the plaintiffs Robert F. Casey, Jr., Rita A. Casey, David McCoy, Amy McCoy and Beverly Smith and state the following as their opposition to the Defendants' Joint Motion for Summary Judgment:

**PLAINTIFFS' REBUTTAL OF
DEFENDANTS' STATEMENT OF UNDISPUTED FACTS**

1. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The Plaintiffs agree with the statement of fact contained in Paragraph Number 1.

2. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The Plaintiffs agree with the statements of fact contained in Paragraph Number 2 with the exception to the characterization of Executive Flyers Aviation, Inc. as a "small" flight school. In his deposition testimony, Defendant Michael Goulian, president of Executive Flyers Aviation, Inc. (hereinafter referred to as "Defendant Goulian"), stated that Executive Flyers Aviation, Inc. (hereinafter referred to as the "Defendant Executive Flyers") has thirty-two (32) aircraft in use in its fleet (see attached "**Exhibit A**" – Deposition transcript of Michael Goulian dated July 12, 2004, Page 9, Lines 8 through 24 and Page 10, Lines 1 through 22). Executive Flyers Aviation, Inc. at its eponymous website "ExecutiveFlyers.com" holds itself out as the leader in New England flight schools with a fleet of over thirty (30) aircraft, fifteen (15) instructors, and up to one

hundred (100) flights per day (see attached “**Exhibit B**” – web page of Executive Flyers Aviation, Inc. at www.executiveflyers.com/july04.html).

3. *Defendants’ Statement of Undisputed Fact:*

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.

Plaintiffs’ Rebuttal:

The Plaintiffs agree with the facts stated in the first sentence of Paragraph Number 3.

The defendants Kent Christman, Steve Pennypacker, and Peter Bocon all remain aerobatic pilots who have access to leased aerobatic aircraft. The Plaintiffs disagree with the factual statement claiming that the Defendants Steve Pennypacker, Peter Bocon and Kent Christman sold their aircraft due to the costs of this litigation. The Plaintiffs’ disagreement is based on the deposition testimony of Defendant Steve Pennypacker who was asked whether the sale of his interest in the aircraft was prompted by this litigation:

Question: What was the reason the aircraft was sold?

Pennypacker's Answer: I needed to get out financially. I had it for sale for some time.

Question: Does the sale of the aircraft have anything to do with this litigation?

Pennypacker's Answer: The sale of my share had nothing to do with this litigation. (see attached "**Exhibit C**" – Deposition transcript of Steven Pennypacker dated June 11, 2004, Page 16, Lines 3 through 10).

The Aircraft Owners and Pilots Association (hereinafter referred to as the "AOPA") is a four hundred thousand (400,000) member industry special interest group. The Defendant Goulian testified at his deposition that the AOPA has paid twelve thousand five hundred (\$12,500.00) dollars towards the defendants' legal fees (see attached "**Exhibit A**" – Deposition transcript of Michael Goulian dated October 27, 2004, Pages 121, Lines 14 through 24, Page 122, Lines 1 through 24, and Page 123, Lines 1 through 9).

4. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The Plaintiffs do not dispute the facts stated in Paragraph Number 4.

5. *Defendants' Statement of Undisputed Fact:*

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 over sparsely populated areas or over open water, at any altitude, but not closer than 500 feet to any person, vessel, vehicle, or structure.

Plaintiffs' Rebuttal:

The statement is erroneous in that it states federal regulation permits certain types of aerobatic flight. *Federal Regulation 14 CFR 91.303* states prohibited acts, not permitted acts. The regulations prohibit all aerobatics over congested areas (see attached “**Exhibit D**” – *14 CFR 91.303*).

Regarding nonaerobatic aircraft flight, too, the federal regulation states prohibits facts, not permitted acts.

6. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The Defendants' statement of law is misleading in various ways. It states that aerobatic flight over non-thickly settled areas at greater than fifteen (1,500) feet is permitted. The Defendants, by implication in this paragraph, are stating that the Defendants' aerobatic flights were done over non-thickly settled areas. The Plaintiffs reside in a congested and thickly settled area. The Defendants' flights are done over these thickly congested areas; such flight is prohibited by Massachusetts flight regulations (see attached "**Exhibit E**" – 702 CMR 4.06).

7. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The Plaintiffs agree with the first sentence in Paragraph Number 7. Regarding the second sentence, the Plaintiffs' counts are all for nuisance. The Defendants did fly with knowledge of the results of their flights. The Plaintiffs contend that the Defendants' conduct does have a negligent component that supports their nuisance counts. Nuisance has been likened to negligence in that it calls for a determination of whether the defendant's conduct was reasonable under the circumstances. The Plaintiffs' state that the Defendants' failure to use due care and prudence has created a nuisance (see attached

“Exhibit F” – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 8, Paragraph 19). *Mass. Practice Series, Vol. 33A, sec. 19:1 – Nuisance – Definition and Nature.*

The Plaintiffs disagree with the third sentence of Paragraph Number 7. The third sentence says that the Plaintiffs do not “allege that the noise from the flights is unnecessary”. The defendants control the power settings on their aircraft. These power settings effect the noise produced. The defendants set the propeller speed to break the sound barrier which creates even louder sound (see attached **“Exhibit A”** – Deposition transcript of Michael Goulian dated July 12, 2004, Page 73, Lines 14 through 16, Page 74, Lines 10 through 24, and Page 75, Lines 1 through 20). The defendant Peter Bocon stated that the aerobatics done by him were for recreation only (see attached **“Exhibit G”** – Deposition transcript of Peter Bocon dated June 16, 2004, Page 17, Lines 2 through 7).

8. *Defendants’ Statement of Undisputed Fact:*

The plaintiffs have specifically stated that their claims do not arise out of any violation of the Federal Aviation Regulations.

Plaintiffs' Rebuttal:

The plaintiffs' claims do not arise from violation of federal regulation. The plaintiffs' claims are common law cause of action arising from the law of the Commonwealth of Massachusetts. But the plaintiffs will at trial introduce as evidence of nuisance the defendants' violation of Massachusetts flight regulations that prohibit aerobatic flights over thickly settled areas and prohibit aerobatic flight under 1,500 feet (see attached **"Exhibit E"** - 702 CMR 4.06(1) and (4)). These Massachusetts flight regulations are identical to the federal regulations that prohibit aerobatic flight over congested areas and aerobatic flight under 1,500 feet (see attached **"Exhibit E"** - 702 CMR 4.06(1) and (4)).

9. *Defendants' Statement of Undisputed Fact:*

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.

Plaintiffs' Rebuttal:

The plaintiff Robert F. Casey, Jr. testified at his deposition that the sound from aerobatic dives was an alarmingly “roar” that would make windows shake. The sound would wake him from a sound sleep when he was using earplugs. The plaintiff Robert F. Casey, Jr. testified that the sound was so loud and immediate that there was no place inside his home to escape it. The sound and vibrations from the dives were immediate and alarming. The plaintiff Robert F. Casey, Jr. testified that he could both hear the loud sound and feel the vibration caused by the aircraft (see attached “**Exhibit H**” – Deposition transcript of Robert F. Casey, Jr. dated February 28, 2005, Page 25, Lines 19 through 24 and Page 26, Lines 1 through 12). The plaintiffs Beverly Smith and Robert F. Casey, Jr. in their affidavits state that the aerobatic noise could be heard despite their use of electronic noise cancellation headsets (see attached “**Exhibit I**” – Affidavit of Beverly Smith dated October 27, 2005, Page 2, Paragraph 7; see attached “**Exhibit F**” – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 4, Paragraph 10). The plaintiff David McCoy in his affidavit states that he was alarmed by numerous episodes of the defendant Executive Flyers Aviation, Inc. aircraft performing landing approaches in his front yard descending as low as 30 feet above the ground with a deafening sound (see attached “**Exhibit J**” – Affidavit of David McCoy dated October 26, 2005, Page 5, Paragraph 12).

10. *Defendants' Statement of Undisputed Fact:*

Plaintiffs David McCoy and Robert F. Casey, Jr. both testified that these flights lasted less than 45 minutes.

Plaintiffs' Rebuttal:

The plaintiffs agree that each aerobatic flight typically was a duration of up to 45 minutes. The plaintiff Rita A. Casey observed numerous low altitude non-aerobatic flights by the defendant Executive Flyers Aviation, Inc. that lasted well in excess of 45 minutes. These flights involved repeated low altitude over-flight of the plaintiffs' homes by the same aircraft involving 20+ passes over the plaintiffs' homes (see attached **"Exhibit K"** – Affidavit of Rita A. Casey dated October 27, 2005, Page 5, Paragraph 17).

11. *Defendants' Statement of Undisputed Fact:*

Plaintiff McCoy attributes twenty seven flights to the defendant Michael Goulian from June 19, 2001 through October 9, 2003.

Plaintiffs' Rebuttal:

A. From 1996 to October 9, 2003, the plaintiff David McCoy saw and heard hundreds of flights by the defendant Michael Goulian. The defendant Michael Goulian regularly did aerobatic stunts near the plaintiff David McCoy's home for years (see attached **"Exhibit J"** – Affidavit of David McCoy dated October 26, 2005, Page 2, Paragraphs 4 and 5, and Page 3, Paragraph 7).

- B. *Rule 36* admission requests were posed to the defendant Michael Goulian. He admitted to performing aerobatics on ten or more occasions over Ayer. In response to the request to admit that he performed 25 or more aerobatic flights over Ayer, the defendant Michael Goulian answered he could not admit or deny (see attached “**Exhibit L**” – *Rule 36* responses of Michael Goulian dated March 8, 2004, Response Numbers 1 and 2).
- C. At his oral deposition, the defendant Michael Goulian then stated that “perhaps” he had done more than 50 aerobatic flights over Ayer (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated July 12, 2004, Page 46, Lines 15 through 16). The defendant Michael Goulian’s aerobatics over Ayer were for the purpose of practice (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated July 12, 2004, Page 36, Lines 12 through 15).
- D. The defendant Michael Goulian admitted to performing aerobatics over Ayer in aircraft number N232176, the same aircraft observed by the plaintiff Robert F. Casey, Jr. and other plaintiffs on numerous occasions. The plaintiff Robert F. Casey, Jr. observed hundreds of aerobatic flights by the defendant Michael Goulian (see attached “**Exhibit L**” – *Rule 36* Responses of Michael Goulian dated March 8, 2004, Response Number 28, and see attached “**Exhibit F**” – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 6, Paragraph 16).

- E. The defendant Michael Goulian admitted to doing aerobatics over Ayer on weekdays and weekends. He was aware that hospitals and churches were on the surface (see attached “**Exhibit L**” – *Rule 36* Responses of Michael Goulian dated March 8, 2004, Response Numbers 34, 35, 58 and 62).
- F. The defendant Michael Goulian is the President of the defendant Executive Flyers Aviation, Inc.; Executive Flyers Aviation, Inc. designated Ayer, Massachusetts as a noise sensitive area (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated July 12, 2004, Page 26, Lines 3 through 24).
- G. The defendant Michael Goulian testified at his deposition that he does the same type of stunts over Ayer as he does at air shows (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated July 12, 2004, Page 91, Lines 6 through 11).
- H. The defendant Michael Goulian flies aerobatics over Ayer, Massachusetts although there are less densely populated areas to the north and west of Ayer, Massachusetts (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated July 12, 2004, Page 96, Lines 5 through 17).
- I. The defendant Michael Goulian received and reviewed the FAA Advisory Circular advising pilots to avoid noise sensitive areas (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated October 27, 2004, Page 144, Lines 5 through 24, Page 145, Lines 1 through 24, Page 146, Lines 1 through 5).

J. The defendant Michael Goulian attended a meeting in 2001 called by the FAA to alleviate the aerobatic noise problem to residents (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated October 27, 2004, Page 159, Lines 6 through 19).

12. *Defendants’ Statement of Undisputed Fact:*

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.

Plaintiffs’ Rebuttal:

A. The plaintiff David McCoy at his deposition testified that not all the flights he witnessed were recorded in his interrogatory answers (see attached “**Exhibit M**” – Deposition transcript of David McCoy dated June 17, 2005, Page 40, Lines 10 through 16).

B. In his Affidavit dated October 26, 2005, Page 4, Paragraph 9, the plaintiff David McCoy states that he has witnessed hundreds of aerobatic flights by the defendant Center of Mass Aerobatics, LLC’s Pitts aircraft and by the defendant Michael Goulian’s Cap 232 aircraft. The plaintiff David McCoy states in his affidavit that these aircraft had been doing aerobatics on a regular basis over years (see attached “**Exhibit J**” – Affidavit of David McCoy dated October 26, 2005, Page 2, Paragraph 5, Page 3, Paragraph 8, and Page 4, Paragraph 9). The plaintiff David McCoy did not record the date and time of each of these flights. The answer to interrogatories represents only the dates and times of which he made a

written record.

- C. The defendant Peter Bocon, one of the owner/pilots of the Center of Mass Aerobatic, LLC aircraft, admitted that he alone flew more than 25 aerobatic flights over Ayer, Massachusetts. Each flight lasted up to 45 minutes. In the defendant Peter Bocon's *Rule 36* answers, he would neither admit nor deny that he flew 100 or more aerobatic flights over Ayer, Massachusetts (see attached "**Exhibit G**" – Deposition transcript of Peter Bocon dated June 16, 2004, Page 12, Lines 2 through 6, Page 15, Lines 8 through 13 and see attached "**Exhibit N**" – *Rule 36* responses of Peter Bocon dated November 5, 2003, Response Numbers 3).
- D. The defendant Peter Bocon testified at his deposition that he started doing aerobatic stunts over Ayer, Massachusetts after the nearby Fort Devens closed in 1995. The defendant Peter Bocon's aerobatics were for recreation (see attached "**Exhibit G**" - Deposition transcript of Peter Bocon dated June 16, 2004, Page 13, Lines 3 through 12, Page 17, Lines 2 through 4).
- E. The defendant Peter Bocon testified at his deposition that the aerobatics he did involved vertical dives to a low altitude. The defendants Peter Bocon, Steve Pennypacker, and Kent Christman's aircraft did engage in two or more aerobatic flights over Ayer, Massachusetts on the same day (see attached "**Exhibit G**" - Deposition transcript of Peter Bocon dated June 16, 2004, Page 17, Lines 14 through 17, Page 21, Lines 9 through 14).
- F. The defendant Peter Bocon testified at his deposition that the Center of Mass

Aerobatic, LLC aircraft was used by the three defendant pilots to do aerobatics on weekdays and weekends, in the morning, afternoon, and evening (see attached **“Exhibit G”** - Deposition transcript of Peter Bocon dated June 16, 2004, Page 15, Lines 14 through 24, Page 16, Lines 1 through 7).

- G. In response to *Rule 36* requests, the defendant Kent Christman admitted to performing 25 aerobatic flights over Ayer, Massachusetts (see attached **“Exhibit O”** –*Rule 36* Responses of Kent Christman dated November 6, 2003, Response Number 2).
- H. The defendant Steve Pennypacker started doing aerobatics in 1995. He was instructed by the defendant Michael Goulian (see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 6, Lines 22 through 24, and Page 7, Lines 1 through 20).
- I. Aerobatics are done without any legal certification by the FAA or the Massachusetts Aeronautics Commission (MAC) (see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 8, Lines 16 through 20).
- J. The defendant Steve Pennypacker admitted in a *Rule 36* request that he had done aerobatics 25 times over Ayer, Massachusetts (see attached **“Exhibit P”** –*Rule 36* Responses of Steve Pennypacker dated November 5, 2003, Response Number 2).

- K. The defendant Steve Pennypacker would neither admit nor deny *Rule 36* requests that he had done 50 or more or 100 or more aerobatic flights over Ayer, Massachusetts (see attached “**Exhibit P**” –*Rule 36* Responses of Steve Pennypacker dated November 5, 2003, Response Number 4).
- L. The defendant Steve Pennypacker at his deposition testified that he did not know exactly how many times he did aerobatics over Ayer, but it was possible that he did “one hundred or more” aerobatic flights over Ayer, Massachusetts (see attached “**Exhibit C**” – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 22, Line 24; Page 23, Lines 1 through 24; and Page 24, Lines 1 through 4).
- M. The defendant Steve Pennypacker stated there is a “fly friendly” policy in aviation and that “fly friendly” means minimizing the “noise footprint” of aerobatic flights on an area (see attached “**Exhibit C**” – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 30, Lines 7 through 24 and Page 31, Lines 1 through 20).

- N. The plaintiff Robert F. Casey, Jr. testified at his depositions to observing multiple aerobatic flights by the defendants at less than the 1,500 foot minimum altitude requirement of both state and federal flight regulations (see attached **“Exhibit H”** – Deposition transcript of Robert F. Casey, Jr. dated May 24, 2005, Page 70, Lines 20 through 24, Page 71, Lines 1 through 24, and Page 72, Lines 1 through 6 and see attached **“Exhibit H”** – Deposition transcript of Robert F. Casey, Jr., dated August 22, 2005, Page 27, Lines 13 through 22).
- O. The defendant Steve Pennypacker at his deposition testified that he did not know the lowest altitude of his aircraft during aerobatics over Ayer, Massachusetts (see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 30, Lines 7 through 24 and Page 31, Lines 1 through 20).

13. *Defendants’ Statement of Undisputed Fact:*

The 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."

Plaintiffs’ Rebuttal:

The defendants’ statement distorts the plaintiff Beverly Smith’s actual testimony. The plaintiff Beverly Smith’s testimony stated that most of the flight activity from Daniel Webster College was flight training and ground reference maneuvers (see attached **“Exhibit Q”** – Deposition transcript of Beverly Smith dated June 21, 2005, Page 55, Lines 14 through 24, and Page 56, Lines 1 through 15).

Plaintiffs’ Additional Material Facts

14. State and federal definitions of aerobatic flight are substantively identical:

Intentional maneuvers involving abrupt changes in an aircraft's altitude, an abnormal altitude or abnormal acceleration not necessary for normal flight (see attached "**Exhibit D**" – *14 CFR 91.303(f)* and see attached "**Exhibit R**" – *702 CMR 2.01*).

15. Ayer, Massachusetts is a town located 35 miles west/northwest of Boston. Ayer is small in area with only 9.6 square miles. Ayer is thickly settled; it has a population density of 808 persons per square mile. (Census data 2000)
16. The plaintiffs Robert F. Casey, Jr., Rita A. Casey, Amy McCoy, David McCoy, and Beverly Smith live in residences within one mile of each other (see attached "**Exhibit F**" – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 1, Paragraph 1).
17. There are no operating airports in Ayer (see attached "**Exhibit F**" – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 1, Paragraph 1).
18. Until the mid 1990's the plaintiffs had enjoyed their homes free of aerobatic noise (see attached "**Exhibit F**" – Affidavit of Robert F. Casey, Jr. dated October __, 2005, Page 2, Paragraph 2).
19. The defendant pilots Michael Goulian, Peter Bocon, Steve Pennypacker, and Kent Christman flew their aerobatic aircraft 20 miles from Hanscom Field to the thickly settled Ayer, Massachusetts to do aerobatic stunts. They then returned to Hanscom Field (see attached "**Exhibit J**" – Affidavit of David McCoy dated October 26, 2005, Page 3, Paragraph 8).
20. The defendants have flown aerobatics in locations other than Ayer, Massachusetts. The defendants have other locations available to do aerobatic stunts (see attached "**Exhibit**

G” – Deposition transcript of Peter Bocon dated June 16, 2004, Page 12, Lines 7 through 23, see attached **“Exhibit A”** – Deposition transcript of Michael Goulian dated July 12, 2004, Page 53, Lines 14 through 19).

21. The defendant aerobatic pilots did aerobatics over congested Ayer while knowing there were less congested areas north and west of Ayer (see attached **“Exhibit A”** – Deposition transcript of Michael Goulian dated July 12, 2004, Page 96, Lines 5 through 17).
22. The aerobatic stunts done by the defendant pilots over the plaintiffs’ homes include high speed, downward, vertical dives where the defendant pilots pull out of the dive at low altitude. Their dives are repeated in flights that last up to 45 minutes (see attached **“Exhibit G”** – Deposition transcript of Peter Bocon dated June 16, 2004, Page 15, Lines 8 through 13, Page 17, Lines 14 through 17).
23. The defendants’ aerobatic aircraft produces its loud sound due to their large engines with horsepowers exceeding 250 horsepower (see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 51, Lines 3 through 5). The loud sound is also the result of the defendants using power settings so that the propeller speed is supersonic, i.e., the blades break the sound barrier (see attached **“Exhibit A”** – Deposition transcript of Michael Goulian dated July 12, 2004, Page 73, Lines 14 through 16, Page 74, Lines 1 through 24, and Page 75, Lines 1 through 20).

24. Aerobatic pilots, other than the defendant pilots, voluntarily desisted from doing aerobatics over Ayer, Massachusetts (see attached **“Exhibit F”** – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 9, Paragraph 22 and Page 12, Paragraph 27).
25. Prior to commencing this litigation, the plaintiffs made numerous written requests to the defendant pilots to desist the loud and disturbing aerobatic flights. Attached are letters sent by the plaintiff Robert F. Casey, Jr. to the defendant Center of Mass Aerobatics, LLC and Executive Flyers Aviation, Inc. making such requests (see attached **“Exhibit S”** – Letters of Robert F. Casey, Jr. to Executive Flyers Aviation, Inc. dated July 12, 2001, to Center of Mass Aerobatics, LLC dated June 27, 2002 and August 21, 2002, and letter of Gary Arber to Robert F. Casey, Jr. dated August 21, 2001).
26. AOPA (Aircraft Owners and Pilots Association) is a pilot and aviation special interest group with a large membership. The defendants are all members. AOPA urges all its members to adhere to a “Fly Friendly” policy that urges pilots to fly so that they do not disturb residents with their noise (see attached **“Exhibit G”** – Deposition transcript of Peter Bocon dated June 16, 2004, Page 33, Lines 8 through 9, see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 52, Lines 23 through 24, see attached **“Exhibit A”** – Deposition transcript of Michael Goulian dated July 12, 2004, Page 17, Lines 11 through 15).
27. The FAA has published and the defendant pilots have received Advisory Circulars that urge pilots to minimize aerobatics noise to residents by avoiding thickly settled areas (see attached **“Exhibit T”** – *FAA Advisory Circular 91-36C and 91-36D*).
28. The plaintiffs made complaints to the FAA about aerobatic noise. The plaintiffs David

McCoy and Robert F. Casey, Jr. made numerous written complaints to the FAA about specific aerobatic flights by the defendants. The plaintiffs sought to eliminate the aerobatic noise by having the FAA enforce aerobatic flight regulations prohibiting aerobatics over congested areas and aerobatics under 1,500 feet. The FAA refused to take enforcement action. The FAA repeatedly declined to define congested areas. The FAA repeatedly informed the plaintiffs that it had no jurisdiction over noise complaints. The FAA stated that aerobatic noise was a state and local issue (see attached “**Exhibit F**” – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 9, Paragraph 23; see attached “**Exhibit U**” – Letter of Sharon L. Felton of the FAA to David McCoy dated June 5, 2003, Page 2).

29. The aerobatic flights became a regular occurrence. There were many days when there were multiple aerobatic flights. The plaintiffs, to escape the aerobatic noise, left their homes. To escape the defendants’ noise, the plaintiff David McCoy went to the Fitchburg State College library to study for his teacher certification examination (see attached “**Exhibit J**” - Affidavit of David McCoy dated October 26, 2005, Page 7, Paragraph 20).
30. The aerobatic aircraft of the defendants Michael Goulian and Center of Mass Aerobatics, LLC often made more than one aerobatic flight per day (see attached “**Exhibit K**” - Affidavit of Rita A. Casey dated October 27, 2005, Page 6, Paragraph 24).

31. The plaintiffs attempted to soundproof rooms in their homes. The plaintiff Beverly Smith attempted to soundproof a room in her basement; the plaintiffs David McCoy and Amy McCoy attempted to soundproof a room in their basement; the plaintiffs Robert F. Casey, Jr. and Rita A. Casey attempted to soundproof a home office. The noise from the defendants' aerobic flights was so loud that it penetrated into these soundproofed rooms. The plaintiffs Robert F. Casey, Jr. and Rita A. Casey spent over \$8,000.00 to soundproof, including purchasing special windows costing \$900.00 each. But, the sound penetrated into these rooms (see attached "**Exhibit M**" – Deposition transcript of David McCoy dated June 17, 2005, Page 34, Lines 21 through 24 and Page 35, Lines 1 through 6, see attached "**Exhibit K**" - Affidavit of Rita A. Casey dated October 27, 2005, Page 7, Paragraph 26).
32. The plaintiff Beverly Smith purchased an electronic noise cancellation headset to wear at home to mask the noise. It was not effective. The plaintiff Beverly Smith used an electric "white noise" machine to mask/cancel the noise. The sound from the defendants' aerobics overpowered these devices. The plaintiff Robert F. Casey, Jr., too, used "white noise" machines. The plaintiff Robert F. Casey, Jr. used a Bose noise cancellation headset, but it was not effective against the defendants' aerobic stunt noise. The plaintiffs David

McCoy and Robert F. Casey, Jr. used earplugs in their homes (see attached “**Exhibit I**” - Affidavit of Beverly Smith dated October 27, 2005, Page 2, Paragraphs 7, see attached “**Exhibit F**” - Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 4, Paragraph 10, and see attached “**Exhibit M**” – Deposition transcript of David McCoy dated June 14, 2005, Page 128, Lines 19 through 24 and Page 129, Lines 1 through 4).

STATEMENT OF THE CASE

The plaintiffs are all residents of Ayer, Massachusetts, who own private residences. The plaintiffs Amy McCoy and David McCoy are husband and wife who built their home with their own hands. The plaintiff Amy McCoy is her family=s third generation living on the land in Ayer. The plaintiffs Robert F. Casey, Jr. and Rita A. Casey are husband and wife. The plaintiff Rita A. Casey is a lifelong resident of the Ayer area. The plaintiff Robert F. Casey, Jr. has lived and worked in the Ayer area for 26 years. The plaintiffs Robert F. Casey, Jr. and Rita A. Casey=s home was purchased in 1986. The plaintiff Beverly Smith has lived in Ayer most of her life. All the plaintiffs intend to live in the Ayer area the rest of their lives.

Ayer is a town located thirty-five (35) miles west/northwest of Boston, Massachusetts. Ayer is thickly settled; it has a population density of 808 persons per square mile (Census data of 2000).

In the mid 1990's, aerobatic aircraft began coming to Ayer and doing prolonged stunt flights over Ayer. There are no operating airports in the immediate Ayer area. These aircraft flew to Ayer from Hanscom Field and then did stunts at low altitudes over the plaintiffs' homes. The stunt flights lasted up to forty-five (45) minutes. The aircraft then returned to Hanscom Field. The aircraft are small, single engine with one or two seats. The stunts included vertical downward dives at 200 m.p.h. and pulling out of the dives at low altitudes with resulting loud, surging sound. There were many other abrupt maneuvers at low altitudes that involved loud and distressing noises. In these flights were as many as seventy-five (75) separate dives or other stunts.

In addition to the aerobatic aircraft, low flying single engine aircraft began performing landing practice maneuvers. This involved simulating a landing approach and pulling up at the last moment. Aircraft were at altitudes as low as thirty (30) feet when doing these practice landings. This practice landing maneuver has been done hundreds of times near the plaintiffs' homes. These practice landing approaches are noisy and alarming.

In 1997 to 2003, the plaintiff David McCoy had a number of Massachusetts teacher certification examinations. The examinations involved many hours of study. The plaintiff David McCoy left his home to escape the aircraft noise to study. The noise created by these aircraft is so loud that it disturbs the plaintiffs inside their homes. The noise can be heard at disturbing levels miles from the aircraft. There is no escape from the noise. The plaintiff Robert F. Casey, Jr. tried using earplugs while in his home, but still the aircraft noise was disturbing. The plaintiffs Robert F. Casey, Jr. and Rita A. Casey have spent over eight thousand (\$8,000.00) dollars to make one room in their home free of noise. The soundproofing did not stop the

aerobatic aircraft noise. The plaintiffs Beverly Smith, Amy McCoy, and David McCoy have attempted to soundproof rooms in their homes from the noise, but the noise penetrates the soundproofing.

These maneuvers are done over neighborhoods with schools, hospitals, nursing homes, churches, and densely settled residential areas. These unannounced stunts are done morning, afternoon, and evening. There were multiple flights in a day. The flights took place in all seasons.

Over time, the plaintiffs were able to identify most of the aircraft that performed these stunts and maneuvers over Ayer. Those identified included the defendants. The defendants' aircraft are hangered at the Hanscom Civil Terminal. The defendants fly the aircraft to the vicinity of the plaintiffs' homes in Ayer. They then perform their low altitude stunts and maneuvers, and return to Hanscom Field. Commencing in 2002, requests were made to aerobatic pilots to desist from these activities as they disturbed the plaintiffs. The plaintiffs made complaints to both the FAA and the EPA seeking enforcement action against the defendants for violation of flight regulations. Both the FAA and the EPA state that the plaintiffs' complaints were state and local matters. A number of pilots desisted from their stunt flights. The defendants refused to desist. The plaintiffs commenced this action for nuisance in the Middlesex Superior Court in May, 2003 after all attempts to have the defendants desist failed. The plaintiffs have given serious consideration to selling their homes if this activity is not abated.

What is not at issue in the plaintiffs' action is the routine commercial and general aviation traffic over the plaintiffs' homes. The plaintiffs do not take issue with the usual air traffic passing over their homes. The plaintiffs do not take issue with the defendants' passing over their homes on their way to other locations. The plaintiffs need relief from the defendants' stunt activity and low altitude maneuvers that produce prolonged disturbing noise that interferes with the plaintiffs' use and enjoyment of their homes (see attached "**Exhibit F**" – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, see attached "**Exhibit K**" – Affidavit of Rita A. Casey dated October 27, 2005, see attached "**Exhibit J**" – Affidavit of David McCoy dated October 26, 2005, and see attached "**Exhibit I**" – Affidavit of Beverly Smith dated October 27, 2005).

ARGUMENT

The plaintiff residents bring an action for nuisance caused by noise. The following states the prima facie case for nuisance by noise:

Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as to materially interfere with the ordinary comfort of life, and impair the reasonable of his habitation, is a nuisance.

Malm v. Dubrey, 325 Mass. 63, *65 (1949).

The plaintiff residents seek injunctive relief and damages pursuant to *M.G.L. Chapter 243, §1* which provides for both equitable relief and money damages for nuisance.

The plaintiff residents have established a prima facie case by their affidavits and by the materials submitted in their foregoing Rebuttal to the defendants' statement of facts.

The defendants seek to deprive the plaintiff residents of a remedy based on arguments which are without merit.

1. Presumption Against Preemption

There is well established presumption against federal preemption of state law. The U.S. Supreme Court has repeatedly stressed the presumption against federal preemption of state law:

...we have long presumed that Congress does not cavalierly pre-empt state law causes of action. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, *485 (1996)

In *Medtronic*, the appellant argued that the appellee *Lohr's* state law cause of action was barred by preemption. The U.S. Supreme Court found that argument to be “unpersuasive” and “implausible”. *Id.* 487. The Court rejected the argument that Congress intended to preclude state residents from any remedy. The Court went on to say that because Congress had not created a federal cause of action, preemption would have barred relief to the appellee *Lohr*. The Court found that a finding of preemption would “...have the perverse effect of granting immunity...” to an entire industry. *Ibid.* The U.S. Supreme Court rejected preemption.

The defendants in this case want to achieve the “perverse effect” of immunity by their request that the plaintiffs be denied any cause of action against the defendants for nuisance. There is no federal cause of action for nuisance available to the plaintiffs. The U.S. District Court in remanding this case from the federal court to this Court noted that the plaintiffs were afforded no federal cause of action. *Casey v. Goulian*, 273 F.Supp.2d 136, *138 (2003). Thus, the defendants seek to leave the plaintiffs without a remedy and to be granted immunity. This is contrary to the established U.S. Supreme Court case law authority.

The defendants have misstated the law. The established law does not seek out preemption. The established law starts with a presumption against preemption. The presumption against preemption arises because the states are independent sovereigns in the federal system. It is presumed that Congress does preempt state law causes of action:

In all preemption cases, and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied', (citation omitted) we 'start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, *230 (1947).

States have traditionally occupied the field of common law causes of action such as nuisance. Thus, the presumption against preemption in the plaintiffs' case is particularly strong.

In remanding the plaintiffs' case, the U.S. District Court ruled that Congress had not evidenced this intent to supersede state law causes of action. The Court pointed out that there is **no** broad language in the Federal Aviation Act prohibiting state and local governments from regulating air flight. *Casey v. Goulian*, 273 F.Supp.2d 136, *139-140 (2003).

Thus, absent statutory language of Congressional intent to bar state law causes of action, the presumption against preemption holds firm.

The defendants argue that comprehensive FAA regulation weights in favor of preemption. The U.S. Supreme Court has scrutinized and rejected the argument that comprehensive federal regulation creates preemption. The U.S. Supreme Court said the following in response to a claim that comprehensive FDA regulation invalidated a local regulation:

We reject the argument that an intent to pre-empt may be inferred from the comprehensiveness of the FDA's regulations... *Hillsborough County, Fla v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, *716 (1985).

The preceding quotation from *Hillsborough* unhinges the defendants' argument. In its memorandum, the defendants parade a host of federal regulations to demonstrate comprehensive regulatory scheme. But, the U.S. Supreme Court has ruled that a comprehensive federal regulatory scheme does not lead to preemption that invalidates state law or state causes of action.

Federal courts have noted that Congress could have easily inserted statutory or regulatory preemption language if Congress had really intended to totally preempt an area of the law. *Caraker v. Sandoz Pharmaceuticals Corp.*, 172 F.Supp.2d 1018, *1043 (2001). The absence of such language there is a strong presumption against preemption. *Id.* As the U.S. District Court noted in the plaintiffs' case, Congress did not insert preemptive language in the Federal Aviation Act. *Casey v. Goulian*, 273 F.Supp.2d 136, *139-140 (2003).

2. Factors Creating Even Stronger Presumption Against Preemption

Under certain circumstances, the presumption against preemption becomes stronger. *Hillsborough County, Fla v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, *717 (1985).

The presumption against preemption is even stronger when a party argues that the preemption is the result of agency regulation rather than the result of federal statutes. The defendants argue that FAA's comprehensive regulation brings about preemption. This is a misstatement of the law as demonstrated by the following quotation from the U.S. Supreme Court decision:

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. *Hillsborough County, Fla v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, *717 (1985).

The Court went on to state a principle directly applicable to the present case:

To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. *Hillsborough County, Fla v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, *717 (1985).

The presumption against preemption is in its strongest form when the preemption would deprive a party of a tort remedy.

The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists. *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, *1112 (C.A.4 Va. 1988) citing. *Silkwood v. Kerr – McGee Corp.*, 464 US 238, *251 (1984).

The defendants have failed to overcome these presumptions against preemption.

The *Medtronic* case bears directly on the present case. In *Medtronic*, the plaintiff brought a state tort action for injuries resulting from defects in a heart pacemaker. The U.S. Supreme Court held that pervasive FDA regulation of medical devices did not preempt a state tort action. The court held that the State of Florida had the right to provide a tort remedy for violation of common law duties. "...when those duties parallel federal requirements." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, *495 (1996). As in *Medtronics*, the plaintiffs seek tort recovery under nuisance for violation of common law duties that parallel federal requirements

including flight regulations that prohibit aerobatics over congested areas (see attached “**Exhibit D**” - 14 CFR 91.303(a)).

The U.S. Supreme Court in the *Hillsborough* case demonstrates the strength of the presumption against preemption. Hillsborough County, Florida adopted a county regulation that required blood donor centers to test each donor for hepatitis and alcohol use. The blood donor center brought suit claiming that county regulations were preempted by FDA regulations. The blood donor centers argued (as the defendants argue this case) that the agency regulations were meant to bring about uniformity in regulations and that allowing local regulation would bring about chaos. The court rejected these arguments and held the local ordinance was valid.

Hillsborough County, Fla v. Automated Medical Laboratories, Inc., 471 U.S. 707, *717 (1985).

The regulations promulgated by the FDA are as extensive and pervasive as FAA regulation. Yet the Court found no preemption in *Hillsborough*. Thus, there is no authority to hold that the FAA regulations preempt the plaintiffs’ Massachusetts tort remedy of nuisance.

3. FAA’s Dealings With The Plaintiffs Weigh Against Preemption

The defendants claim the plaintiffs’ nuisance action is barred by total preemption. The defendants claim that Congress through the FAA intended to regulate the entire aviation field to the exclusion of any state action, including the plaintiffs’ civil action based on Massachusetts law. The defendants’ analysis is flawed as demonstrated by the actions of the FAA in response to the plaintiffs’ complaints to the FAA concerning the defendants’ aerobatic flights. The plaintiffs complained that the defendants’ aerobatic flight violated the federal flight regulations stated in 941 CFR 91.303 (see attached “**Exhibit D**” - 14 CFR 91.303, see attached “**Exhibit F**” – Affidavit of Robert F. Casey, Jr., dated October 27, 2005, Page 9, Paragraph 23). After

numerous complaints by the plaintiffs, the FAA's Sharon Felton wrote a letter to the plaintiff David McCoy stating that the FAA would not act on the plaintiffs' noise complaints because the plaintiffs complaints were a matter for state and local law. Within the same letter, the FAA states to the plaintiff David McCoy that: "Further, we have no jurisdiction over state and local issues." (see attached "**Exhibit U**" – Letter of Sharon L. Felton of the FAA to David McCoy dated June 5, 2003, Page 2). This letter from the FAA to the plaintiff David McCoy is an official communication. The FAA in this letter states its policy. Under the prevailing law, an agency policy statement is binding if it sends a clear message to the reader that the agency (FAA) "...will not be open to considering approaches other than those prescribed in the document" or if the statement of policy is couched in mandatory language. *General Electric Co. v. EPA*, 290 F.3d 377, *383 C.A.D.C. (2002).

The FAA letter to the plaintiff David McCoy is couched in mandatory language and sends a clear message to the plaintiff David McCoy of a clear FAA policy not to involve itself in aerobatic aircraft noise complaints because the FAA considers such complaints to be state and local matters. Deference is to be given to the FAA's construction of a statute or statutory scheme. The U.S. Supreme Court has held that a court is not to substitute its own construction of statutory schemes for the reasonable interpretation by the agency. *Chevron USA, Inc. v. Natural Resources Defense Fund Council, Inc.*, 467 U.S. 837, *843-844 (1984). Thus, it follows that the

policy stated in the FAA letter to the plaintiff David McCoy should be accorded deference. If there were preemption of the plaintiffs' nuisance action, the FAA would not be telling the plaintiff David McCoy that he should raise his complaints at the state or local level.

The defendants' assert the defense of federal preemption and state that the federal government occupies the area of aviation law to the exclusion of the states including Massachusetts. But, the FAA, which is the agency exercising federal aviation policy, has clearly stated in its policy letter that the plaintiffs' claims are state and local matters. Far from claiming preemption of the aviation noise, the FAA states it does not even have jurisdiction (see attached "**Exhibit U**" – Letter of Sharon L. Felton of the FAA to David McCoy dated June 5, 2003). The FAA is telling the plaintiff McCoy to pursue noise complaints in a state forum. The defendants' claim of total preemption is at odds with the FAA's policy statement to the plaintiffs. And, the FAA's statements are to be accorded deference.

4. Limitation of *Burbank* Decision

The FAA letter to the plaintiff David McCoy is the result in changes in the law since *Burbank*, on which the defendants rely in their preemption argument. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 US 624 (1973). *Burbank* was decided in 1973, just one year after Congress passed the Noise Control Act, 42 USCA §4901. This act called for the FAA and the EPA to make and enforce regulations that would limit aircraft noise. The Noise Control Act gave citizens (like the plaintiffs in this case) a right to sue persons (like the defendants in this case) for violation of these regulations. 42 USCA §491(a)(2)(B). A decision of the District of Columbia Circuit Court of Appeals recounts the history of the FAA's refusal to adopt the mandatory regulations. Rather the FAA chose to adopt voluntary regulations. The result was

the right to bring suit to enforce regulations became meaningless. *People of State of Illinois v. FAA*, 832 F.2d 168, *170 CADDC (1987). The FAA adopted this policy of not seeking to enforce controls on noise. The courts have recognized that the significance of *Burbank*¹ has been limited by these subsequent events. *Id.*

The policy statement of the FAA in the letter to the plaintiff David McCoy is a reflection of these events that led to the FAA abandoning noise control enforcement (see attached “**Exhibit U**” – Letter of Sharon L. Felton of the FAA to David McCoy dated June 5, 2003).

Coupled with the FAA policy to leave noise pollution issues to the states is the clear trend of U.S. Supreme Court decisions in favor of state sovereignty and against federal preemption, especially in areas relating to the health and well being of its citizens.

Commentators have discerned in U.S. Supreme Court and federal court decisions a clear trend toward “appreciation of the concurrent role of the states...” in “promoting” the health, welfare, and comfort of its citizens. *University of Pittsburgh Law Review – “On Preemption, Congressional Intent, and Conflict of Laws” – Winter 2004 – 66 UPLR 181, *234 (2004).*

The Noise Control Act contains *Section 4911* entitled “*Citizen Suits*”. Within this section is the following language:

(e) Other Common Law or Statutory Rights:
Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or **common law** to seek enforcement of any noise control requirement or **to seek any other relief** (including relief against the Administrator)”.
42 USCA §4911(e). (emphasis added)

¹ The court was sharply divided in this 5 to 4 decision.

This statutory language could not be clearer in its preservation of the plaintiffs' right in this case to bring an action under Massachusetts law.

5. Recent Federal Cases from the Massachusetts District

In a recent case, an airline passenger brought a state court action against a commercial air carrier which included tort causes of action. The air carrier removed the case to the federal court. The defendant air carrier claimed preemption on the ground that state tort claims would disrupt federal aviation law. The court rejected this argument. The court found no complete preemption of state tort claims by the Federal Aviation Act. *Kingsley v. Lania*, 221 F.Supp.2d 93, *97 (2002).

In another recent case, a state court tort action for wrongful death was brought against an interstate commercial air carrier. The defendant air carrier claimed that the FAA regulations on passenger safety preempted the state tort claim. The court did not agree:

This Court holds that the law embodied in Mrs. Stone's state tort claim does not conflict with the relevant federal statutes so as to be preempted. *Stone v. Frontier Airlines, Inc.*, 256 F.Supp.2d 28, *43 (2002).

The trend is obvious. Preemption is retreating.

6. Conflict Preemption

The U.S. District Court employed the conflict preemption doctrine to remand the case. The U.S. District Court has already ruled that there is no complete preemption. The U.S. District Court ruled that conflict preemption may be asserted as a defense in this state court proceeding. *Casey v. Goulian*, 273 F.Supp.2d 136, *139 (2003). The conflict preemption defense may only succeed if it is shown that the state law cause of action actually conflicts with federal law. *Chesler/Perlmutter Prods., Inc. v. Fireworks Entertainment Works, Inc.*, 177 F.Supp.2d 1050 (C.D. Cal) (2001).

Applying “conflict preemption” to the plaintiffs’ case shows that the defendants’ claim of preemption completely fails. It fails because there is no actual conflict between federal law and the state law cause of action. In fact, there is harmony, not conflict.

Federal flight regulation forbids aerobatic flights over congested areas (see attached “**Exhibit D**” - 14 CFR 91.303(a)) The plaintiff residents point to the defendant pilots’ aerobatic stunts done over their congested neighborhood as evidence of nuisance. And, the Commonwealth of Massachusetts, too, has flight regulations that prohibit aerobatic stunts over congested areas (see attached “**Exhibit E**” - 702 CMR 4.06(1)) The plaintiffs intend to use at trial the defendants’ violation of this regulation as evidence the jury may consider as evidence of nuisance. Thus, there is consistency, not conflict, between the federal regulatory scheme and the plaintiffs’ state law nuisance cause of action. Far from the defendants demonstrating conflict preemption, the plaintiffs have demonstrated a harmony between the state and federal law. And, this makes eminent good sense. Both the federal and state governments take the common sense approach of prohibiting aerobatic stunts over thickly settled and congested areas. There is no

federal regulatory scheme to protect the thrill seeking of aerobatic stunts. The plaintiffs seek to stop an activity that is a violation of federal law.

In their preemption argument the defendants try to gather onto themselves a special immune status under the aegis of federal law. But, they are all Massachusetts residents who drive in their automobiles to Hanscom Field to fly their aerobatic aircraft. They are subject to the laws of the Commonwealth of Massachusetts on their way to their aircraft. They then fly their aircraft twenty miles from Bedford to Ayer and do aerobatics over the plaintiffs' homes. The defendants claim that once they are in their aircraft, the Commonwealth of Massachusetts has no authority over them although they never leave Massachusetts. They claim that the laws of the Commonwealth of Massachusetts do not apply to them no matter what actions they take, because the federal government has exclusive and complete authority over them to the exclusion of Massachusetts law. By the defendants' reasoning, they could do aerobatics directly over the Superior Court in Lowell during a trial; they could dive down upon the Court and pull out at the last moment causing great noise. They could do this as long as they desired and by their reasoning Massachusetts law would have no authority to protect the trial proceedings from being disturbed. By the defendants' reasoning, if the Court called the State Police to stop this disturbance, the State Police would have no authority to enforce Massachusetts law that prohibits aerobatics over congested areas or to enforce *M.G.L. Ch. 90 §46* which prohibits flight activity that interferes with the customary activity of the landowner or occupant. Obviously, the position advocated by the defendants is wrong. There is a body of aviation law in Massachusetts and other states that is necessary and valid. Massachusetts law authorizes state law enforcement officials to arrest a pilot "...who violates any statute or regulation relating to the operation and

control of aircraft;” *M.G.L. Chapter 90, §40, Paragraph 4*. The law of nuisance like the law of negligence and trespass are tort laws that recognize the need to impose duties and responsibilities on all of its citizens to act in a fashion that does not harm the legitimate interests of fellow citizens. The defendants in this case are subject to these duties and responsibilities. The defendants enjoy no privileged status as pilots that immunize them from the legitimate relief sought by the plaintiffs under the laws of the Commonwealth.

7. Long History of Aviation Law in Massachusetts and Other States

As previously stated, Massachusetts law empowers police officers to arrest pilots who violate flight statutes or regulations of the Commonwealth. *M.G.L. Chapter 90, §40*. The defendants do not challenge these Massachusetts statutes and regulations that include this power to arrest pilots. It would be a strange result for a state to be permitted to arrest pilots and prosecute pilots criminally for flight violations, but deny states the power to hold pilots liable in tort.

There is a long and well established body of state aviation law, none of which has been challenged as invalid by preemption. The State of Pennsylvania has a statute that is very similar to statutes adopted in other states. This Pennsylvania statute makes it clear that Pennsylvania law including Pennsylvania tort law applies to pilots in flight over Pennsylvania:

All crimes, **torts** and other wrongs committed **by** or against a **pilot** or passengers while in flight over or above lands and waters of this Commonwealth, shall be governed by the laws of this Commonwealth. (see attached “**Exhibit V**” – *74 Pa.C.S.A. §5503(a)*). (emphasis added)

The defendants claim that the application of state tort law to aviation is unprecedented. Yet, this Pennsylvania statute was enacted in 1984 and it remains unchallenged. It clearly applies Pennsylvania tort law to aviation.

The State of Indiana likewise has a statute that holds pilots liable in tort for wrongs done in flight over Indiana. This statute was enacted in 1927 and remains unchallenged (see attached “**Exhibit V**” – *IC 8-21-4-5*).

The State of Michigan, too, holds pilots liable for tort in flight (see attached “**Exhibit V**” – *MCLA 259.177*). The State of Michigan has a criminal penalty for engaging in aerobatics over thickly settled areas of up to one year imprisonment (see attached “**Exhibit V**” - *MCLA 750.44*).

The plaintiffs have found eleven (11) other states with statutes holding pilots liable in tort: Delaware, Georgia, Idaho, Maryland, Minnesota, New York, North Carolina, South Carolina, Tennessee, Vermont, and Wisconsin (see attached “**Exhibit W**” – Eleven (11) state statutes). This body of unchallenged state law shows there is no merit to the defendants’ claim that state tort liability for pilots is unprecedented.

8. Defendants' Burden of Proof on Affirmative Defense

To prevail on the affirmative defense of conflict preemption, the defendants must demonstrate that the plaintiffs' nuisance claims interfere with the FAA's implementation of the Federal Aviation Act.

The defendants removed this action to the Federal Court seeking a ruling that the plaintiffs' action was totally preempted by federal law. Upon the plaintiffs' motion to remand, the Federal Court rejected the defendants' claim of total preemption. The Federal Court ruled that all that remained was an affirmative defense of "conflict preemption" in which the defendants have the burden of evidence production and the burden of proof. But, the defendants continue to frame their argument in total preemption terms which the U.S. District Court rejected in ruling there is no complete preemption. The Federal Court pointed out that there are only two areas where there has been total preemption recognized by the U.S. Supreme Court: federal pension law and federal labor law. Contrary to the defendants' contention, the Federal Court pointed to clear authority that the FAA does not preempt all state law. The Federal Court stated "there is no...broad language in the Federal Aviation act specifically prohibiting state and local governments from regulating airflight in any way whatsoever". *Casey v. Goulian*, 273 F.Supp.2d, 136, *139-140 (D. Mass. 2003).

The defendants are left with conflict preemption, an affirmative defense. They must prove that in this particular case that there is a conflict with federal law if the plaintiffs prevail. And, it is settled law that the proponent of an affirmative defense has both the burden of production of evidence and the burden of proof. *Whitcomb v. Hearst Corp.*, 329 Mass. 193 (1952).

The defendants state there is a conflict. But, they have no facts to back this argument. Their bold statement that the FAA would be frustrated is not supported by deposition testimony or documents from the FAA to support their argument. The defendants have no affidavits, policy statements, or any submissions that indicate that at trial they have any competent evidence on the issue of the affirmative defense of conflict preemption. There is evidence from the FAA on this issue, but it is evidence unfavorable to the defendants. The letter from the FAA to the plaintiff David McCoy undercuts conflict preemption because the FAA does not state the enforcement of the plaintiffs' claims will interfere with federal law. In fact, the FAA letter states just the opposite. It tells the plaintiff David McCoy to pursue his claim at the state or local level (see attached "**Exhibit U**" – Letter of Sharon L. Felton of the FAA to David McCoy dated June 5, 2003, Page 2). If there were the conflict required to be proved in conflict preemption, the FAA would be stating that the plaintiff David McCoy's claims were interfering with the FAA mission and the state law was invalid in the face of federal law.

The FAA was aware of this litigation. On May 31, 2005, an FAA official, Arthur S. Davis, was deposed in this litigation by the defendants. Present at the deposition from the FAA's Office of the Chief Counsel was Attorney Christopher Poreda.

9. Law of the Case on Preemption

The defendants removed this action to the U.S. District Court. In the “Notice of Removal”, the defendants asserted that the plaintiffs’ action was barred by complete and total federal preemption of aviation law (see attached “**Exhibit X**” – Notice of Removal – *Casey v. Goulian* – U.S. District Court – District of Massachusetts – Case No. 03-11042-PBS). The plaintiffs moved for remand on the grounds that there was no federal preemption, i.e., there was a long and well-established history of state regulation of aviation. The U.S. District Court agreed with the plaintiffs’ position, entered a published ruling and remanded the case stating that there was no total federal preemption. In remanding, the U.S. District Court issued its ruling in a published opinion. *Casey v. Goulian*, 273 F.Supp.2d, 136, *138-139 (2003). Under the doctrine of the “law of the case” a decision on an issue of law made by the court at one stage of a case becomes binding precedent to be followed in successive stages of the litigation. *Abbadessa v. Moore Business Forms, Inc.*, 987 F.2d 18, *22 (1st Cir 1993). The defendants sought by removal a ruling on preemption from the U.S. District Court. The defendants are bound by the U.S. District Court ruling. The U.S. District Court ruled that there was no complete or field preemption. The U.S. District Court remanded stating that only the more limited affirmative defense of “conflict preemption” remained on which the defendants have the burden of proof. Yet, the defendants in their motion for summary judgment again argue for a ruling that there is complete preemption.

At page 6 of the defendants' memorandum they state:

The United States Congress has, in fact,
specifically expressed its intent to preempt
the control and regulation of airspace..."

This argument on preemption is an attempt to revisit the total preemption issue that was clearly rejected by the U.S. District Court which stated that Congress did not use language in the Federal Aviation Act that prohibits state regulation of aviation. *Casey v. Goulian*, 273 F.Supp.2d 136, *139-140 (2003). By the doctrine of the law of the case this issue is foreclosed against the defendants. Because the remand came by way of a published opinion, it is not only binding on the parties, it is also a binding precedent for federal law in the District of Massachusetts. *Hoilett v. Allen*, 365 F.Supp.2d 110, *114 footnote 9 (D. Mass. 2005).

10. EPA's Role

The defendants point to the federal EPA and its regulation of noise as proof of federal preemption (Page 11 of Defendants' Memorandum). But, this argument by the defendants actually supports the plaintiffs' position. The Defendants' Memorandum states: "To date, EPA has not exercised this authority by promulgating rules regulating aircraft noise." (Page 11 of Defendants' Memorandum). This statement does not weigh in favor of preemption. It weighs against presumption. Complete preemption means that the federal government completely occupies an area of the law to the exclusion of the states. When the EPA chooses not to regulate an area, this is evidence against preemption of that area.

The plaintiffs' direct dealings with the EPA, too, demonstrate that there is no federal preemption of noise enforcement. The plaintiff Robert F. Casey, Jr. contacted the EPA in March 2002 when the FAA indicated that the FAA had no jurisdiction over aircraft noise complaints. The plaintiff Robert F. Casey, Jr. made a written complaint to the EPA about aerobatic stunt noise. On March 15, 2002 the plaintiff Robert F. Casey, Jr. received a written reply from Attorney Stephen Mack of the New England office of the EPA. Attorney Mack stated that the EPA stopped all enforcement relating to noise in 1981. Attorney Mack stated: "Authority for the control of noise rests with state and local government agencies" (see attached "**Exhibit Y**" – Email from Stephen Mack to Robert F. Casey, Jr. dated March 15, 2002 and see attached "**Exhibit F**" – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 11, Paragraph 25). There can be no clearer statement by a federal agency that demonstrates there is no preemption of state regulation of aircraft noise. There are numerous examples of unchallenged state regulation of aircraft noise. The Commonwealth of Massachusetts extensively regulates aircraft noise. Under the regulation entitled "Logan Airport Noise Abatement" there are detailed regulations to diminish the noise impact of aircraft including the authority to prohibit the operation of aircraft engines between midnight and 6:00 A.M.; flight training hours are limited, too (see attached "**Exhibit Z**" - *740 CMR 24.05(1) and (d)(9)*).

11. Local Nature of Activity

Much of preemption case law involves state court plaintiffs who seek to enjoin flight that is otherwise permitted by federal law or attempts to effect flight paths. Many actions like *Vorhees* dealt with attempts to enjoin landings and take-offs. *Vorhees* overcame preemption claims. *Vorhees v. Napier Aero Club, Inc.*, 272 F.3d 398 C.A.7 (Ill - 2001). But, the plaintiffs' case is materially different from and stronger than these "end of the runway" types of cases. The plaintiffs do not seek to effect the defendants in taking off or landing. The plaintiffs are twenty miles from where the defendants hangar their aircraft. The plaintiffs do not seek to prevent the defendants from flying over the plaintiffs' homes. Thus, the plaintiffs do not seek to effect the defendants in location or direction of their flight. Rather, the plaintiffs seek to enjoin and recover for the abnormal maneuvers of the diving down near the plaintiffs' homes so that they are alarmed and disturbed; the plaintiffs seek to recover and enjoin simulated landings at alarmingly low altitudes in violation of both state and federal law. The plaintiffs seek to recover for actions by the defendants that violate both the state **and** federal regulations. The plaintiffs have demonstrated that the defendants violated these regulations in the plaintiffs' affidavits, discovery responses, and deposition testimony. There are no affidavits from the defendants that they are in compliance. The defendants are not afforded any federal preemption protection when they are in violation of federal regulations. The defendants are not in navigable airspace when they do aerobatics over congested areas or do simulated landings at altitudes of less than 500 feet. Navigable Airspace is

defined in *49 USCA §40102(a)(32)* which incorporates FAA regulation as to the altitudes at which federal airspace begins. The state retains complete jurisdiction over that airspace not part of federal airspace as Navigable Airspace.

12. Defendants' "Safe Harbor" Argument is Meritless

The defendants claim that flights in compliance with flight regulations are not actionable. The defendants state that the settled law in the Commonwealth is that any actions that comply with flight regulations and statutes cannot be deemed a nuisance. But, nowhere in the defendants' submissions is there any evidence by affidavit or otherwise that the defendants did fly in accordance with the flight regulations. An unsupported assumption will not suffice.

The defendants point to flight regulations that prohibit aerobatics under fifteen hundred (1,500) feet and over congested areas (see attached "**Exhibit E**" - *702 CMR 4.06(1)* and *(4)*). The defendants posit that aerobatics above 1,500 feet over uncongested areas are per se not actionable. But, the defendants have provided no affidavit or deposition testimony from which the Court could conclude that the defendants did in fact comply with the flight regulations. There is testimony of the defendant Steve Pennypacker, however, that weighs against the defendants. At his deposition on June 11, 2004 the defendant Steve Pennypacker admitted to performing aerobatics over the Town of Ayer. The defendant Steve Pennypacker was asked to state the lowest altitude at which he did aerobatic flights. He testified that he did not know:

Attorney Casey: During your aerobatic flights, either over Ayer or anywhere in Massachusetts, what's the lowest altitude you ever attained during aerobatic?

Attorney Cain for defendant Steve Pennypacker: Above ground level?

Attorney Casey: Excuse me, above ground level. Not above sea level, above ground level.

Answer by Pennypacker: I don't know. (see attached **"Exhibit C"** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 58, Lines 6 through 13).

The defendants cannot legitimately ask this Court to find that the defendants complied with the flight altitude requirements when the defendant Steve Pennypacker does not know the lowest altitude at which he did aerobatics. Moreover, the plaintiffs observed repeated violations of the Massachusetts flight regulations. The defendants' aerobatic flights over the plaintiffs' homes violated the flight regulation that prohibits aerobatics over congested areas because Ayer, Massachusetts is a congested area and the area near the plaintiff Robert F. Casey, Jr.,'s home is highly congested (see attached **"Exhibit F"** – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 1, Paragraph 1, and Page 9, Paragraph 23). The defendants state that there can not be nuisance when they comply with flight regulations. But, the plaintiffs' observations support a conclusion that all the defendants' aerobatic flights did violate the flight regulations that prohibit aerobatics over congested areas. In the plaintiff Robert F. Casey, Jr.'s affidavit dated October 27, 2005 he states that the town of Ayer is a congested area and that he observed the defendants to do their aerobatics over his congested neighborhood (see attached **"Exhibit F"** – Affidavit of Robert F. Casey, Jr. dated October 27, 2005, Page 1, Paragraph 1, Page 6, Paragraph 16, and Page 7, Paragraph 18).

In both negligence actions and nuisance actions, a defendant may be found liable

although the defendant is in compliance with all applicable laws. An ice cream producer was found liable for nuisance although he had violated no statute. The milk producer was engaged in otherwise legal activity in the early morning hours. The noise generated by the business between 9:00 P.M. and 7:00 A.M. was found to be a nuisance. It was the circumstances that led to liability: the proximity to residences, the time of day, the nature of the noise, the duration of the noise, and the volume of the noise were all factors leading to liability. The jury weighed all the factors. The mere fact that the defendant did not violate any law in no way prevented liability.

The court stated:

The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. *Shea v. National Ice Cream Co.*, 280 Mass. 206, *210 (1932).

To illustrate this point, defendants in motor vehicle tort claims are routinely held liable for negligence although they complied with all rules of the road. To further illustrate this point in the nuisance context, there is nothing *per se* illegal in running machinery. But, if the defendant's machinery produces vibrations in the plaintiff's home, this would be a *prima facie* case of nuisance, although the defendants had complied with all laws.

The law of nuisance addresses those particular situations unaddressed by statute and regulations. In the present case, the Defendants' flights are nuisance for a variety of reasons.

The defendants cite *M.G.L. Chapter 90, §46* “Altitude of Flights”. This statute states in two (2) disjunctive clauses when flight above prescribed minimum altitude shall be unlawful. The first exception is when the aircraft flies at “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.” *Ibid*. This clause supports the plaintiffs’ nuisance claim as the plaintiffs’ claim is for interference with their use of their land.

13. The Plaintiffs Have Established Prima Facie Case of Nuisance

The defendants attempt to paint the picture that the noise generated by their aerobatics does not rise to the level of a nuisance.

A hallmark of nuisance is whether the activity involved interferes with the use and enjoyment of one’s property. It is measured by a reasonable man standard. *Malm v. Dubrey*, 325 Mass. 63, *65 (1949). The aerobatics over Ayer brought about a meeting of over one hundred fifty (150) residents who wanted the aerobatic stunt noise to stop (see attached “**Exhibit Q**” – Deposition transcript of Beverly Smith dated June 21, 2005, Page 45, Lines 10 through 24, Page 46, Lines 1 through 24, and Page 47, Lines 1 through 9). If the defendants’ noise did not disturb people of reasonable sensibilities, it would not generate that type of response.

The FAA, although it claims to have no jurisdiction over noise, did issue advisory circulars urging aerobatic pilots to recognize that they were causing noise that disturbed residents (see attached “**Exhibit T**” – *FAA Advisory Circular 91-36C* and *91-36D*).

The FAA called a meeting in February 2001 to urge the aerobatic pilots to avoid noise sensitive areas. The defendant Michael Goulian attended the meeting. But, he continued to do aerobatics over Ayer, a noise sensitive area (see attached “**Exhibit A**” – Deposition transcript of Michael Goulian dated October 27, 2004, Page 158, Lines 9 through 24, and Page 159, Lines 1 through 14). It is unlikely that the FAA would issue advisory circulars and call a meeting if the aerobatic activity did not interfere with the residents’ quiet enjoyment of their homes.

The defendants characterize the aerobatic flights as brief, although the flights last up to 45 minutes. It stretches credulity to state that repeatedly enduring forty-five (45) minutes of continual harsh noise from dives and rolls is brief. At a minimum, it is a disputed issue of fact that is the province of the trier of fact.

In these Advisory Circulars, the FAA recognizes that aerobatic stunts and lingering over residents’ homes interfere with the residents’ quiet enjoyment of the homes:

Excessive aircraft noise can result in annoyance, inconvenience, or interference with the use and enjoyment of property, and can adversely affect wildlife. It is particularly undesirable in areas where it interferes with normal activities associated with the area’s use, including residential, educational, health, and religious structures and sites,... (see attached “**Exhibit T**” – *FAA Advisory Circular, AC No. 91-36D*).

To reduce the noise impact, the FAA seeks the following from pilots:

Avoidance of noise sensitive areas, if practical, is preferable to over flight at low altitudes (see attached **“Exhibit T”** – *FAA Advisory Circular, AC No. 91-36D*).

and the FAA asks for all aircraft owners and pilots to comply with the advisory circular’s policy of avoiding residential areas (see attached **“Exhibit T”** – *FAA Advisory Circular, AC No. 91-36D*).

The relief the plaintiffs seek in this action is no more than what the FAA expects of pilots.

14. Extent and Character of Nuisance Created by the Defendants

The defendants attempt to minimize the impact of the noise and the amount of flights. The defendants argue that the disturbance is trivial and brief. The facts are to the contrary. The aerobatic aircraft used by the defendant pilots are so loud that the defendant pilots use noise protection devices. The defendant Peter Bocon and Steve Pennypacker state that they use electronic noise cancellation headsets to protect themselves from the noise generated by their aircraft (see attached **“Exhibit G”** – Deposition transcript of Peter Bocon dated June 16, 2004, Page 22, Lines 4 through 18 and see attached **“Exhibit C”** – Deposition transcript of Stephen Pennypacker dated June 11, 2004, Page 36, Lines 20 through 24, and Page 37, Lines 1 through 2). The noise from the defendants’ aerobatic stunts is so loud that the plaintiffs Amy McCoy, David McCoy, Rita A. Casey, and Robert F. Casey, Jr. attempted to soundproof a room in each of their homes to have a refuge from the intense noise (see attached **“Exhibit M”** – Deposition transcript of David McCoy dated June 14, 2005, Page 47, Lines 12 through 24, and Page 48, Lines 1 through 15, and see attached **“Exhibit H”** – Deposition transcript of Robert F. Casey, Jr.

dated February 28, 2005, Page 44, Lines 15 through 24, Page 45, Lines 1 through 24, and Page 46, Lines 1 through 10).

In their affidavits and in their Rebuttal to the Defendants' Statement of Undisputed Facts, the plaintiffs state the facts constituting nuisance:

- A. The plaintiffs observed hundreds of aerobatic flights by the defendant Michael Goulian and the defendant Center of Mass Aerobatic, LLC aircraft.
- B. The plaintiff David McCoy observed hundreds of landing approaches by the defendant Executive Flyers Aviation, Inc. aircraft in front of the plaintiff David McCoy's home as low as 30 feet accompanied by alarming noise.
- C. The defendants did multiple loud aerobatic flights in a day.
- D. The defendants did aerobatic flights from morning to dusk.
- E. The defendants' noise awoke the plaintiffs from a sound sleep.
- F. The defendants' loud aerobatic noise created vibration.
- G. The defendants' aerobatic noise caused the plaintiffs to leave their homes for relief.
- H. The defendants' propellers were set at supersonic speeds that broke the sound barrier.
- I. The defendants' did aerobatics over the plaintiffs' congested neighborhoods and at less than 1,500 feet.

J. The defendants' aerobatic noise caused the plaintiffs' to use noise machines and noise cancellation headsets.

This is strong evidence of nuisance.

CONCLUSION

The plaintiffs have provided ample evidence to establish a prima facie case of nuisance by means of the four plaintiff affidavits, *Rule 36* admissions of the defendants, depositions, and FAA Advisory Circulars.

The defendants have the burden of production and the burden of proof on the affirmative defense of conflict preemption. The defendants have produced no evidence from which the trier of fact could conclude that a conflict of state and federal law exists in the present case. The plaintiffs have ample evidence that no conflict preemption exists. The plaintiffs' submissions raise a genuine issue of material fact on the conflict preemption defense. In reality, the defendants' preemption argument is an argument for immunity which has no support in the law.

Based on the foregoing, the Defendants' Joint Motion for Summary Judgment should be denied.

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Dated: October 28, 2005

REQUEST FOR HEARING

In accordance with *Superior Court Rule 9A(c)(2)* and *9A(c)(3)*,
the plaintiffs Robert F. Casey, Jr., Rita A. Casey, Amy McCoy, David McCoy,
and Beverly Smith, respectfully request a hearing on the
Defendants' Joint Motion for Summary Judgment and the Plaintiffs' Opposition thereto.